

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 for 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 State's position, and then with those favorable to the Inter-American Commission on Human Rights (hereinafter IACHR, Inter-American Commission, or the Commission). The examination of the merits of the case will be in reverse order.

¹ The Protocol of San Salvador entered into force in November of 1999.

II. FACTS

As described in the hypothetical, the Inter-American Commission considered that the State of Alta Caledonia had violated its international human rights obligations in connection with three events. Described succinctly, they are:

1. 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 failure to recognize the Pagura Workers' Union as the majority union and to grant it the corresponding bargaining agent status; and
3. The dismissal and subsequent denial of reinstatement of the 13 workers after they organized a strike.

The Commission considered that the alleged facts violated articles XI and XIV, 1st paragraph, of the American Declaration of the Rights and Duties of Man (ADRDM or the Declaration); articles 8, 13, 16 and 25 of the American Convention on Human Rights (ACHR or the Convention) and article 8 of the Protocol of San Salvador.

The hypothetical did not give the Commission's opinion as to which of the facts infringed upon each particular norm, and it is expected that the participants correctly define this issue.

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 to 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".

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

General considerations and applicable law

The Commission considered that the State of Alta Caledonia was responsible for the violation of its international obligations as a result of “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, and the accompanying risks.”²

Among the norms that the IACHR considered violated, it cited article XI of the ADRDM:

“Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”

The Commission indicated in its claim that the State of Alta Caledonia had also violated the norm contained in the first paragraph of article XIV of the Declaration:

“Every person has the right to work, under proper conditions...”

Inasmuch as the alleged facts are *prima facie* subsumed by the above-cited provisions of the Declaration, the issue of the Inter-American Court’s contentious jurisdiction to examine violations of the rights provided in the Declaration must be addressed.

Article 62.3 of the ACHR establishes that:

“The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.”

Neither the Inter-American Commission nor the Court has addressed directly the issue of the contentious jurisdiction of the Court with regard to the application of the above-cited norms of the Declaration. Nevertheless, they have dealt with similar issues which can provide guidance in approaching this point.

In the case of *Las Palmeras*³, the IACtHR declined to assert contentious jurisdiction to apply the Geneva Conventions. The Court emphasized that *“the Convention anticipates the existence of an Inter-American Court to exercise jurisdiction over ‘all cases*

² Paragraphs 26 and 27 of the hypothetical case.

³ Inter-Am.Ct.H.R., *Las Palmeras*, Preliminary Objections, Judgment of February 4, 2000.

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 Commission which culminate in an action before the Court, must refer precisely to the rights protected under the Convention (see articles 33, 44, 48.1 and 48). Excepted from this rule are cases in which another convention, ratified by the State, grants competence to the Commission or the Inter-American Court to examine violations of the rights protected by that convention, such as the Inter-American Convention on Forced Disappearance of Persons.”⁶*

The advisory jurisdiction of the IACtHR, on the other hand, does not encounter the same limitations.⁷

In its interpretation in Advisory Opinion OC-10 of the phrase “other treaties concerning the protection of human rights” contained in article 64, the IACtHR maintained that it is competent, in the exercise of its advisory jurisdiction, to interpret the Declaration. The Court considered that the OAS Member States have understood the Declaration to contain and define those fundamental human rights referred to in the Charter, so that the human rights obligations established in the Charter must be integrated with the corresponding

⁴ *Id.*, para. 32.

⁵ *Id.*, para. 33. The Court also held that “when a State is Party to the American Convention and has accepted the contentious jurisdiction of the Court, it becomes possible for the Court to analyze the State’s conduct to determine whether it conforms to the provisions of the Convention, even if the question has been resolved definitively within the domestic legal system” (para. 32).

⁶ *Id.*, para. 34. Likewise, Judge Sergio García Ramírez’s opinion emphasizes that the exceptions to the Court’s contentious jurisdiction “are located in other instruments of our system for the protection of human rights” (para. 15). The Judge added that “one such exception is found in the Inter-American Convention to Prevent and Punish Torture, article 8 of which authorizes access ‘to the international fora whose competence has been recognized by [the] State’ which has allegedly violated that treaty. The Court has had the opportunity to pass judgment on this point in the cases of Paniagua Morales et al. (judgment of March 8, 1998, para. 136 and conclusion (3) and Villagrán Morales et al. (judgment of November 19, 1999, paras. 247-252 and conclusion (7))” (para. 16).

⁷ The text of article 64 expressly includes “other treaties concerning the protection of human rights in the American States” within the Court’s advisory function. The Court has considered that its authority to interpret the norms of the Declaration is based on this formula.

Article 64 of the ACHR states that:

“1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their sphere of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.”

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 American Convention on Human Rights, 1989, OEA/Ser.L/V/III.21, doc. 14, August 31, 1989, para. 43.

⁹ *Id.*, para. 44.

¹⁰ In OC-3, the IACtHR found that “*supplementary means of interpretation, especially the preparatory work of a treaty, may be used to confirm the meaning resulting from the application of the foregoing provisions, or when it leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable (Vienna Convention on the Law of Treaties, article 32)*” (Inter-Am.Ct.H.R., Advisory Opinion No. 3, OC-3/83 of September 8, 1983, Restrictions to the Death Penalty (arts. 4.2 and 4.4 of the American Convention on Human Rights), para. 49).

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.

¹¹ Inter-Am.Ct.H.R., Advisory Opinion No. 3, OC-3/83 of September 8, 1983, para. 50. Applying the above-cited principles of interpretation in this Advisory Opinion, the Court has expressed that, “[n]o provision of the Convention can be relied upon to give a different meaning to the very clear text of Article 4(2), in fine” (para. 59).

¹² See, *inter alia*, holding of the Court in the *Cayara* case, Preliminary Objections, judgment of February 3, 1993, in the Annual Report of the Inter-American Court of Human Rights, 1993, OEA/Ser.L/V/III.29, doc. 4, January 10, 1994, pp. 25-41.

