VI Inter -American Moot Court Competition

BENCH MEMORANDUM

Pagura Workers' Union et al. v. State of Alta Caledonia

I. INTRODUCTION

As outlined in the hypothetical, the Inter-American Court of Human Rights (hereinafter IACtHR, Inter-American Court, or the Court) has decided to hear the arguments of the parties on preliminary matters and the merits of the case in a single hearing.

Accordingly, it is expected that the respective team representatives deal, in both their written and oral presentations, with all of the relevant points raised in the hypothetical case.

In this bench memorandum, only the issues considered most problematic will be addressed. Many of them are related to the enforceability of social rights and to the recent entry into force of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)[1]. Neither of these issues has been dealt with extensively by the organs of the Inter-American system, reason of which jurisprudence on them is limited.

First, the relevant facts will be summarized; next, the admissibility questions deemed most complicated will be addressed; finally, the merits of the case will be discussed. On admissibility matters, the memorandum will first deal with the arguments favorable to the

III. ADMISSIBILITY

Three main problems concerning the admissibility of the IACHR's claim can be identified:

1. The contentious subject matter jurisdiction of the IACtHR to apply the provisions contained in articles XI (right to the preservation of health and well-being) and XIV, first paragraph (right to work under proper conditions) of the American Declaration of the Rights and Duties of Man.

2. The contentious subject matter jurisdiction of the IACtHR to apply the provisions contained in article 8 (trade union rights) of the Protocol of San Salvador.

3. The contentious personal jurisdiction of the IACtHR over a labor union as a "victim".

concerning the interpretation and application' of its provisions (article 62.3)"[4] and established that the American Convention had only granted jurisdiction to the Court "to determine the compatibility of the acts or norms of the States with the Convention itself and not with the Geneva Conventions of 1949."[5]

In the same case, the IACtHR further held that the Commission itself lacked jurisdiction over this area, indicating that, "Although the Inter-American Commission has broad powers as an organ for the promotion and protection of human rights, it is clear from the American Convention that proceedings initiated in contentious cases before the

provisions of the Declaration, in accordance with the practice followed by the organs of the OAS.[8] The Court concluded that, "[i]n view of the fact that the Charter of the Organization and the American Convention are treaties with respect to which the Court has advisory jurisdiction by virtue of Article 64(1), it follows that the Court is authorized, within the framework and limits of its competence, to interpret the American Declaration and to render an advisory opinion relating to it whenever it is necessary to do so in interpreting those instruments."[9]

Consequently, the current state of the issue seems to indicate that the competence of the IACtHR in its advisory role is extended without question to the ADRDM, but that it is limited in its contentious activity to the examination of those rights considered exclusively in the ADHR.

The correctness of this standard as applied to the rights involved in the hypothetical case is an issue on which the parties' positions differ, and one which they should argue.

The State's Arguments

The text of the ACHR provides that the Inter-American Court, in the exercise of its contentious jurisdiction, can only deal with violations of the ACHR, provided that the States Parties to the case recognize or have recognized such jurisdiction by special declaration or by a special agreement (see article 62.3 of the ACHR).

Article 63 of the ACHR, which expressly determines the contentious jurisdiction of the Court, does not allow for divergent interpretations, since it does not make reference to the ADRDM and restricts its scope to the rights contained in the ACHR.

The ACHR, like every international treaty, must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose (article 31 of the Vienna Convention on the Law of Treaties).[10]

[8] See Inter-Am.Ct.H.R. Advisory Opinion No. 10, OC-10/89 of July 14, 1989, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the A fTJ 0-4(e .542paR(dv)12aon)2(O)5432(O)5-1.181 TD (A)Tj ifact <</Attach /TT0 1 Tf8Tf 12 -0 0 12 90 192.184.8 Tr

The Court has held that the method of interpretation provided for in the Vienna Convention on the Law of Treaties "...respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation."[11]

Therefore, if the signatory States had accepted the contentious jurisdiction of the IACtHR with respect to the rights enshrined in the ADRDM, they would have done so either tacitly or expressly.

Within international law, as well as within international human rights law, the principle of consent is of particular consequence. Article 34 of the Vienna Convention on the Laws of Treaties establishes that: "A treaty does not create either obligations or rights for a third State without its consent", and the Court itself has set forth this principle in many of its decisions.[12] The value of this principle is readily appreciated insofar as assumptions of responsibility for the State's prior conduct are based upon it (estoppel).[13]

Respect for the IACtHR's jurisprudence also requires the exclusion of its jurisdiction here. The IACtHR is the ultimate organ competent to interpret the norms of the ACHR, and in these terms, compliance with the Convention demands the observation of the Court's opinions. Most relevant here, the arguments of the Las Palmeras case preclude a conclusion in favor of the jurisdiction of the IACtHR over the rights enshrined in the ADRDM.

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[11] Inter-Am.Ct.H.R., Advisory Opinion No. 3, OC-3/83 of September 8, 1983, para. 50. Applying the above-

It is not correct to assert, as the Commission has[14], that article 29(d) of the ACHR requires the application of the ADRDM by the Inter-American Court in the exercise of its contentious jurisdiction.

Article 29 of the ACHR governs the principles of "interpretation" relating to the provisions of the ACHR, but does not establish the scope of the obligations of the State whose violation the Court might examine[15].

This norm provides that:

"No provision of this Convention shall be interpreted as:

(...) d) excluding or limiting the effect that the American Declaration on the Rights and Duties of Man and other international acts of the same nature may have."

In the Court's own jurisprudence there is a difference between the interpretation of a treaty and its application. Otherwise, there would be no coherence to the Court's affirmations in OC-1 that, in the exercise of its advisory jurisdiction, it can interpret treaties other than the ACHR[16] and its decision in Las Palmeras, in which it declared its lack of competence to apply the Geneva Conventions[17].

