

## DISPATCH NO. 32 - ARGENTINA

# THE RIGHT TO FAIR AND SATISFACTORY WORKING CONDITIONS THROUGH THE LENS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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### INTRODUCTION

On June 9th, 2020 (and published on August 28th, 2020), the Inter-American Court of Human Rights (hereinafter, “the Court”) delivered a landmark judgment in the case *Spoltore v. Argentina*<sup>1</sup> and recognized for the first time the protection of the right to fair and satisfactory working conditions, enshrined in Article 45, b of the Charter of the Organization of American States (hereinafter, “the OAS Charter”).<sup>2</sup>

The Court has traditionally played a rather limited role in the protection of labor rights. Until the mid-2010s, the direct protection of labor rights was restricted to trade unions rights—especially freedom of association—whilst the others were protected indirectly (for instance, wages were protected as part of the right to property). However, this has recently changed in the 2017 *Lagos del Campo v. Peru* case<sup>3</sup> in which the Court, for the first time, relied directly upon Article 26 of the American Convention on Human Rights<sup>4</sup>

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1. *Spoltore v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Inter-Am. Ct. H.R. (ser. C) No. 404 (June 9, 2020), ¶ 84.

2. Even though the main objective of the OAS Charter was the creation of this organization, it also enshrines some rights, such as the right to education, to culture and to work. It is an Inter-American treaty that every state must ratify to be part of the OAS.

3. *Lagos del Campo v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Inter-Am Ct. H.R. (ser. C) No. 340 (Aug. 31, 2017), ¶ 142-143. The relevance of the judgment is further explored in section 3.

4. 25 out of the 35 OAS Member States have ratified the American Convention: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, the Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, México, Nicaragua, Panamá, Paraguay, Perú, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.

(hereinafter, “the American Convention”) to protect labor rights. This constitutes a major development because the Court has adopted a systemic approach vis-à-vis all the Inter-American instruments, opening a new era where labor rights are taken seriously within this regional system.

Under this new approach, the Court has mainly focused on the right to work to protect the right to job security.<sup>5</sup> However, Article 45 of the OAS Charter is quite rich and also includes the right to strike, the right to collective bargaining, the right to consultation, the right to participation, and the right to social security. Therefore, the role of the Court is crucial in strengthening workers’ rights enshrined in this provision through the direct application of Article 26 of the American Convention. Specifically, in the case of *Spoltore v. Argentina*, the Court concluded that the Argentine State was responsible for the excessive delay of the judicial proceedings initiated by Mr Victorio Spoltore to protect his right to fair and satisfactory working conditions.<sup>6</sup>

### BACKGROUND

Mr Victorio Spoltore suffered two heart attacks while he was working. The competent administrative agency determined he was unfit for work (70% of work incapacity).

On May 8th, 1987, Mr. Spoltore, aged 50, stopped working and was awarded an invalidity pension. On June 30th, 1988, he decided to lodge an occupational disease claim against his former employer, arguing that his health had worsened because of the company’s hostile treatment. Nine years later, on June 3rd, 1997, a labor court (*Tribunal del Trabajo No 3 de San Isidro*, Buenos Aires) refused Mr. Spoltore’s claim. On September 2nd, 1997, Mr. Spoltore made an exceptional appeal to the Supreme Court of the Province of Buenos Aires, which was subsequently rejected on August 16th, 2000.

In parallel, on September 16th, 1997, Mr. Spoltore lodged a disciplinary complaint to the General Inspectorate of the Supreme Court of the Province of Buenos Aires due to the excessive delay and negligence of the labor court, which took 12 years, 1 month, and 16 days to deliver a judgment. The General Inspectorate agreed with Mr. Spoltore’s complaint. However, given the heavy workload, the court clerk’s health issues, and the clean disciplinary record of that labor court, it concluded that a mere warning was sufficient.

