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Decided by:	Chairman: Ambassador John Donaldson; First Vice Chairman: Dr. Carlos Manuel Ayala Corao; Second Vice Chairman: Professor Robert Kogod Goldman; Members: Ambassador Alvaro Tirado Mejia, Dean Claudio Grossman. Commissioner Oscar Lujan Fappiano, an Argetina national, did not participate in the consideration and vote on this report, pursuant to Article 19(2)(a) of the Commission's Regulations.
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I. BACKGROUND

1. On August 31, 1987, Mr. Gustavo Carranza filed a petition with the Inter-American Commission on Human Rights (hereinafter "the Commission") against the Republic of Argentina (hereinafter "the State"), alleging that the refusal of the Supreme Court of that country to hear his appeal against a decision of the Superior Court of Justice of the Province of Chubut (hereinafter "the Superior Court of Chubut"), constituted a violation of the following provisions of the American Convention on Human Rights (hereinafter "the American Convention"): the right to a fair trial (Article 8), right to privacy (Article 11), the right to have access to public service (Article 23(1)(c)), and the right to judicial protection (Article 25).

2. The petitioner had instituted suit in the provincial courts seeking the nullification of a decree issued by the previous military government that had ordered his removal in 1976 as a lower court judge of the Province of Chubut, as well as the recovery of material and moral damages resulting therefrom.

3. His case was declared "non-justiciable" by the Superior Court of Chubut on July 1, 1986, invoking jurisprudence of the Supreme Court of Argentina in a similar case (*Sansó, Gerónimo v. National Government*, July 3, 1984) which held that the courts were not competent to rule on the fairness, wisdom or efficacy of the measures ordering the removal of magistrates, the claim underlying this litigation, as these were eminently political acts of a de facto government.

4. He appealed that decision to the Supreme Court of Argentina, which dismissed his appeal on February 24, 1987, on the ground that the petitioner had not presented any new arguments meriting review of the criteria set forth by the Superior Court of Chubut regarding the lack of competence of the Judiciary to adjudicate matters of such a nature.

5. The petitioner alleged that the Argentine Supreme Court's decision denied him access to the courts, thereby violating the guarantee contained in Article 25 of the American Convention. He therefore requested that the case be submitted to the Inter-American Court of Human Rights, so that he be compensated for the consequences of the measure or situation that violated those rights.

II. PROCEEDINGS BEFORE THE COMMISSION

6. On July 6, 1988, the State sent its reply concerning this case, requesting that the petition be declared inadmissible. The reply noted that the Argentine State's ratification of the American Convention on August 14, 1984, was subsequent to the dismissal of the judge, the act that prompted this complaint. Therefore, the allegation concerns actions that occurred before the American Convention entered into force for Argentina.

7. The reply also pointed to the fact that both international doctrine and jurisprudence were unanimous on the principle of the nonretroactivity of the treaties, citing the Vienna Convention on the Law of Treaties in this regard.[FN2]

[FN2] Article 28 of the Vienna Convention states:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind the party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to the party.

8. The State concluded that the petitioner could not seek damages for his removal on June 17, 1976, since by that time he was no longer a constitutional judge but a "de facto judge" and that under the present democratic system, such conduct would be unlawful, although at the time it was not.

9. On July 14, 1988, the State's reply was forwarded to the petitioner. He presented his observations on August 29, 1988. The petitioner stated that the Argentine domestic courts have violated the right that the American Convention accords to all individuals, which is the right to a hearing by a Court for the determination of his rights and obligations of a civil, labor, fiscal or any other nature (Article 8).

10. He further said that there was never any decision by the courts on the merits of the issue raised precisely because it was declared non-justiciable; the rulings being challenged were rendered subsequent to Argentina's ratification of the American Convention.

11. When the Superior Court of Chubut formally admitted the case, it determined how it would be handled and referred the case to the provincial State. The attorney for the province appeared in court, but did not contest the case, since he did not dispute the facts as alleged. However, the petitioner considers that the Judiciary denied him the right to a court decision on the merits of the case when it declared the matter "non--justiciable."

12. According to the petitioner, "political questions" were never uncontested matters in the jurisprudence of the Argentine Supreme Court. Political functions reserved exclusively for political departments of the State cannot be challenged in the courts so long as no conflict is created between the law or deed and the Constitution by virtue of the exercise of those political functions. However, when a law or action of the executive is contrary to those provisions, rights and guarantees that the Constitution upholds, there will always be a legal case which the aggrieved party may choose to take to the courts.

