

WorldCourts™

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 89/03; Petition 12.303
Session: Hundred and Eighteenth Regular Session (7 – 24 October 2003)
Title/Style of Cause: Mariblanca Staff Wilson and Oscar E. Ceville v. Panama
Doc. Type: Decision
Decided by: President: Jose Zalaquett;
First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioners: Robert K. Goldman, Julio Prado Vallejo.
Dated: 22 October 2003
Citation: Staff Wilson v. Panama, Petition 12.303, Inter-Am. C.H.R., Report No. 89/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)

Terms of Use: Your use of this document constitutes your consent to the Terms and Conditions found at www.worldcourts.com/index/eng/terms.htm

I. SUMMARY

1. On June 30, 2000, the Inter-American Commission on Human Rights (hereafter "the Inter-American Commission", the "Commission", or "the IACHR") received a petition from Mrs. Mariblanca Staff Wilson and Mr. Oscar E. Ceville R. (hereafter "the petitioners") against the Republic of Panama (hereafter "the State" or "Panama"), for the alleged violation of the right to a fair trial (Article 8) and the right to judicial protection (Article 25) established in the American Convention on Human Rights (hereafter "the Convention" or "the American Convention"), to their prejudice.

2. The petitioners claim that they were serving as magistrates in Chamber V (for Constitutional Guarantees (Instituciones de Garantías) of the Supreme Court Justice and that, by virtue of the Legislative Assembly's approval on October 24, 1999, of Article 28 of Law 49, repealing Law 32 of July 23, 1999 creating that Chamber, their appointments were canceled and they were dismissed without justification. With respect to the exhaustion of domestic remedies, the petitioners declare that they brought an action of amparo for constitutional protection (recurso de amparo de garantías constitucionales) before the Supreme Court Justice, in Plenary, against the Legislative Assembly, for having issued that rule. This appeal was rejected as inadmissible, and the petitioners claim that their rights were thereby violated, with respect to due process, to defense and to acquired rights such as protection from removal, autonomy, stability and permanence in the position of magistrates, and specifically, Articles 8 and 25 of the Convention.

3. The State maintains that the petitioners failed to exhaust domestic remedies because their appeal was declared inadmissible on the basis of jurisprudence that holds that " an action of amparo cannot be invoked against laws of a general nature", and it argues that the rights relating

to protection from removal, autonomy, stability and permanence in office can only be enforced by the amparo route when the order to perform is directed specifically at the individual in question. The State argues that the appropriate remedy was independent action to challenge the constitutionality of the law, which the petitioners did not exhaust, and that those challenges to constitutionality presented by third parties before the Supreme Court Justice have not yet been decided. The State also asks that the petition be declared inadmissible because the alleged facts do not constitute violations of the Convention.

4. In considering the petition, the Commission concludes that it has jurisdiction to examine it, but that the petitioners failed to exhaust domestic remedies as stipulated in Article 46(1) of the Convention, and that therefore the petition must be considered inadmissible, pursuant to Article 47(a) of the Convention.

II. PROCEEDINGS BEFORE THE COMMISSION

5. On July 11, 2000, the IACHR sent the petition to the State and asked for its observations. On September 14, 2000, the State presented its observations and requested the IACHR to dismiss the petition because the remedies available under internal jurisdiction had not been exhausted. This response was remitted to the petitioners on October 2, 2000, giving them a period of 30 days to respond. On November 1, 2000, the IACHR received the observations of the petitioners, in which they indicated that they had fulfilled the requirement of exhausting domestic remedies. On May 25, 2001, this information was transmitted to the State, with a period of 30 days to respond. Its response of June 25, 2001, was transmitted to the petitioners, with 30 days to respond. On July 10, 2001, the State sent additional information to the IACHR, which was transmitted to the petitioners. On August 16, 2001, the petitioners sent their observations, repeating their earlier position. On November 21, 2001, the IACHR requested specific information from the parties on judicial precedents relating to the effectiveness of the remedies cited for rectifying the current situation. On January 2, 2002, the petitioners submitted the requested information and on January 4, 2002, the IACHR received information submitted by the State. On January 9, 2002, the IACHR transmitted to the State the relevant portions of the communication of the petitioners, and it sent to the petitioners the relevant portions of the communication from the State. On August 19, 2002, the petitioners asked to attend a hearing during the 116th regular session of the IACHR. On September 16, 2002, the IACHR advised the petitioners that it would be impossible to accept their request for a hearing.