¹³ From the point of view of international law, the State is bound by its own declarations, which means that the content of a unilateral act is applicable to its author by virtue of the principle of good faith, one of the fundamental principles of the international order of our times (see United Nations General Assembly Resolution 2625 (XXV)). As the International Court of Justice has expressly recognized in the *Nuclear Tests* case, unilateral declarations can have the effect of creating legal obligations for their authors, if that is the author’s intent (International Court of Justice, Recueil 1974:267-268 and 472-473). This opposability of unilateral acts to their authors is a consequence of the acceptance by international law of the institution known in English law as estoppel. In the field of international litigation there is abundant jurisprudence recognizing the applicability of unilateral acts to their authors, which can be interpreted as the application of estoppel. Within the Inter-American system for the protection of human rights, the principle of estoppel has been applied frequently by the Inter-American Court of Human Rights. For example, in *Neira Alegria et al.*, the Court found that: “[o]n September 29, 1989, Peru contended that domestic remedies had not been exhausted, but that a year later, on September 24, 1990, it asserted the contrary to the Commission, as it now does to the Court. International practice indicates that when a party in a case adopts a position that is either beneficial to it or detrimental to the other party, the principle of estoppel prevents it from subsequently assuming the contrary position. Here the rule of non concedit venire contra factum proprium applies.” *Neira Alegria et al.* Case, Preliminary Objections, Judgment of December 11, 1991, Inter-Am.Ct.H.R. (Ser. C) No. 13 (1994), paras. 28 and 29.

It is not correct to assert, as the Commission has¹⁴, 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 ACHR¹⁶ 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.

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-1/82 of September 24, 1982, “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Series A No. 1. The Court resolved that, “...the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.”

¹⁷ See Inter-Am.Ct.H.R., *Las Palmeras*, para. 33. There the Court found that the American Convention has granted the Court the authority only “to determine the compatibility of the acts or norms of the States with the Convention itself and not with the Geneva Conventions of 1949.”

The example provided by international custom in regard to universal jurisdiction over certain crimes is significant. In such cases, customary international law establishes certain rules of responsibility (for example, the characterization of particular conduct as a crime against humanity), but there is also a customary norm which grants competence to any tribunal to try such crimes.¹⁸

Arguments of the Commission

The Inter-American Court is competent to examine violations of the rights enshrined in the ADRDM.

The *Las Palmeras* Case makes reference to the opinion of the Commission, according to which “*to ignore the content and scope of certain international obligations of the State, and to abandon the task of harmonizing them with the competence of the organs of the inter-American system in an integral and teleological context, would signify a betrayal of the legal and ethical good promoted by article 29, the best and most progressive application of the American Convention.*”¹⁹

Although article 62.3 establishes the competence of the Court to hear any case relating to the application and interpretation of the ACHR, this norm must be integrated and harmonized with that of article 29(d) of the ACHR which provides that, “[*n*]o provision of this 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.”

In Advisory Opinion OC-10, after referring to a series of provisions and recommendations of the General Assembly of the OAS, the Court affirmed that, “*...by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.*”²⁰

The Inter-American Court said that, “*For the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself. It must be remembered, however, that, given the*

¹⁸ It is “widely recognized that under international customary law and general principles of law states may exercise universal jurisdiction over persons suspected of genocide, crimes against humanity, war crimes in international armed conflict other than grave breaches of the Geneva Conventions and war crimes in non-international armed conflict, extrajudicial executions, enforced disappearances and torture.” Amnesty International, Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction, at <<http://www.igc.org/jcc/html/ai199904.html>>.

¹⁹ Inter-Am.Ct.H.R., *Las Palmeras*, para. 31.

²⁰ Inter-Am.Ct.H.R. Advisory Opinion No. 10, OC-10/89 of July 14, 1989, para. 43.

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 Inter-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, *Amilcar 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, "*In the instant case, there is a material similarity between the norms of the Declaration and the Convention invoked by the petitioners. As such, the rights to a fair trial (article XVIII), and to property (article XXII) enshrined in the Declaration are included under the rights protected in articles 8 and 21 of the Convention. As such, in relation to said violations of the Declaration, the Commission shall refer only to the norms of the Convention.*" (para. 41).

*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 is a fundamental and primary instrument in the inter-American system. As the Court recognized in Advisory Opinion OC-10,²⁶ the American Declaration is the starting point for the definition of the human rights obligations assumed by the States upon signing the Charter of the OAS. The rights enshrined in the Declaration constitute the minimum that the OAS member States have decided to recognize with respect to the individuals subject to their jurisdiction. The ACHR broadened and specified the States’ human rights obligations, with the ADRDM as the point of departure. Consequently, if the character of the ADRDM as a primary and founding instrument of the inter-American human rights system is taken into account, it is illogical to deny the competence of the system’s high tribunal, the IACtHR, to apply it.

²⁴ *Id.*, para. 42.

²⁵ The Commission has stated that, “... when reviewing the legality of derogation measures taken by a State Party to the American Convention by virtue of the existence of an armed conflict to which both the American Convention and humanitarian law treaties apply, the Commission should not resolve this question solely by reference to the text of article 27 of the American Convention. Rather, it must also determine whether the rights affected by these measures are similarly guaranteed under applicable humanitarian law treaties. If it finds that the rights in question are not subject to suspension under these humanitarian law instruments, the Commission should conclude that these derogation measures are in violation of the State Parties’ obligations under both the American Convention and the humanitarian law treaties concerned.” IACHR, Report No. 55/97, Case 11.137, *Juan Carlos Abella*, Argentina, November 18, 1997, para. 170. On this point, the Report cites the opinion of T. Buergenthal, “To Respect and to Ensure: State Obligations and Permissible Derogation” in *The International Bill of Rights* 73 at 82 (L. Henkin ed. 1981).

²⁶ Inter-Am.Ct.H.R. Advisory Opinion No. 10, OC-10/89 of July 14, 1989, para. 43.

For this reason it can also be argued that the *Las Palmeras* 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 violation 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

²⁷ Inter-Am.Ct.H.R. Advisory Opinion No. 3, OC-3/83 of September 8, 1983, para. 50. In applying the above-cited principles of interpretation in this Advisory Opinion, the Court expressed that, “[n]o provision of the Convention can be relied upon to give a different meaning to the very clear text of Article 4(2), in fine” (para. 59).

