In the case of Castañeda Gutman

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 29, 31, 53(2), 55, 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers the following judgment.

I. INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On March 21, 2007, in accordance with Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") lodged before the Court an application against the United Mexican States (hereinafter "the State" or "Mexico"), which originated in the petition submitted on October 12, 2005, by Jorge Castañeda Gutman. On October 26, 2006, the Commission adopted Report on admissibility and merits No. 113/06, in the terms of Article 50 of the Convention, which contained certain recommendations for the State. This report was notified to the State on December 21, 2006, which was given two months to report on the actions taken to implement the Commission's recommendations. After "considering the State's [brief] on implementation of the recommendations contained in the report on merits, and the failure to make any progress in complying with them," the Commission decided to submit the case to the jurisdiction of the Court. The Commission appointed Florentín Meléndez, Commissioner, and Santiago A. Canton,

Executive Secretary, as delegates and the lawyers, Ariel E. Dulitzky, Elizabeth Abi-Mershed, Juan Pablo Albán Alencastro and Mario López Garelli as legal advisers.

2. According to the Commission, the application "relates to the inexistence in the domestic sphere of a simple and effective remedy to claim the constitutionality of political rights and the consequent impediment for Jorge Castañeda Gutman […] to register his independent candidacy for the presidency of Mexico" in the elections held in July 2006.

3. In the application, the Commission asked the Court to declare that "Mexico is responsible for the violation, to the detriment of Jorge Castañeda Gutman, of the right to judicial protection embodied in Article 25 of the American Convention on Human Rights, in relation to the general obligations to respect and ensure human rights and to adopt all legislative or other measures to make the protected rights effective, in accordance with Articles 1(1) and 2 of the Convention." The Commission also asked the Court to order the State to adopt certain measures of reparation and to reimburse costs and expenses.

4. On June 5, 2007 Jorge Castañeda Gutman, alleged victim in the instant case, and his representatives, Fabián M. Aguinaco, Gonzalo Aguilar Zínser and Santiago Corcuera (hereinafter "the alleged victim" or, indistinctly, "the representatives"), presented their brief with pleas and motions (hereinafter "brief with pleas and motions"), under Article 23 of the Rules of Procedure. In this brief, they asked the Court, based on the facts described by the Commission in its application, to declare the violation of the rights to participate in government, to equal protection, and to judicial protection established in Articles 23, 24, and 25 of the American Convention, all in relation to Articles 1(1) and 2 thereof. Mr. Castañeda Gutman also indicated that, if the Court considered that they had omitted "possible violations to other rights embodied in the Convention […] such as those established in Articles 1, 2, 8(1), 13, 16, 29 and 30 of the Convention [in their brief], the Court should issue a ruling in this regard." Lastly, he asked the Court to order measures of reparation for the violation of his rights.

5. On September 11, 2007, the State submitted a brief in which it filed preliminary objections, answered the application, and presented observations on the brief with pleas and motions. The State requested, inter alia, that the Court consider that "the preliminary objections it had filed were admissible and founded […] and, consequently, declare that it was not competent to hear and decide" this case; or, if applicable, that the Court "conclude and declare the inexistence of violations to the human rights established in the American Convention […]," or eventually, if it declared the State's responsibility "and decided that some type of reparation was appropriate," that the Court "establish this respecting the considerations and the limits established by the State." The State appointed Juan Manuel Gómez Robledo Verduzco as its Agent, and Joel Antonio Hernández García, María Carmen Oñate Muñoz and Alejandro Negrín Muñoz as Deputy Agents. [FN1]

[FN1] Cf. the State's brief of May 31, 2007, received on June 1, 2007 (merits file, tome I, folios 108 to 110).

II. PROCEEDINGS BEFORE THE COURT

6. The Commission's application was notified to the State and to the representatives on May 14, 2007. [FN2] During the proceedings before the Court, in addition to the presentation of the principal briefs forwarded by the parties (supra paras. 1, 4 and 5), and the briefs with arguments concerning the preliminary objections filed by the State, which the representatives and the Commission submitted on October 17 and 18, 2007, respectively, the parties remitted the briefs indicated below.

[FN2] On May 11, 2007, the State was advised that it could appoint a judge ad hoc to participate in hearing this case. On May 15, 2007, the Inter-American Commission stated that "the figure of judge ad hoc is not applicable in cases arising from petitions concerning human rights violations submitted by individuals." On June 8, 2007, the State appointed Claus Werner von Wobeser Hoepfner as judge ad hoc, and the latter accepted the appointment on June 28, 2007.

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7. On November 27, 2007, the State forwarded a brief in which: (a) it submitted its observations on the written arguments of the Inter-American Commission and the representatives on the preliminary objections; (b) it submitted its observations on the supervening information offered by the alleged victim as an appendix to his brief with arguments on the preliminary objections; and (c) it offered supervening information regarding the constitutional reform on electoral matters published in the official gazette of November 13, 2007. At the request of the Secretariat of the Court, on the instructions of the President, the Commission and the representatives forwarded their respective observations on the information provided by the State on December 14 and 15, 2007, but only with regard to the constitutional reform of electoral matters. On January 22, 2008, the State forwarded observations on the brief presented by the Inter-American Commission on the constitutional reform.

8. Regarding the offer of testimonial and expert evidence, in addition to the opportune offer made by the Commission and the State, on October 24, 2007, when responding to the Secretariat's request for submission of the definitive list of witnesses and expert witnesses, the representatives "confirm[ed] the designation of the expert witnesses proposed […] in [their] brief of January 19, 2007, addressed to the Commission, […] which is included as appendix 2 to the application filed […]" by the Commission before the Court. Furthermore, they indicated that "the curriculum vitae of the expert witnesses offered were provided by the Inter-American Commission as an appendix to the application," and they made no mention in any of these briefs to the purpose of the expert opinions offered. On November 2 and 7, 2007, at the request of the President of the Court, the representatives forwarded the purpose of the expert opinions and the testimony of the alleged victim.

9. In this regard, on November 14, 2007, the State requested the Court to reject "the participation of the persons indicated by [the representatives] as expert witnesses, because the offer does not comply with the requirements […] established in the Rules of Procedure," and to declare that the testimony of the alleged victim had not been offered within the appropriate time

frame and in the correct form; the State also indicated that "the [representatives] had not specified their claims concerning reparations at the appropriate procedural opportunity."

10. In its Order of November 30, 2007, the Court decided to reject the offer of expert evidence offered by the representatives after the statutory time limit had expired and, of the persons the representatives had offered, to summon only the alleged victim, in the understanding that his testimony was useful for deciding the instant case (infra para. 72). Also, in the said Order of November 30, 2007, the Court convened the Commission, the representatives and the State to a public hearing to receive the testimony of Jorge Castañeda Gutman, proposed by the representatives, and the expert opinion of Lorenzo Córdova Vianello, proposed by the Inter-American Commission, and to hear the final oral arguments of the parties on the preliminary objections and possible merits, reparations and costs. On December 14, 2007, the Commission advised that it desisted from providing the expert evidence offered. On January 30, 2008, the State asked the Court to consider the possibility of redistributing the stages of the public hearing in order to make a distinction between a first stage with arguments on preliminary objections and a second stage with arguments on possible merits, reparations and costs; this was accepted by the Court. Also, on February 6, 2008, the representatives submitted various requests in relation to the public hearing, which were considered and decided by the Court in a meeting held before the hearing.

11. The public hearing was held on February 8, 2008, during the seventy-eighth regular session of the Court. [FN3] Both the representatives and the State submitted probative documents during the said hearing. On March 12, 2008, the alleged victim forwarded his brief with final arguments, to which he attached several documents, including vouchers for the expenses incurred in relation to the public hearing. On March 10, 2008, the Inter-American Commission and the State forwarded their respective final arguments briefs. Lastly, on July 19, 2008, the representatives forwarded a brief on "certain supervening facts" relating to the deliberations of the Supreme Court of Justice of July 3, 2008, concerning the constitutional validity of the norm which establishes that only the political parties may request the registration of candidacies for elected public office, and attached a copy of the "stenographic version" of this session. On July 30, 2008, the Inter-American Commission advised that it did not have any observations on the representatives' brief, because, when adopting its report on admissibility and merits in this case, the Commission had not declared "a violation of Article 23 of the American Convention." On the same date, the State forwarded its observations, reiterating the arguments submitted during the processing of the case and, in particular, it indicated that the stenographic version forwarded "is not of a supervening nature, nor is it related to the litigation before the Court." The State added that the content of the stenographic version "has no probative value" and that the final decision "will only be known when the corresponding judgment is notified."

[FN3] At the audience, there appeared: (a) for the Inter-American Commission: Florentín Meléndez and Santiago Cantón, Delegates, and Juan Pablo Albán and Lilly Ching Soto, Advisers; (b) for the representatives of the alleged victim: Fabián Aguinaco Bravo, Santiago Corcuera Cabezut and Federico Reyes Heroles; and (c) for the State: Juan Manuel Gómez-Robledo, Ambassador and Vice Minister for Multilateral Affairs and Human Rights, Ministry of Foreign Affairs; Miguel Alessio Robles, Legal Adviser of the Federal Executive; María Carmen

Oñate Muñoz, Ambassador, Mexican Embassy in Costa Rica; Joel Hernández García, Ambassador, Legal Unit, Ministry of Governance; Rolando Wilfredo de Lassé Cañas, Director of Juridical Affairs, Federal Electoral Institute; Alejandro Negrín, Minister-Director General for Human Rights and Democracy, Ministry of Foreign Affairs; Ana Luz Brun Iñarritu, Director General of Constitutional Studies and Consultations, Legal Advisory Services, Federal Executive; Víctor Manuel Uribe Aviña, Associate Legal Consultant, Ministry of Foreign Affairs; José Luis Alcudi Agoya, Associate Director General of Social Communication, Ministry of Foreign Affairs; José Ignacio Martín del Campo, Director of Litigation, Ministry of Foreign Affairs; and Jorge Ulises Carmona Tinoco, External Adviser, Federal Electoral Institute.

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12. In addition, on January 24 and 31, February 6 and 7, April 28, and July 7 and 21, 2008, respectively, the Court received amicus curiae briefs from the following individuals and institutions: Jorge Santistevan de Noriega; the Mexican Lawyers' Professional Association; a group of students, former students and academics of the Human Rights master's degree program of the Universidad Iberoamericana of Mexico; the Parliamentary Group of the Convergence Party; a group of post-graduate and licentiate students of the Law School of the Universidad Autónoma de Mexico; Socorro Apreza Salgado, Ricardo Alberto Ortega Soriano and Jorge Humberto Meza of the Law School of the Universidad Nacional Autónoma de México; and Imer Flores of the Juridical Research Institute of the Universidad Nacional Autónoma de México.

13. On May 26, 2008, the representatives of the alleged victim asked the Court "to abstain from considering" the amicus curiae submitted on April 28, 2007, "because it was received long after the date on which the file of this case before the Court had been closed, on March 10, 2008 [and] the briefs submitted by third parties should respect the time frames and procedures in each case, and not be submitted late." On the same grounds, on July 19, 2008, the representatives raised an objection to the amicus curiae sent to the Court on July 7, 2008.

14. Regarding the alleged late submission of the briefs of April 28 and July 7, 2008, the Court reiterates that amici curiae are submitted by third parties who are not parties to the dispute who provide the Court with arguments or opinions that can serve as relevant information in relation to legal aspects that are being aired before it. As the Court has indicated recently, [FN4] amici curiae can be submitted at any time before the deliberation of the corresponding judgment. In addition, pursuant to the Court's practice, amici curiae can even refer to matters relating to compliance with judgment. Moreover, the Court emphasizes that the cases it hears have a general importance or interest that justifies the greatest possible deliberation of publicly-debated arguments. Hence, amici curiae have significant value in strengthening the inter-American system for the protection of human rights, through the considerations provided in the Court's possession. Consequently, the Court rejects the objection submitted by the representatives based on late presentation. If appropriate, the Court will take into account the representatives' observations on the contents of these briefs when it examines the corresponding issues.

[FN4] Cf. Case of Kimel v. Argentina. Merits, reparations, and costs. Judgment of May 2, 2008. Series C No. 177, para. 16.

III. PRELIMINARY OBJECTIONS

15. The State filed several preliminary objections that the Court has proceeded to organize and examine according to the affinity or nature of the objections and a reasonable criterion of convenience in order to consider them.

A) FIRST PRELIMINARY OBJECTION (Actual enforcement of the law as a requirement for the competence of the Court)

16. The State alleged that, in the instant case, there was no act that enforced the law, because Mr. Castañeda Gutman requested registration of his candidacy in March 2004, when the electoral process in which he wished to participate, and which would be held in 2006, had not commenced. This request was time-barred as regards both the start of the electoral process on October 6, 2005, and the registration of candidacies, which began on January 1, 2006, pursuant to the electoral laws. Consequently, the law was not enforced because, when responding to this time-barred request, the electoral administrative authority only informed Mr. Castañeda Gutman about the provisions of the respective norms, since the fact that his request was time-barred conditioned the other requirements. The fact that, in its response the electoral authority referred to the legal requirement to be nominated by a party, did not imply the enforcement of this provision to the detriment of the alleged victim, because, in that case, the electoral process would, at least, have had to have commenced and Mr. Castañeda Gutman to have presented his request during the stage corresponding to the registration of candidacies. The Inter-American Court is only competent to hear a case if the law in force was applied in a specific case, and cannot decide if a law is contrary to the American Convention if it has not adversely affected the rights and freedoms protected by the Convention, as in the instant case.

17. The Commission argued that, as the Court had stated in its Advisory Opinion No. 14, the individuals subject to the jurisdiction of a norm may be affected simply because it is in force, in the case of "self-executing norms" ("leyes de aplicación immediata"). This is the situation in the instant case where the mere existence of Article 175 of the Federal Code for Electoral Institutions and Procedures (hereinafter "COFIPE" or "Federal Electoral Code) [FN5] and the possibility of its application may violate the provisions of the Convention and, thus, grant competence to the organs of the inter-American system to hear a contentious case related to them. Despite the above, it indicated that, in a communication of March 11, 2004, the Federal Electoral Institute (hereinafter "IFE") responded to Mr. Castañeda Gutman's request stating that, pursuant to the legal norms, his candidacy could not be registered, so that maintaining that Article 175 of the Federal Electoral Code was not enforced in this case "is not based on the reality." The Commission considered that this objection was unfounded and asked the Court to reject it.

[FN5] The Federal Code for Electoral Institutions and Procedures (COFIPE) was rescinded and substituted by a new code that was published in the Official Gazette of the Federation on January 14, 2008. Article 175 and other Articles of COFIPE that are referred to in this judgment are those

that were in force at the time of the facts. Cf. the representatives' final arguments brief (merits file, tome IV, folio 1140).
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18. The representatives argued that the Court has the authority to hear cases regarding laws that are incompatible with the Convention when they are "self-executing"; moreover, irrespective of whether Article 175 of the COFIPE has the characteristics of a "self-executing" norm or not, the alleged victim was seeking the non-execution of this norm. The one and only disputed act of the authority was precisely the refusal of IFE to register Mr. Castañeda Gutman's candidacy by enforcing, among other norms, Article 175 of the COFIPE. The application for amparo that was filed alleged, precisely, the incompatibility of Article 175 of the COFIPE with the Convention and, consequently, with the Constitution, since the ultimate intention was to contest the law itself, not in an abstract sense, but in order to achieve the specific effect of registration of the candidacy. Lastly, they indicated that when the Court has found that a provision of domestic law is not in keeping with the inter-American legal system, it has decided that the State concerned should reform its laws.

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19. In official communication No. DEPPP/DPPF/569/04 of March 11, 2004, the Federal Electoral Institute answered the request for registration as a candidate for the elected office of President of the United Mexican States submitted by Jorge Castañeda Gutman on March 5, 2004. In this communication, based on case law and the pertinent legal provisions, including Article 175 of the COFIPE, the IFE Privileges and Political Parties Directorate concluded:

"Based on the foregoing grounds and reasons […] you are advised that the right to be postulated for and elected to elected public office at the federal level, can only be exercised through one of the national political parties that are registered with the Federal Electoral Institute.
Lastly, paragraph 1(e) of Article 177 of the respective Code indicates that the time frame for the registration of candidacies for President of the United Mexican States is from January 1 to 15 of the year of the election.
Based on the above, it is not possible to accept your request as presented […]."

20. Owing to this decision by the electoral administrative body, Mr. Castañeda Gutman had recourse to the courts where this decision was considered first by the Seventh District Administrative Judge of the Federal District, under an application for amparo filed by the alleged victim. This judge considered his competence to hear the unconstitutionality of certain provisions of the COFIPE contested by the alleged victim and the official communication of the IFE Privileges and Political Parties Directorate of March 11, 2004, as a specific act enforcing the contested provisions. The Seventh District Administrative Judge of the Federal District established that it was necessary to determine whether an application for amparo was admissible when claiming that substantive rights relating to political rights had been affected owing to a specific enforcing an electoral law, considering that the said official communication constituted the specific act enforcing the law. Similarly, the Supreme Court of Justice, when examining the issue, considered that this action was the act enforcing the law and decided to dismiss the case "[…] in the action for amparo filed by Jorge Castañeda Gutman regarding the specific act of

enforcement contained in official communication No. DEPPP/DPPF/569/04 of March 11, 2004, issued by the Executive Director of Privileges and Political Parties of the Federal Electoral Institute."

21. The Court observes that Mr. Castañeda Gutman submitted his request for registration as a candidate to IFE; that is, to the administrative body which, according to the law (Federal Code for Electoral Institutions and Procedures), is the authority responsible for receiving requests for the registration of candidacies. On March 11, 2004, the IFE Privileges and Political Parties Directorate informed the applicant that, under the provisions of Article 175 of the said Code "the right to be postulated for and elected to an elected public office at the federal level, can only be exercised through one of the national political parties." It also informed him that paragraph 1(e) of Article 177 of the Code established that the time frame for the registration of candidacies for President of the United Mexican States was from January 1 to 15 of the year of the election. This authority concluded that, on this basis, "it [was] not possible to accept [the] request as presented"; this decision was legally contested by Mr. Castañeda Gutman and revised by local courts. Indeed, the Court observes that the domestic judicial authorities themselves considered the decision of the Federal Electoral Institute to be an act enforcing the law and, on this basis, they conducted the pertinent hearing (supra para. 20).

22. The Court considers that, irrespective of whether or not the request was made outside the legal time frame for the registration of candidacies submitted by political parties, the decision of IFE not to accept the alleged victim's request constituted, for the effects of this Court's competence, an act enforcing the law, since this negative was based, first, on the provisions of Article 177 of the COFIPE concerning the legal time frames for the registration of candidacies and, second, on the provisions of Article 175 of COFIPE, concerning candidacies by means of political parties, and this authority had indicated the legal impossibility of accepting Mr. Castañeda Gutman's request. This decision, based on the constitutional and legal provisions that regulate the matter, issued by the competent administrative authority hat ruled on the legal issue filed before it, with the specific and concrete effect of not allowing the registration of the candidacy, was the act enforcing the law, and was even considered as such by the domestic courts. Based on the above, the Court rejects this preliminary objection.

B) SECOND PRELIMINARY OBJECTION (Absence of the alleged victim in the electoral process that began in October 2005)

23. The State argued that the Court lacks competence to hear the merits of this case owing to the absolute and deliberate absence of the alleged victim from the electoral process commencing on October 6, 2005. In this regard, it indicated that, since Mr. Castañeda Gutman did not submit his request for registration of his candidacy within the established time frame – in other words between January 1 and 15, 2006 – "[…] the electoral authority was actually and legally unable to consider the merits of the admissibility of the registration of [Mr. Castañeda Gutman] to take part in the electoral process." This situation made it impossible to consider him as a candidate and prevented his participation in the electoral process. In addition, the State indicated that submission of the request within the time frame is the requirement sine qua non for taking part in the electoral process and, if applicable, for exhausting the subsequent jurisdictional procedures established as a means of filing an objection. This requirement cannot be substituted, avoided or

anticipated. Based on the foregoing, the State maintained that the Commission should have proceeded to declare the petition inadmissible, "[…] owing to an evident failure to exhaust domestic remedies […] due to [Mr. Castañeda Gutman's] failure to submit a request at the time allocated for registration within the electoral process."

24. The Commission stated that the application does not refer to the electoral process commenced in October 2005, but to the inexistence in the domestic sphere of a simple and effective remedy to claim the constitutionality of political rights. Mr. Castañeda Gutman's request for registration of his candidacy of March 5, 2004, was not rejected based merely on the formal issue of the time frame for registration, but also on the merit of the request, because it was considered that the candidacy was not sponsored by a national political party, so that it was not worth the victim insisting on his registration again. The State confuses the privilege of exercising a right protected by the Convention, with the obligation to exhaust a domestic remedy, because the presentation of the candidacy request is not a remedy, since its purpose is the exercise of a right and not to establish whether there has been a human rights violation in order to remedy it. Lastly, the Commission stated that, since the violation of rights arose from the inexistence of an effective remedy, the exception established in Article 46(2)(a) of the Convention was applicable. Based on these arguments, it requested that this preliminary objection should be rejected.