III. POSITIONS OF THE PARTIES

A. The petitioners

6. The petitioners claim that the alleged victims, Mariblanca Staff Wilson and Oscar E. Ceville R., were appointed by the then-President of the Republic of Panamá, Dr. Ernesto Perez Balladares, as magistrates in the Fifth Chamber of the Supreme Court of Justice of Panama, pursuant to Resolution 73 of July 26, 1999, approved by the Council of Cabinet. Moreover, they were duly confirmed for those positions by the Legislative Assembly of the time, through resolutions of July 30, 1999, for fixed terms as follows: Mariblanca Staff Wilson for five years, from August 1, 1999 to December 31, 2002, and Oscar E. Ceville for 10 years, from August 1,

1999 to December 31, 2009. As of the time they took up their duties they acquired all the rights, guarantees and prerogatives that the political constitution (hereafter " the Constitution") and the laws of Panama have established for the position of magistrate of the Supreme Court, they received an inventory of proceedings related to amparo for constitutional protection and appeals for habeas corpus, which, pursuant to Law 32 creating Chamber V of the Supreme Court, was within their competence, and they began to receive and to process new cases in these areas, conducting their work with dispatch and impartiality.

7. The petitioners declare that they were dismissed without justification from their positions as magistrates of the Supreme Court by the Legislative Assembly on October 24, 1999 (after two months and 24 days in their functions), by means of Law 49[FN1] of that date, which repealed Law 32 of July 23, 1999 creating Chamber V. Specifically, Article 28 of the new law provided as follows:

[FN1] Issued by the Legislative Assembly, published in the Official Gazette No. 23,914 of October 24, 1999. See petition, annex 4.

The appointments of Mariblanca Staff Wilson, Elitza A. Cedeño and Oscar E. Ceville as magistrates of the Supreme Court Justice are declared null and void, as are those of their respective alternates, José de la Cruz Bernal Sucre, Roberto Will Guerrero and Ricardo José Alemón Alfaro, who no longer have functions as a result of the repeal of Law 32 of 1999 creating the Fifth Chamber of Constitutional Guarantees.

8. The petitioners argue that, despite warnings to the legislative chamber in the initial debates of the draft law, this resolution affected them personally and directly by dismissing them without complying with the clear and express procedure that the Constitution provides, whereby a magistrate of the Supreme Court may not be removed or dismissed from office except in the cases specifically indicated in the Constitution, and after compliance with the formalities established by law. They argue that Article 28 of Law 49 of October 24, 1999 expressly and specifically denied their fundamental rights and guarantees, including the right to due process, the right to defense and their acquired rights such as protection from removal, autonomy, stability and permanence in office, rights that are established in the Constitution, the laws and the international human rights conventions ratified by Panama.

9. With respect to the exhaustion of domestic remedies, the petitioners argue, in response to the State's objection, that they did not pursue the motions for unconstitutionality proposed by the State because those were not appropriate for remedying the violations alleged in this case. According to Article 203 (1) of the Constitution, motion for unconstitutionality is an extraordinary public action that may be brought by any person before the Supreme Court, for the purpose of challenging the constitutionality of laws, decrees, orders, resolutions and other acts that must be impugned for reasons of form or of substance. The four appeals for unconstitutionality referred to by the State were not lodged by the petitioners, either by themselves or on their behalf, but rather by third parties, acting in their personal capacity or through an attorney.