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.

Nevertheless, the authority of the Court to examine the strike issue in the exercise of its contentious jurisdiction can still be affirmed in the instant case.

Although the case may have been presented to the Inter-American Court as a violation of the right to freedom of association (article 16, ACHR), or of another Convention right, without categorizing the events under the norms of clauses (a) and (b) of article 8 of the Protocol, it is evident that, even in such a case, the situation denounced by the Commission could infringe upon trade union rights and the right to strike provided in the Protocol; thus, the discussion surrounding the competence of the Court in this matter is pertinent.

Arguments of the State

Article 19(6) of the Protocol does not authorize the review of petitions in which the right to strike appears to be involved. The specificity of article 8(1)(b) of the Protocol and the express reference of article 19(6) to the rights contained in article 8(1)(a) make clear that neither the text of the Protocol, nor the intent of its signatories, has been to grant the Inter-American Court contentious jurisdiction over the right to strike.

Although the exercise of the right to strike may bear, in certain contexts, some relation to the exercise of trade union rights, the normative recognition of any act of protest characterized as a strike is contained in 8(1)(b). The literal tone of this norm does not support any other conclusion, since the specificity of its text is evident.

Certainly, all human rights are inter-dependent and it is always possible to find relationships among them. But this in no way prevents the normative system from imputing different effects to different categories of events, according to the description chosen by lawmakers. Among these different effects, of course, is the possibility of litigation before the Inter-American Court. In this context, forced constructions for the interpretation of these norms are not acceptable. Here we reiterate what we stated with regard to the possibility of the Court to hear cases involving rights contained in the ADRDM in the exercise of its contentious jurisdiction: if it had been the intent of the signatory States to grant competence to the Court, this would be clearly reflected in the text of the Protocol. Simply stated, the right provided in article 8(1)(b) would have been included in the drafting of article 19(6) of the Protocol.

Arguments of the Commission

It can be asserted *prima facie* that the strike in which Armando and his co-workers were involved was carried out in the exercise of trade union rights.

There are different types of strikes, all of them encompassed necessarily by article 8(1)(b) of the Protocol, which expressly recognizes the right to strike. Nevertheless, in many cases the act of the strike is additionally protected as a trade union right under article

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

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. 87³², 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 right of workers and their organizations to strike constitutes one of the essential means at their disposal to promote and defend their professional interests.*”³³

³¹ As a result of negotiations between the Governing Body of the ILO and the Economic and Social Council of the United Nations, a special complaint procedure was created in 1950-1951 for the protection of trade union rights. This procedure complements the general procedures controlling the application of the norms of the ILO, and is overseen by two organs: the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) and the Governing Body Committee on Freedom of Association (CFA) of the ILO. This special procedure allows governments, workers’ organizations or employers’ organizations to present complaints against States (whether ILO Members or non-ILO members that are members of the United Nations) for the violation of trade union rights, even when they have not ratified conventions on trade union and collective bargaining rights. The Commission, created in 1950, is a permanent organ and is the highest body of this special mechanism for the protection of trade union rights. It is composed of independent members and its mandate is to examine all complaints regarding alleged violations of trade union rights submitted to the Governing Body of the ILO. Although it is essentially a fact-finding body, it is authorized to work with the government in question on the possibility of reaching a friendly settlement to the dispute. This Commission - which to date has examined six complaints - requires only the consent of the interested government to intervene when the country has not ratified the conventions on trade union rights. The Committee on Freedom of Association is a tripartite organ established in 1951 by the Governing Body, and is composed of nine members and their alternates representing the Governing Body’s employer, worker and government groups. It also has an independent president. It meets three times a year and is responsible for the preliminary examination of the cases submitted through the special complaint procedure. In its examination, the Commission takes into account the observations presented by the government. The Commission may also recommend to the Governing Body, depending on the case, that a case does not require a more thorough examination, and that the Governing Body should reprimand the government with regard to the proven irregularities, inviting it to take the appropriate measures to remedy them, or that it try to obtain the agreement of the government for the case to be referred to the Fact-Finding and Conciliation Commission. The experience acquired in the examination of over 1800 cases in its 44 years of existence has allowed the Committee on Freedom of Association to develop a complete, balanced and coherent body of principles of freedom of association and collective bargaining rights based on the provisions of the Constitution and of the ILO, and on the conventions, recommendations and resolutions in this area. Having been established by a specialized, impartial and prestigious tripartite international organ, and stemming from real situations - varied, concrete allegations of the violation of trade union rights from around the world, frequently very serious and complicated - this body of principles has acquired authority which is generally recognized in the international sphere as well as within different countries. It is referred to with increasing frequency in the development of national legislation, in different fora responsible for the application of trade union rights, in the resolution of large collective conflicts and in scholarly publications (See Freedom of Association: Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO, 1996, pp. 1 and 2).

³² See Freedom of Association, CFA: Digest of Decisions (1973), para. 107, cit. by O’Donnell, op.cit., pp. 270 and 271.

³³ See Freedom of Association, CFA: Digest of Decisions (1985), para. 362, cit. by O’Donnell, op.cit., pp. 270 and 271. The U.N. Human Rights Committee has also passed judgment on this problem of interpretation in the case of *J.B. v. Canada*. The majority opinion holds that the *travaux préparatoires* of both International Covenants, as well as the text of article 8 of the International Covenant on Economic, Social and Cultural Rights exclude the hypothesis that the right to strike is implicit in the freedom of

The Inter-American Court must interpret the normative content of trade union rights taking into account the distinctive features of the international organs in this specific area³⁴, and in terms of the *pro homine* principle, must apply the most favorable standards of trade union rights developed by the Committee on Freedom of Association.³⁵