25. The representatives argued that Mr. Castañeda Gutman did not submit his candidacy during the candidacy registration period established in Article 177 of the COFIPE because this referred to candidacies postulated by political parties, so that this time frame applied only to candidacies postulated by political parties; and, since the laws did not provide for the postulation of non-party candidacies, this time frame could not be applicable in his case. Moreover, they added that IFE never had any intention of registering Mr. Castañeda Gutman's candidacy, as it fallaciously attempted to establish by stating that the request was not presented within the time frame, because its ruling makes it clear that it was not possible to admit the request, not only on a temporal basis, but also because the COFIPE precludes the registration of candidates without a party. Lastly, they indicated that Mexican federal laws absolutely prohibit candidates to postulate for elected office unless they are presented by a party, and it is this situation that constitutes the fundamental and substantial issue of the instant case.

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26. Regarding Mr. Castañeda Gutman's alleged failure to participate in the electoral process, the Court considers that the submission of a request for registration of a candidacy relates to the possibility of exercising a right and not to the obligation to exhaust domestic remedies. The submission of a request for registration of a candidacy is not a remedy, because its purpose is not to establish whether there has been a violation of the human rights established in the American Convention and, if applicable, provide the necessary remedy. Based on the foregoing the Court rejects this preliminary objection.

C) THIRD PRELIMINARY OBJECTION (Failure to exhaust appropriate domestic remedies and undue filing of an inappropriate remedy)

27. In its brief answering the application, the State argued that: (a) in its first answer to the Commission of January 17, 2006, "it referred to the origin, regulation and functioning of the action for the protection of a citizen's political and electoral rights"; (b) that the action for the protection of a citizen's political and electoral rights: (i) complies fully with the requirements of access to justice for all Mexican citizens who adduce violations of their rights, such as the right to vote and to be elected, of association and membership"; (ii) it is "the appropriate means of defense to contest acts that can be attributed to the Federal Electoral Institute which violate the Constitution and other applicable norms"; and (iii) "it also has the characteristics of being simple (because the requirements for its presentation and the formalities during its processing are not excessive), and brief (because it is decided by ordinary justice in just under a month"; (iv) that "the Electoral Tribunal is the highest authority in electoral matters, and is responsible for protecting the political and electoral rights of the citizens, verifying that the acts and resolutions delivered in this matter are adapted to the legal and constitutional legal framework," and (v) that the alleged victim "used an inappropriate procedure for the protection of his political rights and merely sought the declaration of the unconstitutionality of the COFIPE, which confirms the assertion of the failure to exhaust the appropriate and effective remedies in this case, […] with the consequent failure to comply with Articles 46 and 47 of the American Convention to the detriment of the State."

28. In its brief with observations on the preliminary objections of October 18, 2007, the Commission referred to its Report on admissibility and merits No. 113/06 in this case and indicated that "the action for the protection of political and electoral rights is neither appropriate nor effective for [Mr. Castañeda Gutman] to claim his right to be registered as an independent candidate in the Mexican presidential elections, so that he is not obliged to exhaust it before having recourse to the inter-American system," because "according to the Mexican legal system, the [Electoral Tribunal of the Federal Judiciary (hereinafter the Electoral Tribunal" or "TRIFE")] cannot, either in general or for relative effects, declare the unconstitutionality of an electoral law." Lastly, it concluded that "the content of the decisions on admissibility adopted under the rules established by the Convention and in the Commission's Rules of Procedure should not be subjected to renewed examination of their substance," and that "the facts of the case that have constituted a violation of the right to judicial protection and the ineffectiveness of the domestic remedies are precisely the fundamental elements of the dispute lodged before the Court."

29. The representatives stated that the alleged victim was attempting, "in a particular case, to achieve the non-enforcement of a general norm that became the effective cause of the specific violation of his rights"; that "the remedy before the TRIFE is inappropriate and inaccessible for a private individual, as expressly stated by law"; that "since 2002 the [Supreme Court of Justice] has developed case law stating that the TRIFE, despite having done so in the past, did not have the authority to declare the non-applicability of electoral norms due to violation of the Constitution," and that, subsequently, in sessions on September 4, 6 and 10, 2007, when deciding the request to modify case law 2/2006, "the [Supreme Court of Justice] had confirmed the content of the jurisprudential opinions which indicated that the only way to contest a legal precept of an electoral nature, was the unconstitutionality proceedings, and that the TRIFE could not hear this 'even if the only purpose was to determine its possible non-application.'"

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30. The Court has developed clear rules for examining an objection based on an alleged failure to comply with the exhaustion of domestic remedies. First, the Court has interpreted the objection as a defense available to the State and, as such, the State may waive it, either expressly or tacitly. Second, this objection must be submitted opportunely so that the State may exercise its right to defense. Third, the Court has stated that the State that submits this objection must specify the domestic remedies that have not yet been exhausted and prove that those remedies are applicable and effective. [FN6]

[FN6] Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections. Judgment of June 26, 1987. Series C No. 1, para. 88; Case of the Saramaka People v. Suriname. Preliminary objection, merits, reparations, and costs. Judgment of November 28, 2007. Series C No. 172, para. 43; and Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits. Judgment of May 6, 2008. Series C No. 179, para. 40.

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31. The State first alleged the supposed failure to exhaust domestic remedies in its initial communication with the Commission on January 18, 2006, thus complying with the timely presentation of the preliminary objection. In this communication, the State indicated that Articles 8, 79 and 83 of the Law on the System of Mechanisms for Contesting Electoral Matters (hereinafter "Law on Contesting Electoral Matters") provides for an action to protect the political and electoral rights of the citizen, which must be filed four days after learning about the authority's act that an individual wishes to contest and which will be decided in a single proceeding by the Superior Chamber of the Electoral Tribunal. The State alleged that this remedy was the appropriate way, established in the Law on Contesting Electoral Matters, to protect political rights that had allegedly been violated, and that Mr. Castañeda Gutman did not exhaust it, but rather filed an inappropriate remedy under the Mexico legal system to contest an act by the authority relating to electoral matters. Consequently, the State complied with its obligation to specify the remedies that it understood had not yet been exhausted.

32. Based on the above, the Court considers that the State alleged the objection of failure to exhaust domestic remedies in the appropriate time and form.

33. When filing this preliminary objection before the Court, the State alleged, as it did before the Commission, that the said action for the protection of the political and electoral rights of the citizen was an available, appropriate and effective remedy. In this regard, the Commission and the representatives of the alleged victim stated that this remedy was not effective; in consequence, first, it not have to be exhausted and, second, the absence, in Mexico, of a simple, prompt and effective remedy to contest the constitutionality of a law that allegedly affected Mr. Castañeda Gutman's political rights constituted a violation of Article 25 of the American Convention.

34. The Inter-American Court has considered that, in the sphere of international human rights law, the rule of prior exhaustion of domestic remedies has specific implications that are included in the Convention. Indeed, according to the Convention, the States Parties are obliged to provide

effective judicial remedies to the victims of human rights violations (Article 25), remedies that must be substantiated according to the rules of due process of law (Article 8(1)), both in relation to the general obligation of these States to ensure the free and full exercise of the rights recognized by the Convention to all those subject to their jurisdiction (Article 1(1)). Therefore, when exceptions to the rule of failure to exhaust domestic remedies are invoked, such as the ineffectiveness of such remedies or the inexistence of due process, not only is it being alleged that the victim is not obliged to file such remedies but, indirectly, the State is being accused of a new violation of the obligations it has assumed under the Convention. In these circumstances, the issue of domestic remedies borders on the merits of the case. [FN7]

[FN7] Cf. Case of Velásquez Rodríguez, supra note 6, para. 91; Case of Fairén Garbi and Solís Corrales v. Honduras. Preliminary objections. Judgment of June 26, 1987. Series C No. 2, para. 90; and Case of Godínez Cruz v. Honduras. Preliminary objections. Judgment of June 26, 1987. Series C No. 3, para. 93.

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35. Consequently, on repeated occasions, the Court has examined the arguments on this preliminary objection together with the other merits of the case. [FN8]

[FN8] Cf. Case of Velásquez Rodríguez, supra note 6, para. 96; Case of Castillo Petruzzi et al. v. Peru. Preliminary objections. Judgment of September 4, 1998. Series C. No. 41, para. 53; and Case of Salvador Chiriboga, supra note 6, para. 45.

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36. Since a preliminary examination of the effectiveness of the action for the protection of the political and electoral rights of the citizen would mean a ruling on the compatibility of this remedy with the American Convention, which could eventually result in the determination of a violation of the Convention, the Court considers it essential to examine the arguments of the parties in this respect with the merits of the case when determining whether Article 25 of the American Convention has been violated.

D) FOURTH PRELIMINARY OBJECTION (Actions of the Inter-American Commission in the processing of the case)

37. As preliminary objections, the State raised six issues related to the actions of the Inter-American Commission in this case. It considered that the Inter-American Commission:

1. Should not have processed the alleged victim's request for precautionary measures;
2. Should have finalized the initial processing of the petition based on the information that the State provided when responding to the precautionary measures ordered by the Commission, and after learning that the alleged victim did not present his candidacy during the registration stage of the electoral process;

3. Should have ruled on the admissibility of the petition; however, without sufficient and clear grounds, it ordered the transfer of the matter of admissibility to the consideration of the merits of the petition;
4. Should have declared the inadmissibility of the petition based on Article 47 of the American Convention, even Report on admissibility and merits No. 113/06;
5. Infringed Article 50 of the American Convention by adopting Report on admissibility and merits No. 113/06; and
6. Did not comply with the requirements of its own Rules of Procedure to lodge the case before the Inter-American Court.

38. The Court will establish the relevant criteria for examining the issues raised, it will summarize the arguments of the parties and, lastly, it will decide those issues.

39. The Court considers it necessary to indicate that, although neither the American Convention nor the Court's Rules of Procedure define the concept of "preliminary objection," according to the Court's case law, it can be defined as the procedural act that contests the admissibility of an application or the competence of the Court to hear a specific case or any of its aspects based on the person, the issue, the time or the place. [FN9] The purpose of a preliminary objection is to obtain a decision that prevents or impedes the examination of the merits of the matter questioned or of the whole case. Accordingly, irrespective of whether an assertion is defined as a "preliminary objection," its content and purpose must have the essential juridical characteristics that ensure that it is of a preliminary nature. Assertions that are not of this nature, such as those that refer to the merits of a case, can be formulated during other procedural acts established in the American Convention, but not as a preliminary objection.

[FN9] Cf. Case of Las Palmeras v. Colombia. Preliminary objections. Judgment of February 4, 2000. Series C No. 67, para. 34; and Case of Luisiana Ríos et al. v. Venezuela. Order of the Court of October 18, 2007, second considering paragraph.

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40. When a preliminary objection questions the Commission's actions concerning proceedings before it, it should be recalled that the Court has stated that the Inter-American Commission has autonomy and independence in the exercise of its mandate as established by the American Convention [FN10] and, particularly, in the exercise of its functions in the proceedings relating to the processing of individual petitions established in Articles 44 to 51 of the Convention. [FN11] However, one of the Court's attributes is to monitor the legality of the Commission's actions as regards processing matters that are being heard by the Court. [FN12] The Court has upheld the opinion that the American Convention grants it full jurisdiction over matters relating to a case submitted to its consideration, including the procedural assumptions on which the possibility of it exercising its jurisdiction are based. [FN13] This does not necessarily mean reviewing the proceedings before the Commission, unless there has been a grave error that violates the right to defense of the parties. [FN14]

[FN10] Cf. Control of Legality in the Exercise of the Authority of the Inter-American Commission on Human Rights (Arts. 41 and 44 to 51 of the American Convention on Human Rights). Advisory Opinion OC-19/05 of November 28, 2005. Series A No. 19, first operative paragraph.
[FN11] Cf. Control of Legality in the Exercise of the Authority of the Inter-American Commission of Human Rights the Inter-American Commission on Human Rights (Arts. 41 and 44 of the American Convention on Human Rights), supra note 10, second operative paragraph.
[FN12] Cf. Control of Legality in the Exercise of the Authority of the Inter-American Commission of Human Rights the Inter-American Commission on Human Rights (Arts. 41 and 44 of the American Convention on Human Rights), supra note 10, third operative paragraph
[FN13] Cf. Case of Velásquez Rodríguez, supra note 6, para. 29; Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations, and costs. Judgment of November 24, 2006. Series C No. 158, para. 66; and Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations, and costs. Judgment of November 21, 2007. Series C No. 170, para. 15.
[FN14] Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.), supra note 13, para. 66; and Case of the Saramaka People, supra note 6, paras. 32 and 40.
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41. Moreover, in this regard, the Court emphasizes its findings since its first contentious case, to the effect that, under international case law, the failure to observe certain formalities is not always relevant, because the essential factor is that the necessary conditions are preserved to ensure that the procedural rights of the parties are not reduced or unbalanced and to achieve the purposes for which the different proceedings have been designed. [FN15]

[FN15] Cf. Case of Velásquez Rodríguez, supra note 6, para. 33; Case of Baena Ricardo et al. Preliminary objections. Judgment of November 18, 1999. Series C No. 61, para. 41; and Case of the 19 Tradesmen v. Colombia. Preliminary objection. Judgment of June 12, 2002. Series C No. 93, para. 28.
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42. Lastly, the party that affirms that the Commission's actions during the proceedings before it have included a grave error that affected the party's right of defense must prove this prejudice. [FN16] Consequently, in this regard, a complaint or a difference of opinion in relation to the actions of the Inter-American Commission is not sufficient.

[FN16] Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.), supra note 13, para. 66; and Case of the Saramaka People, supra note 6, para. 32.

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43. First, the State alleged that the Commission should not have processed the alleged victim's request for precautionary measures, among other reasons, because: (i) it granted

precautionary measures in favor of Jorge Castañeda Gutman without inviting the State to provide information or offer its observations, in other words, inaudita parte; (ii) it required the State to violate its domestic legal norms by ordering the registration of the beneficiary as a candidate for the office of President of the United Mexican States as a precautionary measure; (iii) it granted precautionary measures that revealed prejudgment from the start by processing the matter with unusual haste, and (iv) it proceeded irregularly by granting the precautionary measures, as revealed by the Order of the Inter-American Court of November 25, 2005, which decided that the matter did not merit granting provisional measures, because this would have entailed "an incidental anticipated judgment with the consequent establishment in limine litis of the facts and their respective consequences, object of the principal debate."

44. Among other arguments, the Commission maintained that: (i) when it requires the adoption of a precautionary measure to protect the alleged victim's rights, in keeping with its regulatory mandate, this does not anticipate the merits of the matter submitted to its consideration; (ii) it is not the first time that the Commission has granted precautionary measures to protect political rights, including the request for the provisional registration of the candidacies of an independent movement for Congress, until the merits of the matter raised have been decided; (iii) the State's allegation is not a matter for a preliminary objection, in the sense that the decision on a preliminary objection is intended to determine whether the proceedings on merits should continue; therefore, the petition formulated the by the State must relate to the Court's competence in relation to the merits of the case, which did not occur in this case, and (iv) the filing of a preliminary objection regarding a precautionary procedure is not generally admissible, and particularly if this procedure has concluded, as in this case, because it is understood that the precautionary measures procedure ended and lost all effectiveness with the State's refusal to provisionally register the independent candidacy of the victim. Based on the above, the Commission requested that this preliminary objection be rejected.

45. The representatives did not add any observations to those submitted by the Commission.

46. The Court finds that the State's allegation relating to the granting of precautionary measures by the Commission and the supposed prejudgment of this organ when granting them, is not an argument relating to a preliminary objection, because, the issues raised are not able or intended to prevent the Court from hearing the merits of the case. Indeed even if, hypothetically, the Court resolved the assertion affirmatively, it would in no way affect the Court's competence to hear the merits of the case. Based on the above, this allegation is rejected.

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47. Second, the State alleged that the Commission should have concluded the initial processing of the petition based on the State's response to the precautionary measures requested and after learning that the alleged victim did not present his candidacy during the registration stage of the electoral process. As soon as the Commission knew that the alleged victim had not submitted any document in the time allotted to the valid reception of requests for the registration of candidates and established his absolute and voluntary absence from the electoral process, the Commission should have decided de oficio that the petition was inadmissible or out of order.

48. The Commission argued that: (i) its application did not refer to the non-registration of Mr. Castañeda Gutman in the electoral process, but rather "to the inexistence in the domestic sphere of a simple and effective remedy to claim the constitutionality of political rights"; (ii) in its report responding to the order to adopt precautionary measures, the State merely indicated the provisions of domestic law that prevented the registration of the candidacy of the beneficiary of the measures, even though the Court has established that international obligations cannot be modified or left unfulfilled by invoking provisions of domestic law; and (iii) it continued to process the petition owing to the need to examine whether the inexistence in the domestic sphere of a remedy to question the constitutionality of the legislation and authoritarian acts that affect political rights entailed violations of the rights protected by the Convention, in the understanding that, as the Court has established, "[…] the international responsibility of the State arises immediately with the unlawful international act attributed to it; [consequently, a subsequent action] implemented under domestic law, does not prevent either the Commission or the Court from hearing a case that has been initiated under the American Convention." Based on the above, the Commission requested that this preliminary objection be rejected.

49. The representatives did not add any observations to those submitted by the Commission.

50. Regarding the arguments based on the failure of Mr. Castañeda Gutman to postulate his candidacy during the electoral process, the Court observes that they are the principal purpose of another issue raised as a preliminary objection by the State, on which the Court has already ruled (supra para. 26). Based on the above, this argument is rejected.

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51. Third, the State indicated that the Commission should have ruled on the admissibility of the petition; but, without clear and sufficient grounds, it ordered the transfer of the issues of admissibility to the consideration of the petition's merits. Among other arguments, the State maintained that: (i) in the same document in which the Commission sent the State the alleged victim's observations on the State's document, it informed the State of its decision to open a case and defer its treatment of admissibility until the debate and decision on merits, without giving the State the opportunity to offer its point of view or additional elements, and leaving the State in an evident situation of defenselessness; (ii) Article 37(3) of the Commission's Rules of Procedure refer to 'exceptional circumstances' to combine the treatment of admissibility with the debate on the merits of the case, and the Commission did not justify what these circumstances were, but merely alluded to abstract affirmations, without satisfying the basic requirement of reasonableness; (iii) the Commission never explained "the nature of the facts that were the object of the petition," or which aspect of the electoral process was questioned, disregarding its obligation to provide satisfactory justification for its decisions; and (iv) the change in the juridical situation signified by the commencement of the electoral process and the alleged victim's absence from it, should have led the Commission to verify whether the reasons for the petition existed or subsisted, and to proceed to close the case in keeping with Article 48(1)(a) and (c) of the Convention.

52. The Commission maintained, among other arguments, that: (i) it had not granted the State the opportunity to offer additional opinions or elements, because it considered that the

exceptional circumstances stipulated in Article 37(3) of its Rules of Procedure had been met. In this regard, the Commission took into account the nature of the facts that were the purpose of the petition, which challenged an aspect of the electoral process that was being conducted at the time – the Mexican electoral calendar – and the interest in preserving the effectiveness of the eventual decision that the organs of the inter-American human rights system would take; based on the foregoing, it considered it essential to process the petition as rapidly as possible; (ii) when processing the petition, each party had ample possibility to submit its arguments on admissibility and merits, and the Commission had even granted the State extensions on two occasions; (iii) the Commission merely complied with its obligations under the Convention, its Statutes and its Rules of Procedure, which could not be a motive for a preliminary objection; and (iv) the joinder of the stages of admissibility and merits is a possibility established in the Commission's Rules of Procedure; consequently, its application and interpretation is an attribute of the Commission; the Court itself has recognized "the independence of the Commission's decision-making processes," which it has described as "the result of a collective exercise of an autonomous nature," executed in its capacity as a supervisory organ of the American Convention. Based on the above, the Commission asked the Court to reject this preliminary objection.

53. The representatives did not add any observations to those submitted by the Commission.

54. Article 37(3) of the Rules of Procedure of the Commission establishes that:

"In exceptional circumstances, and after having requested information from the parties in keeping with the provisions of Article 30 of these Rules of Procedure, the Commission may open a case but defer its treatment of admissibility until the debate and decision on the merits. The case shall be opened by means of a written communication to both parties."

55 The Court observes that this norm establishes a limited number of formal requirements regarding the opening of a case and the Commission's authority to defer the treatment of admissibility until the debate and decision on merits. This provides the Commission with flexibility in that respect. The Court finds that the Commission has acted in exercise of its regulatory powers and that, irrespective of whether the Commission executed this optional joinder, according to the case file, the parties had the opportunity to submit their arguments on both the admissibility and the merits of the case, and the Commission examined them and ruled on them, so that no harm was produced to the right of defense. The State has not proved how the Commission's actions have entailed an error that could have adversely affected its right to defense. Based on the above, the Court rejects this preliminary objection.

