2006 Inter-American Human Rights Moot Court Competition

Juana Olin v. Iberoland[1]

BENCH MEMORANDUM

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[1] Prepared by Ariel E. Dulitzky in collaboration with Oscar Parra Vera, "Rómulo Gallegos" Fellow at the IACHR. I would like to thank the following Washington College of Law students for their contributions to the research and preparation of this document: Daniel Brindis, Mariana Canelon, Jessica Farb, Julio Guity, Lindsay Jenkins, Adam Norlander and Marta Maria Tavares Vargas. I would like to thank Claudia Martin, Diego Rodríguez-Pinzón and Shazia Anwar for their well-informed remarks and comments for improving this work. Of course, the errors and omissions are my responsibility. This memo does not purport to be a solution to the case of Olin v. Iberoland. It is only meant to be a guide for the judges, identifying some – not all—of the basic principles that the Inter-American Commission on Human Rights and the State of Iberoland might maintain.

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1. INTRODUCTION

The case of Juana Olin v. Iberoland poses a situation that is present in various Member States of the Organization of American States (hereinafter OAS). The case requires the analysis of what obligations an OAS Member State with a federal structure has to ensure, in an egalitarian fashion, the effective exercise of the right to higher education of a woman of African descent.

1.1. Use of international instruments and jurisprudence other than Inter-American

Given that the case is related to issues that have not been widely developed in the jurisprudence of the Inter-American Commission and the Court of Human Rights (hereinafter Inter-American Commission, Commission or IACHR and Inter-American Court or Court), it is legitimate for some teams to use international instruments that do not form part of the Inter-American system and possibly to use jurisprudential standards from some courts of the States Parties. This *bench memorandum* alludes to sources that are not part of the Inter-American system, and this practice has been advanced by the organs of the System. Upon using these tools, the teams must justify their role as sources of international law, involving one of the following possible arguments or counter-arguments. In this segment, save for some specific exceptions, no distinction is made between arguments of the Commission and of the State, since both may use these instruments in their strategies.

Arguments for the use of standards and jurisprudence from other systems:

a. The practice and jurisprudence of the Inter-American Court of Human Rights permits the use of instruments from outside the Inter-American system as a guide for integrating the interpretation of the American Convention on Human Rights (hereinafter American Convention).

In its Advisory Opinion OC-1 on "Other Treaties", the Inter-American Court stated that in the Convention there is a notable tendency to integrate the regional system and the universal system of human rights protection (OC-1, para. 41). More recently, the Court has said that the American Convention forms part of a very comprehensive international *corpus juris* of human rights protection, which it can make use of in order to determine the scope of some of the provisions of the Inter-American instrument.[2]

b. Article 29 b) of the American Convention regarding rules of interpretation establishes that no provision of the Convention may be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party." In this respect, it is not possible to lower the standard of protection attained at the national or international level. Therefore, it can be maintained that this norm makes it legitimate for the organs for the protection of human rights to interpret the American Convention without minimizing the standard of protection attained at the national level.

c. The actions of the organs of the Inter-American System are guided by the principles of subsidiarity and complementarity with regard to national systems, as indicated in the Preamble to the American Convention. This urges the involvement of national law in a complementary manner

[2] Inter-Am. Ct.H.R., *Case of the "Street Children" (Villagrán Morales et al.),* Judgment of November 19, 1999, Series C No. 63, paras. 192 and 194.

when it contributes to the strengthening of the protection of human rights and is reasonable according to the circumstances of the specific case.

d. The Court's practice has integrated national law in order to define the specific scope of different Convention rights. "Through an evolving interpretation of the international instruments for the protection of human rights, taking into account the applicable norms of interpretation and, in accordance Article 29.b of the Convention – which prohibits a restrictive interpretation of rights", the jurisprudence of the Court has used various national provisions upon determining a violation of rights. In the *Five Pensioners Case*, the Court used national law to decide whether the right to a pension could be considered an acquired right.[3] In the *Awas Tingni Case*, the Court made use of domestic law in order to establish the scope of the right to property in the case at hand, which enabled the rights of members of the indigenous communities to be ensured within the framework of communal property.[4] Thus, it is a matter of analyzing the national protection of rights in order to determine the scope of international protection.

e. Article 24 of the American Convention specifies that all persons have a right to equal protection of the law. The Court, as well as the Human Rights Committee, has indicated that this drafting means that the sphere of protection covers not only the Convention rights but also rights at the domestic level. Therefore, national law is relevant in determining the scope of the Convention rights and the degree of equality that it is pertinent to evaluate.

f. The jurisprudence of the European Court of Human Rights has provoked a dialogue among the organs of the system and the national courts. In effect, in the European System there is a greater degree of deference to courts that ensure rights. For example, in some cases, for purposes of determining the "common European good", national courts (in particular the German Constitutional Court) have been used as European guides in the interpretation of the content of rights.[5]

g. The *pro homine principle* indicates that if the standards used are lower than the protection established by the Convention, they may not be invoked in order to displace the broader protection. This is also consistent with the basic legal principle of the international responsibility of the State, supported by international jurisprudence, according to which States must comply in good faith with their international Convention obligations (*pacta sunt servanda*). Likewise, as the Inter-American Court has already specified and as provided for in Article 27 of the 1969 Vienna Convention on the Law of Treaties, they cannot, for reasons of internal policy, disregard the previously established international responsibility.[6]

Arguments against the use of standards and jurisprudence from other systems:

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[3] Inter-Am. Ct.H.R., *Five Pensioners Case*, Judgment of February 28, 2003, Series C No. 98, para. 95 et seq.

[4] Inter-Am. Ct.H.R., *Mayagna (Sumo) Awas Tingni Community Case*, Judgment of August 31, 2001, Series C No. 79, para. 148.

[5] This type of practice can also be seen in some precedents of the IACHR. See Report No 30/97, Case 10.087, *Gustavo Carranza*, (Argentina), September 30, 1997, paras. 41 and 42, where the IACHR used case law from the Supreme Court of the United States [and] the Constitutional Court of Colombia to reject the argument of the State to declare "non-justiciable" a case regarding the removal of a judge by a previous military government without having considered the merits of the case.

[6] Inter-Am. Ct.H.R., *Provisional Measures with respect to Venezuela,* Resolution of May 4, 2004; Inter-Am. Ct.H.R., *Baena Ricardo et al. Case* (Competence), Judgment of November 28, 2003. Series C No. 104, para. 61; Inter-Am. Ct.H.R., *Juan Humberto Sánchez Case*, Interpretation of the Judgment on Preliminary Exceptions, Merits and Reparations (art. 67 American Convention on Human Rights), Judgment of November 26, 2003, Series C No. 102, para. 60 and Inter-Am. Ct.H.R., *Bulacio Case*, Judgment of September 18, 2003, Series C No. 100, para. 117.

a. The rules for the interpretation of international law require that the first interpretation be the literal one in accordance with the Vienna Convention on the Law of Treaties. If the text of the treaty is clear, alternative means of interpretation should not be sought. The use of other treaties is useful, but the text of the Articles said to be violated must take precedence. This is even truer in relation to the jurisprudence of the European System, which follows a different rationality.

b. The General Comments of the Committee on Economic, Social and Cultural Rights (hereinafter ESCR Committee) are the product of an organ that is not based on a Convention. The ESCR Committee was created in 1985 by the Economic and Social Council, a body established by the United Nations Charter and which has some supervision mandates under the International Covenant on Social, Economic and Cultural Rights (hereinafter ICESCR) . This distinguishes the ESCR Committee from other human rights bodies created by virtue of treaties. For this reason, its comments do not create obligations for States and its authorized interpretations are non-binding.

c. The Comments are general remarks and not resolutions that decide individual cases. As such, their relevance must be set forth in each specific case. In individual cases, jurisprudence has greater relevance than general comments.

2. ARTICLE 24 IN RELATION TO ARTICLES 1 AND 2 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

In its petition the Commission alleges the violation of Article 24 of the Convention in relation to Articles 1 and 2 of the same instrument.

Nondiscrimination, together with equality before the law and equal protection of the law is a basic, general and fundamental right relative to the international protection of human rights.[7] Thus, the American Declaration on the Rights and Duties of Man (hereinafter the American Declaration) begins in its Preamble with the premise that "All men are born free and equal, in dignity and in rights." In the Charter of the OAS, the Member States proclaim the fundamental rights of the human person without distinction as to race, nationality, creed or sex.[8] The American Convention states the following:

> Article 1. Obligation to Respect Rights. 1. 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. (…)
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> Article 2. Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

[7] Human Rights Committee, General Comment Nº 8, Nondiscrimination, para. 1.

[8] OAS Charter, Article 3 clause l. See also Article 45 (The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: a) All human beings, <u>without distinction as to race, sex, nationality, creed, or social condition</u>, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security). (The underlined is pertinent here).

> Article 24. Right to Equal Protection. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

The Inter-American Commission has indicated that the principle of nondiscrimination is one if the pillars of any democratic system and a fundamental basis[9] of the system of human rights protection established by the OAS.[10] As a reaffirmation of this principle, the Inter-American Democratic Charter states in its Preamble that the American Declaration and the American Convention contain the values and principles of liberty, equality and social justice that are intrinsic to democracy. In particular, Article 9 of the Democratic Charter states that:

> The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation.

The international human rights regime was created and operates on the basic premise of equality among all human beings, and thus precludes all forms of discrimination. The principles of nondiscrimination and equal protection of the law are fundamental bases of the main normative instruments of the international human rights system.[11] The Inter-American Court has held that:

> At the current stage in the evolution of international law, the fundamental principle of equality and nondiscrimination has entered into the domain of *jus cogens.* The legal framework of national and international public policy rests upon it, and it permeates the entire legal system.[12]

In short, the fundamental principal that underlies the entire international human rights system is one of equality and nondiscrimination. Its denial would mean the very denial of this system in its totality. The magnitude of this basic principle is such that a reservation to it would be contrary to the object and purpose of the respective treaties and would therefore be invalid.[13]

It is from this perspective that the case of Juana Olin v. Iberoland must be analyzed. In particular, the issues debated in the case have to do with clarifying whether Iberoland was obligated to adopt a policy of affirmative action in order to overcome a situation of social disparity and structural discrimination such as it exists in the country. In the affirmative, we must examine whether the affirmative action measures adopted are compatible with the principle of equality and non-discrimination. We must also examine whether the actions adopted by the authorities of Iberoland and North Shore are sufficient to satisfy the duty to ensure equality and non-discrimination.

2.1. What are the obligations of the States regarding structural differences? In particular, is there an affirmative action obligation with regard to structural discrimination?

The Commission has brought a case against Iberoland for violation of Article 24 in conjunction with Article 1.1 of the American Convention. The Commission could argue that the

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[9] IACHR, Report Nº 4/01, Case 11.625, *María Eugenia Morales de Sierra*, Guatemala, January 19, 2001, OAS/Ser.L/V/II.95 Doc. 7 rev. at 144 (1997) para.36.

[10] IACHR, *Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination*, Section A, Annual Report of the Inter-American Commission on Human Rights, 1999, Chapter VI (hereinafter IACHR, *Considerations Regarding Compatibility*).

[11] Ídem.

[12] Inter-Am. Ct.H.R, *Yatama v. Nicaragua*, Series C No. 127 (June 23, 2005), para. 184.

[13] Cecilia Medina, Toward a more effective guarantee of the enjoyment of human rights by women in the Inter-American system, in Cook, Human Rights of Women, pp. 268-269.

conduct of the authorities of North Shore, whose actions and omissions give rise to the international responsibility of Iberoland (as will be developed in the section corresponding to Article 28), were discriminatory in different aspects: first, for not having adopted the affirmative action policies that were necessary in a society with profound racial differences; second, for allowing the existence of structural discrimination against Afro-Iberolandians, including Juana Olin; third, and finally, for having given prevalence to the interview requirement in deciding which candidates were selected, when this was the most subjective requirement and one that allowed for the concealment of a prejudicial practice.

The analysis of the Convention norms cannot be separated from the context in which it operates. As a judge of the Inter-American Court has stated:

> The action of protection, in the ambit of the International Law of Human Rights, does not seek to govern the relations between equals, but rather to protect those ostensibly weaker and more vulnerable.[14]

To this effect, the reality of Iberoland, and in particular that of North Shore, not only allowed for but required the adoption of affirmative action policies in university admissions as a possible form of observing the principle of equality and non-discrimination on behalf of Juana Olin. There are certain *de facto* inequalities, such as those present in North Shore with respect to the Afro-Iberolandians, which can translate legitimately into inequalities in legal treatment without this contradicting the principle of nondiscrimination. In reality, as the Commission has stated, the distinction is necessary in order to render justice or protect persons who require the application of special measures.[15] Failure to do so resulted in the violation of Juana Olin's right to equality and non-discrimination.

The Court has expressly endorsed the importance of adopting affirmative action measures, stating:

> When examining the implications of the differentiated treatment that some norms may give to the persons they affect, it is important to refer to the words of this Court declaring that not all differences in treatment are in themselves offensive to human dignity. […] Distinctions based on *de facto* inequalities may be established; such distinctions constitute an instrument for the protection of those who should be protected, considering their situation of greater or lesser weakness or helplessness.[16]

Not every difference in treatment is discriminatory, provided that this distinction is based on substantially different factual scenarios, such as those disparities existing particularly in North Shore, and that they express proportionally a well-founded connection between these differences and the objectives of the norm. It is important to reaffirm that these distinctions cannot be unjust or unreasonable; they cannot pursue arbitrary, capricious or despotic aims, or aims that in any way are contrary to the essential unity and dignity of human nature.[17] Law 768 was an appropriate measure in this sense and should have been implemented on behalf of Juana Olin.

The Court has recognized expressly different starting points or particular experiences of various groups. To this effect, the Court requires that differentiated measures be taken in certain situations for purposes of guaranteeing equality. Thus, for example, it has stated that "the [judicial]

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[14] Inter-Am. Ct.H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, Series A No. 16, Concurring Opinion of Judge A.A. Cançado Trindade, para. 23.

[15] IACHR, Report Nº 4/01, Case 11.625, *María Eugenia Morales de Sierra*, Guatemala, January 19, 2001, para. 31.

[16] Inter-Am. Ct.H.R., *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, para. 89.

[17] Inter-Am. Ct.H.R., Advisory Opinion OC-4/84, para. 57.

process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests."[18]

In particular, the Court held that:

> Likewise, States must combat discriminatory practices at all levels, especially in public entities, and finally must adopt the affirmative measures necessary to ensure the effective equality before the law of all persons.[19]

As such, the real inequality of the Afro-Iberolandians in general and of Juana Olin in particular required the adoption of affirmative action measures such as the guarantee of equal access to higher education. Although it is true that the establishment of a limited number of available places at the universities is a legitimate aim in order to ensure high-quality education, said aim cannot justify discriminatory attitudes. In Advisory Opinion OC-18/03 the Court stated that "the State may not subordinate or condition the observance of the principle of equality before the law and non-discrimination to achieving the goals of its public policies, whatever these may be."[20] Therefore, upon having established the quota of 250 students and not admitting Juana Olin, the different starting points and the structural discrimination that she was a victim of were ignored, and the requirements of Article 24 in relation to Article 1(1) of the Convention were violated.