10. With respect to the interpretation of Article 2564 of the Judicial Code, as found in doctrine and jurisprudence on the ex-nunc effects of challenges for unconstitutionality, the petitioners argue that the outcome of such challenges will have no direct or indirect impact on their situation, since, pursuant to Article 2564 of the Judicial Code, decisions taken by the Supreme Court in the area of unconstitutionality are definitive and binding, but they are not retroactive, as can be concluded from the copious jurisprudence of that tribunal.[FN2]

[FN2] The petitioners referred to the following decisions of the Supreme Court: Judgment of August 3, 1990; Judgment of July 5, 1950; Judgment of June 4, 1991. See the communication from the petitioners to the IACHR, December 20, 2001, page 2.

11. The petitioners argue that, because this type of decision by the Supreme Court has no retroactive effect, even on the assumption that it were to declare the challenged laws unconstitutional, that judgment would not lead to their reinstatement in the judicial positions of which they were deprived by virtue of Law 49 of October 24, 1999, nor would it entitle them to any compensation for damages. In fact, a declaration of unconstitutionality would open the possibility for the government to appoint new magistrates to those positions. The petitioners point to the time that has been taken by the proceedings, where more than two years have elapsed since the first complaint was filed, and it has still not been resolved.

12. With respect to the appropriateness of the amparo for protection, the petitioners argue that this was the only feasible domestic remedy under Panamanian law for challenging the violation of the rights and guarantees enshrined in the Constitution, to which Article 50 of the Constitution refers as follows:

Article 50. Any person against whom an order to perform or to abstain has been issued by any public official, where that order violates the rights and guarantees enshrined in this Constitution, is entitled to have that order revoked at his own request or that of any person.

The remedy of amparo for constitutional protection to which this Article refers will be handled through summary proceedings by the courts of justice.

13. The constitutional provision cited above is developed further by Article 2606 of the Judicial Code, the third paragraph of which reads as follows:

This amparo for constitutional protection may be brought against any class of act that infringes or violates the fundamental rights or guarantees enshrined in the Constitution, by way of an order to perform or to abstain, when the severity and imminence of the injury requires immediate revocation.

14. The petitioners indicate that the appeal for constitutional protection against the order dismissing them contained in Article 28 of Law 49 of October 24, 1999, was the only domestic remedy available to them against the violation of their individual and specific rights, and this

appeal was brought by Mrs. Mariblanca Staff Wilson after the dismissal of the three magistrates and their alternates. The action was not accepted by the Supreme Court, which on March 20, 2000 dismissed it on the grounds that the law in question did not violate individual rights, but affected the existence of an institution of which the petitioners were part, resulting in the rejection of the action of amparo. The petitioners argue that the Supreme Court thus left them completely defenseless, by denying them the only domestic remedy available for defending their rights and individual guarantees, since this was a case that was specific and not abstract or general, and that procedurally it would be inappropriate to appeal the same act again. The petitioners argue that this decision of the Supreme Court specifically violates Articles 8 and 25 of the Convention.

15. Moreover, the petitioners refer to points of doctrine and jurisprudence relating to the appropriateness of the amparo for constitutional protection for use against violations of individual and specific rights and guarantees enshrined in the Convention involving legislative acts of general impact.[FN3]

[FN3] Communication from the petitioners to the IACHR, dated December 20, 2001, citing Fuentes Montenegro, Luis, *Constitución Política de la República de Panamá 1972*, Publipan, Panama, 1997, page 140, and referring to the Judgment of the Supreme Court of Justice of October 2, 1991. They also cite the Ruling of the Supreme Court of Justice issued on March 20, 2000, including the explanation of vote by Justice Graciela J. Dixon. Finally, they present a portion of the report submitted by Dr. Cesar A. Quintero to the Symposium on the Evolution of Political and Constitutional Organization in Latin America, 1950-1975, held in Oaxtepec, Mexico in 1976.