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56. Fourth, the State maintained that the Commission should have declared the inadmissibility of the petition based on Article 47 of the American Convention. Among other consideration, Mexico indicated that: (i) the Commission unduly rejected the objections of failure to exhaust domestic remedies filed by the State, without examining the latter's arguments seriously and in detail, but rather focusing on clarifying whether there was a way to contest the constitutionality of the electoral laws in Mexico without taking into consideration the Electoral Tribunal's effective protection of the rights, and without having to exercise attributes relating to

control of the constitutionality of the laws; (ii) the Commission prejudged and presupposed the existence of a right to register an independent candidacy and, also, that this inexistent right would only be exercised by declaring that the COFIPE was contrary to the Constitution and the American Convention, which, in turn, implied that this right derived from these instruments; and, in order to conclude unduly that the matter was admissible, it failed to refer to the time-barred nature of the alleged victim's request to the IFE and affirmed that the only grounds for the refusal was the application of Article 175 of the COFIPE, among other inexact and erroneous affirmations; (iii) in any case, it is for the legislator to decide whether to incorporate the mechanism of the independent candidacy or another similar mechanism, as this cannot be created via judicial control of the constitutionality of the laws. Even if the Supreme Court had considered the amparo action filed by Mr. Castañeda Gutman admissible, this would not have led ipso facto to the legal creation of the mechanism of the independent candidate; and (iv) the Commission should at least have indicated which provision of the Convention establishes the right to register as an independent candidate in the elections because, if this right cannot be inferred from the Convention, the Commission is attempting to demand the existence of a special means of protection for an inexistent right.

57. The Commission argued that: (i) the State's discontent with the processing of the case merely translates into disagreement with the way in which the Commission, in plenary session, interpreted the scope of Article 46 of the Convention. In this regard, the Court has indicated that the Commission, as an organ of the inter-American system for the protection of human rights, has full autonomy and independence in the exercise of its mandate under the Convention; (ii) there is no regulatory or Convention-based provision that obliges the Commission to explain in detail the reasons why it considers that a petition complies with the requirements of admissibility. Admission does not require an express and formal act; nevertheless, the Commission examined thoroughly and explained in detail the reasons for which it decided to apply one of the exceptions to the rule of prior exhaustion of domestic remedies in its Report No. 113/06; (iii) the State seeks to return the proceedings to a precluded procedural stage, in which the Commission gave due consideration to the arguments of both parties on the admissibility of the matter; and (iv) the Court has indicated that there are no grounds for re-examining the Commission's reasoning on admissibility that are compatible with the relevant provisions of the Convention. Based on the above, the Commission asked the Court to reject this preliminary objection.

58. The representatives did not add any observations to those submitted by the Commission.

59. The Court has already ruled on the Commission's authority to defer the admissibility of a petition until the debate and decision on merits pursuant to its Rules of Procedure (supra para. 55). The Court also observes that, as can be seen from reading Report No. 113/06, the State's arguments on the exception to the failure to exhaust domestic remedies were considered and decided by the Commission. The Court does not find any reasons to re-examine the Inter-American Commission's reasoning when deciding on the admissibility of this case. [FN17] Lastly, under this section, the State formulated other arguments referring to the existence of an appropriate remedy and the non-obligatory nature of independent candidacies under domestic law. The Court observes that the State referred to the existence of an appropriate remedy in another preliminary objection and it has already ruled in this regard (supra paras. 30 to 36). The

allegations about independent candidacies refer to the merits of the matter; hence this is not a preliminary objection. Based on the above, the Court rejects this argument.

[FN17] Cf. Case of the Serrano Cruz Sisters v. El Salvador. Preliminary objections. Judgment of November 23, 2004. Series C No. 118, para. 141; and Case of Salvador Chiriboga, supra note 6, para. 44.

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60. Fifth, the State alleged that the Commission had infringed Article 50 of the American Convention by adopting Report on admissibility and merits No. 113/06, among other reasons, because: (i) Article 50 of the Convention refers to a report that describes the facts and the conclusions, as well as the oral or written statements that the interested parties have made under Article 48(1)(e) of the Convention; in this regard, Report No. 113/06 offers a partial and incomplete description of the facts and does not reflect the elements contained in the file before the Commission; (ii) the facts on which the Report is based do not correspond to a true account of what occurred, and are not supported by objective elements; moreover, both the merits and the recommendations are based on erroneous, false and incomplete premises; and (iii) neither a right to submit an independent candidacy, nor that the party system is per se inappropriate can be inferred from Article 23 of the Convention; the establishment of independent candidacies is a decision for the legislator and requires a prior legal basis that does not involve modifying the Constitution; however, the Constitution does not make such candidacies obligatory or order them.

61. The Commission submitted the following arguments, among others: (i) at this procedural stage of formal objections, it is not for the parties to the proceedings to propose objections that are based on the veracity of the facts, since it is for the Court to determine the truth, since it has authority to reach its own conclusions about the facts of the case and decide aspects of law that have not been alleged by the parties under the iura novit curia principle; and (ii) the Convention establishes a qualified system of protection that involves the Court, as a jurisdictional organ for the matter, so that, if a State disagrees with the Commission's findings and considers that it is not lawful to comply with the Commission's recommendations, the Convention offers the possibility of submitting the matter to the jurisdiction of the Court. Based on the above, the Commission asked the Court to reject this preliminary objection.

62. The representatives did not add any observations to those submitted by the Commission.

63. The Court observes that the States arguments relating to the Inter-American Commission's Report on admissibility and merits No. 113/06, to the effect that it provided a "partial and incomplete description of the facts"; that the facts "do not correspond to a true account of what occurred," and that "both the merits and the recommendations" were based on "erroneous, false and incomplete premises" are arguments that relate to the merits of the case before the Court. Indeed, the Court's examination of whether the Commission's interpretation of the facts or the conclusions in this case are erroneous, evidently refers to the merits of the case,

and only at that stage can the Court examine these allegations by the State. Moreover, the Court considers it opportune to observe that, should the State disagree with the Report issued by the Inter-American Commission pursuant to Article 50 of the American Convention, Articles 51(1) and 61 thereof empower it to submit the case to the consideration of the Court for the Court to determine the facts and apply the law pursuant to its contentious jurisdiction. Lastly, the State's allegations in this section, that the right to present an independent candidacy cannot be inferred from Article 23 of the Convention, does not correspond to a preliminary objection. Based on the above, the Court rejects this argument.

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64. Lastly, sixth, among other arguments, the State affirmed that: (i) over and above the Commission's autonomy to assess the grounds for forwarding the case to the Court, which cannot be the subject of preliminary objections, the Commission's infringements of the procedural norms of its Rules of Procedure resulted in lack of procedural balance that led to the defenseless of the State; (ii) the Commission's powers are discretionary but not arbitrary when considering and complying with the parameters of Article 44 of its Rules of Procedure. In particular, in this regard, the State alleged that: (a) the decision to forward the case to the Court was not based on obtaining justice in a specific case, owing to the alleged victim's lack of interest in presenting his candidacy during the electoral process; (b) the gravity of the alleged violation was nullified by the existence of an effective means of protecting political rights before the Electoral Tribunal; and (c) the possible effect of adopting a decision affecting the legal order of the member States in the terms proposed by the Commission, would evidently be negative, because it would imply that it was insufficient that they had electoral administrative bodies and courts for the protection of political rights, and were obliged to adapt their laws to create a specific mechanism so that individuals could contest the constitutionality of electoral laws.

65. The Commission argued that: (i) the Commission's application was not lodged hastily, but responded to the State's failure to comply with the recommendations contained in the reported adopted under Article 50 of the Convention; (ii) none of the Commission's actions affected the State's right of defense or its possibility of complying with the recommendations made by the Commission; (iii) neither the Charter of the Organization of American States nor the Convention contain a provision that subjects the quasi-jurisdictional acts of the Commission to the scrutiny of other organs of the Organization; indeed, the actions of the Commission are guided by a series of guarantees, including the principles of good faith and of interpretation pro homine, which ensure the supremacy of the Convention, added to the guarantees of a specific nature relating to the individual petition procedure, such as the conditions of admissibility, and the principles of adversarial proceedings, procedural equality and juridical certainty; monitoring that the quasi-jurisdictional actions of the Commission adhere to the said principles is a function of the Commission itself; (iv) the Court itself has indicated that the Commission's assessment of whether or not to forward a case to the Court should be the result of a distinctive autonomous collective exercise carried out by the Commission in its capacity as a supervisory organ of the American Convention and, consequently, the grounds on which it is forwarded cannot be the subject of a preliminary objection; and (v) the Commission has predominance in the application and interpretation of the criteria that it established when issuing its Rules of Procedure, including

the criteria for the adoption of the decision to submit a case to the consideration of the Court. Based on the above, the Commission asked the Court to reject this preliminary objection.

66. The representatives did not add any observations to those submitted by the Commission.

67. The Court considers that the State has not proved how the Commission's conduct led to an error that specifically affected or violated the State's right of defense during the proceedings before the Commission. The Court has previously ruled that, according to Article 51 of the Convention and the standards established in Article 44 of its Rules of Procedure, the Commission is competent to determine whether the State has complied with the recommendations contained in its report under Article 50 and to decide whether to submit the case to the Court's jurisdiction. [FN18] Lastly, the Court considered the State's arguments about the existence of an effective measure of protection and Mr. Castañeda Gutman's lack of interest, because he did not present his candidacy during the electoral process, when examining the preliminary objections filed by the State in that respect (supra paras. 36 and 26). Based on the above, the Court rejects this preliminary objection.

[FN18] Cf. Case of the Saramaka People, supra note 6, para. 40.

IV. COMPETENCE

68. The Inter-American Court is competent, in the terms of Article 62(3) of the Convention, to hear this case because Mexico has been a State Party to the American Convention since March 24, 1981, and accepted the compulsory jurisdiction of the Court on December 16, 1998.

V. EVIDENCE

a) Documentary and testimonial evidence

69. In addition to the documentary evidence provided, during the public hearing, the Court heard the statement of Mr. Castañeda Gutman who testified on: (a) the facts related to his attempt to be registered as a candidate for the presidency of Mexico in the elections held in 2006; (b) the subsequent judicial proceedings, following the refusal of the Federal Electoral Institute to register his candidacy and the reasons why he had recourse to the inter-American system for the protection of human rights, and (c) the effects that this impairment of his right caused in the pecuniary and non-pecuniary sphere.

b) Assessment of the evidence

70. In this case, as in others, the Court accepts the probative value of the documents presented by the parties at the proper procedural opportunity that were not contested or opposed, and the authenticity of which was not questioned. [FN19]

[FN19] Cf. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 140; Case of Yvon Neptune v. Haiti. Merits, reparations, and costs. Judgment of May 6, 2008, paras. 29 and 30; and Cas of Apitz Barbera et al. ("First Administrative Court") v. Venezuela. Preliminary objection, merits, reparations, and costs. Judgment of August 5, 2008. Series C No. 182, para. 16.

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71. Likewise, the Court admits the documents provided by the State and the representatives during the public hearing, because it considers them useful for this case and, in addition, neither their authenticity nor their veracity were questioned.

72. Regarding the testimony given by the alleged victim before the Court, the Court considers it pertinent to the extent that it conforms to the purpose defined by the Court in the Order requiring it (supra para. 10). Despite this, the Court considers that Mr. Castañeda Gutman's testimony cannot be considered in isolation, but must be assessed together with all the evidence in the proceedings because he is an alleged victim and has a direct interest in the case. [FN20]

[FN20] Cf. Case of Loayza Tamayo v. Peru. Merits. Judgment of September 17, 1997. Series C No. 33, para. 43; Case of Yvon Neptune, supra note 19, para. 33; and Case of Apitz Barbera et al. ("First Administrative Court"), supra note 19, para. 20.

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73. In relation to the evidence forwarded by the representatives as an appendix to their brief with arguments on the preliminary objections filed by the State, the Court observes that this was not contested by the parties and that it is pertinent to decide this case, so the Court admits it and will assess it together with the body of evidence, bearing in mind the observations made by the State in its brief of November 27, 2007.

74. As regards the brief forwarded by the State on November 27, 2007, the Court observes that, in this brief, Mexico: (a) submitted additional observations on the written arguments of the Inter-American Commission and of the representatives on the preliminary objections; (b) presented observations on the supervening information offered by the alleged victim; and (c) offered supervening information on the constitutional reform on electoral matters published in the official gazette on November 13, 2007 (supra para. 7). In this regard, the Court will only consider the part of that brief referring to the evidence and information provided on the constitutional reform of November 13, 2007, and the observations made by the State on the evidence forwarded by the representatives on October 18, 2007. Regarding the State's additional observations on the preliminary objections, the Court notes that submission of such observations is not provided for in the Rules of Procedure, nor was it requested by the President, so that the Court will not consider these observations. Furthermore, regarding the brief of January 18, 2008, in which the State forwarded observations on the brief presented by the Inter-American Commission concerning the constitutional reform on electoral matters, the Court observes that, although this was not requested by the President, and its presentation is not provided for in the Court's Rules of Procedure, its only purpose was to offer a clarification, and therefore the Court

admits it. Lastly, regarding the brief forwarded by the representatives on July 19, 2008, pursuant to Article 44(3) of the Rules of Procedure, the Court admits it and will assess it together with the body of evidence, bearing in mind the State's observations.

75. Regarding the documents forwarded by the alleged victim with the brief on final arguments concerning the procedural expenses and costs related to the public hearing (supra para. 11), the Court has indicated that "the claims of the victims or their representatives with regard to costs and expenses, and the evidence that they provide, must be submitted to the Court at the first procedural moment granted to them; that is in the brief with pleas and motions, without prejudice to these claims being updated subsequently, according to the new costs and expenses incurred as a result of the proceedings before the Court." [FN21] Based on the above, the Court admits these documents. Regarding the other documents provided, the Court observes that they have not been contested and, if appropriate, will assess them with the body of evidence.

[FN21] Cf. Case of Molina Theissen v. Guatemala. Reparations and costs. Judgment of July 3, 2004. Series C No. 108, para. 22; Case of Kimel, supra note 4, para. 34; and Case of Apitz Barbera et al. ("First Administrative Court"), supra note 19, para. 258.

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76. Now that it has examined the probative elements in the case file, the Court will analyze the alleged violations of the American Convention, considering the proven facts and the pertinent legal arguments of the parties

VI. ARTICLE 25 (JUDICIAL PROTECTION) [FN22] IN RELATION TO ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) [FN23] AND 2 (DOMESTIC LEGAL EFFECTS) [FN24] OF THE AMERICAN CONVENTION

[FN22] Article 25 of the Convention stipulates:

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

2. The States Parties undertake:

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

to develop the possibilities of judicial remedy; and

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

[FN23] Article 1(1) of the Convention establishes that:

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

[FN24] Article 2 of the Convention establishes that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

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77. In the instant case, the Inter-American Commission alleged the violation of Article 25 of the Convention, because it understood that at the time of the facts, the State did not provide the persons subject to its jurisdiction with a prompt, simple and effective remedy to protect political rights and that the application for amparo filed by the alleged victim in this case was not an effective remedy in the terms of the said Article. The representatives argued that the alleged victim filed an application for amparo because this was the only remedy that appeared to be admissible, given that, to achieve the enjoyment of the right claimed by the alleged victim, it was necessary to declare that an Article of the electoral law was unconstitutional, which was not within the powers of the Electoral Tribunal. Lastly, the State alleged that the action for the protection of the political and electoral rights of the citizen was an appropriate and effective remedy for the protection sought by the alleged victim, because the amparo was not admissible for claiming political rights.

78. Article 25(1) of the Convention establishes, in general terms, the obligation of the States to guarantee an effective judicial remedy against acts that violate fundamental rights. When interpreting the text of Article 25 of the Convention, the Court has stated that the State's obligation to provide a judicial remedy is not limited to the mere existence of the courts or the formal procedures, or even to the possibility of resorting to the courts, but that the remedies must be effective; [FN25] in other words, they must provide the person with the real possibility of filing a remedy, in the terms of that provision. The existence of this guarantee "constitutes one of the basic pillars, not only of the American Convention, but also of the rule of law in a democratic society pursuant to the Convention." [FN26] Thus, in accordance with Article 25(2)(b) of the Convention, the States undertake to develop the possibilities of the judicial remedy.

[FN25] Cf. Case of Bámaca Velásquez v. Guatemala. Merits. Judgment of November 25, 2000. Series C No. 70, para. 191; Case of the Saramaka People, supra note 6, para. 177; and Case of Yvon Neptune, supra note 19, para. 77. See also Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24.

[FN26] Cf. Case of Castillo Páez v. Peru. Merits. Judgment of November 3, 1997. Series C No. 34, para. 82; Ximenes Lopes v. Brazil. Merits, reparations, and costs. Judgment of July 4, 2006. Series C No. 149, para. 192; and Case of Claude Reyes et al. v. Chile. Merits, reparations, and costs. Judgment of September 19, 2006. Series C No. 151, para. 131.

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79. In turn, the State's general obligation to adapt its domestic laws to the provisions of the Convention in order to guarantee the rights it embodies, which is established in Article 2, includes issuing norms and developing practices that lead to the effective observance of the rights and freedoms embodied in the Convention, as well as adopting measures to eliminate

norms and practices of any nature that entail a violation of the guarantees established therein. [FN27]

[FN27] Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations, and costs. Judgment of May 30, 1999. Series C No. 52, para. 207; Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations, and costs. Judgment of July 4, 2007. Series C No. 166, para. 57; and Case of Salvador Chiriboga, supra note 6, para. 122.

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80. Based on the arguments of the parties regarding the alleged violation of Article 25 of the American Convention, the Court will examine whether, at the time of the facts, Mexican laws provided for an effective remedy in the terms of Article 25 of the American Convention. To this end, the Court will determine the relevant facts, and then describe the pertinent findings, first, in relation to the application for amparo filed by the alleged victim in the instant case, and then in relation to the action for the protection of the political and electoral rights of the citizen, a remedy that Mr. Castañeda Gutman should have filed, according to the State's arguments.

I. Facts

81. On March 5, 2004, the alleged victim submitted to the IFE General Council a request for registration as an independent candidate for the office of president of the United Mexican States in the elections of July 2, 2006. He alleged that he requested his registration "in exercise of the right granted [him] by Article 35(II) of the Constitution"; [FN28] he submitted various documents and "declared under protest to tell the truth" regarding compliance with the constitutional requirements to exercise this elected office.

[FN28] Article 35. The citizen shall have the following prerogatives:
[…]
II. To be able to be elected for any elected public office and appointed to any other employment or assignment, if he complies with the requirements established by law;
[…]

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82. In a communication of March 11, 2004, notified the following day, the Privileges and Political Parties Executive Directorate, Political Parties and Financing Directorate, of IFE, informed Mr. Castañeda Gutman that "it [was] not possible to respond to his petition as requested." As grounds for this decision, IFE cited, among other provisions, Article 175 of the COFIPE, which establishes that "only the national political parties have the right to request the registration of candidates to elected office" and cited TRIFE case law of October 25, 2001, indicating that "the refusal to grant registration as an independent candidate based on [a legal provision establishing] that only political parties have the right to postulate candidates for elected public office, does not violate the Constitution or international treaties […]." IFE stated that "[t]he right to be postulated and to be elected to an elected office at the federal level can only be exercised through one of the national political parties that are registered with the Federal

Electoral Institute," and also that the COFIPE "indicates the time frame for the registration of candidacies for President of the United Mexican States, which runs from January 1 to 15 of the electoral year."

83. On March 29, 2004, the alleged victim filed an application for amparo against this ruling of the Federal Electoral Institute before the Seventh District Administrative Court of the Federal District. Mr. Castañeda Gutman based his application for amparo on the following arguments: (a) violation of the individual guarantees of the exercise of freedom to work and participate in the development of the democratic regime on the national political scene; (b) violation of the individual guarantee of equality before the law, and (c) violation of the individual guarantee of freedom of association, all based on the Mexican Constitution.

84. On March 30, 2004, the Seventh District Administrative Court of the Federal District, in its decision to admit the application for amparo, indicated that, "in general, the application for guarantees [amparo] in which an attempt is made to infer rights of a political nature shall be inadmissible, except in cases in which individual rights are claimed therein. [C]onsequently, and in order not to judge this circumstance a priori, based on Article 114 [and others] of the Amparo Act, [this court] considers it in order to admit the application for amparo […]." Subsequently, on July 16, 2004, the Seventh District Administrative Court of the Federal District decided to declare the application for amparo filed by the alleged victim inadmissible, owing to "the constitutional inadmissibility arising from paragraph 3 of Article 105(II) of the Constitution, [which] establishes[…] that the only remedy to allege that electoral laws are not in accordance with the Constitution is the unconstitutionality proceeding; a provision that […] harmonizes with the legal inadmissibility contained in Article 73(VII) of the Amparo Act."