From this perspective, it is impossible to maintain that the affirmative action measures that seek to remedy structural discrimination or seek to be remedies for discriminatory practices may be subject to the same strict judgment of differences based on race or sex in order to harm racial or sexual groups but not benefit them. In this respect it cannot be maintained that the American Convention is an impediment to the adoption of policies such as Law 678, which are adopted precisely to promote equality and not to perpetuate or deepen discrimination.

On the other hand, Article 29 of the Convention prevents a limitation of the scope that other international instruments may have. In this respect, Article 4.1[21] of the Convention on the Elimination of All Forms of Discrimination against Women as well as Articles 1.4[22] and 2.2[23] of the Convention

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[18] Inter-Am. Ct.H.R., Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Series A No. 16, para. 119.

[19] Inter-Am. Ct.H.R., *Case of the Girls Jean and Bosico*, Judgment of September 8 , 2005, Series C No. 130, para. 141.

[20] Inter-Am. Ct.H.R., *Juridical Condition and Rights of Undocumented Migrants,* Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, para. 172.

[21] 1. Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards, these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. Convention on the Elimination of All Forms of Discrimination against Women, art. 4.1.

[22] 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. Convention on the Elimination of All Forms of Discrimination against Women, art. 1.4.

[23] 2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case en tail as a con sequence the maintenance of unequal or separate rights for

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on the Elimination of All Forms of Racial Discrimination permit expressly the adoption of these measures.

The State can simply argue that the Commission is unable to demonstrate that Juana Olin was discriminated against in this particular case. The case information does not offer any element that supports the assertion that Juana was denied admission to the university because of her Afro-Iberolandian status. The Human Rights Committee has indicated that a law that is applied uniformly even when it has a discriminatory effect is not a violation of Article 26 of the International Covenant on Civil and Political Rights (hereinafter ICCPR), similar to Article 24 of the Convention.[24] Here the University of North River applied the same criteria to all of the applicants and it is not possible to maintain that they were applied differentially to the detriment Juana Olin.

The case information, in spite of the unfortunate disparities existing in Iberoland and which the government of President Acheve is attempting to reverse, does not demonstrate that Juana Olin individually has been the victim of any kind of discrimination. The jurisprudence has shown that the simple demonstration of statistics on certain disparities is insufficient to prove the existence of discrimination in a specific case; therefore it is imperative to present specific evidence in relation to the particular case at hand.[25]

Article 1.1 of the American Convention recognizes generally some prohibited criteria of discrimination,[26] among which it mentions race,[27] color and sex.[28] Distinctions based on the factors prohibited explicitly in the American Convention, including race and color, must be subject to a particularly strict degree of scrutiny. Among the prohibited bases of discrimination are some that are particularly serious, and which present a *prima facie* case of discrimination, at least insofar as members of groups that are treated differently are similarly situated. Discrimination on the grounds of race and sex are among these suspect categories.[29] In order for such distinctions not to be considered discriminatory, States must demonstrate a particularly important interest or a compelling social need and a strict justification for the distinction, to demonstrate that the measure used is the least restrictive one.[30] Unlike the explained standard of reasonableness, the strict test presents

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different racial groups after the objectives for which they were taken have been achieved. Convention on the Elimination of All Forms of Racial Discrimination, art. 2.2.

[24] Human Rights Committee, *PPC v. The Netherlands*, Communication No. 212-1986 (1988), para. 6.2.

[25] IACHR, Resolution Nº 23/89, case 10.031, United States, September 28, 1989, paras. 41 and 45.

[26] In his separate opinion in Advisory Opinion OC-4, Judge Piza maintained that the unspecific character of this statement finds support in the language itself of the Convention, which it uses in Spanish (sin discriminación alguna), Portuguese (*sem discriminação alguma*), English (*without any discrimination*) and French (*sans distinction aucune*), cit, para. 12.

[27] IACHR, *William Andrews v. the United States*, Case 11.139, Report No. 57/96, December 6, 1996, para. 174, Report No, 37/02; Petition 12.001, *Simone André Diniz*, Brazil, October 9, 2002 (Admissibility).

[28] IACHR, *María Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Report No. 4/01, January 19, 2001; IACHR, *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Report No. 54/01, April 16, 2001, para. 2, 51 and 56; *María Merciadri de Morini v. Argentina,* Case 11.307, Report No. 103/01 (Friendly Settlement); IACHR, *María Mamérita Mestanza Chávez v. Perú*, Case 12.191, Report No. 66/00 (Admissibility) October 3, 2000; Report No. 73/01, Case 12.350, Bolivia, October 10, 2001 (Admissibility); Report No. 51/02, Petition 12.404, *Janet Espinoza Feria et al.,* Perú, October 10, 2002 (Admissibility); and Inter-Am. Ct.H.R., Advisory Opinion OC-4/84, cit, para. 67.

[29] ECtHR, *East African Asians v. United Kingdom*, 3 EHRR 76 (1976); *Abdulaziz* Case, Judgment of 1985, Series A No. 94; *Inze v Austria* Case, Judgment of 1987, Series A No. 126.

[30] Numerous national and international courts have placed a high burden on governments to justify distinctions or classifications based on factors such as nationality, race, color or sex. See, for example, IACHR, Report Nº 4/01 *María Eugenia Morales de Sierra*, Case 11.625 (Guatemala), January 19, 2001, para. 36 (Legal distinctions based on criteria linked to conditions such as race or sex require more intense scrutiny); European Court of Human Rights, *Abdulaziz v. United Kingdom*, Judgment of May 28, 1985, Ser. A. Nº. 94, para. 79 ("the advancement of the equality of the sexes is today a major goal in the Member States of the Council of Europe. This means that very substantial reasons would have

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analytical elements that are very demanding. The aim of the measure must be legitimate and important, but in addition it must be *compelling*. The means chosen must be not only appropriate and effectively conducive but also *necessary*. That is, it cannot be replaced by *less harmful alternative means*. In addition, the principle of proportionality requires that the benefits of adopting the measure exceed clearly the restrictions imposed by the measure upon other principles and values.[31] In this respect, the case does not set forth that Law 678 or a similar measure in North Shore overcomes this strict test. In effect, it is not possible to maintain that there was a compelling social need, nor that the imposition of quotas was compelling. It especially does not demonstrate that the setting aside of quotas was a less harmful alternative means relative to the rights of the population as a whole. Thus, it is impossible to request that the Inter-American Court rule that a measure is obligatory when the compatibility of such measure with the American Convention has not been demonstrated.

This being the case, measures that have the aim of compensating for prior disadvantages sustained by specific social groups, in principle, are not contrary to equality; however, their validity depends on the real operation of the discriminatory circumstances. Mere membership in a social group is not sufficient in order to proclaim the compatibility of supposed protective measures with the norms of equality and non-discrimination. On the contrary, there must be concurrent discriminatory conduct or practices to justify them.[32] In this situation, the Commission has not demonstrated any justification requiring the adoption of affirmative action measures in North Shore for Juana Olin.

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to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention"); and *Gaygusuz v. Austria*, Judgment of September 16, 1996, Reports 1996-IV 1129, para. 42 ("very substantial reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention"); Supreme Court of Justice (Argentina), *Repetto, Inés*, November 8, 1988, Justices Petracchi and Baqué, para. 6 (all distinctions between nationals and foreigners, with respect to the enjoyment of the rights recognized in the Argentinean Constitution, "have a presumption of unconstitutionality" and consequently, any party supporting the legitimacy of the distinction "must prove the existence of an 'urgent state interest' for its justification, and it is not sufficient for such purposes that the measure adopted be 'reasonable'." Supreme Court of the United States, *Palmore v. Sidoti*, 4666 US 429 (1984) (racial classifications "are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be "necessary […] to the accomplishment of their legitimate purpose"); *Loving v. Virginia*, 388 US 1, 87 (1967) (The Equal Protection Clause of the Constitution "demands that racial classifications, especially suspect in criminal statutes, be subjected to the most rigid scrutiny"), Supreme Court of Justice of Venezuela, Judgment 1024 of May 3, 2000, opinion delivered by J. José Rafael Tinoco (a) establishing the necessity for complete proof of the justification, demonstrably extremely necessary and demonstrably effective for the important, necessary and indispensable objective; b) the fundamental need that is made necessary by the exigency of the requested discriminatory condition; c) the prediction that such condition will attain both necessities, through professionally proven and accepted methods; and d) the impossibility of attaining the stated objectives without the establishment of the discriminatory condition and the absence of another means, way or condition through which it would be substantially effective to attain such objectives without bringing about the prohibited discriminatory situation or a less discriminatory [situation] than the one derived from the condition of the same type alleged); Constitutional Court of Colombia, Judgment C-673/01, delivered by J. Manuel José Cepeda Espinosa (The Court has applied a strict test of reasonableness in certain cases, for example: 1) when dealing with a suspect classification such as those stated generally as prohibitions against discrimination in Article 13, clause 1 of the Constitution; 2) when the measure affects mainly persons in manifestly weak conditions, groups that are marginalized or discriminated against, sectors without effective access to decision-making or insular and discrete minorities; 3) when the measure that differentiates among persons or groups seriously affects *prima facie* the enjoyment of a fundamental constitutional right; 4) when examining a measure that creates a privilege).

[31] Constitutional Court of Colombia, Judgment C-i673/01 delivered by J. Manuel José Cepeda Espinosa.

[32] Constitutional Court of Colombia, Judgment C-410/94, delivered by J. Carlos Gaviria Díaz.

2.2. Are the actions taken by Iberoland sufficient to guarantee equality and nondiscrimination?

Juana Olin took and passed satisfactorily the three exams required for admission to the University of North Shore. Nevertheless, and due to the fact that the University decided not to apply Law 678 and the affirmative action policies it provides for, she was not admitted to the University. In this respect, as a woman and a person of African descent, her right to be free from discrimination and her right to equal treatment before the law could be considered to have been violated when North Shore failed to take the appropriate measures to remedy in fact, or at least to reduce or eliminate, the conduct that perpetuates the structural discrimination of which the Iberolandians are victims. Whereas North Shore makes no distinctions among differently situated groups, as the white Iberolandians and Afro-Iberolandians are, it equalizes different groups and individuals. Consequently, the government's omission to adopt measures that guarantee the equality of unequal groups constitutes discrimination. The State had the obligation to adopt special measures. This means that in different circumstances, the State must make distinctions for purposes of treating groups or individuals equally.[33]

The Court has said that "a norm that deprives a portion of the population of some of its rights — for example, because of race — automatically injures all the members of that race." In this scenario, the Court maintained, "the violation of human rights, whether individual or collective, occurs upon [its] promulgation."[34] Likewise, the failure to adopt laws necessary to guarantee the principle of equality, to the disadvantage of a specific racial group, also deprives the entire group of equal protection of the law. North Shore therefore violates the Convention in detriment to Juana Olin by not distinguishing among the Afro-Iberolandians and the rest of the population, who are in diametrically differentiated positions and nevertheless treated without the pertinent distinctions being made.

Article 24 is not limited to the sphere of rights set forth in the Convention.[35] It also encompasses the rights recognized in the Constitution of Iberoland, as well as in other human rights conventions to which the State is a party, such as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol Of San Salvador" (hereinafter Protocol of San Salvador or Protocol). Article 5 of the International Convention against Racial Discrimination provides precisely that:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: […] v) The right to education and training.

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[33] U.N. Econ. & Soc. Council [ECOSOC], Sub-Commission on the Promotion and Protection of Human Rights, *Final Report: Prevention of Discrimination, The Concept and Practice of Affirmative Action*, ¶ 52, U.N. Doc. E/CN.4/Sub.2/2002/21 (June 17, 2002) (*prepared by* Marc Bossuyt), see also Inter-Am. Ct.H.R., *Yatama v. Nicaragua*, para. 185, Judgment of June 23, 2005.

[34] Inter-Am. Ct.H.R*., International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of The American Convention on Human Rights),* Advisory Opinion OC-14-94 of December 9, 1994, Ser. A No. 14 (1994) para. 43.

[35] Human Rights Committee, General Comment Nº 18, para. 12, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 26 (1994).

Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women requires that States adopt all appropriate measures to eliminate discrimination against women, for purposes of ensuring equal rights with men in the sphere of education, and in particular to ensure under conditions of equality between men and women:

> (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
>
> (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
>
> (d) The same opportunities to benefit from scholarships and other study grants;
>
> (f) The reduction of female student drop-out rates and the organization of programs for girls and women who have left school prematurely;

Article 24 read in conjunction with the obligations arising from the Conventions against Discrimination against Women and against Racial Discrimination require the prevention of any discrimination that Juana Olin could have sustained, eliminate the discrimination that she did sustain and adopt the necessary measures, including the pertinent affirmative action so that Juana Olin may enjoy equally her right to education. None of these measures were adopted by the North Shore authorities. Although the adoption of Law 678 is a step in the right direction, it was not effective in Juana Olin's case because of the North Shore provincial authorities' failure to apply it.

The State can argue that Juana Olin was not discriminated against by the authorities of North Shore, much less by the authorities of Iberoland. On the contrary, in recent years Iberoland has taken extraordinary measures to address the problem of race and gender-based discrimination in the country that even exceed the requirements of the American Convention. Among these measures they can mention not only the historical fact of the election of the first Afro-Iberolandian President of the country but also the amendment or repeal of legal provisions that are *prima facie* discriminatory and the approval of laws and policies aimed at dealing with the problem of *de facto* discrimination. Specifically, the government of President Acheve adopted a series of policies, incentives and programs in order to achieve greater equality among the different racial sectors. These measures have favored the Iberolandian population in general, through decreases in the rates of infant mortality, malnutrition, unemployment and illiteracy among the Afro-Iberolandians. In line with this, salary levels and access to basic services have increased. This also benefited Juana Olin and her family precisely. The entire family enjoys free federal health care services, the father obtained low-interest credit and Juana Olin received scholarships from the national government in order to complete her secondary education, being the first in her family to do so. It is difficult to maintain that Juana Olin or her family have been discriminated against.

Iberoland has not violated the principle of equality and non-discrimination with respect to Juana Olin. The State has taken specific actions that have benefited her personally and has adopted general policies that favor the Afro-Iberolandian population, of which Juana Olin is a member, as a whole. The Court has interpreted that "[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as

inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified."[36] Thus, it cannot be considered that the simple fact of not having been selected for admission to one of the public universities of Iberoland means that she was considered "inferior", that she was treated with "hostility" or that she has been denied the enjoyment of certain rights that are granted to those persons not considered inferior. In fact, Juana Olin was not the only person, black or white, who was denied admission to the University of North Shore. There were 137 applicants and there is no element in the case to demonstrate that Juana was treated differently from the rest of the candidates because of the fact that she was a woman or that she was Afro-Iberolandian.

In Advisory Opinion OC-4/84, the Court interprets that there is no discrimination if a difference in treatment has a legitimate aim, that is, if it does not lead to situations that are contrary to justice, reason or the nature of things. Thus, discrimination cannot be said to exist in every difference in the treatment of individuals by the State, provided that this distinction is based on sufficiently different facts and that they express proportionally a well-founded connection between these differences and the objectives of the norm. It is important to reaffirm that these distinctions may not be unjust or unreasonable; they cannot pursue objectives that are arbitrary, capricious, despotic or in any way contrary to the essential unity and dignity of human nature (para. 57).

The adoption of Law 678 is the best demonstration of the effort made by the government of President Acheve to ensure the full equality of the Afro-Iberolandians. From the time of its passage the Afro-Iberolandian student population increased by between 150 and 300%. There is no way to assert that the principles of equality and non-discrimination would require greater efforts on the part of the government. Consequently, its international responsibility cannot be demanded.