16. The petitioners argue that, while the law was being debated in the Legislature, they had exhausted the remedy of amparo of constitutional protection (preventive) before the Supreme Court against the Legislature, brought in order to prevent the dismissal of the magistrates from the Supreme Court. Nevertheless, that State body ignored the ruling granting the appeal and suspending further proceedings with the law dismissing them. With respect to this appeal, as well as those to review the validity of the decision and the request for clarification submitted in the name of the Legislative Assembly (all of these mentioned by the State), the petitioners claim that they are irrelevant to the complaint submitted to the IACHR, and that they have been decided and closed.[FN4]

[FN4] Communication from the petitioners to the IACHR dated November 1, 2000.

B. The State

17. The State argues that the petitioners have not exhausted the remedies of internal jurisdiction, pursuant to Article 46 of the Convention, because the appropriate remedy is a motion for unconstitutionality and that remedy was not only not exhausted by the petitioners, but

is currently proceeding before the Supreme Court, where a decision is still pending. The State maintains that although the petitioners did not bring appeal for unconstitutionality themselves, the fact that no decision has been rendered on those challenges of unconstitutionality before the Supreme Court shows that domestic remedies have not been exhausted.

18. The State also explains that the plenary Supreme Court, consistent with its powers, had heard and resolved, or was considering, as of December 27, 2001, a total of six actions relating to the subject of the complaint, namely: three motions for unconstitutionality (not decided), one motion for the protection of constitutional guarantees, a request for clarification and correction of judgment, and an appeal for revision.

19. With respect to the interpretation that doctrine and jurisprudence have given to Article 2564 of the Judicial Code in effect at this time, dealing with the ex-nunc effects of motions for unconstitutionality, the State argues that Article 2564 of the Judicial Code, which now corresponds to Article 2573, provides that decisions of the Supreme Court on issues of unconstitutionality do not have retroactive effect when they relate to a legal norm or regulatory act.

20. The State argues that, although the Constitution allows action for unconstitutionality against jurisdictional acts (except for the decisions of the Supreme Court and its Chambers), the general rule that judgments of unconstitutionality are effective only ex-nunc has been made more flexible by jurisprudence, allowing for effects ex-tunc of unconstitutionality rulings when the constitutional proceedings deal with individual acts of a public or jurisdictional authority, so as to prevent such decisions from being rendered ineffective.

21. The State argues that the amparo for constitutional protection brought by the petitioners does not constitute the only constitutional mechanism available in Panama for defending constitutional rights and guarantees, and that the action of the petitioners was resolved by the Supreme Court in resolution 20 of March 2000, in which it denied the admissibility of the petition on the grounds that the act challenged did not violate individual rights, declaring additionally and expressly that the challenge submitted through the amparo for constitutional protection could proceed through independent action for unconstitutionality.

22. The State also indicates that a number of challenges are pending decision relating to the constitutionality of Article 28 of Law 49 of October 24, 1999, and that the Supreme Court decision could result in two legal situations, namely: 1) if the Supreme Court declares that the challenged rule is not unconstitutional, then Law 32 of July 23, 1999, creating the Fifth Chamber, will remain repealed; 2) if the Supreme Court declares that the rule is unconstitutional, this will produce the phenomenon known as "constitutional reviviscence" of a law that has been repealed, i.e. the repealed law (Law 32 of July 23, 1999) would be restored and consequently the Fifth Chamber would remain in existence.