85. On August 2, 2004, Mr. Castañeda Gutman filed an appeal for review against the Seventh Court. As this appeal raised legal and constitutional issues, the Fourteenth Collegiate Administrative Court of the First Circuit, to which the hearing of this appeal corresponded, decided the legal issues in a judgment of November 11, 2004, and proposed that the Supreme Court should exercise its powers to rule on constitutional matters.

86. On August 8 and 16, 2005, the Plenary session of the Supreme Court of Justice confirmed the appealed judgment and decided to declare the application for amparo it was reviewing inadmissible based on Articles 175, 176, 177(1)(e), and 178 of the COFIPE, the constitutionality of which was being challenged by the alleged victim, without examining the merits of the issue. The Supreme Court also decided to dismiss the application for amparo regarding the decision of the Executive Director of Privileges and Political Parties of IFE contained in the communication of March 11, 2004, which had motivated Jorge Castañeda Gutman's action for amparo. The Supreme Court considered that "[…] the authority to decide on contradictions between electoral laws and the Federal Constitution is entirely restricted by constitutional mandate to the plenary session of the Supreme Court of Justice, while the Electoral Tribunal shall decide any other act or decision or the interpretation of a constitutional provision, provided that this interpretation is not to verify that an electoral law conforms to the Constitution"; because "[…] the intention is to give certainty to the rules that govern the electoral process, by establishing a constitutional means of control called the unconstitutionality proceedings; […] therefore, federal and local legislative bodies are obliged to enact electoral

laws at least 90 days before an electoral process takes place so that, should the Supreme Court declare that the norm is invalid, there is time for the legislator to modify it and, based on this system, there is certainty about the applicable provisions and that they will not be modified during the electoral process."

87. On October 6, 2005, the Mexican electoral process was officially initiated and from January 1 to 15, 2005, the Federal Electoral Institute received the candidacies for the office of President of Mexico. The alleged victim did not submit a request to register his candidacy during this period.

II. The amparo procedure

88. The Commission alleged that, at the time of facts, there was no simple, rapid and effective remedy in Mexico under which private individuals, such as the alleged victim, could raise constitutional issues relating to the electoral norms. Such a remedy was not available under Mexican law, because the application for amparo and the action for the protection of political and electoral rights did not meet the requirements of appropriateness to decide the situation denounced by the alleged victim. Despite this, the Commission indicated that, for a remedy to be considered effective, reference must have been made to the merits of the matter, and this did not happen in the instant case. The Inter-American Commission alleged that the "judicial remedy does not have to be decided in favor of the party alleging the violation of his rights in order to be considered 'effective'; however, effectiveness implies that that the judicial organ has assessed the merits of the complaint." The Commission argued that Article 25(2)(a) of the Convention establishes that the person who files a judicial remedy has the right that the authority deciding on his rights must refer to the merits, which would entail "determining the facts and the law – the legal effect – that refers to and deals with the specific purpose." Lastly, it considered that amparo would have been the appropriate remedy, if its application had not been excluded from electoral matters, and that it was not unreasonable for a State to restrict the application for amparo to certain matters, provided that it ensured another prompt and simple protective remedy, for the matters that were not protected by the application for amparo.

89. The representatives indicated that they had filed an application for amparo, because it was the only remedy that might be admissible, since, to obtain the protection that the alleged victim sought, it was necessary to declare that Article 175 of the COFIPE was unconstitutional, and only the Supreme Court of Justice had jurisdiction to do this. Consequently, the resolution of the Supreme Court that the application for amparo was inadmissible in this case closed all the doors to justice in the State to the alleged victim, violating his right to judicial protection, established in Article 25 of the Convention. As in the case of the Inter-American Commission, the representatives argued that, at the time of the facts, there were no remedies available in Mexico that could have been effective in this case.

90. The State did not submit arguments about the effectiveness of the application for amparo in this case, but rather alleged that the effective remedy to protect political rights in Mexico was the action for the protection of the political and electoral rights of the citizen and stated that it was effective, simple, accessible and prompt.

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91. The Court observes that, in order to prove the alleged violation of Article 25 of the Convention, both the Commission and the representatives indicated the lack of a simple, prompt and effective remedy for the alleged victim to claim the protection of his constitutional rights. In this regard, the Court considers, as do the Commission and the State, that the application for amparo filed by the alleged victim was not the appropriate remedy in this case, since it was inadmissible in relation to electoral matters.

92. The Court finds that it is not inherently incompatible with the Convention that a State limits the application for amparo to specific matters, provided that it offers another remedy of a similar nature and equal scope for those rights that cannot be heard by the courts using the amparo proceeding. This is particularly relevant as regards political rights, which are human rights of such importance that the American Convention prohibits their suspension, and also of the judicial rights that are essential to protect them (infra para. 140).

93. Despite the above, the Court considers it pertinent to refer to the Inter-American Commission's argument that, over and above the fact that the application for amparo was not the appropriate remedy, because electoral matters fell outside its sphere of competence, "effectiveness implies that the judicial body has assessed the merits of the complaint." In this regard, the Court has established that "the competent authority's examination of a judicial remedy […] cannot be limited to a mere formality, but must examine the reasons invoked by the complainant and specifically express an opinion on them, according to the parameters established by the American Convention. [FN29] In other words, it is a minimum guarantee for anyone who files a remedy that the grounds for the ruling deciding it are stated; otherwise the ruling will violate the guarantee of due process.

[FN29] Cf. Case of López Álvarez v. Honduras. Merits, reparations, and costs. Judgment of February 1, 2006. Series C No. 141, para. 96.

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94. For the Court, the requirement that the decision should be founded is not the same as an analysis of the merits of the matter, since this examination is not essential to determine the effectiveness of the remedy. The existence and application of conditions for the admissibility of a remedy is compatible with the American Convention, [FN30] and the effectiveness of the remedy implies that, when these conditions are complied with, the judicial organ may assess its merits.

[FN30] In this regard, the Court has stated: "[…] Based on legal certainty, for the proper and functional administration of justice and the effective protection of human rights, the State can and must establish admissibility presumptions and criteria for domestic recourses of a judicial or any other nature. Thus, although these domestic recourses must be available to the interested party and decide the matter raised effectively, stating the grounds, as well as possibly providing appropriate reparation, it cannot be considered that always and in all cases, the domestic organs

and courts must decide on the merits of the matter lodged before them, without verifying the formal presumptions of admissibility and the validity of the specific recourse filed" (italics added). Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.), supra note 13, para. 126.

II. The action for the protection of the political and electoral rights of citizens

95. The Commission stated that TRIFE lacked competence to declare that Article 175 of the COFIPE was inapplicable in a specific case, based on the express wording of Article 10 of the Law on Contesting Electoral Matters and the criteria of the Supreme Court of Justice. Although the State alleged the effectiveness and appropriateness of the action for the protection of the political and electoral rights of the citizen before TRIFE, the case law of this judicial organ reveals the contrary. In this regard, the Commission pointed to the judgment delivered on February 2, 2006, in relation to the remedy filed by Héctor Montoya Fernández, in which TRIFE, when referring specifically to the application of Article 175, paragraph one, of the COFIPE established that "[…] this Superior Chamber must apply the legal provisions, even when they are considered contrary to the Constitution." Given that the judicial action for protection was not effective, at the time of the facts an individual did not have an effective remedy to protect his political rights in Mexico and, in practice, the Mexican legal system did not include a mechanism for individuals such as Mr. Castañeda Gutman to question constitutional issues relating to the electoral norms.

96. The representatives emphasized that the Law on Contesting Electoral Matters excluded questioning the non-conformity of federal or local laws with the Constitution from the sphere of the said contestation mechanisms. They also indicated that the Electoral Tribunal did rule on the constitutionality of juridical norms regarding electoral matters, but that, subsequently, the Supreme Court of Justice clarified definitively the Electoral Tribunal's lack of competence to rule on the constitutionality of electoral norms, and determined that the power to decide on contradictions between electoral norms and the Constitution was limited to the Plenary session of the Supreme Court of Justice, so that the only way to raise the non-conformity of such laws with the Constitution was the unconstitutionality proceeding. In addition, the representatives stated that the Law on Contesting Electoral Matters established that the action for the protection of political and electoral rights before TRIFE could only be filed by a citizen who had been proposed by a political party. They stated that, since the alleged victim had not been proposed by a party, the action would have been declared inadmissible and the application would have been rejected in limine.

97. The State indicated that the alleged victim should have proved that a right to an independent candidacy existed, "before stating that he had no simple, prompt and effective remedy to claim it. It also argued that the action for the protection of the political and electoral rights of the citizen, a means of defense created by the constitutional reform of August 22, 1996, was the appropriate and effective remedy that the alleged victim should have chosen in order to protect the juridical situation that had allegedly been violated before the Electoral Tribunal. Owing to the existence of the protection action, the inadmissibility of the application for amparo in electoral matters did not imply the inexistence of an appropriate and effective remedy. In

addition, the simple and brief remedy required by the American Convention does not necessarily have to be equated with the possibility of challenging the constitutionality of a specific law, because the relevant aspect is that this remedy can protect and restitute the fundamental right that has allegedly been violated. The judicial action for protection should have been used by the alleged victim, because it constitutes a specialized amparo in this matter; it would have allowed him to challenge the refusal to register him as an independent candidate for the office of President of the Republic and, should his claim have been justified, that the restitution of his right would have been ordered, without the need to declare that Article 175 of the COFIPE was unconstitutional. Furthermore, the Electoral Tribunal, which is the competent organ to examine the remedy, is independent and impartial, according to the Inter-American Commission's report on its visit in loco to Mexico in 1996. The State underscored that the TRIFE Superior Chamber has proceeded to restitute the rights of individuals when their claims were considered to be justified; and that this jurisdictional body has powers "to examine the constitutionality of the acts of the authorities in its area, and to interpret the law in light of the Constitution, and has even applied the American Convention on Human Rights and the International Covenant on Civil and Political Rights appropriately. Moreover, regarding the accessibility of the action for the protection of political and electoral rights of the citizen, the State indicated that the requirements for the admissibility of a remedy, according to the Electoral Tribunal's case law, are those established in Article 79 of the Law on Contesting Electoral Matters, and not those established in Article 80 thereof, as the representatives alleged. According to the State, to file an action it is sufficient to be a Mexican citizen, to file the remedy as an individual and to allege supposed violations of political rights.

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98. The Court will refer first to the State's argument that the alleged victim should have proved that a right to present himself as an independent candidate existed in order to be able to file remedy.

99. In the instant case, the alleged victim sought to exercise his right to judicial protection to obtain a pronouncement on the scope and content of a human right, the political right to be elected, embodied in Article 23(1)(b) of the American Convention and in Article 35(II) of the Mexican Constitution and eventually obtain a judicial decision in favor of his claim.

100. The Court considers that the meaning of the protection granted by Article 25 of the Convention is the real possibility of access to a judicial remedy so that the competent authority, with jurisdiction to issue a binding decision, determines whether there has been a violation of a right claimed by the person filing the action, and that the remedy is useful to restitute to the interested party the enjoyment of his right and to repair it, if it finds there has been a violation. Indeed, it would be unreasonable to establish this judicial guarantee if the plaintiffs were obliged to know beforehand whether the judicial organ would consider that their situation was protected by a specific right.

101. Based on the above, and irrespective of whether the judicial authority declares the claim of the persons who files a remedy to be unfounded, because it is not covered by the norm invoked or should it find that there has not been a violation of the right alleged to have been

violated, the State is obliged to provide effective remedies that allow individuals to challenge those acts of authority which they consider violate their human rights established in the Convention, the Constitution and the law. Indeed, Article 25 of the American Convention establishes the right to the judicial protection of the rights embodied in the Convention, the Constitution or the law, and it can be violated irrespective of whether or not there has been a violation of the right claimed or that the situation on which it was based fell within the sphere of application of the right invoked. This is because, like Article 8, "Article 25 of the Convention also embodies the right of access to justice." [FN31]

[FN31] Cf. Case of Cantos v. Argentina. Preliminary objections. Judgment of September 7, 2001. Series C No. 85, para. 52.

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102. The Convention establishes that a person subject to the jurisdiction of the State must have access "to a simple and prompt recourse, or any other effective recourse to a competent court or tribunal for protection against acts that violate his fundamental rights."

103. The Court considers that, in the instant case, the dispute between the parties is limited to two of the said characteristics related to the effectiveness of the recourse: (a) whether the alleged victim had access to a recourse, and (b) whether the competent court had the necessary powers to restore the enjoyment of his rights to the alleged victim, if it found that those rights had been violated. The Court will refer to the first of these characteristics as the "accessibility of the recourse" and to the second as the "effectiveness of the recourse."

a) Accessibility of the recourse

104. The representatives alleged that Article 80 of the Law on Contesting Electoral Matters restricts the admissibility of the judicial action for protection to individuals who, having been proposed by a political party, consider that their right to be elected has been violated when their registration for public office is unduly denied. They stated that the Electoral Tribunal does not have the competence to decide contestations of electoral laws in the case of a citizen who does not belong to a political party such as Mr. Castañeda Gutman. Lastly, they indicated that the cases to which the State referred, including the Hank Rhon case, "were filed individually by candidates proposed by a party or by a coalition of parties," and that "if they had not been proposed by a party, the action would have been declared inadmissible and the claim would have been rejected outright."

105. The State argued that the Electoral Tribunal has stated that the admissibility of the judicial action for protection only required the presence of the elements established in the first paragraph of Article 79 of the Law on Contesting Electoral Matters and that "for the admissibility [of the action], the provisions of Article 80 [of this Law] are not important." It attached the Electoral Tribunal's case law indicating that the "requirements for the admissibility of the action for the protection of the political and electoral rights of the citizen are established in Article 79 (and not 80) of the [Law on Contesting Electoral Matters]." Based on this case law,

the State indicated that Article 79 of the Law on Contesting Electoral Matters "opens up the judicial action for protection to any citizen who considers that his rights have been infringed, including those who state that they have not been postulated by a party," and that Article 80 of the said Law establishes "some specific conditions, for example, the case of candidates proposed by political parties." To reinforce the argument about the admissibility of the action for the protection of political and electoral rights, without the need to file this through a political party, the State referred during the public hearing, among other cases, to that of Hank Rhon, in which "[…] the said citizen, when filing the remedy, did so on his own behalf; in other words, he was not supported by any political party when he resorted to the Tribunal to defend his right to participate, and it was only when the Tribunal ruled in his favor that a political party adopted him and, consequently, he was able to take part in the corresponding elections.

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106. To comply with its Convention-based obligation to establish within their domestic laws an effective recourse in the terms of the Convention, the States must provide accessible recourses to all persons to protect their rights. If a specific judicial action is the recourse destined by the law to obtain the restitution of the right that is considered violated, any person who holds title to that right must be genuinely able to file it.

107. In this case, the alleged victim claimed a violation of his political right to be elected, owing to an electoral law that imposed the requirement that candidates had to be postulated by a political party. The Court must determine whether the judicial action for protection was an accessible recourse for the alleged victim. As the Court has observed, the amparo was an inadmissible recourse owing to the matter involved (supra para. 91) and the unconstitutionality proceedings were not available for an individual such as Mr. Castañeda Gutman, because it is a special recourse limited, among other aspects, by its active legal capacity (infra para. 128).

108. The law that regulates the judicial action for protection is the Law on Contesting Electoral Matters. Article 79(1) of this Law establishes that:

The judicial action for the protection of political and electoral rights is only admissible when the citizen, on his own behalf and on an individual basis, claims alleged violations of his right to elect and be elected in general elections, to associate individually and freely to take part peacefully in political matters and to join political parties freely and individually.

109. Article 80(1)(d) of the same law provides that the judicial action may be filed by the citizen when:

He considers that his political and electoral right to be elected has been violated, when, having been proposed by a political party, his registration as a candidate to an elected office is unduly denied (italics added).

110. The Court underscores that it is important that States regulate judicial recourses so that the individual has legal certainty and guarantees of his conditions of access. After examining the arguments and the evidence provided, particularly the laws and the case law submitted by the

State on the requirements to ensure the validity of the proceedings, the Court understands that the requirements for filing the judicial protection proceedings are always those established in Article 79 of the Law on Contesting Electoral Matters and, in certain cases, also the factual assumptions for admissibility established in Article 80 thereof. The Court observes that, in the same case law provided by the State, the Electoral Tribunal clarifies that "from the interpretation of the word 'when,' in Article 80(1) of the Law on Contesting Electoral Matters, it is clear that it is used as an adverb of time and with the meaning of 'at the time,' 'at the moment,' 'on the occasion that,' because all the subparagraphs that follow this expression refer to the fact that the action can be filed at the time or moment when the facts observed in each hypothesis occurred" [FN32] (italics added).

[FN32] Cf. Case law J.02/2000 of the Superior Chamber of the Electoral Tribunal of the Federal Judiciary (final arguments of the State, merits file, tome IV, folios 1256 and 1257).

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111. In other words, every citizen has active legal capacity to file the recourse under Article 79; but when he himself alleges specific violations of his political rights "the action can be filed at the time or moment at which the facts observed in each hypothesis occurred" according to Article 80, which implies that the conditions referred to in this Article of the Law on Contesting Electoral Matters are really only de facto assumptions, that condition the admissibility of the judicial action for the protection of the political and electoral rights of the citizen. Article 80 imposes the condition that the citizen has been postulated by a political party and, in that capacity, his registration as a candidate for elected public office has been denied.

112. As the Court observes, in addition to the fact that both Article 79 and Article 80 of the Law on Contesting Electoral Matters are in the chapter "On admissibility," a distinction is made between the general requirements for admissibility of the judicial action for protection and the specific assumptions that, in certain cases, condition this admissibility in relation to political and electoral rights. Regarding admissibility, the action must be filed by an individual and it is not necessary that the person files it under the auspices of a political party, as the State maintains when affirming that the requirements of admissibility are those in Article 79 of the Law on Contesting Electoral Matters. However, the law establishes and the case law of the Electoral Tribunal has ratified, that a condition sine qua non that must be complied with by anyone specifically claiming his right to be elected is to have been proposed by a political party prior to the refusal to register him as a candidate for public office. This condition, even though it is not a requirement for the general admissibility of the judicial action according to Article 79, conditions its admissibility when the undue refusal to register a candidacy for elected office is alleged, which means that the action for the protection of political and electoral rights is only accessible, as regards the political right to be elected, to individuals who were proposed by a political party and not to any person entitled to political rights.

113. After examining the judgment of the TRIFE Superior Chamber of July 6, 2007, deciding the Hank Rhon case, to which the State referred during the public hearing, the Court observes that, although the judicial action was filed by the person with active legal standing, in other words, the citizen on his own behalf and individually, this citizen complied with the condition

that he was "proposed by a political party" referred to in Article 80 of the Law on Contesting Electoral Matters. In that case, a coalition of political parties known as Alianza para que Vivamos Mejor [Alliance for a Better Life] requested the registration of this individual as a candidate for the governorship of a state of the Federation, and this registration was granted by a decision of the State Electoral Council of the Baja California State Electoral Institute and revoked by the Federal Electoral Tribunal of the Judiciary of that federal entity. That Tribunal's revocation of the decision to register the candidate proposed by the coalition of political parties was an act of authority that the said individual contested before TRIFE, by means of a judicial action for the protection of political and electoral rights. Although the State Electoral Tribunal revoked the decision of the electoral authority granting the registration, this ruling could not be considered firm until TRIFE decided the action for the protection of political and electoral rights. As can be seen from the judgment, TRIFE confirmed that Hank Rhon complied with the factual conditions when it ruled that "the decision to register Jorge Hank Rhon as a candidate for governor of the state of Baja California, postulated by the coalition Alianza para que Vivamos Mejor is confirmed […]" (italics added). [FN33]

[FN33] Cf. Judgment SUP-JDC-695/2007 of the Superior Chamber of the Electoral Tribunal of the Federal Judiciary of July 6, 2007 (file of appendixs to the answer to the application, tome II, appendix 2, folio 1640).

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114. In the instant case, as a condition for the admissibility of the judicial action for the protection of political and electoral rights, the Law on Contesting Electoral Matters required that Mr. Castañeda Gutman would have to have been postulated by a political party in order to claim a violation of the political right to be elected, in relation to the registration of his candidacy. Added to this, in this case, there was no other remedy for the alleged victim, who had not been postulated by a political party, to claim the alleged violation of his political right to be elected (infra para. 131).

b) Effectiveness of the recourse

115. The Commission indicated that the grounds for the IFE administrative act rejecting the alleged victim's registration were the application of Article 175 of the COFIPE, so that the only way to declare that this Article was inapplicable to the specific case was by examining its constitutionality. In other words, to declare this Article inapplicable to the specific case, it was necessary to consider it contrary to the Constitution. However, the Mexican legal system did not include a mechanism for private individuals such as Mr. Castañeda Gutman to question the constitutionality of the electoral laws. According to the Commission, the Supreme Court's negative decision on the amparo procedure ended definitively the alleged victim's hope to receive an opportune determination of his rights.

