Inter-American Court of Human Rights

Case of Baena-Ricardo et al. *v.* Panamá

Judgment of November 18, 1999
(Preliminary Objections)

In the Baena Ricardo *et al.* case,

The Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), composed of the following judges[*]:

Antônio A. Cançado Trindade, President
Máximo Pacheco-Gómez, Vice-President
Hernán Salgado-Pesantes, Judge
Oliver Jackman, Judge
Alirio Abreu-Burelli, Judge, and
Carlos Vicente de Roux-Rengifo, Judge

also present,

Manuel E. Ventura-Robles, Secretary and
Renzo Pomi, Deputy Secretary

in accordance with Article 36.6 of its Rules of Procedure (hereinafter "the Rules of Procedure"), delivers the following judgment on the preliminary objections filed by the State of Panama (hereinafter "the State" or "Panama").

I
INTRODUCTION OF THE CASE

1. This case was referred to the Court by the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") on January 16, 1998. It derived from petition number 11,325, received by the Secretariat of the Commission on February 22, 1994.

II
FACTS SET OUT IN THE APPLICATION

2. In the following paragraphs, the Court summarizes the facts alleged by the Commission in the application that are relevant for considering the preliminary objections.

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[*] Judge Sergio García Ramírez informed the Court that for reasons beyond his control, he was unable to take part in the preparation, deliberation and signature of this judgment.

a) on October 16, 1990, the State Enterprise Trade Union Coordination Agency presented to the Government of Panama, at that time under the presidency of Guillermo Endara, a list of petitions on labor-related issues regarding certain proposed changes in its political program of government that, according to trade union leaders, affected the workers;

b) on November 16, 1990, the State rejected all the requests referred to in the previous subparagraph and, as a result, the State Enterprise Trade Union Coordination Agency called for a march on December 4, 1990, and a 24-hour work stoppage the following day. These actions were taken as a "protest movement", owing to the rejection of the requests made to the President of the Republic;

c) on December 4, 1990, the planned march was held. Concurrently, the former head of the National Police Force, Colonel Eduardo Herrera Hassán, and other members of the armed forces who had been detained, escaped from the prison on "Flamingo prison island" and took the principal barracks of the National Police Force during the night of the same day and part of the following day. The State related this act to the march organized by the trade union leaders and therefore the latter decided to suspend the work stoppage on December 5, 1990, at 7.30 a.m. Despite this, the State considered that the trade union action amounted to "an accessory involvement" aimed at overthrowing the "constitutionally installed Government" and proposed the mass dismissal of all the workers who had taken part in the march; to this end, it sent a draft law to the Legislative Assembly;

d) on December 10, 1990[1], without waiting for the approval of the Legislative Assembly and, if appropriate, the entry into force of the said law, the State began a "systematic policy of mass dismissals of public enterprise workers, which concluded with the dismissal of the 270 petitioners in the instant case", who worked for the following public institutions: the National Port Authority, the Bayano State Cement Company, the National Telecommunications Institute, the National Institute for Renewable Natural Resources, the Institute of Hydraulic Resources and Electrification, the Institute for Water Supply and Sewage Systems, the Ministry of Public Works and the Ministry of Education;

e) on December 14, 1990, the Legislative Assembly approved the draft law presented by the Executive and called it Law 25; under this law, "measures are adopted in order to protect democracy and the legal constitutional order in Government institutions" retroactive to December 1990 (article 5, Law 25) (*cfr*: draft law, annex 14 of the application). Owing to this, the labor-related procedure in a Labor Tribunal, which should have been followed, according to the legislation in force when the events occurred (and when the majority of the dismissals took place), was replaced by "a special claim under administrative law, totally alien to the labor sphere". The claims were totally rejected by the Supreme Court's Chamber for actions under administrative law.

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[1] According to page 3 of the application presented by the Commission, "as of December 10, a systematic policy of mass worker dismissals commenced…", while page 4 of this document mentions that "the victims [were] dismissed as of December 6, 1990".

f) the 270 dismissed workers presented their claims in accordance with the laws in force; however, these claims were processed under the procedure created by Law 25, under the argument that the former laws had been annulled or partially modified.

III
PROCEEDINGS BEFORE THE COMMISSION

3. On February 22, 1994, the Secretariat of the Commission received a petition from the Panamanian Human Rights Committee on behalf of 270 public employees dismissed as a consequence of Law 25 of December 14, 1990. On July 6, 1994, the Commission informed the State of the petition and requested it to present the corresponding information within 90 days.

4. On July 24 and October 19, 1994, the Commission sent the State additional information presented by the complainant and, in the latter communication, requested it to adopt the pertinent measures to present all its reports within 60 days.

5. On September 9, 1994, Panama presented its reply to the Commission, which forwarded it to the complainant on October 25, 1994, and on January 24, 1995, the complainant presented its observations to this document, which were forwarded to the State on January 31, 1995.

6. On February 14, 1995, the State presented its observations to the additional information that the Commission had forwarded on October 19, 1994, and on March 1, 1995, the Commission forwarded them to complainant.

7. On April 7, 1995, the Commission made itself available to the parties in order to reach a friendly settlement. Although both the State and the petitioners informed the Commission that they were interested in reaching a friendly settlement, after almost three years during which three meetings were held to try and reach a settlement, "the Commission considered that the action for settlement had been exhausted and initiated the legal proceeding".

