

THE EXPERT TESTIMONY BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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I. INTRODUCTION.....	567
II. CONCEPTUALIZATION.....	570
III. PRACTICE AND JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS.....	574
IV. CONCLUSION	580

I. INTRODUCTION

The purpose of this essay is to provide a review of the doctrine and jurisprudence of the expert testimony as a probatory medium¹ used by the Inter-American Court of Human Rights (ICHR, Court, Tribunal) in the issues presented before it. It is a universally accepted legal principle that courts have the duty of initiating the investigation of the facts presented before them in order to achieve proper administration of justice. The ICHR is not foreign to this obligation, not only because it is an international court, but because of its fundamental knowledge and essential nature to modern societies, it seeks the international protection of human rights.

Article 44 of the Rules of Procedure of the ICHR, relating to the probatory diligences, officiously grants broad powers to the Court when asserting that:

[T]he Court may, at any stage of the proceedings:

1. Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant;
2. Invite the parties to provide any evidence at their disposal or any explanation or statement that, in its opinion, may be useful;

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1. Cafferata Nores, José I., *LA PRUEBA EN EL PROCESO PENAL* 21 (Ed. Depalma 1986). “[T]he means of proof is the process established by Law intended to result in admission of the element of proof in the process.” (Editorial Note: Translated from Spanish).

3. Request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point. The documents may not be published without the authorization of the Court;

4. Commission one or more of its members to conduct an inquiry, undertake an in situ investigation or obtain evidence in some other manner.²

When it is so authorized by law that the Court, by its own motion, will procure every proof that it considers useful to request from the parties, entities, offices and authorities, the general legal principle of Freedom of Proof,³ made up of principles of freedom of object of proof,⁴ and Freedom of Means of Proof,⁵ basis of every probative system and narrowly linked to the valuation pursuant to the rules of constructive rational criticism, are welcomed.⁶

That pragmatic intention is derived from what is set forth in the Preamble of the American Convention on Human Rights, when it states that the American states signatories of the Convention have the “[i]ntention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect

2. THE INTER-AMERICAN COURT OF HUMAN RIGHTS: RULES OF PROCEDURE, OEA/Ser. L/V/111.3, doc. 13, corr.1 (1981), *reprinted in* 20 ILM 1289 (1980) [hereinafter The Rules].

3. Alfredo Vélez Mariconde, DERECHO PROCESAL PENAL 198 (Ed. Lerner). Views said principle in this manner: “The principle itself allows the penal process to follow the norm that everything can be proven and through any means, except that which the law specifically prohibits, which occurs in exceptional circumstances.” (Editorial Note: Translated from Spanish).

4. The freedom of the object of proof is recognized as the doctrine of *Thema Probandum*, but it is a freedom understood in terms that the events concern the process thus are in the Judge’s interest in the formation of his conviction.

5. The freedom of medium of proof is the possibility of appealing to any source of proof relating to the truth of the events to create the conviction or reasoning of the judge. Some legislation as sectors of the doctrine sustained the principle of the limitation in the mediums of proof, allowing in the process only those results that the law expressly indicates. Nevertheless, said proposition is not commonly shared and article 44 of the Rules of Procedures does not provide for such limitation.

6. Vélez Mariconde, *supra* note 3, at 361-363. “The method of free conviction or rational criticism (both formulas have the same meaning), consist in that the law does not impose general norms to credit some delinquent facts (as those relating to the body of the crime) nor does it determine the value of the evidence abstractly, but rather it gives freedom to the trier of fact to admit all evidence found to be useful to the clarification of the truth (in principle, everything can be proven and by any means), and to appreciate it according to the rules of logic, psychology, and experience.” (Editorial Note: Translated from Spanish).

for the essential rights of man.”⁷ Human rights in our time have become a sacred matter, because their recognition and respect is the basis for the support of the people, pivotal to the socio-economic development.

In the past, the expert testimony was unknown as a probatory means because the methods used were totally non-scientific; they were based on religious beliefs, fear, witchcraft, etc, as evidenced in the famous trials of God. In the mid nineteenth century, with the anthropological studies developed by Lambroso, the beginning of a new era was marked in the expertise field based upon an interest in knowing the causes of criminal activity; in finding suitable means of reinstating the criminal into society as a useful person; and in achieving more efficiency in clarifying the crimes before the high level of existent impunity was born. These factors forced the search of scientific methods of investigating crime.

