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Valle Orozco, Concepcion Rodriguez A., Robin Escorcía Maradiaga, Francisco Obregon Garcia, Leonel Argüello Luna, Napoleon Aguirre Aguirre, Pedro Mendoza Membreno and Marvin Narvaez Martinez v. Nicaragua

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I. SUMMARY

1. On June 7, 1994, the Inter-American Commission on Human Rights (hereinafter the “Commission” or the “IACHR”) received a petition lodged by the Nicaraguan Center for Human Rights [Centro Nicaragüense de Derechos Humanos] (CENIDH), subsequently joined by the Center for Justice and International Law (CEJIL) as co-petitioner (hereinafter the “petitioners”), against the Republic of Nicaragua (hereinafter the “State,” the “Nicaraguan State,” or “Nicaragua”), in which they allege a judicial error in Supreme Court of Justice Ruling N° 44 on a petition for amparo. The petitioners contend that as a consequence of the arbitrary actions of the administrative and judicial authorities, 142 customs service workers were dismissed.[FN1] These persons have 600 relatives who are financially dependent on them, and more than half of them are children.

[FN1] Milton García Fajardo, Pedro José Galeano Suárez, Alvaro Martínez Ruiz, Alvaro Ruiz Mendoza, Eddy Fuerte Balmaceda, Martina Espinoza Baltodano, Giovanni Zúñiga Palma, Roger Rivas Espinoza, Eduardo Delgado, Rubio Zapata Bejarano, Frankin Belli Mora, Orlando Matamoros Rojas, Domingo Sandoval Agurcia, Leonardo Solís Jarquín, Evert Delgadillo Mora, Sergio Ibarra Rodríguez, Miriam Ibarra Rojas, Esmelda Martínez Ortiz, Gerardo Duarte Berroteran, Vicente Centeno Calderón, René Varela Munguía, Francis Cruz Cortez, Reymundo López Navarro, Socorro Mora Delgado, Laura Dávila Membreño, Damaris Muños Fuerte, José Adán Ortiz Barahona, Manuel Cruz Baldelomar, Armando Lira Obando, Marina Martínez Santos, Wilfredo Pizarro Castillo, Blanca Gaitán Canda, Jorge Tercero Rivera, Roberto Fajardo Martínez, Marvin Barbosa Swart, César Víctor Sandoval, Jeamilet Molina Pérez, María Auxiliadora Balmaceda, Enrique López Pizzis, Angela Torrez Centeno, Edwin Calero Córdoba, Orlando Vilchez Flores, Víctor Lacayo González, Víctor Peralta Duarte, Olvin Corrales Laynez, Evelio Mendoza Somarriba, Mariano Soto Hernández, José Rojas Sotelos, José Ricardo Méndez B., Carlos García Gutiérrez, Alberto Ferrufino Canales, José Trejos Bonilla, Orlando Espinoza

Mendieta, Héctor Sánchez Baltodano, Javier Palma González, Rigoberto Cárdenas López, Rosa Ruiz Cuevas, Sagrario Sáenz Ruiz, Xiomara Rivera Rodríguez, Maura Escalante Turcio, Lesbia Briceño Mondragón, Rosibel Maradiaga Martínez, Carlos Mejía Martínez, Carlos Montenegro Mina, Socorro Hurtado Maradiaga, Concepción García Savala, Nelba Palma Padilla, Lidia Hernández Pérez, Carmen Balladares, Alejandro Narváez Chávez, José García Huete, Eduardo Cajina Pérez, Juan Castellón Cruz, Enrique Cruz Calderón, Marcio Betanco Vásquez, Carlos Torrez Ordóñez, Luis A. López Ramírez, Luis García Ríos, Omar Centeno Molina, Noel Rayo Romero, Saúl López Cruz, Edgard Sandi Jurado, Yadira Vega Mejía, Elba Ayerdis Solis, Carlos Cortez, Aníbal Pérez Reyes, Marlon Guadamuz Suárez, Rosario Orozco Suárez, Sergio Lenin Lezama, Francisco Ñurinda Santam, Pablo Granera López, Alcidez Guzmán López, Pedro Portobanco, Abraham Zamora, Georgina Tijerino Cruz, Ana María Siu Lang, Marbely Sequeira Ramírez, Alfredo Barberena Campo, Yader Silva Centeno, Marvin Cajina Gómez, Francisco Zamora Castro, Alejandro Uriarte Berríos, Mario Norori Ríos, Franklin Hernández Canales, Sebastián Calderón A., José Molina Membreño, César Chavarria Vargas, Felix Gaitán Ayerdis, Carlos Calero Miranda, Agustín Lazo Lizano, Oscar Luna Sequeira, Melchor Pino Guzmán, Bosco Vado Espinoza, Manuel Marin Cruz, Karla Shang, Juan Correa Zamora, Rogelio Medina Maltes, María Elena Escobar Cerna, Martha Palacios Mayorga, Eugenio Arróliga Ruiz, César Ampié Rivas, Lauren Galeano Lazo, Henry Espinales Cabrera, Javier Escalante Quinta, Gonzalo Salablanca G., Aníbal Ibarra Luna, Armando Delgado Sotelo, Eddy Quintero, Francisco Castillo López, José Luis Morales Araya, Harold Pérez Gómez, Martha Balmaceda, Juan Merlo R., Norberto Montenegro Med., Roberto Valle Orozco, Concepción Rodríguez A., Robin Escorcía Maradiaga, Francisco Obregón García, Leonel Argüello Luna, Napoleón Aguirre Aguirre, Pedro Mendoza Membreño and Marvin Narváez Martínez.

2. According to the petition, on May 26, 1993, the customs service workers went on strike after trying unsuccessfully to negotiate a number of petitions with the Ministry of Labor. The petitions were for, inter alia, nominal reclassification of the specific and common positions in the General Directorate of Customs, job stability, 20% indexing of wages pegged to devaluation, and others. The Ministry of Labor, on May 27, 1993, found that the workers' strike was illegal, charging that Article 227 of the Labor Code did not extend the right to strike to public or social service workers

3. On June 7, 1993, the customs service workers filed a petition for amparo with the Court of Appeals against the Ministry of Labor's declaration of illegal strike, seeking a ruling from the Supreme Court of Justice declaring the supremacy of the Constitution over the labor laws. The Court of Appeals issued an interlocutory decision ordering the custom service to suspend its dismissal of employees. Despite this, the customs authorities still dismissed 142 employees, most of whom were local labor leaders.

4. The petitioners say that the Supreme Court of Justice issued Ruling N° 44/94 on the petition for amparo one year after it was filed, confirming the Ministry of Labor's resolution with respect to the illegality of the strike. The petitioners also say that the justices based their decision on events that took place one year before the customs workers' strike. The justices argued that the workers had placed obstacles on the runway, which had occurred in the case of the AERONICA employees, not the customs workers.

5. The petitioners also alleged excessive use of force by the police during the customs workers' strike on June 9 and 10, 1993.

6. The petitioners claim that the State is responsible for violation of their rights to humane treatment (Article 5), a fair trial (Article 8), compensation (Article 10), freedom of association (Article 16), and judicial protection (Article 25) enshrined in the American Convention on Human Rights (hereinafter the "Convention").

7. On March 12, 1997, during its 95th session, the Commission adopted Report N° 14/97, whereby it found Case N° 11.381 admissible[FN2]. In the same report, the IACHR placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter. However, the State rejected any possibility of a friendly settlement.

[FN2] See IACHR, 1997 Annual Report pp. 640 et seq.

8. After examining the case's merits, the Commission adopted Report N° 80/00 on October 4, 2000, during its 108th Session, in accordance with Article 50 of the American Convention. It concluded that the State of Nicaragua did violate, with respect to Milton García Fajardo, Cristóbal Ruiz Lazo, Ramón Roa Parajón, Leonel Arguello Luna, César Chavarría Vargas, Francisco Obregón García, Aníbal Reyes Pérez, Mario Sánchez Paz, Frank Cortés, Arnoldo José Cardoza, Leonardo Solís, René Varela, and Orlando Vilchez Florez, the right to humane treatment set forth in Article 5 of the American Convention on Human Rights. It also concluded that with respect to Milton García Fajardo and the 141 workers involved in the complaint, the State violated the right to a fair trial, the right to judicial protection, and the economic, social, and cultural rights protected by Articles 8, 25, and 26 of the same international instrument, in connection with the general obligation of respecting and ensuring those rights set forth in Article 1(1) thereof. The Commission recommended that the State of Nicaragua conduct a complete, impartial, and effective investigation to determine the criminal responsibility of all the perpetrators of the injuries inflicted on the persons named in the previous paragraph and to punish the guilty in accordance with Nicaraguan law. It also recommended that the State take the steps necessary to ensure that the 142 customs workers who lodged this complaint receive proper and timely compensation for the aforesaid violations.