Finally, it must be understood that the main reason for which Juana Olin does not attend a university is not that North Shore failed to adopt a policy of affirmative action. To the contrary, it is due to the fact that Juana Olin, for understandable reasons, does not want to leave North Shore. If her province's university were the only one in the country, a situation of discrimination could be alleged. But there is no right to be admitted to a particular university; rather, the right is to not be discriminated against by the education system in general. The information presented in this case show that, counter to the arguments of the Commission, the situation in Iberoland is one that promotes equality and not one of discrimination.

2.3. Do the admissions criteria fulfill the obligation to guarantee equality and nondiscrimination? In particular, is the use of an oral interview acceptable in this case?

The Commission can argue that the authorities of North Shore gave priority to the requirement of the oral interview in deciding which candidates were selected, when that was the most subjective requirement and one that would enable the concealment of a prejudicial act. The Inter-American Court has already found that discretionary practices of State authorities violate the principle of equality, stating that

> The law should not grant broad discretion to the State official who applies it, as this would create a space in which discriminatory acts could arise.[37]

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[36] *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* (OC-4/ 84), January 14, 1984, Ser. A No. 4 (1984), para. 55.

[37] Inter-Am. Ct.H.R., *Jean and Bosico Case*, Judgment of September 8, 2005, Series C No. 130, para. 191.

As such, Juana Olin was discriminated against in that, in spite of having passed the three requirements, the oral interview was over-emphasized, and this gave the university officials an application that was discretionary, subjective and therefore discriminatory.

For its part, the State might assert that Juana Olin did not enter the University of North Shore because she was discriminated against, because a situation arose that was contrary to justice, reason or the nature of things, or for motives that were arbitrary, capricious, despotic or in conflict with essential human unity and dignity. To the contrary, the University of North Shore applied a uniform standard to all of the applicants and did not grant privilege to any group because of its racial origin or the color of its skin. The University of North Shore acted reasonably in applying three criteria for admission, that is, a minimum in terms of academic grades, exam and personal interview. It pursued the legitimate aim of ensuring quality education by limiting the number of entering students to 250. The means used, the reduction to 250 applicants and an objective selection method like the one specified, is in this way reasonable and proportional.

In particular, the State can argue that the University conducted the review of all of the candidates and applicants fairly. Following a rigorous personalized evaluation of each candidate, it made a selection. Juana Olin was not among the ones selected, but this does not mean that there was discrimination, or that the bodies of the inter-American system are capable of reviewing the applicants to a university and the decisions that the university officials make. As the Inter-American Court has indicated:

> To this effect, the Court considers that it does not have the jurisdiction to replace the national judge in deciding whether the circumstances under which some were acquitted and others were convicted were exactly equal and deserved the same treatment; therefore, a violation of Article 24 of the Convention has not been sufficiently proved.[38]

Similarly, the Court cannot replace the national university officials in order to determine whether Juana Olin was better qualified for admission to the University of North Shore. There is no element in the facts of the case that tends to demonstrate that the university authorities of North Shore acted discriminatorily in the course of their evaluation.

2.4. Is it admissible to demand that the Court order the adoption of a quota system as the model of affirmative action applicable to the case?

The Commission may assert that Law 678 was an appropriate affirmative action measure that was compatible with the international obligations of Iberoland and that it should have been implemented by North Shore in order to guarantee the principle of equality to Juana Olin.

1) The affirmative action was justified in order to remedy traditional injustices as well as conditions of structural discrimination. It was not only to compensate for centuries of slavery but also, in the particular case of North Shore, a segregated education system had been implemented. The way in which education is financed creates a situation in which the schools mainly attended by Afro-Iberolandians lack basic elements such as a sufficient number of teachers. Consequently, the students who graduate from these schools never compete equally with the students who graduate from economically privileged schools. Furthermore, Law 678 promoted a diverse student body, which is fundamental for higher education.[39]

[38] Inter-Am. Ct.H.R., *De la Cruz Flores Case*, Judgment of November 18, 2004, Series C No. 115, para. 115.
[39] See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2) The implementation of a quota system was temporary, just as Law 678 set forth, and is required by both the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination.
3) The affirmative action was reasonable and proportional. First of all it required that in order to qualify for the 20% of reserved spaces the Afro-Iberolandians had to meet all of the minimum requirements. Moreover, the percentage reserved was less than the percentage of Afro-Iberolandians in the total population. The Commission has understood expressly on at least one occasion, and implicitly on another, that the setting of quotas is compatible with the American Convention.[40]

The argument of the State might be to insist that the Commission is requesting a specific type of remedy: quotas. International and comparative law demonstrates that there is no right to a specific model of affirmative action, like one consisting of a quota system. As such, this option was rejected in the European System. Being one of the most debated forms of affirmative action, it cannot be required through the bodies of the Inter-American System. These measures are the most controversial of all in that they favor an individual from a disadvantaged group over individuals from other equally qualified groups. In fact, the European Court of Justice has held that the establishment of quotas or automatic preferences violates the relevant regional European provisions.[41]

3. ARTICLE 7 IN CONNECTION WITH ARTICLES 6.A AND 9 OF THE INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter Belém do Pará Convention) recognizes the crucial link between the right to be free from discrimination and the acknowledgement of other fundamental rights, especially the right to be free from gender-based violence. The relevant norms are as follows:

> Article 6. The right of every woman to be free from violence includes, among others:
>
> a. The right of women to be free from all forms of discrimination; and
> b. The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.
>
> CHAPTER III. DUTIES OF THE STATES
>
> Article 7. The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:
>
> a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
> b. apply due diligence to prevent, investigate and impose penalties for violence against women;

[40] See *Considerations Regarding Compatibility* and Report Nº 103/01, Case 11.307, *María Merciadri De Morini*, Argentina, October 11, 2001.
[41] ECJ 1995/172, Judgment of the European Court of Justice, Luxemburg (in full attendance), October 17, 1995, delivered by J. Paul J. G. Kapteyn.

c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;
g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and
h. adopt such legislative or other measures as may be necessary to give effect to this Convention.

Article 9. With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socio-economically disadvantaged, affected by armed conflict or deprived of their freedom.

As we can see, Juana Olin was protected against discrimination by the Belém do Pará Convention.

3.1 Is discrimination a matter of violence against women covered by the Belém do Pará Convention?

The Commission should respond that yes, nondiscrimination is an essential element of the Belem do Pará Convention, as stated expressly in Article 6, clause (a). In its 1998 report on the Status of Women in the Americas, the Inter-American Commission stated that the expression “discrimination against women” contained in the Belém do Pará Convention refers to “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms....” The definition covers any difference in treatment on the basis of sex which (a) Intentionally or unintentionally places women at a disadvantage; (b) prevents recognition by society as a whole of the rights of women in the public and private spheres; or (c) prevents women from exercising their rights. The Commission adds that the Convention requires that the States Parties to adopt and implement "by all appropriate means and without delay, a policy of eliminating discrimination against women," which includes the duty to “refrain from any act or practice of discrimination against women and to ensure that public authorities and institutions act in conformity with this obligation," as well as the duty to adopt the legislative and other measures required "to modify or abolish existing laws, regulations customs and practices which constitute discrimination against women" (art. 2 of the “Belém do Pará Convention”).

The State could argue that it is indeed covered by the Belém do Pará Convention, but only provided that discrimination is shown to exist, which has not occurred in this case. Therefore, all of the obligations arising from the Belém do Pará Convention are inapplicable if the basic principle, the existence of discrimination, is not formed as explained in the previous section. Furthermore, the fact

should not be overlooked, as the Commission has stated, that the Belém do Pará Convention is mainly an essential instrument that reflects the great efforts made to find concrete measures for protecting women's right to a life free from violence and aggression, both within and outside of their home and family.[42]

Also with regard to the examination of the inter-relationship between gender-based discrimination and violence, it is important to note that the definition of discrimination established in the United Nations convention applies to gender-based violence. Discrimination includes:

> acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.[43]

3.2 What are the resulting obligations in relation to the status of Afro-Iberolandian women? In particular, do the measures adopted by Iberoland meet the standard of due diligence set forth in the Belém do Pará Convention?

Given the pernicious nature of gender-based violence and discrimination, and the effects of the impunity that generally surrounds this violation of rights, the key obligation of the States party to the Belém do Pará Convention is to act with due diligence in order to prevent, investigate and punish this violence, regardless of whether it takes place in the home, the community or the public sphere. This principle of due diligence is also closely connected to the norms of the American Convention, especially those that require the States party --like Iberoland—to respect and ensure each one of the rights protected, and to provide protection and effective judicial guarantees.

The Commission can argue that the Belém do Pará Convention covers a situation that is prevalent in Iberoland and in North Shore. Two or more causes of discrimination are present. This intersection of discrimination motivated by two or more factors has not been overlooked, and different international bodies have highlighted it as particularly important.[44] The obligations arising from the Belém do Pará Convention that Iberoland has assumed include the duty to adapt national laws and practices to the applicable norms, including the right of women in general and Juana Olin in particular to live free from discrimination.

The Belém do Pará Convention recognizes particularly the vulnerability of women and imposes upon the States Parties the obligation to condemn, prevent, punish and eradicate any form of discrimination. It specifically imposes an additional obligation if the woman is discriminated against not only for her status but also because of her race or color (Article 9). As such, Iberoland was obligated to – and failed to - make the necessary efforts to prevent Juana Olin from sustaining double discrimination by virtue of her status as a woman and as an Afro-Iberolandian. The case information, particularly the paucity of Iberolandian female graduates and university professors, demonstrates that the situation of Afro-Iberolandian women was particularly serious and required special measures not satisfied by neutral university admissions policies. Article 7 of the Belém Convention is clear in requiring that the States adopt "appropriate means and without delay, policies

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[42] IACHR, Report Nº 54/01, Admissibility and Merits, Case 12.051, *Maria da Penha Maia Fernandes* (Brazil), para. 53.
[43] United Nations Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (11th session, 1992) "Violence against Women", para. 6.
[44] Human Rights Committee, General Comment Nº 28, para. 30 (Discrimination against women is often intertwined with discrimination on other grounds such as race, color, language, religion, political or other opinion, national or social origin, property, birth or other status.), CERD, General Recommendation XXV, Gender Related Dimensions of Racial Discrimination.

to prevent, punish and eradicate such violence." As indicated, discrimination is considered a form of violence and therefore is covered by this obligation. In particular, the various clauses of Article 7 include three basic principles that guide the entire Convention and which Iberoland, and North Shore in particular, failed to observe: First, they failed to make the Belém do Pará Convention effective (e.g. Article 7 clauses f, g and h); second, they did not act with due diligence to enforce the Convention obligations (e.g. Article 7 clause b) and finally, they failed to adopt the necessary measures to prevent the occurrence of discrimination against Juana Olin, to redress such discrimination and specifically to modify the legal and customary practices that support the permanence and tolerance of discrimination against Afro-Iberolandian women, including Juana Olin (Article 7 clauses b, c, d and e).

The State can argue that Iberoland complied with each and every one of the obligations arising from the Belém do Pará Convention. Conscious of the double discrimination faced by Afro-Iberolandians women as a result of their gender and their race (Article 9 of the Belém do Pará Convention), it adopted a series of measures aimed at improving their situation. The Belém do Pará Convention obligations contained in Article 7 are based on the premise of the due diligence with which the States must act. This due diligence requires that the State adopt firm, conscious and deliberate policies to eliminate the structural discrimination of which Afro-Iberolandian women are victims. As discussed on the previous paragraphs, Iberoland acted reasonably and exceeded its obligations under international norms, including those of the Belém do Pará Convention.

As such, the assertions of the Committee on the Elimination of Racial Discrimination in General Comment Nº XXV should be taken into account particularly. There the Committee maintained that on examining the relationship between sex-based discrimination and racial discrimination it would take into account

a) The form and manifestation of racial discrimination;
b) The circumstances in which racial discrimination occurs;
c) The consequences of racial discrimination; and
d) The availability and accessibility of remedies and complaint mechanisms for racial discrimination.

In this case, as discussed in the previous paragraphs, there was no particularized discrimination against Juana Olin and in fact, she has had the opportunity to make use of all existing legal recourse, even going to the Supreme Court. As such, the elements essential to establishing double discrimination and therefore the possible violation of the Belém do Pará Convention obligations are absent.

4. ARTICLE 13 OF THE PROTOCOL OF SAN SALVADOR

In its case before the Court, the Commission alleges the violation of Article 13 of the "Protocol of San Salvador" with regard to Juana Olin. This Article provides for the following:

> Article 13. Right to Education
>
> 1. Everyone has the right to education.
>
> 2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that

> education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.
>
> 3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:
>
> a. Primary education should be compulsory and accessible to all without cost;
>
> b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
>
> c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;
>
> d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;
>
> e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.
>
> 4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.
>
> 5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.

The standards appropriate to the case are related to equal access to the higher education system and the content and scope of the right to higher education. The legal problem, in terms of the right to education, is posed as follows: Is the aforementioned Article 13 violated if there is no public education policy based on affirmative action in order to provide equal opportunity access for a person belonging to an ethnic minority? What are the possibilities of demanding the adoption of specific social policies through the contentious case system? To what extent could a social policy whose channeling of resources or focalization in the collection of taxes is discriminatory be justiciable in the inter-American system?

The considerations raised by each team in relation to Article 13 of the Protocol are subordinate to the arguments turning on Articles 24 and 1(1) of the Convention with regard to equal access to the higher education system. Likewise, some Article 13 standards can be used to interpret Articles 24 and 1(1). It is also possible to read Articles 24, 13 and 1(1) jointly.

The doctrine of the ESCR Committee affirms that both civil and social rights involve a similar set of obligations, containing both positive and negative obligations. The differences between both types of rights are essentially ones of degree.[45] It only provides for a true recognition of the interdependence of such rights. It explains the inadmissibility of the arguments regarding the judicial non-enforceability of social rights.

[45] Víctor Abramovich and Christian Courtis, *Los derechos sociales como derechos exigibles*, Madrid, Trotta, 2002, p. 24-25.

The realization of the right to education, and to all social rights in general, is related to two possible approaches to the right to equality. In the first option, the right to equality (formal) appears as mere equality of treatment, while in the second option the right to equality (material) is projected as the redistribution of power and wealth and the overcoming of certain types of social hierarchies. The principle of equal opportunity within the framework of the right to education corresponds to the latter.

On the other hand, economic, social and cultural rights set limits on state discretion in the administration of its public policies (Quito Declaration,[46] para. 27). The obligations relative to social rights cover a large part of this type of limitation surrounding state interpretation of the redistribution of goods and obligations. Some of the litigation strategies developed by the teams could be related to:

- The difference between obligations of immediate effect and obligations of progressive realization.
- The difference between an essential content of the right to education and a sphere subject to restrictions.

The first obligation in relation to social rights deals with the obligation to adopt immediate measures. Articles 1 and 2 of the Protocol of San Salvador establish this obligation, but emphasize that their realization must take into account the degree of the State's development. They stress the adoption of legislative or other measures when the exercise of the rights enshrined in the Protocol is not guaranteed under national law. On this point, the Limburg Principles[47] specify that all States Parties have the obligation to begin **immediately** to adopt measures in pursuit of the full realization of the rights recognized in the ICESCR. The phrase "to the maximum of its available resources" that is usually contained in these norms, qualifies the obligation to adopt immediate measures. Nevertheless, it does not change the international commitments regarding social rights, conditioning them upon a mere budgetary decision of each government. Rather, the Limburg Principles (paragraphs 25 to 28) indicate that the States Parties have the obligation, independent of their level of economic development, to guarantee respect for the minimum subsistence rights of all persons. In addition, they state that "its available resources" refers to the resources that a State has as well as the resources it derives from the international community through international cooperation and assistance. Likewise, upon determining the adequacy of measures adopted for the realization of the rights recognized in the Convention, the equitable and efficient use of, and access to, available resources shall be taken into account.