Although the scope of this right and the particularities of the case are issues to be dealt with in the analysis of the merits, in what is relevant here, it is clear that the complaint regarding the punishment received by the workers as a result of the exercise of the right to

association enshrined in article 22 of the International Covenant on Civil and Political Rights; nevertheless, five members dissented, finding that the right to strike, insofar as it is a necessary element in the protection of the members of a particular trade union, must be considered implicit in the right to form unions. In their opinion, the necessity of a strike would be a question to be examined on the merits, on a case-by-case basis (see Human Rights Committee, Report No. 26/1982, para. 10). The dissenting opinion stated that, “*Article 22 provides that ‘Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.’ The right to form and join trade unions is thus an example of the more general right to freedom of association. It is further specified that the right to join trade unions is for the purpose of protection of one’s interests. In this context we note that there is no comma after ‘trade unions’, and as a matter of grammar ‘for the protection of his interests’ pertains to the ‘right to form and join trade unions’ and not to freedom of association as a whole. It is, of course, manifest that there is no mention of the right to strike in article 22, just as there is no mention of the various other activities, such as holding meetings, or collective bargaining, that a trade-unionist may engage in to protect his interests. We do not find that surprising, because it is the broad right of freedom of association which is guaranteed by article 22. However, the exercise of this right requires that some measure of concerted activities be allowed; otherwise it could not serve its purposes. To us, this is an inherent aspect of the right guaranteed by article 22, paragraph 1. Which activities are essential to the exercise of this right cannot be listed a priori and must be examined in their social context in the light of the other paragraphs of this article*” (para. 3). According to these jurists, it is perfectly valid to make use of the texts and doctrines of other of other instruments and organs to illuminate the meaning of article 22(2) of the ICCPR. Thus, they asserted that “... we see no reason to interpret article 22 in a manner different from ILO when addressing a comparable consideration ... we cannot see that a manner of exercising a right which has, under certain leading and widely ratified international instruments, been declared to be in principle lawful, should be declared to be incompatible with the Covenant on Civil and Political Rights” (paras. 7 and 8).

³⁴ In Advisory Opinion OC-1, the IACtHR established that “[a] certain tendency to integrate the regional and universal systems for the protection of human rights can be perceived ... Special mention should be made in this connection of Article 29, which contains rules governing the interpretation of the Convention, and which clearly indicates an intention not to restrict the protections of human rights to determinations that depend on the source of the obligations” (Inter-Am.Ct.H.R. Advisory Opinion OC-1/82, of September 24, 1982, cit.).

³⁵ Likewise, in Advisory Opinion OC-5, the Inter-American Court stated that, “if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Covenant, to limit the exercise of rights and freedoms that the latter recognizes” (Inter-Am.Ct.H.R. Advisory Opinion OC-5/85, of November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), para. 52). The criterion applicable to the resolution of the potential conflict between two or more human rights norms is the *pro homine* principle which requires the application of the norm that is most comprehensive and favorable to the individual.

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-American Court to consider a trade union a “victim.”

General considerations and applicable law.

The Commission considered that the State of Alta Caledonia was responsible for the violation of its international obligations as a result of “The failure to recognize the Pagura Workers’ Union as the majority union and to grant it the corresponding bargaining agent status.”³⁶

Article 1.1 of the ACHR states that:

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

Article 1.2 defines the term “person”:

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

Article 8 of the Protocol of San Salvador provides that:

1. *“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 (...).”

The Commission has maintained on repeated occasions that it lacks jurisdiction to examine allegations of violations of the rights of legal persons.

³⁶ Paragraphs 26 and 27 of the hypothetical case.

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 *Bendeck-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 contemplation 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 recognition of legal persons as victims of the violation of fundamental rights would not distort any basic principles in this area.

³⁷ IACHR, Report No. 47/97, *Tabacalera Boquerón S.A.*, Paraguay, October 16, 1997, in the 1997 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/II.98, Doc. 6 rev., April 13, 1998, p. 223. The Commission further maintained that, “[i]n this case, the petition has been filed on behalf of *Tabacalera Boquerón S.A.* and its shareholders. In this sense and according to the aforementioned jurisprudence, the Commission has pointed out that the protection afforded by the inter-American human rights system is limited to natural persons, and excludes legal entities. Therefore, *Tabacalera Boquerón S.A.*, as a legal entity, cannot be a ‘victim’ of a human rights violation in the inter-American system, since such bodies are not protected by the Convention. It would, perhaps, be advisable to analyze the situation of individual shareholders, in this case the owners of the company, who also claim to be victims in this case. In this regard, the shareholders of *Tabacalera Boquerón S.A.* point out that they have been victims of an attack against their right to property, which is protected by the Convention in Article 21. In this regard and after a more detailed analysis of the rights specifically alleged, it must be pointed out that the Convention in the aforementioned article limits the protection of the right to property to individual persons. The Commission has stated: ‘Consequently, in the inter-American system, the right to property is a personal right. The Commission is empowered to vindicate the rights of an individual whose property is confiscated, but is not empowered with jurisdiction over the rights of judicial beings, such as corporations or as in this case, banking institutions.’ (ibid). Although in this case we are not dealing with a banking institution, it is also true that both are corporations, that is to say, legal entities, and in the case in question, the party directly affected by the judicial decision was always *Tabacalera Boquerón S.A.* which suffered ‘damages to its assets.’ During domestic judicial proceedings, the shareholders were never mentioned as victims of any violation, there were never any initiatives to protect their rights; therefore, just as in the aforementioned case, what is at issue is not the individual property rights of shareholders, but the commercial rights and ‘assets’ of *Tabacalera Boquerón S.A.*, which are not protected by the jurisdiction of the Inter-American Commission on Human Rights” (pp. 233 and 234).

³⁸ IACHR, Report No. 10/91, Case 10.169, Peru, February 22, 1991, in the 1990-1991 Annual Report of the Inter-American Commission on Human Rights, OEA/L/V/II.79.rev.1, Doc.12, February 22, 1991; Report No. 39/99, *Mevopal, S.A.*, Argentina, March 11, 1999, Report of the Inter-American Commission on Human Rights, OEA.Ser.L/V/II.102, Doc.6, rev., April 16, 1999.

³⁹ IACHR, Reports No. 103/99 and 106/99 of September 27, 1999, paras. 17 and 20, respectively, in the 1999 Annual Report of the Inter-American Commission on Human Rights, vol. 1, pp. 324-327 and 328-333, respectively.

The specific instruments which protect trade union rights also provide for the possibility of considering labor unions subjects endowed with rights.