13. The petitioner pointed out that the exclusive authority of the political branches of government are not outside the purview of the courts; when the transgressions that those political branches commit adversely affect matters submitted to the jurisdiction of the court, the case must be examined and a decision rendered. Those State powers may not invoke exclusive privilege.

14. On September 26, 1988, the petitioner's observations were forwarded to the State, which replied on November 11, 1988. The State restated the same arguments asserting the inapplicability of the American Convention *ratione temporis*, since the facts that precipitated the petition occurred before the Convention's entry into force.

15. As for the petitioner's allegation that he did not obtain a judicial decision on his claim, the State pointed out that the petitioner's removal from the bench was carried out in accordance with the generalized legal system in force.

16. The State also noted that the rulings of the Superior Court of Chubut and of the Argentine Supreme Court addressed the nature of that act and declared it to be eminently political in nature. Consequently, there was a court decision, and Article 25 of the American Convention was not disregarded. There was due process of law, in accordance with the law.

17. On December 29, 1988, the petitioner forwarded his observations to the State's most recent reply. He said that the State was confusing the facts that gave rise to the complaint with the denial of due process. The facts of the case are very different from the denial of due process that would have enabled the petitioner to assert his rights *vis-à-vis* the facts that led to the case. He clarified that the denial was not a refusal to institute an action, because there was such an action; the denial of due process was the decision of the Argentine Court declaring his case non-justiciable as a political question, thereby denying him a decision on the merits of his claims.

18. The result, he insisted, was to deny him the due process to which he is entitled under domestic law and the American Convention. The violation of this right occurred on February 24, 1987, with the Supreme Court's ruling that dismissed his complaint on the grounds of non-justiciability, which was rendered subsequent to Argentina's ratification of the American Convention.

19. He also said that the ruling handed down by the Supreme Court did not provide the required "adequate" remedy to which the Inter-American Court of Human Rights has referred to when interpreting the State's obligation to ensure the exercise of human rights (Article 1(1) of the American Convention), which "requires the State to conduct itself so as to effectively ensure the free and full exercise of human rights".[FN3]

[FN3] Inter-American Court of Human Rights, Velásquez Rodríguez Case, para. 167.

20. The petitioner stated that "a proceeding was conducted, but it was useless and did not address the merits of the case, because the ruling declared that the question before the Court was non-justiciable". If it is not justiciable, then there is no remedy, understood as due process of law to vindicate the right infringed.

21. The petitioner pointed out that illegal and anti-judicial nature of his dismissal, as well as other grounds for his lawsuit, were debated sufficiently during the course of the proceedings before the courts of Chubut. What prompted the petition filed with the Commission was the fact that the debate never produced any result. The ruling that ought to have established the rights of the litigant based on issues debated in the *litis* never came out, and failed to be the kind of "useful" exercise that ensures protection of rights.

22. Finally, the petitioner cited Article 27 of the Vienna Convention on the Law of Treaties, which provides that a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty or to contend that it is not bound by a treaty.

23. The Commission received further notes from the petitioner on 28 September 1989 and 6 November 1991. On October 21, 1993, the Commission placed itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter. The petitioner accepted on December 16, 1993, but the State rejected it by its letter of August 25, 1994.

24. Both parties restated their respective positions; the State on January 3, 1995, and the petitioner on March 3 and October 12, 1995. The issue has been fully debated and the arguments of both parties have been clarified. Consequently, the Commission is called upon to issue a report under Article 50 of the American Convention.

III. ADMISSIBILITY

25. The alleged violations of Articles 11 and 23(1)(c), invoked in the original petition, are manifestly inadmissible since the petitioner has not complied with the requisites of Article 46(1) of the American Convention. The case file reveals that he did not seek internal legal redress of these claimed violations.

26. Regarding the alleged violation of Articles 8 and 25, the petition satisfies the formal requirements for admissibility provided for in Article 46(1) paragraphs (a) through (d) of the

American Convention and in Article 32 of the Commission's Regulations. The decision of the Argentine Supreme Court declared his appeal inadmissible and upheld the ruling handed down by the Superior Court of Chubut. Therefore, the petitioner has pursued and exhausted remedies under domestic law.

27. As for the State's contention that the petition is inadmissible *ratione temporis*, the following must be clarified:

- a) the removal of the magistrate occurred before the American Convention entered into force for the Argentine State;
- b) the petitioner filed suit in the Courts of Argentina also before the American Convention entered into force for that country; and
- c) the final Supreme Court ruling that denied his petition was handed down subsequent to Argentina's ratification of the American Convention.