9. The Commission transmitted Report N° 80/00 to the State of Nicaragua on October 24, 2000, granting it a period of two months to take the steps necessary to comply with the recommendations, as stipulated in Article 50. As of March 11, 2001, the case had been neither resolved nor submitted by the Commission or the State for judgment by the Court, and so the Commission adopted Report N° 56/01, reiterating the conclusions and recommendations contained in Report N° 80/00, in accordance with Article 51(1) and (2) of the American Convention, and granting the State a period of one month to comply.

10. The State replied on May 16, 2001, repeating the position set forth in its communication of March 7, 2001. The petitioners submitted their reply on July 6, 2001, indicating that the State

had not implemented the Commission's recommendations. Based on the information that was furnished, the Commission agreed to publish this report in accordance with the terms of Article 51(3) of the American Convention.

II. PROCESSING BEFORE THE COMMISSION

11. On June 7, 1994, the Commission received the petition relating to the 142 customs workers of Nicaragua. The petition was amended on September 13 of the same year to include the names of each of those persons. On September 21, 1994, the Commission entered the case as N° 11.381, and transmitted the pertinent parts of the petition to the State, asking it to furnish information about the material events of that petition within a term of ninety days. It further asked the State to provide any evidence that would enable it to determine whether all the remedies under domestic law had been exhausted in this case.

12. The State replied on October 27, 1994, and requested the Commission to find case 11.381 inadmissible in accordance with Article 47(d) of the Convention and Article 39(b) of the Commission's Regulations, inasmuch as it was pending in another international proceeding for settlement. The State further stated that the Trade Union Freedom Committee of the International Labour Organization (ILO) had taken up the matter as Case N° 1719, on June 6, 1993, pursuant to a claim originally filed by the Sandinista Workers' Union (Central Sandinista de Trabajadores) and the National Union of Employees (Unión Nacional de Trabajadores). The State's reply was transmitted to the petitioner on November 7, 1994. On December 21, 1994, the petitioners submitted their comments, which were forwarded to the State on February 14, 1995.

13. On March 24, 1995, the petitioners furnished additional information and reiterated the terms of their petition. On March 30, 1995, the State of Nicaragua submitted its reply to the observations made by the petitioners. On April 4, 1995, the Commission transferred the contents of the reply prepared by the State of Nicaragua to the petitioners. On May 30, 1995, the Commission transmitted to the State of Nicaragua the additional information provided by the petitioners.

14. The petitioners submitted their observations in a note dated June 8, 1995, in which they requested the Commission to settle the conflict of competencies between the ILO Trade Union Freedom Committee and the Inter-American Commission. On July 12, 1995, the Commission transmitted to the State the contents of the additional information furnished by the petitioners. In June and July 1995, the Commission received many communications from the petitioners, in which they refer to their financial situations. On July 13, 1995, the Commission transmitted to the State the pertinent parts of the additional information furnished by the petitioners. On October 3, 1995, the State provided additional information which referred to the recommendations made to the State by the Trade Union Freedom Committee in connection with petition N° 1719. On October 12, 1995, the Commission transmitted to the petitioners the content of the information provided by the State. On November 2, 1995, the Commission forwarded to the State the additional information provided by the petitioners.

15. On January 23, 1996, the Commission sent to the State the observations made by the petitioners, in which they reject the argument of the State that the matter is pending in another

international proceeding for settlement and reiterate that the petition lodged with the ILO concerned a violation of labor rights that occurred prior to issue of Ruling N° 44, whereas the petition presented to the Commission, as they have been explaining in their many communications, deals with the error contained in the aforementioned ruling. During the months of March and April 1996, the Commission continued receiving many communications from the workers describing their financial situation since they were dismissed. Those communications were forwarded to the State in due course.

16. On March 12, 1997, during its 95th session, the Commission adopted Report N° 14/97, admitting Case N° 11.381 concerning Milton García Fajardo and others. In that report the IACHR analyzed the admissibility requirements set forth in Article 46 of the Convention and in Articles 32 and 38 of the IACHR Regulations. With respect to exhaustion of domestic remedies, the Commission found that the petitioners had proven that they had availed themselves of all the remedies under domestic law provided by the legislation of Nicaragua. In reference to the State's objection asserting duplication of international proceedings, the Commission found that it was competent to take up the case based on the following:

The Trade Union Freedom Committee reviewed the right to strike, as an essential component of trade union freedom, and condemned the discharge of trade union leaders for this reason, but at no time did it refer to the arbitrary actions that were committed in the court proceedings involved in this case such as unjustified delay and the judicial error on which ruling No. 44-94 of the Nicaraguan Supreme Court of Justice was based.

17. In the same Report 14/97 the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the Convention. The report was forwarded to the State on May 19, 1997. On July 25, 1997, the State replied to the IACHR's Report on Admissibility, requesting that it order the record closed. The State reiterated its position on the illegality of the strike and said that no violation of constitutional principles existed. The State further informed the IACHR that the workers committed criminal acts during the strike. On July 31, 1997, this reply was transmitted to the petitioners for comment.

18. On August 14, 1997, the petitioners requested the Commission for a hearing during the 94th regular session of the IACHR. On October 2, 1997 the petitioners reiterated the terms of their complaint and requested the IACHR to order them to receive just compensation. On October 6, 1997 the Commission transmitted the petitioners' communication to the State of Nicaragua. On that same date the petitioners sent the Commission additional information regarding the excessive force used by the National Police. On October 8, 1997, during its 97th regular session, the Commission held a hearing attended by the parties, wherein the possibility was put forward of initiating a friendly settlement procedure.

19. On February 23, 1998, the petitioners sent additional information to the Commission refuting the State's accusations. On July 10, 1998, the State requested the Commission for a 30-day extension in order to reply to the petitioners observations. In a note dated July 16, the Commission granted the State an additional period of 30 days. On August 17, 1998, the State sent its observations to the IACHR and said that the workers were accorded full judicial

guarantees and pursued all the remedies provided by Nicaraguan law. The above mentioned communication was sent to the petitioners on August 26, 1998.

20. The IACHR held a hearing of the parties during its 100th regular session on October 7, 1998. At that hearing the Commission offered its good offices for reaching a friendly settlement. The State made a compromise to reply to the petitioners' proposed offer within a month following the latter's communication thereof. On October 13, 1998, the Commission received a proposed offer from the petitioners designed to reach a friendly settlement based on two basic elements: redress and compensation. The communication was forwarded to the State that same day. In the absence of a reply from the State, the petitioners requested that a report be prepared under Article 50 of the Convention. On December 17, 1998, the IACHR received the State's reply in which the latter rejected any negotiation. The communication was transmitted to the petitioners on December 30, 1998.

21. On November 26, 1999, the State sent additional information on the status of the judicial deposits, saying that 81 workers had withdrawn their social services benefits from the total of 121 judicial deposits, and those that had not could do so through the various ordinary tribunals. On December 10, 1999, this communication was forwarded to the petitioners. On December 3, 1999 during a working visit by the Commission to Nicaragua, the IACHR, at the request of the petitioners, again raised the possibility of coming to an arrangement in the framework of a friendly settlement. That offer was rejected by the State.

22. After examining the substance of the case, the Commission adopted Report N° 80/00, on October 4, 2000, during its 108th session, in accordance with Article 50 of the American Convention. The Commission transmitted Report N° 80/00 to the State of Nicaragua on October 24, 2000, and granted it a period of two months to take the steps necessary to comply with the recommendations, as stipulated in Article 50.

23. On December 14, 2000, the State requested an extension to the deadline allowed for its reply. The Commission granted it a period of ten days. Subsequently, on January 23, 2001, the Nicaraguan State requested a 45-day extension for it to present the results of the investigations conducted in connection with case N° 11.381 and its comments on Confidential Report N° 80/00, in the understanding that granting it the extension it requested would suspend application of the deadlines referred to in Article 51 of the Convention, which were to fall due on January 24, 2001. In that context, the Commission agreed to grant the State the extension it requested.

24. In a letter received on March 7, 2001, the State presented its comments, refuting Report N° 80/00 and concluding the following:

Based on the analysis and conclusions of this report, the State of Nicaragua reiterates its willingness to resolve this case by proposing to pay only the petitioners who did not withdraw their awards and agreeing to maintain the value of their severance payments up to the present moment.