8. On October 16, 1997, during its 97th session, the Commission approved Report No. 37/97, which was forwarded to the State on October 17, 1997. In this report, the Commission concluded:

> 148. That the acts of the State public authorities by which the Legislative Assembly adopted Law 25 of December 14, 1990, the Judiciary declared that it was almost completely constitutional and the Executive applied it and on the basis of which the human rights of the petitioners were violated and all their claims were rejected are incompatible with the provisions of the American Convention on Human Rights.
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> 149. That, with regard to the 270 persons in whose name this case has been filed, the State of Panama has failed to comply with its obligations under the following provisions of the American Convention on Human Rights: Article 8 (Right to a Fair Trial), Article 9 (Freedom from Ex Post Facto Laws), Article 10 (Right to Compensation), Article 15 (Right of Assembly), Article 16 (Freedom of Association)), Article 24 (Right to Equal Protection), and Article 25 (Right to Judicial Protection).
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> 150. That, with regard to these same persons, the State of Panama has failed to comply with its obligation to recognize and guarantee the rights contained in Articles 8 and 25, in relation to Article 1.1 and 2 of the American Convention on Human Rights, to which Panama is a State Party.

> 151. That the State has not complied with the provisions of Article 2 of the American Convention on Human Rights, since it has not adapted its legislation to the provisions of the Convention.

Moreover, the Commission determined:

> 1. To recommend to the Panamanian State that it should order the reinstatement of the workers dismissed under Law 25 of December 14, 1990, identified in paragraph 5 of this report, in their respective positions or in others with the same conditions as those in which they were working at the time they were dismissed; that it should recognize their back pay and other fringe benefits to which they have a right; and that it should pay them compensation for the damage caused by their unjustified dismissal.
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> 2. To recommend to the State that, pursuant to the constitutional and legislative procedures in force, it should adopt all necessary measures to make the rights and guarantees contained in the American Convention on Human Rights fully effective.
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> 3. To recommend to the State that it should modify, repeal or permanently annul the said Law 25.
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> 4. To recommend to the State that the expression "to punish without prior trial" in Article 33 of the Panamanian Constitution should be duly interpreted, in order to comply with the obligation assumed by the Republic of Panama to adapt the provisions of its legislation to those of the Convention.
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> 5. To recommend that the rule contained in Article 43 of the Panamanian Constitution that permits ex post facto laws for reasons of "public order" or "social interest", should be amended and/or interpreted, pursuant to Article 9 of the American Convention, to the effect that "no one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed".
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> 6. To forward this report to the State, which shall not be authorized to publish it, granting the State a period of two months to adopt the above recommendations. The period shall commence from the day on which the report is transmitted.
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> 7. To inform the petitioner of the adoption of an Article 50 report in this case.

The Commission forwarded the said report to the State, and granted it a period of sixty days in which to inform it of the measures adopted to comply with the above-mentioned recommendations.

9. On December 10, 1997, the State rejected the Commission's report, alleging "legal reasons and …[of domestic law that impede it] from executing the recommendations of the honorable Inter-American Commission on Human Rights".

10. On January 14, 1998, the Commission, in the minutes of a conference telephone call, decided to refer the case to the Court.

IV
PROCEEDINGS BEFORE THE COURT

11. On January 16, 1998, the Commission presented the application to the Court in which it invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or the "Inter-American Convention"), and Articles 2, 26 *et seq*. of the Rules of Procedure of the Court. The Commission submitted the case for the Court to decide if there had been a violation of the following articles of the Convention: 8 (Right to a Fair Trial); 9 (Freedom from Ex Post Facto Laws); 10 (Right to Compensation); 15 (Right of Assembly); 16 (Freedom of Association); and

25 (Right to Judicial Protection) in relation to Articles 1.1, 2 and 33 and 50.2 (Duty of the State to comply in good faith with the recommendations issued by the Commission in its reports).

Furthermore, it requested the Court to declare that Law 25 and the provision contained in Article 43 of the Panamanian Constitution are contrary to the Convention, because they allow laws to be retroactive and that, in consequence, they should be modified or repealed in accordance with Article 2 of the said Convention. The Commission also requested the Court to require the State to reestablish the 270 workers in the exercise of their rights and to make reparations to and compensate the victims or their families for the acts committed by its agents, as established in Article 63.1 of the Convention.

Lastly, the Commission requested that the State should be condemned to pay the costs and expenses of the proceeding.

12. The Commission appointed Carlos Ayala Corao and Hélio Bicudo as its Delegates, Jorge E. Taiana and Manuel Velasco-Clark as its Advisors, and Minerva Gómez, Ariel Dulitzky, Viviana Krsticevic and Marcela Matamoros as their assistants. In a note received by the Secretariat of the Court (hereinafter "the Secretariat") on June 18, 1998, Marcela Matamoros advised that she was withdrawing from the instant case.

13. On January 28, 1998, once the President of the Court (hereinafter "the President") had made a preliminary examination of the application, the Secretariat notified it to the State, and informed it of the time limits for replying to it, opposing preliminary objections and appointing its representatives. Moreover, the State was invited to name a Judge *ad hoc*.