28. The practice of the Commission in this respect was clearly established in the case of the amnesty laws in Argentina, which resulted in Report 28/92. The following considerations in that report are relevant to this case:

The violation at issue in the instant case is the denial of the right to judicial protection and of the right to a fair trial, since the laws and Decrees in question paralyzed the judicial inquiry. Therefore, the disputed measures were adopted at a time when the Convention was already in force for the Argentine State.

The articles of the Convention that the petitioners invoke relate to events that took place after Argentina became a State Party to the Convention. Therefore, the petition is admissible *ratione temporis* (emphasis supplied).[FN4]

[FN4] Annual Report of the IACHR 1992-1993, pars. 16 and 19, respectively, pp. 44-45.

29. Also worthy of note is the decision in case 9850 against Argentina. A citizen of that country denounced his unlawful imprisonment since November 1975, when he was arrested on charges of having committed politically motivated offenses. His conviction was issued in a trial without any legal safeguards by judges sworn to uphold the decrees issued by the military dictatorship. The Commission concluded, in that case, among other things, that:

...the Commission does not concur in the possible implication of the argument for inadmissibility *ratione temporis* that the member States of the Organization contract obligations to respect human rights only as from the date of their ratification of the Convention. This premise would appear to suggest that prior to such ratification the member States had no international obligation whatever in respect of human rights and, concretely, that this Commission has no competence to receive complaints other than those in the text of the Convention.[FN5]

[FN5] Resolution 22/88, case 9850 (Argentina) 23 March 1988. Inter-American Yearbook on Human Rights 1990, p. 174, par. 5.

30. Mr. Carranza's petition was filed with the Commission on August 31, 1987, within the statutory six months of the date on which the petitioner was notified of the Supreme Court decision (April 2, 1987) which upheld the Superior Court of Chubut's decision and made it final and not subject to appeal; the subject of the petition is not pending in another international proceeding, and the petition contained the petitioner's personal data and signature.

IV. ANALYSIS

31. The petitioner began litigation in the domestic courts on June 19, 1984--before the American Convention entered into force for Argentina--and sought redress of his rights that were violated when he was removed from the bench under Decree No. 656 of June 17, 1976. Consideration of the case continued, and the final decision was reached after ratification of the American Convention by that State.

32. The fact of his removal was not contested in the proceeding that the petitioner instituted in the domestic courts, nor was it denied by the State in its observations to this Commission.

33. The Argentine Supreme Court's jurisprudence (*Sansó v. National Government*), invoked in the July 1, 1986 decision of the Superior Court of Chubut that declared his case non-justiciable, took into consideration such factors as juridical stability and republican institutions' smooth transition to routine operations. The *Sansó* decision emphasizes that

the very appointment of the members of this Court (the Supreme Court of Justice) by the Executive Power, with the consent of the Senate, implies ratification of the removal of judges serving on the bench on March 24, 1976.

34. The Superior Court of Chubut also cited another Supreme Court ruling (*Delves, Eduardo Raúl v. Buenos Aires Province and National State, damages and injuries August 29, 1985*) which reached the following conclusion:

...the Judiciary is not competent to settle matters such as the one that has arisen here, since it implies a judgment of the validity of the legal provisions whereby the subject was ordered removed from his position as judge.

35. The Superior Court of Chubut also stated that:

...plaintiff's petition that Decree No. 656/76 which ordered his dismissal as a judge be vacated and his petition that he be granted the salary he has not received since the time of the dismissal ordered by that decree, plus physical and moral damages and currency revaluation, are non-justiciable.

36. Therefore, the Superior Court of Chubut concluded that by declaring the underlying merits of the case non-justiciable, there was an inherent defect in its competence to render a decision as this case did not properly pertain to the Judiciary.

37. The 1853 Constitution of Argentina, which was in effect at the time the military seized power on March 24, 1976, states that "Judges of the Supreme Court and of the lower courts of the Nation shall retain their seats so long as they observe proper conduct."

38. As for the dismissal of the judges, articles 45, 51 and 52 of the Constitution regarding impeachment stipulate that federal judges may only be removed by a procedure wherein the Chamber of Deputies approves the articles of impeachment, and the Senate conducts the trial; in both cases, a vote of two thirds of the members present in the chamber is required. There are three grounds for impeachment: misconduct, criminal conduct in the exercise of one's functions and common crimes. The rules established by the Constitution of Chubut, which should have been applied to the petitioner, follow the same principles.

