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### Inter-American System

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'individual concern' and introduced the following criterion: 'A natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.'

The Court of First Instance had clearly been inspired by the Opinion of Advocate General Jacobs in the case *Unión de Pequeños Agricultores* (Case C-50/00 P). The latter case concerns the appeal before the ECJ against a decision of the CFI in which the CFI had applied the strict interpretation of Article 230 fourth paragraph EC and declared the action inadmissible. The ECJ decided to hear in plenary session with a view to reconsidering its case-law on individual concern. In his Opinion of 21 March 2002 AG Jacobs advised the ECJ to give the 'individual concern' criterion a broader definition. In its decision in *Unión de Pequeños Agricultores* of 25 July 2002, the ECJ made it clear that – unlike Jacobs and the CFI – it is not willing to broaden its definition of the criteria for access to Court for individuals. It upheld the *Plaumann* doctrine and made it clear that Treaty amendment is necessary in order to improve the system of judicial protection within the European Union.

## I THE EUROPEAN CONVENTION ON THE FUTURE OF THE EUROPEAN UNION

In the previous issue of EU human rights news, reference has been made to the 'European Convention' that has been convened to discuss the future of the European Union. In the mean time, six working groups have been established dealing with the following topics: Subsidiarity, Charter/ECHR, Legal Personality, National Parliaments, Complementary Competencies and Economic Governance ([http://european-convention.eu.int/doc\\_wg.asp?lang=EN](http://european-convention.eu.int/doc_wg.asp?lang=EN)). Each working group is given a specific mandate. The working group 'Charter/ECHR', for example, is asked to address the following questions: 'If it is decided to incorporate the Charter of Fundamental Rights in the Treaty: how should this be done and what would be the consequences? What would be the implications of accession by the Community/Union to the European Convention on Human Rights?'. On 18 June 2002, the secretariat of the Convention issued an elaborate discussion paper in which these issues are examined in detail (<http://register.consilium.eu.int/pdf/en/02/cv00/00116en2.pdf>).

## IV INTER-AMERICAN SYSTEM

CLAUDIA MARTIN

The present report covers decisions issued by the Inter-American Court of Human Rights, which reflect new issues in the case law of the Inter-American System. In that respect, the first case, *Cantos vs Argentina*, addresses the rights of individuals whose interests are entangled with those of corporations. The Commission has consistently rejected cases in which the interests of corporations were at stake, alleging that the

American Convention only protects 'human beings' and not legal entities. The Court appears to have established an exception to such a rule. The second case, *Las Palmeras vs Colombia*, involves issues related to the international responsibility of a State once that State has awarded monetary compensation to victims in the domestic jurisdiction and to evidentiary problems faced to prove the State's responsibility in cases of alleged summary executions. Finally, the report covers the decision on the merits in the case *Hilaire et al. vs Trinidad and Tobago*. The decision on the preliminary objections in this case was reported in June 2001. *Hilaire et al.* addresses the issue of the mandatory application of the death penalty in murder cases in Trinidad and Tobago. The full text of the reported decisions can be found on the website of the Inter-American Court at [www.corteidh.or.cr](http://www.corteidh.or.cr).

It is important to note that the Inter-American Court recently issued Advisory Opinion 17 in which it addressed the scope of Article 19 of the American Convention, which protects the rights of children, in relation to the right to a fair trial and the right to an effective remedy protected under Articles 8 and 25 of that treaty. The content of this opinion will be reported in future presentations.

*Cantos vs Argentina Case, Judgment of 7 September 2001*

The Inter-American Commission on Human Rights (hereinafter 'the Commission') submitted this case against Argentina (hereinafter 'the State') alleging violations of the rights of José María Cantos, the owner of a business group in the province of Santiago del Estero. In 1972, the Revenue Department of the Province investigated Mr. Cantos' companies for alleged violations of the Stamp Act. During the investigation, the Revenue Department searched and seized the company's documents. The company's lack of access to its documents caused them to incur financial losses. Mr. Cantos filed several lawsuits to defend his company's rights; as a result, the State agents harassed him and subjected him and his family to 'systematic persecution'. In 1982, Mr. Cantos reached an agreement with the government of the Province, in which the government acknowledged its debts towards his company and established a system of payment. The government did not comply with its agreement and, as a result, Mr. Cantos filed a petition against the province and the State before the Supreme Court of Justice. In 1996, the Supreme Court rejected the petition and required Mr. Cantos to pay the costs of the proceedings.

