SEPARATE OPINION OF JUDGE *AD HOC* ROBERTO DE FIGUEIREDO CALDAS IN RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE *CASE OF ESCHER ET AL. V. BRAZIL* OF JULY 6, 2009

1. I submit this separate opinion, which concurs on the whole with the Court's conclusions, for two main reasons. The first is to place on record my understanding of some specific issues examined by the judgment with which I agree. The second is to express a contrary – dissenting – opinion regarding the Court's conclusion that the brief with pleadings, motions and evidence of the victims' representatives was untimely, even though it did not apply the effects deriving from this declaration, but rather received the brief as timely, and as entirely useful.

2. Regarding the legal principles debated, I fully agree with the terms of the judgment, which was drawn up in a collegial manner.

I. Timeliness – a time limit that expires on a non-working day is extended to the next working day

3. Owing to a delay of one day, the Court considered that the presentation of the brief with pleadings, motions and evidence by the victims' representatives on April 7, 2008 (Monday), was untimely. This was because the Secretariat of the Court established that the original brief with the application and its attachments had been received by the representative of Justiça Global on February 6, 2008, while the two-month period established in Article 36 of the Court's Rules of Procedure[1] expired on April 6, 2008 (Sunday).

4. The Court's Rules of Procedure are silent as regards the way in which time limits should be calculated.

5. Since there is also no provision for calculating working and non-working days in its Rules of Procedure – and because Article 2(21) of the Rules of Procedure defines "month" as "calendar month"[2] – the Court concluded that the presentation of the brief with pleadings, motions and evidence was untimely. Nevertheless, the Court admitted it, based on generosity, and this could lead to questions, given the clarity of the provision drawn up by the Court itself, which states that this time limit cannot be extended. However, the brief was admitted in light of the fact that the Court's proceedings are not subject to the same judicial formalities as the domestic proceedings of the countries, and also because the Court considered that the delay of only one day was reasonable, and had not affected either the legal certainty or the procedural balance of the parties.

6. To the contrary, I consider that the brief was entirely timely.

7. To clarify: even though most members of the Court have understood that the brief was untimely, it accepted it as timely for all legal purposes, which, ultimately, converged with my understanding.

8. However, I feel the need to record my reasoning so that the issue can be debated in a future case and that case law will not remain silent in this regard, *concessa venia*, since this would be the case if the presentation of the brief with pleadings, motions and evidence of the representatives de las victims, or of any parties in a similar situation, should be considered timely.

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1 Article 36. Written Brief Containing Pleadings, Motions and Evidence
1. When the application has been notified to the alleged victim, his next of kin or his duly accredited representatives, they shall have a period of 2 months, which may not be extended, to present autonomously to the Court their pleadings, motions and evidence.

2 Article 2. Definitions
For the purposes of these Rules of Procedure: (...) 21. the term "month" shall be understood to be a calendar month.

9. A first aspect to consider is that, usually, the calculation of time limits in days should begin (*dies a quo*) on the subsequent working day. In this case, since the time limit was established on the basis of months, this rule does not apply. Time limits in months or years are calculated according to the calendar unit corresponding to the calendar day on which the period commenced, as agreed to simplify the calculation for the parties and for the courts. For example, if the time limit starts on the 5th, it will expire on the 5th day of the respective month or month-year.

10. However, from this other perspective and *a fortiori*, with regard to the day of expiry (*dies ad quem)* of the procedural time limit, the general rule must be to extend it to the following working day in cases when the date of expiry occurs on a non-working day (that is, a holiday or weekend). This, irrespective of the calculation of the time limit in days, months or years.

11. Precisely in the case of dates of expiry where the traditional calculation did not allow an extension – in other words, if the period expired on a non-working day – it was not extended until the following working day, but had to be brought forward to the previous working day; however, the actual tendency is to extend the period to the first working day. This is in the understanding that procedure should merely be an instrument, and not an end in itself, and that it should be simple. Also, it should be noted that the instant case does not refer to a lapsed period, or even to prescription, but to a simple procedural time limit in which the discussion of non-extension owing to a lapsed period does not exist. Therefore, it should not exist in these proceedings either.

12. If the Rules of Procedure are omissive in this regard – which is intentional, a truly eloquent silence, to avoid redundancy and innovation in the domestic law of the jurisdictional State – national laws are not. Even though the Rules of Procedure are silent in this respect, since they do not include a provision with regard to the day of expiry that can be used, we should not adopt the restrictive interpretation of expiry over a weekend, when the Court is not even functioning. Moreover, requiring the period to be brought forward to the previous working day is also an undesirable and unacceptable restriction for the comprehensive right to defense of the parties.