Unsatisfied with this outcome, in September 2000, Mr. Spoltore decided to make a request (*Petición 460/2000*) to the Inter-American Commission on Human Rights (hereinafter, ‘the Commission’).<sup>7</sup> The Argentine State argued

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5. *Lagos del Campo v. Peru*, *supra* note 5; Inter-American Court of Human Rights, *San Miguel Sosa et al. v. Venezuela*. Merits, Reparations and Costs. Inter-Am. Ct. H.R. (ser. C) No. 348 (Feb. 8, 2018).

6. *Spoltore v. Argentina*, *supra* note 3, at ¶ 84.

7. The Inter-American Commission on Human Rights promotes and protects human rights in the American hemisphere. It focuses its work on three main areas: (i) it receives, analyzes and investigates

that his claim should be rejected because he had not exhausted the local remedies.

On July 25th, 2008, the Commission released its Admissibility Report 65/08,<sup>8</sup> which launched a period in which an amicable solution was sought. However, the Argentine State did not pursue that path. Therefore, on July 25th, 2017, the Commission, through its Substantive Report 74/17, found that the Argentine State had violated Articles 8 and 25 of the American Convention. It also recommended that Mr. Spoltore should be compensated, and that Argentina should adopt all the necessary measures to ensure that labor proceedings reach a solution in a reasonable time.<sup>9</sup> On January 23rd, 2019, the case went up to the Court.

### THE JUDGMENT

Having dismissed the preliminary objections presented by the Argentine State, the Court considered, for the first time, that the right to fair and satisfactory working conditions enshrined in Article 45(b) of the OAS Charter was protected under Article 26 of the American Convention. It went on to state that “prevention of professional accidents and diseases” constituted a key element to guarantee the health of workers. States must also ensure that workers have access to justice and to adequate complaint mechanisms to claim compensation.<sup>10</sup> Therefore, the lengthy delay in the judicial process resulted in the international responsibility of the Argentine State. Considering this, the Court concluded that the Argentine State had violated Article 26 of the American Convention, which requires that States guarantee the progressive development of economic, social, and cultural rights. To reach this conclusion, the Court relied upon Articles 8 and 25 of the American Convention, which protect the right to a fair trial and the right to judicial protection respectively, and Article 1(1) of the American Convention, which lists the general duties owed by States, one of them being, according to the interpretation of the Court, Article 26.<sup>11</sup>

The Commission had also requested that Argentina should implement a global reform to ensure that labor proceedings reach a solution in a

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individual petitions alleging violations of specific human rights protected by the American Convention on Human Rights; (ii) it monitors the compliance of human rights in the Member States; and (iii) it conducts on-site visits to examine members’ general human rights situation or to investigate specific cases. According to Article 61 of the American Convention, only the Commission and State Parties that have recognized the jurisdiction of the Court have the right to submit a case to the Court.

8. Inter-Am. Comm’n H.R., Report No. 65/08, Petition 460-00, Admissibility, *Victorio Spoltore v. Argentina* (Jul. 25, 2008), ¶ 46-47.

9. Inter-American Commission on Human Rights. Report No. 74/17, Case 12.656. Report on the merits. *Victorio Spoltore v. Argentina* (Jul. 5, 2017), ¶ 70.

10. *Spoltore v. Argentina*, *supra* note 3, at ¶ 98-99.

11. *Id.* at ¶102.

reasonable time. Nonetheless, the Court considered that there was not sufficient information to order such a measure.<sup>12</sup>

It is worth noting that this decision was adopted by three votes against three votes. However, since the president of the Court (Elizabeth Odio Benito) was of the opinion that the Argentine State had violated the above-mentioned provisions, her view prevailed. The minority considered that Mr. Spoltore should have exhausted all domestic legal remedies before lodging a claim in the Inter-American system. The majority considered, though, that since Argentina had recognized its responsibility, the imposition upon Mr. Spoltore to initiate an action to obtain damages and compensation would have been an excessive burden.

