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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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 Fi ve the Court used national law to decide whether the right to a is pension could be considered an acquired right.[3] In the Aw a , 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 “commTiuropean Sygood7(c44)]TJ 0 Tc 43 I

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 (

> 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.

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

analytical elements that are very demanding. The aim of the measure must be legitimate and important, but in addition it must be [illegible] and effectively conducive but also [illegible]. That is, it cannot be replaced by [illegible]. In addition, the principle of proportionality requires that the benefits of adopting [illegible] 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

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

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;
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> (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;
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> (d) The same opportunities to benefit from scholarships and other study grants;
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> (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 DSav 0 Tc 0 Tw ( )Tj EMC 4 Tc -0.002 Tw4-4.23 TwTd [(s)-2auhe ght esp-0.002 Tc 0.003 Tw 10.94.62T

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 P [illegible]

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

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 all

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

> 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.
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> 3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:
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> a. Primary education should be compulsory and accessible to all without cost;
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> 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;
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> 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;
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> 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.
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> 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.

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[45] Víctor Abramovich and Christian Courtis, Los de re, 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

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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 R of t ove he), General n C 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 [a c . Seco de t ut

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” [proye c 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

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

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:

> 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 u1(st)7(em)3Tw 0.308

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.0F(of)-42.49 Tw 2.044 ofnen are o are

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 protd.uver t

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 fail

Article 28. Federal Clause

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

the rights enshrined in the conventions and are aware of their duty to ensure respect for those rights.[88] In

> 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,

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.
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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 i(e)14(w)1992 T8133 TD n242 0 Td o t

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 [illegible]

Article 1 of the Convention

> imposes an affirmative duty on the States. It is also important to know that the obligation to e n 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] T A

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

As statd [prdviously , the human rights trdaties adoptd [in the Unitd [Nations contdxt ard diametrically opposd [to their[intdr -American equivalent.[Therdford, any rdferdnce the Commission makds to the[practicds of the world bodids is irrdlevant.[

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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]

…Continuation.
Ca n a da, Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (1999), para. 3.1.
European Court of Human Rights, Dudge on, October 22, 1981, Dissenting Opinion of Judge Un
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.