The advanced technology developed during the end of the present millennium, has led to the birth of new techniques and the development of existing techniques in the field of investigation, of which the Courts of Justice have been witnesses. The latter have had to update themselves, promoting the modernization of legislation and a greater demand in the training of their officers in various fields of human knowledge. Nowadays, we have professionals and tribunals specialized in diverse disciplines.

The enrichment of the knowledge has become so broad that it is difficult to imagine in the early Twenty First Century the existence of geniuses such as Miguel Angel, Leonardo Da Vinci and many others that marked humanity's history for their in-depth and broad general culture in multiple fields. Presently, it is impossible to have extensive knowledge in all sciences, arts or techniques recognized by their level of development, which has enriched this field of study.

In recent years, scientific tests have been perfected such as the carbon 40, the DNA, blood groups and other important genetic markers in the field of the criminal, family, civil rights, as well as in other branches of the human knowledge such as biology, genetics, paleontology, archaeology and many others in charge of enriching the human knowledge.

Presently, the tribunals have at their disposal experts in medicine, social sciences, mathematics, business and other fields, so that before conflicts arise the court may utilize experts, as valuable assistants in the administration of justice, acquiring a more important role every day and strengthening this method of proof that is undergoing study.

It is important to divide the focus of the expert test, into a first part which is the conceptualization of the topic and then pass to the second part, in which reference is made to the jurisprudence and some practices of the Inter-American Court of Human Rights.

7. American Convention of Human Rights, Nov. 22, 1969, 9 ILM 673, OEA/Ser. K/XVI/1.1, doc. 65 rev. 1, corr. 1 (1970) para. 1 [hereinafter *The Convention*].

II. CONCEPTUALIZATION

The definition of "expert" is uniform in the doctrine. Experts are considered assistants to the judges⁸ which are necessary in discovering how to evaluate the elements of proof that are presented before them.⁹ It is necessary to have a specific knowledge in a science, art or technique.¹⁰ This knowledge should be generally unknown to the judge who, as director of the process, will determine whether this method of proof is relevant¹¹ and pertinent to achieve the access to the relevant information that such elements give him. The report that the expert renders is given different names: know-how, expert report, expert opinion or expert testimony. It is precisely this probative means that becomes a representation of a declaration of the expert's knowledge.

It is the duty of the judges to determine the necessity of asking for an expert's opinion in order to add to the record the specific knowledge that they lack. For that reason it is the judge's discretion to appoint the expert. The parties can request the expert test, but the ultimate decision rests on the tribunal. It is the duty of the tribunal to direct the methods of proof selecting the expert or experts to designate and indicate the specific point in which they must render a decision. This is why the experts have the right

8. Ricardo C. Nuñez, *CÓDIGO PROCESAL PENAL PROVINCIA DE CÓRDOBA* 230 (Marcos Lerner Eds. 1986). "The expertise is not like a testimony, an independent probatory element, but it always works as an accessory to establish or guarantee the existence or value of the evidence that cannot be noticed or appreciated thoroughly by means of observation and common knowledge." (Editorial Note: Translated from Spanish).

9. CAFFERATA NORES, at 14. "Element of proof, or proof, is all objective fact that is legally incorporated to the process, capable of producing a certain or probable knowledge about the particulars of the criminal imputation." (Editorial Note: Translated from Spanish).

10. *Id.* at 47. "The expert testimony is the means of proof used to obtain an opinion based in specialized scientific, technical, or artistic knowledge; useful for the discovery and understanding of the elements of proof." See also Víctor De Santo, *COMPENDIO DE DERECHO PROCESAL CIVIL, COMERCIAL, PENAL Y LABORAL* (Ed. Universidad 1995). "The expert, as noted, is an advisor that offers to the judges their specialized culture, different from the general and judicial of that of the judges. . . ." See also Eduardo J. Couture, *VOCABULARIO JURÍDICO* 146 (Ed. DePalma). "Assistants of justice, are those who, in exercising a public function or a private activity, are called upon to give an opinion about issues relating to their science, art or practice, thereby advising judges in subject matters foreign to the judges." (Editorial Note: Translated from Spanish).