13. Logically, the expiry of the time limit can only occur on a working day, when the parties can use any of the formally established means to submit briefs. Article 26 of the Rules of Procedure provides for them expressly. Clearly some of the means of presenting briefs could not be used during weekends and holidays, simply because there would be no Court official to receive them. These are precisely the traditional forms of presentation, which are in person, by mail or courier. If the briefs reach their destination and cannot be delivered, it is reasonable to wait until the following day, when the Court officials and judges can act on them, and no delay has occurred.

14. Although at first glance, it could appear that the emphatic nature of the words “which may not be extended” expressly included in Article 36 – transcribed above in a footnote – refer to the expiry (*dies ad quem*) of the time limit, constituting a real obstacle to the extension when it falls on a holiday, in truth this interpretation is unsustainable because it is not coherent with the continental or even the universal procedural system.

15. The words “which may not be extended” mean that the time limit should not be extended by an agreement between the parties or the generosity of the Court (except in extremely exceptional cases that need not be discussed) since, according to Chiovenda’s classification,[3] it is a “strictly peremptory” time limit[4] that results in absolute preclusion and does not admit extension.

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[3] CHIOVENDA, Giuseppe. *Instituciones de derecho procesal civil*. Translated by Paolo Capitanio, Campinas (Brazil): Bookseller, 1998. 3v., pp. 12/14.

[4] Chiovenda distinguishes three types of time limits: (a) strictly peremptory; (b) extendible, and (c) comminatory or simple.

16. Time limits, such as the one under consideration here, are only peremptory and non-extendible to act, to answer and to have access into the procedural relationship as a party, correctly established in the Court's Rules of Procedure, Article 36 (autonomous access of the victims or their representatives) and Article 38 (answer by the State).

17. The calculation of the time limit is another issue and has rules that have been accepted universally for centuries. It is subject to rules that go back to the origins of the Latin legal aphorisms (*brocardos*) (at least to classical Roman law, which began in the first century of the Christian era). Subsequently, in the eleventh century during Medieval times, these aphorisms were compiled,[5] and have survived the passage of time and remain strong and vigorous as rules that have duly passed the test of time.

18. Maxims and time-honored phrases, such as those that follow, which constitute legal norms under diverse legal systems derive from them:

a) *dies a quo non computatur in termino* (the initial day is not calculated as part of the time period);
b) *dies ad quem computatur in termino* (the last day is calculated in the period);
c) *dies dominicus non est juridicus*[6] (Sunday is not a court day);
*d) dies non (*abbreviation of *dies non juridicus)*[7] (non-working or not a court day)
e) *dies feriati*[8] (holidays)
f) *dies utiles*[9] (working day).

19. We can easily conclude, based on the sequence of the ancient aphorisms transcribed above, that this type of calculation, which is made in these proceedings, is customary, universally accepted and used. Moreover, in defense of the legal certainty that this Court so often urges, this tradition should be followed; even because, as we have noted, the expression "that may not be extended" is directed at the judge and at the parties, and not at the way the time limit is calculated.

20. It is also important to note that the domestic law of several countries worldwide contains normative rules for calculating judicial time limits that incorporate the Latin aphorisms, even as regards establishing that if the day of expiry of a time limit occurs on a non-working day, it must be transferred to the following working day by fluid, logical, consequent natural law.

21. The fact is that those ancient aphorisms wound up incorporating authentic procedural principles for calculating time limits, which have extended to universal common rules inspired today by Italian procedural law, the reference for most national procedural codes. As an example of the said actuality, it is sufficient to recall the 1940 "*Codice di Procedura Civile*" (Italian Code of Civil Procedure) in force today, in its extremely clear Article 155:

Art. 155. (Computo dei termini)
Nel computo dei termini a giorni o ad ore, si escludono il giorno o l'ora iniziali.

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[5] The word "axiom" is not Latin. It results from the latinization of the name of the jurist Burchard (or Burckard), Bishop of Worms, Germany, from the year 1000 to 1025, who compiled 20 volumes of the *Regulae Ecclesiasticae* (ecclesiastic rules) which included maxims and axioms, subsequently called "*brocardos*" (aphorisms). The term was adopted definitively as of 1508 when the book of juridical maxims "*Brocardia Juris*" was published in Paris.