25. As of March 11, 2001, the case had been neither resolved nor submitted by the Commission or the State for judgment by the Court, and so the Commission adopted Report N°

56/01, reiterating the conclusions and recommendations contained in Report N° 80/00, in accordance with Article 51(1) and (2) of the American Convention, and granting the State a period of one month to comply. The State replied on May 16, 2001, repeating the position set forth in its communication of March 7, 2001. The petitioners submitted their reply on July 6, 2001, indicating that the State had not implemented the Commission's recommendations. Based on the information that was furnished, the Commission agreed to publish this report in accordance with the terms of Article 51(3) of the American Convention.

III. POSITIONS OF THE PARTIES

A. The Petitioners

26. The petitioners claim that the employees of the Nicaraguan Customs Service held a strike on May 26, 1993, which was found illegal by the Ministry of Labor and 142 workers were dismissed from their jobs, even though several court rulings issued after the strike ordered that they be reinstated in their jobs.[FN3]

[FN3] On May 26, 1993, the customs service workers went on strike after trying unsuccessfully to negotiate a series of demands with the Ministry of Labor. The Ministry of Labor, on May 27, 1993, declared that the workers' strike was illegal, claiming that Article 227 of the Labor Code did not extend the right to strike to public or social service workers.

27. The petitioners say that on June 7, 1993, the customs service workers filed a petition for amparo before the Appeals Court for Civil and Labor Matters against the Ministry of Labor's declaration of illegal strike of May 27, 1993, requesting the Supreme Court of Justice to issue a ruling declaring the supremacy of the Constitution over the labor laws.

28. The petitioners say that on June 23, 1993, the Court of Appeals issued a decision suspending the effects of the Ministry of Labor's resolution. The implication of this was that the workers should be reinstated in their positions, and that all the dismissals that the custom service had initiated arbitrarily should be suspended. Despite this, the customs authorities still dismissed 142 employees, most of whom were local labor leaders. In addition, the Director General of Labor issued a notice on July 7, 1993, ordering that the dismissed workers be rehired, along with the employees who had been arbitrarily prosecuted for crimes. Later, the Supreme Court of Justice itself issued an official notice ordering compliance with the decision of the Court of Appeals. None of these judicial decisions was carried out.

29. The petitioners say that the Amparo Law provides a term of 45 days in which to issue a decision on such an appeal. However, Supreme Court Ruling N° 44/94 was issued one year after the appeal was filed, that is, on June 12, 1994, upholding the Ministry of Labor's resolution with respect to the illegality of the strike. The petitioners say that the justices based their decision on events that took place in February 1992, in other words, one year before the customs workers' strike. The justices alleged that the workers had placed obstacles on the runway, a charge imputable to the AERONICA employees but not the customs workers.

30. The petitioners claim that the judicial deposits mentioned by the State were used as a means to advise the workers of their dismissal, which contradicted their nature. Moreover, those judicial deposits did not include indemnity for unjustified dismissal or any other compensation. The judicial deposits only covered the salaries due. The petitioners say that the withdrawal of these judicial deposits by some customs workers in no way signifies agreement with their unjustified dismissal but, rather, has to do with a matter of financial necessity.

31. The petitioners claim that they were victims of excessive use of force by the security forces. On June 9 and 10, 1993, customs service workers were beaten up by the National Police, who used tear gas, clubs and firearms against them. The petitioners say that 50 workers were arrested and 30 brought up on criminal charges. These persons were later cleared of the charges against them by the justice system.

32. The petitioners contend that as a consequence of the judicial error and the arbitrary actions of the administrative authorities, 142 customs service workers were dismissed. These persons have 600 relatives who are financially dependent on them, and more than half of them are children. Based on the foregoing, the petitioners claim that the State violated their rights to humane treatment (Article 5), a fair trial (Article 8), compensation (Article 10), freedom of association (Article 16), and judicial protection (Article 25) contained in the American Convention.

B. The State

33. The State has argued in its replies and comments on Case 11.381 that the Commission should refrain from taking up the case on grounds of: i) duplication of international proceedings, inasmuch as a prior petition was submitted to the ILO Trade Union Freedom Committee; and ii) failure to exhaust domestic remedies.

34. In addition, the State claims that the customs service workers committed criminal acts during the strike. It says that the strike was found illegal and that most of the workers had been reinstated in their jobs.

35. The State says that the workers' social benefits were placed in judicial deposit and that 80% of these deposits were withdrawn by the customs service workers.

36. Finally, the State rejected the offer of a friendly settlement made during the two hearings of the parties held by the Commission.

IV. ANALYSIS

A. Right to humane treatment (Article 5 of the Convention)

37. Article 5 of the Convention provides that, "Every person has the right to have his physical, mental, and moral integrity respected." This individual guarantee is also protected under Nicaraguan domestic law. Article 36 of the Constitution [of Nicaragua] provides that,

“Every person has the right to have his physical, mental, and moral integrity respected. Nobody shall be subjected to torture, or to cruel, inhuman or degrading procedures, punishment or treatment. Violation of this right constitutes a criminal offense and shall be punished by law.”

38. The information presented by the petitioners mentions that the Government, through the Ministry of Labor, issued a resolution declaring the customs workers’ strike illegal and ordered the National Police to suppress the strike by means of force on June 9 and 10, 1993. As a consequence thereof, many workers were severely beaten and others were arbitrarily arrested.

39. The victims’ representatives provided information on the injuries sustained by some of the workers as a result of the excessive violence used by police officers, who even resorted to harassment and raids on their homes.[FN4] The petitioners also mention that the excessive and disproportionate use of force by the police affected women and children.

[FN4] See Report of the CENIDH “Police Repression of Striking Workers of the Central Customs Offices [Represión Policial de Trabajadores en Huelga de las Oficinas Centrales de Aduana],” File N° 1, Separata N° 2.

40. According to the list provided by the petitioners on June 9, 1993, the following workers were beaten up at the Central Customs Office by the police: Leonel Argüello Luna, César Chavarría Vargas, Francisco Obregón García, and Aníbal Reyes Pérez.[FN5] Also injured were the journalist from El Nuevo Diario, Mario Sánchez Paz, photographer Frank Cortés, and Arnoldo José Cardoza.[FN6]

[FN5] File N ° 1, Sep. N° 2.

[FN6] See File N° 1, Sep. 2, Report on the events of June 10, 1993, at Sapoá, Rivas Dept. [Informe sobre los sucesos del 10 de Junio, 1993 en la localidad de Sapoá, Depto. de Rivas].

41. On June 10, 1993, the following persons were injured as a result of the repressive measures adopted by police officers at Sapoá in the Department of Rivas: Cristóbal Ruiz, Ramón Roa Parajón, Leonardo Solís, René Varela and Orlando Vilchez Florez.[FN7]

[FN7] Ibid., File 1, Sep. 2.

42. The State holds that the Customs Service workers committed acts of vandalism and violence during the strike and furnishes a list of the offenses allegedly committed. With that list it seeks to undermine the legitimacy of the instant petition by adducing criminal acts that are unproven, given that no conviction has been issued against the Customs Service workers. A contrario sensu, the prosecution against the workers was dismissed and the charges quashed, as the annexes attached to this record show.[FN8] Furthermore, the Commission does not know the

origin of the list presented by the State, inasmuch as no mention is made of the judicial or police proceeding that yielded said information.[FN9]

[FN8] Record 400/93, Judgment 171, Page 273, Fifth Local Court for Criminal Matters in and for Managua, August 26, 1993; in which the court acquits the customs workers of the crime of injury with intent of three police officers: Antonio Martínez, Alvaro Valle Mendoza and Oscar Membreño Escobar. Documents received by means of a communication of January 18, 1996. See File N° 2, Sep.16.

[FN9] See File 3, Sep. 26.

43. The judgment delivered by the Military Tribunal of First Instance on September 13, 1993 supports the position of the petitioners regarding the excessive use of force by the police and contradicts the information provided by the State that the workers committed acts of violence, given that said judgment found Carlos José Cerda Sánchez and Erik Salazar Vargas guilty of the crime of abuse of position. Subsequently, on April 12, 1994, the Office of the Military Judge Advocate of the Sandinista Armed Forces convicted Carlos José Cerda Sánchez of the crime of abuse of authority to the detriment of the customs employees Cristóbal Ruiz Lazo, Ramón Roa Parajón, and Milton García Fajardo.[FN10]

[FN10] Documents presented by the petitioners on February 5, 1996. File N° 2, Sep. 16.