The definition of the scope of intervention of the courts is natural in any legal system. The international legitimacy of the Inter-American Court as a judicial organ is based on the restriction of its jurisdiction to the application of certain international norms accepted by the States bound by its decisions.

Finally, even when it is asserted that the ADRDM is customary international law, it cannot be said that there exists an additional norm of customary international law which gives the Court contentious jurisdiction over it. The mere verification of the existence of a customary norm of human rights does not suffice to assert that an international tribunal which has competence in the application of a regional treaty possesses, for this sole reason, competence for its direct application without the consent of the obligated State.

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[14] See infra., on the same point, "Arguments of the Commission."
[15] See Inter-Am.Ct.H.R., Las Palmeras, para. 33.
[16] Inter-Am.Ct.H.R., Advisory Opinion OC-

provisions of Article 29(d), these States cannot escape the obligations they have as members of the OAS under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto.[21]"

Consequently, the ADRDM contains legal obligations for the States Parties to the Convention and it is within the Court's role to apply it to the conduct of such States.

This was the opinion of the Inter-American Commission in declaring its own competence to directly apply the provisions of the ADRDM, by virtue of article 29(d) of the ACHR, to a State Party to the ACHR.[22] Alluding to the Court's Advisory Opinion OC-10, the Commission expressed that, "... once the Convention entered into force in the State, it, and not the Declaration, became the primary source of law applicable by the Commission, provided that the petition refers to the alleged violation of rights which are identical in both instruments and does not involve a continuing violation."[23]

The Commission was vested with competence to examine violations of the ADRDM by virtue of the mandate granted by the OAS Charter relative to the States Party to the Organization. Nevertheless, in its report the Commission did not base itself on this authorization, but rather considered the text of the ADRDM applicable via article 29 of the ACHR. In other words, without prejudice to its competence as an organ of the OAS, it passed judgment on violations of the ADRDM by virtue of the American Convention exclusively.

These reasons support the assertion that the American Court, competent only with respect to the rights contained in the ACHR, can also apply the ADRDM by virtue of the Convention.

Of particular interest here, the Commission expressed "that the rights to health and well-being (article XI) and to social security as it relates to the duty to work and contribute to social security (articles XVI, XXXV and XXXVII) enshrined in the Declaration, are not protected specifically in the Convention. The Commission considers that this circumstance does not exclude its jurisdiction over the subject matter, since by virtue of article 29(d) of the Convention 'no provision of the Convention shall be interpreted as excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.'" As such, the Commission will examine the allegations of the petitioners regarding violations of the

[21] Id., para. 46.

[22] See IACHR, Report No. 03/01, Case No. 11.670, Aníbal Menéndez, Juan Manuel Caride y otros, Argentina, January 19, 2001 (OEA/Ser.L/V/II, Doc. 20). In this report the IACHR issued a determination on the admissibility of the petition.

[23] Id., para. 41. In this opinion the IACHR found that,

Declaration."[24] Thus, the text of the American Convention itself supports the competence of the Inter-American Court in the case.

This line of argument is firmly based in the logic of the ACHR itself, if we observe the manner in which the states of exception are regulated. The suspension of guarantees provided in article 27 may be adopted only under certain circumstances, among others:

"... provided that such measures are not inconsistent with its other obligations under international law..."

Therefore, in the exercise of its contentious jurisdiction, the IACtHR must apply and consider the law of treaties other than the ACHR when faced with a State's alleged violation of the rules regulating the suspension of rights.[25] In this context, it is impossible to distinguish between "interpreting" the other treaties and "applying" the ACHR. Likewise, it cannot be asserted that the scope of the ACHR can be interpreted, in terms of article 29(d), without applying the ADRDM.

In numerous cases, discerning a violation of the ACHR also involves the Court's verification of a State's violation of one of the rights enumerated in another instrument. The denomination assigned to this jurisdictional task - whether it be "application" or "interpretation"- does not shed any light on the content of the rule which binds the state, which, in any case, as a final resort, will always be the one contained in the ADRDM.

Furthermore, it must be noted that the ADRDM

For this reason it can also be argued that the Las Palmas decision does not apply. The historical circumstances linking the ADRDM to the ACHR and the nexus that ACHR article 29(d) expressly establishes require a discussion of the question from another point of view which is less restrictive, and related to the progressive interpretation which must govern the philosophy of human rights. It is clear that no human rights treaty established outside the inter-American human rights system can be assimilated into the American Declaration.

On the other hand, the ADRDM today is customary international law, with binding force, and the IACtHR must be competent to declare the violations of its provisions, since the affirmation of a right is meaningless if no tribunal exists for its application. The recognition of a subjective right involves the imposition of obligations upon the passive subject as well as the ability to demand enforcement in a court of law.

This interpretation of article 62.3 of the Convention, in light of article 29, far from rigid and formal in tenor, is what the pro homine principle demands. As stated by the Inter-American Court, "[i]n the case of human rights treaties, moreover, objective criteria of interpretation that look to the texts themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the Parties. This is so because human rights treaties, as the Court has already noted, 'are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States'; rather 'their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States.' (The Effect of Reservations on the Entry into Force of the American Convention (Arts. 64 and 75) (Inter-Am. Ct.H.R., Advisory Opinion OC-2/82 of September 24, 1982, Series A No. 2, para. 29)."[27]

2. The contentious subject matter jurisdiction of the Inter-American Court to apply the provisions contained in article 8 [trade union rights] of the Protocol of San Salvador.

General considerations and applicable law.

The Commission considered that the State of Alta Caledonia was responsible for the violation of its international obligations based on "the failure to recognize the Pagura Workers' Union as the majority union and to grant it the corresponding bargaining agent status" and on "the dismissal and subsequent denial of reinstatement of the 13 workers."[28]

Among the norms that the Commission considered to have been breached were those found in article 8 of the Protocol of San Salvador:

" The States Parties shall ensure:

a. The right of workers to organize trade unions and to join the unions of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;

b. The right to strike."