[6] BLACK, Henry Campbell. *Black's law dictionary;* centennial edition (1891-1991). 6th ed., actual. By the Publisher's Editorial Staff, co-authors Joseph R. Nolan et alii. St. Paul: West Publishing Co., 1990. p. 455. According to this dictionary under the entry "*[d]ies dominicus non est juridicus.* Sunday is not a court day, or day for judicial proceedings, or legal purposes."

[7] Ibid. Entry "*dies non juridicus*. A non-juridical day; not a court day. A day on which courts are not open for business, such as Sundays and some holidays."

[8] Ibid. Entry "*dies feriati*. In civil law, holidays."

[9] Ibid., pp. 455/456. Entry "*dies utiles*. Juridical days; useful or available days. A term of the Roman law, used to designate special days occurring within the limits of a prescribed period of time upon which it was lawful, or possible, to do a specific act."

Per il computo dei termini a mesi o ad anni, si osserva il calendario comune*. I giorni festivi si computano nel termine.*
Se il giorno di scadenza è festivo, la scadenza è prorogata di diritto al primo giorno seguente non festivo.
[...] [10]

22. The same rules are followed even in the case of time limits for prescription, regarding which greater normative care is normally taken not to extend them, according to Article 2,963 of the Italian Civil Code, in the sense that, in the case of a time limit that expires on a non-working day, it should be postponed to the following working day.

23. Consequently, the general rule is applicable to any type and periodicity of time limit, whether hour, day, month or year. Some differences exist as regards the calculation of the initial day of the period, whether the date on which notification is received or the following day, but not as regards the day of expiry. We should underscore the legal opinion on the calculation of the time periods in months or years: "if the day of expiry is a holiday, the expiry is legally extended to the next working day."

24. Another example that supports this argument is that the domestic law of the State where the application originated, Brazil, follows the same rules. The systematization adopted by the Brazilian Code of Civil Procedure is present in its Article 184, § 1º,[11] which states: "It shall be deemed that the time limit is extended until the first working day, if the time limit expires on a holiday."

25. Randomly, to confirm the legal certainty of this system of calculation, we take a rapid glance at the domestic law of another country, which follows as an example:

The Peruvian Civil Code:
Article 183. Rules for calculating time limits
The time is calculated according to the Gregorian calendar, pursuant to the following rules:
1. The period indicated by days is calculated by natural days, unless the law or a legal act establishes that it should be calculated by working days.
2. **The period indicated by months expires in the month of expiry and on the day of this month corresponding to the date of the initial month.** If that day is lacking in the month of expiry, the period expires on the last day of the said month.
3. The period indicated in years is governed by the rules established in subparagraph 2.
4. The period excludes the first day and includes the day on which it expires.
5. **The period whose last day is non-working, shall expire on the first subsequent working day**. [Bold added]

26. In addition, the rule interpreted in theory is in the interests of all jurisdictional parties before this Court – including the States – and results from the understanding that the procedure, while relevant, is merely the instrument for applying the law.

27. The procedural time limits merely contribute to ensuring that there is no delay in settlement of the litigation. Accepting the expiry of a time period on a non-working day would punish the party that exercised a reasonable interpretation of the Court's Rules of Procedure, in defense of an extremely short, indeed insignificant, span of time for the course of the

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[10] Free translation :
Article 155 (Calculation of time limits)
When calculating periods in hours or days, the initial hour or day are excluded.
To calculate the periods in months or years, the ordinary calendar is used.
Holidays are calculated within the period.
If the day of expiry is a holiday, the expiry is legally extended until the first subsequent working day.
[...]

[11] "Art. 184. Unless there is a provision to the contrary, time periods shall be calculated excluding the initial day and including the day of expiry.

§ 1º. The period shall be deemed extended until the first working day if the expiry falls on a holiday or on a day on which: I. The court will be closed; II. The legal file was closed before the usual time."

procedure, especially because the Court does not work on Sunday.

28. In conclusion, the brief of the victims' representatives is entirely timely, because the day of expiry of the time limit was Sunday, a non-working day of the courts, and was therefore extended until the following day.

II – Possibility of alleging violations that were not examined during the proceedings before the Inter-American Commission

29. The State argued, in its answer, that the alleged violation of Article 28 of the American Convention (Federal Clause), an aspect of the Commission's application, cannot be examined, because it had not been brought up previously during the proceedings before the Commission and also because the said provision does not establish a right or freedom, but merely some rules for the interpretation and application of the American Convention.