39. In the case in question, the procedure stipulated in the Constitution of Chubut to dismiss judges was violated. The de facto government installed in the Argentine Republic on March 24, 1976, not only deposed the constitutional authorities but also took upon itself the functions of a "constitutional power" by partially repealing the Constitution "insofar as it was contrary to the norms sanctioned by the Military Junta."

40. In that context, Law 21,258 was enacted, which declared judges to be "on probation" and authorized the new members of the national and provincial executive powers to confirm them or not, at their discretion, provided said judges "swore allegiance to the basic objectives established by the Military Junta through the "Bylaws for the National Reorganization Process".

41. The Argentine constitutional system --like that of other democracies--upholds the principle of the irremovability of judges. This system creates stability on the bench; if a judge is to be removed, then such removal must be done in strict accordance with the procedure established in the Constitution, as a safeguard of the democratic system of government and the rule of law.[FN6] The principle is based on the very special nature of the function of the courts and to guarantee the independence of the Judiciary vis--à-vis the other branches of government and political-electoral changes.[FN7]

[FN6] The Inter-American Court has established the following:

The concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning.

Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of January 30, 1987, "Habeas corpus in emergency situations" (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights, para. 26, p. 41.

[FN7] In Report No. 28/94 (Panama), regarding the case of the Judges of Chiriquí, the IACHR held that:

...the importance of these acts (the removal of the judges) is augmented by the need for all states to maintain an independent judiciary that is able to provide guarantees ensuring the enjoyment of the rights established in the Convention.

Annual Report of the Inter-American Commission on Human Rights 1994, para. 30, p. 66.

42. Democratic systems recognize the so-called "delegated powers" of the branches of government that is a product of their classic three-way separation. The appointment and removal of magistrates by the Legislature, under the conditions stipulated in the Constitution, is one of those powers.

43. Other examples of such powers expressly reserved for a given branch of government under the Constitution are, inter alia, the authority to declare war, ratification of treaties, declaration of a state of siege, recognition of foreign governments or their representative, appointment and removal of ministers and ambassadors, and the authority to declare something to be in the public domain.

44. The political question doctrine is premised on the existence of those powers of the branches of government. According to that doctrine, the Judiciary will abstain from reviewing certain acts when such a decision presupposes an eminently political judgment that is exclusively reserved for a given branch of government, whether it be the executive or legislative. However, such doctrine also recognizes that those acts can only be judicially reviewed with respect to their extrinsic conformity to the Constitution, that is, if they were passed by the competent body, following constitutional procedure, and without any express violation of some material rule in the Constitution.

45. It is not for the Commission to pass judgment on the wisdom or efficacy of a judicial doctrine per se, unless its application results in a violation of any of the rights protected by the American Convention. In the instant case, however, the Commission notes that the effect of the political question doctrine has been to preclude a decision on the merits of the petitioner's claims. The State has quoted several United States cases (*Marbury v. Madison*, *Baker v. Carr*) to support its position with respect to this case, so certain clarifications are considered necessary.

46. The Supreme Court ruled in *Baker v. Carr* that the primary considerations for refusing to hear a case under the political question doctrine are the following:

- A textual demonstrable constitutional commitment of the issue to a coordinate political department;
- A lack of judicially discoverable and manageable standards for resolving the issue;
- The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
- The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
- An unusual need for unquestioning adherence to a political decision already made;

- The potentiality of embarrassment from multifarious pronouncements by various departments on one question.[FN8]

[FN8] Baker v. Carr, 369 U.S. 186, 217 (1962).

47. This doctrine is a part of the United States constitutional system. It has been in use in countries that base their own system, in part, on the United States Constitution. The greater constitutional principles which guide the legal system in that country are the following:

- a) Constitutional supremacy within the context of the rule of law;
- b) Separation of powers;
- c) Power of judicial review and its role in the overall system;
- d) The limitations on the judiciary - the political question doctrine.

48. However, judges have frequently redefined the scope of political questions--sometimes based on the constitutional power itself--giving the Judiciary a greater voice for the sake of guaranteeing due process. Consequently, this issue is still being debated.

49. Constitutional authors in the United States have also questioned the doctrine and its application, considering it to be "...at odds with our commitment to constitutional and limited government, to the rule of the law monitored by judicial review".[FN9]

[FN9] Henkin, Lexical Priority or 'Political Question': A Response, 101 Harvard Law Review 524, 529 (1987).