Among them we can cite ILO Convention 87 on Freedom of Association and Protection of the Right to Organize (1948), which has been ratified by Alta Caledonia, and which is the cornerstone of trade union rights in the international sphere.⁴⁰

The Committee on Freedom of Association has affirmed that the right to strike is one of the fundamental legitimate measures available to workers and their organizations for the promotion and defense of their social and economic interests.⁴¹ The Committee has made clear that this is a right that workers' organizations (trade unions, federations and confederations) must enjoy.⁴²

Finally, article 8 of the International Covenant on Economic, Social and Cultural Rights, textually similar to the Protocol of San Salvador, establishes that:

“The States Parties to the present Covenant undertake to ensure:

- a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. (...);*
- b) the right of trade unions to establish national federations or confederations and the right of the latter to form and join international trade-union organizations;*

⁴⁰ Various norms of Convention 87 establish employers' and workers' organizations as subjects having rights. Among others, article 3(1) states that: “[w]orkers’ and employers’ organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities, and to formulate their programs.” Article 4 establishes that “[w]orkers’ and employers’ organizations shall not be liable to be dissolved or suspended by administrative authority,” principle which also applies to federations and confederations, according to article 6. Finally, article 5 recognizes the right of workers’ and employers’ organizations to join federations and confederations, as well as similar organizations of international character.

⁴¹ See ILO, 1996, paras. 473-475, cited in Gernigon, Bernard, Odero, Alberto and Guido, Horacio, *ILO Principles on the Right to Strike*, in *International Labour Review*, vol. 117 (1998), No. 4, p. 4.

⁴² See Gernigon, Bernard, Odero, Alberto and Guido, Horacio, *ILO Principles on the Right to Strike*, in *International Labour Review*, cit., p. 4. In reference to strikes relating to the level of negotiation, the Committee has established that: “The legal provisions prohibiting strikes related to the application of a collective bargaining agreement to more than one employer are incompatible with the principles of trade union rights relative to the right to strike; the workers and their organizations must be able to have recourse to acts of protest in support of contracts that cover various employers” (ILO, 1996, para. 490). In the same sense, it maintained that “workers and their organizations must be able to have recourse to collective actions (strikes) so that the (collective) employment contracts bind several employers” (ibid., para. 491).

- 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.

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.”*⁴³ In subsequent cases, the IACHR has maintained the same opinion.⁴⁴

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 inter-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 must be interpreted in a more dynamic manner, taking into account the evolution of hemispheric standards in this area. The Court stated in Advisory Opinion OC-10 that, *"This American law has evolved from 1948 to the present; international protective measures, subsidiary and complementary to national ones, have been shaped by new instruments. As the International Court of Justice said: 'an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation' (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971, p. 16 ad 31)."*⁴⁵

Thus it can be argued that although the Protocol of San Salvador does not contain a specific norm attributing the character of "victim" to legal persons, article 8 of the same instrument explicitly constitutes workers' organizations as subjects within the law.

Let us recall the text of the Protocol:

1. *"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*

⁴⁵ Inter-Am.Ct.H.R. Advisory Opinion No. 10, OC-10/89, cit., p. 123. The Court concluded that: *"That is why the Court finds it necessary to point out that to determine the legal status of the American Convention it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948"* (ibid.).

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. A union, 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.

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).
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.

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 manufacturing process.

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 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, and the accompanying risks.*”⁴⁷

Among the norms that the IACHR considered violated was article XI of the ADRDM:

“Every person has the right to the preservation of his health and through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”

The Commission indicated in its claim that the State of Alta Caledonia had also violated the norm contained in the first paragraph of article XIV of the Declaration:

“Every person has the right to work, under proper conditions...”

Likewise, the Commission cited the norm established in article 13 of the ACHR, which provides that:

“1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or*
- b. the protection of national security, public order, or public health or morals. (...).”*

⁴⁷ Paragraphs 26 and 27 of the hypothetical case.

In the case of the *Pagura Workers' Union et al.* (Alta Caledonia), the scope of the State's positive obligations with regard to health is at issue. The question is whether, once the State has committed itself to ensuring the health of its inhabitants, this obligation requires the State to adopt concrete measures, or if it must only abstain from conduct that might adversely affect this right.

If the obligation to adopt specific measures is assumed, the scope of this obligation remains to be determined. At issue then is the degree of the State's obligation to adopt positive measures to guarantee the right to health. In the hypothetical case, the measure that the State should have adopted was to provide information in relation to high-risk activities affecting the health of the workers, in a situation where the risk is the result of a non-state activity, the danger of which has not been proven.

With regard to positive obligations, the Inter-American Court has sustained 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.*"⁴⁸

The jurisprudence of the European system has for its part developed clear guidelines with respect to the positive obligations of states when interests concerning the right to health, life or physical integrity are at issue.

In the case of *LCB v. United Kingdom*, the ECHR held that the obligation contained in the first paragraph of article 2 of the Convention obliged the States not only to abstain from intentionally and illegally depriving a person of his or her life, but also to adopt appropriate measures to guarantee the right to life. The ECHR found that "*the Court's challenge is consequently to determine, given the circumstances of the case, whether the State did everything that could have been required of it to prevent that the life of the petitioner be placed in a situation of avoidable risk.*"⁴⁹

⁴⁸ Inter-Am.Ct.H.R., *Velásquez Rodríguez* case, Judgment of July 29, 1988, para. 175.

⁴⁹ ECHR, *LCB v. United Kingdom*, Judgment of June 9, 1998. In this case the parties argued the scope of the State's duty to provide adequate information to the petitioner regarding circumstances that could have mitigated or prevented the illness that he was suffering from. As to the scope of the State's obligations, the ECHR stated that, "... *the Court considers that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. (Cf. the Court's reasoning in respect of Art. 8 in Guerra v. Italy, 19 February 1998, not yet reported in EHRR, para. 58: see also the decision of the Commission on the admissibility of App. No. 7154/75, Association X v. United Kingdom, 12 July 1987, DR 14, p. 32.) It has not been suggested that the respondent State intentionally sought to deprive the applicant of her life*" (para. 36).