If it is proved that the resources have not been utilized adequately for the realization of economic, social and cultural rights, the State could be considered to be in breach of its international obligations; hence the importance of determining whether adequate measures have been adopted and whether they are accompanied by the equitable and effective use of and access to available resources. These general requirements lead the way to a more specific distinction: the classification of obligations of immediate effect and of progressive realization.

Obligations of immediate effect are those that can be demanded now, regardless of budgetary problems or other types of obstacles that a given State faces. According to the various General Comments of the ESCR Committee, immediate obligations include, among others, the

[46] Declaration signed on July 24, 1998 by a group of non-government organizations, on the enforcement and realization of economic, social and cultural rights in Latin America and the Caribbean.

[47] "The Limburg Principles on the Implementation of the ICESCR", approved by a group of experts gathered in Maastricht from June 2 – 6, 1986. This document was later adopted by the United Nations (doc. E/C 4/1987/17).

obligation to adjust the legal framework, the obligation to produce and publicize information and the obligation to provide judicial resources and other effective resources.

With respect to the distinction between essential content and areas open to restriction, the Committee's General Comment 13[48] specifies that the States have the minimum obligation of ensuring essential levels of the right to education.[49] The Quito Declaration (para. 29) states that this obligation remains in force even during periods of severely limited resources caused by [economic] adjustment, economic recession or other factors. The obligations of the States are of immediate effect with respect to these essential levels. In these situations, the State must establish an order of priority for the use of public resources, identifying vulnerable groups to be benefited in order to take advantage efficiently of all the resources it has. For the Committee, this minimum obligation demands the guarantee of essential levels of the right to education (availability, accessibility, acceptability and adaptability) and, in this context, the obligation to safeguard the right of access to public education programs and institutions without any type of discrimination. It should be noted that the relationship between the essential content of a right and its justiciable content is an open debate.[50]

Regarding obligations of progressive realization, according to Limburg Principle No 72, a State Party violates economic, social and cultural rights if, for example, it fails to adopt a measure required by the Covenant; fails to remove as quickly as possible, when it has a duty to do so, all of the obstacles preventing the immediate realization of a right; fails intentionally to meet a generally accepted minimum international standard of attainment that it is capable of meeting; or adopting a limitation on a right recognized by the Covenant in a way that is contrary to the Covenant. As we can see, the duty of progressive realization of positive social rights does not mean that they cannot be violated by the omissions or insufficient actions of the State.

The expression "progressively" thus cannot be interpreted to mean that obligations under the ICESCR must be observed only once a certain level of economic development has been achieved. Progressivity must be understood as the obligation to proceed as explicitly and effectively as possible with a view to attaining this objective, although it is recognized that the complete fulfillment

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[48] Committee on Economic, Social and Cultural Rights, *The Right to Education (Article 13 of the Covenant)*, General Comment No. 13, 21st session, doc. E/C.12/1999/10, December 8, 1999, para. 49-57.

[49] This obligation is based on the Limburg Principles (principle 25) as well as General Comment No. 3 of the Committee on Economic, Social and Cultural Rights (para. 10), United Nations, Document E/1991/23. There are many theories as to what can be understood as the essential content of a right. In judgment SU-225 of 1998, the Constitutional Court of Colombia held that "Fundamental positive rights have a double content. First, they are comprised of a minimum essential nucleus, non-negotiable in democratic debate, which confers subjective rights that are directly enforceable through a petition for the protection of constitutional rights [*acción de tutela*]. Second, they include a complementary aspect, which is defined by the political bodies based on the availability of resources and the political priorities of the situation." For its part, the IACHR has stated that "(t)he obligation of the Member States to observe and defend the human rights of individuals within their jurisdictions (…) requires them, independently of the level of economic development, to guarantee a minimum threshold of these rights." IACHR, Annual Report 1993, OAS/Ser.L/V/II.85 Doc. 9 re. (1994), p. 524.

[50] On this point, Porter notes that "(w)hile this approach (minimum core used to identify particular category of justiciable ESC rights violations) is certainly preferable to one in which justiciability itself is limited to the minimum core content of rights, I would hesitate to accept that the onus should ever be placed on rights claimants to establish unreasonableness of governmental policy decisions, particularly in the context of the obligation to allocate resources among competing demands. While there is invariably some back and forth in the development and filing of evidence in these kinds of claims, it is the government, in the final analysis, which has access to the necessary evidence and must bear the onus of justifying a decision to have allocated resources in a particular manner". Bruce Porter, "The Crisis of ESC Rights and Strategies for Addressing It", in John Squires, Malcolm Langford and Bret Thiele (ed), *The Road To A Remedy. Current Issues in the Litigation of Economic, Social and Cultural Rights*, Australian Human Rights Centre, The University of New South Wales, COHRE, 2005, p. 53.

of the rights established in the Covenant presumes certain gradualness. The ESCR Committee explains it thus:

> "[w]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."[51]

Paragraphs 21 to 24 of the Limburg Principles complement this interpretation by specifying that the obligation to "achieve progressively the full realization of the rights" requires that the States Parties act as quickly as possible to achieve the effectiveness of the rights. Under no circumstances is this to be interpreted to imply that the States have the right to postpone indefinitely their efforts to ensure full effectiveness. To the contrary, all of the States Parties have the obligation to begin immediately adopting measures aimed at observing their obligations under the Convention. Furthermore, the obligation of progressive achievement exists independently of any increase in resources. It requires the efficient use of available resources.

The obligation to develop social rights progressively implies a **prohibition against regressiveness** with regard to the scope of these rights and the respective public policies. States are required to improve conditions for the enjoyment and exercise of economic, social and cultural rights through means that are deliberate, concrete and aimed toward the full effectiveness of the recognized rights. Therefore, the State cannot unreasonably adopt legal standards, measures or policies that worsen the status of these rights. The State bears a **burden of proof** in relation to deliberately regressive measures. Any decision must be made following an exhaustive examination of all possible alternatives and must be based on a proper justification given its commitment to use fully the maximum resources available.

In sum, it is clear that the principle of nondiscrimination, or the obligation to refrain from engaging in it –a negative obligation- is an obligation of immediate effect that is currently enforceable against the States and justiciable through Article 24 of the Convention. Nevertheless, the States can assert that, although the principle of nondiscrimination is of immediate effect, affirmative action programs are of progressive realization.

Neither the Commission nor the Court has declared a direct violation of the right to education in a contentious case. The inter-American jurisprudence has dealt with the right to education as part of the normative content of rights such as the right to life, the right to safety, the rights of children and others. Likewise, jurisprudential constructions regarding the "life plan" [*proyecto de vida*] of victims has permitted claims to the right to education in numerous cases on reparations. It is relevant to this case to point out that neither the Commission nor the Court has referred to cases relating to the right to higher education.[52]

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[51] Committee on Economic, Social and Cultural Rights. General Comment 3 (para. 2), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 12/05/2004, HRI/GEN/1/Rev.7.

[52] There are some important comparative law cases relating to the right to education. In 1996, the African Commission on Human and Peoples' Rights concluded that Zaire had violated the right to education by closing secondary schools and universities for two years during a period of armed conflict. Moreover, a violation was found to exist because the government had failed arbitrarily to pay teacher salaries. See African Commission on Human and Peoples' Rights, *Free Legal Assistance Group, Committee of Jurists for Human Rights, Union interafricaine des droits de l'homme, Les Témoins de Jehovah v. Zaire*, Communications 25/89, 47/90, 56/91 and 100/93, Ninth Annual Activity, Report of the African Commission on Human and Peoples' Rights 1995/96. Other important cases are *Saburo Ienaga v. The Japanese Government*, Tokyo High Court (1997), regarding censorship and distortion – in history books written by the State- of historical facts related to grave violations of human rights during the Second World War and *Mohini Jain v. State of Karnataka and Others*, from the Supreme Court of India. See also, *Iván José Sanchez et al. v. Universidad*

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The Commission has declared the admissibility of cases relating to the right to education enshrined in the Protocol of San Salvador,[53] has advanced friendly settlements[54] and has issued protective measures in defense of this right.[55] In addition, in its country reports, the Commission has recommended the adoption of changes in the education policies of the States Parties[56] and has asserted the interdependence and indivisibility of civil rights and social rights.[57]

For its part, the Inter-American Court has referred to the right to education in cases dealing with minor children and in various judgments on reparations. In the *Case of the "Street Children*", the Court found that the protection of access to conditions of life that guarantee a dignified existence underlies Articles 4 and 19 of the Convention, and that this includes access to education for boys and girls.[58]

In its *Advisory Opinion on the Juridical Condition and Human Rights of the Child,* the Court examined education as part of the right of children to a dignified life, in such a way that the realization of the right to education is part of the special measures for the protection of children and is among the rights granted to them under Article 19, since it "contributes to the possibility of enjoying a dignified life and to prevent unfavorable situations for the minor and for society itself."[59]

A similar line of argument is evident in the *Case of Children's Rehabilitation v. Paraguay,* where the Court examined the situation of a center that housed juvenile delinquents in inhuman conditions. The Court ruled that the Paraguayan State was responsible internationally for the violation of the rights to life and personal dignity in relation to Articles 1.1 and 19, among other violations. It is relevant to note that the Court considered that a correct interpretation of Articles 4 and 19 of the Convention had to be made in light of the pertinent provisions of the Convention on

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Experimental Simón Bolivar, from the Supreme Court of Justice of Venezuela, which declared unconstitutional the imposition of a mandatory monthly contribution from the students at a university because the constitutional procedure for establishing these types of charges was not followed.

[53] In a complaint regarding the situation of adolescent detainees in Sao Paulo, the Commission issued an Admissibility Report admitting the case due to the violation of Article 19 of the Convention and Article 13 of the Protocol of San Salvador. IACHR Report Nº 39/02, Admissibility, Petition 12.328, *Adolescents in the Custody of the FEBEM*, Brazil, October 9, 2002.

[54] IACHR Report No. 32/02, Petition 12.046, *Mónica Carabaotes Galleguillos*, Friendly Settlement, Chile, March 12, 2002. It is worth noting that in this case the right to education was not invoked directly, but it was related to the expulsion of a student due to her condition of pregnancy. In the Friendly Settlement the State agreed to grant a scholarship for her to undertake higher education.

[55] In the *Case of the Girls Jean and Bosico*, the Commission issued protective measures to prevent their being expelled from the Dominican Republic and so that Violeta Bosico would not be deprived of the right to attend classes and receive the education that is provided for all other Dominican children. IACHR, Annual Report 1999.

[56] In its Fifth Report on the Situation of Human Rights in Guatemala, the Commission recommended, among other things, to take additional steps in order to provide education and employment opportunities to people in pre-trial detention. In addition, this report analyzed the disparities between men and women in terms of access to education, which were discerned at all levels.

[57] "(…) The violation of economic, social and cultural rights is generally accompanied by a violation of civil and political rights. In effect, a person who does not receive adequate access to education might see his possibilities for political participation or his right to freedom of expression diminished. (…) This situation could arise in different degrees, according to the extent of the violation of economic, social and cultural rights. It can be asserted in general terms that where there is less enjoyment of economic, social and cultural rights, there will be less enjoyment of civil and political rights." See IACHR Report on Nicaragua, 2001.

[58] Inter-Am. Ct.H.R., *Case of the "Street Children" (Villagrán Morales et al.),* Judgment of November 19, 1999, Series C No. 63.

[59] Inter-Am. Ct.H.R., *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, para. 84.

the Rights of the Child and the Protocol of San Salvador, since these instruments and the American Convention form part of a comprehensive international *corpus juris* for the protection of children. It was thus concluded that the State has the obligation to provide them with health and education services in order to ensure that detention does not destroy their life plans.[60] The Court reiterated the role of the right to education as part of the right to a life plan. It then pointed out the deficiencies of resources and teachers in the educational programs available to the minors detained in unacceptable circumstances. It is important to note that the victims' representatives requested that the Court find a violation of Article 26 of the Convention regarding the progressive development of economic, social and cultural rights. The Court dismissed that request as improper and found that the pertinent issue had been examined in the violations declared.

In the *Case of the Girls Jean and Bosico*, the Court found that the vulnerability created by a lack of nationality and legal capacity resulted in Violeta Bosico's having to attend a night school for persons over the age of 18 for a time because she did not have a birth certificate. The Court stated that this fact aggravated her condition of vulnerability since she did not receive the special protection that was her right as a girl, in order to attend school at an appropriate time, together with children of her own age, and not with adults. As such, the Court found a violation of Articles 3 and 18 in relation to Articles 19 and 1.1 of the Convention.[61] In this case, as in others[62], the Court ordered as reparation that access to free elementary education be guaranteed for all children, regardless of their ancestry or origin.

4.1 Is the obligation to adopt a quota system to provide access for persons of African descent an obligation of immediate effect or one of progressive realization?

The Commission can argue that the duty to respect and guarantee Article 13 of the Protocol of San Salvador requires that equal opportunity access to the education system be understood as an obligation of immediate effect. To this end, if a specific case requires the adoption of an affirmative action policy, it must be understood that the failure to adopt such a policy, without admissible reasons to justify such an omission, constitutes a violation of the aforementioned Article.

The Commission will stress that this obligation to guarantee access without discrimination is even non-derogable. General Comments 14 (right to health) and 15 (right to water) of the ESCR

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[60] Inter-Am. Ct.H.R., *Case of Children's Rehabilitation v. Paraguay*, Judgment of September 2, 2004, Series C No. 112.
[61] Inter-Am. Ct.H.R., *Case of the Girls Jean and Bosico v. the Dominican Republic*, Judgment of September 8, 2005, Series C No. 130.
[62] The Court has adopted measures relating to the guarantee of the right of education in many of its reparations orders. In the *Cantoral Benavides Case*, in providing for monetary reparations for damages to the victim's life plan, the Court ordered that Mr. Cantoral, who was a university student in biology, be granted a higher education or university scholarship to cover the costs of the professional degree program of his choice. In the *Aloeboetoe et al. Case*, the Court ordered Surinam to "that the children be offered a school where they can receive adequate education (…). The Court believes that, as part of the compensation due, Surinam is under the obligation to reopen the school at Gujaba and staff it with teaching and administrative personnel to enable it to function on a permanent basis as of 1994." In the *Myrna Mack Chang Case*, the Court ordered the State to grant an annual scholarship named after Myrna Mack Chang, to cover the entire cost of one year of study in the Anthropology department of a prestigious national university, and which must be granted every year on a permanent basis. In the *Gómez Paquiyauri Case* a university scholarship was also granted as a form of reparation to Mr. Gomez's daughter. In the *Case of Children's Rehabilitation,* the Court ordered the State to implement an educational and vocational assistance program for former residents of the center. In the *Plan de Sánchez Massacre Case*, the Court ordered the State to adopt an education program for the victims and inhabitants of the village and other adjoining villages affected by the events within five years of the publication of the judgment. In the *De La Cruz Flores Case*, the Court ordered the granting of an academic scholarship in order for the victim, who had been working as a medical doctor at the time of her detention, to update her professional skills and training.