23. Finally, the State sites sources of doctrine[FN5] and jurisprudence in support of its arguments.[FN6]

[FN5] Judgment of November 6, 1993, of the Supreme Court of Justice, reproduced in JURISPRUDENCIA SELECTIVA CONTENCIOSO ADMINISTRATIVA. Abilio Batista Domínguez and Roy Arosemena Calvo. First Edition February 2000; Editorial Mizrachi & Pujol, S.A., Panama City. Pages 56, 57, 60 and 61; GARANTÍAS JURISDICCIONALES CONSTITUCIONALES EN PANAMÁ. 1997, Conferencias 3. Co-sponsored by USAID – Panama; LA JURISDICCION CONSTITUCIONAL EN IBEROAMÉRICA, García Belaúnder, D. – Fernández Segado, F. 1995. Dykinson, S.A., Madrid; Editorial Jurídica Venezolana. Pages 809 to 826; LA JURISDICCION CONSTITUCIONAL EN PANAMÁ EN UN ESTUDIO DE DERECHO COMPARADO. Edgardo Molino Mola. Edición 1998, Biblioteca Jurídica Dike. Pages 429 to 432, 564 and 565; EFECTOS DE LA DECLARATORIA DE INCONSTITUCIONALIDAD. Luis Carlos Reyes. Panama, 1983. Extract from the Review “Temas Procesales” No. 17. Pages 7 to 21. See communication of the State to the IACHR, January 3, 2001, page 6.

[FN6] Judgment of June 5, 1992, motion for unconstitutionality against the Auto of January 25, 1986, issued by the Third Civil Circuit Judge. Judgment of October 11, 1991, appeal for constitutional protection brought against Article 7 of resolution 25/JD of September 14, 1990, issued by the Civil Aeronautics Board. See communication from the State, January 3, 2001, pages 6 and 7.

IV. ANALYSIS RELATING TO ADMISSIBILITY

A. The Commission’s jurisdiction *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae*

24. The petitioners are entitled under Article 44 of the American Convention to present complaints to the IACHR. The petition identifies individual persons as victims whose rights under the American Convention Panama has undertaken to respect and guarantee.[FN7]

[FN7] The IACHR has previously held the term "victim" to apply to every person protected by the Convention as established generically in Article 1(1) in accordance with the regulations establishing the rights and freedoms specifically recognized therein. See Annual Report 1998, Report 39/99, Mevopal Petition, paragraph 16.

25. With respect to the State, the Commission observes that Panama has been a State party to the American Convention since June 22, 1978, when it deposited the instrument of ratification. The Commission therefore has jurisdiction *ratione personae* to examine the petition.

26. The IACHR has jurisdiction *ratione loci* to review the petition, inasmuch as violations of rights protected in the American Convention have been alleged to occur within the territory of a State party to that treaty.

27. The IACHR has jurisdiction *ratione temporis*, inasmuch as the obligation to respect and guarantee the rights protected in the American Convention was in force for the State on the date when the acts alleged in the petition were said to have occurred.

28. Finally, the Commission has jurisdiction *ratione materiae*, inasmuch as the petition complains of violations of human rights protected by the American Convention, i.e. the right to a fair trial (Article 8) and the right to judicial protection (Article 25).

B. Other requisites for admissibility

a. Exhaustion of domestic remedies

29. Article 46(1a) of the Convention stipulates that the admissibility of a petition submitted to the IACHR is subject to the requirement "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law". The preamble to the Convention declares that it grants "international protection in the form of a Convention reinforcing or complementing the protection provided by the domestic law of the American States".[FN8] The IACHR reiterates that the rule of prior exhaustion of domestic remedies allows the State to resolve the problem in accordance with its domestic law before finding itself drawn into international proceedings.

[FN8] See the second paragraph of the Preamble to the American Convention.

30. In the first place, the IACHR notes that the petitioners argue that an amparo was submitted on behalf of one of the victims on November 24, 1999, that that amparo was rejected by the Supreme Court in its decision of March 20, 2000[FN9], and that that decision "put an end to domestic proceedings, by exhausting domestic remedies available to the victims".[FN10]

[FN9] Petition, Page 4: Communication of October 17, 2000, page 2.

[FN10] Communication of October 17, 2000, Page 2.

11. The Commission notes that this amparo was brought only on behalf of Mariblanca Staff Wilson, one of the two victims, and not on behalf of Oscar E. Ceville.[FN11]

[FN11] Petition, Annexes 5 and 6.

32. The IACHR concludes consequently that the victim Oscar E. Ceville did not exhaust domestic remedies, and so the petition must be declared inadmissible as it relates to him, because of the failure to exhaust domestic remedies.