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 non-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.

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. Kitts on the basis that there he would not be able to continue the medical treatment that kept him alive. In this sense, he alleged that deportation involved subjecting him to inhuman or degrading treatment.

⁵³ Inter-Am.Ct.H.R., *Velásquez Rodríguez* case, Judgment of July 29, 1988, para. 175.

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.

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 12⁵⁷ 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

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 Covenant 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 hygiene; (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) the creation of conditions which would assure to all medical services and medical attention in the event of sickness.*"

⁵⁸ See Committee on Economic, Social and Cultural Rights, General Comment 14, *The right to the highest attainable standard of health*, U.N. Doc. E/C.12/2000/4 (2000). The Committee maintained that, "(35) *Obligations to protect include, inter alia, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct. States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning; to prevent third parties from coercing women to undergo traditional practices, e.g., female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence. States should also ensure that third parties do not limit people's access to health-related information and services.* (36) *The obligation to fulfill requires States parties, inter alia, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions. Public health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas. States have to ensure the appropriate training of doctors and other medical personnel, the provision of a sufficient number of hospitals, clinics and other health-related facilities, and the promotion and support of the establishment of institutions providing counseling and mental health services, with due regard to equitable distribution throughout the country. Further obligations include the provision of a public, private or mixed health insurance system which is affordable for all, the promotion of medical research and health education, as well as information campaigns, in particular with respect to HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, the abuse of alcohol and the use of cigarettes, drugs and other harmful substances. States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. Furthermore, States parties are required to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services.* (37) *The obligation to fulfill (facilitate) requires States inter alia to take positive measures that enable and assist individuals and communities to enjoy the right to health. States parties are also obliged to fulfill (provide) a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. The obligation to fulfill (promote) the right to health requires States to undertake actions that create,*

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

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, agents and work processes; the provision of health information to workers and the provision, if needed, of adequate protective clothing and equipment; the enforcement of laws and regulations through adequate inspection; the requirement of notification of occupational accidents and diseases, the conduct of inquiries into serious accidents and diseases, and the production of annual statistics; the protection of workers and their representatives from disciplinary measures for actions properly taken by them in conformity with such a policy; and the provision of occupational health services with essentially preventive functions. See ILO Occupational Safety and Health Convention, 1981 (No. 155) and Occupational Health Services Convention, 1985 (No. 161).*"

⁵⁹ ECHR, *McGinley & Egan v. United Kingdom*, cit.

⁶⁰ ECHR, *Guerra et al. v. Italy*, cit.

was not being asked to produce the surrounding information, but only to guarantee access to it.

The State took all of the actions within its power to guarantee the right in question in terms of the expected risk.

The State cannot be required to avoid every potentially harmful activity. Every community must assume risks in order to function. For example, although it is objectively foreseeable that automobile traffic will result in the loss of a more or less quantifiable number of human lives, the State cannot be required to prohibit the circulation of traffic, or to avoid these deaths at all costs. It is clear that, in certain specific contexts, and even in cases where risk is certain - such as automobile traffic - the activity must be tolerated and even encouraged.

To tolerate the advance of a manufacturing activity that only presumably generates a risk does not offend any human right. If the suspicion of harmfulness of an activity is not solidly based, then a partial absence of information must be assumed. In this case, nothing indicates that there is a relevant nexus between the products used in the factory and the ailments of some of the workers.

If the State is held accountable for this potential hazard, a standard will be established that discourages entrepreneurial innovation. To know “all” the risks of a product is really impossible, and a reasonable limit to the State’s obligation must be established so as not to discourage the relationships of private individuals. This is especially relevant in socially valuable spheres like industry, which promotes employment and progress, and particularly in Alta Caledonia, which is experiencing a deep economic recession that will be exacerbated if production requirements are made more stringent.

Placing the existing information at the disposition of private individuals and establishing reasonable rules for the reparation of damages among private individuals, with the preventive and dissuasive effect that this implies, adequately satisfies the common good. Thus, in the absence of information regarding certain remote risks of a product, the assignment of responsibility for damages to whomever is preparing to use the product is sufficient incentive for the production of that information. Consequently, the State’s obligation will be strengthened only insofar as the direct relationship between the product or activity and a certain injury is more evident.

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;

Article 16 (Freedom of Association) of the ACHR states that:

“(1) Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. (2) The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others. (3) The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.”

The inter-American human rights system has rarely dealt with this right. Only in one recent

decision has the Inter-American Court considered the issue and defined the content of this right. In that case the Court held that, *“freedom of association, with regard to trade unions, consists basically of the capacity to form organizations and develop their internal structures, activities and programs of action without the intervention of the public authorities to limit or hinder the exercise of this right.”*⁶³ The Court added that, *“it is a*

⁶¹ Paragraph 11 of the hypothetical case.

⁶² Paragraph 27 of the hypothetical case.

⁶³ Inter-Am.Ct.H.R., *Baena, Ricard et al.* (270 workers v. Panama), Judgment of February 2, 2001, para. 156.

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*

In the case of the *Pagura Workers' Union et al.* (Alta Caledonia), the State's capacity to establish permanent restrictions on trade union rights is at issue.

The restrictions in Alta Caledonia's legislation limit the exercise of powers inherent in this right (collective bargaining and the right to strike) to the union with bargaining agent status.

The parameters of permissible restrictions on trade union rights are set forth in clause 2 of article 8 of the Protocol of San Salvador, which states that, *"[t]he exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others (...)."*⁶⁷

On the other hand, in reference to the restriction of rights, article 5 of the Protocol provides that, *"The States Parties may establish restrictions and limitations on the enjoyment and exercise of the rights cited herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights."*⁶⁸

In its analysis of restrictions on trade union rights, the Committee on Freedom of Association of the International Labour Organization has indicated that, *"[a]lthough it*

⁶⁴ *Id.*

⁶⁵ *Id.*, para. 158.

⁶⁶ *Id.*, para. 159.

