



*Resolution 2/22*

# **Explanation of Vote**

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**Corr.1**

**RESOLUTION 2/22**

**EXPLANATION OF VOTE**

**August 8, 2022**

The IACHR adopts this resolution pursuant to Article 78 of its Rules of Procedure for the purpose of interpreting the scope of the explanation of vote provided for in Article 19 of that same instrument. In particular, the interpretation refers to the type of decisions, timing, and publicity of explanations of votes, also referred to as separate votes.

**HAVING SEEN:**

Article 19 of the IACHR's Rules of Procedure, which establishes as follows:

1. Whether or not members agree with the decision of the majority, they shall be entitled to present a written explanation of their vote, which shall be included following the text of that decision.
2. If the decision concerns the approval of a report or preliminary report, the explanation of the vote shall be included following the text of that report or preliminary report.
3. When the decision does not appear in a separate document, the explanation of the vote shall be included in the minutes of the meeting, following the decision in question.
4. The explanation of the vote shall be presented in writing to the Secretariat within the 30 days following the period of sessions in which that decision was adopted. In urgent cases, an absolute majority of the members may stipulate a shorter period. Once that deadline has elapsed, and no written explanation of the vote has been presented to the Secretariat, the member in question shall be deemed to have desisted from submitting an explanation of his or her vote, without prejudice to his or her dissent being recorded.

Article 20 of the IACHR's Rules of Procedure, according to which: "Summary minutes shall be taken of each session. They shall state the day and time at which it was held, the names of the members present, the matters dealt with, the decisions taken, and any statement made by a member especially for inclusion in the minutes. These minutes are confidential internal working documents."

Article 78 of the IACHR's Rule of Procedure, which provides: "Any doubt that might arise with respect to the interpretation of these Rules of Procedure shall be resolved by an absolute majority of the members of the Commission"; and

**WHEREAS:**

Recently, the scope of Article 19, transcribed above, has been raised in the internal discussions of the IACHR, in particular in terms of the types of decisions to which the text refers, as well as the timing and publication of the explanations of votes.

Article 19 of the IACHR's Rules of Procedure draws a distinction between decisions in general, in a broader sense, and decisions on the adoption of reports or preliminary reports that appear in specific documents submitted to the Commission.

Said provision refers, restrictively, to certain types of decisions and regulates the publication of the respective explanations of votes, or separate votes.

Most of the separate votes of the IACHR have been adopted in reports on individual petitions and cases.

The institution of separate votes has been also used, albeit on a very exceptional basis, with respect to resolutions on precautionary measures, country reports, and thematic reports.

After a well-founded request by a Commissioner, the IACHR has debated and decided to apply different modalities for the publication of resolutions and thematic reports.

With respect to voting on reports at its electronic *e-vote* platform, the IACHR has incorporated into its practice that a Commissioner should express his or her intent to issue an explanation of vote at the time of voting, or no later than the deadline indicated for that purpose in the *e-vote* platform; and that in the absence of such an indication, the Executive Secretariat shall give notice of the approved report.

According to the above-indicated practice, the 30-day period set out in the Commission's Rules of Procedure begins to run when the first Commissioner states his or her intent to present a separate vote so long as he or she has done so prior to the close of the corresponding vote; if the explanation of vote is received within that term, the Executive Secretariat will incorporate it into the report and give notice or publish it, as the case may be.

Due to their very nature, consisting of carrying out decisions adopted by the IACHR that reflect a previously adopted collegial institutional position, the separate votes with respect to the approval of press releases or pronouncements in social media have not been understood to be for publication.

The IACHR has understood that it is not appropriate to publish separate votes with respect to submitting cases to the Inter-American Court of Human Rights, in the terms of Article 51 of the American Convention on Human Rights and Article 45 of the Rules of Procedure, for it concerns the execution of a decision by that organ, and not a new "preliminary report" or "report" as per Article 19(2) of the Rules of Procedure.

The IACHR has not considered as publishable the requests for information made pursuant to Article 41 of the American Convention and Article 18 of the Statute, nor administrative matters that go to its operations.

The IACHR has understood that the decisions mentioned in the three preceding paragraphs correspond to the situation addressed in Article 19(3) of the Rules of Procedure, since they do not entail a preliminary report, report, or separate document, and therefore has interpreted that an explanation of vote should be transcribed in the corresponding minutes, after the respective decision.