33. With respect to the exhaustion of domestic remedies by Mariblanca Staff Wilson, the IACHR notes that the petitioners argue that she exhausted domestic remedies by submitting an amparo, in her name, on November 24, 1999, which was declared inadmissible by the Supreme Court on March 20, 2000.

34. On this point, the State argues that the alleged victim did not exhaust domestic remedies. The Commission stresses that, with respect to the burden of proof for determining whether the requirement for exhaustion of domestic remedies has been met, when the State argues that those remedies have not been exhausted it has the responsibility to indicate the remedies that should have been exhausted, and their effectiveness.[FN12] If the State, in arguing the failure to exhaust domestic remedies, proves the existence of specific domestic remedies that could have been used, it will then be up to the petitioners to show that those remedies were exhausted or that one of the exceptions of Article 46 (2) of the Convention should apply.[FN13] The Inter-American Court has said that “it must not be lightly presumed that a State Party to the Convention has failed to comply with its obligation to provide effective remedies.”[FN14]

[FN12] IACHR, Annual Report 2000, Report N° 02/01, Case 11.280, Juan Carlos Bayarri, Argentina, 19 January 2001. Para. 30. The Inter-American Court has repeatedly held that “the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.” See: Velasquez Rodriguez case, Preliminary Objections, Judgment of June 26, 1987, Series C No. 1, párr. 88; Caso Fairén Garbi y Solís Corrales case, Preliminary Objections, Judgment of June 26, 1987, Series C No. 2, para. 8; Caso Godínez Cruz case, Preliminary Objections, Judgment of June 26, 1987, Series C No. 3, para. 90; Caso Gangaram Panday case, Preliminary Objections, Judgment of December 4, 1991, Series C No.12, para. 38; Caso Neira Alegría y Otros case, Preliminary Objections, Judgment of December 11, 1991, Series C No.13, para. 30; Caso Castillo Páez case, Preliminary Objections, Judgment of January 30, 1996, Series C No. 24, para. 40; Caso Loayza Tamayo case, Preliminary Objections, Judgment of January 31, 1996, Series C No. 25, para. 40; Exceptions to the Exhaustion of Domestic Remedies (Art. 46.1, 46.2.a and 46.2.b American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Series A No.11, para. 41.

[FN13] See also Human Rights Practice (Sweet and Maxwell), para. 20.008.

[FN14] Inter-American Court of Human Rights, Annual Report 2000, Report 02/01. Case 11.280, Juan Carlos Bayarri, Argentina, January 19, 2001, para. 30. See also Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C No 4, paragraphs 59 and 60; Godínez Cruz Case, Judgment of January 20, 1989, Series C N° 5, paragraphs 62 and 63; Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989, Series C N° 6, paragraphs 83 and 84; Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Series A N° 11, para. 41.

35. In the present situation, the State argues that the petitioners did not exhaust domestic remedies because the amparo brought by the presumed victim was not the appropriate remedy. It argues that in reality the petitioners should have presented a motion of unconstitutionality against Law 49 of October 24, 1999.

36. In support of its arguments, the State invokes the decision of the Supreme Court of March 20, 2000, in which the court, analyzing the amparo brought by the alleged victim, ruled that the amparo was not the appropriate remedy because the challenged law was a legislative act of a general nature issued by an authority constitutionally empowered to do so, even though it contained a performance order relating to individuals, and that it was not susceptible to challenge through an amparo for constitutional protection. The Supreme Court also explained that the declaration voiding the appointment of the magistrates was a logical consequence of that law and that it did not constitute a targeted dismissal. The court concluded that this type of challenge must be pursued through independent action for unconstitutionality. The State argues that the petitioners failed to exhaust this remedy.

37. Taking into consideration the decision of the Supreme Court of Panama, the IACHR concludes that the State demonstrated the existence of the remedy of unconstitutionality, and so it is up to the petitioners to show that such remedy was exhausted or that one or other of the exceptions of Article 46(2) of the Convention should apply, as explained earlier.