Committee specify that failure to observe the essential minimums can never, under any circumstance, be justified.[63] On this point, it will assert the character of *jus cogens* that the prohibition against discrimination has acquired in the inter-American system, according to Advisory Opinion No. 18 on Migrant Workers.[64] The standard from the last two comments of the ESCR Committee is stricter than the one that was set forth in General Comment No. 3 on the nature of States Parties' obligations, when it considered that all measures that are deliberately retroactive with regard to essential levels require the most careful consideration and must be fully justified by reference to the totality of rights provided for under the Convention and in the context of taking full advantage of the maximum resources available.[65]

The State might counter-argue that, in relation to the obligation to guarantee essential levels, the Limburg Principles as well as the Maastricht Guidelines[66] admit that the limitation of resources must be considered in the evaluation of compliance with the obligation to guarantee minimum standards, since the measures must be taken to the maximum of available resources.[67] In turn, this leads to the assertion that affirmative action programs in higher education are not an obligation of immediate effect and fall within the framework of the progressive development that is appropriate to the right to education.

The State will argue that it is elementary education that is protected immediately and with special concern by the international human rights instruments. General Comment 13 of the ESCR Committee lays out the differences between the standards of protection for different levels of education in the following terms:

> 19. The third and most significant difference between article 13 (2) (b) and (c) is that while secondary education "shall be made generally available and accessible to all", higher education "shall be made equally accessible to all, on the basis of capacity". According to article 13 (2) (c), higher education is not to be "generally available", but only available "on the basis of capacity". The "capacity" of individuals should be assessed by reference to all their relevant expertise and experience.[68]
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> (…)
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> 48. In this respect, two features of article 13 require emphasis. First, it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances; States parties recognize, for example, that the "development of a system of schools at all levels shall be actively pursued" (art. 13 (2) (e)). Secondly, given the differential wording of article 13 (2) in relation to primary, secondary, higher and fundamental education, the parameters of a State party's obligation to fulfill (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, States parties have an enhanced obligation to fulfill (provide) regarding the right to education, but the extent of this obligation is not uniform for all levels of education. The Committee observes that this interpretation of the obligation to fulfill (provide) in relation to article 13 coincides with the law and practice of numerous States parties.
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[63] Committee on Economic, Social and Cultural Rights, General Comment No. 14, para. 47; Committee on Economic, Social and Cultural Rights, General Comment No. 15.

[64] Inter-Am. Ct.H.R., *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, paras. 102-110. According to the Court, the principle of equality and non-discrimination must be considered *jus cogens* norms, that is, such principle involves mandatory, non-derogable obligations.

[65] Committee on Economic, Social and Cultural Rights, General Comment No. 3, para. 9.

[66] Maastricht Principles on violations of economic, social and cultural rights. These guidelines were prepared by a group of experts between January 22 and 26, 1997 and have been used by the Committee on Economic, Social and Cultural Rights in its general and final comments.

[67] General Comment 3, para. 10, Limburg Principles (25-28) and Maastricht Guidelines (10).

[68] Committee on Economic, Social and Cultural Rights, General Comment No. 13, para. 19.

> 51. As already observed, the obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical. Given the wording of article 13 (2), States parties are obliged to prioritize the introduction of compulsory, free primary education. This interpretation of article 13 (2) is reinforced by the priority accorded to primary education in article 14. The obligation to provide primary education for all is an immediate duty of all States parties.

The State can likewise indicate that among the violations of the right to education recognized by the General Comment, there is express reference to [the obligation to] "prioritize the introduction of compulsory, free primary education" for all. There is no express mention of the right to higher education. This silence is explained in that this latter right does not form part of the essential content of the right to education.

4.2 How can a policy of resource allocation and/or focalization in the collection of taxes violate the right of equal access to the higher education system?

The Commission can argue that Iberoland, in addition to North Shore, allowed the unequal distribution of resources for numerous years. This distribution created a scenario where the majority white districts had higher incomes and, consequently, there was inequity in the prior levels of education. In the specific case at hand, this creates inequality in the competition for the two hundred and fifty spaces, which is why it was necessary to adopt measures to address this inequality of starting points. Moreover, the structural inequality can result in lower levels of training, causing many difficulties in meeting the requirements for access to the higher education system. As such, giving priority to the oral interview becomes problematic and discriminatory relative to access to the university, given that better education at the lower levels provides greater interaction for the oral interview.

Along these lines, the disparity between rich and poor will widen if the responsibility to finance education is left to the local families and communities. In order to break this vicious circle, governments must give priority to the funds earmarked for education and make them equal. It must increase the funding of teachers and poor students with a view to correcting problems that they must overcome. This is exactly the situation that Juana Olin was a victim of, given the manner in which public education is funded in North Shore. In terms of comparative law, the group of cases litigated before the state courts of the United States in relation to the constitutionality of education funding based on state constitutional clauses is relevant to the hypothetical case.[69] Abramovich and Courtis discuss how the litigation was focused on the dependency of a large part of compulsory education funding on local (municipal or district) taxes. Violation of the right to equal protection of the law was alleged since the quality of education received by children and adolescents was linked to the wealth of the school district in which they resided, given that the poorest districts had a greater financial burden in order to attain levels of education similar to those of the wealthier districts. The litigants requested that the state funding plan be deemed constitutional, and for the states to be ordered to finance a majority of the education system's operating costs with state resources. As indicated by the authors, General Comment No. 13 of the ESCR Committee embodies an important standard with respect to the issue, stating that "[s]harp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant."[70] In this case, it is clear that the schools attended mainly by

[69] These cases are dealt with systematically in Víctor Abramovich and Christian Courtis, *Los derechos sociales como derechos exigibles*, Madrid, Totta, 2002, p. 177-179.

[70] Para. 35. Abramovich and Courtis note that the litigants have employed two strategies: the first (*equity claims*) has been to demand the leveling of education spending among the different districts, based on the equal protection clauses; the second (*adequacy claims*) proposes the improvement of education resources in the districts that are in worse condition, without necessarily requiring the equality of resources among districts. This second strategy demands the

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Afro-Iberolandians lack basic infrastructure and a sufficient number of teachers, among other defficiencies.

The Commission may additionally argue that availability and quality are among the essential elements of the right to education. Both components are violated by the existence of a public policy that, even though different in other provinces, results in an insufficient number of teachers in school districts in North Shore where the majority of children are of African descent. As such, the inequity in North Shore's policy violates the duty to guarantee the right to education.

The State can argue that although it is true that the distribution of resources is inadequate, everything possible has been done to reverse it, so much so that Juana Olin has been supported financially with scholarships to complete her secondary education, and Juana was even the first person in her family to do so. As indicated by the Inter-American Court in the *Five Pensioners Case*, the impact of such unequal distribution in an individual case must be proven in that specific case. No violation was found in that case, which affected five individuals; therefore, it is even less feasible in this case, which deals with a single individual. Further, Juana Olin did pass the three tests required by the university, which means that she cannot claim that structural inequality resulted in a disadvantage with regard to access.

4.3 Is Article 13 violated if there is no public education policy based on affirmative action in order to permit equal opportunity access for a person belonging to an ethnic minority?

The Commission will stress that the right to equal opportunity access to the education system implies that all persons with an interest in being admitted to an educational institution can gain access to the selection process on an equal footing, and that the granting of admission is done according to established procedures. This relationship between the right to education and the right to equality can be advocated with respect to the entire education system, without regard to age or the level of education a person seeks to enter.[71] On the other hand, the selection criteria for gaining entry to an educational institution must be academic and cannot give rise to any type of discriminatory conduct.

International law acknowledges the possibility of promoting admissions prerogatives in the education system in benefit of marginalized or disadvantaged social groups for purposes of ensuring

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provision of adequate education services based on an attempt to determine the minimum content of the right, based on the services effectively received by the wealthier districts.

[71] In Judgment T-798 of 1998 the Constitutional Court of Colombia examined the case of a student who was denied admission to medical school in spite of having obtained a higher grade than other applicants who were accepted through special incentive procedures relating to military service or status as children of professors. The Constitutional Court found that once the universities, in exercise of their autonomy, established a number of spaces, their distribution and the mechanisms for access, selection must correspond to the personal academic merit of the applicants, and not to external factors. Consequently, all persons with an interest in gaining admission have the right, under equal conditions, to have access to the selection process and for the distribution of the places to be done in accordance with established procedures. Equality of access means that where there is a limited number of spaces, selection must be done according to the criterion of academic performance, based on the principle of equal opportunity. The Court held that it is reasonable to grant favorable treatment only if it is directed at groups that have been traditionally marginalized or discriminated against, or persons who are in circumstances of manifest weakness due to their financial, physical or mental condition. When the right to equal access is violated, *tutela* [a complaint for the protection of constitutional rights] is proper, regardless of whether the person is a child or an adult, or of what level of education he or she is at. Consequently, the High Court ordered the University to authorize the enrollment of the student in the first medical program to begin after the date of the notice of judgment.

equal opportunity access. This includes the policy of setting quotas in institutions of higher education.[72] The ESCR Committee has stated the following in regard to these types of measures:

> The adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.

Other mechanisms to promote equal opportunity of access to the education system focus on the obligation to implement systems of scholarships for persons from disadvantaged groups.[73]

On the other hand, although it is possible for educational institutions to control admissions to its programs through their own regulations, they are not permitted to impose disproportionate requirements that invalidate the right of access.[74] Nor can they deny a place based on reasons not provided for in the law or the regulations.

As we can see, the discretion of the authorities of the Province of North Shore to design a specific social policy is not absolute. The advancement of a public education policy must respect the *pro homine* principle and the obligations acquired under the Protocol of San Salvador. In this sense, the Court has jurisdiction to determine whether the education policy implemented in this case is sufficient, appropriate and strictly proportional, in order to develop the right of equal opportunity access to the education system.

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[72] The granting of admission must adhere to standards that respect the principles of reasonableness and equal opportunity access to the education system. In judgment T-441 of 1997, the Constitutional Court of Colombia held that "the promotion of sports is not a sufficient reason for the creation of a special quota in order to favor the access of athletes to higher education. Although we do not deny that the presence of high-performance athletes at the university could be a stimulus for the practice of physical recreation activities, this objective can be achieved through measures that are much less harmful to the interests of the other candidates for admission to the university, which do not involve the unfair and excessive sacrifice of some peoples' aspirations to undertake higher education." In the same decision, the Constitutional Court held that the essential standard for admission has to be academic merit. After applying the academic criterion, universities may employ other constitutionally acceptable parameters for admission, such as those seeking to counteract the unequal conditions in which the different applicants arrive at the admissions examinations. Based on this, in this specific case, the court found that the privileges accorded to athletes and children of professors were unconstitutional, in that they disregarded the essential criterion for access to the university and violated the right to equality. It further held that the awarding of places based simply on the fact that a student was a native of the region was unconstitutional. On the other hand, it accepted the validity of special quotas for former guerrillas, since in favoring the social reintegration of demobilized guerrillas into society and granting them training to enter the job market, the university contributes to the objective of peace that is advanced in the Constitution. Attainment of the minimum grades for entry into the university is required in such cases. With respect to "inequality of origin", the Constitutional Court held that it can indeed be a sufficient argument for special treatment in the admission of applicants coming from marginalized areas and places where basic education services are deficient, since the students from those areas have been traditionally neglected by the State and they have not been provided with education services similar to those provided to the residents of other areas of the country. The Constitutional Court of Colombia emphasized that special treatment for admission to the university is a way of counteracting these differences of origin that cause the applicants from these areas, in practice, having scant possibilities of gaining access to higher education.

[73] An obligation in this sense is enshrined in Article 13 (2)(e) of the International Covenant on Economic, Social and Cultural Rights; See also General Comment 13, paras. 26 and 53.

[74] In Judgment T-215 of 2002, the Constitutional Court of Colombia found that certain restrictions on access relating to a maximum age limit could be disproportionate with respect to certain minors in a situation of forced displacement. The Court found that since the case dealt with children displaced by the internal conflict, forced to move from place to place, beginning a school year and then suspending it in order to start again at another school if possible, it was normal for them to exceed the age that usually corresponds to a given school grade. The Court therefore found that exceeding certain time limits should not lead to their exclusion from the education system.

The test that should have been conducted in order to determine whether the measure fails to respect the Protocol is a strict test. Thus, the lack of alternatives for Juana Olin in this specific case renders inadmissible the opposition of other possibilities that are not effective or suitable to protect her rights. In light of the inter-American jurisprudence, the fact that Juana Olin's life plan is affected requires the direct judicial intervention of the Court.

Finally, it should be noted that in the *Case of the Girls Jean and Bosico*, the Inter-American Court found that a determination of the violation of the right to equality could involve the analysis of the discriminatory impact of a policy that appears to be neutral in its formulation. In effect, the Court said:

> 141. The Court believes that the imperative legal principle of the effective and egalitarian protection of the laws and nondiscrimination dictates that the States, in regulating the mechanisms for granting nationality, must refrain from producing regulations that are discriminatory or have discriminatory effects on different groups of a population when they exercise their rights.[75] In addition, the States must combat discriminatory practices at all levels, especially in public institutions, and finally must adopt the affirmative measures necessary to ensure the effective equality before the law of all persons.

As such, -the Commission will argue- if the failure to adopt a policy of affirmative action in the case at hand creates difficulties in access to higher education for traditionally excluded groups, the Court must find a violation of Article 13 of the Protocol and of Article 24 of the Convention given the inequity created by North Shore's omission.

The State could offer several counter-arguments in response to the above. Iberoland will insist that, in spite of the allegation of possible discrimination against Juana Olin, what the Commission is really pursuing is for the Court to order the State to adopt a specific public education policy, which –the State would assert- is untenable in the contentious proceedings of the Inter-American System.

In effect, obligations relative to social rights do not commit the States Parties to the adoption of a specific social policy. The Protocol of San Salvador establishes some goals and it is the obligation of the States Parties to determine the path to attaining such objectives, even more so when not all of the States are in the same situation when they promote the progressive development of these rights.

Iberoland will thus argue that the European Court has stressed that national authorities are in a better position to determine the suitable and effective measures for the best fulfillment of their international commitments.[76] It follows that the States have a margin of appreciation in relation to the needs of their society and democratic institutions.[77] It is then the provincial parliament and [provincial] executive branch that are called upon to determine the economic model that the province should follow, and the direction of public spending allowed by the Constitution. An intervention by the Inter-American Court with regard to this issue would be undemocratic, given that those popularly elected persons in North Shore have given priority to the public interest in the adoption of the education policy. It is illegitimate for the Court to accelerate a change that must arise from public

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[75] On this point, the Court cites its precedents from the *Yatama Case*, its *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrant Workers,* Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, para. 88, and *Juridical Condition and Human Rights of the Child*, supra fn. 59, para. 44.

[76] European Court of Human Rights, *Stjerna v. Finland*, Judgment of November 25, 1994, Series A, No. 299-B, para. 39.

[77] European Court of Human Rights, *Lingens v. Austria Case*, Judgment of July 8, 1986, Ser. A No. 103, para. 39.

deliberation in the appropriate political contexts, where minorities can be heard and where their interests are also taken into account.