## **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

### **RESOLVES:**

1. That the interpretation of Article 19 of its Rules of Procedure is the one that is set forth below.
2. That all the decisions adopted by the IACHR may be the subject matter of a separate vote in writing.
3. That a Commissioner should state his or her intent to issue a separate vote when voting or, at latest, before the end of the respective period of sessions or the end of the term indicated for that purpose in the electronic voting platform; absent such a statement, the Executive Secretariat shall give notice of the approved report.

4. That the 30-day period set out in the Rules of Procedure shall begin to run when a Commissioner states his or her intent to submit a separate vote, so long as he or she has done so prior to the end of the time for voting or the conclusion of the respective period of sessions; if the separate vote is received within that period the Executive Secretariat shall include it as part of the report, and give notice of it or publish it, as the case may be.
5. That the reports or preliminary reports with respect to which the explanation of vote should be publicized as per Article 19(2) of the Rules of Procedure of the IACHR refer to individual petitions and cases; thematic reports; reports on human rights in a State; annual reports; and resolutions of the IACHR.
6. That separate votes that are presented with respect to the decisions to approve the reports or preliminary reports of the paragraph *supra*, and in keeping with the time frames and conditions provided for in Article 19(4) of the Rules of Procedure of the IACHR, are governed in keeping with Article 19(2).
7. That upon a well-founded request by a Commissioner, and to preserve the object and purpose of the country report, thematic report, or resolution the IACHR may agree upon another modality, time frame, and way of accessing the respective separate vote.
8. That the separate votes with respect to the decisions that are not in a separate document as per Article 19(3) of the Rules of Procedure, and that are presented in keeping with the time frames and conditions provided for in Article 19(4) thereof, are recorded in the corresponding minutes.
9. That the decisions mentioned in the paragraph *supra* include the referral of cases to the Inter-American Court; approval of requests for information pursuant to Article 41 of the American Convention and Article 18 of the Commission's Statute; and the approval of press releases and statements on social media.

Approved on August 8, 2022 by: Julissa Mantilla Falcón, President; Edgar Stuardo Ralón Orellana (explanation of vote, concurring),\* First Vice-President; Margarette May Macaulay, Second Vice-President; Esmeralda E. Arosemena de Troitiño; Joel Hernández; Roberta Clarke; and Carlos Bernal (partially dissenting vote),\*\* Commissioners.

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\* Commissioner Edgar Stuardo Ralón submitted a separate vote concurring with the judgment. It is available at the Executive Secretariat of the IACHR.

\*\* Commissioner Carlos Bernal issued a partially dissenting separate vote. It is attached to this document.

**PARTIALLY DISSENTING VOTE BY COMMISSIONER CARLOS BERNAL PULIDO**

**RESOLUTION 2/22**

**EXPLANATION OF VOTE**

**August 8, 2022**

In the context of respect for the decisions that the Inter-American Commission on Human Rights hands down,, and in the exercise of my right to present a separate vote with respect to the decisions of the IACHR whose foundation or conclusion I do not share, in keeping with the term established for this purpose in Article 19 of the Commission’s Rule of Procedure, I present the considerations that led me to partially dissent from Resolution 2/22.

While I highlight the importance of Resolution 2/22, insofar as it defines the institutional position regarding the scope of Article 19 of the Commission’s Rules of Procedure which, among other things, spells out the right of the members of the Commission to present explanations of votes and, accordingly, gives expression to the exercise of the freedom of expression enjoyed by those of us who make up this important organization, I present this separate vote as I take issue with operative paragraph seven, insofar as it could facilitate censorship – which is clearly prohibited by international human rights law.

Accordingly, herein I will set forth the reasons why I consider that operative paragraph seven is at odds with the right to freedom of expression and the right to issue separate votes – recognized in Article 19 of the Commission’s Rules of Procedure; and I shall present some additional reflections.

**1. Grounds for dissenting from the seventh operative paragraph of the Resolution:**

The seventh operative paragraph of the resolution provides: “That **upon a well-founded request** by a Commissioner, and to **preserve the object and purpose of the country report, thematic report, or resolution** the IACHR may **agree upon another modality, time frame, and way of accessing the respective separate vote**” (emphasis added).