38. The petitioners admit that they did not exhaust this remedy, and therefore the IACHR must determine whether the petitioners have demonstrated that one of the exceptions of Article 46(2) of the Convention should apply. On this point, the petitioners claim that, even had they brought such an amparo, it was not the appropriate remedy for rectifying the violations alleged.

39. The Commission must determine whether the petitioners have demonstrated that the motion for unconstitutionality was inappropriate for remedying the central situation of which they were complaining to the IACHR. In the viewpoint of the IACHR, the principal complaint of the petitioner relates to her dismissal from her functions as a magistrate by virtue of Law 49 of October 24, 1999, which abolished the Fifth Chamber of the Supreme Court.

40. The IACHR reiterates that “to determine whether a remedy is “adequate” and, by extension, whether there is a probability that relief for the violations claimed by the alleged victim will be granted, the Commission must examine whether that remedy is set forth in the domestic laws in such a way that it can be used to remedy the violations being alleged. Here, the IACHR need not determine a priori whether the allegations have any foundation or can be characterized as or constitute violations of the Convention. Instead, it has to assume that probability, albeit on a strictly provisional basis, as a kind of working hypothesis. Using this criterion, the Commission must determine whether one or more of the remedies mentioned is or are relevant for purposes of Article 46(1)(a) of the Convention”[FN15].

[FN15] Inter-American Court of Human Rights, Annual Report 2000, Report 02/01. Case 11.280, Juan Carlos Bayarri, Argentina, January 19, 2001, para. 27.

41. In the present case, the petitioners argue that even if they had pursued such a remedy, it would not resolve the situation because decisions of the Supreme Court declaring the unconstitutionality of a legislative provision do not have retroactive effect, meaning that while

Law 49 of October 24, 1999 might be declared unconstitutional this would not remedy the situation. More specifically, the petitioners argue that it would not be possible in this way to restore the alleged victims to their positions[FN16]. In addition, the petitioners subsequently argue that for the same reason, a motion for unconstitutionality "would not entail their reinstatement in their traditional functions, nor any compensation for the injuries caused by such legislation".[FN17]

[FN16] Communication of October 17, 2000, page 2.

[FN17] Communication of August 6, 2001, page 2.

42. The IACHR stresses that in determining the admissibility of the petition it must decide whether the petitioners have exhausted the appropriate remedy for resolving the principal situation in question. In other words, the IACHR must determine what was the appropriate and effective remedy for rectifying that situation, and will not concern itself with the manner of obtaining a particular type of reparations, which is a necessary consequence of prior establishment of a substantive violation of the right. Thus for example, on many occasions, when considering violations of the right to life, the Commission has stipulated that the appropriate remedy is a criminal investigation to identify and punish those responsible, but it has not stipulated the type of administrative proceedings that should be followed to determine compensation, or the disciplinary process for imposing administrative penalties.

43. Therefore, the IACHR must determine whether the remedy of unconstitutionality would have restored the petitioner in the enjoyment of her position as a magistrate, which she lost because the court for which she worked ceased to exist by virtue of a general law. With respect to the possibility of bringing independent action for unconstitutionality against Law 49 of October 24, 1999, the State argues that if the Supreme Court of Justice were to declare that rule unconstitutional, this would produce the phenomenon known as constitutional reviviscence of a repealed law, i.e. that the repealed law (Law 32 of July 23, 1999) would regain its validity and the Fifth Chamber would remain in existence.[FN18]

[FN18] Report of the State, December 28, 2001, paragraph 5.2.

44. The petitioners explain that the remedy of unconstitutionality would not have allowed them to obtain reparations, and they cite two examples, reinstatement of the victim in her position, and compensation for damages caused by the legislation.

45. The IACHR notes that the petitioners do not explain why the declaration of unconstitutionality would not have had, as an implicit consequence, the reinstatement of the alleged victim. They argue only that, since a decision on the unconstitutionality of a legislative provision has no retroactive effect, such declaration would merely have opened the way for the government to appoint new magistrates to those positions.[FN19] The petitioners do not explain the reasons for such consequences.