44. The press reports furnished by the petitioners provide evidence of the violence used by the security forces. Thus, for instance, El Nuevo Diario, in its edition of May 27, 1993, published the following: "The presence of armed forces troops prompted acts of violence at the Peñas Blancas Customs Office on the border with Costa Rica, where yesterday police beat up the General Secretary of the Union, Milton García, who was admitted to hospital with head injuries." On May 30, 1993, the same newspaper published: "Repression of Customs Workers Intensifies: The State stepped up its repression of striking workers, with the result that combined forces of army troops and police used an excessive level of violence to evict striking workers from the Peñas Blancas and El Guasaule customs offices".[FN11]

[FN11] See communication of March 20, 1998. File N° 4, Sep. 32.

45. By means of a letter from the National Police of Nueva Segovia, the petitioners show that it was a matter of record that "the workers took part in a sit-down strike in which there were no acts of violence." The petitioners show that the customs workers' strike was peaceful,[FN12] whereas the attitude of the National Police was not, which constitutes a violation of Article 5 of the Convention, in particular due to the disproportionate and excessive use of force, in clear violation of international standards.

[FN12] Letter from the National Police of Nueva Segovia which shows for the record that the workers took part in a sit-down strike in which there were no acts of violence. See File N° 4, Sep. 32.

46. The disproportionate use of force on the part of the security forces caused violations of the physical integrity of the forenamed persons. The existence of arbitrary acts, such as mistreatment of persons, use of firearms, and inflicting serious injuries on the demonstrators was clearly shown. The above is demonstrated by the fact that one agent of the security forces was convicted of abuse of authority. This shows that the workers were victims of violence used by the security forces,[FN13] on the days that led up to the strike, and did not, as the State baselessly accuses them, commit acts of violence, proof of which is that they were all acquitted.[FN14] The Commission finds that the facts stated constitute a violation of the right to humane treatment on the part of the State, in accordance with Article 5 of the American Convention.

[FN13] See El Nuevo Diario, May 29, 1993, "Workers' leadership: State steps up repression. Thirteen striking customs workers injured;" El Nuevo Diario, May 30, 1993, "Army troops and police use excessive level of violence. Repression against customs workers intensified." File 4, Sep. 32.

[FN14] In a communication of October 6, 1997, the petitioners adduced the following evidence: 1) Record 400/93, Judgment 171, Page 273, Fifth Local Court for Criminal Matters in and for Managua, August 26, 1993, in which the court acquits the customs workers of the crime of causing injury with intent to three police officers; 2) Record of the Judgment of the Criminal Chamber of the Court of Appeals of the Fourth Region, of March 2, 1994, in which the court decided to annul the proceedings against the defendants, who were workers, and to acquit the other workers, who were arbitrarily prosecuted; 3) Letter from the Interior Ministry, National Police of Nueva Segovia, which certifies that the workers took part in a sit-down strike in which there were no acts of violence; 4) Certificate from the Interior Ministry, National Police of Somotillo, which shows that the 22 customs workers do not have criminal records for the offenses of taking part in strikes and protests. Communication of October 6, 1997. File 4, Sep. 30.

B. Right to a fair trial and to judicial protection (Articles 8(1) and 25 of the Convention)

a. Right to a fair trial

47. Article 8 of the Convention provides, "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." Article 34 of the Nicaraguan Constitution also guarantees the right to a fair trial.

48. The information furnished by the petitioners states that the procedure for declaring a legal strike starts with an administrative proceeding. The customs workers presented a list of petitions in which they also requested the creation of a Reconciliation Board or appointment of a strike judge by the Departmental Inspector of the Ministry of Labor (Article 302 et seq. of the Labor Code). Such inspector failed to comply with the established procedure. The talks between the union and the parties ended without an agreement and the General Directorate of Labor issued a resolution declaring the strike illegal.

49. On June 23, 1993 the Court of Appeals issued a decision suspending the effects of the administrative resolution while the Supreme Court of Justice was examining the petition for amparo that the workers had filed.

50. Ruling N° 44-94 of the Supreme Court of Justice was issued on June 2, 1994, in other words, one year after the petition was presented. There was no reasonable cause that warranted a delay of 10 months in reaching such decision.

b. Unwarranted delay in rendering a judgment

51. Article 8 of the American Convention mentions the judicial guarantees whose compliance is required in all proceedings for determination of rights and obligations. Clause 1 provides that compliance is obligatory within a reasonable time established in order to avoid unnecessary delays that may lead to a deprivation or denial of justice.

52. In the instant case, on June 7, 1993, the customs service workers filed a petition for amparo with the Appeals Court for Civil and Labor Matters of the Third Region against the Director General of Labor, charging violation of Articles 83 and 88 of the Constitution. The Supreme Court of Justice of Nicaragua finally issued a ruling on June 2, 1994, and declared the petition unfounded.

53. Under Nicaraguan law, the Supreme Court was required to issue a decision on the petition for amparo within 45 days (Article 47 Law on Amparo N° 49). However, it took a year to do so, which demonstrates clear negligence on its part, in breach of Article 8 of the Pact of San José. Regarding this, the Supreme Court failed to comply not only with this procedural deadline prescribed by domestic law, but also with international standards developed for determining a reasonable time, by issuing a ruling that was vital to the job and financial security of a large number of workers and to the effectiveness of other human rights long after the respective petition in question was filed.

54. The jurisprudence of the Inter-American Court has established three points that must be taken into account in determining a reasonable time: a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behavior of the judicial authorities.[FN15]

[FN15] Genie Lacayo Case, Judgment of January 29, 1997, para. 77; Suárez Rosero Case, Judgment of November 12, 1977, para. 72.

55. With respect to the complexity of the matter, the Commission finds that the petition for amparo sought purely to obtain a ruling from the Supreme Court on a point of law: the supremacy of the Constitution over the inferior law insofar as the right to strike is concerned. The IACHR has noted that the judicial procedure followed in the case of this petition did not involve numerous steps or requests; on the contrary, the process was very straightforward, given that it consisted of presentation of the petition for amparo, followed by the procedure conducted before the Court of Appeals; the presentation of the opinion of the Office of the State's Attorney for Civil and Labor Matters; and the reply of the Director General of Labor. Accordingly, a large number of measures were not required, in view of the nature of the petition and the little activity with respect to discovery.

56. As to the judicial activity of the interested party, the petitioners filed a petition for amparo and always presented additional information whenever it was necessary. Both they and the government authorities against whom the petition was filed met the deadlines and terms provided for presentation of their respective arguments. However, as a result of the delay of the Supreme Court of Justice in rendering a judgment, the petitioners repeatedly requested that it issue a decision. The Commission finds that the delay in rendering a judgment was not due either to negligence or lack of interest of the parties but, rather, to the inactivity and failure to meet deadlines of the Supreme Court of Justice itself.

57. There is nothing to suggest to the Commission that the Supreme Court of Justice needed longer than the prescribed term of 45 days, or that it was compelled by the complexity of the matter or the activity of the parties to delay its decision. Furthermore, the Commission wishes to mention that this is not the first time that this judicial organ has committed such a violation, inasmuch as, previously, in the Genie Lacayo Case, the Inter-American Court found that the actions of the Supreme Court of Justice of Nicaragua were in breach of Article 8(1) of the Convention:

With reference to the third point, that is, the behavior of the Nicaraguan judicial authorities, this Court finds that there were no excessive delays at the various stages of the proceedings, with the exception of the phase which is yet to be settled (supra 71), that is, the application for judicial review before the Supreme Court of Justice filed by the accusing party on August 29, 1994, admitted by that Tribunal on August 31 and which, notwithstanding the various requests from the parties, has still not been disposed of. Even considering the complexity of the case, as well as the excuses, impediments and substitution of judges of the Supreme Court of Justice, the two years that have elapsed since the application for judicial review was admitted is not reasonable; this Tribunal therefore deems it to violate Article 8(1) of the Convention.[FN16]

[FN16] Inter-American Court of Human Rights, Genie Lacayo Case, Judgment of January 29, 1997, p. 80.

58. The Commission finds no justification whatsoever why this high tribunal should have taken longer than the prescribed term to deliver a ruling on a petition for amparo, which, by its

very nature, entails a prompt procedure. However, what occurred was straightforward lack of activity by the court, which left the customs employees in a situation of legal defenselessness during a year and constituted a violation of Article 8(1) of the American Convention.

c. Right to judicial protection (Article 25 of the Convention)

59. Article 25(1) of the Convention guarantees everyone 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."

60. The Inter-American Court has interpreted Article 25(1) of the Convention as "a general provision that gives expression to the procedural institution known as "amparo," which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention".[FN17]

[FN17] Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations, Advisory Opinion OC-8/87, of January 30, 1987, Series A, N° 8, para. 32, p. 18.