50. Still others consider that the result of the political question doctrine sometimes turns out to be judicial inaction in the face of a manifest constitutional violation. This passivity allows the violation to continue, and the high cost "...to society in general and the Supreme Court in particular, far outweighs whatever benefits are thought to derive from the judicial abdication of judicial review".[FN10]

[FN10] Martin Redish, Judicial Review and the 'Political Question', 79 Nw. U. L. Rev. 1031, 1060 (1984-85).

51. In Baker v. Carr, the United States Supreme Court held that the doctrine, "...a tool for maintenance of governmental order, will not be so applied as to promote only disorder".[FN11]

[FN11] Baker v. Carr, 369 U.S. 186, 215 (1962) quoted in J. Choper, Judicial Review and the National Political Process 298 (1980).

52. One of the preconditions of governmental order is legal predictability, including knowledge of applicable procedures. Therefore, the application of the doctrine could actually result in disorder, because

...judicial nondecision of a bona fide case deprives litigants as well as future actors of that knowledge. The courts decline to say what behavior legal procedure requires. The political-question doctrine, by denying law-respecting governmental actors knowledge of the rules they must live by, undermines predictability in public affairs...[FN12]

[FN12] Michael J. Glennon, *Constitutional Diplomacy*, Princeton University Press, 1990, p.

53. In any event, it is clear from the above considerations that the doctrine was conceived as based on the constitutional separation of powers. In the instant case, the doctrine was used by the courts of a democratic government in Argentina to justify the actions of a de facto government, following a practice that began in the aftermath of the 1930 military dictatorship that ruled that country.

54. A de facto government is by definition unconstitutional, since it comes to power by taking up arms against the Constitution and against the lawful authorities created under the Constitution. The history of de facto governments has been one of unlawful take-over of not only legislative powers, but also of judicial and constitutional powers when they amend the Constitution (for example, the so-called institutional acts, statutes of military juntas, etc.).

55. The de facto government of Argentina recognized the validity of the 1853 Constitution only insofar as it was not contrary to the "basic objectives of the National Reorganization Process." The legality of the system decreed by the de facto government is a question that has profound and serious political and juridical implications, which the authorities of the democratic government must resolve.

56. In this case, the Superior Court of Chubut has invoked the doctrine whereby

...the Courts are not competent to rule on the wisdom or efficacy of the measures whereby magistrates were removed, as these are eminently political acts by a de facto government.

57. Declaring the case to be a "political question" means that the Judiciary:

a. effectively sanctioned the constitutionality of the legal framework (Law 21,258) which, by suspending and intending to derogate the Constitution, established a summary procedure that was a violation of the principle of due process and the right to self-defense in the case of the magistrates removed; and

b. made a distinction between the political acts of a de facto government and those of a de jure government.

58. The removal of magistrates by order of the competent body and in accordance with established constitutional procedure is one thing, but the "dismissal of a magistrate" by an illegitimate authority without competence, with utter disregard for the procedure prescribed by the Constitution, is quite another. The first under internal legislation, might well be non-justiciable, but the second would be unconstitutional and unlawful, and it is up to the Courts to review it and declare so.

59. Indeed, the Argentine courts which invoked the political question doctrine should actually have been bound by that same doctrine to review petitioner's case, since the matter clearly does not fall within the requisites of non-justiciability under *Baker v. Carr* which is quoted by those same courts, and cited by the State in its reply to the petition.

60. It should also be noted that recent constitutional jurisprudence from Colombia and Venezuela has excluded states of exception from being regarded as "political questions", by ruling that such acts fall within the scope of judicial review. In effect, the Supreme Court of Venezuela ruled on a presidential decree of November 27, 1992 by which the Chief Executive of the country suspended certain constitutional guarantees. In its decision dated March 11, 1993 that court stated that the decrees suspending guarantees are subject to judicial scrutiny on constitutional grounds, indicating expressly that such review extends to objective or formal elements related to the public officer's powers, the correct exercise of the Executive's powers, observance of previously established procedure, as well as the legality of the act. The content of the decree of suspension of guarantees can also be reviewed as to its reasonableness and the true existence of the factual circumstances that motivated it. The Venezuelan Court concluded that the governmental nature of the act does not immunize the decree of suspension of guarantees from judicial control, and that the Executive's discretionary powers in this regard refer only to the evaluation of the graveness of the circumstances and the convenience of adopting such measure.