Article 19(6) of the Protocol ("Means of Protection") provides that:

"Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights."

In view of these norms there does not appear to be any admissibility problem with respect to the recognition of the UTP as a union with bargaining agent status, according to articles 8(1)(a) and 19(6) of the Protocol. At the same time, the contentious jurisdiction of the Inter-American Court seems prima facie debatable with regard to the workers' strike, in that the right to strike provided in article 8(1)(b) is not contemplated in article 19(6) of the Protocol.

[28] Paragraphs 26 and 27 of the hypothetical case.

8(1)(a) of the Protocol.[29] It is not difficult to recognize that certain strikes have a strong trade union content, such as protests over working conditions or those aimed at obtaining wage increases. Other strikes respond to other purposes, for example, those meant to show the solidarity of workers with other social movements, or support for a political party. The former touch upon both provisions of article 8.

Once this assumption is made, the argument for affirming the competence of the IACtHR in this case becomes more clear.

Without prejudice to the conclusion that should be made upon analyzing the merits, it is clear that the events under examination can be seen as an act of protest seeking the consolidation of a trade union organization, and therefore must be analyzed within the framework of trade union rights.

Trade unions in their formative stage do not have other tools for their consolidation. In general, until they receive certain normative recognition, they lack powers of negotiation and their scope of action is relatively reduced.

Nevertheless, if a standard is set by which groups in their infancy lacked all force of action, a rigid regime of trade union representation would be established, and this would definitively infringe upon the right to organize trade unions. In this context, it must be recalled that one of the few measures of action within the reach of groups in formation is the strike.

From this it follows that the State which does not guarantee trade unions in development the possibility of carrying out actions pertaining to labor politics does not guarantee trade union rights, since the possibility of taking the first step in the founding process of a labor organization is not ensured by the State.

Supporting this view, the Inter-American Commission has said that:

"The right to strike and the right to collective bargaining, although not specifically enumerated in the American Declaration of Human Rights, are closely related to fundamental labor rights. Furthermore, article 43 [44(c)] of the Charter of the Organization of American States declares that, '[e]mployers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike.' In view of this, the Commission considers that the right to strike and to bargain collectively must implicitly be considered basic collective rights."[30]

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[29] The ECHR has recognized that in many cases the violation of one right necessarily implies the infringement of another, reason which supports this position. On this point, see in the following pages the citations to cases dealing with the absence of useful information and the right to life or to health.

[30] IACHR, Seventh Report on the Human Rights Situation in Cuba, 1983, OEA/Ser.L/V/II.61, Doc. 29, rev.1, October 4, 1983, pp. 159 & 160, paras. 52 & 53.

Coincidentally, the Committee on Freedom of Association of the International Labor Organization (ILO)[31] considers that the right to strike is included in the right of trade unions to “organize their activities” and “formulate their own plan of action” in defense of the workers’ interests, according to articles 3 and 10 of ILO Convention No. 87[32] which Alta Caledonia has ratified. Likewise, the Committee has recognized the right to strike as a legitimate right to which workers and their organizations must have recourse, in defense of their social and economic interests and that

The Inter-American Court must interpret the normative content of trade union rights

strike could affect trade union rights; consequently, the Inter-American Court is competent in this respect, by virtue of article 8(1)(a) of the Protocol.

3. The contentious personal jurisdiction of the Inter

In the case of Tabacalera Boquerón S.A. against the State of Paraguay, the Commission stated that "the Preamble of the American Convention on Human Rights as well as the provisions of article 1(2) resolve that 'for the purposes of this Convention, 'person' means every human being,' and that consequently the system for the protection of human rights in this hemisphere is limited to the protection of natural persons and does not include juridical persons" (Report No. 10/91, Case 10.169 (Peru), IACHR, 1990-1991 Annual Report, p. 152).[37] In subsequent cases the IACHR maintained the same opinion.[38]

In the more recent cases of Mendeck COHDINSA against Honduras and Bernard Merens and Family against Argentina, although the Commission ratified in substance the aforementioned view, it asserted that "these petitions do not contain elements which justify a modification of the Commission's jurisprudence,"[39] statement which allows for the comtemplation of a future change.

Although the American Convention limits the concept of victim to physical persons, the European system allows legal persons to allege violations of the rights contained in the European Convention and the European Social Charter. Thus it can be argued that the

c) the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

d) the right to strike, provided that it is exercised in conformity with the laws of the particular country."

Arguments of the State

The standards of the inter-American system do not recognize legal persons as victims of human rights violations.

Article 1.2 of the ACHR is clear:

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

The Protocol of San Salvador does not contain any norm which refers to the concept of victim. In consequence, and considering that the Protocol constitutes further development of the standards contained in the American Convention and not an independent treaty, attention should be paid to the above-cited Convention definition of "victim." If the States had had the intention of broadening the concept of "victim", they would have expressed it in the Protocol.

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This position is supported by the norms of interpretation contained in the Vienna Convention on the Law of Treaties, which indicates that treaties should be interpreted in good faith, in accordance with the ordinary meaning of its terms. This issue has been developed in point 1 (Arguments of the State) of this memorandum, which we refer to here for reasons of brevity.

Furthermore, the Protocol of San Salvador, unlike the International Covenant on Economic, Social and Cultural Rights, does not confer status upon workers' organizations as legal subjects; rather, it indicates only that the States Parties shall permit trade

[43] IACHR Report No. 47/97, Tabacalera Boquerón S.A., Paraguay, October 16, 1997, cit., p. 223.
[44] IACHR Report No. 10/91, Case 10.169, Peru, February 22, 1991, cit.; Report No. 39/99, Mevopal, S.A., Argentina, March 11, 1999, cit.

unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely (...)."

The various decisions of the IACHR in the cases where this issue has been debated support this assertion. The IACHR has invariably discounted the characterization of legal persons as "victims", reasoning that this limitation is based on the American human rights system.