The Court also ordered reparations. Firstly, it considered that the judgment *per se* was a form of reparation. Secondly, the Court established the sum of USD 30,000 as non-pecuniary damage in favor of Mr. Spoltore<sup>13</sup> and USD 10,000 for costs and expenses.<sup>14</sup> It also ordered that Mr. Spoltore's daughter should be reimbursed USD 4,340.58 for the costs she had incurred to travel to Costa Rica—where the Court is based.<sup>15</sup>

#### THE RIGHT TO FAIR AND SATISFACTORY WORKING CONDITIONS IN THE INTER-AMERICAN SYSTEM

The American Convention, adopted in 1969, has created the Court and has established the procedural rules that can only be initiated against State Parties that have accepted its jurisdiction. In principle, only the American Convention provisions can be invoked in contentious cases before the Court. This is crucial because the American Convention recognizes almost exclusively civil and political rights. It had been considered that economic and social rights were already protected by the OAS Charter.<sup>16</sup> Nonetheless, some labor rights have been incorporated, such as: the prohibition of discrimination (Articles 1 and 24), freedom from slavery (Article 6), the prohibition of child labor (Article 19) and freedom of association (Article 16). Labor rights are also protected by Article 26, which sets out that States should adopt measures to achieve “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.” However, given

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12. *Id.* at ¶122.

13. *Id.* at ¶120.

14. *Id.* at ¶124.

15. *Id.* at ¶128.

16. The 1948 OAS Charter, which created the Inter-American System, through the 1967 Protocol of Buenos Aires, included Article 34 in which the Member States agreed to accomplish the following basic goals: fair wages, employment opportunities and acceptable working conditions for all (g). It also incorporated Article 45, which recognizes that work is a social right and duty that requires the protection of fair wages (b). It also enshrines the right to collective bargaining and the right to strike (h).

the procedural organization of the Inter-American system, doubts were casted upon their justiciability.

In *Spoltore v. Argentina*, for the first time, the Court has analyzed and considered the right to fair and satisfactory working conditions that guarantee the health of workers as part of the right to work protected in the OAS Charter. The Court has followed the recent two-step methodology and the systemic interpretation of the American Convention adopted in the recent *Lagos del Campo vs. Peru*.<sup>17</sup>

Firstly, it identified the source of the right at issue. In this case, the Court went beyond the American Convention and identified the right to fair and satisfactory working conditions protected in the OAS Charter. The Court considered that Article 26 of the American Convention, which enshrines economic, social and cultural rights, was part of Part I (“States Obligations and Rights Protected”). Therefore, relying upon Article 1(1) of the American Convention, the Court judged that Member States must respect those obligations recognized, among others, in the OAS Charter (Articles 34 and 45).

Secondly, the Court defined the scope of the right in question. To do so, the Court relied upon Article 29 of the American Convention that establishes the *pro persona* principle. This prevents Member States from suppressing the enjoyment or exercise of the rights and freedoms recognized in the American Convention or to restrict them to a greater extent than is provided for herein. Furthermore, when examining the scope of the obligations as defined in Article 1(1) of the American Convention, the Court considered other international instruments, such as the American Declaration that contains and defines the fundamental human rights referred to in the OAS Charter,<sup>18</sup> UN Declarations and ILO conventions.

Specifically, the Court’s starting point was Article 45(b) of the OAS Charter, which determines that an adequate protection of the health of workers should be guaranteed. It also referred to Article XIV of the American Declaration that enshrines the right to fair and satisfactory working conditions. It sets out that every person has the right “to work under proper conditions.” The Court also drew upon the international *corpus iuris* on this subject, such as: Article 7(e) of the Protocol of San Salvador, Article 7(b) of

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17. *Lagos del Campo v. Peru*, *supra* note 5. In a first period that ran between 1979 to 2001, the Court protected labor rights through the lens of the right to life (Article 4) and the right to personal liberty (Article 7). This was mainly because trade unionists were being assassinated in the region by dictatorial regimes. In a second period, the Court decided to protect labor rights directly and indirectly. The former is represented by the case *Baena Ricardo* where it was considered that there had been a direct violation of Article 16 (freedom of association) of the American Convention, and in the *Ituango Masacres* case where Article 6 (freedom from slavery) had been violated. The Court also protected the right to work indirectly through the lens of procedural rights such as the right to a fair trial and the right to judicial protection, particularly in cases where workers had been unfairly dismissed.