116. The representatives argued that the Constitution considers that the action for amparo is the only means of constitutional control to ensure the citizen the validity and effectiveness of his constitutional guarantees when the authorities violate them. Article 10 of the Law on Contesting Electoral Matters indicates that the mechanisms for contesting electoral matters are inadmissible

when the intention is to contest the constitutionality of federal and local laws. They alleged that none of the provisions referred to by the State give the Electoral Tribunal the express competence to hear contestations of the electoral laws. They also indicated that "the power to decide on contradictions between the electoral norms and the Constitution is clearly limited by constitutional mandate to the plenary session of the Supreme Court of Justice of Mexico, so that the Electoral Tribunal can only rule on the legality of an act or decision, if it is not to verify the conformity of the electoral law with the Constitution, because, to the contrary, it would be exercising a power that it does not have pursuant to the Constitution."

117. According to the State, under the juridical system, the function of the judicial procedure for the protection of the political and electoral rights of the citizen is to revoke or modify acts or decisions that are considered to violate, among others, the political and electoral rights of voting and being elected, according to the provisions of Article 84 of the Law on Contesting Electoral Matters. Consequently, the alleged victim should have filed this remedy so that, if his claim had been justified, his right would have been restituted without the need to declare the unconstitutionality of Article 175 of the Electoral Code. Despite the foregoing, according to the State, the action for the protection of the political and electoral rights of the citizen is also a remedy to exercise control of the constitutionality and legality of acts that violate political rights, and "since [the 1996 constitutional reform], the Electoral Tribunal is the highest jurisdictional authority in the matter, a specialized organ of the Judiciary (Article 99 of the Constitution) and the final instance with regard to the control of the constitutionality of electoral acts and decisions."

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118. On this point, the Court is called on to determine whether the judicial proceedings for the protection of the political and electoral rights of the citizen constituted an effective remedy. An effective judicial remedy is one, which can produce the result for which it was conceived; [FN34] in other words, the remedy must be capable of leading to an analysis by the competent court to establish whether there has been a human rights violation and of providing reparation. [FN35]

[FN34] Cf. Case of Velásquez Rodríguez, supra note 19, para. 66; Case of Ximenes Lopes, supra note 26, para. 192, and Case of Yvon Neptune, supra note 19, para. 77.
[FN35] Cf. supra notes 29 and 31. See also: Judicial Guarantees in States of Emergency, supra note 25, para. 24.

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119. In this case, the parties disagree on whether the Electoral Tribunal, which is the competent organ to decide the protection action, had jurisdiction to examine and decide the alleged victim's claim concerning the unconstitutionality of Article 175 and others of the COFIPE and, if applicable, to disapply this provision in the specific case so that the alleged victim could be restored to the enjoyment of his rights.

120. Regarding the competence of the Electoral Tribunal, since 1996, Article 99 of the Constitution has established (and this was in force at the time of the facts) that the "Electoral Tribunal shall be […] the highest jurisdictional authority on the matter [and] it corresponds to it to decide definitively and irrefutably on […] contestations of acts and decisions that violate the political and electoral rights to vote and to be elected, and of free and peaceful association to take part in the country's political affairs, in the terms of the Constitution and the law." In addition, the Law on the Federal Judiciary (hereinafter the "Law on the Judiciary"), in force at the time of the facts, had established since 1996 in its Article 186(III)(a) and (c), that the Electoral Tribunal had competence "[t]o decide definitively and irrefutably, disputes arising from:

(a) Acts and decisions of the federal electoral authority other than those indicated in the preceding subparagraphs I and II [contestations relating to the federal elections for deputies and senators and to the election of the President of the Republic], that violate constitutional or legal norms."
[…]
c) Acts and decisions that violate the political and electoral rights of the citizens to vote and to be elected in the general elections, to associate individually and freely to take part peacefully in political matters, and to join political parties individually and freely, provided the constitutional requirements have been met together with those indicated in the laws for their exercise.

121. Without detriment to the fact that the Constitution and the Law on the Judiciary grant competence to the Electoral Tribunal to review "contestations of acts and decisions that violate political and electoral rights," Article 105, subparagraph II, of the Constitution, which regulates the exclusive competence of the Supreme Court of Justice to hear judicial proceedings on unconstitutionality, has established, since 1996, that the "only means for alleging the non-conformity of the electoral laws with the Constitution is the one provided for in [the said] Article." [FN36]

[FN36] Article 105. The Supreme Court of Justice shall hear, in the terms established in the law regulating it, the following:
[…]
II. Unconstitutionality proceedings with the purpose of raising possible contradictions between a general norm and this Constitution.
Unconstitutionality proceedings may be filed within the 30 calendar days following the publication of the norm, by:
(a) The equivalent of 33% of the members of the Chamber of Deputies of the Congress of the Union, against federal laws or laws of the Federal District issued by the Congress of the Union;
(b) The equivalent of 33% of the members of the Senate, against federal laws or laws of the Federal District issued by the Congress of the Union, or international treaties concluded by the Mexican State;
(c) the Prosecutor General (Procurador General), against federal, state and Federal District laws, and international treaties concluded by the Mexican State;

(d) The equivalent of 33% of the members of a state legislative organ against laws issued by that organ;
(e) The equivalent of 33% of the members of the Assembly of Representatives of the Federal District, against laws issued by the Assembly; and
(f) The political parties registered with the Federal Electoral Institute, through their national leadership, against federal or local electoral laws; and the political parties registered with the states, through their leadership, exclusively against electoral laws issued by the legislative organ of the state where they are registered.
The only means of contesting the conformity of the electoral laws with the Constitution is established in this Article.
Federal and local electoral laws shall be promulgated and published at least 90 days before the start of the electoral process in which they will be applied and, during this process, no fundamental modifications shall be made to the laws.
The decisions of the Supreme Court of Justice may only declare the invalidity of the contested norms if they are adopted by a majority of at least eight votes.
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122. In keeping with Article 105(II) of the Constitution, Article 10 of the Law on Contesting Electoral Matters provided that the contestation mechanisms, including the judicial action to protect the political and electoral rights of the citizen, "shall be inadmissible […w]hen the intention is to contest the unconstitutionality of federal or local laws."

123. Despite the provisions of the preceding constitutional and legal norms, as the representatives mentioned, TRIFE "[…] did issued rulings on the constitutionality of legal norms concerning electoral matters."

124. Notwithstanding the above, in May 2002, the plenary session of the Supreme Court of Justice decided a contradiction between the criteria of the TRIFE Superior Chamber and the Supreme Court of Justice. On that occasion, the Supreme Court interpreted, as binding case law for the Electoral Tribunal, pursuant to Articles 235 and 236 of the Law on the Federal Judiciary, [FN37] that the Constitution did not allow the Electoral Tribunal to control the constitutionality of electoral laws as a result of acts and decisions in which they had been applied, because the only control of the constitutionality of laws allowed by the Constitution was the control with general effects, which was the exclusive competence of the Supreme Court of Justice by means of the unconstitutionality proceeding. Hence, the Supreme Court indicated that:

ELECTORAL LAWS. THE ONLY MEANS OF CONTESTING THEM IS THE UNCONSTITUTIONALITY PROCEEDING. Article 105, subparagraph II, of the Constitution of the United Mexican States, and the law regulating it, […] establish the system for […] contesting [federal and local electoral laws]; pursuant to this, the only means of alleging the unconstitutionality of the said laws is the unconstitutionality proceeding, […] and the only authority with competence to hear and decide such actions is the National Supreme Court of Justice[.] Therefore, the Electoral Tribunal of the Federal Judiciary cannot, in any circumstance, rule on the constitutionality of electoral laws, because such laws cannot be contested before it as a result of the acts and decisions in which they may have been applied, because, on the one hand, owing to their nature, they are designed to regulate the electoral process, and it is essential to

consider their final nature; otherwise, the balance of the electoral process would be violated, because it would not be logical that, under a system of an electoral contest between political parties, the constitutionality of a norm on that process was questioned owing to acts and decisions produced by it; and, on the other hand, that it is beyond the powers of that tribunal to compare the electoral norm with the Constitution, even with the pretext of determining its possible inapplicability (italics added). [FN38]

[FN37] Article 235. The jurisprudence of the Supreme Court of Justice shall be compulsory for the Electoral Tribunal when it relates to the direct interpretation of a precept of the Constitution of the United Mexican States, and in cases in which it is exactly applicable.
Article 236. As established in Article 99(5) of the Constitution of the United Mexican States and section VIII of Article 10 thereof, when a Chamber of the Electoral Tribunal, directly or when deciding a contradiction in criteria, offers an opinion regarding the unconstitutionality of an act or resolution or regarding the interpretation of a precept of the Constitution itself, and this opinion may be contradictory to the one maintained by the Chambers or the Plenary session of the Supreme Court of Justice, any of the ministers, the Chambers, or the parties may denounce the contradiction so that, within ten days, the Plenary session of the Supreme Court of Justice may make a final ruling on which opinion should prevail.
[FN38] Cf. Case law opinion 25/2002 of the Plenary session of the Supreme Court of Justice of June 10, 2002 (brief with the representatives' pleas and arguments, merits file, tome I, folios 139 and 140).
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125. This 2002 criteria was repeated by the Supreme Court of Justice in August 2005, when deciding the review of the application for amparo concerning the law filed by Mr. Castañeda Gutman:

"Consequently, from what has been said, it is concluded that the power to decide on contradictions between electoral laws and the Constitution is entirely limited by constitutional mandate to the plenary session of the Supreme Court of Justice, while the Electoral Tribunal shall hear actions relating to any act or decision or to the interpretation of a constitutional provision, provided that this interpretation is not to verify the conformity of an electoral law with the Constitution" (italics added). [FN39]

[FN39] Cf. Judgment of August 8 and 16 of the Plenary session of the Supreme Court of Justice deciding the appeal relating to the application for amparo 743/2005 filed by Mr. Castañeda Gutman (file of appendixs to the application, appendix 9, folio 1077).
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126. This 2002 opinion of the Supreme Court of Justice has been applied by the Electoral Tribunal on other occasions. For example, in February 2006, the TRIFE Superior Chamber applied the binding jurisprudence when Héctor Montoya Fernández alleged that Article 175 of COFIPE was unconstitutional because IFE had refused to register him as an independent candidate for the Presidency of the Republic:

[…]
Therefore, the only way in which his claim could be accepted would be through non-application of Article 175(1) of the Federal Code on Electoral Institutions and Procedures.
However, on the one hand, the General Council of the Federal Electoral Institute is not permitted to disapply the Article, because its powers do not allow this and, on the other hand, nor can this Superior Chamber disapply legal provisions, even when it considers them contrary to the Constitution because, in this regard, the Supreme Court of Justice issued the criteria under the headings: "ELECTORAL LAWS. THE ONLY MEANS OF CONTESTING THEM IS THE UNCONSTITUTIONALITY PROCEEDING" and "ELECTORAL TRIBUNAL OF THE JUDICIARY. LACK OF COMPETENCE TO RULE ON THE UNCONSTITUTIONALITY OF LAWS." […]. [FN40]

[FN40] Cf. Judgment SUP-JDC-67/2006 of the Superior Chamber of the Electoral Tribunal of the Federal Judiciary February 2, 2006 (the representatives' final arguments brief, merits file, tome IV, folios 1130 and 1131).
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127. Lastly, the Supreme Court of Justice confirmed its 2002 case law in September 2007, when it concluded that it could not be modified "[…] because there had been no changes in the law or in the circumstances that gave rise to it." [FN41]

[FN41] Cf. Typed version of the sessions of September 4, 6 and 10, 2007, of the Plenary session of the Supreme Court of Justice in which the request to modify case law 2/2006 was decided (the representatives' brief with arguments on preliminary objections, merits file, tome II, folio 438).
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128. Based on the above, although, prior to 2002, TRIFE delivered judgments in which it disapplied local laws contrary to the Constitution in specific cases, subsequent to the Supreme Court's case law of May 2002, the Supreme Court decided definitively that TRIFE did not have competence to rule on the constitutionality of the laws in order to disapply them in specific cases. Therefore, TRIFE cannot decide a dispute filed against an act or decision of an electoral authority when the decision would imply ruling on the constitutionality of the law on which the act or decision was based. Moreover, it has already been mentioned that, following the 1996 constitutional reform, the only way to contest a federal electoral law was the unconstitutionality proceeding, which was a special remedy with restricted active legal standing. From the text of Article 105(II) of the Constitution, it can be concluded that, in order to file this action, only certain local or federal parliamentary fractions, the Prosecutor General (Procurador General de la República) and, following the 1996 constitutional reform, registered political parties have active legal capacity; therefore, individuals cannot file it. [FN42] The special nature also arises from the effect of this remedy, which declares the invalidity of a law with general effect only when the decision has been adopted by a majority consisting of eight votes of the justices of the Supreme Court of Justice. Lastly, regarding the opportune procedural moment for filing this writ, it can only be filed within 30 natural days following the date of publication of the law in question.

[FN42] By constitutional reform published in the federal official gazette of September 14, 2006, the National Human Rights Commission was granted active legal standing to file actions of unconstitutionality against federal or local laws and international treaties that violate the human rights embodied in the Constitution, as were analogous organs in the federative entities to file this type of action in relation to local laws.

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129. Lastly, it is worth indicating that, although the State alleged that "[…] resorting to TRIFE would have signified […] an internal form of control that the laws conformed to the Convention," which "[…] definitively proves the existence of an adequate and effective judicial recourse to protect human rights of a political nature […]," the Court observes that, contrary to the cases mentioned by the State, such as those of Hank Rhon, Manuel Guillén Monzón, María Mercedes Maciel and Eligio Valencia Roque, in Mr. Castañeda Gutman's case there is no evidence in the case file before the Court that TRIFE would have been able to carry out this "Convention control" of a federal electoral law. [FN43]

[FN43] Cf. Judgments SUP-JDC-037/2001, SUP-JDC-695/2007, SUP-JDC-710/2007 and SUP-JDC-717/2007 de la Of the Superior Chamber of the Electoral Tribunal of the Federal Judiciary (file of appendixs to the answer to the application, appendixs 1, 2, 3 and 4, folios 1168 to 1908).

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130. To be able to restore the alleged victim to the enjoyment of his rights in this case, the procedure for the protection of the political and electoral rights of the citizen should have enabled the competent authority to assess whether the regulation established in the Federal Electoral Code, which allegedly restricted unreasonably the political rights of the alleged victim, was compatible or not with the right established in the Constitution; in other words, this means reviewing the constitutionality of Article 175 of COFIPE. As mentioned above, this was not possible; so the Electoral Tribunal, pursuant to the binding criteria of the Supreme Court, did not have competence to examine the compatibility of legal provisions relating to electoral matters with the Constitution.

131. Given that the application for amparo was not admissible in the case of electoral matters, the exceptional nature of the unconstitutionality proceeding and the inaccessibility and ineffectiveness of the judicial procedure for protection to contest the failure of a law to conform to the Constitution, at the time of the facts of this case, there was no effective remedy in Mexico enabling an individual to question the legal regulation of the political right to be elected established in the Constitution and in the American Convention. Owing to this, the Court concludes that, the State did not offer the alleged victim an appropriate remedy to claim the alleged violation of his political right to be elected and, consequently, violated Article 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Castañeda Gutman

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132. The Court has stated on many occasions that each State Party to the Convention "must adopt all necessary measures to ensure that the provisions of the Convention are effectively complied with in its domestic legal order, as required by Article 2 of the Convention." [FN44] It has also indicated that the States "must adopt positive measures, avoid taking initiatives that limit or infringe a fundamental right and eliminate the measures and practices that restrict or violate a fundamental right." [FN45] The obligation contained in Article 2 of the Convention acknowledges a customary norm which provides that, when a State has ratified an international convention, it must introduce into its domestic law the necessary modifications to ensure the execution of the international obligations it has assumed. [FN46]

[FN44] Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos el al.) v. Chile. Merits, reparations, and costs. Judgment of February 5, 2001. Series C No. 73, para. 87; Case of La Cantuta v. Peru. Merits, reparations, and costs. Judgment of November 29, 2006. Series C No. 162, para. 171, and Case of Zambrano Vélez el al., supra note 27, para. 79.
[FN45] Cf. supra note 27.
[FN46] Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs. Judgment of August 27, 1998. Series C No. 39, para. 68; Case of La Cantuta, supra note 44, para. 170; and Case of Zambrano Vélez et al., supra note 27, para. 55.

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133. In the instant case, the inexistence of an effective recourse constituted a violation of the Convention by the State Party, and non-compliance with its domestic legal effects to make effective the rights established in the Convention, in the terms of Article 25 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 thereof.

VII. ARTICLE 23 (RIGHT TO PARTICIPATION IN GOVERNMENT) [FN47] IN RELATION TO ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) AND 2 (DOMESTIC LEGAL EFFECTS) OF THE AMERICAN CONVENTION

[FN47] Article 23. Right to participate in government
1. Every citizen shall enjoy the following rights and opportunities:
a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

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134. The Inter-American Commission did not find that there had been a violation of Article 23 of the American Convention in its report on admissibility and merits; consequently, it did not allege the violation of the right to participate in government before the Court.

135. To the contrary, the representatives asked the Court to declare that Mexico was responsible for the violation of the right to participate in government embodied in Article 23 of the American Convention and of Articles 1(1) and 2 of this instrument to the detriment of Jorge Castañeda Gutman. They stated that his right to be elected was violated by the official communication of March 11, 2004, issued by IFE in which, based on Article 175 of the COFIPE, among other provisions, he was denied registration of his independent candidacy for the office of President of the United Mexican States. Among other arguments, the representatives alleged that: (i) political parties are not the only vehicles enabling citizens to postulate themselves for elected office, as established in the respective norms and the progressive development of the precedents of the Inter-American system for the protection of human rights, especially the ruling of the Court in the Yatama case; (ii) there can be no restrictions to the exercise of the political rights embodied in the Convention other than the assumptions established in Article 23(2) thereof; in this regard, the word "only" [Note: exclusivamente in Spanish] used in that provision reinforces the fact that there can be no other restrictions than those indicated therein and any requirement other than those expressly established in the said Article is contrary to the Convention; (iii) according to Human Rights Committee General Comment 25, the right of persons to stand for election should not be excessively limited by requiring candidates to be members of parties or of specific parties, which applies in this case, and (iv) independent candidates are necessary and would constitute an escape valve in view of the limited credibility of political parties and low participation in elections.

136. The representatives also alleged that, when ratifying the American Convention, Mexico had made a reservation to Article 23(2) of the Convention to the effect that members of religious orders would not have the passive right to vote or the right to associate for political purposes, which "clearly reveals Mexico's intention regarding the scope of Article 23(2), because, in this reservation, it merely introduced one additional restriction to the limitations indicated in the provision" and that "it is beyond doubt that if Mexico had wished to introduce another limitation […], for example, that in order to be elected it was necessary to be postulated by a political party […,] the Convention only allowed [Mexico] to incorporate the limitations established in Article 23(2) into its electoral laws, and perhaps the one formulated in the reservation, but no other limitation"; the Inter-American Commission did not apply its own criteria of making the interpretation most favorable to the individual and decided, regressively, to conclude that a monopoly political party system is not, in itself, contrary to the American Convention, based on a former decision and omitting the more recent precedents that offer more protection to the right to be elected. They underscored that the Commission's 1998 Report on Mexico referred to the issue of independent candidacies and that Mexico had not complied with its recommendation to adopt the necessary measures to regulate the right to vote and to be elected, and to include the broadest and most participative access of candidates to the electoral process, as an element to consolidate democracy.

137. The State argued that the alleged violation of Article 23 is not part of the dispute in this case, because the Commission's application refers "only to the alleged violation of Article 25 of

the Convention" and that the Court "is not competent to hear abstract allegations of violation of the American Convention owing to supposed laws in force that have not been applied in specific cases." It also argued that, in the instant case, Mr. Castañeda Gutman's political rights had not been violated for the following reasons: (i) political rights are not absolute and can be restricted, provided the principles of lawfulness, necessity and proportionality in a democratic society are respected; (ii) the monopoly of the political parties to nominate candidates is based on the right of the States to provide themselves with their own specific political system and is not contrary to international law; therefore, it was not necessary to introduce a reservation concerning the postulation of candidacies by political parties either when ratifying the Convention or subsequently; (iii) a distinction should be made between direct limitations to political rights (such as exclusions based on gender or race) and the mechanisms that the States put in place for the exercise of political rights; (iv) the Yatama case is not applicable in this case, and (v) Human Rights Committee General Comment 25 does not refer to the monopoly of political parties to nominate candidates, but to the requirement that citizens should join specific parties in order to be elected; Article 175 of the Electoral Code does not establish the necessary membership of a citizen in a political party in order to postulate for elected public office, because the possibility and the right exists for a political party to postulate for elected office citizens who do not belong to it, a right that is frequently exercised; and (vi) the exclusivity of postulation by political parties is based on historical and practical factors for the organization of the electoral system within the Mexican social and economic context.