11. 1 GIOVANNI LEONE, *TRATADO DE DERECHO PROCESAL PENAL* 181 (Ed. Jurídicas Europa-América, 1963). "Relevancy of proof means its contribution to the verification in course. This contribution does not necessarily have to be direct or immediate, even allowing it to be only gradual (thus, providing circumstances may be relevant in establishing the credibility of a witness). Relevancy of the proof means its possibility to concur, including mediate and indirectly, to proving; in substance, more than a positive characterization, it is a negative characterization, in the sense that it excludes evidence totally superfluous." (Editorial Note: Translated from Spanish).

of accessing the judicial file in which will be rendering their opinion as well as to the existent elements of proof. Also, the parties to the process have the right of initiative to indicate the areas in which the expert will have to address, indicating to the tribunal their points of interest based on the principle of burden of proof. From those points the tribunal will choose the ones that it considers pertinent and relevant.

The judges, responsible for their decisions, will determine if it is necessary to appoint an expert. If the judge has the necessary knowledge over the specific case, the judge is not forced to require the appointment of an expert. This finds its basis not only in the Principle of Procedural Economy, but also in the fact that the expert's opinion is not binding on the judge. Instead, the judge will appreciate said opinion pursuant to the rules of logic.¹²

The expert, as a technician, will have to have a professional title in the area in which he will render an opinion, except for those cases in which the discipline is not regulated. In the absence of said regulation, the tribunal shall apply a proper criteria in the selection, based on the experience, reputation, published studies, and experience in similar situations.¹³

If the expert opinion results in the fulfillment of irreproducible facts, it is necessary pursuant to the norms of due process and defense that the tribunal notify the parties and allow them to witness these studies, even with the assistance of their technical consultants.¹⁴ Therefore, the experts have to be notified by the tribunal about the necessity of communicating any act that is deemed to be impossible to reproduce in order that the parties may control the expert's work. In those cases in which the expert's opinion does not result in the fulfillment of irreproducible facts, the expert will render his opinion and the tribunal will grant the pertaining hearing to the parties so that they can make the necessary findings; requesting

12. William Corujo Guardia, *Pericia: Su Valoración Crítica*, 2 REVISTA URUGUAYA DE DERECHO PROCESAL 298 (1991). "The Expert is not the main subject of the process thus he is not concerned with outlining the *Thema Decidendum* (function of the parties) or to solve it (the Judge's function); his opinion is not binding and this approach has been sustained unanimously by Doctrine and Jurisprudence." (Editorial Note: Translated from Spanish).

13. Ernesto Abreu Gómez, *Perito y peritajes*, 9 REVISTA CRIMINALIA 572 (1969). "The expert testimony presumes in the person that will render it, the expert, an exact wisdom of the subject to be dealt with; that is not only what the expert requires, the expert requires an exact and concised knowledge in the field that he will study; under these conditions, it is very natural for the expert to be a person, recognized publicly as an expert in the field. But another attribute is still needed: Honesty. Honesty in experts is a basic commodity." (Editorial Note: Translated from Spanish).

14. The technical consultant is appointed by the interested parties to assist them and collaborate with the defense of their interests and is overseen by the attorney; it is important to note that it is a technical advisor unlike the lawyer who works with the legal part and is responsible for his client's interests.

additions, clarifications, and even, requesting another expert in case of a dispute.

The tribunal, as director of the process, will warn the expert of the obligation to avoid destroying, altering or in any other way modifying the elements of proof that are the subject of analysis. Therefore, if any of the aforementioned situations occur, the expert will need to have the pertaining authorization of the tribunal.

The expert should be warned when accepting the job, of his obligation of not communicating to the parties or any third party, the results of his conclusions and studies because the tribunal is entitled to be the first to know. As a result, we enter in the realm of loyalty to the tribunal, departing from the thesis that in the event of a violation of this obligation, the tribunal has the authority to annul the opinion as a consequence of the appointment that the same gave. It is considered that the expert should also maintain this loyalty after presenting his study, since the comments and opinions given off the record to parties of the process or to third parties endangers the judgment and its objectivity.

What derives from what is stated above is the fact that the expert opinions should be ordered by the competent tribunal to have probatory value. As a result, those carried out beforehand by the parties, such as the preparation of a demand or answer, lack of probatory effectiveness for being extrajudicial, in which case the parties may present them as testimonial proof.