14. On February 20, 1998, Panama appointed Rolando Adolfo Reyna Rodríguez as the Judge ad hoc.

15. On February 27, 1998, the State appointed Carlos Vargas Pizarro as its Agent.

16. After having requested two extensions to the period for presenting preliminary objections, the State filed the following on April 17, 1998:

> 1. Inadmissibility of the application owing to non-compliance with the provisions of Article 51 of the Convention, which state that in order to refer a contested case to the Court, the Commission must adopt the respective resolution;
> 2. Inadmissibility of the application because the subject of the application is the replication of a petition that has already been examined by the International Labor Organization (hereinafter "the ILO");
> 3. Inadmissibility of the application because the Commission has violated the rule of confidentiality, by transmitting a copy of Report No. 37/97 to the petitioners;
> 4. Expiry of the application filed before the Court;

and requested that the Court should declare the application inadmissible and order the case to be closed.

17. On May 20, 1998, the Commission presented its observations, in which it requested the Court to reject "the preliminary objections as they were inadmissible and time-barred" and order "the proceeding on the merits of the case to continue".

18. On June 29, 1998, the State presented its reply to the application.

19. On December 14, 1998, the President summoned the State and the Commission to a public hearing to be held on January 27, 1999, to hear their points of view on the preliminary objections filed by the former. Furthermore, the President summoned Antonio Ducreux Sánchez, Deputy Minister of Work of Panama and a witness proposed by the State, to make a statement during the hearing.

20. On January 19, 1999, the State appointed Jorge Federico Lee as Deputy Agent.

21. On January 19, 1999, Rolando Adolfo Reyna Rodríguez, in his capacity as Judge *ad hoc* in the case, informed the Court that he "had participated […] [in] the claim JORGE A. MARTINEZ vs. INSTITUTE OF HYDRAULIC RESOURCES AND ELECTRIFICATION which he had dismissed owing to want of jurisdiction without beginning to hear the case". Likewise, he advised that he "[would be] performing the function of International Maritime Affairs in the Republic of Panama".

Lastly, he requested the Court to "determine if [the facts described above] are grounds for impediment".

22. On January 19, 1999, following the Court's instructions, the Secretariat requested Rolando Adolfo Reyna Rodríguez to provide information on "[the c]haracteristics and objective of the proceeding identified as Jorge A. Martínez vs. Institute of Hydraulic Resources and Electrification, in which […] he participated as President of Settlement and Decision Board No. 4", and about the "[l]ocation in the structure of the State of Panama of the 'International Maritime Affairs' office or unit".

23. On January 22, 1999, in reply to the request dated the previous day, Rolando Adolfo Reyna Rodríguez informed the Court that the proceeding in which he took part as President of Settlement and Decision Board No. 4, was based on the labor claim filed by several of the workers dismissed under Law 25, which he had rejected for want of jurisdiction. Likewise, he advised that "in Panama, [the] maritime authority is an autonomous institution devoted to all matters relating to merchant ships".

24. The same day, the Court issued an order in which it decided:

> 1. To declare that Rolando Adolfo Reyna Rodríguez is prevented from exercising the function of Judge *ad hoc* in the instant case.
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> 2. To continue hearing the case with its actual composition.
>
> 3. To notify this decision to Rolando Adolfo Reyna Rodríguez.

25. The public hearing on preliminary objections was held at the seat of the Supreme Court of Justice of the Republic of Costa Rica on January 27, 1999.

There appeared before the Court

for the Republic of Panama:

Carlos Vargas Pizarro, Agent;
Jorge Federico Lee, Deputy Agent;
Isabel Damian K., Ambassador to Costa Rica of the Republic of Panama;
Angela Alvarez Oller, Consul of the Republic of Panama in Costa Rica;
Santiago E. O'Donnell, Minister Plenipotentiary of the Embassy of the Republic of Panama in Costa Rica;
Jorge Ruiz, Administrative Vice-President of the Institute of Hydraulic Resources and Electrification; and
Sofía Escalante Trejos, Assistant;

for the Inter-American Commission on Human Rights:

Hélio Bicudo, Delegate;
Manuel Velasco Clark, Lawyer;
Viviana Krsticevic, Assistant; and
Soraya Long, Assistant;

witness proposed by the State:

Antonio Ducreux Sánchez.

26. The Court summarizes the witness's statement, as follows:

a. Testimony of Antonio Ducreux Sánchez
(Deputy Minister of Work and Labor Relations of the Republic of Panama, Panamanian Ambassador to the ILO, Member of the Freedom of Association Committee, President of the ILO Budget and Finance Committee, and President of the Committee for Complaints against Latin America in cases that cannot be considered by the Freedom of Association Committee)

As Panamanian Ambassador to the ILO Governing Body, it was his responsibility to verify any complaints presented against Panama, and one of these was the complaint filed by some of the employees dismissed from SITIRHE and SITINTEL in 1991.

Regarding the steps taken in relation to the complaint before the ILO, the Freedom of Association Committee examined the documentation presented by the complainants and by the State and, towards the end of 1992, recommended to Panama that it should adopt the measures necessary to reinstate the employees of the two State institutions who had been dismissed under Law 25 of 1990; that it should amend the laws that violated some precepts of ILO Conventions 87 and 98; that it should not take actions contrary to due process; that it should not limit the freedom of association of any trade union and that it should restore to the workers the right to organize, the inviolability of trade union premises and the management of trade union quotas.

Although a judgment of the Supreme Court of Justice of Panama declared that, under Law 25, the dismissals were not illegal, the Government that assumed power in 1994 accepted the ILO recommendation and reinstated

most, but not all, of the workers. Panama has not been subjected to international sanctions for only having complied partially with the recommendations.