I express my disagreement with this provision insofar as, first, it represents a limitation on the exercise of the freedom of expression by the commissioners that does not comply with the standards that have been developed by the very Commission and the Inter-American Court of Human Rights, opening the door to possible cases of censorship within the Organization; and second, insofar as it blurs the scope of Article 19 of the IACHR’s Rules of Procedure, which recognizes the possibility of presenting separate votes as a **right of the commissioners**.

**1.1. The seventh operative paragraph is not compatible with the standards of protection of the right to freedom of expression**

As established by the Charter of the OAS, the IACHR has the mandate to promote the observance and protection of human rights.<sup>1</sup> Thus, based on the universal nature of these freedoms and guarantees – that encompass all human rights, without distinction – the Commission should also promote the rights of the commissioners, who do not lose, *inter alia*, their rights to freedom of thought and freedom of expression when joining the Commission. Yet the majority decision moves away from the standards applicable to the freedom of expression on establishing the possibility of numerically superior positions silencing minority voices.

I reach that conclusion through the following points: (i) the separate votes by the commissioners constitute speech specially protected by the freedom of expression; (ii) the seventh operative paragraph represents a

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<sup>1</sup> Charter of the Organization of American States. Article 106.

limitation on the exercise of the freedom of expression; (iii) even though this right is not absolute, the provision analyzed does not meet the international standards applicable to limitations on the freedom of expression; (iv) the seventh operative paragraph opens the door to censorship; and, (v) it gives rise to impairments that affect not only the commissioners, but society as a whole.

### 1.1.1. The separate votes of the commissioners constitute speech specially protected by the freedom of expression

The Inter-American Commission has indicated: “While it is true that all forms of expression are protected in principle by the freedom enshrined in Article 13 of the Convention, there are certain types of speech that receive special protection because of their importance to the exercise of other human rights, or to the consolidation, proper functioning and preservation of democracy.”<sup>2</sup>

This includes speech on matters of public interest which, according to the Inter-American Court, corresponds to opinions or information concerning matters about which society has a legitimate interest in being informed, either because it has to do with the performance of the country’s institutions, may “affect general rights or interests or that may have significant consequences.”<sup>3</sup> For the Court, such content “requires a higher degree of protection for freedom of expression.”<sup>4</sup>

Under that logic, the separate votes put forward by the commissioners of this important international organization which, as noted above, defends and promotes **human rights in the region**, would no doubt constitute speech of public interest and, therefore, enjoy special protection.

From a practical and theoretical perspective, separate votes pursue any number of aims that reinforce the need to publicize them. Accordingly, these votes, in addition to facilitating a dialogue among the members of the Commission, have an external communicative purpose from at least three angles.

First, as recognized by Sergio García Ramírez, separate opinions put the considerations of the institutions and their members “under the analysis of the reader and whoever applies” the decisions. Accordingly, this dimension of communication considers a dialogue with an external audience.<sup>5</sup>

Second, Judge Augusto Cançado Trindade noted as follows:

“I do not expect to convince with this the current majority of the Court in the *cas d'espèce*, whose line of thought I am already aware of and I do not share in different aspects. But maybe in the future my personal reflections, which I hereby spread upon the record, can be considered appropriate by a new composition of this Tribunal in the years to come. And even if they are not, maybe they will be of some use for those who wish to interest themselves in the lessons obtained from the work in the Court by a survivor of the same.”<sup>6</sup>

In addition, separate votes have the potential to further dialogue – not necessarily with the current composition of the Commission, but with a future one. This reflects a dynamic of domestic courts in which dissenting opinions have been the seed of positions which, in other generations, end up being adopted by the institutions.

<sup>2</sup> IACHR. The Inter-American Legal Framework regarding the Right to Freedom of Expression. 2010. Para. 32.

<sup>3</sup> I/A Court HR. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340. Para. 110.

<sup>4</sup> I/A Court HR. Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective (interpretation and scope of articles 13, 15, 16, 24, 25, and 26 in relation to articles 1(1) and 2 of the American Convention on Human Rights; articles 3, 6, 7, and 8 of the Protocol of San Salvador; articles 2, 3, 4, 5, and 6 of the Convention of Belém do Pará; articles 34, 44, and 45 of the Charter of the Organization of American States; and articles II, IV, XIV, XXI, and XXII of the American Declaration on the Rights and Duties of Man). Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27.