30. In addition to the well-founded reasons given in the judgment, I would like to add some elements that concur with the admission of allegations, even though they have not been brought up previously, since the legal issue has been approached and discussed.

31. The State also alleged that the violation Article 28 of the American Convention (Federal Clause) was introduced in the application merely as the result of an affirmation concerning the difficulty of communicating with the state of Paraná made during a working meeting before the Commission on compliance with the recommendations of Report on merits No. 14/07.

32. The Court's ruling, with which I concur fully, is not to admit the arguments because: (1) the Commission has independence and autonomy to define the content of the application; (2) the inclusion in the application of the supposed failure by Brazil to comply with Article 28 of the Convention when the said provision appears in Report on merits No. 14/07 of the Commission is not contrary to the American Convention or to the Rules of Procedure of the Commission; (3) during the processing of the application before the Court, Brazil had the opportunity to defend itself in relation to the alleged violation; hence the right to defense was not harmed; (4) in accordance with Article 62(3) of the Convention, the Court has competence to examine the non-compliance of provisions, irrespective of their legal nature (general obligation, law or norm of interpretation).

33. In particular, I would like to add a justification invoked by the victims' representatives: the Court has the authority to examine violations of the articles of the Convention that have not been alleged by the parties, which is also supported by the Convention, by the *iura novit curia* principle, an interpretation that the Court has adopted on other occasions[12] and of its consequent legal principle *da mihi factum dabo tibi jus* ([to the party] give me the fact, and I [the judge] will give you the law).

34. *Iura novit curia* is a classic principle. Besides being a maxim of Roman law, even before, in Aristotle (BC. 384 to 322) a clear preview, a prediction, an anticipation is found. In the first pages of his volume "Rhetoric" in which the philosopher explains the attributes of a lawyer, the position of a judge, and the purpose of laws, he criticizes rhetoric, the exaggerated assessment of the non-essential to the detriment of facts that are relevant for the judicial decision. Note how this applies perfectly to the *iura novit curia* principle and to *da mihi factum dabo tibi jus*, another Latin maxim that is consequent with the former. According to Aristotle, it is fully within

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[12] […] This Court also has the authority to analyze possible violation of articles of the Convention that were not included in the application brief and in the reply to the application, as well as in the representatives' brief containing pleadings and motions, based on the principle of *iura novit curia*, firmly supported by international jurisprudence, "in the sense that the judge has the authority and even the duty to apply pertinent legal provisions in a case, even when the parties do not explicitly invoke them," in the understanding that the parties will always be allowed to submit the pleadings and evidence they deem pertinent to support their position regarding all the legal provisions examined. *Cf. Case of the "Juvenile Reeducation Institute" Judgment of September 2, 2004. Series C No. 112, paras. 124 to 126; Case of the Gómez Paquiyauri Brothers. Judgment of July 8, 2004. Series C No. 110, para. 178; Case of the "Five Pensioners". Judgment of February 28, 2003. Series C No. 98, para. 156; Case of Cantos. Judgment of November 28, 2002, Series C No. 97, para. 58.*

the competence of the judge to decide on the importance or lack of importance, on the justice or injustice of a fact without taking his instructions from the litigants.

35. Calamandrei, when examining the provision concerning the formal assumption in the remedy of cassation of the right to demand an indication of the legal principle on which the appeal is founded[13] was thoughtful when he admitted:[14] "[...] the indication that may also be lacking when the violated norms are equally identifiable, given the description of the charges or when the violation refers to general principles that have not been formulated in an article."

36. Long ago, the universal human rights system established the right to a simple judicial proceeding to protect the individual from complicated proceedings and appeals, complex for public defenders and lawyers, understood with difficult by the ordinary jurisdictional person, for the individual who rarely brings a case to trial, all in the interest of the guarantee of access to justice and an effective remedy (or proceeding).

37. It is also evident that the law can establish supposedly general remedies, but excessive rigor restricting their observance, in addition to those restrictions expressed by law will always act against due access to justice, especially because the less privileged layers of society, which undoubtedly have greater difficulty in hiring the best lawyers who dominate the complex and increasingly specialized procedural techniques, will find themselves at a considerable disadvantage. This real inequality becomes a concrete impediment to access to justice and the simplicity of the remedy.