When an expert is appointed, he must formally appear before the tribunal by making a written presentation within the terms granted to show his acceptance of the position and to swear to complete it faithfully. In this manner the expert is notified of his obligation of fulfilling his obligations with strict objectivity, thus giving clear, precise and sustainable statements in his opinion, never making assumptions or presumptions. In the event he is forced to make assumptions or presumptions he will explain the reasons for doing so.¹⁵

In some cases, because of the nature of the required expertise, the tribunal must appoint several experts so that they can elaborate on the

15. 3 JORGE CLARÍA OLMEDO, *TRATADO DE DERECHO PROCESAL PENAL* 331 (Ediar S.A. Ed. 1961). "The expert produces his opinion in an objective manner, giving rise to the conclusions as way of making intelligible an element of proof for which direct observation presented difficulties or left serious doubts about its significance." See also 2 HERNALDO DEVIS ECHANDÍA, *TEORÍA GENERAL PRUEBA JUDICIAL* 321, provides that "[t]he foundation of the probatory merit of the expert testimony resides in a concrete presumption, for the particular case, that the expert is sincere, truthful and possibly correct in his conclusion, when he is an honest, capable person, expert in the field; who has also carefully studied the problem presented for his consideration, has carried out his perceptions of the facts or of the probatory material of the trial with efficiency and has given his opinion on such perceptions and deductions that are concluded thanks to the technical, scientific or artistic rules of expertise known and applied to those ends, in an explained, motivated, and convincing matter." (Editorial Note: Translated from Spanish).

commended studies. In such cases, there is an implicit obligation in the experts to administer the tests jointly and to make their deliberations in a secret manner, drawing the opinion jointly if agreed upon. Otherwise, it should be done separately.

Today, the possibility that the expert's opinions be rendered by public and private juridical entities is broadly accepted. Consequently, it is common practice to request expert opinions from auditing companies and universities that carry out studies in diverse fields, such as agronomy, medicine, and pharmacy. Nevertheless, in order for the expert opinion to have probatory value, the interveners should accept the position and be properly sworn in by the tribunal, because otherwise, their probatory value would change,¹⁶ to either documental or testimonial proof.

In disputes where differences exist, like in an agrarian matter, the expertise of institutes is usually required to determine the agricultural vocation of country property. The most common cases in the judicial practice are in the areas of criminal, family and labor law, which studies in psychology, psychiatry, labor medicine, and trauma are required. In other areas they are requested from established public institutions and not to experts in specific areas, since it is already by law that they are official experts. In such cases, the experts are already properly sworn and sufficiently notified of their responsibilities.

As a rule, the expert's opinion must be presented in writing, and should include all observations, tests performed, methods followed, elements of proof observed and valued as well as any detail that would allow the Court and the parties to establish its degree of certainty. Also, the opinion must contain a chapter with conclusions that will allow the judges to know the final valuations to which the technician committed himself during his study. The expert is also committed to provide all additional information or clarification to his opinion, as well as to appear in Court, if necessary, to provide such information and clarification orally before the Court and the parties.

All experts, except the officials that already have an established compensation for their work, solicited by the Tribunal acquire with the execution of their responsibility, the right to be properly compensated for their work, to be notified previous to the acceptance of their position of the amount they will receive and to request, if necessary, approvals to incur additional expenses and rearrange their fees. The above-mentioned is an obligation of the proposing party initially so that after the resolution of the case, when calculating the costs, the appropriate party may proceed to

16. See 2 MARIO A. ODERIGO, *LECCIONES DE DERECHO PROCESAL PENAL* 204 (Ed. Depalma 1971). "Certain Juridical, public or private entities, such as academies and universities, can be consulted about science, art, or industry, requesting from them the information that will have certain probatory value, proportionate to the authority of the people which integrate them, but they will represent expert testimony, in the precise legal sense." (Editorial Note: Translated from Spanish).

the tribunal to make the unsuccessful party pay for these costs or to absolve it from paying such costs.