The Freedom of Association Committee requested the State to "reinstate the workers, according to its needs". Panama has complied with the ILO recommendations, in accordance with its economic capacity. The fact that the State began to comply with the recommendations halted the possibility of declaring that it has not complied.

When the ILO issued the report that included its recommendations to the State, the latter was obliged to keep the ILO informed on progress with regard to the recommendations, and Panama has been complying with this obligation since 1992.

The ILO is the only international instance competent to receive labor complaints. The complaints have to be presented through an international trade union organization as they cannot be presented directly by the trade unions, and they are channeled through the ILO Standards Directorate. Subsequently, according to the dimension of the complaints, they are transferred to the Freedom of Association Committee, the Experts Committee or the Tripartite Complaints Committee.

The SITIRHE and SITINTEL unions presented the complaint to the Freedom of Association Committee, through the International Confederation of Free Trade Unions (CIOSL-ORIT). The number of workers was not defined to the ILO, as the number of persons affected varied in the different reports presented, and they were not individualized in the recommendations of the Freedom of Association Committee. The complaint, alleging the violation of ILO Conventions 87 and 98, which refer to freedom of association, only referred to the workers of the trade unions that presented it, SITIRHE and SITINTEL, and did not mention the other workers from other trade unions who were affected by Law 25.

The complaint before the Freedom of Association Committee was restricted to the events that occurred in December 1990. The ILO only hears matters of a strictly work-related nature, so that it did not deal with due legal process as this was outside its competence.

However, the point raised with regard to the labor courts of Panama refusing to accept the complaints of the workers without any legal justification is incorrect, because there were proceedings before that instance, filed by workers who considered that they had been unfairly dismissed.

There were no objections to the statement of the witness, Antonio Ducreux Sánchez, so the Court considers that the facts that he declared are proved.

V
COMPETENCE

27. Panama has been a State Party to the American Convention since June 22, 1978, and recognized the jurisdiction of the Court on May 9, 1990. Therefore, under the terms of Article 62.3 of the Convention, the Court is competent to hear the preliminary objections filed in the instant case.

VI
FIRST AND FOURTH OBJECTION:

Non-compliance with Article 51 and Expiry of the Application

28. The first objection filed by the State refers to the Commission's alleged non-compliance with the provisions of the Convention and the Regulations of the Commission regarding the decision to refer the case to the Court.

29. To justify this objection, the State presented the arguments on the facts and legal points that the Court summarizes below:

a) that on October 17, 1997, during its 97th session, the Commission forwarded to Panama, Report No. 37/97 on case 11,325, adopted the previous day;

b) that the Commission did not act in accordance with the rules established in Article 51 of the Convention, and Articles 46.2, 46.3, 46.4, 46.5 and 46.6, 50.1, 47.2 and 73.1.b of the Regulations of the Commission on the procedure for referring a case to the Court, as no resolution of the Commission deciding on this referral was recorded;

c) that, according to Articles 50 and 51 of the Convention, the Commission has to prepare two different reports. In this case, the Commission only adopted and issued the report referred to in Article 50. According to the State, the report referred to in Article 51.1 of the Convention is of a final nature and is the only instrument in which the referral of a case to the Court may be stipulated;

d) that at no time did the Commission proceed according to the procedural rules cited above, since it agreed to refer case 11,325 to the Court "on the basis of on an interpretation of the procedural rules that was clearly erroneous and in bad faith", using an informal and irregular procedure based on a telephone consultation with five of its seven members, entitled "Minutes of the telephone conference call between members of the Inter-American Commission on Human Rights to decide on the referral to the Inter-American Court of Human Rights of the case of the workers of the State of Panama dismissed under Law 25 of 1990"; and

e) that the minutes of the telephone conference call between the members of the Commission did not comply with the procedural formalities, so that it violates the rules of the Convention and its Regulations, under which there is no authorization for the Commission to hold a "Session-Conference Call" by telephone, take a decision, and refer a contested case to the Court in this way.

30. The Court summarizes the arguments of the Commission on the first objection filed by the State below:

a) that Article 51 of the Convention establishes two alternatives: the referral of the case to the Court or the preparation of the corresponding report. The adoption of one of these alternatives excludes the other;

b) that, in this case, it expressly acknowledges that it did not adopt the report of Article 51 of the Convention, since this was not in order as the case had been referred to the Court;

c) that the decision of the Commission had to be taken while it was not in session since, to the contrary, the three-month period would have expired;

d) that it took the decision to refer the case to the Court within a period of three months from the transmittal of its report to the State, in accordance with the terms of the Convention and the jurisprudence of the Court;

e) that it proceeded to hold a telephone conference call, as it has repeatedly done in similar cases, with the participation of five of its seven members on this occasion;

f) that Panama has never questioned the authenticity of the minutes of the Commission recording its decision to refer the case to the Court. It has only questioned the way in which the adoption of the decision was executed;

g) that it used the procedures established in the provisions of the Convention and the Regulations, and to this end used its internal working methods and the facilities offered by modern telecommunications technology (*cf. Paniagua Morales case, Preliminary Objections,* Judgment of January 25, 1996. Series C No. 23, para. 35);

h) that the members of the Commission do not reside at the seat of the Commission and, as this is not a permanent institution, it is difficult and unnecessary to hold a special session, particularly when the possibility that the period for presenting an application may expire is taken into consideration;