61. Article 45 of the Constitution of Nicaragua protects the right to judicial recourse, and provides, "Any person whose constitutional rights may have been violated, or are in danger of being so, may claim a remedy of exhibición personal a form of habeas corpus or of amparo, as the case may be, in accordance with the Amparo Law". For its part, Article 188 of that body of laws provides the remedy of amparo "against any provision, measure, or decision and, in general, against any act or omission by any official, authority, or agent thereof that violates or attempts to violate the rights and guarantees enshrined in the Constitution."

62. Furthermore, Law N° 49 (the Amparo Law) sets forth a series of principles that the Nicaraguan justice administration is required to observe when it examines a petition for amparo. Thus, Article 5 of that law provides that, "The Courts of Justice (...) shall: 1.) Oversee all proceedings connected with the petition, prevent their interruption and enforce the principle of procedural economy; 2) Prevent and punish all acts that are contrary to the principles of fairness and good faith, which must be observed during the proceedings; 3) Enforce the principles of equality, openness and promptness of the proceedings; 4) Adopt all the necessary steps to ensure compliance with their decisions " (emphasis added).

63. Under Law N° 49 (the Amparo Law) of 1988, a petition for amparo is first filed with a court of appeals which decides admissibility. If found admissible the petition is then taken up by the Supreme Court of Justice, which must issue a decision on the merits.

64. Having established the existence of the institution of amparo under Nicaraguan law and bearing in mind the nature of the instant case, which originated in a labor dispute, for which the

domestic laws provide exhaustion of administrative, and then judicial, remedies, the Commission proceeds to examine the remedies sought by petitioners.

65. On March 8, 1993, the customs service workers submitted a list of petitions to the Departmental office of Inspection of the Ministry of Labor in Managua, and initiated, at the same time, a round of negotiations between the Executive Board of the Trade Union and the authorities of the Ministry of Labor.

66. Since the negotiations did not reach an agreement, an application to appoint a strike judge was submitted to the Office of the Director of Reconciliation of the Ministry of Labor for consideration. This was done in conformity with the procedure set forth in Article 305 of the Labor Code. No strike judge was ever appointed, and no board of reconciliation was ever designated. These are the authorities expressly empowered by the very Labor Code to declare whether or not a strike is legal. As a result, even this phase of the administrative procedure failed to comply with the provisions of the Labor Code.

67. Since the Ministry of Labor did not rule in good time, which leads to the assumption of an infringement of a right which exists in all bodies of law, whereby a private person is entitled to a prompt reply from an administrative authority, since otherwise there would be a denial of justice, the petitioners decided to avail themselves of the constitutional precept that recognizes the right to strike (Article 83 of the Constitution of Nicaragua). After this, the Ministry of Labor declared the strike illegal in a resolution dated May 27, 1993, on the grounds that public sector workers are not thus entitled, in accordance with the provisions of the Labor Code.

68. Disagreeing with the contents of the resolution which declared the strike illegal, the workers sought an administrative remedy known as "recourse to appeal" for the purpose of having the executive reconsider its decision. This appeal process is provided for in Article 68 of the regulations of the Labor Code from which the following conclusion can be drawn:

The right of appeal follows resolutions issued by the authorities of the Ministry of Labor. This recourse must be filed within 24 hours, plus the amount of time required to make notification of the pertinent resolution. After the remedy is filed, the authority that issued the resolution shall immediately bring the activities to the attention of a senior official so that the latter may, within no more than five working days, not extendable, confirm, amend or void the resolution appealed....

69. On June 4, 1993, the Director General of Labor decided to uphold each and every part of the resolution issued by the Office of the Inspector General of Labor, on May 27, 1993, and, consequently, declared the strike started by the unions of the General Directorate of Customs to be illegal.

70. Having exhausted all available administrative remedies, the petitioners resorted to the courts where they filed a petition for amparo.

71. The petitioners filed a petition for amparo on June 7, 1993, with the Appeals Court for Civil and Labor Matters of the Third Region in accordance with Article 31 of the Amparo Law.[FN18]

[FN18] Article 31 of the Amparo Law, published in the Official Gazette, No. 241, December 20, 1988, provides the following:

Article 31: When the petition for amparo is duly filed with the court, it shall be made known to the Office of the Attorney General of Justice, accompanied by a copy of the petition. Within a term of three days, the court shall decree, de oficio or at the request of party, suspension of the act against which a claim has been made or denial thereof, as appropriate.

72. This Appeals Court issued a decision on June 23, 1993, suspending the effects of the resolution of the Ministry of Labor and ordered that the workers be reinstated in their jobs. Nevertheless, this ruling was not respected by the authorities, which continued to dismiss workers. This led the employees to request the Supreme Court of Justice, on two occasions, August 25, 1993 and September 7, 1993, to issue an executive order for the purpose of enforcing the ruling issued by the Appeals Court. On September 9, 1993, the Supreme Court issued an order requiring compliance with the interlocutory suspension ruling issued by the Appeals Court. This decision was also ignored.

73. The State violated Article 25(2)(c) of the American Convention by ignoring the precautionary measures ordered by the Appeals Court for Civil and Labor Matters of the Third Region, which required the suspension of all dismissals while the petition for amparo was being heard.

74. Article 25 establishes the obligation for the states to make available to private citizens a simple and prompt recourse designed to protect them against acts that violate their fundamental rights. In paragraph 2(c) of that Article, the Convention binds the states parties "to ensure that the competent authorities shall enforce such remedies when granted."

75. In his book "El juicio de Amparo" ["The Amparo Proceeding"], Professor Ignacio Burgoa says that suspension of the unconstitutional act is the crux of any petition for amparo: Suspension of the act alleged by the complaint to be unconstitutional and which gives rise to the suit is a crucial aspect of the institution of Amparo, insofar as it guarantees the claimant the possibility of having his right respected once the suit has been admitted, either by preventing violation of that right through continuation of the injury, or preventing harm to and deterioration of the protected property. The importance of this institution of suspension lies, therefore, in the fact that it guarantees the existence of the legally protected interest or the conclusion of the proceeding.[FN19]

[FN19] Burgoa, Ignacio, *El juicio de Amparo*, Porrúa Hnos., Mexico, 1983, p. 703.

76. In the case sub-lite the suspension was ordered of the act cited in the claim. The Customs Authority never obeyed the various orders issued by the Court of Appeals of Managua, which sought to halt the dismissals until a decision was forthcoming on the petition for amparo filed by the workers.

77. The following court decisions were ignored:

i) The decision of the Court of Appeals of Managua of June 23, 1993, which ordered suspension of dismissals of employees upon notice of that decision being served to the General Directorate of Labor, in other words, as of 9:45 a.m. on June 24, 1993. Despite that notice, the Customs authorities continued with the dismissals and to make the respective judicial deposits with the civil and labor courts.

ii) Following the Government's failure to comply, the customs workers requested the Court of Appeals to issue a clarifying decision on its ruling of June 23. On July 1, 1993, that court issued a clarifying decision, which stated, "what is suspended are the effects of that administrative act as of notification of the decision being clarified; concretely it is suspended as of a quarter to ten on the morning of the twenty-fourth of June, nineteen hundred and ninety-three, when the first notice was served." That decision, which supposedly clarified the position of the Court of Appeals was also ignored.

iii) In a notice of July 7, 1993, the Director General of Labor ordered the reinstatement both of the dismissed workers and of the workers who had been arbitrarily prosecuted on criminal charges. That order was not obeyed.

iv) By court order of September 9, 1993, the Supreme Court of Justice ordered the customs authority to comply with the interlocutory suspension ruling issued by the Court of Appeals. That request was not carried out either.

78. Proof of the State's contempt are the judicial deposits on behalf of the customs workers, which were made after 9:45 a.m. on June 24, 1993, in open disobedience of the decision of the Court of Appeals. These deposits were used as means to finalize the mass dismissals. The foregoing demonstrates the State's attitude of flagrant disrespect of the decisions of the courts, in spite of their clarification and reiterated demands for their execution.

79. In contradiction of the judicial deposit of the workers' severance pay, the General Directorate of Customs issued a press release on June 28, 1993 in which it stated that it was complying with the decision of the Court of Appeals of Managua and announced the reinstatement of the striking workers; it did not, however, annul the judicial deposit of their social services benefits.

80. The petitioners say that this incongruity was designed to conceal the failure to comply with the judicial decision. Indeed, the Supreme Court of Justice again requested the General Directorate of Customs to comply with the court's decision on September 9, 1993.

81. It has been demonstrated that the decisions issued by the Court of Appeal ordering precautionary measures as a remedy to prevent future violations of the customs workers' rights proved ineffective and illusory. In that connection, the Inter-American Court has found 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 of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision..."[FN20]

[FN20] Inter-American Court of Human Rights, Judicial Guarantees in States of Emergency (arts. 27.2, 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A, N° 9, para. 24.