III. PRACTICE AND JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Article 44 of the ICHR's Rules of Procedure sets forth the principle of the freedom of proof and its valuation which must conform the rules of logic.¹⁷ Regarding said principle of the freedom of proof used in jurisprudence, the ICHR is of the view that "[i]nternational jurisprudence has reconquered the power of the courts to weigh the evidence freely, although it has avoided a rigid rule regarding the amount of proof necessary to support a judgment."¹⁸

Regarding the system of valuation that the ICHR has been applying, based on the reasoned opinions, it has been established by jurisprudence that "[t]he Court must determine what the standard of proof should be in [each] case. Neither the Convention, the Statute of the Court nor its Rules of Procedures speak of this matter."¹⁹ Indeed, after reviewing the Court's legal instruments, we do not find any specific norm on the issue, and the Court's case law is considered appropriate since it completely adjusts itself to the spirit of article 44 and other modern doctrines.

The Court, when valuing the proof, has come to apply the reasoned opinion as a criteria of valuation and has given foundation to its application.²⁰ The jurisprudence of the Court that the valuation of the proof according to the reasoned opinion's rules will allow the judges to arrive to the conviction about the truth of the alleged facts.²¹ The ICHR has reinforced article 44 given its condition of international tribunal of human rights, indicating that the criteria of appreciation of proof:

[Has] the greatest amplitude, because the determination of the international responsibility of a State for violation of the person's rights, allows the Tribunal a greater amount of flexibility in the valuation of the proof rendered before it in regards to the

17. The Rules, *supra* note 2, art. 44.

18. Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), para. 127. See also Godínez Cruz v. Honduras, Judgment of January 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989), para. 133; Fairén Garbi v. Honduras, Judgment of March 15, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 6 (1989), para. 130.

19. Velásquez Rodríguez, (Ser. C) No. 4, para. 127; Godínez Cruz (Ser. C) No. 5, para. 133; Fairén Garbi, (Ser. C) No. 6, para. 130.

20. Velásquez Rodríguez, (Ser. C) No. 4, para. 129; Godínez Cruz (Ser. C) No. 5, para. 135; Fairén Garbi (Ser. C) No. 6, para. 132.

21. Paniagua Morales et al. v. Guatemala, Judgment of March 8, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 37 (1998), para. 76.

pertaining facts, in accordance with the rules of the logic and based on experience.²²

The American Convention on Human Rights as well as the Statute and Rules of Procedure of the Court, do not adequately regulate the means of proof commonly used in the processes before this Tribunal, such as the documental, testimonial and expert testimony. Only in Chapter IV of its Rules of Procedure does it refer to the topic of proof in articles 43 through article 54 inclusive, but in a very general way, forcing the Court to resort to the doctrine and international practice that has become concrete in each of its decisions.

In the aforementioned chapter, in connection with the expert testimony, it is established that the expenses will be covered by the party that prolongs it.²³ It is necessary to point out that the practice has been that the Court itself has rarely ordered an expert test. In the majority of the cases, the interested party has been the one that has not only offered the evidence, but also the one who has indicated the technician that the Court will appoint as an expert so that the expert can render the opinion and also take charge of covering the corresponding expenses.

This practice could be modified so the Court could use a list of professionals in diverse disciplines that have been previously chosen by means of convocation systems for the integration of the same. In this manner, the Tribunal will appoint the expert and the interested party will be limited to request the area of practice and to cover its expenses. This system guarantees even more the objectivity in the realization of the expert proof, which was conceived as auxiliary to judges and as necessary proof when specific knowledge is required for a specific problem.

Allowing the parties to appoint the expert has led to problems in terms of credibility of the evidence, since in some cases the experts treated general topics instead of themes relevant to the "thema probandum" of the matter. This is against the principle of "iura novit curia." Said practice prevents the Tribunal from directing the expert opinion and giving it the proper treatment. Further, this test is not that of an expert opinion, but rather of testimonial proof, because the experts assigned in this manner are not assistants to the Judges, but rather witnesses of the appointing party thereby weakening the credibility of the expert testimony, since there may be a subjective focus in the studies to convince the Tribunal, thus, lacks the necessary objectivity that characterizes technical reports, and ultimately hurts the administration of justice.

22. Blake v. Guatemala, Judgment of January 24, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 36 (1998), para. 50; See also Loayza Tamayo v. Peru, Judgment September 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997), para. 42; Castillo Páez v. Peru, Judgment of November 3, 1997, Inter-Am. Ct. H.R. (Ser. C), No. 34 (1997), para. 39.