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138. The Court has established that the alleged victim, his next of kin or his representatives may allege different rights from those included in the Commission's application, based on the facts presented by the Commission. [FN48]

[FN48] Cf. Case of the "Five Pensioners" v. Peru. Merits, reparations, and costs. Judgment of February 28, 2003. Series C No. 98, para. 155; Case of Escué Zapata v. Colombia. Merits, reparations, and costs. Judgment of July 4, 2007. Series C No. 165, para. 92; and Case of the Saramaka People, supra note 6, para. 27.

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139. Furthermore, the Court has established that the disputed law was applied in the instant case (supra para. 22). The Court will now examine the arguments of the parties and will decide on the alleged violation of the political rights embodied in Article 23 of the American Convention.

I. Political Rights in a democratic society

140. Political rights are human rights of fundamental importance within the inter-American system and they are closely related to other rights embodied in the American Convention, such as freedom of expression, and freedom of association and assembly; together, they make democracy possible. The Court underscores the importance of political rights and recalls that

Article 27 of the American Convention prohibits their suspension and establishes the judicial guarantees essential for their protection. [FN49]

[FN49] Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 34; and Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations, and costs. Judgment of June 23, 2005. Series C No. 127, para. 191.

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141. The political rights embodied in the American Convention, as well as in diverse international instruments, [FN50] promote the strengthening of democracy and political pluralism. The Court has stated that "[r]epresentative democracy is a determinant factor of the entire system of which the Convention forms part," and constitutes "a 'principle' reaffirmed by the American States in the OAS Charter, a basic instrument of the Inter-American system." [FN51]

[FN50] Some of these international instruments are: the Inter-American Democratic Charter (Articles 2, 3 and 6); the American Convention on Human Rights (Article 23); the American Declaration on the Rights and Duties of Man (Article XX); the Universal Declaration of Human Rights (Article 21); the 1993 International Covenant on Civil and Political Rights (Article 25); Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3); and the African Charter on Human and Peoples' Rights "Banjul Charter" (Article 13).
[FN51] Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights, supra note 49, para. 34.

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142. In the Inter-American system the relationship between human rights, representative democracy and political rights, in particular, is established in the Inter-American Democratic Charter, adopted on September 11, 2001, at the first plenary session of the twenty-eighth special session of the General Assembly of the Organization of American States. This instrument indicates that:

Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government. [FN52]

[FN52] Cf. Organization of American States. Inter-American Democratic Charter. Adopted at the first plenary session of the OAS General Assembly held on September 11, 2001, during the twenty-eighth session, Article 3.

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143. The Court considers that the effective exercise of political rights constitutes an end in itself and also a fundamental means that democratic societies possess to guarantee the other human rights established in the Convention.

II. Content of political rights

144. Article 23(1) of the Convention establishes that every citizen shall enjoy the following rights and opportunities, which must be guaranteed by the State in conditions of equality: (i) to take part in the conduct of public affairs, directly or through freely chosen representatives; (ii) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters, and (iii) to have access to the public service of his country.

145. Article 23 contains various norms that refer to the rights of the individual as a citizen; that is, as titleholder of the decision-making process in public matters, in his capacity as a voter by means of his vote, or as a public servant; in other words, to be elected by the people or by appointment or designation to occupy a public office. In addition to possessing the particularity of dealing with rights recognized to the citizen, as distinct from almost all the other rights established in the Convention that are recognized to every person, Article 23 of the Convention not only establishes that its titleholders must enjoy rights, but adds the word "opportunities." The latter implies the obligation to guarantee with positive measures that every person who is formally the titleholder of political rights has the real opportunity to exercise them. As the Court has previously indicated, it is essential that the State create optimum conditions and mechanisms to ensure that political rights can be exercised effectively, respecting the principle of equality and non-discrimination. [FN53]

[FN53] Cf. Case of Yatama, supra note 49, para. 195.

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146. Political participation can include widespread and varied activities that people perform individually or within an organization in order to intervene in the appointment of those who will govern a State or who will be responsible for conducting public affairs, as well as to influence the development of State policy using direct participation mechanisms.

147. Citizens have the right to play an active role in the conduct of public affairs directly through referenda, plebiscites or consultations or through freely elected representatives. The right to vote is an essential element for the existence of a democracy and a way in which citizens freely express their wishes and exercise the right to participate in government. This right implies that citizens can decide directly and elect freely, in conditions of equality, those who will represent them in decision-making in public affairs.

148. Political participation by exercising the right to be elected supposes that citizens can postulate themselves as candidates in conditions of equality and that they can occupy public office subject to election if they are able to achieve the necessary number of votes.

149. The right and opportunity to vote and to be elected embodied in Article 23(1)(b) of the American Convention is exercised regularly in genuine periodic elections by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters. Over and above these characteristics of the electoral process (genuine periodic elections) and of the principles of the suffrage (universal, equal, secret, that reflect the free expression of the will of the people), the American Convention does not establish a specific mechanism or a particular electoral system by which the right to vote and to be elected must be exercised (infra para. 197). The Convention merely establishes certain standards within which the States legitimately may and must regulate political rights, provided that these regulations comply with the requirements of legality, are designed to fulfill a legitimate purpose, and are necessary and proportionate; that is, they are reasonable according to the principles of representative democracy. [FN54]

[FN54] Cf. Case of Yatama, supra note 49, para. 207.

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150. Lastly, the right to have access to public office in general conditions of equality protects access to a direct form of participation in the design, development and execution of State policies through public office. It is understood that these general conditions of equality refer to both access to public office by popular election, and to appointment or designation.

III. The interpretation of the word “only” [Note: “exclusivamente” in Spanish] in Article 23(2) and the obligation to guarantee political rights.

151. The representatives argued that “by requiring necessarily that, in order for a person to be able to take part in an election, he must be postulated exclusively by a political party, the Mexican legal framework violated the second paragraph of Article 23 of the Convention,” which establishes that the law can regulate political rights only for the reasons set out therein. These restrictions are specific not illustrative, so that domestic law cannot include others that are not expressly established in the said provision, since this provision uses the word “only.” According to the Vienna Convention on the Law of Treaties, the term “only” must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. In this regard, the meaning of the word “only” equals “exclusively”; it is synonymous with “solely” and therefore excludes any possibility of adding to the established restrictions any that are not expressly included. Although it is not necessary to resort to the complementary means of interpretation established by the Vienna Convention, they indicated that the terms used in the four official languages of the American Convention (“only,” in the English version, “exclusivement,” in the French version, and “exclusivamente,” in [the Spanish and] the Portuguese version[s]) have exactly the same meaning and there is no difference in what they signify. The requirements enumerated in Article 23(2) of the American Convention mesh with the provisions of Articles 29 and 30 thereof, so that domestic law cannot enact a norm for reasons of general interest with a purpose that

contradicts an express provision of this convention. The restrictions established in Article 23(2) of the Convention are lex specialis, applicable to human rights of a political nature, while Articles 29 and 30 thereof are norms applicable, in general, to all the provisions of the Convention. Lastly, they stated that TRIFE had already ruled on the compatibility with the American Convention and the Constitution of a legal provision establishing that the request for the registration of candidates can only be presented by the political parties, but it did so erroneously, failing to examine the word "only" in Article 23(2) of the Convention.

152. Among other arguments, the State indicated that "an electoral system that establishes the postulation of candidates by political parties does not per se violate the provision on political rights of the American Convention." Political rights are not absolute, so that they can be subject to limitations, provided this regulation observes "the principles of lawfulness, necessity and proportionality in a democratic society." Article 175 of the Electoral Code, which establishes that only political parties may postulate candidacies for elected office at the federal level, does not violate the passive right to vote established in Article 23 of the American Convention, because it is a means of exercising this political right that is consistent with the relevant international standards in terms of lawfulness, necessity and proportionality. The State affirmed that a distinction must be made between direct limitations or restrictions, such as the exclusion of a specific group of individuals from their passive right to vote based on gender or race, and the modalities that the legislator establishes for the exercise of political rights. In order to exercise these rights, the State may require that "a specific juridical mechanism or specific conditions and methods are used," such as, for example, the impossibility of registering a candidate for several elected offices in the same electoral process, the impossibility of being a candidate for an elected federal office and, at the same time, being a candidate for another position in one of the states. This should not be understood as a limitation of the passive right to vote but as a mechanism for exercising it which, in addition to not being excessive, responds to a juridical, political and historic rationale.

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153. Article 23 of the American Convention must be interpreted as a whole and harmoniously, so that it is not possible to disregard paragraph 1 of this Article and interpret paragraph 2 in isolation, nor is it possible to disregard the other provisions of the Convention or the basic principles that inspire it to interpret Article 23 as a whole.

154. As has already been indicated, paragraphs 1 and 2 of Article 23 refer to the rights of citizens and recognize rights that are exercised by each specific individual. Paragraph 1 recognizes the rights: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) to have access, under general conditions of equality, to the public service of his country (supra paras. 144 to 150).

155. Article 23(2) of the American Convention establishes that the law may regulate the exercise and opportunities of such rights only on the basis of "age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal

proceedings." The provision that limits the reasons for which it is possible to restrict the use of the rights of paragraph 1 has only one purpose – in light of the Convention as a whole and of its essential principles – to avoid the possibility of discrimination against individuals in the exercise of their political rights. It is evident that the inclusion of these reasons refers to the enabling conditions that the law can impose to exercise political rights. Restrictions based on these criteria are common in national electoral laws, which provide for the establishment of the minimum age to vote and to be elected, and some connection to the electoral district where the right is exercised, among other regulations. Provided that they are not disproportionate or unreasonable, these are limits that the States may legitimately establish to regulate the exercise and enjoyment of political rights and that, it should be repeated, they refer to certain requirements that the titleholders of political rights must comply with so as to be able to exercise them.

156. In addition to the above, Article 23 of the Convention imposes certain specific obligations on the State. From the moment that Article 23(1) establishes that the right to participate in the conduct of public affairs may be exercised directly or through freely chosen representatives, the State has a positive obligation that is manifested with the obligation to carry out certain actions or conducts, and to adopt measures that arise from the obligation to ensure the free and full exercise of human rights to all the persons subject to their jurisdiction (Article 1(1) of the Convention) and of the general obligation to adopt measures in their domestic law (Article 2 of the Convention).

157. This positive obligation consists in designing a system that allows representatives to be elected to conduct public affairs. Indeed, for political rights to be exercised, the law must establish regulations that go beyond those related to certain State limitations to restrict those rights, established in Article 23(2). The States must organize their electoral systems and establish a complex number of conditions and formalities to make it possible to exercise the right to vote and to be elected.

158. Consequently, the State not only has the general obligation established in Article 1 to ensure the enjoyment of the rights, but has specific guidelines to comply with its obligation. The electoral system that the States establish in accordance with the American Convention should make it possible to hold genuine periodic elections, by universal and equal suffrage, and by secret ballot that guarantee the free expression of the will of the voters. Hence, this gives the State a specific mandate in relation to the mechanisms that it should choose to comply with its general obligation "to ensure" the enjoyment of the rights established in Article 1 of the Convention, compliance that, as Article 1(1) states in general, should not be discriminatory.

159. In the sphere of political rights the guarantee obligation is especially relevant and is implemented, among other mechanisms, by the establishment of the organizational and institutional aspects of the electoral processes, and by the enactment of norms and the adoption of different types of measures to implement the rights and opportunities recognized in Article 23 of the Convention. In the absence of this action by the State, the right to vote and to be elected could simply not be exercised. The political and other rights established in the Convention, such as the right to judicial protection, are rights that "cannot be merely by virtue of the provisions that embody them, because they are, by their very nature, ineffectual without a detailed normative regulation, and even without a complex institutional, economic and human apparatus

that endows them with the effectiveness they claim, as rights under the Convention[…]; if there were no electoral codes or law, electors' lists, political parties, propaganda media and mobilization, polling stations, electoral boards, dates and times for exercising the vote, the right could simply not be exercised, due to its very nature; similarly, the right to judicial protection cannot be exercised unless there are courts that grant this right, and procedural norms that discipline it and make it possible." [FN55]

[FN55] Cf. Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights). Advisory Opinion OC-7/86 of August 29, 1986. Series A No. 7. Separate opinion of Judge Rodolfo E. Piza Escalante para. 27.

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160. These are the grounds that the Court considers should guide its ruling in this case, which refers to the way in which Mexico designed the system. The representatives argue that, "the Mexican legal framework violates the second paragraph of Article 23 of the Convention by making it an essential that, for a person to be able to take part in an election, his candidacy must be presented by a political party."

161. As is evident from the foregoing, the Court finds that it is not possible to apply only the limitations of paragraph 2 of Article 23 of the American Convention to the electoral system established in a State. Nevertheless, the measures that the States adopt in order to ensure the exercise of the rights embodied in the Convention are not excluded from the Inter-American Court's jurisdiction when a violation of the human rights established in the Convention is alleged. Consequently, the Court must examine whether one of these aspects connected with the organization and regulation of the electoral process and political rights, that is, the exclusivity of the nomination of candidates to federal office by political parties, entails an undue restriction of the human rights embodied in the Convention.

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162. Prior to this, the Court finds it necessary to indicate that, in general, international law does not impose a specific electoral system or a specific means of exercising the rights to vote and to be elected. This is clear from the norms that regulate political rights in both the universal and the regional sphere, and from the authorized interpretations made by their organs of application.

163. In the universal sphere, Article 25 of the International Covenant on Civil and Political Rights, the wording of which is very similar to the provision in the American Convention, establishes broad parameters concerning the regulation of political rights. When interpreting this norm, the United Nations Human Rights Committee has stated that "the Covenant does not impose any specific electoral system," but rather that any electoral system operating in a State "must be compatible with the rights protected by Article 25 and must guarantee and give effect to the free expression of the will of the electors." [FN56] In particular, regarding the limitations to the right to be elected, the Committee indicated that:

The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy […]. [FN57]

[FN56] Cf. United Nations, Human Rights Committee, General Comment No. 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) of July 12, 1996, para. 21.
[FN57] Cf. United Nations, Human Rights Committee, General Comment Nº 25, supra note 56, para. 17.

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164. The Court observes that this aspect of General Comment No. 25 refers to the obligation not to limit the exercise of these rights unreasonably by requiring candidates to be members of parties or to belong to specific parties. This is a factual assumption that is distinct from exclusive registration by the candidates' parties. In the instant case, neither the norm that is alleged to be contrary to the Convention, nor other COFIPE norms establish as a legal requirement the need to be a member of a political party in order to register a candidacy and allows political parties to request the registration of candidacies of individuals who are not their members; that is, external candidacies.

165. In the regional sphere, the European Court of Human Rights, as of the very first case in which it was asked to rule on the right to vote and to be elected that can be inferred from Article 3 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms indicated that this provision does not create any obligation to introduce a specific system. [FN58] It has also indicated that, "there are numerous ways of organizing and running electoral systems and a wealth of differences, inter alia, historical development, cultural diversity and political thought within [the States]." [FN59] The European Court has emphasized the need to assess any electoral system "in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another […]." [FN60]

[FN58] Cf. ECHR, Mathieu-Mohin and Clerfayt v Belgium, judgment of 2 March 1987, Series A, No. 113, § 54.
[FN59] Cf. ECHR, Zdanoka v Latvia, judgment of 16 March 2006 [GC], no. 58278/00, § 103.
[FN60] Cf. ECHR, Mathieu-Mohin and Clerfayt, supra note 58, § 54, and Zdanoka, supra note 59, § 115.

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166. The inter-American system also does not impose a specific electoral system or a specific means of exercising the rights to vote and to be elected. The American Convention establishes general guidelines that determine a minimum content of political rights and allows the States to regulate those rights, within the parameters established in the Convention, according to their

historical, political, social and cultural needs, which may vary from one country to another and even within one country, at different historical moments.

167. Regarding the standards established by the Court, the representatives argued that, in the Yatama case the Inter-American Court concluded that "there is no provision in the American Convention that allows it to be established that citizens can only exercise the right to stand as candidates to elected office through a political party." They stated that the Court should apply the principles of case law "in an evolutive, progressive and expansive manner […] not only to political organizations or to groups of citizens, but also to the citizen as an individual" such as Mr. Castañeda Gutman. Lastly, they stated that "[…] the contents of paragraphs 215 and 217 of the judgment in the Yatama case are perfectly applicable by analogy to the instant case."

168. The State indicated that this case "does not refer to independent candidacies, but to the right of groups other than political parties to take part in municipal elections by means of their traditional customs and practices." That precedent was inapplicable in the instant case because the fundamental issue in Yatama was the restriction of the political participation of a specific sector of the population, while Mr. Castañeda Gutman "claims that 'citizens without a party' should be considered a 'certain group or sector' of the population." The State also stressed what the Commission had said in its Report No. 113/06, to the effect that the Court's conclusion in that case was that "the American Convention is completely compatible with systems of representation that are distinct from the traditional system of political parties, but does not say that a party system is, in itself, contrary to that international instrument." Lastly, Mexico affirmed that the Yatama case "[…] does not concord with the facts of the one we are dealing with (in that case the community joined the electoral process on the registration dates), either with regard to the type of petitioner involved (an indigenous community), or to the purpose of the application; hence this precedent is not applicable to the instant case."

169. The Court considers it opportune to recall that in the Yatama case, it found as follows:

"202. When examining the enjoyment of these rights by the alleged victims in this case, it must be recalled that they are members of indigenous and ethnic communities of the Atlantic Coast of Nicaragua, who differ from most of the population, inter alia, owing to their languages, customs and forms of organization, and they face serious difficulties that place them in a situation of vulnerability and marginalization. […]"

"215. There is no provision in the American Convention that allows it to be established that citizens can only exercise the right to stand as candidates to elected office through a political party. The importance of political parties as essential forms of association for the development and strengthening of democracy are not discounted […], but it is recognized that there are other ways in which candidates can be proposed for elected office in order to achieve the same goal, when this is pertinent and even necessary to encourage or ensure the political participation of specific groups of society, taking into account their special traditions and administrative systems, whose legitimacy has been recognized and is even subject to the explicit protection of the State. […]"

"217. The Court considers that the participation in public affairs of organizations other than parties, […] is essential to guarantee legitimate political expression and necessary in the case of groups of citizens who, otherwise, would be excluded from this participation, with all that this signifies."

"218. The restriction that they had to participate through a political party imposed on the YATAMA candidates a form of organization alien to their practices, customs and traditions as a requirement to exercise the right to political participation, in violation of domestic laws […] that oblige the State to respect the forms of organization of the communities of the Atlantic Coast, and affected negatively the electoral participation of these candidates in the 2000 municipal elections. The State has not justified that this restriction obeyed a useful and opportune purpose, which made it necessary so as to satisfy an essential public interest. To the contrary, this restriction implied an impediment to the full exercise of the right to be elected of the members of the indigenous and ethnic communities that form part of YATAMA."

"219. Based on the foregoing, the Court considers that the restriction examined in the preceding paragraphs constitutes an undue limitation of the exercise of a political right, entailing an unnecessary restriction of the right to be elected, taking into account the circumstances of the instant case, which are not necessarily comparable to the circumstances of all political groups that may be present in other national societies or sectors of a national society." (Italics added)

170. The Court observes that although the representatives of the alleged victim stated that the Yatama case and the instant case were analogous, they did not provide reasons or arguments that permitted affirming that the two cases shared certain relevant properties that could be classified as essential; thus allowing them to apply the same juridical consequence to both cases. Indeed, for a case to be analogous to another, it is necessary to prove that there is a similarity between the facts of the first case and the facts of the second, because the two cases share the same essential relevant properties, which allow the same juridical consequence to be applied in both cases.

171. The Court observes that it cannot be affirmed that the factual circumstances and the underlying juridical dispute in the Yatama case and the factual circumstances and the request of the alleged victim in the instant case are identical, in order to conclude that the juridical consequence of the Yatama case is applicable to this case.

172. The Yatama case dealt with individuals who belong to indigenous and ethnic communities of the Atlantic Coast of Nicaragua, who are different from the majority of the population, inter alia, based on their languages, customs and forms of organization, who were faced with serious difficulties which kept them in a vulnerable and marginal situation as regards taking part in public decisions in that State, and where the requirement to participate in politics by means of a political party translated into a form of organization that was alien to their practices, customs and traditions which prevented their candidates from participating in the respective municipal elections, without offering any alternative. To the contrary, the instant case deals with an individual who wished to postulate himself as an independent candidate, who did not allege or prove that he represented the interests of a vulnerable or marginalized group of society that was formally and materially prevented from acceding to any of the alternatives that

the Mexican electoral system offered to take part in the election, and who had various appropriate alternatives to be postulated as a candidate (infra para. 202).