i) that it adapted and interpreted the provisions of its Regulations in accordance with the needs imposed by the time limits established in the Convention and the circumstance of not being a permanent institution;

j) that neither the Convention nor the Regulations of the Commission nor the Rules of Procedure of the Court require the Commission to adopt a decision to refer a case to the Court by a special report that is adopted in the physical presence of all the members of the Commission, but rather the filing of an application is the expression of the intention to refer a case to the Court;

k) that it had complied with the formalities established in the Regulations of the Commission: that the Chairman should submit the matter to the Commission's consideration, that the majority of the members of the Commission should take part in the deliberations, that the decisions should be adopted by the majority of the participants and that the Secretariat should write up the minutes;

l) that it could not take a decision to refer the case to the Court during its 97th session when it adopted the report under Article 50 of the Convention, because it would have prejudged Panama's compliance or non-compliance with its recommendations;

m) that the State knew that, by not complying with the Commission's recommendations to provide reparations and compensation within a period of three months, it ran the risk of the Commission referring the case to the Court or preparing a report in accordance with Article 51 of the Convention;

n) that the Court's criterion with regard to alleged defects in form is that, with regard to the international protection of human rights, formalities before international organizations do not play the same role as before local courts;

o) that, according to the theory of implicit powers, monitoring bodies may use those powers that are inherent in them in the light of their purpose, although such powers are not expressly mentioned in their basic texts; and

p) that considerations of a formal nature may not prejudice justice being done.

31. The fourth objection filed by the State refers to the expiry of the application filed before the Court by the Commission.

32. In order to establish this objection, Panama presented the legal and factual arguments that are summarized below:

a) that the Commission never approved the report referring the case to the Court mentioned in Article 51.1 of the Convention, in accordance with the procedure and in the form stipulated in both the Convention and the corresponding Regulations. To the contrary, it carried out "a series of telephone calls to five members of the Commission [recorded] in an unofficial and informal document that THE COMMISSION (has called] 'MINUTES OF TELEPHONE CONFERENCE…'";

b) that the application against Panama suffers from a formal legal defect that "annuls" the referral of case 11,325 to the Court because the three-month period has expired without the corresponding report having been drawn up and presented as the Convention establishes. Accordingly, the Commission's right to refer the case to the Court has expired;

c) that the Commission referred the case to the Court on the basis of Report No. 37/97 of October 16, 1997, which never established that, should the State fail to comply with the recommendations, the case could be referred to the Court;

d) that the Court cannot allow the Commission to use the time limits arbitrarily, particularly if these are stipulated in the Convention; and

e) that from the point of view of time and reasonableness, the period of three months given to the Commission to refer case 11,325 to the Court, in application of the provisions of Article 51.1 of the Convention and Article 43 of the Commission's Regulations, expired after January 16, 1998.

33. The Commission argued:

a) that this preliminary objection is closely linked to the first and arises from the State's conceptual error of equating the report under Article 51 of the Convention with the application;

b) that the Convention does not require a report to be prepared on the referral of the case to the Court; to the contrary, it only requires that the application should be presented within three calendar months from the date that Report No. 37/97 was transmitted to the State; and

c) that as the alleged facts which would establish that the Commission's right to file the application had expired are not grounded, the Court should reject the objection that has been filed.

* * *

34. The Court proceeds to consider the first and fourth preliminary objections.

35. The State declared that the Commission did not proceed in accordance with the provisions of the Convention and its Regulations with regard to referring the case to the Court, because the report mentioned in Article 51.1 of the Convention is of a final nature and is the only instrument by which the referral of a case to the Court may be ordered.

36. Article 51 of the Convention states that:

> 1. If, within a period of three months from the date of the transmittal of the report of the Commission to the States concerned, the matter has not either been settled or submitted by the Commission or by the State concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

37. Article 50 of the Convention concerns the preparation of a report by the Commission that is transmitted to the State, which may not publish it; it contains a series of recommendations to be complied with to settle the matter. If, within the three months following the transmittal of the report to the State, the matter has not been settled and the Commission considers that the State did not comply, it has two options: to refer the case to the Court, by filing an application or to draw up the report referred to in Article 51 of the Convention, which, by the vote of an absolute majority of its members, shall set forth its opinion and conclusions concerning the question submitted for its consideration. As in the Article 50 report, in the Article 51 report, the Commission shall prescribe a period within which the State must take the necessary measures to comply with the recommendations and, thus, remedy the situation that is being examined. Lastly, once this period has expired, the Commission shall determine whether the State has complied and, if appropriate, decide whether to publish the report (*cfr*: Articles 50 and 51 of the Convention). The Court has already stated that this decision is not discretional, but rather "should be based on the alternative most favorable for the protection of the human rights" established in the Convention. (*Certain Attributes of the Inter-American Commission on Human Rights* (Articles 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 54).

38. Once a case has been referred to the Court, the provisions of Article 51 of the Convention are not applicable, because the filing of an application is subject to the

condition that the report in this article has not been published. If the Commission prepares or publishes the report under Article 51, despite having presented the case to the Court, it is clear that it has applied the Convention improperly. In view of the foregoing, Panama interpreted the applicable rules erroneously.