Arguments of the Commission

By considering that labor organizations possess trade union rights, Article 8(a) of the Protocol has broadened the concept of victim laid out in article 1.2 of the ACHR, thereby establishing a privileged standard of protection in contexts where that right is at stake.

Given the Protocol's entry into force, the term "victim" in the inter-American human rights system.

national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;

(...)."

The Protocol of San Salvador has modified the original concept of victim, permitting at least labor unions to allege violations of certain rights protected under the Convention, the Declaration and the Protocol.

Furthermore, the legislation of the ILO corroborates the norm of the Protocol of San Salvador, since, as previously explained, it includes labor unions as holders of labor rights.

Under a literal interpretation of the norm, trade unions are capable of being victims under international standards. Although article 1 of the American Convention establishes that "person" means every human being, and article 2 similarly provides that the States agree to respect rights and freedoms and to ensure their free and full exercise to all persons subject to their jurisdiction, it is certain that the Protocol of San Salvador has come to establish an exception to the general regime and has expressly attributed to trade unions the character of "victim."

Following another line of argument, it cannot be denied that trade union rights acquire real meaning only if labor unions are in possession of those rights. If we go back to the origins of labor law, we will see that unions were formed to counterbalance managerial power, and that their strength and possibilities for action lie in uniting large numbers of workers in an association which represents and defends their interests. Labor law has developed based on the existence of collective subjects, i.e., management and the workers' representation (unions, federations).

The effectiveness of the defense of workers' rights depends largely upon the notion that a trade union will promote actions toward this objective.

On the other hand, the violation of the trade union rights of a labor organization does not directly translate into a violation of the same right with respect to its individual members.

Although the traditional human rights paradigm has focused its attention on the rights of the individual and the State's correlating obligations, the exercise of social rights, as well as certain civil rights, is often of a collective or group character.[46] For example, the right of self-determination or the rights of minorities presuppose a collective or group exercise.

[46] In Advisory Opinion OC-5, the IACtHR recognized the collective dimension of the exercise of freedom of expression, by stating that, "[i]n its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive

Thus, certain rights acquire full meaning in their collective exercise. The case of the rights of indigenous peoples is paradigmatic in this respect. The right to collective ownership of land, recognized in ILO Convention 169, only makes sense if exercised by the indigenous community as a whole. Its individual exercise vitiates it altogether. This is precisely the case of trade union rights, once the workers have decided to form or join a union.

Not only is this not problematic, but also in certain cases the most prudent legislative option is to consider that the individual rights of the workers translate into State obligations with respect to the legal persons that join them into groups, in the first degree, as labor unions, and in the second and third degree, as federations and confederations.

Then, if it is possible to bind the State internationally for non-compliance of its obligations to third degree associations because such non-compliance is a projection of the injury of a specific worker's rights, the Pagura Workers' Union (UTP) cannot be excluded from consideration as the passive subject of a violation in terms of Article 1 of the American Convention.

Furthermore, it should be noted that associations of persons are really a group of "human beings" linked in a particular way by legal relationships. To speak of a "union", or of other types of groups in the case of other rights, is nothing but a reference to a group of real, existing persons legally connected in a particular way. An, at the end of the day, is nothing more than each of its members and the legal ties among them. In this sense, the organizational theories of legal personality or certain constructions of criminal responsibility admit this concept without any problem.

It might be said that a harmonious interpretation of the object and meaning of the text of the convention requires this analysis.

Finally, the pro homine principle requires us to interpret article 1.2 of the Convention as broadly as the reception that the legislation of Alta Caledonia has given to the procedural aptitude of the UTP. If it is true on the merits that the State has violated international human rights law by not respecting a higher domestic standard, it cannot argue with respect to the Convention, based on the exegesis of international procedural norms, that the principle does not operate in identical fashion.

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opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions." (Inter-Am.Ct.H.R. Advisory Opinion No. 5, OC-5/85 of November 13, 1985, cit., para. 32). In Advisory Opinion OC-14, the Inter-American Court held that, "[i]n the case of self-executing laws, as defined above, the violation of human rights, whether individual or collective, occurs upon their promulgation." (Inter-Am.Ct.H.R. Advisory Opinion No. 14, OC-14/94 of December 9, 1994, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the American Convention on Human Rights, para. 43).

IV. MERITS

Three principal issues can be identified with regard to the merits of this case:

1. The violation of the rights to the preservation of health and to well-being [article XI of the ADRDM]; the right to work, under proper conditions [article XIV, first paragraph, of the ADRDM] and to access to information [article 13 of the ACHR] based on the denial of the petition made by Mr. Armando Correa and another twelve workers from the Automac company to obtain information relative to the chemical composition and toxicity of the materials used in the automotive manufacturing process.

2. The violation of trade union rights [article 8(1)(a) of the Protocol of San Salvador] and of freedom of association for labor purposes [article 16(1) of the ACHR] in relation to the legislation of Alta Caledonia (2.1) and its application to the case based on the dismissal and subsequent denial of reinstatement of the 13 workers after they organized a strike (2.2).

I. The violation of the rights to the preservation of health and to well-being [article XI of the ADRDM]; the right to work, under proper conditions [article XIV, first paragraph, of the ADRDM] and to access to information [article 13 of the ACHR] based on the denial of the petition made by Mr. Armando Correa and another twelve workers from the Automac company to obtain information relative to the chemical composition and toxicity of the materials used in the automotive

In the case of the Pagura Workers' Union et al (Alta Caledonia), the scope of the State's

In the case of Mahmut Kaya v. Turkey, the ECHR decided that the States had strong positive duties related to the right to be free from torture or inhuman or degrading treatment, enshrined in article 3 of the Convention, including situations involving the conduct of non-state actors. The State can violate article 3 when it fails to adopt measures which reasonably would have prevented the risk of the person being subject to this type of treatment if the authorities knew or could have known of the existence of this risk.[50] It is irrelevant to the case whether the action originated with a state actor.