173. Consequently, the Court finds that this precedent does not adversely affect the general standards of international law, but affirms them to the extent that the existence of different electoral systems that are compatible with the Convention is possible.

IV. The restriction of political rights in the instant case

174. With the exception of some rights that cannot be restricted in any circumstance, such as the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, human rights are not absolute. As the Court has established previously, the establishment and application of requirements to exercise political rights is not, per se, an undue restriction of political rights. [FN61] However, the power of the States to regulate or restrict rights is not discretional, but is limited by international law, which requires compliance with certain obligations that, if they are not respected, make the restriction unlawful and contrary to the American Convention. As established in Article 29(a) in fine of this instrument, no provision of the Convention shall be interpreted as restricting them to a greater extent than is provided for therein.

[FN61] Cf. Case of Yatama, supra note 49, para. 206.

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175. The Court has defined the conditions and requirements that must be fulfilled when regulating or restricting the rights and freedoms embodied in the Convention, [FN62] and will proceed to analyze the legal requirement being examined in this case in light of them.

[FN62] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 39; and Case of Kimel, supra note 4, para. 52.

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1) Lawfulness of the restrictive measure

176. The first step to evaluate whether a restriction of a right established in the American Convention is permitted in light of this instrument consists in examining whether the limitative measure complies with the requisite of lawfulness. This means that the general circumstances and conditions that authorize a restriction to the exercise of a specific human right must be clearly established by law. [FN63] The norm that establishes the restriction must be a law in the formal and substantial sense. [FN64]

[FN63] Article 30 of the American Convention establishes that:

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.
[FN64] Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights, supra note 49, paras. 27 and 32.
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177. In the instant case, the alleged victim did not allege that the restrictive measure was not established by law; rather his arguments were designed to prove that the law regulating this matter and its application in his specific case established an undue restriction and, therefore, was contrary to the political rights embodied in the American Convention.

178. The State argued that the "Federal Code of Electoral Institutions and Procedures was the result of a legislative process of drafting, discussion, approval, promulgation and publication, carried out within the framework established in the Constitution and its lawfulness was based on the support of the democratically-elected representatives." It added that " [t]he decision of the Mexican federal legislator to establish that mechanism for exercising political participation respected the standard of lawfulness, because it fell within the powers that the Constitution confers on him."

179. The Court observes that the requirement that it is the political parties that must request the registration of the candidates for elected office at the federal level is established in Article 175 of the COFIPE, which is a formal and substantial law.

2) Purpose of the restrictive measure

180. The second limit to any restrictions is related to the purpose of the restrictive measure; in other words, that the cause invoked to justify the restriction should be among those permitted by the American Convention, and established in specific provisions included in certain rights (for example, to protect public order or public health, in Articles 12(3), 13(2)(b), and 15, among others), or in the norms that establish the legitimate general purposes (for example, "the rights of others," or "the just demands of the general welfare in a democratic society," both in Article 32).

181. Contrary to other rights that, in the Article embodying them, specifically establish the legitimate purposes that could justify restrictions to a right, Article 23 of the Convention does not explicitly establish the legitimate causes or permitted purposes by which the law may regulate political rights. Indeed, this Article merely establishes certain aspects or reasons (such as, civil or mental capacity and age) on the basis of which political rights may be regulated in relation to their titleholders, but does not determine explicitly either the purposes or the specific restrictions that will necessarily have to be imposed when designing an electoral system, such as electoral districts and others. However, the legitimate goals that the restrictions should pursue arise from the obligations that can be inferred from Article 23(1) of the Convention, which the Court referred to above.

182. Mexico has invoked some reasons to maintain that the system in operation in that State is a mechanism for the exercise of political rights that conforms to the corresponding international standards, in terms of lawfulness, necessity and proportionality, and that this is clear from the COFIPE. Article 175 of this Code, which establishes that "only the national political parties have the right to request the registration of candidates to elected office," regulates Article 41 of the Constitution of the United Mexican States which stipulates that "the purpose of political parties is to promote the participation of the people in democratic life, to contribute to the integration of the national representation and, as citizen organizations, to enable them to have access to the conduct of public affairs, in accordance with their programs, principles and ideas, and by means of free, secret and direct suffrage […]."

183. The Court considers that Article 175 of the COFIPE, which is being examined, was designed to organize the electoral process and the access of citizens to the exercise of public office under equal conditions and effectively. This objective is essential for the exercise of the rights to vote and to be elected in genuine periodic elections, by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters, in keeping with Article 23 of the American Convention.

184. Nevertheless, the fact that a measure is designed to achieve a purpose permitted by the Convention does not imply that it is necessary or proportionate, and the Court will examine this below.

3) Necessity in a democratic society and proportionality of the restrictive measure

185. Under the inter-American system there is a third requirement that must be met in order to consider that the restriction of a right is compatible with the American Convention. The Inter-American Court has stated that, for a restriction to be permitted in light of the Convention, it must be necessary for a democratic society. The Court has incorporated this requirement, which the American Convention has established explicitly in relation to certain rights (of assembly: Article 15; of association: Article 16; of movement: Article 22), as a criterion for interpretation and as a requirement that characterizes restrictions to the rights established in the Convention, including political rights. [FN65]

[FN65] Cf. Case of Yatama, supra note 49, para. 206 and ff.

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186. To evaluate whether the restrictive measures being examined complies with this requirement, the Court must assess whether: (a) it fulfills an urgent social need; in other words, that it is designed to fulfill an essential public interest; (b) it is the measure that least restricts the protected rights, and (c) it is closely adapted to achieving the legitimate purpose.

i) The existence of an essential social need – essential public interest

187. The State argued that the system of nomination for public office by political parties responded to various social needs. First, it responded to a historical and political necessity; that

of creating and strengthening a system of political parties where such a system did not exist and where, to the contrary, there had been a hegemonic party or official State party regime. In that respect, the State argued that from 1917 to 1946, independent candidacies were permitted by law. The Electoral Act published on January 7, 1946, established that only the political parties could register candidates, excluding the possibility of citizens aspiring to be elected to public office independently of the political parties at the federal level. Shortly after the publication of this law, the Mexican Party of the Revolution (PRM) was transformed and gave rise to the Institutional Revolutionary Party (PRI) and "[f]or decades, PRI was the party that played a dominant role in the State's political structure." The "minimal party system at that time became a model [defined] as the 'hegemonic party system.'" Consequently, the subsequent constitutional reforms were aimed at "opening up the party system to all the political options that the political plurality of a society requires," and neither the 1977 reform nor the subsequent reforms incorporated the mechanism of independent candidacies at the federal level, because "the principal objective of all the reforms was, first, to build up a party system where there had been none and, second, to strengthen this party system. These reforms were elaborated based on the premise that "democracy cannot exist without an open, representative, plural, equitable and competitive party system. This is why a mixed system of party financing was created, although with a predominantly public component, which has provided the political parties with important resources to bring about equity in the electoral processes."

188. The State also indicated that its system of registering candidacies also responds to the need to organize an electoral process in a society of 75 million voters, in which independent candidacies could "[…] promote the multiplication of those who aspire to public office, so that the popular representation would be fragmented and it could reach a level where the electoral process would be inoperative, owing to the complications that could arise at its different stages."

189. Lastly, according to the State, the need for the system in force is also related to the predominantly public system of financing the Mexican electoral system. This financing model has three purposes: first, to create conditions of equity in the political campaign; second, to introduce transparency in the resources provided to the electoral campaigns by ensuring the certainty of the origin of most of the money used and, third, to prevent private, lawful or unlawful interests influencing the political campaign. In this regard, the State argued that independent candidacies: (i) would make it difficult to monitor financing, which could lead to private interests predominating over the public interest and even to the possibility of unlawful activities related to certain challenges "facing the country, particularly those relating to large-scale organized crime"; (ii) could lead to the distribution of public funds becoming a system that was impossible to finance, given the predominantly public funding of candidates, with the consequent and evident inequality among the candidates postulated by the political parties and those that eventually run for office independently, and (iii) would establish a system that was very complicated to administer in terms of equality in electoral processes; "it is evident that financial capacity is needed to develop an independent candidacy and recruit voters, which implies inequality as regards those that do not have this capacity." The introduction of independent candidacies would entail a radical change in the electoral system, which has been conducted successfully over the past decade.

190. The representatives argued the need for independent candidates for the following reasons, among others: only a very small percentage of the population was interested in taking part in a party organization; the limited credibility of the political parties and the legislators; the low rates of participation recorded in some states of the Federation, and the search for alternatives by the citizens. According to the representatives, "[i]ndependent candidacies would operate as an escape valve […], but also as an incentive for the political parties to seek candidates who represent them better." The representatives argued that, in Mexico, political democratization "could be classified very broadly into two moments. The first, during which, from a closed and authoritarian system, democratic channels were opened up to the participation of very diverse groups […]; alternation reached the highest level, the head of the Executive, and the real political competition was less than 10 points between the first and second party in almost 80% of the districts"; and "public opinion was increasingly influential." However, they argued that, now, the "second phase" was underway, in which "Mexico moved from the political control of a hegemonic party to the political control of three parties" and that there is a "[…] growing tendency to concentrate power in the party leaders, who are not necessarily party militants […]."

191. When testifying at the public hearing, the alleged victim indicated that, to continue democratizing Mexican institutions it was important "[…] to introduce more competition into the electoral campaign and, in particular, to allow citizens to be candidates to elected office, not in substitution of political parties, but together with political parties to give the citizens more alternatives, both to be elected and to elect." He added that, although this matter evidently referred to the fight for his political rights, the case formed part of a long struggle to expand democratic opportunities in the country.

192. The systems that accept independent candidacies can be based on the need to expand and improve participation and representation in the management of public affairs and to enable a greater rapprochement between the citizens and the democratic institutions; while the systems that opt for the exclusivity of candidacies through political parties can be based on different needs, such as strengthening these organizations as essential instruments of democracy, or the efficient organization of the electoral process. These needs must ultimately respond to a legitimate purpose in accordance with the American Convention.

193. The Court considers that the State has justified that the registration of candidates exclusively through political parties responds to compelling social needs based on diverse historical, political and social grounds. The need to create and strengthen the party system as a response to an historical and political reality; the need to organize efficiently the electoral process in a society of 75 million voters, in which everyone would have the same right to be elected; the need for a system of predominantly public financing to ensure the development of genuine free elections, in equal conditions, and the need to monitor efficiently the funds used in the elections, all respond to essential public interest. To the contrary, the representatives have not provided sufficient evidence that, over and above their statements regarding the lack of credibility of the political parties and the need for independent candidacies, would nullify the arguments put forward by the State.

ii) The exclusivity of the nomination and the least restrictive appropriate mechanisms to regulate the right to be elected

194. Among other arguments, the State indicated that the mechanism of exclusive registration of candidacies by political parties complies with the requirement of proportionality because "it does not in any way discriminate against or exclude any person or group of persons from public office using the democratic channels; Mexican federal electoral norms open up non-exclusive and non-discriminatory access channels to candidacies that are open to every citizen […]." It also indicated that the COFIPE included alternatives by which a citizen could accede to candidacy for elected office: (i) the possibility of joining a political party so that the latter would postulate him as a candidate to elected office; (ii) the possibility of political party postulating him, without his need to belong to it (external candidate); and (iii) the possibility of creating his own political party. In this regard, it added that there is "increasing flexibility in the requirements and procedures to constitute political parties"; this had resulted in two new parties, which were competing for the first time in the 2006 federal elections, legitimizing their registration by obtaining 2% of the national vote and acceding to seats in the Legislature; that the COFIPE obliges "political parties to incorporate in their statutes and internal rules of procedure, the democratic procedures for the renewal of their administrative organs as well as norms for the democratic postulation of their candidates," and "the Federal Electoral Institute and the Electoral Tribunal are responsible for monitoring and sanction procedures to ensure that everything is carried out in accordance with the law and democratic principles." Consequently, it concluded that the regulation of this aspect "is not […] an excessive mechanism or one that curtails the passive right to vote."

195. The representatives did not expressly allege that the exclusivity of nomination by the political parties was the most restrictive or disproportionate measures to regulate the right to be elected. Their arguments were directed essentially at showing that a provision of domestic law applied in this case was contrary to the American Convention and to justify the need to adopt the system of independent candidacies.

196. To assess the proportionality of the measure that is alleged to be restrictive of the right to be elected, the Court must examine the existing alternatives to regulate this right, which are equally appropriate to the regulation that is considered to violate the Convention, and must define the greater or lesser harm of the human right that is restricted.

197. As indicated, the American Convention, like other international human rights treaties, does not establish the obligation to implement a specific electoral system. Nor does it establish a specific mandate on the mechanism that the States must establish to regulate the exercise of the right to be elected in general elections (supra paras. 149 and 162 to 166).

198. The Court observes that, in comparative electoral law, the regulation of the right to be elected, as regards the registration of the candidacies, may be executed in two ways: by the system of registration of candidates exclusively by the political parties, or by the system of registration of candidacies by the political parties, together with the possibility of registering independent candidacies. In the region, there is a certain balance between the States that have establishes the system of registration exclusively by parties and those that also allow independent candidacies.

199. The States whose laws recognize the possibility of registering independent candidacies establish various requirements for their registration, some of them similar to those established for candidacies registered by political parties. A common requirement for the registration of independent candidacies is the backing of a certain number or percentage of voters who support the registration of the candidacy, which is essential to organize the electoral process effectively. [FN66] In addition, the States establish other requirements such as the presentation of the political platforms or plans of government for the period for which the candidacy is postulated, the deposit of financial guarantees or "sincerity policies," even a management organization similar to that of the political parties throughout the territory of the State, in case of independent candidacies for the Presidency of the Republic.

[FN66] In some States of the region, the following has been required to register such candidacies: a number of citizens registered that is no less than 0.5% of the citizens that voted in the previous election for Deputies (Chile); the support of signatures that equal 5% of registered voters (Ecuador); the names of citizens representing 2% of voters in the Republic (Honduras); supporters who represent no less than 4% of the citizens who can vote at the national level (Peru); statements of support signed by a number of registered voters that equals 0.5% of the voters in the circumscription in question (Venezuela).

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200. Neither of the two systems: exclusive nomination by political parties or the one that allows independent candidacies is, in itself, more or less restrictive than the other in terms of regulating the right to be elected embodied in Article 23 of the Convention. The Court considers that it is not possible to make an abstract assessment of whether the system that allows independent candidacies is a less restrictive alternative for regulating the right to be elected than the other that does not allow them. This will depend on diverse circumstances, especially on how the abovementioned aspects of the independent candidacies are regulated or on the regulation of the candidacies presented by parties.

201. Independent candidacies can be regulated to facilitate and expand access to the right to be elected, but at times the requirements for registering independent candidacies can be greater than those established for the nomination of a candidate by a political party. The mere fact that independent candidacies are allowed does not mean that this is the least restrictive way to regulate the right to be elected. The essential point is that whichever of the two systems is chosen, it should make accessible and guarantee the right and the opportunity to be elected established in the Convention, under equal conditions.

202. The Court observes that the State justified its affirmation that the regulation contested by Mr. Castañeda Gutman was not disproportionate (supra par. 172). Moreover, the alleged victim did not argue or provide any evidence that would allow the Court to conclude that the requirement to be nominated by a political party imposed concrete, specific obstacles that signified a disproportionate, burdensome or arbitrary restriction of his right to be elected. To the contrary, the Court notes that Mr. Castañeda Gutman even had several alternatives to exercise his right to be elected, such as joining a political party and trying, by means of the internal democracy, to obtain the nomination to be postulated by a party; being an external candidate of a

party; forming his own party and competing under equal conditions or, lastly, forming a national political group that signs an agreement to participate with a political party. According to the elements in the case file before the Court, the alleged victim did not use any of these alternatives.

iii) Proportionality of the interest that is justified and adaptation to the achievement of the legitimate objective

203. Regarding whether the measure was adapted to achieving the legitimate objective sought, based on the above the Court finds that, in the instant case, the exclusivity of nomination by political parties to elected office at the federal level is an appropriate measure to produce the legitimate result sought of organizing the electoral processes efficiently in order to hold genuine periodic elections, by universal and equal suffrage and by secret vote that guarantee the free expression of the will of the voters, as established by the American Convention.

204. Lastly, the Court considers that both systems, one built on the exclusive basis of political parties, and the other that also allows independent candidacies can be compatible with the Convention and, therefore, the decision on which system to choose is subject to the political decision made by the State, in accordance with its constitutional norms. The Court is aware that there is a profound crisis as regards the political parties, the legislatures and those who conduct public affairs in the region, which calls for a thorough and thoughtful debate on political participation and representation, transparency, and the rapprochement of the institutions to the people, in brief, on strengthening and improving democracy. Civil society and the State have the fundamental responsibility, which cannot be waived, to carry out this discussion and make proposals to reverse the situation. In this regard, the States must assess the measures that will strengthen political rights and democracy according to their particular historical and political evolution, and independent candidacies may be one among many of these mechanisms.

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205. Based on the foregoing arguments, the Court does not find that, in the instant case, it has been proved that the system of registering candidacies for elected office by political parties constitutes an unlawful restriction to regulate the right to be elected established in Article 23(1)(b) of the American Convention and, consequently, has not verified a violation of Article 23 thereof.

ARTICLE 24 (RIGHT TO EQUAL PROTECTION) [FN67] IN RELATION TO ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) AND 2 (DOMESTIC LEGAL EFFECTS) OF THE AMERICAN CONVENTION

[FN67] Article 24. Right to equal protection.
All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

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206. The Inter-American Commission did not find that there had been a violation of Article 24 of the American Convention in its Report on admissibility and merits and, consequently, did not allege the violation of the right to equal protection before the law before the Court.

207. Among other arguments, the representatives indicated that Article 175 of the COFIPE "[…] contains restrictions, that are not only excessive but also unnecessary in a society such as that of Mexico, which claims to be democratic" and indicated that "the states of Sonora and Yucatán have electoral laws that allow independent candidacies, and the Supreme Court of Justice has considered them permissible under the Mexican Constitution." They stated that "it is not possible to prove that the circumstances in Yucatán and Sonora are so different from those of Coahuila or Campeche, or of the whole of Mexico, for it to be necessary, useful and opportune in order to protect public interest to prohibit independent candidacies at the federal level or in Nuevo León and Chiapas, and consider that this is not so in Yucatán and Sonora, where they are permitted." They argued that the State "does not treat its candidates equally in equal circumstances, which is contrary to the principle embodied in the right to equal protection before the law, established in Article 24 of the American Convention" and that "this differentiated and unjustified treatment produced a specific violation to [Mr. Castañeda Gutman's] detriment […], because he was unable to register himself as a candidate without a party for the federal elections of July 2, 2006." In brief, the representatives maintained that, in addition to violating the right to be elected established in Article 23 of the American Convention, the exclusivity of registration of candidacies by political parties violated the right to equality embodied in Article 24 of this instrument.

208. The State affirmed, among other arguments, that "the harm to equality established in Article 24 arises for those who are or who place themselves in the same factual situation that makes the normative hypothesis applicable in its sphere of effectiveness," so that "the existence of a federal legal order and different local ones does not imply that they have to be identical, because their spheres of validity are different." It also indicated that "the interpretation of the Constitution admits the possibility that, if the Legislature so decides, options other than the exclusive postulation of candidates for public office by the political parties may be established; this is a decision they are empowered to make, which does not imply that the option in force at the federal level is contrary to the Constitution or to the international treaties that Mexico has ratified […]," and that, in Mexico, the electoral law "establishes for everyone equally and without any basis for affirming the existence of discrimination, that it corresponds to the political parties to postulate candidates, without requiring that the citizens postulated must be members of those parties." Lastly, it concluded that "to ensure the equal protection of human rights, the State may establish differences between distinct situations and establish categories for certain groups of individuals, provided that it seeks a legitimate purpose and that the classification is reasonable and related to the purpose sought by the legal order," and this premise is complied with in the instant case, because "the regulation of the exercise of the right to be elected, with regard to the participation of candidates for elected office in the federal elections with the support of political parties, is based on the State's legitimate interest in guaranteeing a minimal organization and planning of political representation, and not on any individual characteristics such as race, gender, religion, etc., so that it cannot be affirmed that human rights have been violated" in this case.

209. The Court has established that the alleged victim, his next of kin or his representatives may invoke different rights to those included in the Commission's application, based on the facts presented by the Commission (supra para. 138). The fact affirmed by the representatives that independent candidacies are allowed in certain states of Mexico was not mentioned in the application brief. However, this is a fact that is stated as an example in its arguments and the State did not contest it. Hence, the Court will continue with its findings in this regard.