39. The Court considers that there is an evident confusion between filing the application and drawing up the report under Article 51 of the Convention. As the Court has already declared (*supra*, para. 38), these two options are mutually exclusive and both are not required for a case to be referred to this Court.

40. According to the State, the "Minutes of the telephone conference call between members of the Inter-American Commission on Human Rights to decide on [the] referral to the Inter-American Court of Human Rights of the case of the workers of the State of Panama dismissed under Law 25 of 1990", "is an informal, irregular procedure based on an interpretation of the procedural rules that was clearly erroneous and in bad faith". In this respect, the Commission declared that it had to take the decision in this way because, to the contrary, the three-month period would have expired, and that it did so in accordance with the terms of the Convention, its Regulations and the jurisprudence of the Court (*supra,* para. 30.c, e, g and j).

41. The Court proceeds to analyze the validity of the minutes of the Commission's telephone conference call. As regards the observation of certain formalities, the Court has declared that it is essential to respect the conditions necessary for the full exercise of procedural rights and in order to achieve the objectives for which the procedures in the Convention and the regulations of the Commission and the Court have been established (*cfr: Castillo Petruzzi case, Preliminary Objections*. Judgment of September 4, 1998. Series C No. 41, para. 77; *Paniagua Morales et al. case, Preliminary Objections.* Judgment of January 25, 1996. Series C No. 23, para. 42; *Gangaram Panday case, Preliminary Objections.* Judgment of December 4, 1991. Series C No. 12, para. 18; *Godínez Cruz case*. *Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, para. 36; *Fairén Garbi and Solís Corrales case, Preliminary Objections*. Judgment of June 26, 1987. Series C No. 2, para. 38; *Velásquez Rodríguez, Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 33.)

42. Furthermore, this Court has stated that

> [t]he Court must preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of international protection [because, to the contrary] it would result in the loss of authority and credibility that are indispensable to organs charged with administering the system of human rights protection (*Cayara case, Preliminary Objections*. Judgment of February 3, 1993. Series C No. 14, para. 63 and *Caballero Delgado and Santana case, Preliminary Objections*. Judgment of January 21, 1994. Series C. No. 17, para. 44).

43. There is no provision in either the Convention, the Rules of Procedure of the Court or the Regulations of the Commission that determines how the Commission should decide to refer a case to the Court. In view of this regulatory vacuum, the Commission has a certain margin of discretion, on condition that the procedural rights of the parties are respected. This Court considers that, in the instant case, the Commission complied with the basic provisions of the Convention in this respect. Justice should not be sacrificed to mere formalities. It is important that a non-permanent body such as the Commission may keep abreast of the times and make

use of technological advances and modern electronic means to facilitate its communications, so that it may operate smoothly and promptly, without endangering legal certainty and procedural rights (*cf. Paniagua Morales case. Preliminary Objections*, *supra* 41, para. 35).

44. The Court therefore rejects the first preliminary objection because it is unfounded.

45. Regarding the fourth objection, the State declared that, since the Commission did not adopt the report under Article 51 of the Convention, the application suffers from a defect that results in the expiry of the three-month period during which it may be filed. This objection is closely linked to the first one.

46. Since this Court considers that the minutes of the telephone conference call are valid and, therefore, the filing of the application too, it proceeds to reject the fourth preliminary objection also, considering that the said application was filed within the period established to this effect.

VII
SECOND OBJECTION:
Lis pendens

47. The second objection filed by the State refers to the alleged duplication of international proceedings.

48. In this respect, the State alleged:

A. Arguments on the facts:

1. that the Trade Unions of Workers of the Institute of Hydraulic Resources and Electrification (hereinafter "SITIRHE") and the National Telecommunications Institute (hereinafter "SITINTEL") denounced the State before the ILO for enacting Law 25 of 1990 and for the alleged indiscriminate and mass dismissal of public sector workers who took part in a work stoppage on December 5, 1990;

2 that the ILO found Panama guilty of violating a series of international work norms;

3. that the ILO issued a resolution recommending a series of measures that should be complied with, under penalty of the application of international sanctions for the violation of ILO Conventions;

4. that the petitioners then presented an identical complaint to the Commission on January 18, 1994;

5. that the Commission did not declare case 11,325 inadmissible, knowing that the ILO had issued a resolution in 1995 condemning Panama for the mass dismissal of workers and that, subsequently, "in bad faith", it omitted to mention the existence of this procedure for international settlement in its written application to the Court.

B. Legal grounds:

1. that the Commission should not have accepted the petition that was presented and that, although it knew that a duplication of procedures existed, it not only admitted the said petition but prepared Report No. 37/97 and referred the case to the Court;

2. that the existence of this duplication affects the admissibility of case 11,325, as Articles 46.1.c, 47.d and 62.3 of the Convention have been violated;

3. that, according to the articles mentioned above and Article 39.1.a and 39.1.b of the Commission's Regulations, there may not be a duplication of procedures for international settlement, related either to the matter or to the subjects of the complaint;

4. that the European Commission on Human Rights, when examining cases presented under Article 27.1.b of the European Convention on Human Rights, which in substance and in drafting is similar to Article 46.1 of the American Convention, has been constant in refusing to accept a case that has previously been submitted to the ILO; and

5. that the Commission acted outside the framework of the inter-American norms and procedures mentioned above from the moment it knew that the same petition had been presented to the ILO.