<sup>5</sup> Sergio García Ramírez. Advisory Opinion OC-20/09.

<sup>6</sup> Separate Vote. Case of La Cantuta v. Peru.

Finally, as discussed internally in the Commission, separate votes give greater legitimacy to an institution's decisions insofar as they reflect the complex and in-depth deliberations prior to a decision, while at the same time providing a practical exercise in transparency.

Accordingly, on having a dimension of communication with society and with the future compositions of the organization, the separate votes of the commissioners, within the definition given by the Inter-American Court regarding speech of public interest, play a role in determining the scope and in guaranteeing the human rights set forth in the American Convention and, therefore, enjoy the reinforced protection to which reference has been made. Such recognition has important effects, as described in greater depth next.

### 1.1.2. The seventh operative paragraph represents a limitation on the exercise of the freedom of expression

The right to the freedom of expression, as it has been interpreted by the Inter-American Commission and Inter-American Court, encompasses the capacity of **each person** to choose and define the contents they wish to express, the tone or aesthetic of the message, and **the medium** by which to disseminate said contents.<sup>7</sup>

Under this logic the holders of the right to freedom of expression, concomitant to the power to choose the means of dissemination, define the scope, form, and possible target audiences. In this way, protected by Article 13 of the ACHR, among other instruments, they may circumscribe the issuance of their content to a very specific audience or, to the contrary, may, in selecting the means, seek to project the speech to a much wider group.

Given the importance of separate votes, collectively and in keeping with the Commission's Rules of Procedure, **their publication** has been the general rule, accordingly, the institutional media of the Commission have been identified as the means par excellence for commissioners to express their disagreement with majority decisions or arguments.

These media enjoy sufficient visibility, reliability, security, and seriousness for the members of the Commission, individually and collectively, to choose them for channeling their positions. In addition, the institutional media guarantee the legal dialogue, fostered by the dissenting positions, among the various compositions of collegial bodies over time.<sup>8</sup>

And now the seventh operative paragraph establishes the possibility of a majority of the members of the Commission (and not one who casts a dissenting vote) being able to agree upon "another modality, time frame, and way of accessing the respective separate vote." In other words, the provision being analyzed could change the means and the scale which, as indicated above, underlie that choice, i.e. by delimiting the scope of the content.

By providing expressly for changing the conditions for publishing separate votes, the possibility of selecting the medium is impacted – which, it should be noted, is not arbitrary, but it has also been delimited collectively in the context of the Resolution and as a derivation of the Rules of Procedure – and therefore the exercise of the freedom of expression is being expressly limited.

<sup>7</sup> I/A Court HR. Case of Herrera Ulloa v. Costa Rica. Judgment of July 2, 2004. Para. 109; I/A Court HR. Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. Paras. 145-147; I/A Court HR. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73. Para. 65; I/A Court HR. 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. Serie A No. 5. Paras. 31-33.

<sup>8</sup> I/A Court HR. Article 55 of the American Convention on Human Rights. Advisory Opinion OC-20/09 of September 29, 2009. Series A No. 20. Concurrent vote of Judge Sergio García Ramírez on Advisory Opinion OC-20/2009 of the Inter-American Court of Human Rights, September 29, 2009, on "Article 55 of the American Convention on Human Rights." In addition: I/A Court HR. Case of La Cantuta v. Peru. Interpretation of the Judgment on Merits, Reparations and Costs. Judgment of November 30, 2007. Series C No. 173. Separate vote by Judge A.A. Cançado Trindade.