⁶⁷ In turn, clause 2 of article 16 of the Convention stipulates in relation to freedom of association that, *"The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others."*

⁶⁸ Finally, article 30 of the Convention defines the scope of restrictions contemplated therein: *"the restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."*

can be advantageous for workers and employers to avoid the multiplication of the number of organizations defending their interests, any monopoly imposed by legal means contradicts the principle of freedom of choice in relation to the employers' and workers' organizations. (...) The unity of the trade union movement should not be imposed through legislative intervention on the part of the State, as such intervention is contrary to the principles of freedom of association."⁶⁹

On the other hand, the Committee on Freedom of Association has indicated, "...on several occasions, and particularly during discussion on the draft of the Right to Organize and Collective Bargaining Convention, that the International Labour Conference referred to the question of the representative character of trade unions, and, to a certain extent, it agreed to the distinction that is sometimes made between the various unions concerned according to how representative they are. (...) [T]he Committee felt that the mere fact that the law of a country draws a distinction between the most representative trade union organizations and other trade union organizations is not in itself a matter for criticism. Such a distinction, however, should not result in the most representative organizations being granted privileges extending beyond that of priority in representation, on the ground of their having the largest membership, for such purposes as collective bargaining or consultation by governments, or for the purpose of nominating delegates to international bodies. In other words, this distinction should not have the effect of depriving trade union organizations that are not recognized as being amongst the most representative of the essential means for defending the occupational interests of their members, for organizing their administration and activities and formulating their programmes, as provided for in Convention No. 87."⁷⁰

In evaluating restrictions upon trade union rights, the Committee has taken into consideration the effect that this regulation has on the means available for unions to protect the rights of workers. On this point, it concluded that, "[t]he workers' freedom of choice would be jeopardized if the distinction between most representative and minority unions results, in law or in practice, in the prohibition of other trade unions which workers would like to join, or in the granting of privileges such as to influence unduly the choice of organization of workers. Therefore, this distinction should not have the effect of depriving those trade unions that are not recognized as being amongst the most representative of the essential means for defending the occupational interests of their members (for example, making representations on their behalf, including representing them in case of individual grievances), for organizing their administration and activities, and formulating their programmes, as provided for in Convention No. 87."⁷¹

⁶⁹ Freedom of Association: digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (Geneva: International Labour Office, 1996), para. 309.

⁷⁰ Id.

⁷¹ Id. at para. 310.

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 number of members, are not consistent with the principle of freedom to organize; the same holds if this authorisation depends on deposit of an excessively large sum of money.*”⁷⁴ Affirming this, the Committee rejected the argument of the Irish Government which maintained in reference to these requirements that “*they are necessary in order to reduce the number of trade unions so as to improve their bargaining power.*”⁷⁵ On this point, the Committee found that “*the presence of a high number of trade unions is not a phenomenon exclusive for Ireland and does not necessarily entail a weakening of the labour movement as long as trade unions are in a position to organize horizontally and vertically to defend their interests.*”⁷⁶

Paragraph 4 of article 6 of the European Social Charter concerns the right of workers and employers to collective action, including the right to strike. This was the first time that this right was recognized in an international instrument.

As regards the right to strike as a key element of trade union rights, the Committee has recognized this right not only with respect to legally constituted trade unions, but also as to groups of workers as a necessary consequence of trade union rights. Thus, the Committee maintained: “*as regards the requirement that all strikes be led by a trade union, the Committee pointed out that paragraph 6, Part I of the Charter lays down the principle that all workers and employers have the right to bargain collectively, and that since therefore an ordinary group of workers without any legal status may engage in*

⁷² Article 5 of the Charter (according to its 1996 revised text) states: “*With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join these organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom (...).*”

⁷³ Article 6 of the Charter (according to its 1996 revised text) states: “*With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: 1. To promote joint consultation between workers and employers; 2. To promote, where necessary and appropriate, machinery for voluntary negotiations, between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; 3. To promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labor disputes; and recognise: 4. The right of workers and employers to collective action on cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.*”

⁷⁴ Conclusions III, cited in *The Right to Organise and Bargain Collectively*, cit. p. 31.

⁷⁵ Id.

⁷⁶ Id.

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

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.

The restriction of the rights enumerated in the ACHR and in the Protocol are only legitimate if they conform to the requirements established in these instruments. With regard to trade union rights, the State of Alta Caledonia has set restrictions which are not permissible under the ACHR and the Protocol.

Alta Caledonia's legislation establish restrictions which affect the essence of trade union rights as they have been recognized by the ACHR and the Protocol.

In this case the restrictions must be evaluated in the light of the criteria of article 8(2) of the Protocol, taking into particular account the nature of the activities in question (the exercise of trade union rights) and the effects of the permanent restriction on the exercise of this right established by law.

In view of the established principles, the regulation of trade union rights in Alta Caledonia exceeds the limits imposed by clause 2 of article 8 of the Protocol.

On one hand, this is because the regulation affects the content of the right so as to distort it and deprive it of its real content. This regulation openly contradicts article 5 of the Protocol, since it affects the "*purpose and reason*" of this right. The essential content of a right "*...is that part of the right without which it would lose its peculiarity; it is that which makes [the right] recognizable, that which is necessary for the right to allow its holder the satisfaction of those interests for the attainment of which the right is granted.*"⁸²

The legislation of Alta Caledonia deprives the minority union of the tools it requires to develop its work in defense of the employees it represents. This system is a result of the imposition of a trade union monopoly as a consequence of the laws passed by the State. If the minority union lacks, by law, the fundamental tools to defend the interests of its members, then it will never be able to legitimately dispute "bargaining agent status."

The State intervention restricting trade union rights is not proportional to the objective it seeks. It unduly influences the workers' freedom to choose the organization they wish to join, by creating a situation where one union has mechanisms to defend its members while the other does not. Consequently, although the legislation recognizes the minority union, it does not permit it to develop any "trade union activity" because such activities are confined to the most representative union. The restriction in question thus eliminates the possibility for another union to emerge. The legislation affects competition between unions, resulting in fact in a single-union system, or trade union monopoly.