38. In turn, in the 1948 American Declaration on the Rights and Duties of Man, the inter-American regional system included a very clear text on the right to a simple, brief procedure.[15]

39. Likewise, in the case of the American Convention on Human Rights (Pact of San José, Costa Rica), its Article 25[16] would be violated if the arguments were not accepted on the basis of the reason alleged by the State.

40. Consequently, the Commission's reference to Article 28 of the American Convention (Federal Clause) should be accepted for reasons other than those already cited by the Court, which are the *iura novit curia* principle and its consequent *da mihi factum dabo tibi jus*, and also in observance of the obligation in the provision of the Convention cited above (Article 25 – judicial protection or, more specifically, right to a simple and prompt procedure).

41. Finally, condemning the State for violating Article 28 of the American Convention (Federal Clause), which the Court finally accepts, should not be seen as linked to a more severe punishment. To the contrary, in the instant case, despite Brazil's tenacity in defending its position, its understanding and respect for the victims' position was clear to see; and this was not observed in its federal unit, Paraná, as was evident during the proceedings before the Commission, especially owing to the communication difficulties between the federal and state spheres. In fact, the recognition of the violation of Article 28 helped to define the domestic responsibilities for the violations.

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13 CPC, Art. 366. (Contenuto del ricorso)
Il ricorso deve contenere, a pena di inammissibilita:
(...)
4) i motivi per i quali si chiede la cassazione, con l'indicazione delle norme di diritto su cui si fondano; [text prior to the 2006 reform].

14 CALAMANDREI, Piero. *Casación Civil.* Translation by Santiago Sentís Melendo and Marino Ayerra Redín. Buenos Aires: EJEA, 1959, p. 119.

15 Article XVIII - Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

16 Art. 25. Right to Judicial Protection. 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.

III – Obligation to publish the judgment on the electronic sites of the Union and of the government of the state of Paraná

42. We proposed a significant innovation in this ruling, which was accepted by the Court as a measure of satisfaction and a guarantee of non-repetition. This was the obligation imposed on Brazil to publish the summary and the entire content of this judgment on Internet websites of the Union and the state of Paraná, at least until full compliance with the judgment (minimum obligation imposed) or longer, which could be equal to the duration of the cases to be tried, calculated from the date of the facts until the publication of this judgment, or (b) definitively (ability and commitment of the State).

43. It is a simple, inexpensive means, resulting in better and more widespread dissemination than the burdensome publications in newspapers, which could be substituted in future decisions.

44. It is a recourse that is fully adapted to contemporary life; one that expands the scope of the non-pecuniary reparation to the victims and promotes more effectively the disincentivation of the repetition of conducts and omissions similar to those that resulted in the violations recognized in this specific case, in view of the facility of access to the contents of the Court's judgment.

45. Since it is evident that access to the global Internet is increasingly more frequent and of easier access to everyone throughout the world, the deliberations of the Court should not fail to consider among its measures of satisfaction and guarantees of non-repetition, ordering the measure that, in a pioneering fashion, is established in this case.

46. The power of the pedagogical nature of the judgment is undeniable, as is its prompt distribution given the speed not only of access, but also of the dissemination of information by Internet, in addition to the ease with which the State can comply with the said obligation by the State.

III.a. Regarding the time limit

47. Regarding the time limit, the Court has preferred to leave this open, trusting in the State to execute the judgment, and we agree; however, this opinion leaves a record; a suggestion promoting citizenship, democracy and human rights. Despite this, we understand that judicial decisions should include clear, specific and objective rulings that leave no margin for misinterpretation by those executing them, as can be appreciated from the unforgettable lessons of Judge Antônio Augusto Cançado Trindade, former President of this Court, either when he speaks of overcoming the traditional idea of the optional clause of obligatory jurisdiction, or when he discusses the "*compétence de la compétence,*" in which he advocates that the Court should reduce the sphere of discretion in the execution of judgments up until the complete satisfaction of the judicial ruling, thus reducing the possibility of executions being obstructed by the States. Since we trust that in this case, there are indications that the State will comply amply, we adhere to the unanimity.

III.b. Regarding the form and the place of publication

48. Also, with regard to the form of dissemination by Internet and the place of publication (on what site and of which public entity), the Court preferred not to establish this directly, trusting that the State would be better able to indicate this in order to ensure the greatest dissemination of the information, which will be analyzed by the Court subsequently, when monitoring execution of the judgment.

Roberto Figueiredo Caldas

Jugde *ad hoc*

Pablo Saavedra Alessandri
Secretary