While it is true that this right is not absolute, and, consequently, may be subject to limitation, I note that as the Inter-American Court has indicated, when speech addresses matters of public interest, and therefore enjoys reinforced protection, one should evaluate “the need to limit freedom of expression with special care.”<sup>9</sup>

### 1.1.3. The seventh operative paragraph does not meet the international standards applicable to the freedom of expression

According to Article 13 of the American Convention, any limitation on the freedom of expression must be *expressly provided for by law* and be necessary to ensure the aims expressly established by the American Convention, or, in other words, an imperative public interest or an imperious social need. Therefore, measures that restrict the freedom of expression should pursue collective objectives that are *so important that they prevail* over the social need for full enjoyment of the right established in Article 13 of the Convention.<sup>10</sup>

In addition, as has been indicated by the I/A Court HR, the authorities who establish restrictions on human rights and, in particular, the freedom of expression, should meet the requirements of suitability, necessity, and proportionality.<sup>11</sup> By virtue of the principle of legality, any limitation on this right should be previously defined clearly, expressly, and restrictively.<sup>12</sup>

The principle of **suitability** establishes that any restriction on the right to freedom of expression must be suitable for attaining a purpose that is legitimate under the Convention, which, in this case, is none other than the imperious ends contained in Article 13 of the Convention.<sup>13</sup> The principle of **necessity** implies that any limitations on the freedom of expression should restrict this right to the least extent possible, and that there *absolutely* must not exist any measure less cumbersome for the right to the freedom of expression among all those that are equally suitable for attaining the proposed end.<sup>14</sup> The principle of **proportionality** means that the sacrifice inherent in the restriction on the right to freedom of expression cannot be exaggerated or disproportionate to the advantages secured by that restriction and the attainment of the end pursued reaches the guarantee of other human rights or principles set forth in the Convention.<sup>15</sup>

The seventh operative paragraph renders flexible, without sufficient justification, the Commission’s judgment as to whether restrictions on freedom of expression are allowed by the Convention, insofar as it contemplates a wide open clause, *without expressly determining* in what situations a commissioner may make such a request, what criteria could be taken into account for weighing whether such a request is proper, without requiring that such a request be based solely on the *imperious ends* that the limitations may legitimately pursue, without

<sup>9</sup> I/A Court HR. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340. Para. 109.

<sup>10</sup> I/A Court HR. 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. 46. I/A Court HR. Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111. Para. 96. I/A Court HR. Case of López Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141. Para. 165.

<sup>11</sup> I/A Court HR. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340. Para. 102. I/A Court HR. Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2010. Series C No. 219. Para. 229. I/A Court HR. Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207. Para. 88.

<sup>12</sup> I/A Court HR. 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. 40.

<sup>13</sup> I/A Court HR. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340. Para. 124.

<sup>14</sup> I/A Court HR. 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. 46. I/A Court HR. Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111. Para. 96. I/A Court HR. Case of López Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141. Para. 165. I/A Court HR. Case of Norín Catrimán et al. (Leaders, Members, and Activist of the Mapuche Indigenous People) v. Chile. Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279. Para. 312.

<sup>15</sup> I/A Court HR. Case of Norín Catrimán et al. (Leaders, Members, and Activist of the Mapuche Indigenous People) v. Chile. Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279. Para. 312.



requiring that the limitation exhaust considerations of suitability, necessity, and proportionality. With this very broad clause one blurs the extensive inter-American case-law, as well as the many pronouncements by the Commission that have sought, valiantly and consistently, to close the doors to arbitrariness.

Now then, if one accepts for the sake of discussion that the provision analyzed makes it past the first level of evaluation and, therefore, meets the requirement of legality, it is essential to reflect on the existence of a legitimate end that supports the limitation imposed by the seventh operative paragraph.

Accordingly, I note that Article 13 of the American Convention defines **restrictively** legitimate ends for establishing a limitation on the freedom of expression. Accordingly, preserving the object and purpose of a pronouncement – the teleology that the provision analyzed says it pursues – does not represent a legitimate end that justifies the limitation on the freedom of expression.

Yet on the other hand, I consider that the message being sent with this provision is **very unfortunate**, for when may a separate vote so affect a pronouncement made by the Commission that demands actions aimed at “preserving” it? Since when are differences, criticisms, or pluralism seen as a threat to the Commission? Nothing could be further from the founding postulates of the inter-American system. Nothing is further from the struggle maintained by the Commission, aimed at vindicating counter-majoritarian speech and reinforcing those voices which, in difference, some have sought to silence.

The seventh operative paragraph seeks to limit how a commissioner may make known his or her positions in relation to the pronouncements of the Commission without clear or sufficient justification for doing so. The Resolution does not provide any answer to the question as to why in certain cases it could be inappropriate for the separate votes of the commissioners to be publicized to the same extent as they are in most cases.