The Commission assessed Mr. Cantos' petition and concluded that the State had violated the right to a fair trial, the right to judicial protection, and the right to property as stipulated respectively in Articles 8, 25, and 21 of the American Convention. The Commission requested the Court to re-establish the rights of José María Cantos and provide adequate reparation for the violations stated above.

The State filed two preliminary objections: 1) in regard to the Court's competence to hear the case and 2) in regard to the terms by which the State recognised the compulsory jurisdiction of the Court. The State argued that the Court could not hear the complaint because the case alleged violations against a legal entity, which is not explicitly protected under the American Convention. Article 1(1) of the Convention provides that State Parties undertake to respect and ensure to all 'persons' subject to their jurisdiction the exercise of the rights protected therein. The State highlighted

Article 1(2) of that treaty, which states that '[f]or the purposes of this Convention, "person" means every human being'. To support its arguments, the State cited consistent jurisprudence developed by the Commission according to which the Convention only protects the rights of individuals, thereby excluding the possibility for corporations to be considered victims under that treaty. The Court rejected this objection and observed that the rights and obligations attributed to companies generally become the rights and obligations of persons comprising or acting on behalf of the company. The Court recalled the Vienna Convention on the Law of Treaties and concluded that the State's interpretations would imply denying the human rights protection of the American Convention to an important group, which would lead to unreasonable results. The Court concluded that the human rights protection of the American Convention, under specific circumstances, extends to individuals whose rights are 'encompassed in a legal figure or fiction created by the same system of law', such as when the rights of individual shareholders in a corporation are violated. For those individuals to claim violations under the Convention, however, it appears that the Court requires that they must exhaust domestic remedies 'in their own name', that is to say, challenging violations to their personal rights, in addition to those of the company.

The State's second objection was based on the terms by which it accepted the compulsory jurisdiction of the Court. On 5 September 1984, the State ratified the American Convention and recognised the Court's jurisdiction subject to the limitation that its obligations 'would only take effect with regard to acts that occurred after the ratification of the said instrument'. Since the events of Mr. Cantos' case took place before 5 September 1984, the State argued that the Court could not address the violations. In response, the Court recalled the Vienna Convention on the Law of Treaties, which states that the provisions of a treaty 'do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty...' Thus, the Court concluded that it could only exercise jurisdiction over the proceedings of Mr. Cantos' case that took place after 1984. Without significant reasoning, the Court rejected the argument advanced by the Commission according to which the facts of the case showed the existence of a denial of justice, which in turn constituted a continuous violation of several rights protected by the Convention, particularly the rights to a fair trial, to an effective remedy and to property. The Court will continue hearings and processing of the instant case.

*Las Palmeras vs Colombia Case, Judgment of 6 December 2001*

The Inter-American Commission on Human Rights submitted this case on behalf of seven civilians killed as a result of an armed operation conducted by the Colombian National Police in a place known as Las Palmeras. The Commission argued that Colombia (hereinafter 'the State') violated Articles 4, 8 and 25 of the American Convention, which protect the right to life, the right to a fair trial and the right to judicial protection, all in relation to Article 1(1) of that treaty.

Initially, the Commission petitioned the Court to declare that the State had violated the right to life, recognised in Article 4 of the American Convention and Article 3 of the Geneva Convention to the detriment of Artemio Pantoja Ordóñez, Hernán Javier Cuarán, Julio Milcíades Cerón Gómez, Edebraiz Cerón Rojas, Wilian Hamilton Cerón

Rojas, Moisés Ojeda, and Hernán Lizcano Jacanamejoy. The Court, in its decision on preliminary objections, ruled that it does not have jurisdiction to apply international humanitarian law; therefore, only the violation of Article 4 of the American Convention remained to be decided. The State acknowledged international responsibility for the death of six of the victims, but challenged the allegations of the Commission stating that State agents also arbitrarily deprived Mr. Lizcano Jacanamejoy of his life.