23. Rules, *supra* note 2, art. 45.

In a number of cases, the expert testimony is presented orally at the public hearings rather than in writing. The oral expert testimony is inconvenient to the Court as well as for the opposing party. The Tribunal's right to govern the expert testimony in terms of relevancy and credibility is weakened. Additionally, it prejudices the intervening parties who will hear an oral testimony with all its technicalities without a written copy. This prevents a complete understanding which would allow control of the expert testimony by means of questioning that may clarify, provide adequate explanations, and even to determine the need for a new expert.

Indeed, expert testimony by definition is technical. Not only the judges, but also the parties, and their lawyers lack knowledge in those sciences, arts or techniques. Consequently, in order to provide an adequate defense and due process rights, the parties should be allowed to have the expert's opinion in writing so that the technical consultant may evaluate and control what the expert stated. When the expert testimony is presented orally at a hearing, the party's rights are limited as opposed to if a written report would be provided which the expert must defend at the hearing while the party is exercising the right to a defense. The party could, for example, rebut with an opinion from another expert.

The problem of the oral expert testimony is tied to the practice that the interested party proposes the expert, since it could generate inequalities among the parties that affect the due process as a whole. That is because the proposing party could have had previous comments, which would allow it to know in advance what would be said at the public hearing. Consequently, one party has a primary focus, which the opposing party lacks. This results in an inequality between the parties. Said practice also compromises the expert in his role as auxiliary of the judges and in his commitment of expert loyalty.

In practice, the Court omits the formality that the technicians accept the position like a procedural act prior to surrendering their expert testimony. This is the consequence of not being appointed, it is only under these circumstances that the interested party offers the expert and the technician, the Court summons him and he appears at the public hearing, where he is sworn and renders an opinion.

The acceptance of the position is an essential formality for the expert testimony along with the oath, for when the expert is under oath he is committed to present the opinion and to complete his tasks faithfully and strictly to his technical knowledge. Furthermore, the expert will have the obligation of presenting the report in writing, as well as to appear before the public hearing if required by the Tribunal to make any explanation or clarifications to his testimony which may even be done in writing, thus reinforcing the principle of community of the proof.²⁴

24. It arises from the concept that the expert evidence together with the testimonial and documentary proof, are the fundamental evidence of the whole process and consequently, it is necessary that appropriate and precise regulations exist regarding their practice. The principle of

In accordance with the practice followed by the ICHR, the expert offered by the proposing party and properly summoned by the Court to appear at the public hearing does not always appear. The expert's failure to appear can be avoided by requiring previous acceptance. The Court has the power to propose sanctions by means of its internal legislation. However, when there is no acceptance, the expert can avoid these sanctions because he did not sign an acceptance and was not sworn.

The practice of having experts render live testimony appears to have used the oath as part of the expert's acceptance of the position before the Court. The oath found in article 37 of the Rules of Procedure states that "I swear or I solemnly declare that I will discharge my duty as an expert witness honorably and conscientiously."²⁵ This oath or declaration set forth in article 37 of the Rules of Procedure has to be completed before the Court, the President or other judges that act for on its behalf. Regulating the oath in this manner, we find that it has promising character since it is taken before the expert testimony is presented. So the assertive oath is not permitted after the opinion, affirming having said the truth, since the formula "I will discharge my duty as an expert" is stated in the future tense.²⁶

It is necessary to make the distinction in the practice of the Court, between the act of the acceptance and that of the oath. Although they can be carried out in one act, they are not the same thing. The doctrine is unanimous in considering that the purpose of the oath is to give "a guarantee of the conscientious severity of its tests and of the sincerity of his science and to set forth all the means to respond reasonably and positively to the questions that have been asked."²⁷ This is the true commitment of expert fidelity.²⁸ In contrast, the acceptance is a commitment in expert matters that binds the acceptor to the Tribunal in such a way that the failure to fulfill the obligations makes the expert subject to sanctions that the Court may set in accordance with article 51 of its Rules of Procedure, which states that "[t]he Court will be able to request to the States that the State apply the sanctions that its legislation sets forth against those who do not

the real or material truth requires the elements of proof brought to the process by the parties to be common so that it will not be evidence which will only favor its presenter, but rather it is incorporated to the process as a whole, for the investigation of the truth.