18. Inter-Am. Ct. H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, 29 INT’L LEGAL MATERIALS 378 (1990), ¶43.

the International Covenant of Economic, Social and Cultural Rights and Article 23 of the Universal Declaration of Human Rights. It finally relied upon Article 14 bis of the Argentine Constitution and Article 39 of the Constitution of the Province of Buenos Aires, which also protect the right to decent working conditions.

One of the main contributions of the Court has been the recognition of the prevention of accidents and occupational diseases as a key element of the right to fair and satisfactory working conditions. To reach this conclusion, the Court specifically referred to the ILO Convention No. 155 and to the General Comments No. 18 and 23 of the Economic, Social and Cultural Rights Committee.

Furthermore, the Court concluded that the protection of this right contains two dimensions: one that focuses on aspects that are immediately enforceable and one that concentrates on its progressive realization.<sup>19</sup> The former entails an obligation to have effective complaint mechanisms in case of violation of labor rights to guarantee the right of access to justice and effective judicial protection. This applies to the right to fair and satisfactory working conditions. States have to ensure that workers who have suffered an accident or occupational disease have adequate and effective mechanisms to seek compensation.<sup>20</sup> Concerning the latter, States have a specific and continuing obligation to act as expeditiously and effectively as possible towards the full realization of this right. To do so, States should adopt, to the extent of their available resources, all the necessary legislative and administrative measures. Furthermore, States have an obligation of non-regression, which requires that any measure that aims to restrict the exercise of the right to fair and satisfactory working conditions must be duly justified.

#### RECEPTION IN THE ARGENTINE LEGAL SYSTEM (AND BEYOND)

The American Convention constitutes a source of direct obligations for States Parties (Articles 1(1) and 2). Furthermore, Article 2 requires that States have an obligation to adopt all the legislative and administrative measures in order to achieve the full effectiveness of the rights and freedoms recognized herein. It is, however, to the State Parties, through their constitutional systems, to decide the hierarchy of the American Convention within their domestic legal order.<sup>21</sup>

In the 1994 constitutional reform, Argentina adopted Article 75(22) in which a list of international instruments, including the American Convention, have been granted constitutional hierarchy. Prior to this reform, the Argentine Supreme court had decided in the *Ekmekdjian c/ Sofovich* case, in which it

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19. *Spoltore v. Argentina*, *supra* note 3, at ¶ 97.

20. *Id.* at ¶ 97–102.

21. See Pablo González Domínguez, *La relación entre la doctrina del control de convencionalidad y el derecho nacional*, REVISTA MEXICANA DE DERECHO CONSTITUCIONAL, Jan.–June 2018, at 199.

adopted a monist approach, that the “interpretation of the *Pacto* [American Convention] must be guided by the case law of the Inter-American Court of Human Rights.”<sup>22</sup> This was subsequently confirmed in multiple cases. However, this approach needs to be qualified due to the recent *Fontevicchia* case (2017) in which the Argentine Supreme Court decided that the judgments of the Court are “in principle” mandatory. However, they do not have to be respected either if the Inter-American judges go beyond their competence, or when it is impossible to comply with the judgment because it contradicts the “principle of Argentine public constitutional law.”<sup>23</sup> It is within this legal framework that the impact of the *Spoltore* judgment on the Argentine legal order must be understood.