49. Lastly, the State requested the Court to consider, revise and re-evaluate all the facts involved in this case, in particular those referring to the duplication of procedures that occurred from the moment that the case was referred to the ILO and to the Commission; to admit and declare with merit the preliminary objection filed; to reject the application and to close the case.

50. The Commission argued:

a) that, when referring to the issue of *lis pendens*, Articles 47.d of the Convention and 39.1.b of the Commission's Regulations use the expression "substantially the same" or "essentially duplicates", respectively;

b) that international jurisprudence has established that three elements determine if a petition is substantially the same as another that has previously been resolved, these are: the victim must be the same, the petition must be based on the same facts, and the legal grounds must be the same;

c) that none of these three elements is present in the case referred to the Court, since there are the following differences between the two proceedings:

1. the subject of the application before the Court refers to 270 specific victims, while the procedure before the Freedom of Association Committee does not mention the names of any of the victims who are the subject of the current application; therefore, none of them has obtained an individualized response from the Freedom of Association Committee that would provide personal satisfaction.

2. the case before the Court also refers to due process, which the Freedom of Association Committee has not examined or pronounced on, as many of the decisions questioned were issued after the ILO pronouncement. The claims before the Committee referred to violations of freedom of association, and before the Court, the application refers to violations of the Convention; and

3. the rights invoked before the Committee (related to freedom of association, particularly through violation of ILO Conventions 87 and 98) do not coincide with those that are invoked before the Court (related to judicial guarantees, due process, presumption of innocence, freedom from ex post facto laws, right to compensation, right of assembly, freedom of association, right to judicial protection, the obligation to comply with the recommendations of the Commission in good faith, and the general provisions of Articles 1.1 and 2 of the Convention), and were not the subject of the petition before the Commission or the application before the Court.

d) that the United Nations Human Rights Committee has indicated that, if a victim is not individualized, particularly in the original petition, it should not be considered that there is duplication if his or her name appears directly and specifically in a second petition;

e) that the State tacitly renounced filing the objection of duplication because it did not allege it before the Commission and, thus, precluded its right. According to the Commission, the State's position that the Commission should have rejected the petition as it allegedly knew that grounds for duplication existed, although Panama did not raise an objection before the Commission, is totally unacceptable, because it is contrary to the procedural principles emanating from the Convention and the jurisprudence of the Court;

f) that the inadmissibility of the case was neither manifest nor evident and that the State had both the right and the procedural responsibility to file the objection of duplication of proceedings and prove its merits;

g) that Panama's failure to make this allegation promptly, prevented the Commission and the victims from exercising their right to defend themselves from it;

h) that, in view of the principles of good faith and procedural equality, the State may not introduce a question of admissibility that was not alleged before the Commission belatedly and after the statutory time limit has passed; and

i) that the State had ample opportunity to respond and file the objection of duplication, but did not invoke it in any of its appearances, so that, in view of the principles of good faith and procedural equality, its tacit waiver is presumed and filing the objection before the Court at this stage of the proceedings is time-barred.

* * *

51. The Court proceeds to consider the second preliminary objection.

52. Article 47 of the American Convention states that:

> The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:
>
> …

> d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

53. The phrase "substantially the same" signifies that there should be identity between the cases. In order for this identity to exist, the presence of three elements is necessary, these are: that the parties are the same, that the object of the action is the same and that the legal grounds are identical. In the instant case there is no duplication of proceedings.

54. With regard to the subject, the Court has stated that "the concept of 'persons' is related to the active and passive subjects of the violation and mainly to the latter, that is, the victims". (*Durand and Ugarte case, Preliminary Objections.* Judgment of May 28, 1999. Series C No. 50, para. 43.) In the instant case, only the defendant party before the ILO Freedom of Association Committee and the Court is the same, the Panamanian State. The complainant party (the petitioners) is not identical because, before the Freedom of Association Committee, it was SITIRHE and SITINTEL, through the International Confederation of Free Trade Unions, and before the Inter-American Commission on Human Rights, the Panamanian Human Rights Committee. Nor is their identity as regards the victims, since the Freedom of Association Committee refers to the SITIRHE and SITINTEL workers and trade union leaders who were dismissed in general, without individualizing them specifically. To the contrary, in the application before the Court, the Commission individualizes 270 alleged victims. Furthermore, the alleged victims in the case before the inter-American system are workers from all the Panamanian State enterprises who were affected by the application of Law 25, and not only from the National Institute of Hydraulic Resources and Electrification and the National Telecommunications Institute, as in the case before the ILO (*supra,* para. 2.d).

55. Regarding the object, when referring to the concept of "facts", the Court has established that this corresponds "to the behavior or the event that is a violation of some human right". (*Durand and Ugarte case, Preliminary Objections, supra* 54, para. 43). In this case, the Freedom of Association Committee did not hear facts that occurred after their pronouncement; facts, such as the proceedings before the Panamanian Judiciary, that were included in the application before the Court. Moreover, the Court observes that, in the public hearing on preliminary objections of January 27, 1999, Antonio Ducreux Sánchez declared that the complaint before the Freedom of Association Committee only referred to the events of December 1990.