In the case of D. v. United Kingdom,[51] the ECHR broadened considerably the scope of this principle by applying it to immigration proceedings, and in particular by evaluating the risk that deportation could cause the interruption of medical treatments essential to the life of an immigrant.[52] The ECHR considered that, even though in its past judgments it had limited the application of article 3 in immigration cases to the possibility that the person exposed to deportation could suffer torture or inhumane treatment as a consequence of the intentional action of the receiving State's agents, the importance of the norm obliged the Court to reserve certain flexibility to apply it in other contexts. According to the ECHR, under the standards of article 3, it could be considered that the expulsion of the petitioner "would expose him to a real risk of death under the most distressing circumstances, which would amount to inhuman treatment."

Arguments of the Commission

The State has the duty to adopt positive actions to protect the right to health.

These affirmative actions are all of those which prevent risk when it is possible to establish that a particular thing or situation might constitute a health hazard.

In regard to affirmative obligations, the Inter-American Court has held in the interpretation of article 1 of the ACHR that "the duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, as they vary with the law and the conditions of each State Party."[53]

The jurisprudence of the European system has evolved in the sense of establishing that the human rights norms which bind States internationally can be interpreted as mandates for concrete action, the definition of which corresponds to each particular context.

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[50] ECHR, Mahmut Kaya v. Turkey, Judgment of March 28, 2000, citing Osman v. United Kingdom, case in which a similar duty is established with respect to the right to life.

[51] ECHR, D v. United Kingdom, Judgment of April 21, 1997.

[52] The immigrant was a carrier of HIV/AIDS who questioned the order of deportation to the Island of St.

Among the positive actions that the State of Alta Caledonia was required to adopt is the provision of information regarding the potential health risks and particularly to health in the context of work.

The duty to ensure access to information cannot be interpreted in a passive sense; on the contrary, it is an active duty. In certain instances, in order to ensure the right to health, the State must produce information relevant to the determination of risk in a particular context.

Thus the CCA's response as to the possible toxicity of some of the products, and the rejection of the legal action which considered the CCA's report sufficient, do not satisfy adequately the State's obligation.

This position is also supported by the jurisprudence of the ECHR, according to which the necessity of information prior to the exercise of a right is extended to the protection of other Convention rights, such as private and family life or the right to life.

In the case of Guerra v. Italy,[54] the ECHR - in spite of interpreting narrowly the right to freedom of information - decided that the State of Italy had violated the right to private and family life, for not providing the victims with "essential information that would have allowed them to evaluate the risks that they and their families ran if they continued to live in Manfredonia, city particularly exposed to the dangers of an accident in the [fertilizer] factory."

In the case of McGinley & Egan v. United Kingdom,[55] the ECHR affirmed the holding of the Guerra decision by finding that when the government conducts dangerous activities, respect for private and family life requires that effective and accessible procedures be established so that individuals can obtain all relevant and appropriate information.

With regard to the intervention of third parties, in the case of LCB v. United Kingdom,[56] the ECHR affirmed that the obligation of the first paragraph of article 2 of the Convention obliges States not only to abstain from intentionally and illegally depriving a person of his life, but also to adopt appropriate measures to guarantee the right to life.

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[54] ECHR, Guerra et al. v. Italy, Judgment of February 19, 1998.

[55] ECHR, McGinley & Egan v. United Kingdom, Judgment of June 9, 1998. In this case, the petitioners had been soldiers stationed on Christmas Island while nuclear tests were conducted there in 1954. They alleged that the British government had violated article 8 of the Convention by maintaining the confidentiality of the documents containing information that would have allowed them to evaluate the risk they assumed by exposing themselves to the nuclear tests. However, the ECHR rejected the petition in light of the fact that the State had revealed all the available information relevant to the petitioners' claim.

[56] ECHR, LCB v. United Kingdom, cit.

The Inter-American Court should also consider that the United Nations Committee on Economic, Social and Cultural Rights (the Committee), in its interpretation of article 12[57] of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has set forth in great detail the State's obligations to produce information relative to industrial safety and hygiene, with express reference to ILO Conventions 155 and 161.[58]

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[57] Article 12 of the ICESCR provides that: "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Convenant to achieve the full realization of this right shall include those necessary for: (a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) the improvement of all aspects of environmental and industrial hygie(or)9nFtm( )-12(hpe)4(c-2(fD,hpe)4(c-2(Rse)4(pr)910(onv)4(uc)4(t)7(i, [(of)7( )12(r)10)-2(oi0 e3[nEti3[hE)(E)-4(f)3(s re 3(cknE)-4esa)6sa

Alta Caledonia is a State party to the ICESCR. Therefore, by virtue of article 29 of the ACHR, the Inter-American Court must consider the jurisprudence of the ICESCR's supervisory organ (the Committee) in all that is favorable to the broadest protection of rights.

This Committee has made clear that the obligation derived from article 12 includes the possibility of requiring the State to produce information in fulfillment of its duty to protect and ensure the right to health in the industrial context. The State must produce general information as part of its health policy or as part of its industrial health and safety campaigns. It can also be required to provide specific information regarding the potential harmfulness of certain equipment, substances, agents or work practices that a private actor uses or seeks to use. The information will serve as an estimate of whether the State's action relative to workplace regulation has complied with the legal standards.

Arguments of the State

The State has a positive obligation to protect and ensure health and life. This duty can involve, under certain circumstances, the adoption of all actions likely to prevent a foreseeable risk. Among these affirmative actions is for the State to ensure access to available information, particularly regarding working conditions.