I believe it is unfortunate that the decision of the majority presupposes that there are issues with respect to which any criticism must be buried, hidden, given no type of publicity. I emphasize that the legitimacy of the Commission and its *esprit de corps* has been edified by the practice of pluralism, inclusion, and, in effect, profoundly critical dissent, which day by day improves the work of this inter-American institution. Contributing to the legitimation and strengthening of the Commission necessarily implies publicity, transparency, criticism, and discrepancy.

#### 1.1.4. The seventh operative paragraph opens the door to censorship

The American Convention **expressly** prohibits censorship.<sup>16</sup> As interpreted by the Commission this conduct – which represents the most serious violation of the freedom of expression – is found in those scenarios in which, through prior control of the contents, an authority, agency, or entity impedes the dissemination of speech and/or urges that it be modified.<sup>17</sup>

Accordingly, the seventh operative paragraph opens up the possibility of committing acts of censorship, insofar as (i) it provides for the possibility of modifying access to a vote – which could imply the consummation of a barrier that impedes its dissemination; (ii) it does so prior to its issuance; and (iii) it stems from a prior consideration of the contents – for only after this exercise will one be able to reach the conclusion that the measure in question needs to be adopted in order to “preserve” the object and purpose of the institutional pronouncement.

<sup>16</sup> Article 13 of the ACHR; IACHR. The Inter-American Legal Framework regarding the Right to Freedom of Expression. Para. 146.

<sup>17</sup> IACHR. The Inter-American Legal Framework regarding the Right to Freedom of Expression. Para. 148.

I reiterate, first, that as the I/A Court HR has held, the seriousness of censorship increases when it harms specially protected speech – which includes separate votes.<sup>18</sup> Yet **I also emphasize that** censorship violates the individual and collective dimensions of the freedom of expression.<sup>19</sup>

Accordingly, scenarios such as these not only repudiate the individual facet of the rights of commissioners, but also negatively impact the freedom of society to access proactively, transparently, and pursuant to the principle of maximum dissemination of pluralist contents that directly impact the determination of the scope and contents of their rights and freedoms.

### **1.2. The seventh operative paragraph blurs the scope of Article 19 of the Rules of Procedure of the Inter-American Commission on Human Rights**

In addition to what is indicated above, the Resolution violates – now it does – *the object and purpose of Article 19 of the Commission’s Rules of Procedure*. According to what the article literally states – and it has remained unchanged since 1996 – a separate vote is a right that all commissioners have to state the reasons why they agree or disagree with the decision of the majority. One of the essential elements of the right to a separate vote is that the Commission must include the respective vote after the corresponding decision, report, or preliminary report.

A separate vote is, therefore, a right that protects minorities in the Commission and keeps the majorities from dissolving the opinions or convictions of commissioners with dissenting positions. Nonetheless, the Resolution expressly allows for the majorities to make the opinions of their peers – who have equal rights – disappear, without a clear basis for doing so.

The Inter-American Commission has held that “participation must not be confused with the will of the majority; on the contrary, using a human rights perspective, it requires, in particular, emphasizing meeting the needs and perspective of the groups that historically have been discriminated against....”<sup>20</sup> Paradoxically, with the seventh operative paragraph, the position of the majority accords priority to the will of the majorities over and above the individual rights to cast a separate vote and to the freedom of expression.

There is an unquestionable fact: majorities can express their opinions through those decisions with which they are in agreement. However, minorities will only have that same opportunity insofar as the majorities so allow. Accordingly, even though all the commissioners have freedom of expression, some commissioners will be freer than others to express themselves.

Article 19(4) of the Rules of Procedure establishes a general term of 30 days for issuing any kind of dissenting vote, without distinction, which indicates that the commissioners have enough time to prepare separate votes for the Commission to be able to publish them, independent of the decision.

Finally, I note that the Commission’s Rules of Procedure do not establish, in any way, the content of the seventh operative paragraph. Therefore, contrary to the purpose of the Resolution, which, according to Article 78 of the Rules of Procedure, is to *interpret*, the seventh operative paragraph resolves to *modify* the Commission’s Rules of Procedure without the proper participation or oversight of the States party to the American Convention.

<sup>18</sup> The Inter-American Legal Framework regarding the Right to Freedom of Expression. Office of the Special Rapporteur for Freedom of Expression. Inter-American Commission on Human Rights. Paras. 32 ff.; I/A Court HR. Case of López Lone et al. v. Honduras. Judgment of October 5, 2015. Para. 165.