82. In the instant case, the remedies did indeed prove illusory and their uselessness was demonstrated in practice when the State refused to comply with the judicial decisions ordering precautionary measures. Despite the existence of those decisions, which sought to avert further violations, the customs workers were dismissed.

83. Furthermore, the ineffectiveness of the remedy of amparo under Nicaraguan law was also demonstrated by the fact that the Supreme Court issued its decision a year after the remedy was sought. The foregoing indicates the lack of a prompt and effective recourse to respond to the claims of the customs workers. The delay of the Supreme Court of Justice to pronounce judgment on the petition for amparo also indicates the ineffectiveness of the courts in protecting the human rights enshrined in the Constitution and in the American Convention. Indeed, according to Article 47 of the Amparo Law, "The Supreme Court of Justice shall in all cases deliver a final judgment within forty-five days after taking up the petition." It is plain that the Supreme Court of Justice issued its decision 10 months late, which is beyond any reasonable term, thereby leaving the customs workers in an unprotected state.

84. The ineffectiveness of the courts was also demonstrated in Ruling N° 44, when the Supreme Court issued a completely unreasoned decision against the petition, in open contravention of Article 45 of the Amparo Law, which expressly states that the judgment shall be reasoned.[FN21] The Inter-American Court has found that, "the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence or exhaustion of all effective domestic remedies."[FN22] It is a different matter, however, "when it is shown that remedies are denied for trivial reasons or without an examination of the merits."[FN23]

[FN21] According to Article 45 of the Amparo Law, "The judgment shall be reasoned; the act or acts against which the claim is filed shall be clearly established; and the legal grounds shall be stated for the decision on the legality of the act against which the claim is filed, together with the analysis of those grounds, which shall mention clearly and precisely the act or acts on which basis amparo is granted or denied."

[FN22] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 67.

[FN23] Ibid., para. 68.

85. In the instant case, the customs workers appealed to the judicial organ provided for by the law in order to seek a judicial remedy that would protect against acts that allegedly violated their constitutional rights. The foregoing shows, therefore, that the petitioner had free access to such a remedy. 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.[FN24] 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 is also covered by indispensable individual guarantees and state obligations.

[FN24] The Commission has expressed its understanding of Article 25 of the American Convention on several occasions. See Case 10.087, Report N° 30/97, Argentina, OEA/Ser/L/V/II.97, doc. 13.

86. In the case of the customs workers, the Supreme Court dismissed the judicial remedy, finding it inadmissible without stating the grounds for its judgment, thereby avoiding issuing a decision on the rights of the petitioners and examining the merits of their claim.

87. The Commission considers that 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. Otherwise the judicial remedy would become inconclusive.[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.[FN26]

[FN25] Ibid.

[FN26] Ibid.

88. In this specific case the customs service workers filed a petition for amparo, in order to obtain a ruling from the Supreme Court of Justice declaring the supremacy of the Nicaraguan Constitution (Article 83 of which recognizes the right to strike) over inferior laws, such as the Labor Code, which establishes limits on said right, particularly in the case of public sector employees, who, under the Labor Code, do not have recourse to the right to strike. However, in Ruling N° 44 the Supreme Court omitted to pronounce judgment in that respect; what it did was

to declare the strike illegal based, as explained, on events not connected with the case,[FN27] consequently making the remedy ineffective and leaving the victims unprotected.

[FN27] *Supra*, paras. 46 et seq.

89. Justice Alba Luz Ramos Venegas, in her dissenting vote in Ruling N° 44, said that the petition for amparo ought to have been admitted based on the following:

Although no fundamental right is limitless, a secondary law that governs it may not impinge upon the essence of that right. Article 83 of the Constitution does not recognize any limitations or restrictions on the right to strike of the workers. She finds, therefore, that what may be regulated are the conditions on the exercise of that right and the procedures for holding a strike, as well as any abuses that might occur in the course thereof. She is of the opinion, rather, that Article 227 of the Labor Code, on which the resolution of the Ministry of Labor is based, should be regarded as nullified by Articles 83 and 182 of the Constitution, and that the ruling, in omitting to pronounce a decision in that respect, skirts the central argument of the petitioners.[FN28] (Emphasis added).

[FN28] Supreme Court of Justice, Ruling N° 44 of June 2, 1994, dissenting vote.

90. The IACHR makes no value judgment on the issue of the strike's illegality or on the Constitution's supremacy over inferior laws, such as the Labor Code, inasmuch as the instant petition deals *expressis verbis* with violations of due process and judicial guarantees.[FN29] However, the Commission concurs with the position of Justice Ramos when she states in fine that, "the ruling, in omitting to pronounce a decision in that respect, skirts the central argument of the petitioners." The Commission finds that the decision of the Supreme Court contained in Ruling N° 44 had the effect of making it impossible for the customs workers to receive an effective judicial remedy as provided by Article 25 of the American Convention, to which Nicaragua became a State Party on September 25, 1979.

[FN29] In Report N° 14/97 on the admissibility of Case 11.381, the IACHR, in the section "Proceedings with the Commission," says the following: In their observations (of January 23, 1996), the claimants contend: "...that the primary objective of the petition in this case is to make the State of Nicaragua responsible, since one of its agencies, the Supreme Court of Justice, has acted irregularly and caused damages to the workers by performing the function of the court in the name of the State." For this reason, the petitioners reject the argument of the State that this a matter pending under another international agency and they reiterate that the contents of the petition formulated to the ILO deal with the violation of labor rights which occurred prior to issue of ruling No. 44. As a result, the petition filed with the Inter-American Commission, as they have been explaining in their many letters, deals with the error contained in the

aforementioned ruling.” OEA/Ser.L/V/II.95, doc. 7 rev. of March 14, 1997, para.. 27, pp. 638-653.

C. Right to compensation (Article 10 of the Convention)

91. Article 10 of the Convention provides, “Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.”

92. The petitioners have alleged in the instant case that when the Supreme Court of Justice set aside the petition for amparo, the resolution of the labor authorities declaring the strike illegal automatically became final. This caused the mass dismissals that had taken place to be considered legal and in accordance to law, as well as a large number of workers to be left unprotected. The petitioners further hold that the Supreme Court was guilty of a grave judicial error in basing its decision on events that pertain to a strike held a year previously, that is, in February 1992, by the employees of AERONICA, and not to the customs workers’ strike, which took place in June 1993. Accordingly, since Ruling N° 44 of the Supreme Court constitutes an unjust judicial act, that tribunal committed a flagrant breach of Articles 8 and 25 of the American Convention, which implies that the customs workers should be compensated by virtue of Article 10 of the same international instrument.

93. In this respect, the Commission finds that Ruling N° 44 of the Supreme Court of Justice on the petition for amparo, restricted the rights of the petitioners but does not constitute a conviction based on a miscarriage of justice under the terms of Article 10 of the American Convention. In consequence, the Commission rejects the application under Article 10 of the American Convention.

D. Economic, social and cultural rights (Article 26 of the Convention)

94. The American Convention provides for the protection of economic, social and cultural rights through progressive development in the following manner:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

95. The Commission finds that the economic rights of the customs workers fall within the framework of protection of the economic, social and cultural rights shielded by the American Convention in Article 26. The violations of the workers’ rights are plain in terms of the principles of legality and retroactivity, and of protection of judicial guarantees. The violations on the part of the State of Nicaragua caused economic harm to, and infringed the social rights of, the petitioners.

96. The Commission wishes to recall that the American Declaration of the Rights and Duties of Man provides that every person has the right to work, leisure time and to social security, in the progressive sense of rights. The Preamble to the American Convention provides: “Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters.”

97. It is for that reason that the American Convention says in Article 26, under the chapter on “Progressive development,” that, “the States Parties undertake to adopt measures, with a view to achieving progressively, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States.” It should be emphasized that the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights was signed in San Salvador on November 17, 1988.

98. The State of Nicaragua signed the Protocol of San Salvador on November 17, 1988 but has yet to ratify it. While it may be true that the Protocol of San Salvador entered into force on November 16, 1999, the main thing is that Nicaragua signed the Protocol in question in 1988, in other words prior to the facts described in the instant petition. In this case, the best doctrine on interpretation of the law of treaties or of any provision on human rights considers that even though a treaty may not be in force, the countries that signed it cannot impose rules against it. Article 1 of the Protocol of San Salvador provides that the measures adopted by the States Parties must be aimed at achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in said Protocol. This means that the States Parties are not permitted to create laws or interpret them in a manner that entails a retrogression in the rights won by workers.