[FN19] Communication of August 6, 2001, page 2.

46. In effect, the IACHR notes that the Article in question, i.e. Article 28 of Law 49 of October 24, 1999, not only revoked the creation of the Fifth Chamber of the Supreme Court but also declared null and void the specific appointment of the alleged victim.[FN20] The petitioner did not explain why that law would be declared unconstitutional in part and not in its totality.

[FN20] Article 28 reads as follows: “The appointments of Mariblanca Staff Wilson, Elitza A. Cedeño and Oscar E. Ceville as magistrates of the Supreme Court Justice are declared null and void, as are those of their respective alternates, José de la Cruz Bernal Sucre, Roberto Will Guerrero and Ricardo José Alemón Alfaro, who no longer have functions as a result of the repeal of Law 32 of 1999 creating the Fifth Chamber of Guarantee Institutions.”

47. The fact that a judgment would not have retroactive effects, i.e. effects on the situation as it existed before the decision, does not mean, directly and automatically, that magistrates could not be restored to their positions in the future, or that the only effect would be to open the way for the national government to appoint new magistrates to those positions. Revocation of Law 49 of October 24, 1999, would consequently produce the same effect for Article 28 thereof, thus reversing the termination of the appointments of Mariblanca Staff Wilson, Elitza A. Cedeño and Oscar E. Ceville as magistrates of the Supreme Court of Justice, Fifth Chamber of Constitutional Guarantee. The hypothetical restoration of the magistrates, consistent with their initial appointment, would produce effects for the future and not for the past.

48. The IACHR considers, consequently, that the petitioners have not proven convincingly their argument that the remedy of unconstitutionality was inadequate for invalidating Law 49 of October 24, 1999, and for obtaining reinstatement of the alleged victim, i.e. for obtaining at least a form of reparations.

49. The IACHR considers that there is at least some doubt as to the effectiveness of the remedy of unconstitutionality for invalidating Law 49 of October 24, 1999, and obtaining the reinstatement of the alleged victim in her position. The Commission considers that this doubt with respect to the effectiveness of the remedy does not absolve the petitioners from the duty to exhaust such remedy, consistent with the requirements of the Convention, with the burden of proof described above, and with international jurisprudence.[FN21]

[FN21] See above paras. XX-YY. See also European Human Rights Commission, Petition 3651/68, Yearbook 13, pp. 512-514; United Nations Committee on Human Rights, Communication No. 79/1980, HRC Selected Decisions I, p. 32; Communication No. 192/1985, HRC 1987 Report, p. 179; Communication No. 224/1987, HRC 1988 Report, p. 250; Communication No. 228/1987, HRC Report 1988, p. 254; Communication No. 324 and

325/1988, HRC 1989 Report, p. 304; Communication No. 262/1987, HRC 1989 Report, p. 281; Communication No. 296/1988, HRC Report 1989, p. 297; Communication No. 318/1988, HRC Report 1990, vol. II, p. 188; Communication No. 363/1989, HRC 1992 Report, p. 379 and Communication No. 397/1990, HRC 1992 Report, p. 408. See generally T. Zwart, *The Admissibility of Human Rights Petitions*, Martinus Nijhoff Publishers, pp. 210 et seq.

50. The Commission therefore concludes that the petitioners did not fulfill the requirement established in Article 46 of the Convention, because they have not exhausted domestic remedies.

V. CONCLUSIONS

51. In considering the present petition, the Commission concludes that it has jurisdiction to examine the petition, but that the petitioners failed to exhaust domestic remedies as stipulated in Article 46(1) of the Convention, and that therefore the petition must be considered as inadmissible, pursuant to Article 47(a) of the Convention.

52. Based on the arguments of fact and law set forth above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition inadmissible.
2. To notify the parties of this decision.
3. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 22nd day of the month of October 2003. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Robert K. Goldman and Julio Prado Vallejo, Commissioners.