The above is reinforced if we consider that the Inter-American Court does not have to assume the political costs inherent in the procurement of resources to fund social policies. In provinces with scarce resources such as North Shore, the adoption of affirmative action policies such as those demanded in this case would mean excessive judicial intervention on the part of the Court. The States Parties did not agree to be responsible for the realization of the most costly elements of the life plans of all persons.

On the other hand, without denying the relevance of human rights norms in the resolution of specific cases, the State will point out that such norms do not set the development policy that a country should promote. Moreover, different types of social policy are viable for the realization of social rights without the States Parties having to assume excessive rigidity in decisions that should be the object of public deliberation.

This argument is strengthened by the precedent of the Inter-American Court in the *Five Pensioners v. Peru Case.* In effect, the inter-American jurisprudence has specified that the obligation of progressive development cannot be referred to for the justiciability of the right to education in specific cases. In the above-cited case, the Court held that "[e]conomic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development […] should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation."[78] Applying this standard to the present case, the fact that the education policy currently implemented in North Shore does not allow for the inclusion of Juana Olin as a university student does not necessarily mean that the progressive realization of the right to higher education has been ignored.

The Court thus lacks jurisdiction to evaluate the impact of a specific public policy. These policies, according to the cited precedent, can only be regulated through contentious cases when the actions of the State affect the population as a whole and not a just a single person.[79] In this case, the Commission offers no arguments as to the form in which the possible violation could have collective effects, in such a way that it is not just an isolated event.

Furthermore, this sphere of discussion is appropriate to the general monitoring of human rights conditions in the region, a task that belongs to the Inter-American Commission through its annual, thematic and country reports, and to other political bodies of the Inter-American System.[80]

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[78] Inter-Am. Ct.H.R., *Five Pensioners Case,* Judgment of February 28, 2003. Series C No. 98, para. 147.

[79] See the opinion of former Inter-American Court Judge Carlos Vicente de Roux, who believes that it is not possible to obtain judicial consequences from Article 3 of the Protocol, which addresses the "obligation of nondiscrimination". De Roux asserts that "if the State's international obligation is not to guarantee positively the right to education or trade unionism, but rather to refrain from committing acts that violate them directly, international legal protection could not perform the task of broadening the coverage of such rights to encompass sectors that are discriminated against." See Carlos Vicente de Roux, "La protección judicial de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano", in VV.AA, *Rumbos del Derecho Internacional de los Derechos Humanos. Estudios en homenaje al Profesor Antonio Augusto Cancado Trindade*, Vol. III, Porto Alegre, Sergio Antonio Fabris Editor, 2005, p. 278.

[80] Such as the General Assembly, the Permanent Council and the Committee on Juridical and Political Affairs, institutions which, for example, are promoting the formation and operation of a Working Group that will analyze the national reports commenting on the advances in compliance with the Protocol of San Salvador.

Therefore, the obligations regarding the right to higher education in this case can only be evaluated in reference to the coverage of the entire population and not in relation to a specific victim.

The State will point out that a supervisory mechanism consisting of a reporting system was established in the Protocol of San Salvador. This mechanism has been strengthened through the "Standards for the Preparation of Periodic Reports Pursuant to Article 19 of the Protocol of San Salvador"[81], adopted by the General Assembly of the OAS. These standards set up a reporting system as a means of tracking the fulfillment of progressive measures. Article 5.1 defines progressiveness as "the notion of gradual advancement in the creation of the conditions necessary to ensure the exercise of an economic, social, or cultural right." Likewise, Article 5.2 focuses the assessment of progressiveness on progress indicators.[82] As we can see, the Protocol tends to be focused toward this type of control mechanism, unlike the contentious case system, given the technical complexity of evaluating macroeconomic policies and the public policies of the States. As such, it would be difficult to accept a judicial intervention whereby the Inter-American Court would admit the contentious enforceability of a specific social policy. It follows that the arguments as to the violation of rights through a failure to adopt a public policy deal with a standard that is the object of monitoring through reports and not of litigation by means of contentious cases.[83]

The State will note that the Court has not applied the standard of progressiveness to individual cases. In effect, the Court has protected social rights through the invocation of civil and political rights such as the right to life, the right to personal safety, the right to due process, political rights and the right of equality. In this respect, the judicial enforceability of a public education policy has no basis in inter-American jurisprudence. This is especially true when the litigation of this case deals with the presumed lack of accessibility and quality of the education system of North Shore. Furthermore, to consider that the right to equality spreads out in such an excessive and unpredictable way so as to include a conditioning of state policies would weaken the force of the Court's jurisprudence, since it would result in a loss of the specificity of rights for which the States Parties have provided means of contentious assertion.

In sum, the State cannot incur international responsibility in a contentious case due to the fact that a structural problem of social exclusion exists. The seriousness of such a situation is not denied, but it cannot be the object of condemnation in the individual case system. This is especially true when the criteria put forth by the ESCR Committee, or the general, thematic and country reports published by the Inter-American Commission in its non-contentious activities are taken as standards of reference.

5. ARTICLE 28 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

Article 28 of the Convention states:

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[81] Resolution GA/RES. 2074 (XXXV-O/05) of June 7, 2005.

[82] According to this norm, "[a] system of progress indicators makes it possible to determine, with a reasonable degree of objectivity, distances between the actual situation and the standard or desired goal. Progress in the area of economic, social, and cultural rights may be measured on the premise that the Protocol of San Salvador expresses a standard against which to assess, on one hand, constitutional compatibility, legal and institutional development, and governance practices of states; and, on the other hand, realization of the aspirations of different sectors of society expressed, *inter alia*, through political parties and civil society organizations."

[83] Therefore, the standards "Are designed to be a useful tool for the states parties themselves to evaluate measures and strategies they adopt to ensure ESCR. In that respect, they enable conclusions to be reached with regard to the aptness of priority allocation, policy shaping, and strategy design in the reporting state, without seeking comparisons with other states." The resolution expressly affirms that the standards "are not intended to record complaints but progress."

> Article 28. Federal Clause
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> 1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.
>
> 2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.
>
> 3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized.

The federal structure of several Member States of the OAS[84] has repercussions in the enforcement of obligations arising from international human rights norms.[85] On many occasions, such as in the case of Olin v. Iberoland, the federal structure may limit the domestic effects of ratification of the American Convention. In parallel fashion, local authorities such as those of North Shore may attempt to disregard their obligations by arguing that the issue at hand, in this case education, falls within its jurisdiction, while the Convention was ratified by the federal government; as the state government did not ratify the Convention, it does not have to comply.

The Olin case requires an analysis of the potentials and difficulties that federalism presents and a definition of the scope of the international obligations of a State with a federal system. This is to avoid unduly restricting or limiting the international protection of the inhabitants of States with federal structures, as well as to prevent the international bodies from conditioning or impeding the harmonious operation of the assignment of authority to the provinces of the federations.

5.1 What are the obligations of a Federal State in relation to the actions and omissions of the entities making up the Federation (What are the obligations of Iberoland in relation to the actions or omissions of North Shore)?

The Commission can argue that the Court has already held clearly and categorically that the international provisions addressing the protection of human rights in the American States must be respected by the American States Parties to the respective conventions, without regard to their federal or unitary structure.[86]

Iberoland is internationally responsible for the actions and omissions of the authorities of North Shore with regard to admission to the public university, and for its own actions and omissions in not getting the provincial authorities to adopt the required positive action measures. Iberoland has not done what the various United Nations bodies have required of federal States. It has not established adequate mechanisms between the federal and provincial levels in order to ensure to the greatest extent the full applicability of the human rights treaties.[87] Nor has it adopted measures to guarantee that the authorities of all of the provinces, and especially those of North Shore, know

[84] In addition to Iberoland, Argentina, Brazil, Canada, the United States, Mexico and Venezuela.
[85] IACHR *Report on the General Situation of Human Rights in Brazil*, 1997, p. 14, OAS/Ser.L/V/II.97, Doc. 29 rev.1, September 29, 1997, Original: Portuguese, Chapter 5.
[86] Inter-Am. Ct.H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 140.
[87] Human Rights Committee, Concluding Observations: Germany, CCPR/CO/80/DEU (2004), para. 12.

the rights enshrined in the conventions and are aware of their duty to ensure respect for those rights.[88] In particular, Iberoland has not been able to guarantee that the federal government has sufficient means and resources to ensure that in all of the provinces the provisions of the ratified international human rights instruments are respected in the provincial laws and in practice[89] and to achieve the effective protection of those rights by the state governments.[90]

The Committee on the Rights of the Child has urged the States to ensure that in all transfers of jurisdiction, the authorities to whom jurisdiction is granted actually have the human, financial and other resources necessary to carry out efficiently their functions relating to the application of the respective treaty, to maintain the necessary authority to demand full observance of the treaty by the autonomous governments or local authorities and to establish permanent monitoring mechanisms so that the treaty is respected and applied to all persons subject to its jurisdiction, without discrimination.[91] The achievement of these goals undoubtedly requires dialogue and negotiation between the central government and the components of the federation. Iberoland has attempted to do just that. However, as the Human Rights Committee has said, while political negotiation between the federal government and the provincial or territorial governments to ensure the application of treaties is valuable, it does not free the State Party from its obligation to make certain that the rights recognized in the treaty are respected and guaranteed throughout the country, without any exceptions or limitations.[92]

The Commission might indicate that in the *Assanidze* case the European Court of Human Rights established that the European Convention, unlike its American counterpart, does not contain a federal clause. Even supposing that there could be an implied federal clause similar to Article 28 of the American Convention –a supposition that the European Court rejects—it could not be construed to free the federal state from complete responsibility. This is because Article 28 of the American Convention requires the national government to take the pertinent measures immediately, in accordance with its constitution and its laws, so that the proper authorities of such entities can adopt the appropriate provisions in order to comply with the Convention.[93]

For its part, the State should indicate that the jurisprudence of the European Court is completely irrelevant since, as the European Court itself says, there is no norm similar to Article 28, and the comments that it may make regarding the American Convention are not binding on the Inter-American Court.

The Inter-American Commission has had occasion to refer to the problems that a federal system creates, stating that it:

> (…) must express its concern over the failure of the (…) State to comply with many of the obligations contained in international human rights instruments, on the premise that the individual states which comprise the Federative Republic have jurisdiction and competence over the offenses committed within the borders of each. The so-called "federative principle" whereby the individual States enjoy autonomous status has been used as explanation given in many instances preventing investigation

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[88] Human Rights Committee, Concluding Observations: Switzerland, U.N. DOC. CCPR/CO/73/CH (2001), para. 6.

[89] *Report of the Working Group on Arbitrary Detention on its Visit to Argentina*, United Nations, Distr. GENERAL, E/CN.4/2004/3/Add.3, December 23, 2003.

[90] Human Rights Committee, Concluding Observations: Brazil (1996), CCPR/C/79/Add.66.

[91] Committee on the Rights of the Child, 34th Session (2003), General Comment No. 5, General Measures of Implementation for the Convention on the Rights of the Child (Articles 4 and 42 and para. 6 of Article 44), para. 41.

[92] Human Rights Committee, Concluding Observations: Australia. 24/07/2000, A/55/40, paras. 498-528; 516.

[93] European Court of Human Rights, *Case of Assanidze v. Georgia*, Application No. 71503/01, Judgment of 8 April 2004, para. 141.

> and the determination of those responsible for the violations--frequently serious ones--of human rights, and it has helped to accentuate the impunity accorded to the perpetrators of such violations.[94]

The State can maintain that attention should be paid to the possibility that international bodies for the protection of human rights can affect the federal structure of a State. In one case the IACHR found that a federal State had violated its international obligations by allowing each state in the union, and not the federal government, to decide whether minors who had committed murder deserved the death penalty.[95] In many federal countries, the criminal laws are under the jurisdiction of the local governments and not the central government. Therefore, the division of constitutional jurisdiction between Iberoland and North Shore must be given adequate consideration, especially considering that, according to the Constitution, all matters relating to education are the responsibility of the provinces.

The States are sovereign and free to adopt the form of government and State they deem appropriate, whether federal, unitary or any other.[96] International law does not impose any model for the internal allocation of jurisdictions. The State might maintain that requiring the application of Law 678 in North Shore would be contrary to Iberoland's sovereignty, which is the limit of the actions of the bodies of the system. It cannot be understood that Iberoland ceded its sovereign authority to distribute jurisdictions within its provinces when it ratified the Convention.

The Commission might assert that States cannot use their federal or unitary form of government or State in order to breach or justify non-observance of their international obligations. The classification of an act as illegal in the international sphere is not affected by the legal/juridical classification of the same act as legal under domestic law. Compliance with the provisions of domestic law does not at all exclude the conduct from being classified as internationally illegal. Not even the Constitution of a State may be used to limit the scope of international responsibility. From this perspective, the decision of the Supreme Court of Iberoland holding that the acts and omissions of North Shore are not unconstitutional is insubstantial to the determination that the Inter-American Court must make. The International Court of Justice has said that:

> Compliance with domestic law and compliance with the provisions of a treaty are different issues. What constitutes a treaty violation may be legal under the domestic law, and what is illegal under domestic law may not entail any violation of the provisions of a treaty.[97]

This means that Iberoland in principle will not be able to exempt itself from responsibility by invoking the argument that in the layout of jurisdictions, education matters fall within the sphere of a federative entity, to wit, North Shore. International responsibility is extended even to situations in which the domestic law does not provide the federal State with elements or instruments that enable

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[94] IACHR *Report on the General Situation of Human Rights in Brazil* , 1997, p. 14, OAS/Ser.L/V/II.97, Doc. 29 rev.1, September 29, 1997, Original: Portuguese, Chapter I(A), para. 5.

[95] IACHR, case No. 9647, United States, Resolution Nº3/87, para. 63, Annual Report of the Inter-American Commission on Human Rights 1986-1987 OAS/Ser.L/V/II.71, Doc. 9 rev. 1, September 22, 1987. In another case, the Commission made a finding regarding the rights of the residents of the District of Columbia in the United States who, according to that country's Constitution cannot vote as long as they reside in the capital city and seat of the federal government. The original framers of the U.S. Constitution were afraid that granting them the ability to vote could create imbalances and undue influences in the federal government. The Commission considered such situation to be a violation of the American Declaration on the Rights and Duties of Man. See Report No. 98/03, Case 11.204, Merits, *Statehood Solidarity Committee*, United States, December 29, 2003, para. 100.

[96] Julio A. Barberis, *Los Sujetos del Derecho Internacional Actual*, (1984), pág. 59. Hereinafter, Barberis, *Los sujetos.*

[97] I.C.J., Elettronica Sicula S.P.A. (ELSI), 1989 Reports, p. 51, para. 73. This principle is supported by Article 27 of the Vienna Convention on the Law of Treaties, which states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

it to require the proper institutions of the constituent units to observe the international obligations of the central government.[98]

The Commission and the State must agree that it is essential to analyze whether the conduct of North Shore can be attributed to Iberoland according to international law. Iberoland cannot evade its international responsibility by reason of a simple process of internal subdivision. The State, as a subject of international law, is considered to be the only party responsible for the conduct of all of its entities, services and officials that form part of its organization and act in this capacity. This includes the bodies of all territorial public entities forming part of the State, as well as the central administrative bodies of the State. The Inter-American Court has established expressly that:

> the case law, which has stood unchanged for more than a century, holds that a State cannot plead its federal structure to avoid complying with an international obligation.[99]

The Inter-American Commission has stated repeatedly that when dealing with a State Party constituted as a federal State, the national government of such State is responsible at the international level for the acts committed by agents of the member states of the federation.[100] This complete and encompassing conception of the State means that the central as well as the local authorities are under an international obligation to observe the provisions of the treaties ratified by the federal government.[101] The State must acknowledge this, but as indicated in the section below, it will first point to Article 28 of the Convention, which attempts precisely to limit the scope of the Convention.