99. Article 18 of the Vienna Convention on the Law of Treaties sets out the “[o]bligation not to defeat the object and purpose of a treaty prior to its entry into force. A State is obliged to refrain from acts which would defeat the object and purpose of a treaty.”

100. This position has been supported by the Inter-American Court in Advisory Opinion OC-14/94, in which it refers “to the interpretation of Articles 1 and 2 of the Convention, which set forth the obligation of the States Parties to respect the rights and freedoms recognized therein and to ensure their free and full exercise to all persons subject to their jurisdiction, and to adopt, if necessary, such legislative or other measures as may be necessary to give effect to those rights and freedoms.” The Court adds that “if a state has undertaken to adopt the measures mentioned above, there is even more reason for it to refrain from adopting measures that conflict with the object and purpose of the Convention.”[FN30]

[FN30] Inter-Am.Ct.H.R., Advisory Opinion OC-14/94 of December 9, 1994, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention

(Arts. 1 and 2 of the American Convention on Human Rights), (Ser. A) No. 14 (1994) paras. 32 and 33.

101. The Commission finds that in the instant case, the Nicaraguan State, instead of adopting measures with the purpose of achieving the progressive development of the customs workers, sought to curtail their rights, thereby causing grave injury to their economic and social rights.

E. Right to freedom of association (Article 16 of the Convention)

102. Article 16 of the American Convention protects the right to freedom of association upon providing the following:

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

103. The Inter-American Court has defined freedom of association as the right of the individual to join with others in a voluntary and lasting way for the common achievement of a legal goal.[FN31]

[FN31] Inter-American Human Rights Court, Advisory Opinion OC-5/85 of November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), of December 9, 1994, paras. 32 and 33.

104. In the instant case, the petitioners basically contend "that the State of Nicaragua, in denying the possibility of the right to strike, which is intrinsically associated with the right of association, and in arbitrarily dismissing the unionized customs workers, has illegally restricted the right to freedom of association, a situation made worse by the discriminatory treatment endured by the unionized workers, who were singled out in particular for dismissal, demonstrating a clear violation of Article 16 of the American Convention".

105. Indeed, the petitioners submit, "The State of Nicaragua, by refusing to convene a board of reconciliation or to appoint a strike judge, which are organs provided for in the Labor Code for declaring whether or not a strike is legal, was preventing the customs workers the possibility of resorting to strike action. Furthermore, the State of Nicaragua persists in this violation with Ruling N° 44-94 of the Supreme Court of Justice, which expressly avoids pronouncing a decision on the superiority of the constitutional provision that enshrines this right over inferior laws. That attitude has the same effect as the attitude of the government, in other words, to deprive the workers of their right to strike... Furthermore, inasmuch as most of the workers dismissed were union members, the right of association was denied."

106. The Commission finds that the right to unionize is a substantive labor right, and that, regardless of any intrinsic link that the right to freedom of association may have with the right to strike, it is not sufficient to prove violation of the right of association of the customs workers under the terms set forth in the Convention. The fact that the State should have denied the possibility to go on strike did not restrict the workers in exercising their right of association, given that it was in their capacity as members of a union that they filed the petition with the Supreme Court of Justice, which petition was admitted.

107. The Commission has already said that by failing to pronounce a decision with respect to the illegality of the strike or the supremacy of the Constitution over inferior laws such as the Labor Code, the Supreme Court skirted the central argument of the petitioners and as a result made it impossible for the customs workers to receive an effective judicial remedy as provided by Article 25 of the American Convention. That, however, does not constitute a violation of the customs workers' right of association.

108. The Commission finds that in the instant case, there is a lack of clarity in the petitioners' allegations that, "inasmuch as most of the workers dismissed were union members, the right of association was denied," since it does not emerge from the evidence contained in the record that that they were prevented from exercising that right or that they suffered persecution because they were members of a union.

109. In consequence, the Commission concludes that it is not possible to charge the State with responsibility for violation of the right to freedom of association contained in Article 16 of the American Convention.

V. DEVELOPMENTS SINCE THE ADOPTION OF REPORT N° 80/00

110. On October 24, 2000, the Commission sent the State of Nicaragua its Report N° 80/00, adopted on October 4, 2000, during its 108th regular session. It asked the State to provide information on the steps taken to comply with the Commission's recommendations and to resolve the situation described in the complaint within no longer than two months following the date of that communication. In addition, on that same date the Commission informed the petitioners that it had adopted a confidential report in accordance with Article 50 of the American Convention.

111. On March 7, 2001, after requesting two extensions, the State submitted its comments; in them it refuted Report N° 80/00 and offered the following conclusions:

The State of Nicaragua concludes by noting that it has at all times shown a willingness to resolve this case, provided that the petitioners' positions and claims were clarified sufficiently. However, since the claims do not fit a clear juridical criterion that would allow a valid claim to be made, there are no conditions given for establishing a compromise between the parties, by means of the procedure requested.

Based on the analysis and conclusions of this report, the State of Nicaragua reiterates its willingness to resolve this case by proposing to pay only the petitioners who did not withdraw their awards and agreeing to maintain the value of their severance payments up to the present moment.

In light of all the above, considering that the applicable provisions of law have been observed and upheld, and in the framework of its commitment of respecting the rights and freedoms enshrined in the American Convention on Human Rights, the State of Nicaragua respectfully requests that the honorable Inter-American Commission on Human Rights declare this case inadmissible and, consequently, duly rule it closed.

VI. CONCLUSIONS

112. Based on the foregoing analysis, the Commission upholds the following conclusions:

1. Based on the facts that emerge from the record, the Commission finds that in spite of the fact that the Office of the Military Judge Advocate of the Sandinista Armed Forces convicted Carlos José Cerda Sánchez of the crime of abuse of authority to the detriment of the workers Cristóbal Ruiz Lazo, Ramón Roa Parajón, and Milton García Fajardo, that measure only constitutes a partial admission, since the parties responsible were not punished, nor were measures adopted to enable the victims to receive compensation. The Commission finds that the State violated the right to humane treatment contained in Article 5 of the American Convention on Human Rights to the detriment of Milton García Fajardo, Cristóbal Ruiz Lazo, Ramón Roa Parajón, Leonel Arguello Luna, César Chavarría Vargas, Francisco Obregón García, Aníbal Reyes Pérez, Mario Sánchez Paz, Frank Cortés, Arnoldo José Cardoza, Leonardo Solís, René Varela, and Orlando Vilchez Florez.

2. Furthermore, based on the acts and omissions examined, the Commission concludes that the State of Nicaragua violated the rights of Milton García Fajardo and the 141 workers named as co-petitioners in the instant petition to a fair trial and to judicial protection, together with their economic, social and cultural rights, protected by Articles 8, 25, and 26, of the above-cited international instrument, in connection with the general obligation to respect and guarantee rights set forth in Article 1(1) thereof.

3. Finally, the Commission rejects the application with respect to the right to compensation and to the right to freedom of association, contained in Articles 10 and 16 of the American Convention. The Commission wishes to point out that the fact that judicial error is not shown does not mean that the judicial decision is not arbitrary.

VII. RECOMMENDATIONS

113. Based on the foregoing analysis and conclusions, from this report, the Inter-American Commission on Human Rights reiterates the following recommendations to the State of Nicaragua:

1. To conduct a complete, impartial, and effective investigation to establish the criminal responsibility of the persons who inflicted the injuries caused to the detriment of Milton García Fajardo, Cristóbal Ruiz Lazo, Ramón Roa Parajón, Leonel Arguello Luna, César Chavarría

Vargas, Francisco Obregón García, Aníbal Reyes Pérez, Mario Sánchez Paz, Frank Cortés, Arnoldo José Cardoza, Leonardo Solís, René Varela and Orlando Vilchez Florez, and to punish those responsible in accordance with Nicaraguan law.

2. To adopt the measures necessary to enable the 142 customs workers who lodged this petition to receive adequate and timely compensation for the violations of their human rights established herein.

VIII. PUBLICATION

114. On April 4, 2001, the Commission adopted Report N° 56/01, in accordance with Article 51(1) and (2) of the Convention, and reiterated to the State of Nicaragua the conclusions and recommendations contained therein. The report was transmitted to the State on April 11, 2001, with a one-month deadline for implementing its recommendations. The Commission decided to transmit this report to the petitioners as well. Neither the State nor the petitioners were authorized to make it public until the Commission had adopted a decision in that regard.