61. The Constitutional Court of Colombia, for its part, indicated in a May 7, 1992 ruling that the constitutional provisions regarding states of exception are a "limitation and hindrance to abuses of discretionality". Those norms grant discretionary powers to evaluate, when confronted with an abnormal situation, what the public interest requires for the reestablishment of order, as well as the choice of alternatives of action. The above mentioned decision affirmed the possibility of judicially controlling the decree of a state of emergency by virtue of the limitations imposed on the Executive Branch by the Constitution of that State.[FN13] One of the limits on the President's discretionary authority in decreeing a state of exception is precisely the very juridical control exerted by the Constitutional Court.

[FN13] "El control jurisdiccional de los estados de excepción", Prof. Carlos Ayala Corao, published in "Colección de Estudios No. 4: Los estados de excepción en Chile", Corporación Nacional de Reparación y Reconciliación, Santiago de Chile, 1997.

62. The jurisprudence of both States regarding judicial review and control of the constitutionality of these kinds of acts offers an indispensable complement to defend the rule of law. Conversely, it must be stressed that a very dangerous precedent would be set by accepting the application of the political question doctrine as a legitimate mean to justify arbitrary acts contrary to the Constitution of a State.

63. The Commission does not have competence to declare per se that a national law or court ruling is either unconstitutional or unlawful, as it has stated previously. However, it does have a fundamental authority to examine whether the effects of a given measure in any way violate the petitioner's human rights recognized in the American Convention.[FN14] This practice is consistent with precedents set by the European Commission of Human Rights.[FN15]

[FN14] ...it is not the function of the Inter-American Commission of Human Rights to act as a quasi-judicial fourth instance and review the holdings of the domestic courts of the OAS member States.

...The Commission's role is to investigate whether a government action violated a right of the petitioner's which is protected by the Convention.

Resolution No. 29/88, Case 9260 (Jamaica). IACHR Annual Report 1987-1988, p. 161, par. 5.

[FN15] In the Decision of 20th December 1960 in the Gudmundsson case, the European Commission concluded:

...whereas errors of law or fact, including errors as to the question of the constitutionality of acts passed by a national parliament, committed by the domestic courts, accordingly concern the Commission during its examination of an application only insofar as they appear to involve the violation of any of the rights and freedoms limitatively listed in the Convention.

Yearbook of the European Convention on Human Rights 1960, p. 426.

64. In this case, the decision of the Supreme Court of Chubut, which declared the petitioner's claim non-justiciable, became res judicata when the Supreme Court of Justice of Argentina disallowed the special extraordinary appeal filed by the petitioner seeking reversal of the provincial tribunal's decision. This precluded any decision on the merits of the petitioner's claim that in 1976 the military authorities had unlawfully dismissed him from his position as a judge.

65. The petitioner's complaint before the Commission does not seek his reinstatement to the post of judge or a decision concerning the illegality of his removal in 1976. The petitioner claims specifically that the lack of a judicial decision on the merits of the claim in reference, through application of the political question doctrine, caused the violation of his rights to legal guarantees and to legal protection recognized by the American Convention.

A. The right to judicial guarantees (Article 8)

66. Article 8 of the American Convention establishes the following:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the

substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

67. Article 8 of the American Convention requires observance of “due guarantees” during the process of determining rights. Dr. Gustavo Carranza filed suit “for the determination of his rights...of a civil [and] labor...nature.” In fact, the article in reference does not contain an actual judicial remedy, but rather the body of requisites that must be observed in procedural actions. It recognizes what is called “due legal process,” which includes the conditions that must be met to ensure the suitable defense of persons whose rights or obligations are under judicial consideration.[FN16]

[FN16] Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of October 6, 1987, “Judicial Guarantees in States of Emergency” (Arts. 27(2), 25 and 8 American Convention on Human Rights, pars. 27 and 28).

68. The guarantees that must be respected and fulfilled to ensure a suitable defense include those calling for intervention by a competent, independent and impartial judicial body to determine the claim’s legality. In the case of the petitioner, the intervening tribunal itself stated that the judicial body lacked the power to determine the scope of the rights claimed. It did this by upholding “. . .the incompetence of the judiciary to decide upon matters like those that have arisen here. . . ,” since there is --expressed-- an “absolute lack of authority to pass judgment”[FN17] Therefore, the petitioner was never guaranteed the possibility of obtaining a favorable decision because any decision in this regard was precluded due to the alleged lack of absolute competence of any judicial body to determine his rights. Consequently, the petitioner’s guarantee to mount a suitable defense of his legal claim was impaired because in the end its exercise was illusory. Therefore, in the instant case, the decision of the Superior Court of Chubut confirmed by the Argentine Supreme Court, constituted a violation of the right to due process protected by Article 8 of the Convention.