Finally, we should point out that the jurisprudence of the ECHR on freedom of Association (article 11 of the Convention) is not applicable in this case. The cases of the European system interpret trade union rights as a particular manifestation of freedom of

⁸² Amicus Curiae, Case 11.325, *Baena, R. et al.* (Panama), submitted to the IACtHR by the Centro de Asesoría Laboral, Centro de Estudios Legales y Sociales, Centro de Derechos Económicos y Sociales and the Comisión Colombiana de Juristas.

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 the 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 the interest which justifies it, and must be narrowly tailored to this legitimate objective.*”⁸³

In the event of regulation of trade union rights, the idea is to create legislation which allows the representation of workers in the manner most effective for the protection of their interests. This system has been established for the benefit of the workers, providing them with strong unions that can undertake the representation of their interests with power equal to that of their adversaries. A fragmented labor movement deprives the representation of the strength required to achieve effective results.

For this reason, the system established in Alta Caledonia recognizes the plurality of the unions and only reserves collective bargaining and the right to strike for the most representative union; it is a pluralistic system with unity of representation. In *Swedish Engine Drivers' Union v. Sweden*,⁸⁴ the ECHR analyzed a case similar to the instant case. It dealt with the negotiation of a collective bargaining agreement restricted to certain federations, excluding a minority union. The ECHR decided that these facts did not constitute a violation of article 11 of the Convention, given that this union was allowed to conduct a series of other activities to represent the interests of its members.

⁸³ Inter-Am.Ct.H.R., Advisory Opinion No. 6, OC-6/86, of May 9, 1986, para. 46 (citing *The Sunday Times* (ECHR)).

⁸⁴ *Swedish Engine Drivers' Union v. Sweden*, ECHR Judgment of January 19, 1976.

Thus, the ECHR held: *"No-one disputes the fact that the applicant union can engage in various kinds of activity vis-à-vis the Government. It is open to it, for instance, to present claims, to make representations for the protection of the interests of its members or certain of them, and to negotiate with the office. Nor does the applicant union in any way allege that the steps it takes are ignored by the Government. In these circumstances and in the light of the two foregoing paragraphs, the fact alone that the Office has in principle refused during the past few years to enter into collective agreements with the applicant union does not constitute a breach of Article 11 para. 1 (art. 11-1) considered on its own."*⁸⁵

In reaching this decision, the ECHR rejected the petitioner's argument that this difference in treatment placed the minority union at a disadvantage that could reduce the usefulness of belonging to this union.⁸⁶

For its part, the Committee on Freedom of Association of the ILO *"felt that the mere fact that the law of a country draws a distinction between the most representative trade union organizations and other trade union organizations is not in itself a matter for criticism."*⁸⁷

On the other hand, the requirements imposed by the legislation respect the principles established by the ILO. The Committee has indicated that the determination of the most representative union must be based on *"objective, pre-established and precise criteria so as to avoid any possibility of bias or abuse."*⁸⁸ The contested legislation in no way contravenes the aforementioned principles, given that the criteria have been objectively pre-established.

The goal of the contested legislation is to guarantee order and the public good, since it aims to facilitate the resolution of labor conflicts so as to promote social peace and strengthen the bargaining power of the workers who would be adversely affected by an excessive fragmentation of representation.⁸⁹

⁸⁵ *Id.*, para. 41.

⁸⁶ The ECHR held that *"As concerns the alleged infringement of personal freedom to join or remain a member of the applicant union, the Court notes that the employees in question of the Swedish State Railways retain this freedom as of right, notwithstanding the conduct of the Office. It may be the fact that the stagnation or fall in the membership of the Swedish Engine Drivers' Union is to be explained at least in part, as the applicant contends, by the disadvantage the applicant is placed at compared with trade unions enjoying a more favourable position. It may be the fact too that this state of affairs is capable of diminishing the usefulness and practical value of belonging to the applicant union. However, it is brought about by the Office's general policy of restricting the number of organisations with which collective agreements are to be concluded. This policy is not on its own incompatible with trade union freedom; the steps taken to implement it escape supervision by the Court provided that they do not contravene Articles 11 and 14 (14+11) read in conjunction."* (para. 42).

⁸⁷ CFA: Digest of Decisions 1996, para. 310.

⁸⁸ *Id.*

⁸⁹ The Inter-American Court has maintained that *"in fact in is possible, within the framework of the Convention, to understand the meaning of public order as a reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles. In*

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.

that sense, restrictions on the exercise of certain rights and freedoms can be justified on the ground 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 so far 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 his twelve co-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 Inter-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 re-employ 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 re-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

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 employment by reason of membership of a trade union, even if that trade union is not recognized by the employer as representing the majority of workers concerned.”*⁹⁷

The reasoning of the above is that *“[o]ne of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom.”*⁹⁸

Arguments of the State

The strike that the dismissed workers were involved in had been declared illegal by the competent authorities, in this case the Ministry of Labor. This strike was declared illegal because it had not been called by the union legally entitled to do so, the UTO.

⁹⁵ CFA, Case 1594 (Cote D'Ivoire), para. 736.

⁹⁶ CFA: Digest of Decisions 1996, para. 592.

⁹⁷ *Id.*, para. 693.

⁹⁸ *Id.*, para. 724.

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.*, para. 533. The concept of public service can even vary from situation to situation, and from country to country. Thus, the Committee found that *“What is meant by essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a country. Moreover, this concept is not absolute, in the sense that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population.”* *Id.*, para. 541.

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 newly-formed 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 representation." The Supreme Court affirmed the appellate court's holding.

[Note to the judges: The students may have dealt with the violation of articles 8 and 25 in relation to the other two key problems presented in the case: (1) the failure to grant the requested information, and its confirmation by the courts; and (2) the rejection of the reinstatement of the workers fired because of the strike].

The right to judicial protection constitutes one of the fundamental rights enshrined in the human rights treaties, and is vital to the protection of economic, social and cultural rights such as trade union rights.

The due process clause constitutes an additional source of fundamental individual rights. Effective judicial protection, as well as the due process clause, form one of the cornerstones of the system for the protection of rights; if there is not adequate judicial protection of international human rights within the domestic legal systems of the States, their effect becomes illusory.

¹⁰⁰ Paragraph 18 of the hypothetical case.

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; 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.