In spite of the State's concession, the Court concluded that it did not have to decide if Colombia had violated Article 4 of the American Convention for the deaths of five of the alleged victims, because domestic administrative courts had already found the State responsible and had ordered payments of compensation to the victims' kin. The Commission argued that these rulings determined the State's domestic violations and that the Court must assess the State's international responsibility for the violations of the right to life. The Court rejected this argument and concluded that the Colombian courts' rulings had become *res judicata*. In relation to the sixth alleged victim, Moisés Ojeda, the Court accepted the State's acknowledgement and therefore established that it had violated Article 4 of the American Convention.

The State argued that the seventh person, Hernán Lizcano Jacanamejoy, died in combat. The Commission contested this conclusion advancing three arguments to prove the State's violation of Article 4 of the American Convention with respect to this particular victim.

First, the Commission urged the Court to shift the burden of proof to the State to demonstrate that it had not violated Article 4 to the detriment of Hernán Lizcano Jacanamejoy, arguing that the victim was on the custody of State agents when he died. The Court decided that reversing the burden of proof was not within its discretion, but 'it is dictated by the rules of law in force'. Moreover, it stated that to prove Colombia's responsibility in this case, the Commission must show that State agents executed the victim. It is not clear from the decision of the Court if it set a new rule of evidence according to which, to prove summary executions in the future, victims will be required to provide direct evidence. If so, such a requirement will definitely constitute a step back for the protection of human rights in the region and a departure from the Court's previous case law.

The Commission also argued that Colombia had not conducted a serious investigation of the events that led to the alleged victim's death and, therefore, its omission constituted a failure to guarantee the victim's right to life. The Court rejected this contention alleging that the rule advocated by the Commission could only apply if no serious investigation was carried out by the State. In the present case, such an argument could not be sustained because there were two judgments from the Administrative Law Court of Colombia's Council of State, which found the State responsible for the events that transpired at Las Palmeras with respect to five of the alleged victims in this case. In addition, since 1998, the State has embarked on a criminal investigation to establish the responsibility of the perpetrators of the executions alleged in this case.

Finally, the Commission urged the Court to hold that the evidence produced in this case was sufficient to prove that State agents summarily executed Hernán Lizcano Jacanamejoy. In this respect, it argued that the State's conclusion regarding the death

of the victim was based on the testimony of officers who participated in the operation, which was not credible evidence. In addition, the State authorities failed to carry out procedures essential for the determination of the cause of death of the victim, such as collecting the shells and bullets at the site where he was killed or taking scrapings from his hands to establish if he had fired a weapon. Furthermore, the expert tests conducted, coupled with the 'unmistakable signs of the modus operandi used by agents of the security forces', are unequivocal proof that the victim was defenseless when executed and in custody of the State. The Court analysed the results of the tests on which the Commission based its arguments, in particular the anthropological analysis and forensic examination carried out on the victim's remains once the exhumation of his body took place, and decided that no conclusive evidence could be drawn from the reports elaborated by expert witnesses. The Court also concluded that a study of the shrapnel present in the alleged victim's remains was not sufficient to lead the Court to conclude that the State executed Hernan Lizcano Jacanamejoy. Therefore, the Court found no violation of Article 4 of the American Convention in relation to this victim.

The Commission also argued that the State violated Articles 8 and 25 of the American Convention, which ensure the right to a fair trial and the right to judicial protection. In assessing this claim, the Court reviewed the proceeding that took place in Colombia with regard to the armed operation in which the alleged victims were killed. First, the Office of Investigation and Discipline of the Putumayo Police Department Command instituted disciplinary proceedings against the officers involved in the armed operation. These proceedings lasted 5 days and the investigating officer cleared all participants of the operation of wrongdoings. The Court concluded that the hasty investigation did not allow a just examination of the evidence and that the officer who acted as a 'judge' lacked the impartiality required by the due process rights ensured by the American Convention.