Nevertheless, this obligation in no way involves the "production" of information. To this effect, we refer again to the case of McGinley & Egan v. United Kingdom[59]. In that case, the ECHR rejected the application precisely because "on the date of the events", there existed no available information linking the nuclear tests to leukemia. In the case of Guerra v. Italy[60], the information requested was already in the State's possession and it

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maintain and restore the health of the population. Such obligations include: (i) fostering recognition of factors favoring positive health results, e.g. research and provision of information; (ii) ensuring that health services are culturally appropriate and that health care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups; (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services; (iv) supporting people in making informed choices about their health." In footnote 25 of paragraph 36, the Committee indicated that: "Elements of such a policy are the identification, determination, authorization and control of dangerous materials, equipment, substances,

2.1. The violation of trade union rights [article 8(1)(a) of the Protocol of San Salvador] and of the freedom of association for labor purposes [article 16(1) of the ACHR] with respect to the legislation of Alta Caledonia.

General considerations and applicable law

Under the legal regulations currently in force in Alta Caledonia, the ability to legitimately declare a strike and negotiate collective bargaining agreements is restricted to those trade unions which have bargaining agent status.[61]

In its report, the Commission found that Alta Caledonia had violated article 16 of the American Convention of Human Rights and article 8 of the Protocol of San Salvador.[62]

Article 8 (Trade Union Rights) of the Protocol provides that:

"The States Parties shall ensure: (1(a)) The right of workers to organize trade unions and to join the unions of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;

question of the fundamental right to form groups for the common attainment of a lawful aim without pressures or intrusions which might alter or distort its purpose."[64]

The Court emphasized the importance of this right in guaranteeing the protection of workers' rights. As such, it indicated that it "considers that freedom of association, with regard to trade unions, is of utmost importance in the defense of the legitimate interests of workers, and lies within the framework of the corpus juris of human rights law."[65] and that "freedom of association in the labor context, and in terms of article 16 of the American Convention, encompasses both a right and a freedom, to wit: the right to form associations without restrictions other than those permitted in clauses 2 and 3 of article 16 of the Convention and the freedom of every person to not be compelled or obligated to join an association."[66]

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The organs of the system of protection created by virtue of the European Social Charter analyzed this issue in the light of articles 5 (the right to organize)[72] and 6 (the right to bargain collectively).[73]

The Committee of Independent Experts issued an opinion regarding restrictions on trade union rights in its analysis of Irish legislation. The Committee sustained that, "national regulations which make authorisation to create a trade union empowered to exercise the right of collective bargaining conditional upon a minimum 0(i)-2(onal)-2(u616)4(r)-1(e(6d((e)4(at)

collective bargaining, it must be given the right to strike under Article 6, para. 4, so that it may effectively exercise its right to bargain collectively."[77]

The interpretive guidelines dealing with the restriction of rights permitted in the inter-American system have been uniform. The Inter-American Court of Human Rights has cautioned that limitations imposed on the rights enshrined in the Convention must always be employed restrictively.

In regard to restrictions, the Court has asserted that "'public order' or 'general welfare' may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content (See Art. 29(a) of the Convention). Those concepts, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the 'just demands' of a 'democratic society', which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention."[78]

Referring to article 30 of the Convention (which is similar to article 5 of the Protocol), the Inter-American Court held that: "... Article 30 cannot be regarded as a kind of general authorization to establish new restrictions on the rights protected by the Convention, additional to those permitted under the rules governing each one of these."[79]

The application of the pro homine principle requires that the scope of legitimate restrictions not be broadened. The Inter-American Court has indicated that "among various options to attain [an] objective, that which least restricts the protected right must be chosen ... That is to say, the restriction must be proportionate to the interest that justifies it, and be narrowly tailored to the attainment of this legitimate objective."[80]

Finally, it must be recalled that although a margin of appreciation exists in evaluating whether a restriction is "necessary in a democratic society", "not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation."[81]

Arguments of the Commission

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[77] The Right to Organise and Bargain Collectively, cit., p. 63, citing Conclusions IV, p. 50.

[78] Inter-Am.Ct.H.R. Advisory Opinion No. 5, OC-5/85 of November 13, 1985, cit., para. 67. The Commission has further indicated that "The Court's jurisprudence establishes that, in order to be compatible with the Convention, restrictions must be justified by collective objectives that are so important that they clearly outweigh the social need to guarantee the full exercise of rights guaranteed in the Convention and are not more limiting than strictly necessary. It is not enough to demonstrate, for example, that the law fulfills a useful and timely purpose." IACHR, Report No. 38/96, para. 58.

[79] Inter-Am.Ct.H.R. Advisory Opinion No. 6, OC-6/86 of May 9, 1986, The Word "Laws" in Article 30 of the Inter-American Convention on Human Rights (Ser. A) No. 6, para. 17.

[80] Inter-Am.Ct.H.R. Advisory Opinion No. 5, OC-5/85 of November 13, 1985., para. 5.

[81] ECHR, Dudgeon v. Ireland, Judgment of 22 October 1981, para. 52.

association, and therefore construe the positive obligations of the State extremely restrictively. On the other hand, the norm that we are invoking in this case, article 8(1) of the Protocol of San Salvador, recognizes a particular and autonomous right and just not a type of freedom of association. The cases that are cited must be analyzed considering the fact that the European Convention lacks a similar norm, and their holdings cannot be applied directly in the instant case.

Arguments of the State

Trade union rights as they have been recognized by the States through the ACHR and Protocol can be subject to certain restrictions, provided that they are characteristic of a democratic society, and necessary to safeguard public order, to protect public health or morals, or the rights and freedoms of others.

The restriction at issue in this case falls within the parameters of the Protocol, because it is necessary in a democratic society. The law abides strictly by the norm established in article 8 of the Protocol. The Protocol stipulates the condition that the content of a regulation must be characteristic of a democratic society. In interpreting the necessity of the regulation of a right in a democratic society, the Inter-American Court has referred to the proportionality between the regulation and the objective it seeks to. fulfill. On this issue, the Court has found that “restrictions upon human rights must be proportionate to

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Labor conflicts can affect not only the social peace of a nation, but also its economic development.[90] It should be emphasized that labor conflicts, which generally involve numerous collectives, require the adoption of certain measures designed to ensure social peace. The system established in Alta Caledonia's regulations favors good labor relations, and has the purpose of contributing to social peace and the prosperity of the workers.