From an employment law perspective, this judgment may constitute a steppingstone for a long-overdue reform of the health and safety at work legislation. Article 75 of the *Ley de Contrato de Trabajo* (Employment Contract Act) enshrines expressly the employer’s duty of security vis-à-vis their employees. This has been reinforced by Law 27323 (2016), which strengthens the employer’s preventive duty to ensure that workers are protected while performing their duties. It also grants workers the right not to perform their duties if hygiene and safety standards are not respected and there is an imminent danger. However, the employer’s duty of security remains closely tied to the *Ley de Riesgos del Trabajo* (Occupational Risks Act, Law 24577<sup>24</sup>), which was reformed in 2017 (Law 27348). Despite serious constitutional objections—the Argentine Supreme Court declared unconstitutional a similar norm in the recent past<sup>25</sup>—the legislator has introduced a mandatory administrative procedure when making a workplace accident claim. Workers must initiate administrative proceedings before a *Comisión Médica*—an administrative body composed of doctors—before being legally allowed to initiate legal proceedings. It is worth pointing out that these commissions are partially funded by *Aseguradoras de Riesgos del Trabajo*—occupational hazard insurance agencies, which are profit-seeking companies—that must pay workplace accident compensations. This system constitutes a violation of the right to a fair trial and the right to effective judicial protection (Article 19 of the Argentine Constitution and Articles 8 and 25 of the American Convention) because workers do not have direct

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22. Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 7/7/1992, “Ekmekdjian, Miguel Angel c. Sofovich, Gerardo y otros,” Fallos (315:1492), ¶ 21.

23. Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 14/2/2017, “Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso “Fontevicchia y D’Amico vs. Argentina” por la Corte Interamericana de Derechos Humanos,” Fallo (FA17000003), , recital 12.

24. It is worth mentioning that this act, which sets the current system, was adopted in 1995. Mr. Spoltore’s claim was governed by Law 9688, which was considered to be less restrictive in its procedural dimension.

25. Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice, 7/9/2004, “Castillo, Ángel c. Cerámica Alberdi SA,” Fallo (FA04000205); and 7/4/2012, “Obregón, Francisco Victor c. Liberty ART.”

access to the labor courts. They are also “forced” to go through a lengthy administrative and legislative procedure, which may discourage them to bring claims as happened in the 1990s and the 2000s. In the aftermath of the *Spoltore* case, this system is now also at odds with Article 45 of the OAS Charter and Article 26 of the American Convention, which protect the right to fair and satisfactory working conditions.

### CONCLUSION

The Court’s judgment in *Spoltore v. Argentina* constitutes a landmark case for two reasons. Firstly, the Court, following the progressive judicial interpretation adopted recently in *Lagos del Campo v. Peru*, reinforces the autonomous protection of labor rights via Article 26 of the American Convention. Secondly, this is the first judgment in which the Court analyzes and protects the right to fair and satisfactory working conditions. It specifically emphasizes that workers have the right to perform their tasks in a safe environment that prevent work accidents or occupational diseases from happening.<sup>26</sup>

It is true, however, that the Argentine State was found responsible due to the excessive delay in the legal proceedings and the lack of access to justice for Mr. Spoltore to seek compensation for a possible occupational disease. It is worth noting that the Court did not rely exclusively on the right to fair and satisfactory working conditions because of the egregious facts in which Mr. Spoltore, who passed away in 2012, had to wait for more than 30 years to get a definitive judgment in this matter.

Although the Court did not have the possibility to further define the scope of this right, this judgment has laid the cornerstone of the minimum standards of the right to fair and satisfactory working conditions that must be respected within the Inter-American system. Although this goes beyond the scope of this dispatch, the Court seems to have gone a step further in the protection of this right in the recent judgment of the case of *Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil*.<sup>27</sup> The Court seems to be at the forefront of the protection of the health of workers in the region by defining its content and by setting minimum standards that every Member State must respect. Specifically, this may be the first step for Argentina on a long overdue reform of its labor proceedings system. This may have a double positive impact. Firstly, it may generally improve the right of workers to access justice if their rights are violated, which is poorly guaranteed in the region.<sup>28</sup> Secondly, the emphasis that the

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26. *Spoltore v. Argentina*, *supra* note 3, at ¶ 99.

27. *Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Inter-Am. Ct. H.R. (ser. C), No. 407 (Jul. 15, 2020).

28. For further information, See CÉSAR ARESE, ORGANIZACIÓN INTERNACIONAL DEL TRABAJO [INTERNATIONAL LABOUR ORGANIZATION], ACCESO A LA TUTELA JUDICIAL EFECTIVA LABORAL EN

Court has put on prevention may also strengthen the protection of the health of workers, particularly in a system that has traditionally focused on reparation and compensation.