25. Rules, *supra* note 2, art. 37.

26. *Id.*

27. Mittermair, TRATADO DE LA PRUEBA EN MATERIAL CRIMINAL 154 (1929).

28. Nuñez, *supra* note 7, at 23. "The expert loyalty implies the duty to affirm the truth, not to deny it, and neither to omit it in his report about the matters to deal with. The non-fulfillment of this duty, besides subjecting the expert to disciplinary sanctions of administrative nature (if an expert in official capacity) or professional nature, is punishable as a crime. . . ." *Id.* (Editorial Note: Translated from Spanish).

appear or refuse to depose without legitimate reason or that, from the Court's standpoint, have violated their oath."²⁹

In the acceptance it is implicit the nonexistence of reasons for recusation or inhibition that could prevent the expert from accepting the position, or else the expert is not aware of any. Having knowledge of these and omitting them in a deceitful manner would make the rendered expert opinion null. The acceptance should always be given by the expert in written form by means of a document directed to the ICHR and presented in the terms set forth in article 26 of the Rules of Procedure, presented personally, via courier, facsimile, telex, mail or any other method generally used. Once the acceptance has taken place, the Court will proceed to the ceremony of swearing in.

In regards to recusation and inhibitions, the doctrine and jurisprudence of the Court agree to apply upon the experts the same rules regulating the judges. This is because of their role as assistants to the judges, as set forth in article 19.1 of the Statute.³⁰ Article 49.1 of the Rules of Procedures provides this position stating that "[t]he reasons for the impediment for the judges set forth in article 19.1 of the Statutes will be applicable to the experts."³¹

In the jurisprudence of the ICHR, there have only been a few cases where recusation and inhibitions were invoked. We find no precedence where recusation has been accepted and the technician been separated. When rejecting the recusation, the Court has always presented its declarations reserving itself the right to reevaluate them at later time.³²

The jurisprudence and practice of the Court are evidence that the Court and the parties have made great use of the expert testimony. Particularly, it has played an important role in cases of damages to determine the material damages and the moral damages. Inside the *sui generis* practice of the expert testimony before the Court, the presentation of written report in certain cases³³ has been used, especially when the ICHR has ordered it. Nevertheless, the custom is the oral presentation rendered in a public hearing.

In reparation matters, the Court in the *El Amparo* case, considered pertinent the use of the professional services of an expert to determine the

29. The Rules, *supra* note 2, art. 51.

30. ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 27, OEA/Ser. L/V/11.50, Doc. 6 (1980), reprinted in 19 ILM 635 (1980) art. 49.1 [hereinafter the Statute].

31. The Rules, *supra* note 2, art. 49.1.

32. *Aloeboetoe v. Suriname*, (Reparations) Judgment of September 10, 1993, Inter-Am. Ct. H.R., (Ser. C) No. 15 (1993), paras. 32, 35, and 37

33. *Fairén Garbi*, (Ser. C) No. 6, para. 55.

amounts to reimburse.³⁴ The Court according to its broad powers in matters of proof appealed to the expert testimony.³⁵ The Court used a mathematical expert who rendered his report in writing. It is also important to point out that the Court while applying its broad powers of valuation and using the rules of logic, based the compensation, indicating the application and interpretation that it makes from the report and sets the criteria for reparations based on said rules.

There are cases which are against the principle "*iura novit curia*."³⁶ For example, the judgment in the Loayza Tamayo case of September 17, 1997, it was considered that the experts report about doctrinal points of importance, but that for the principle "*iura novit curia*," they were not relevant, because they are common knowledge among jurists. Said expert testimonies were offered by the interested party, and this prevents the Court from exercising control of relevance and pertinence.

The Court in the Castillo Páez case, found the expert testimony relevant and pertinent.³⁷ Here one has an expert testimony helpful for the investigation of the real or historical truth of the facts for a correct administration of justice and true assistance to the tribunal, in this case, the ICHR. The Court sometimes requires experts that point out the most recent legislation and its application in the internal law of a State. In said situations, there is no contradiction with the principle "*iura novit curia*", since the Court, as an international tribunal, requires knowledge of the law to evaluate the evidence presented by the parties.³⁸

In the jurisprudence of the Court, different areas of expertise may be found. For example, in the Godínez Cruz case, an expert was used to determine the presumed moral damage invoked by the Inter-American Commission of Human Rights. The Court found that the expert testimony proved that the victim's immediate family suffered moral damages for which they should be indemnified.³⁹ This cite also proves the value that the Court places upon the expert, as a form of evidence, to create its

34. El Amparo v. Venezuela, Judgment of September 14, 1996, Inter-Am. Ct. H.R., (Ser. C) No. 28 (1996), para. 12 and 28. See also Neira Alegria v. Peru, Judgment of September 19, 1996, Inter-Am. Ct. H.R., (Ser. C) No. 29 (1996), para. 34.