115. The State of Nicaragua replied on May 16, 2001, reiterating the position set forth in its communication of March 7, 2001: that it would pay the severance payments ordered for the 60 workers who had not previously withdrawn them, index-linking the amounts to the US dollar. These payments could be collected, on or after May 21, 2001, at the General Directorate of Customs. The State also said that it had instructed the Director of the Interior Ministry's Civil Inspection Division to conduct an additional investigation in order to comply with the IACHR's recommendations and bring this investigation to an effective conclusion. The petitioners submitted their reply on July 6, 2001, indicating that the State had not implemented the Commission's recommendations.

116. Report N° 56/01 basically contains two recommendations for the State of Nicaragua. The first of these refers to the complete, impartial, and effective investigation under regular Nicaraguan criminal law [emphasis added] to determine responsibility for the violations established in this case, while the second deals with the reparations owed to the victims. In consideration of this report's content, the Commission believes that the additional investigation to be conducted by the Civil Inspection Division is solely administrative and does not replace the judicial investigation. The National Police Law states that only the courts of law referred to in Article 93 of the Nicaraguan Constitution are competent to judge police officers. Criminal action needs to be brought, and the judicial authorities will be responsible for the proceedings. It therefore falls to the courts of law and not to the National Police's Civil Inspection Division to conduct the investigation recommended by the IACHR. With respect to the severance payments referred to by the State, it should be noted that they were ordered by the courts in 1993 and, consequently, this measure represents no form of compensation whatsoever.

117. The information presented by the State of Nicaragua does not represent any form of compensation or other measures intended to comply with the recommendations made by the Inter-American Commission on Human Rights in its Report N° 56/01. In consideration of that, the Commission makes no further statements regarding the information submitted by the State.

118. Based on the information supplied and in accordance with the terms of Article 51(3) of the American Convention, the Commission decides to reiterate the conclusions and recommendations contained, respectively, in Chapters VI and VII above; to publish this report; and to include it in its Annual Report to the General Assembly of the OAS. The Commission, in accordance with the provisions contained in its governing instruments, will continue to evaluate the steps taken by the State of Nicaragua in connection with the aforesaid recommendations until they have been fully complied by such State.

Adopted by the Inter-American Commission on Human Rights on the 11th day of October, 2001. (Signed): Claudio Grossman, President; Juan Méndez; First Vice-President; Marta Altolaguirre, Second Vice-President; Commission Members: Hélio Bicudo, Robert K. Goldman, Peter Laurie and Julio Prado Vallejo.

CASE N° 11.381

MILTON GARCÍA FAJARDO AND THE 141 WORKERS

NICARAGUA

Explanation of Vote and Partial Dissent by Commissioner Dr. Julio Prado Vallejo

I participate in announcing the decision of the Inter-American Commission on Human Rights in Case 11.381, Milton García Fajardo and the 141 workers involved in this complaint against the State of Nicaragua, with respect to the IACHR's conclusions on the rights set forth in Articles 5, 8, 16, 25, and 26 of the American Convention on Human Rights, in connection with the general obligation of respecting and ensuring those rights enshrined in Article 1 of that international instrument.

I dissent in part regarding the substantiation of the alleged violations of Article 8 of the American Convention, in that the analysis of this right does not rest on the miscarriage of justice that the petitioners allege, which has been, in my opinion, duly proven. I also dissent from the Commission's analysis in failing to consider the right to receive indemnification for a sentence based on a miscarriage of justice, as set forth in Article 10 of the Convention. I therefore proceed to offer the following comments:

Article 8(1) of the American Convention recognizes the right of all individuals to a hearing, with due guarantees, in the substantiation of any accusation of a criminal nature made against them. In this respect, the Court has said that: "It does, however, provide for due guarantees; consequently, the individual here [in labor matters] also has the right to the fair hearing provided for in criminal cases." [FN32]

[FN32] Inter-Am.Ct.H.R., Advisory Opinion OC-11/90. Exceptions to the exhaustion of domestic remedies, paragraph 28.

Existing doctrine defines miscarriages of justice in the following terms: “A miscarriage exists when, through fraud, negligence, or mistaken knowledge or understanding of the facts, a judicial ruling is issued that does not reflect reality and that deserves to be called unfair.” Also: “a miscarriage means a mistaken result that does not fit the law, either because the laws were not applied correctly, or because facts were established that do not correspond to reality.”[FN33]

[FN33] Goded Miranda and Amagro Nosote, respectively, quoted in: Hernández Olivencia Antonio Rafael, “El error judicial en la jurisprudencia del Tribunal Superior,” Ed. Estudios Trivium Procesal, Madrid, 1995, p. 80.

A judicial ruling must be a reasoned derivation from current law, as it applies to the proven circumstances of the case. Otherwise it would be an arbitrary judicial ruling, which can be defined as one that violates or ignores what the law expressly provides in connection with the case, one that ignores irrefutable evidence that has been brought to trial in accordance with regular procedures, or one that refers to evidence not contained in the case.[FN34]

[FN34] Supreme Court of Justice of the Argentine Nation, Carozzi vs. Tornese Ballesteros, February 14, 1947, Judgments 207:72.

In the case at hand, Nicaragua’s Supreme Court of Justice committed a serious miscarriage of justice in its ruling N° 44/94 of June 2, 1994. In that ruling, the Supreme Court said its main reason for dismissing the amparo suit was that “the strike should have been pursued peacefully, with work being suspended and abandoned, since all those actions of coercion and violence cannot be recognized by the authorities.”

In arguing that the strike had not been peaceful, the Supreme Court held that:

In the instant case, there were a series of events that were not a true and proper abandoning of work activities, including the placement of obstacles on the International Airport’s landing strip; this created unpredictable and dangerous situations that this Court must consider closely. Incidents like these endangered human lives and state property ... In conclusion, the Supreme Court is convinced that there was no violation of the aforesaid constitutional principles and, as a result, it must dismiss this suit.

Regrettably the Supreme Court based its decision on facts other than those that characterized the customs workers’ strike movement and, on that basis, declared the amparo remedy inadmissible. In contrast, the petitioners provided the IACHR with documentation proving that the violent incidents invoked by the Supreme Court in its ruling N° 44/94 occurred during a strike of AERONICA workers in February 1992, not the customs workers’ strike of June 1993.

Moreover, the violent acts described by the Supreme Court do not agree with the State’s claims that the customs workers perpetrated violence and vandalism during the strike. On the contrary,

the complaints made against the customs workers were resolved when the charges against them were dismissed (see the paragraphs dealing with Article 5 of the Convention in the IACHR's report).

Article 8(1) of the Convention establishes that "every person has the right to a hearing, with due guarantees"; consequently, the judge was obliged to give his ruling based on the evidence placed in the case file by the parties and not on personal motivations or knowledge unrelated to the case, which would constitute a clear example of judicial arbitrariness. Ruling N° 44/94 is based on elements not claimed or proven at trial; it is therefore clearly an arbitrary decision and represents a violation of the right to a fair trial in that it is based on a miscarriage of justice.

Since the Supreme Court's Ruling N° 44/94 is, for the reasons given above, an act of judicial arbitrariness for which there are no grounds, the country's top court of law committed a flagrant breach of Article 8 of the American Convention, and the terms of its Article 10 should be applied. This means indemnifying the customs workers for the violation of their right to a fair trial caused by a miscarriage of justice and providing due compensation for the harm inflicted on the victims.

The obligation of providing compensation has been established by the Inter-American Court in most cases, under the terms of Article 63(1) of the Convention:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

In this article the Convention codifies an important rule of customary law that is one of the fundamental principles of current international law governing the responsibilities of States.[FN35] In connection with this, the Inter-American Court has ruled that when a wrongful act occurs that is imputable to a State, it issues international responsibility by the State for violation of an international rule, and thus incurs a duty to make reparation.[FN36] Similarly, the court has referred to the scope of reparations in the following terms: "Reparations is a generic term that covers all of the various ways a State can redress the international responsibility it has incurred (restitutio in integrum, indemnization, satisfaction, assurances of guarantees that the violations will not be repeated, and others)."[FN37]

[FN35] Inter-American Court of Human Rights, Aloeboetoe et al. Case, Reparations, Judgment of September 10, 1993, paragraph 43.

[FN36] Inter-American Court of Human Rights, Castillo Páez Case, Reparations, Judgment of December 2, 1998, paragraph 50.

[FN37] Inter-American Court of Human Rights, Castillo Páez Case, Reparations, Judgment of December 2, 1998, paragraph 48.

In light of all the above points, I believe that by committing a miscarriage of justice, the State of Nicaragua has violated the American Convention and is obliged to provide reparations for the harm inflicted on the victims of this illicit act, pursuant to Article 10 of the American Convention.

(Signed): Julio Prado Vallejo, Member of the Commission