As mentioned in the previous reference to the proportionality of an intended measure, negotiation involving an extremely fragmented social body has the principal effect of weakening the bargaining power of the workers. Furthermore, it greatly complicates the conditions of negotiation by depriving the employer of an easily identifiable, valid interlocutor. The lack of negotiation, and the indefinite prolongation of the conflict, can affect social peace and produce negative effects on the national economy. The objective of the regulations analyzed herein is to ensure harmonious relations between workers and employers, in conformity with the restriction authorized by clause 2 of article 8 of the Protocol of San Salvador.

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that sense, restrictions on the exercise of certain rights and freedoms can be justified on the grounds that they assure public order. Advisory Opinion OC-5, para. 64.

[90] The Committee on Freedom of Association of the ILO has acknowledged that "the right to strike can be restricted or even prohibited in the public service or in essential services in the sense that as a strike there could cause serious hardship to the national community." (Case 893, Canada).

2.2 The violation of trade union rights [article 8(1)(a) of the Protocol of San Salvador] and of freedom of association for labor purposes [article 16(1) of the ACHR] with respect to the dismissal of the thirteen workers.

General considerations and applicable law.

After the CCA decided that the election did not demonstrate that the UTP was the most representative union, Armando Correa and his twelve workers initiated a strike as a sign of protest.[91]

The strike was declared illegal by the Ministry of Labor. The next day, the Automac company fired the thirteen workers, including Armando. On hearing the worker's petition, the courts denied reinstatement, finding that only an authorized union can by law declare a strike, and that "participation in an illegal strike constitutes just cause for dismissal."[92]

As set forth in the section discussing the issues of admissibility and the American Court's subject matter jurisdiction to hear cases involving the right to strike, the violation of this right is encompassed by the terms of the trade union rights recognized in Article 8(1)(a) of the Protocol.

The character of the restriction on the right to strike, and consequently on trade union rights, established by the State of Alta Caledonia is again at issue. Particularly at issue is the application of the regulation to a concrete case in which workers were fired for participating in a strike considered illegitimate because it was declared by a minority union. Among the dismissed workers was the trade union representative.

The Committee on Freedom of Association of the ILO has maintained that no one should be the object of sanctions for having engaged in, or attempted to engage in, a strike. The Committee emphasized that it "has consistently taken the view that the use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to reemploy them, implies a serious risk of abuse and constitutes a violation of freedom of association."[93]

The Committee further stated that respect for the principles of freedom of association "requires that workers should not be dismissed or refused employment on account of their having participated in a strike or other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike. Logically, it should also be irrelevant that the dismissal takes place in advance of a strike, if the purpose of the dismissal is to impede or penalise the exercise of the right to strike."[94]

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[91] Paragraph 23 of the hypothetical case.
[92] Paragraph 25 of the hypothetical case
[93] CFA, Case 1540 (United Kingdom), para. 90.
[94] Id.

Arguments of the Commission

The dismissal of the workers who engaged in the strike constitutes a grave violation of trade union rights. This circumstance is aggravated by the fact that the strike was motivated by a workers' claim essential to the creation of a new union, activity which is specially protected.

The Committee pointed out that "any measures taken against workers because they attempt to constitute organisations of workers outside the existing trade union organisation are incompatible with the principles that workers should have the right to establish and join organisations of their own choosing without previous authorisation."[95]

The dismissal of Armando Correa, who had been elected as a union officer, constitutes a separate violation of trade union rights. On this subject, the Committee on Freedom of Association of the ILO has frequently reiterated: "When trade unionists or union leaders are dismissed for having exercised the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against."[96] It has also affirmed that: "No person should be prejudiced in his or her

Under the laws of Alta Caledonia, only the majority union may legitimately declare a strike. This restriction on the right to strike is duly supported by article 8, clause 2 of the Protocol of San Salvador.

As the State has already submitted, article 8.2 authorizes permanent restrictions on trade union rights and the legislation of Alta Caledonia establishes a restriction that is permitted under the Protocol: it was established by law, is necessary in a democratic society, is proportional to the objective pursued, and protects public order.

We should add that the restriction on the right to strike is not against international law in this field. On the contrary, the organs of the ILO have developed an extensive body of jurisprudence concerning the situations in which the right to strike may be restricted or even prohibited.

For example, strikes may be prohibited in the public sector and limited or prohibited in essential services. The Committee on Freedom of Association "has acknowledged that the right to strike can be restricted or even prohibited in the public service or in essential services in so far as a strike there could cause serious hardship to the national community and provided that the limitations are accompanied by certain compensatory guarantees."[99]

As such, the right to strike is not an absolute right, but rather one that can be legitimately curtailed or even prohibited. The law under analysis in the instant case does not suppress the right to strike, but only restricts it in accordance with the objectives stated in article 8(2) of the Protocol.

In view of the above considerations the strike was legitimately declared illegal, and the dismissal of those workers who failed to comply with their work obligations was justified. Armando Correa is not entitled to any special protection, given that such protection, like the rest of the privileges derived from the exercise of trade union rights, belongs to the most representative union.

[99] Id.

3. The violation of the right to effective judicial protection [articles 8 and 25 of the ACHR] based on the failure to recognize the Pagura Workers' Union as the majority union and to grant it the corresponding bargaining agent status.

General Considerations and applicable law.