35. El Amparo, (Ser. C) No. 28, paras. 12 and 28.

36. Loayza Tamayo, (Ser. C) No. 33, para. 45(h)-(i).

37. Castillo Páez, (Ser. C) No. 4.

38. Paniagua Morales, (Ser. C) No.37, para. 67(i)(j)(k). See also Loayza Tamayo, (Ser. C) No. 33, para. 45(j) and Suárez Rosero v. Ecuador, Judgment of November 12, 1997 (Ser. C) No. 35 (1997), paras. 23 (e) and 29, in this case the Court embraced the expert testimony fully stating so in the valuation given to the evidence in their point 30: "[t]he testimony of the witness, Mrs. [C.A.] and the doctor [E.A.G.]'s expert testimony were not objected to by the State and, therefore, the Court takes as proven the facts declared by the former, as well as the considerations made by the expert on the Ecuadorian Law." (Editorial Note: Translated from Spanish).

39. Godínez Cruz, (Ser. C) No. 8, paras. 49 and 50. See also Velásquez Rodríguez, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989), paras. 51 and 52.

conviction on a specific case. There are precedents of expert testimony ordered by the ICHR to better resolve cases.⁴⁰

Similarly, an expert test was ordered in the Fairén Garbi and Solís Corrales cases. In both cases, the expert testimony was useful for the Court as means to determine the real facts. In the case of Fairén Garbi and Solís Corrales the testimonies served as part of the foundation of the Court to prove that the State was not responsible for the disappearance of the victims.⁴¹ In the Gangaram Panday case, the expert testimony together with other evidence gave indications to discard the possibility that the victim had been tortured.⁴²

Finally, article 50 of the Rules of Procedure regulates the protection of the experts that have submitted their opinions before the Court, which states that "[s]tates may neither institute proceedings against witnesses or expert witnesses nor bring illicit pressure to bear on them or on their families on account of declarations or opinions they have delivered before the Court."⁴³ The existence of this protection is important because of the nature of the matters that the Court deals with. The experts render reports on matters of political or social transcendancy for diverse sectors of society. Thus, the safety of the experts and their relatives will only be guaranteed by the above-mentioned protection.

IV. CONCLUSION

It is considered that in view that the Court, for over eighteen years, in the cases for its consideration, have examined numerous expert tests rendered in diverse fields. Therefore, it is necessary to establish, based in the jurisprudence of the Tribunal and the doctrine, the pertaining rules as regards expert testimony to strengthen the rights to a defense and due process.

Moreover, the expert is a method of proof that has acquired great importance, due to the success that the diverse arts, sciences and techniques have had in this century. This success has allowed the same to develop as auxiliary of the judges for the administration of justice.

The Inter-American Court as an international tribunal counts with more flexible parameters for the employment and valuation of the proof, by virtue of its nature and matter. The American Convention on Human Rights, the Statute, and the Rules of Procedure of the Court do not contain precise norms that regulate its use. By virtue of the above-mentioned, the Court, through its jurisprudence has determined the approaches as regards to admissibility, realization and valuation of proof, which was cleverly

40. Gangaram Panday, Judgment of January 21, 1994, Inter-Am. Ct. H.R. (Ser. C), No. 16 (1994), para. 30. See also Fairén Garbi, (Ser. C) No. 6, para. 38.

41. Fairén Garbi, (Ser. C) No. 6, para. 156.

42. Gangaram Panday, (Ser. C) No. 16, para. 56.

43. Rules of Procedure, *supra* note 2, art. 50.

made according to the principles of the freedom of proof and the rules of logic.

It is considered convenient that certain changes be introduced in the practice of the expert testimony, so that the Tribunal is responsible for appointing the experts. Also, it is necessary to regulate the formal act of acceptance of the position, differentiating it from the oath to guarantee the rendition of the expert opinion and that otherwise, article 51 of the Court's Rules of Procedure may be applied. The technical nature of the expert testimony should be regulated so that the opinion is presented in writing, with the obligation of providing explanations or clarifications and the commitment to appear at a public hearing if necessary.