<sup>19</sup> I/A Court HR. Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73. Para. 64.

<sup>20</sup> IACHR. Corruption and Human Rights: Inter-American Standards. OEA/Ser.L/V/II. Doc. 236. December 6, 2019. Para. 490.

## 2. Final reflections

Beyond the discrepancy described regarding the seventh operative paragraph, first, I state that mindful of the mechanisms for adopting decisions in the Inter-American Commission, its collegial nature, and the respect I have always expressed to my colleagues, I will abide by this resolution.

Second, and mindful that by virtue of the Resolution addressed herein, separate votes concerning, among other decisions, resolutions adopted by the Commission, should be published in keeping with Article 19(2) of the Rules of Procedure of the IACHR, I ask that this memorial be incorporated immediately after the text of the decision adopted by the majority.

Third, I emphasize that, as indicated expressly in the Resolution, the interpretation set forth in the text analyzed is **the one that will be operative going forward**. This implies that the statements in the preambular part regarding the practice of the Commission to date lack any legal effect, especially when at odds with the operative section.

Fourth, the Resolution only refers to making available institutional means for disseminating separate votes. I underscore that the decision addressed in this memorial does not address the possible dissemination by commissioners of their votes through private media such as private social networks. Pursuant to the foregoing, and in keeping with the protection offered by the freedom of expression, it is understood that the commissioners may define other private means of communication for making known the contents of separate or dissenting votes.

Finally, I value the fact that in keeping with paragraph nine of the operative part, it has been recognized that separate or dissenting votes on decisions involving “the referral of cases to the Inter-American Court; approval of requests for information pursuant to Article 41 of the American Convention and Article 18 of the Commission’s Statute; and the approval of press releases and statements on social media” may be published in the terms of Article 19(2) of the Rules of Procedure of the Commission.<sup>21</sup>

This interpretation of the Commission is correct from three points of view. First, it is correct insofar as the decisions identified in the ninth operative paragraph do not correspond to those defined in Article 19(3) of the Commission’s Rules of Procedure, which refers to decisions not in a separate document.

I note that the decisions described, including the pronouncements on social networks and the Commission’s press releases, *are in separate documents*, for when the IACHR publishes them in its official accounts or pages, it does not disseminate the document in which the discussion or decision within the Commission appears, rather it publishes an entirely different document – even if in digital format. Something else happens with decisions such as the definition of the agenda – with respect to which there may be disagreements, even substantive ones<sup>22</sup> – or the assignment of country rapporteurships,<sup>23</sup> which as per the rules do not require a separate document.

Second, I agree with including the ninth operative paragraph insofar as it better spells out the meaning of Article 19 of the IACHR’s Rules of Procedure which, at its first paragraph, considers that the members of the Commission have the right to present an explanation of their separate vote and for it to be published following the decision in question. Given that the definition of contents in social networks or press releases, as indicated above, is the subject of a collective decision insofar as it represents the institutional position of the Commission, it is understood that they are included in the category of the “decisions” of which Article 19(1) speaks.

Finally, I emphasize that the interpretation rendered by the majority position through operative paragraphs six and nine is also consistent with Article 29 of the American Convention, according to which, *inter alia*, no authority may interpret the provisions of the Convention – among them, Article 13 – so as to suppress or limit

<sup>21</sup> Ninth operative paragraph.

<sup>22</sup> Rules of Procedure of the IACHR. Article 10(1)(c).

<sup>23</sup> Rules of Procedure of the IACHR. Article 15(2).

the enjoyment and exercise of human rights and fundamental freedoms to a greater extent than provided for in the Convention, (principle of *pro homine* interpretation).

Had a different interpretation been adopted, restricting the possibility of publicizing the separate votes that stem from submitting cases to the Inter-American Court; the approval of requests for information; and the definition of press releases and pronouncements in social media, another limitation on the freedom of expression would have arisen that would have had a hard time meeting the requirements of legitimate end, suitability, necessity, and proportionality.

Accordingly, I especially value the forum for a sustained debate and the openness of the Commission and the Executive Secretariat to incorporating a large part of the proposals made in the context of the debate.