In addition, the military criminal proceedings began in 1991 and the case remained in the military justice system until 1998 when it was transferred to the ordinary criminal justice system. The Court reiterated that in a democratic State respectful of the rule of law, the military criminal system must be restricted and exceptional in scope, and intended to try military personnel only for crimes or misdemeanors related to acts of military service. According to the Court, when military courts assert jurisdiction over cases that should be heard by regular tribunals, the right to have access to a competent, independent and impartial judge is violated. In light of this analysis, the Court stated that the alleged victims' cases should have been submitted to an ordinary court initially, reiterated that the investigation was pending for seven years, and that the military courts failed to identify, prosecute, and convict the parties responsible for the Las Palmeras killings. Thus, the Court concluded that the State violated Article 8(1) of the American Convention, which recognises the right of the victims' next of kin to a hearing by a competent, impartial and independent court.

In regard to the proceedings in the *ordinary criminal justice system*, which began in 1998, the Court noted that the criminal investigation of these events have been taking place for more than ten years. This was not a reasonable time under the standards set in the American Convention, particularly taking into account previous cases in which the Court has ruled that a proceeding that lasted five years since it was instituted

violated that treaty. Moreover, the State's failure to carry out a proper investigation to identify and punish the perpetrators of the victims' executions affected the rights of the victims' relatives to have access to an effective remedy. Thus, the Court held the State liable for violating Articles 8(1) and 25(1) of the American Convention.

The Court ordered that the reparation phase be initiated and authorised its President to take the necessary measures toward that effect.

*Hilaire, Constantine and Benjamin et al. vs Trinidad and Tobago Case, Judgment of 21 June 2002*

The Court joined the *Hilaire, Constantine et al.* and *Benjamin et al.*, cases that the Inter-American Commission on Human Rights submitted separately against Trinidad and Tobago (hereinafter 'State'). The State convicted the 32 alleged victims in these cases of murder and sentenced them to execution under the *Offences against the Person Act*. This Act proscribes the death penalty as the only applicable sentence for the crime of murder. In the majority of cases, the appeals submitted by the alleged victims to the Court of Appeals of Trinidad and Tobago and to the Judicial Committee of the Privy Council were dismissed. The Constitution of the State precludes individuals from challenging the constitutionality of laws or acts carried out pursuant to any law in force in Trinidad and Tobago before 1976, the year in which the Constitution came into force. Additionally, it did not include a trial within a reasonable time as a part of its due process guarantees.

By applying Article 63(2), the Court adopted provisional measures to delay the execution of several alleged victims in order to allow the Commission and later itself to assess their petitions. Trinidad and Tobago failed to provide information requested by the Court regarding the implementation of the provisional measures. In addition, on 4 June 4 1999, the State executed Joey Ramiah, who was among those protected by the measures issued by the Court.

The Commission argued that the State violated its international obligations under the American Convention in relation to the following issues: the 'mandatory nature' of the death penalty; the delays in the criminal proceedings; the denial of access to legal aid and other due process violations; the deficiencies in the treatment and conditions of detention; and the lack of an effective procedure for issuing amnesty, pardon or commutation of sentence. The Commission also argued that the execution of Joey Ramiah while his petition was pending before the inter-American human rights system, violated the victims' rights under the American Convention.

Trinidad and Tobago ratified the American Convention and recognised the compulsory jurisdiction of the Inter-American Court of Human Rights in 1991. In 1998, it denounced the Convention. Pursuant to Article 78 of that instrument, the denunciation became effective as of 1999. Since the facts of the present case occurred before the date the denunciation became effective, the Court asserted its jurisdiction over the case.

The State challenged the jurisdiction of the Court alleging that its instrument of acceptance of the mandatory jurisdiction of the Court contained a limitation that prevented this tribunal from reviewing this case. The Court, in its judgment on preliminary objections, rejected the State's by holding that the limitation included in the

acceptance of its jurisdiction was incompatible with the object and purpose of the American Convention and therefore invalid [for more information on this decision, see report on the Inter-American System published in this review in June 2001]. The State failed to appear before the Court for the remainder of the proceedings.

On the merits of the case, the Commission and the petitioners first argued that the mandatory imposition of the death penalty, without considering the mitigating and aggravating circumstances of each case and the absence of judicial discretion in the application of the sentence, was a violation of Articles 4(1), 4(2), 5(1), 5(2) and 8(1), in relation to Article 1(1) of the American Convention.