5.2 Is Article 28 of the Convention a "different intent of application" according to Article 29 of the Vienna Convention on the Law of Treaties? What is the interpretation of Article 28 based on its preparatory work? Is there an intention to limit the territorial application of the American Convention?

The State can offer several arguments. Iberoland acknowledges that, in principle, the application of international standards, including those of the inter-American conventions invoked by the IACHR, must be carried out throughout the entire country. Nevertheless, Article 29 of the Vienna Convention on the Law of Treaties expressly provides:

> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Therefore, in the State's opinion, it is crucial to determine whether Article 28 of the American Convention has the intention in any way to limit the general scope of the obligations of States with federal systems. The Inter-American Court has said that the elements to be considered when determining the intent to create an exception to the general application of the Convention throughout the entirety of a federal State arise from the letter and spirit of a treaty. The State of Iberoland

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[98] J.G. Starke, *Introduction to International Law*, Tenth Edition, Butterworths, p. 295.

[99] Inter-Am. Ct.H.R., *Garrido and Baigorria Case*, Reparations (art. 63(1) American Convention on Human Rights), Judgment of August 27, 1998, Ser. C No. 39, para. 46.

[100] IACHR Report No. 35/01, Case 11.634, *Jailton Neri Da Fonseca,* Brazil, February 22, 2001, para. 13, Annual Report of the Inter-American Commission on Human Rights, 2000, OAS/Ser./L/V/II.111, doc. 20 rev., April 16, 2001; Report No. 10/0, Case 11.599, *Marcos Aurelio De Oliveira*, Brazil, para. 21, Annual Report of the Inter-American Commission on Human Rights, 1999, OAS/Ser.L/V/II.106, Doc. 3, April 13, 2000; and Report No. 24/98, Case 11.287, *João Canuto De Oliveira*, Brazil, April 7, 1998, para. 42, Annual Report of the Inter-American Commission on Human Rights, 1997, OAS/Ser.L/V/II.98, Doc. 6, February 17, 1998.

[101] I.C.J. LaGrand (*Germany v. United States of America*), Provisional Measures, I.C.J., Reports 1999, p. 16, para. 28.

understands Article 28 of the Convention to represent a clear intent to limit the scope of the Convention in federal States.

To understand fully the meaning of Article 28, its text should be compared to its world counterparts. This comparison demonstrates the clearly limiting purpose of the American Convention with respect to federal States. In effect, the ICESCR and the ICCPR expressly state that they are applicable throughout the entire territory of a federal State without limitations or exceptions of any kind. Indeed, Article 28 of the ICESCR and Article 50 of the ICCPR stipulate in identical terms that:

> The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

In interpreting Article 50, the Human Rights Committee has understood that although the Covenant allows the States Parties to make the treaty rights effective pursuant to domestic constitutional processes, it follows from the same principle that the States Parties cannot invoke the provisions of their constitutional law or any other elements of national law, including those relative to their federal structure, in order to justify non-compliance or a failure to apply the obligations assumed by virtue of the treaty.[102] In accordance with Article 50 and consistent with Article 2 of the Covenant, the central governments of federations must guarantee that the laws and practices of their provinces are in conformity with the treaty provisions.[103] The clarity of the text of the ICCPR in terms of the extent of its application to all constituent parts of federal States contrasts with Article 28 of the Convention, which inversely seeks precisely to limit its application in federations. It cannot be forgotten that the ICCPR served as a model for a great many of the Convention's Articles. When the drafters of the inter-American instrument diverged from their universal counterpart, they did so consciously and seeking to obtain different results. In the case of Article 28, that was to limit the obligations of federal States.

The Commission might argue that Article 28 does not intend for the Convention *not* to apply throughout the entire country. The Inter-American Court has interpreted Article 28 of the Convention to foresee the hypothesis that a federal State, in which jurisdiction over human rights matters belongs to the constituent entities, wishes to join.[104] Neither North Shore nor any of the provinces of Iberoland are exempt from observing the Convention simply because they have not ratified it.[105] Consistent with this, the Human Rights Committee of the United Nations has indicated that the federal system of government assumes the responsibility of the provinces for the observance of many of the rights provided for in the treaty, which might require the adoption of normative provisions and measures taken at the provincial level in order to ensure that those rights are observed.[106] As such, Article 28 must be understood to extend the obligations arising from the American Convention to each constituent unit of the federation.[107] In a specific case relating to elections in a Mexican state, the Commission cited constitutional provisions in order to find that the American Convention is "applicable throughout the entire territory of the United Mexican States [...]

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[102] Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligations Imposed on States Parties, CCPR/C/21/Rev.1/Add.13, May 26, 2004, para. 4.
[103] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2d. Ed., Oxford University Press (2004), p. 14.
[104] Inter-Am. Ct.H.R., *Garrido and Baigorria Case*, Reparations (art. 63.1 American Convention on Human Rights), Judgment of August 27, 1998, Series C No. 39, para. 46.
[105] Bidart Campos, *Tratado Elemental* p. 280.
[106] Human Rights Committee, Concluding Observations: Argentina, 03/11/2000, CCPR/CO/70/ARG.
[107] Colautti, *El Pacto de San José de Costa Rica*, p. 141.

[t]he provisions of the Convention govern throughout the United Mexican States as the Supreme Law of the whole Union", in accordance with Article 133 of the Constitution of Mexico.[108]

The State therefore can assert that the practice of the United Nations bodies or the European Court of Human Rights is not applicable in the inter-American context since it is clearly the purpose of Article 28 of the Convention to limit the scope of the Convention in federal States such as Iberoland.

In the *Assanidze* case, the European Court of Human Rights stated that the European Convention, unlike its American equivalent, does not contain a federal clause. Particularly important is the fact that the European Court has acknowledged in at least one case the "important practical difficulties" of a federal State to implement its obligations at the provincial level.[109]

The first two subsections of the federal clause have in mind only a group of states, those with a federal system, whereas the great majority of the rest of the Convention's articles are addressed without distinction to all of the States Parties.[110] As a result, the federal States cannot be considered to have greater obligations than the rest of the States Parties. To the contrary, there is no way to interpret the Convention other than for it to specify a limitation on the scope of the obligations of the central governments but in no way for it to impose additional obligations upon them.

In addition, the legislative history of Article 28 and the relationship of Article 28 to Articles 1 and 2 of the Convention must be taken into account in order to determine the intent of Article 28. This is examined in the paragraphs below.

The Commission's argument will be to say that Article 28 did not have the purpose of federalizing the matters covered by the Convention, and that it did not seek to alter the internal apportionment of authority. Nevertheless, this does not relieve the States Parties from observing their international obligations. The States can adopt the political systems they deem appropriate, but they cannot fail to comply with the Convention.

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[108] IACHR, Resolution No. 01/90, Cases 9768, 9780 and 9828 (Mexico), May 17,1990, para. 96, in the Annual Report of the Inter-American Commission on Human Rights, 1990-1991, OAS/Ser.L/V/II.79.rev.1, Doc. 12, February 22, 1991. Article 133 of the Mexican Constitution provides:
This Constitution, the laws of the Congress of the Union that emanate there from, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States.

[109] European Court of Human Rights, ***Belilos v. Switzerland***, judgment of 29 April 1988, Series A No. 132, p. 26, para. 59. This case addressed a reservation made by Switzerland and the scope of what was then Article 64, clause 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which required that "Any reservation made under this article shall contain a brief statement of the law concerned." Switzerland argued that that Article did not take into account the specific problems that federal States face and which can be virtually insurmountable since it would require citing all of the regulations of the specific cantons. The Court rejected this line of argument, maintaining that the function of legal certainty provided by the statement of the law was a substantive issue, whose omission could not be justified on the basis of "important practical difficulties."

[110] Walter Carnota, ***Federalismo y Derechos Humanos***, E.D. 127-911. Other Articles that could have this characteristic are 4(2), which addresses only those States that have the death penalty (establishing the requirements for its imposition); clause 5 of Article 5, which refers only to States that allow the criminal prosecution of minors (requiring that they be separated from adults and brought before specialized courts as promptly as possible); Article 6(2), which deals with countries where certain crimes carry a punishment of incarceration together with forced labor; or Article 6, clause 3.b., which states that "in countries in which conscientious objectors [to military service] are recognized, national service that the law may provide for in lieu of military service" [does not constitute forced or compulsory labor].

Iberoland cannot defend its position that the intent of Article 28 is to restrict the scope of application of the Convention by resorting to the preparatory work of the Convention. First, the background and preparatory work are only an alternative means of interpretation which should be used in case of ambiguity or obscurity, or when the literal, teleological or contextual interpretation leads to an unreasonable result, as Article 32 of the Vienna Convention on the Law of Treaties indicates. The preceding considerations make clear the scope of Article 28, and it is therefore unnecessary to resort to the preparatory work. Nevertheless, it is worthwhile to give a careful reading to this background in order to refute the State's position. It shows, in any case, that the principal concern of the delegation that proposed the current Article 28 was to prevent the internal apportionment of authority between the central government and the local governments from being altered, rather than to restrict the general territorial and jurisdictional scope of the Convention. The Commission agrees with this position. The government of the United States, which proposed the current wording of Article 28, advocated for the inclusion of an Article that would emphasize the need for cooperation between the central government and the federative governments, but without changing the assignment of powers within the federative entities. The legislative history demonstrates that the main concern was to avoid the federalization of all matters covered by the American Convention. But not even in the positions of the United States was there the intention to assert that the Convention would govern only in regard to matters over which the central government exercised jurisdiction.

The State's response will be to assert that the purpose of Article 28 is to restrict the territorial application of the Convention. An analysis of the legislative history of Article 28 leads to the understanding that the original drafters sought to restrict the scope of the Convention in federal States, under the terms of Article 29 of the previously cited Vienna Convention on the Law of Treaties.[111]

The original draft of the Convention, prepared by the Inter-American Commission, indicated in Article 29 that:

> Each State Party that is a federation shall take the necessary measures, in accordance with its Constitution and its laws, to enforce the provisions of this Convention in all of the federal States, Provinces or Departments and other territories under its jurisdiction.[112]

The government of the United States claimed that the Article was ambiguous and lent itself to several interpretations. Nevertheless, it agreed that it was necessary to include an Article that emphasized the need for cooperation between the central government and the governments of the constituent entities of the federation, but without altering the allocation of powers inside the federations. It therefore proposed a draft that would make clear that "all national governments are subject to all of the provisions of the Convention with respect to which they exercise jurisdiction."[113] During the detailed discussions on this Article, the United States delegation again strongly opposed the adoption of any provision that "totally changes the structure of the current form of government"

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[111] The Inter-American Court has used the preparatory work in order to interpret different provisions of the Convention. See, e.g., Inter-Am. Ct.H.R., *Other Treaties Subject to the Advisory Function of the Court (art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82 of September 24, 1982, Series A No. 1, para. 17 (to confirm the scope of the advisory jurisdiction of the Court); or *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82 of September 24, 1982, Series A No. 2, para. 23 (to confirm the interpretation of the system of reservations to the Convention).

[112] Inter-American Specialized Conference on Human Rights, Minutes and Documents, OAS/Ser.K/XVI/1.2, p. 24 (hereinafter Specialized Conference); See also United States Department of State, U.S. Position Paper for the Inter-American Human Rights Conference, San José, Costa Rica, November 7-22, 1969, prepared by Walter J. Landry, section 29.a.

[113] Specialized Conference, p. 67.

and making the federal government legislate matters that do not fall within its domain but rather within that of the States of the Union.[114]

In order to satisfy these concerns, the Specialized Conference decided to include the current Article 28, drafted based on a proposal of the United States government. The United States government delegation understood that the phrasing of Article 28 was fundamentally different from that of Article 50 of the ICCPR. The main distinction would be that the Covenant, unlike the Convention, required the federal government to exercise authority over matters that could be reserved to the state entities. In contrast, the Convention would only require it to take the necessary measures so that the entities of the federation observe the Convention. According to the U.S. delegation these measures could consist, for example, of recommendations. In any case, the manner in which this would be accomplished would be an internal decision and not an international obligation.[115] Iberoland agrees with and adopts this interpretation as its own.

5.3 What is the relationship between the general obligations of Articles 1 and 2 of the Convention in relation to the obligations of Article 28?

The Commission will insist upon an analysis of the obligations arising from the American Convention in federal States based on an overall, integral reading of the entire text of the Convention and not of the federal clause in isolation. In particular, Articles 1 and 2 of the Convention should be considered. Article 1, clause 1 states that:

> 1. 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 2 states:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

A harmonious and integral reading of these provisions supports the notion that the American Convention establishes that it is the fundamental duty of the States Parties, that is, States with federal, unitary or any other system, to respect and guarantee the full exercise of the human rights recognized (Article 1.1). It additionally places upon States Parties with federal systems the obligation to adopt the domestic law provisions that are pertinent and necessary to fulfill such duties (Articles 2 and 28.2). The two general obligations enshrined in the American Convention – to respect and ensure the protected rights (Article 1.1) and to adapt domestic law to international standards (Article 2) - are indivisibly intertwined and not conditioned on Article 28.[116] The federal clause defines the scope of the general obligations but does not limit them.

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[114] Specialized Conference, p. 275.

[115] See Buergenthal, *Inter-American System*, p. 37.

[116] The proposal to extend the scope of the general obligations of the first two Articles beyond the rights recognized in Chapter II relative to Civil and Political Rights has also been put forward in other contexts. Melish has proposed a comprehensive reading of the obligations to respect and guarantee rights and to adjust domestic law accordingly with relation to Article 26 of the Convention relative to economic, social and cultural rights. Contrary to the traditional positions, she maintains that these general obligations of Articles 1 and 2 apply to all of the rights, including the economic, social and cultural ones. See Tara Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims*, p. 155 et seq. Obviously there are differences between extending the scope of the first two Convention Articles to social, economic and cultural rights and extending it

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An interpretation of Article 28 in isolation from the rest of the Convention and the general principles of law "would relieve the central government of its obligations under the Convention and could leave people without international protection."[117] Following the rules of interpretation established in Article 31 of the Vienna Convention on the Law of Treaties, and especially Article 29(a) of the American Convention, it cannot be concluded that Article 28 limits the duties of the federal State. As Article 29(a) states:

> No provision of this Convention shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.[118]

The duties to respect and ensure arising from Article 1 are determinative when defining the scope of the obligations of a federal State, and Article 28 of the Convention complements these general obligations. The IACHR thus indicated that

> Article 1(1) of the Convention clearly establishes the obligation of the State to respect the rights and freedoms recognized by the Convention as well as to ensure the free and full exercise of such rights so that any violation of the rights recognized under the Convention that may be attributable, in accordance with the standards of international law, to an action or omission by any public authority is the responsibility of the State. Pursuant to Article 28 of the Convention, in the case of a federative State […] the national government answers internationally for the acts committed by the federation's constituent units.[119]

It follows from Article 1 of the Convention that the State has two basic obligations: to respect and ensure the recognized rights for *all persons subject to its jurisdiction*. Under the terms of international law, it is clear that persons in federal States are subject to their jurisdiction regardless of whether they are located in or reside in provincial or federative areas. Therefore, this duty to respect and guarantee rights extends to all persons subject to the State's jurisdiction.