[FN17] Judgment of the Supreme Court of Justice of the Province of Chubut, entitled “Provincia de Chubut s/Demanda Contencioso-Administrativa” (File No. 10.808-C-1984), page 4.

B. The right to judicial protection (Article 25)

69. Article 25 of the American Convention establishes the following:

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

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

70. In this case, the petitioner sought from the jurisdictional body provided for by law a judicial remedy that would protect him from alleged acts in violation of his individual rights--that is, illegal removal from his position as judge--and that would afford him suitable redress. The petitioner did in fact have free access to such recourse and the right to defend his claim during the proceedings. The Commission observes that this possibility is what distinguishes this case from cases in the region stemming from the so-called "amnesty laws". In the case regarding the amnesty laws, some of the petitioners directly lost their right to legal recourse; with respect to other petitioners, the procedure for developing judicial remedies was thwarted.[FN18]

[FN18] Annual Report of the IACHR 1992-1993, Reports 28/92 (Argentina) and 29/92 (Uruguay). In other cases, the problem of violation of the Convention's Article 25 was raised in regard to obstruction of the petitioner's access to a tribunal that would determine the scope of their claim. In this sense, in its report on Raquel and Fernando Mejía Egocheaga, the Commission stated:

The State's failure to provide for a thorough investigation in the case of Fernando Mejía affected his wife's right to an effective recourse and, according to Peruvian law, the fact that the existence of an unlawful act was not established through criminal proceedings prevented Raquel Mejía's access to a tribunal to determine whether compensation was due to her.

IACHR Annual Report 1995, Report No. 5/96, Case 10,970, Peru, March 1, 1996, p. 193.

71. The Commission nevertheless understands that the right to effective judicial protection provided for in Article 25 is not exhausted by free access to judicial recourse. The intervening body must reach a reasoned conclusion on the claim's merits, establishing the appropriateness or inappropriateness of the legal claim that, precisely, gives rise to the judicial recourse.[FN19] Moreover, that final decision is the basis for and origin of the right to legal recourse recognized by the American Convention in Article 25, which must also be covered by indispensable individual guarantees and state obligations (Articles 8 and 1(1)).

[FN19] On several occasions the Commission has expressed its interpretation of Article 25 of the American Convention. In the aforementioned Report 5/96, it held that

he Commission considers that the right to a recourse set forth in Article 25, interpreted in conjunction with the obligation in Article 1(1) and the provisions of Article 8(1), must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the constitution, or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial, and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation.

Idem, pp. 190-191.

72. In the case of the petitioner, the intervening judicial tribunal denied a judicial remedy, declaring that “the matters interposed in the claim of fs 44/60 were non-justiciable.”[FN20] In this regard, the Argentine State has alleged that this declaration is a decision, compatible with Article 25 of the American Convention, by the tribunal concerning the claim, despite the fact that it recognizes that the Argentine judicial branch was incompetent to grant the petitioner the relief sought.[FN21] The Commission believes that the effect of this determination by the judiciary made it impossible for the petitioner to have an effective judicial remedy that would protect him against alleged violations of his right to stability as a judge, provided by the Constitution of Chubut at the time he was dismissed, and to an eventual compensation.

[FN20] *Idem* fn. 17, page 6.

[FN21] Presentation by the Argentine State to the Commission dated July 6, 1988.

73. In the first place, the logic of every judicial remedy--including that of Article 25--indicates that the deciding body must specifically establish the truth or error of the claimant’s allegation. The claimant resorts to the judicial body alleging the truth of a violation of his rights, and the body in question, after a proceeding involving evidence and discussion of the allegation, must decide whether the claim is valid or unfounded.[FN22] Otherwise the judicial remedy would become inconclusive.

[FN22] The Inter-American Commission has already stated that the decision with regard to the judicial appeal--which must inevitably occur--need not necessarily be favorable to the claimant. See IACHR Annual Report, Report No. 39/96 (Case 11.673, Santiago Marzioni), Argentina.

74. In the second place, in addition to being inconclusive, the judicial remedy would be patently ineffective. This is because, by not allowing recognition of the violation of rights, in the event such violation had been confirmed, it would not be apt for protecting the individual whose right had been impaired or for providing him suitable redress. The Inter-American Court has established that

Article 25(1) incorporates the principle recognized in international law on human rights of the effectiveness of the procedural instruments or means for guaranteeing such rights. As the Court has already pointed out, according to the Convention:

...States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons under their jurisdictions....

According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances in a given case, cannot be considered effective.[FN23]

[FN23] *Idem* fn. 16, paragraph 24.