210. Article 24 of the Convention establishes that all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

211. The Court has stated that it cannot be considered that every difference in treatment, in itself, violates human dignity. [FN68] The Court has also distinguished between distinctions and discriminations, so that the former are differences that are compatible with the American Convention because they are reasonable, proportionate and objective, while the latter are arbitrary differences that lead to the detriment of human rights. [FN69]

[FN68] Cf. Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 56; Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 46; and Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 89.
[FN69] Cf. Juridical Condition and the Rights of the Undocumented Migrants, supra note 68, para. 84.

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212. The Court finds that local and federal elections cannot be compared, so that it is not possible to conclude that the differences in the way they are organized are discriminatory and violate the right to equality before the law, established in Article 24 of the American Convention.

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213. Finally, the Court does not find it necessary to rule on the other rights of the American Convention that were mentioned, without any arguments, in the brief with pleas and arguments presented by the representatives (supra para. 4).

IX. REPARATIONS (Application of Article 63(1) of the American Convention) [FN70]

[FN70] Article 63(1) of the Convention stipulates that:
If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

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214. It is a principle of international law that any violation of an international obligation that has produced harm gives rise to the obligation to repair it adequately. [FN71] All aspects of this obligation to repair are regulated by international law. [FN72] In its decisions, the Court has based itself on Article 63(1) of the American Convention.

[FN71] Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs. Judgment of July 21, 1989. Series C No. 7, para. 25; Case of Yvon Neptune, supra note 19, para. 152; and Case of Apitz Barbera et al. ("First Administrative Court"), supra note 19, para. 224.
[FN72] Cf. Case of Aloeboetoe et al. v. Suriname. Merits. Judgment of December 4, 1991. Series C No. 11, para. 44; Case of the Saramaka People, supra note 6, para. 186; and Case of Yvon Neptune, supra note 19, para. 152.

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215. Based on the findings on merits and the violation of the Convention declared in the corresponding chapter, as well as in light of the criteria established in the Court's case law in relation to the nature and scope of the obligation to repair, [FN73] the Court will proceed to examine the claims submitted by the Commission and by the representatives and the arguments of the State in this regard, so as to order measures tending to repair the violation.

[FN73] Cf. Case of Velásquez Rodríguez, supra note 71, paras. 25-27; Case of Garrido and Baigorria, supra note 46, para. 43; and Case of the "White Panel" (Paniagua Morales et al.) v. Guatemala. Reparations and costs. Judgment of May 25, 2001. Series C No. 76, paras. 76 to 79.

A) INJURED PARTY

216. The Court considers that Jorge Castañeda Gutman is the "injured party" in the terms of Article 63(1) of the American Convention, as victim of the violation of the right to judicial protection embodied in Article 25 of the American Convention, in relation to the obligation to guarantee and adopt measures, established in Articles 1 and 2 thereof, that has been declared in this judgment, so that he is the beneficiary of the reparations that the Court orders below.

B) COMPENSATION

a) Pecuniary damage

217. The Court has developed the concept of pecuniary damage and the premises in which it should be compensated. [FN74]

[FN74] This Court has established that pecuniary damage entails "the loss or impairment of the victim's income, the expenses incurred in connection with the facts of the case and such pecuniary consequences as may have a causal link to the facts of the case." Cf. Case of Gómez

Palomino v. Peru. Merits, reparations, and costs. Judgment of November 22, 2005. Series C No. 136, para. 124; Case of García Asto and Ramírez Rojas. Preliminary objections, merits, reparations, and costs. Judgment of November 25, 2005. Series C No. 137, para. 259; and Blanco Romero et al. v. Venezuela. Merits, reparations, and costs. Judgment of November 28, 2005. Series C No. 138, para. 78.

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218. The Inter-American Commission indicated the general criteria on reparations and costs that it considered the Court should apply in this case and asked the Court to order the State "to grant compensation to Jorge Castañeda Gutman for the damage arising from the violation of his rights."

219. The victim considered that "it was fair to quantify the pecuniary damage he had incurred and the losses (loss of earnings) suffered, including the expenses of his pre-presidential campaign, and the loss of earnings in his daily professional activities that were interrupted by the activities related to his attempt to participate in the electoral campaign for the presidency of Mexico […]." He added that he does not make a quantified claim, but refers to what the Court will decide in this regard and, to that end, provided "[...] arguments and reasons that could help the Court decide on pecuniary reparation." His representatives clarified that "[…] it is not the [victim's] intention to receive pecuniary compensation or [appear before the Court] for money; [nevertheless,] they established some parameters to show that he had indeed suffered pecuniary damage and loss of earnings […]."

220. The State indicated that "since the American Convention has not been violated, […] it is not obliged to repair the supposed losses claimed by [Mr. Castañeda Gutman]" and, regarding the alleged damage relating to the expenses he stated he had incurred to finance his pre-electoral campaign, it added that "this is not a loss that can be attributed to the State, because it is not a direct consequence of an act or omission of the State, but of a decision taken freely and spontaneously by [Mr. Castañeda Gutman]." Also, with regard to the alleged loss of earnings, it argued that Mr. Castañeda Gutman "never mentioned what this loss consisted of, and did not submit any evidence to prove that he ceased to receive professional earnings or the amount in question; but even assuming that this was true, this claim is also inadmissible." Lastly, the State affirmed that "the Mexican Electoral Law does not refer to the pre-electoral campaign, and particularly to its financing," so that it is "absurd to imagine that the Mexican State could be responsible for expenses incurred in a process that is not regulated by the law and in which the victim took part voluntarily and spontaneously."

221. The Court observes that the victim based his request for compensation for pecuniary damage on the alleged violation of the exercise of his right to be elected established in Article 23 of the American Convention. The Court has not found that his human right has been violated in the instant case, so that no pecuniary damage arises from it that requires the corresponding measure of reparation.

b) Non-pecuniary damage

222. The Inter-American Commission indicated the general criteria related to reparations and costs that the Court should apply in this case and asked the Court to order the State "to grant compensation to Jorge Castañeda Gutman for the damage arising from the violation of his rights."

223. In relation to non-pecuniary damage the victim considered it "justifiable [that the Court] determine a reasonable compensation for the non-pecuniary damage suffered to his image and reputation as a political activist, because he was prevented from participating as a candidate for the presidency of Mexico, as well as the damage to his life project and political trajectory." Among other considerations, he indicated that, "the non-pecuniary damage he has suffered […] owing to the current wording of the Mexican electoral laws that prevented him from competing as an independent candidate for the presidency of the Republic is much greater [than the pecuniary damage]. The damage encompasses issues as extensive as discredit in certain academic and intellectual circles in Mexico, which did not understand how someone specialized in the functioning of Mexican electoral policy did not know that such candidacies were impossible, to pending debts that he would never be able to settle with the media and public security agencies […]. The non-pecuniary damage did not cease with the 2006 elections, but has continued throughout the litigation before the Commission and [the] Inter-American Court of Human Rights. In particular, in recent months, there have been attacks in the media coinciding with decisive moments in the juridical proceedings, which can hardly be attributed to mere chance." Lastly, Mr. Castañeda Gutman indicated that he "left it to [the Court] to consider the facts invoked previously and those that have occurred recently in relation to the damage caused […]."

224. The State indicated that it was legally inadmissible to pay compensation for non-pecuniary damage. Regarding the alleged effect on the victim's life project, the State indicated that " the petitioner had the same access to his political aspirations as all Mexican citizens [and that] it was necessary to point out that the results of any presidential election process are extremely unpredictable, because they involve different political, economic and social factors. Consequently, it is an unreasonable expectation of the petitioner, whose aptitudes, potential and aspirations the State is not judging, to establish a life project subject to a series of conditions of very diverse origin and uncertain achievement, above all, the will of the Mexican electorate." The State concluded that, in any case, the judgment itself could be sufficient reparation for the non-pecuniary damage.

225. In its case law, the Court has developed the concept of non-pecuniary damage and the assumptions under which it should be compensated. [FN75] In the instant case, the Court observes that the victim based his request for compensation for non-pecuniary damage on the alleged violation of the exercise of his right to be elected established in Article 23 of the American Convention. The Court has not found that this human right has been violated in the instant case, so that there is no non-pecuniary damage arising from it that requires a measure of reparation.

[FN75] "Non-pecuniary damage can include both the suffering and hardship caused to the direct victim and his next of kin, the harm of objects of value that are very significant to the individual,

and also changes, of a non pecuniary nature, in the living conditions of the victim or his family." Cf. Case of Neira Alegría v. Peru. Reparations and costs. Judgment of September 19, 1996. Series C No. 29, para. 57; Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary objection, merits, reparations, and costs. Judgment of July 10, 2007. Series C No. 167, para. 175; and Case of Apitz Barbera et al. ("First Administrative Court"), supra note 19, para. 237.

C) MEASURES OF SATISFACTION AND GUARANTEES OF NON-REPETITION

226. The Court will determine the measures of satisfaction that seek to repair the violation declared in this judgment that are not of a pecuniary nature and will order measures of public scope or repercussion.

i) Obligation to adopt measures (legislative and administrative reforms, etc.)

227. The Inter-American Commission asked the Court "to order the Mexican State to prioritize the adoption of the necessary legislative, administrative and other reforms to ensure that, in future, there is a remedy to control the constitutionality of the laws that affect political rights." It also observed that "[…] the State has adopted an important constitutional reform, which the Commission genuinely appreciates […]" and that this reform "[…] is a first and very important step, […] but does not entirely solve the problem that affects the victim in this case […]." The Commission concluded that the effectiveness of this reform should be evaluated based on the application of the new model to specific cases, after the lower-ranking laws had been harmonized with the new provisions of the Constitution.

228. The representatives stated that they left it to the Court to determine the reparations that it considered fair in the circumstances, including, of course, guarantees of non-repetition," and that "a judgment in favor of the victim in this case would be a first and extremely important measure of reparation." Specifically in relation to the constitutional reform, the representatives stated that "[…] it remedies a juridical shortcoming, which had caused the violation" of Mr. Castañeda Gutman's right to judicial protection and it was now up to "the ordinary legislator to regulate the new constitutional provisions and establish the procedures under which citizens may exercise this remedy."

229. The State indicated that "[…] this application was unjustified and without substance, since, as it had already argued, the text of the Constitution guaranteed and guarantees in its Article 99(3) the existence of an adequate and effective remedy that responds to the claims such as the one made today by [Mr. Castañeda Gutman]." Furthermore, the recent electoral reform of November 13, 2007, complements the said Article by developing the actions that the Electoral Tribunal can take when it is exercising its attributes under Article 99(3) of the Constitution. Thus, the Mexican State, through its Constitution, guarantees the existence of an appropriate and effective remedy […]."

230. The Court notes and appreciates the information provided by the State in its brief of November 27, 2007, in which it indicated that: "[…] a constitutional reform of several provisions of the Federal Constitution was published in the official gazette on November 13, 2007; they

included Article 99, which describes the attributes of the Electoral Tribunal of the Federal Judiciary." The State added that "[…] following this reform, in addition to the attributes that the Electoral Tribunal already exercised to guarantee political rights, [...] this jurisdictional body and its regional chambers may expressly declare the non-applicability of legal provisions that are considered contrary to the Federal Constitution with specific effects, which also annuls the future effects of any opinion that the Supreme Court of Justice may have issued on the matter." The Court also observes that the representatives stated that this reform "[…] remedies the juridical defect that resulted in the violation" suffered by Mr. Castañeda Gutman and that its legal regulation remained to be enacted (supra para. 228).

231. Based on the above, and bearing in mind the contents of Chapter VI of this judgment, the Court finds that the State shall, within a reasonable time, complete the adaptation of its domestic law to the Convention, in order to adapt the secondary legislation and the norms that regulate the action for the protection of the rights of the citizen to the provisions of the constitutional reform of November 13, 2007, so that, using this remedy, the citizens are effectively guaranteed the possibility of contesting the constitutionality of the legal regulation of the right to be elected.

ii) Obligation to publish the judgment

232. The Inter-American Commission stated that "satisfaction can be identified with measures of a symbolic or exemplary nature that have an impact on the direct victims but also an impact on their community and social environment" and asked the Court that, given "the nature of the facts of the instant case," it order the publication of the judgment in a national newspaper.

233. The representatives did not make either a request or an observation on this measure of reparation.

234. The State indicated that "reparation as a measure of satisfaction was not in order" either, because no harmful act had existed against the victim, and it requested the Court to reject the Inter-American Commission's claims for reparation.

235. As the Court has ordered in other cases, [FN76] as a measure of satisfaction, the State must publish once in the official gazette and in another daily newspaper with widespread circulation, paragraphs 77 to 133 of this judgment, without the footnotes, and its operative paragraphs. The State must make these publications within six months of notification of this judgment.

[FN76] Cf. Case of Barrios Altos v. Peru. Reparations and costs. Judgment of November 30, 2001. Series C No. 87, operative paragraph 5(d); Case of Cantoral Huamaní and García Santa Cruz, supra note 75, para. 192; and Case of Apitz Barbera et al. ("First Administrative Court"), supra note 19, para. 249.

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iii) Public acknowledgement of State responsibility

236. Lastly, the Inter-American Commission asked the Court, based on the same grounds as the preceding measure of reparation, to order the State to publicly acknowledge the State's responsibility for the violations that had occurred.

237. The representatives did not make either a request or an observation on this measure of reparation.

238. The State indicated that satisfaction in the form of the acknowledgement of a violation, an expression of regret, a formal apology or any other measure of this nature was not in order and requested the Court to reject the Inter-American Commission's claims for reparation.

239. The Inter-American Court considers that the measure usually, but not exclusively, requested by the Inter-American Commission is ordered in order to repair violations to the rights to life, integrity and personal liberty. The Court considers that this measure is not necessary to repair the violation found in the instant case. The judgment constitutes per se a measure of reparation.

C) COSTS AND EXPENSES

240. As the Court has indicated on previous occasions, costs and expenses are included within the concept of reparations embodied in Article 63(1) of the American Convention. [FN77]

[FN77] Cf. Case of Garrido and Baigorria, supra note 46, para. 79; Case of Yvon Neptune, supra note 19, para. 184; and Case of Apitz Barbera et al. ("First Administrative Court"), supra note 19, para. 257.

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241. The Inter-American Commission indicated that Mr. Castañeda Gutman, "through his representatives [...] is in a better position to quantify his claims and authenticate his expenses" and asked the Court to order the payment of the legal costs and expenses incurred in processing the case at both the national level and before the Inter-American system that are duly proven.

242. In their brief with pleas and motions, the representatives indicated that they would like "a reasonable quantification" to be made in this regard and that, "before the expiry of the period for the autonomous submission of evidence, [they would forward] the documentation authenticating the quantification of the respective costs and expenses. In the testimony he gave during the public hearing in this case, Mr. Castañeda Gutman recalled that his lawyers had acted pro bono, and with their final written arguments, the representatives attached a report "on expenses related to the preparation and holding of the [public] hearing incurred by Jorge Castañeda, with the corresponding vouchers." These vouchers related to expenses for air transport, accommodation and food, for a total of US$6,090.80 (six thousand and ninety United States dollars and eighty cents).

243. The State indicated that "[...] a verdict to pay the costs and expenses would not be in order for the simple reason that, since the State has not committed any of the violations attributed

to it by [Mr. Castañeda Gutman], it is for him and his legal representatives to bear the financial consequences of a notoriously inadmissible juridical strategy, as well as their unjustified recourse to international bodies." The State also pointed out that it had been indicated "repeatedly and publicly on several occasions, that the legal assistance he has received was pro bono and that his lawyers have not charged fees. Consequently, his claim to obtain compensation for expenses arising from activities related to this case before the domestic and the international courts are unfounded, and [Mr. Castañeda Gutman] himself has stated that these procedures did not result in any expenditure for him."

244. As indicated previously, "the claims of the victims or their representatives in relation to costs and expenses, and the evidence that they provide, must be submitted to the Court at the first procedural moment granted to them; that is, in the brief with pleas and motions, without detriment to those claims being updated subsequently, in accordance with the new costs and expenses that have been incurred because of the proceedings before the Court" [FN78] (supra para. 75). The victim only forwarded the Court vouchers for his expenses arising from the public hearing in this case. The Court observes that, among those documents, there was a voucher for accommodation in the name of someone who did not take part in the hearing and was not accredited by [Mr. Castañeda Gutman] as his representative. However, the Court also notes that the expenses of one of the victim's representatives who did travel to the seat of the Court and take part in the public hearing were not included. Bearing these considerations in mind and also the evidence provided, the Court determines, based on the equity principle, that the State shall deliver the sum of US$7,000.00 (seven thousand United States dollars) to the victim for costs and expenses. This amount includes the future expenses, which Mr. Castañeda Gutman may incur at the domestic level or during monitoring compliance with this judgment, and shall be delivered within six months of notification of this judgment. The victim shall deliver the amount he considers appropriate to his representatives before the domestic legal system and in the proceedings before the inter-American system.

[FN78] Cf. supra note 21.

E) METHOD OF COMPLIANCE WITH THE PAYMENTS ORDERED

245. The reimbursement of costs and expenses established in this judgment shall be made directly to Mr. Castañeda Gutman, within six months of notification of the judgment.

246. If, for reasons attributable to Mr. Castañeda Gutman, he is unable to receive the reimbursement of costs and expenses within the time indicated, the State shall deposit the amount in favor of the victim in an account or a deposit certificate in a solvent Mexican banking institute, in the most favorable financial conditions permitted by law and banking practice. If, after 10 years, the amount allocated for costs and expenses has not been claimed, the amount shall revert to the State with the accrued interest.

247. The State shall comply with its pecuniary obligations by payment in United States dollars or the equivalent in Mexican currency, using the exchange rate in force on the New York market, United States of America, the day before the payment to make the calculation.

248. The amount allocated in this judgment for reimbursement of costs and expenses may not be affected or conditioned by current or future taxes or charges. Consequently, it shall be delivered to the victim integrally, as established in this judgment.

249. If the State falls into arrears, it shall pay interest on the amount owed, corresponding to banking interest on arrears in Mexico.

250. In accordance with its consistent practice, the Court reserves the right, inherent in its attributes and also deriving from Article 65 of the American Convention, to monitor compliance with all the terms of this judgment. The case will be closed when the State has fully complied with the terms of this judgment. Within one year from notification of the judgment, the State shall provide the Court with a report on the measures adopted to comply with the judgment.

X. OPERATIVE PARAGRAPHS

251. Therefore,

THE COURT

DECIDES,

unanimously:

1. To reject the preliminary objections filed by the State in the terms of paragraphs 15 to 67 of this judgment.

DECLARES,

unanimously, that:

2. The State violated, to the detriment of Jorge Castañeda Gutman, the right to judicial protection embodied in Article 25 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 thereof, in the terms of paragraphs 77 to 133 of this judgment.
3. The State did not violate, to the detriment of Jorge Castañeda Gutman, the political right to be elected recognized in Article 23(1)(b) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 thereof, in the terms of paragraphs 134 to 205 of this judgment.
4. The State did not violate, to the detriment of Jorge Castañeda Gutman, the right to equal protection of the law, recognized in Article 24 of the American Convention on Human Rights, in relation to Articles 1(1) thereof, in the terms of paragraphs 206 to 212 of this judgment.

AND ORDERS,

unanimously, that:

5. This judgment constitutes per se a form of reparation.
6. The State shall, within a reasonable time, complete the adaptation of its domestic law to the Convention, in order to adapt the secondary legislation and the norms that regulate the action for the protection of the rights of the citizen to the provisions of the constitutional reform of November 13, 2007, so that, using this remedy, citizens are effectively guaranteed the possibility of contesting the constitutionality of the legal regulation of the right to be elected, in the terms of paragraphs 227 to 231 of this judgment.
7. The State shall publish once in the official gazette and in another daily newspaper with widespread circulation, paragraphs 77 to 133 of this judgment, without the footnotes, and its operative paragraphs within six months of notification of this judgment, in the terms of paragraphs 232 to 235 hereof.
8. The State shall pay Jorge Castañeda Gutman the amount established in paragraph 244 of this judgment, for reimbursement of costs and expenses, within six months of notification of this judgment.
9. The Court will monitor full compliance with this judgment, in the exercise of its attributes and in compliance with its obligations under the American Convention, and will close this case when the State has complied fully with its terms. Within one year from notification of this judgment, the State shall provide the Court with a report on the measures adopted to comply with the judgment.

Done, at San José, Costa Rica, on August 6, 2008, in the Spanish and the English languages, the Spanish text being authentic.

Cecilia Medina Quiroga
President

Diego García-Sayán
Manuel Ventura Robles
Leonardo A. Franco
Margarette May Macaulay
Rhadys Abreu Blondet

Claus Werner von Wobeser Hoepfner
Ad hoc

Pablo Saavedra Alessandri
Secretary

So ordered,

Cecilia Medina Quiroga
President

Pablo Saavedra Alessandri

Secretary