The Convention system is meant to recognize the rights and freedoms of persons, not to authorize the States to do so.[120] Therefore, if for any circumstance, including the federal structure of the State, this right cannot be exercised by "all persons" subject to the jurisdiction of a State, it would be a violation of the Convention subject to complaint before the protective bodies provided for therein.[121] Article 1 of the Convention does not distinguish between persons subject to the jurisdiction of federal States and those subject to the jurisdiction of unitary States. It contains a general standard that extends to all of the provisions of the treaty, establishing the obligation of the States Parties to respect and guarantee the full and free exercise of the rights and freedoms recognized therein without any type of discrimination.[122] As such, the general obligation to respect and guarantee rights without discrimination also extends to Article 28.

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to the federal clause. Article 26 is titled Progressive Development and is the only Article in Chapter III of the Convention, titled Economic, Social and Cultural Rights. Because of this it can be argued that insofar as rights are concerned, the extent of the general obligations does not change in substance. In contrast, the federal clause appears under Chapter IV, titled Suspension of Guarantees, Interpretation and Application.

[117] IACHR Report Nº 8/91, Case 10.180, Mexico, February 22, 1991, para. 41.

[118] Idem.

[119] IACHR, Report Nº 34/00, Case 11.291, *Carandirú*, Brazil, April 13, 2000, para. 36.

[120] See American Convention, Preamble, and mutatis mutandi, Inter-Am. Ct.H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC2-82 of September 24, 1982, para. 33.

[121] See mutatis mutandi, Inter-Am. Ct.H.R., *Enforceability of the Right to Reply or Correction*, Advisory Opinion OC- 7/86 of August 29, 1986, para. 24.

[122] Inter-Am. Ct.H.R., *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica,* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 53.

> imposes an affirmative duty on the States. It is also important to know that the obligation to *ensure* requires the state to take all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees.[123]

The federal structure of Iberoland was one such obstacle to the effective enjoyment of rights. As such, the central government had the duty to draw up and adopt all of the measures necessary to prevent the federal structure from impeding such enjoyment or making it difficult. It failed to do so and is therefore internationally responsible. This does not mean eliminating federalism, but rather placing the central government and the local governments in a position to ensure the effective enjoyment of rights.

Article 2 of the Convention complements and specifies the Article 1 provision. It requires that the necessary laws be adopted in order to give effect to the Convention's norms of protection, filling any gaps or deficiencies in domestic law, including those arising from the federal structure, in order to harmonize them with Convention standards. To this effect, Article 2

> codifies a basic rule of international law that a State Party to a treaty has a legal duty to take whatever legislative or other steps as may be necessary to enable it to comply with its treaty obligations.[124]

The reference to constitutional processes in Articles 2 and 28 means only that the States can choose the manner in which the adaptation of the law and practices of the constituent units of the federation to the requirements of the Convention will be accomplished. In no way does it mean that the State can avoid such obligations by invoking its constitutional law. Iberoland cannot use the argument that pursuant to its Constitution matters involving the right to education fall within the jurisdiction of the provinces. Clause 2 of Article 28 in this sense is none other than the specification of the general obligation to adopt measures in accordance with the provisions of the Convention. In the case of federal States, clause 2 of Article 28 requires that these measures be adopted immediately. Article 28 contains an obligation that means to make respect for Convention rights more certain and definitive within federations. The obligation arising from Articles 2 and 28.2 to adopt measures necessary for the enforcement of Convention rights in the constituent entities of the federation complements, but in no way substitutes or supplants, the general and unconditional obligation under the first Article of the Convention to respect and guarantee those rights.[125] Article 2 itself indicates that the State must adopt measures consistent with the provisions of the Convention; in the case of federal States specifically, these are contemplated in Article 28.

The Commission has accepted this interpretation, holding that "[t]hese obligations, contained in the first two articles of the American Convention, are those that obligate the Government […] to 'immediately take suitable measures... in accordance with its constitution and its laws, to the end that the competent authorities of the (constituent entities of the Federation) may adopt appropriate provisions for the fulfillment of this Convention', in the words of Article 28.2."[126]

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[123] Inter-Am. Ct.H.R., *Exceptions to the Exhaustion of Domestic Remedies*, Advisory Opinion OC 11/90 of August 10, 1990, para. 34.
[124] Inter-Am. Ct.H.R., *Enforceability of the Right to Reply or Correction*, Advisory Opinion OC- 7/86 of August 29, 1986, para. 30.
[125] Walter Carnota, *Federalismo y Derechos Humanos*, E.D. 127-911 (Article 28 has the objective of rendering the principle enshrined in Article 2 of the Convention operative at the local level, reason for which it is instrumental in adapting the text of the Convention to the hypothesis of a federal State).
[126] IACHR Report No. 8/91, Case 10.180, Mexico, February 22, 1991, para. 40.

Along these lines, the Court on different occasions has ordered the adoption of legislative, administrative or other measures as necessary to make the rights recognized in the Convention effective.[127]

The federal clause serves to delineate responsibilities for the constituent entities of the federal State, but by no means does it create a vacuum of international responsibility.[128] Subheading 2 of Article 28 complements the previous clause in order to obligate the federal government to act pursuant to its constitution and its laws to prompt the local governments to adopt the measures that will enable them to comply with the Convention.[129] If it fails to do so, the State violates the Convention by omitting to dictate the norms that Article 2 requires it to.[130]

The obligations of the federal government may differ from case to case, but in no way do they eliminate the obligations established in Articles 1 and 2 of the Convention in conjunction with Article 28. In order to decide precisely, the bodies of the system should analyze whether the federal government, in addition to its obligations to respect and guarantee rights, was itself obligated to observe "all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction" (Article 28.1), or if, on the contrary, it had to "immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention" (Article 28.2). The determining factor in any case will be whether the right or rights in question were respected and guaranteed as required by Article 1 of the Convention and whether the State adopted the provisions of national law (federal or state) to make effective the rights and freedoms recognized in the Convention.

The general counter-argument of the State will be to assert that Article 2 and 28(2) lead back to domestic constitutional law in examining the responsibility of the State. Iberoland does not deny the basic principle of international law that invoking the national legal system is not a permissible defense. However, this principle has a basic limit, which is when the treaty itself refers to national law, as Articles 2 and 28(2) of the American Convention do. In this sense, it is clear that Iberoland delegated all matters concerning education to its provinces. Therefore, the degree of Convention obligation attributable to the federal State is limited. It cannot go further than to recommend that the provinces adopt measures. And it cannot incur international responsibility if the provinces fail to follow such recommendations. In any case, Iberoland has undertaken many more actions than simply to recommend that the provincial authorities of North Shore adopt affirmative measures.

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[127] See *inter alia* Inter-Am. Ct.H.R., *Case of the "Street Children" (Villagrán Morales et al.),* Reparations (art. 63.1 American Convention on Human Rights), Judgment of May 26, 2001, Series C No. 77, para. 98 (ordering the adoption of necessary measures to bring the Guatemalan legal system into compliance with the Convention Article); *Trujillo Oroza,* Reparations (art. 63.1 American Convention on Human Rights), Judgment of February 27, 2002, Series C No. 92, para. 98 (ordering that forced disappearance be defined in the law as a crime); *Bámaca Velásquez*, Reparations (art. 63.1 American Convention on Human Rights), Judgment of February 22, 2002, Series C No. 91, para. 85 (ordering the adoption of national measures for the application of international human rights law and the protection of the rights to life, liberty and personal safety, as well as judicial guarantees and protection); and the *Mayagna (Sumo) Awas Tingni Community Case,* Judgment of August 31, 2001, Series C No. 79, paras. 137, 138 and 151 (ordering the adoption of necessary measures to create an effective mechanism to delimit, mark the boundaries of, and grant title to the indigenous community property in question).

[128] Mónica Pinto, *Temas de Derechos Humanos* (Editores del Puerto), p. 74.

[129] Ídem.

[130] See mutatis mutandi, Inter-Am. Ct.H.R., Advisory Opinion OC 13/93, *Certain Attributes of the Inter-American Commission on Human Rights*, July 16, 1993, para. 26.

As stated previously, the human rights treaties adopted in the United Nations context are diametrically opposed to their inter-American equivalent. Therefore, any reference the Commission makes to the practices of the world bodies is irrelevant.

In any case, what the United Nations bodies require is that there be coordination and cooperation among the different authorities and organizations in the federal states for the effective application of treaty provisions in the respective constituent entities of the federation.[131] This is what Iberoland has done through the various actions that it taken to achieve coordination and cooperation with the authorities of North Shore. This is an obligation of means and not of ends, which must be pursued reasonably and in accordance with the standard of due diligence. In this respect, Iberoland acted reasonably and diligently through political processes and dialogues at the highest level, the adoption of specific legislation, economic incentives and the provision of training materials for local authorities. That is what the Convention requires, and the federal government met its federal obligations. To demand more of Iberoland would be to impose universal treaty obligations upon it, which are not under discussion or analysis in this case.

The legislative history and the very text of the Convention demonstrate that the purpose of Article 28 is to restrict the application of the Convention and make it more difficult depending on the constitutional organization of the States Parties.[132] Article 28 seeks notably to limit the obligations assumed by federal States within the framework of the Convention[133] by creating inequality among the States Parties to the Convention[134] for purposes of limiting its scope in federal States such as Iberoland. Therefore, the government of Iberoland maintains that it has not violated said Article.

Finally, the State can assert that the Commission is attempting to establish the direct responsibility of North Shore because it has not been able to demonstrate that the central government of Iberoland has failed to act diligently and reasonably, as required by Article 28. This position of the Commission is contrary to international law because the provinces lack international legal standing and therefore are not technically parties to the treaty.[135] As such, international responsibility cannot be attributed to North Shore for its alleged failure to observe a treaty that it had no part in entering into. Iberoland could be held responsible internationally if its failure to comply with its Convention duties had been demonstrated, but that has not occurred in this case.

5.4 Was Juana Olin discriminated against by the uneven application of Law 768, that is, by the failure to apply that law in North Shore given its application in the rest of the provinces?

It is important to highlight that this legal problem would be different if Juana Olin had requested the application of affirmative action in her specific case. This is not a discussion regarding the condition of ethnic minorities relative to the general population; it looks at the residents of some provinces as compared to those of other provinces.

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[131] Committee on Economic, Social and Cultural Rights, Conclusions and Recommendations: Australia, U.N. Doc. E/C.12/1993/9 (1993), para. 13.

[132] Cecilia Medina, *The Battle of Human Rights. Gross, Systematic Violations and The Inter-American System*, Martinus Nijhoff Publishers, p. 100.

[133] Héctor Faundez Ledesma, *El Sistema Interamericano de Protección de los Derechos Humanos, Aspectos Institucionales y Procesales*, 3d Ed., (2004), p. 60.

[134] Julio A. Barberis, "Consideraciones sobre la Convención Americana sobre Derechos Humanos como Tratado Internacional," in *Liber Amicorum en Homenaje al Juez Héctor Fix-Zamudio*, p. 249. Hereinafter, Barberis, *Consideraciones*.

[135] Barberis, *Consideraciones*, p. 249.

The Commission can indicate that there is indeed an obligation that the law be applied equally, regardless of place of residence. In previous segments the criteria for discrimination were female gender and race. The Commission will stress that in Iberoland, the Convention is not applied equally to all persons under the jurisdiction of the State, which could give rise to a situation of discrimination. Some persons under its jurisdiction enjoy certain rights, while others located in North Shore, including Juana Olin, do not. Various United Nations bodies have pointed critically to the disparities existing within states with federal systems with respect to the force and effect of different recognized rights. They have taken note of the differences in the laws on education within the federal system of the State in question,[136] have expressed concern because many of the due process guarantees are not included in the codes of criminal procedure of some federative entities, and have noted that a unified code of criminal procedure has still not been approved.[137] The Committee on the Rights of the Child has insisted upon the importance of safeguards so that the transfer or decentralization of authority does not lead to discrimination in the enjoyment of the rights of children in different regions.[138] In the case of Argentina specifically, it remarked that the federal system of government gives the provinces authority in critical sectors such as the administration of justice, with the consequence that the treaty is not applied uniformly across the different regions of the State's territory.[139]

The Commission can claim that Iberoland discriminated against the applicants in North Shore by allowing the use of a university admissions system in that province that was different from that of the rest of the universities. The Commission has established that the diversity of practices among the States of a Union on a specific matter results in the application of totally different criteria to the same act. This produces "a mosaic of laws" that render the consequences of [a criminal] act dependent not upon the nature of the crime, but on the place where it occurred. Assigning this situation to the state laws produces "a collection of arbitrary legislation" contrary to the principle of equality before the law.[140]

The state can counter-argue that no discrimination can be found to have occurred because of the fact that a different university admissions system is applied in North Shore than in other provincial universities. The majority of international precedent has failed to find that the diversity of laws or practices within a federal State amounts to discrimination *per se.* In particular, this argument has been used in various cases before the United Nations Human Rights Committee, which to date has not accepted it. Thus it has held that

> The fact that a State Party that is a federal union permits differences among the federal units […] does not in itself constitute a violation of [the principle of equality and nondiscrimination].[141]

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[136] Committee on Economic, Social and Cultural Rights, Conclusions and Recommendations: Australia, U.N. Doc. E/C.12/1993/9 (1993), para. 6.

[137] Human Rights Committee, Concluding Observations: Switzerland, U.N. Doc. CCPR/CO/73/CH (2001), para. 12.

[138] Committee on the Rights of the Child, 34th Session (2003), General Comment No. 5, *General Measures of Implementation for the Convention on the Rights of the Child (Articles 4 and 42 and para. 6 of Article 44)*, para. 41.

[139] Human Rights Committee, Concluding Observations: Argentina. 03/11/2000. CCPR/CO/70/ARG., para. 8.

[140] IACHR case Nº 9647, United States, Resolution Nº3/87, September 22, 1987, paras. 62 and 63.

[141] *Sergei Anatolievich Cheban et al v. The Russian Federation*, Communication No. 790/1997, U.N. Doc. CCPR/C/72/D/790/1997 (2001), para. 7.4; See also the *Hesse* case, which alleged discrimination on the basis of different statute of limitations periods in different Australian provinces. The Committee declared the petition inadmissible for lack of foundation on this point. *Peter Hesse v. Australia*, Communication No. 1087/2002, U.N. Doc. CCPR/C/75/D/1087/2002 (2002), para. 4.2. In the case of *Lindgren v. Sweden*, which alleged discrimination because different municipalities had different systems for providing subsidies to private schools, the Committee also failed to find a violation. *Lindgren et al. v. Sweden,* Communication No. 298/1988, U.N. Doc. CCPR/C/40/D/298/1988 (1990), para. 10.4. In the case of *Arieh Hollis Waldman,* the complainants alleged a difference in treatment among residents of different Canadian provinces in relation to religious education without the Human Rights Committee making a finding on the matter; See *Arieh Hollis Waldman v.*

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Canada, Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (1999), para. 3.1. On the same point, see European Court of Human Rights, *Dudgeon v. The United Kingdom*, October 22, 1981, Dissenting Opinion of Judge Matscher, finding that diversity of national laws is characteristic of a federal State, that it can never constitute discrimination, and that there is no need to justify diversity in this respect; a claim to the contrary would be to disregard completely the very essence of federalism.