75. Effective recourse means recourse suitable for protecting the rights violated. The absence of this indispensable condition in the petitioner's case is shown by the intervening judicial body's statement that ". . . there is no legal jurisdiction with regard to the matters set forth in the record, and it is not appropriate to decide thereon." [FN24] If there is no legal jurisdiction and if it is not appropriate to decide, then there can be no protection. Consequently there is no effective legal remedy under the terms of Article 25 of the American Convention.

[FN24] *Idem* fn. 17, page 4.

76. Article 46.2 of the American Convention also recognizes the need for effective legal remedies by establishing certain cases that justify nonapplicability of the requirement for exhaustion of domestic remedies (46.1.a), precisely due to those remedies' ineffectiveness.

77. In the third place, the Commission observes that Article 25(2)(a) expressly establishes the right of any person claiming judicial remedy to "have his rights determined by the competent authority provided for by the legal system of the state." [FN25] To determine the rights involves making a determination of the facts and the alleged right--with legal force--that will bear on and deal with a specific object. This object is the claimant's specific claim. When in this case the judicial tribunal denied the claim and declared "the matters interposed to be non-justiciable" because "there is no legal jurisdiction with regard to the matters set forth and it is not appropriate to decide thereon," it avoided a determination of the petitioner's rights and analyzing his claim's soundness, and as a result prevented him from enjoying the right to a judicial remedy under the terms of Article 25.

[FN25] Article 13 of the European Convention on Human Rights establishes the following: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In the case entitled “Silver and other,” of March 25, 1983, the European Court, referring to Article 13, established the following: The principles that emerge from the Court’s jurisprudence on the interpretation of Article 13 include the following:

(a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. . . .

78. Finally, mention should be made of Article 29 of the American Convention, which establishes the following:

No provision of this Convention shall be interpreted as:

...b. 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.

79. The right to judicial recourse is broad and expressly recognized in the Constitution, in the legislation, and in the jurisprudence of Argentina. The right to due process under domestic legislation is provided for in Article 18 of the Constitution, and this has been recognized repeatedly by the highest judicial tribunal.[FN26] Precisely, and directly connected with this case, it has established that “the constitutional guarantee of defense in judgment assumes the possibility of appearing before the courts of justice and obtaining from them a useful judgment concerning the rights of the litigants.”[FN27]

[FN26] Supreme Court of Argentina. Decisions 268:266, 299:421.

[FN27] Judgment of the Supreme Court of Argentina in the case entitled “Santos c/Valentini,” Red 19-408 No. 106 of May 28, 1985.

80. The right to judicial recourse expressed in Article 25 of the American Convention is a fundamental tool for the protection of individual rights in the framework of the American Convention’s object and purpose. It is so important that the Inter-American Court has concluded that not even the imposition of states of emergency--which did not exist in Argentina at the time the petitioner’s judicial recourse was denied— “cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency”, [FN28] or to control the legality of measures adopted by the executive body due to the state of emergency.”[FN29]

[FN28] *Idem* fn. 16, paragraph 25.

[FN29] *Idem* fn. 6, para. 39.

V. OBSERVATIONS OF THE STATE TO THE REPORTS OF THE COMMISSION

81. After an extension granted by the Commission at the request of the State, it submitted a letter on August 29, 1997 which expressed:

The Government has notified the provincial and national authorities with competence in judicial matters of the content, conclusions and recommendations set forth by that Illustrious Commission in Confidential Report 3/97. Even though no information is yet available to forward to the Commission, it will be supplied in the near future.

82. The Commission approved report No. 30/97 in this case during its 97th period of sessions, reiterating the recommendations issued in the Article 50 report. Report No. 30/97 was transmitted to the State and to the petitioners with confidential status, establishing a period of one month for the former to inform on compliance with such recommendations. On November 24, 1997, the State sent a communication in the following terms:

The Government of the Argentine Republic has no information to supply at this time.

VI. CONCLUSION

83. The Commission finds that when the courts of Argentina precluded a decision on the merits of Mr. Gustavo Carranza's claim concerning his dismissal as a judge in the Province of Chubut, the Argentine State violated his rights to a fair trial and to judicial protection provided for in Articles 8 and 25, respectively, in relation to Article 1(1) of the American Convention.

VII. RECOMMENDATIONS

84. Based on the foregoing,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

A. Recommends to the Argentine State that Gustavo Carranza be compensated adequately for the violations mentioned in the previous paragraph.

B. Decides to make this report public and to include it in its Annual Report to the General Assembly of the OAS.