56. There is no identity either as regards the legal grounds, because in the application before the Court, violations of the following articles of the American Convention are alleged: 8 (Right to a Fair Trial); 9 (Freedom from Ex Post Facto Laws); 10 (Right to Compensation); 15 (Right of Assembly); 16 (Freedom of Association) and 25 (Right to Judicial Protection), in relation to Articles 1.1, 2, 33 and 50.2. The claim presented to the Freedom of Association Committee was based on violations of ILO Conventions 87 (Convention concerning Freedom of Association and Protection of the Right to Organize) and 98 (Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively). Therefore, the object is not the same either; particularly as only the facts concerning the right to freedom of association and workers' rights in general were examined by the ILO while the violation of a series of rights not included in the claim filed before the Freedom of Association Committee, such as the right to due legal process, was raised before the Court.

57. Furthermore, the nature of the recommendations issued by the said Committee is different from the judgments delivered by the Inter-American Court. The former is an action specific to an organ of the ILO with the legal effect of a recommendation to the States. The latter is a judgment that, in the terms of the Convention, is final and not subject to appeal (Article 67) and must be complied with (Article 68.1).

58. In view of these considerations, there is no duplication of proceedings in this case.

59. Therefore, the Court rejects the second preliminary objection.

VIII
THIRD OBJECTION:
Violation of Confidentiality

60. The third objection filed by the State refers to the Commission's violation of the rule of confidentiality by transmitting a copy of the report referred to in Article 50 of the Convention to the petitioners.

61. The Court summarizes the State's arguments justifying this objection, as follows:

a) that on October 16, 1997, the Commission adopted Report No. 37/97 and transmitted it to Panama on October 17, 1997, with an eminently confidential character.

b) that the confidentiality of the report is established in Article 50.2 of the Convention, and also in the Court's Rules of Procedure;

c) that, despite the rule of confidentiality, the Commission forwarded a copy of the application against Panama submitted to the Court to the members of SITIRHE;

d) that, according to Article 50.2 of the Convention, the Commission's violation of the principle of confidentiality is contrary to Articles 62.3 and 63.1 of the Convention and to general international law. Moreover, it states that if the Court does not reject the application, "there will be a double sanction against Panama, which is prohibited not only in the context of the inter-American system, but also by general international law"; and

e) that the violation of the principle of confidentiality has resulted in the "absolute nullity" of the proceedings of the Commission before the Court.

62. The Court summarizes the arguments of the Commission with regard to this objection, as follows:

a) that the State is again confusing the report under Article 50 of the Convention with the application before the Court;

b) that it never transmitted a copy of Report No. 37/97 corresponding to Article 50 of the Convention to the petitioners, but it did forward them a copy of the application filed before the Court, requesting their comments on it in accordance with the aim and purpose of the Convention and its regulatory provisions;

c) that in no part of the Convention, the Rules of Procedure of the Court or the Regulations of the Commission is it stated that the application should be confidential or that it may not be transmitted to the petitioners for their information, and there is no rule on the confidentiality of proceedings before the Commission or the Court and, it is only expressly stated that the report under Article 50 of the Convention shall be transmitted to the State, who shall not be at liberty to publish it;

d) that Article 35 of the Rules of Procedures of the Court and Article 75 of the Regulations of the Commission establish that the petitioners shall be notified of the application.

e) that the State erroneously interpreted the application of Articles 62 and 63 of the Convention, because they do not refer to the right of defense but to the rights of the individual. Likewise, it declared that the State has not demonstrated how notification of the application to the petitioners (not that of Report No. 37/97, which it mentions incorrectly) affected its procedural rights, which is the essential presumption for a preliminary objection to be admissible; and

f) that the application must be notified to the petitioners for several reasons, among these, to ensure the petitioner's individual guarantee of defense.

* * *

63. The court proceeds to consider the third preliminary objection.

64. The Court observes that it is clear from the evidence which the State contributed to establish its allegation that what the Commission transmitted to the petitioners was not Report No. 37/97, but the application, once it had decided to submit this to the Court (*cf. note of the Trade Union of Workers of the Institute of Hydraulic Resources and Electrification of Panama of February 23, 1998; note of the Trade Union of Workers of the Institute of Hydraulic Resources and Electrification of Panama of February 17, 1998).* The Commission took this measure to comply with the provisions of Article 75 of its Regulations, according to which

> [w]hen the Commission decides to refer a case to the Court, the Executive Secretary shall immediately notify the petitioner and alleged victim of the Commission's decision and offer him the opportunity of making observations in writing on the request submitted to the Court. The Commission shall decide on the action to be taken with respect to these observations.

65. Furthermore, the Court notes that this procedure is in accordance with the provisions of Article 35.1.e of its Rules of Procedure, under which the Secretariat of

the Court shall communicate the application to the original claimant, if known, and to the victim or his next of kin, if appropriate.

66. Consequently, it is not admissible to argue, as the State has done, that the Commissions' transmittal of the application to the petitioner contravenes any provisions of the procedure before the Court or the Commission.

67. In view of the foregoing, the Court rejects the third preliminary objection because it is without merit.

IX
OPERATIVE PARAGRAPHS

68. Therefore,

THE COURT

DECIDES

unanimously,

1. To reject the preliminary objections filed by the State.

2. To continue hearing the instant case.

Done in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, this eighteenth day of November 1999.

Antônio A. Cançado Trindade
President

Máximo Pacheco-Gómez Hernán Salgado-Pesantes

Oliver Jackman Alirio Abreu-Burelli

Carlos Vicente de Roux-Rengifo

Manuel E. Ventura-Robles
Secretary

So ordered,

Antônio A. Cançado Trindade
President

Manuel E. Ventura-Robles
Secretary