In the election to determine which union was the majority union, the UTP obtained 67% of the votes, as opposed to 30% in favor of the UTO.[100]

The CCA resolved that the UTP had not demonstrated that it represented the majority of workers at the plant. The CCA found in its resolution that the election only demonstrated the workers' "sympathy" with the UTP at a particular moment, and indicated that this was not sufficient to demonstrate the sustained representation of the majority of the workers. It emphasized that the UTO had been the plant's representative union for the last fifty years, during which time it had participated in the General Labor Confederation of Alta Caledonia. The CCA also stated that at the time of the elections the UTO had 130 members in the plant, which was three more than the UTP had. The CCA further noted that some employees had not voted and that the UTP was a formerly union not affiliated with any national confederation. As such, the CCA refused to certify the UTP as the representative organization authorized to negotiate the collective bargaining agreement, and continued to recognize the UTO as the workers' representative.

The Pagura labor court judge upheld the CCA's decision, and the Court of Appeals affirmed the labor court judge's decision. The appellate court underscored that the decision of the CCA was valid in the light of the labor union system of Alta Caledonia, which was "characterized by a plurality of associations and the unity of its

Article 8(1) of the ACHR provides that: “Every person has the right to a hearing with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.”

Article 25 of the Convention establishes that “1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake:

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

b) to develop the possibilities of judicial remedy; and

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

At issue in this case is the scope of the competence of the systems for the international protection of human rights when the alleged violation stems exclusively from a judicial process.

The Inter-American Court has recently held that “although article 8 of the American Convention is entitled “Right to a Fair Trial”, its application is not limited to judicial remedies in a strict sense, ‘but rather to the sum of requirements that must be observed in legal proceedings, to the effect that individuals are able to adequately defend their rights in view of any type of act of the State which might affect them. That is, whatever act or omission of the state organs within a proceeding, whether it administrative, punitive or jurisdictional, must respect due process of law.’ The Court added “that the catalogue of minimum rights established in article 8(2) of the Convention are applied to the orders mentioned in clause 1 of the same article, that is, the determination of rights and obligations which are of a ‘civil, labor, fiscal or any other nature.’ This reveals the broad scope of due process, as individuals have the right to due process as understood in terms of article 8(1) and 8(2), in criminal as well as other matters. (...) In any matter, including even labor matters, administrative discretion has unyielding limits, one of them being respect for human rights.”[101]

Arguments of the Commission

[101] Inter-Am.Ct.H.R., Baena, Ricardo et al., cit., paras. 124-126.

In the instant case the petitioners lacked access to an effective judicial remedy which would protect them from the violation of their trade union rights. Access to the remedy was a mere formality since the decision adopted considered neither the arbitrary nature of the contested measure nor the characteristics of the legal regulations applied. This openly contradicts the ACHR and the Protocol, as was argued on the merits of the case with respect to the violations of rights.

In this case, the judicial branch's acceptance of the decision adopted by the CCA, clearly contrary to the domestic law and the human rights obligations assumed by the State, results in an independent violation of articles 8 and 25 of the ACHR.

Without considering the merits of the issue, the judge in the case validated the government's act which contradicted the obligations derived from the ACHR and the Protocol.

This is contrary to the obligation the State has assumed by virtue of articles 8 and 25 of the ACHR. The Inter-American Commission has found that: "the right to effective judicial protection provided for in Article 25 is not exhausted by free access to judicial recourse. The intervening body must reach a reasoned conclusion on the claim's merits, establishing the appropriateness or inappropriateness of the legal claim that, precisely, gives rise to the judicial recourse. Moreover, that final decision is the basis for and origin of the right to legal recourse recognized by the American Convention in Article 25, which must also be covered by indispensable individual guarantees and state obligations (Articles 8 and 1(1)).[102]

Access to effective judicial recourse requires that the decision adopted in the substantiation of that recourse be a solidly based decision. In the instant case, with the sentence lacking a real and valid legal basis, the petitioners have been deprived of access to effective judicial recourse.

As in this case, the principle of effectiveness of judicial recourse becomes illusory if its object, which is the sentence, is the result of the mere whim of the judge and is not supported in the record of the case, on the facts proven and on the law currently in effect.

In this case, through the CCA's failure to recognize the results of the election held, and the confirmation of that judgment by the Judicial Branch, the State of Alta Caledonia violated articles 8 and 25 by providing the victims with a remedy that was a mere formality and did not satisfy the minimum requirements of the ACHR.

Arguments of the State

[102] IACHR, Report No. 30/97, Argentina, para. 71.

It is clear in this case that the petitioner has attempted through access to an international forum for the protection of human rights to obtain an additional instance of judicial review of a fair decision that is contrary to his interests; this possibility has been limited by the doctrine of fourth instance, but in no way violates judicial guarantees.

The petitioner seeks to modify the outcome of a judgment that was not in his favor, but which was substantiated in accordance with the guarantees required by the ACHR.

Let us recall that a denial of access to the courts has not been claimed. Nor is it claimed that the court lacks impartiality or independence, or that the alleged victims' due process guarantees were violated. The UTP had the opportunity to present all of the evidence it considered necessary, make its argument on the evidence, and challenge each one of the decisions through appellate means. We reiterate, this case is simply a question of dissatisfaction with the outcome of a fair trial.

It should be recalled that the international protection granted by the supervisory organs of the Convention is subsidiary. The IACHR has indicated that "the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved."[103]

When a complaint is limited to stating that the sentence was erroneous or unjust in itself, the petition must be rejected under the "fourth instance formula." The function of the Commission "... is to ensure the observance of the obligations undertaken by the States parties to the Convention, but it cannot serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction."[104]

"In democratic societies, where the courts function according to a system of powers established by the Constitution and domestic legislation, it is for those courts to review the matters brought before them. Where it is clear that there has been a violation of one of the rights protected by the Convention, then the Commission is competent to review."[105]

In this case, the petitioners have not alleged any violation of due process. Nor have they alleged any denial of access to judicial remedies; rather, they complain exclusively of the result of the proceedings. This type of claim is not within the competence of the organs of the inter-American system for the protection of human rights.

[103] IACHR, Report No. 39/96, Argentina, para. 50.
[104] Id. at para. 51.
[105] Id. at para. 60.