The Court found that the *Offences against the Person Act*, which mandates the application of the death penalty for murder disregarding the fact that this crime may have different degrees of seriousness, prevents the judicial authority from considering the basic circumstances in establishing the degree of culpability and individualising the sentence. Thereby, the Act violates Article 4(1) that ensures the right not to be arbitrarily deprived of life. In addition, by mechanically applying the death penalty to all persons found guilty of murder without judicial review of such application, the Act violates Article 4(2) of the Convention, which limits the imposition of this punishment only to the most serious crimes.

Also, under the general obligation of Article 2, State Parties to the American Convention must implement the necessary changes to ensure that domestic laws comply with their obligations under this treaty. Thus, the Court found that the mere existence of the *Offences against the Person Act* is a *per se* violation of this provision.

Second, the Commission and the plaintiffs argued that the unjustified delays in bringing some of the alleged victims in the present case to trial constituted a violation of Articles 7(5) and 8(1) of the American Convention. Also, the State's Constitution did not guarantee a trial within a reasonable time, demonstrating the State's failure to institute legislation to guarantee the standards of the American Convention in breach of Article 2 of that treaty. In addition, the Commission and the petitioners claimed that the State failed to provide effective legal aid to permit some of the alleged victims to bring constitutional motions before domestic tribunals, thereby violating Articles 8, 25, and 1(1) of the Convention.

To determine the issue of trial within a reasonable time, the Court traditionally follows a three-fold test initially developed by the European system, according to which the complexity of the case, the procedural activity of the interested party, and the conduct of the judicial authorities are to be taken into account to establish the reasonableness of a proceeding. In the case under analysis, however, the Court appears to have decided that the prolonged delay in the victims' trials, in itself, constituted a violation of the right to be tried within a reasonable time as provided for in Articles 7(5) and 8(1) of the American Convention. In addition, the domestic laws in Trinidad and Tobago do not recognise the right to trial within a reasonable time, thereby demonstrating that the State failed to bring its legislation into compliance with the standards of the American Convention. Thus, the Court ruled that the State violated Articles 7(5) and 8(1), in relation to Articles 1(1) and 2 of that treaty.

The Court also found sufficient evidence to conclude that the alleged victims did not have access to adequate legal assistance for the effective presentation of constitutional

motions challenging violations to their basic due process rights. Though the laws of Trinidad and Tobago ensure the right to present constitutional motions, the State impeded the effective use of this remedy by failing to provide appropriate legal aid to the alleged victims. Therefore, the State was in breach of the rights to a fair trial and to an effective remedy as protected by Articles 8 and 25, in relation to Article 1(1) of the American Convention.

Finally, the Court also drew attention to the fact that the Constitution of Trinidad and Tobago provides that no law in force prior to the adoption of the State's Constitution of 1976 may be the object of a constitutional challenge. The Court reasoned that the law at issue in this case, the *Offences against the Person Act*, 'is incompatible with the Convention and thus any provision that establishes that Act's immunity from challenge is likewise incompatible, by virtue of the fact that Trinidad and Tobago (...) cannot invoke provisions of its domestic law as justification for failure to comply with its international obligations'.

Third, the Commission and the petitioners asserted that the inhumane conditions of the detention centers constituted a violation of Articles 5(1) and 5(2), in connection with Article 1(1) of the American Convention. These articles protect the physical, mental, and moral integrity of a person. They also prohibit, *inter alia*, cruel, inhumane, or degrading punishment or treatment, mandate the segregation of the convicted and accused, and obligate the State to make an attempt to reform the accused.

On the basis of the expert testimony submitted by the Commission and the petitioners, the Court concluded that the conditions in the detention facilities impinged on the physical and moral integrity of the alleged victims. These conditions, which affected the alleged victims before and after they were convicted, constituted cruel, inhumane and degrading treatment in violation of Articles 5(1) and 5(2), in relation to Article 1(1) of the American Convention.

Finally, the Commission and the petitioners claimed that the State did not provide an effective procedure for granting amnesty, pardon, or commutation of sentences, thereby violating Article 4(6) of the American Convention. This article grants persons sentenced to death the additional right to request amnesty, pardon, or commutation of sentence before a competent authority. The State's Constitution provides for an Advisory Committee on the Power of Pardon in charge of considering and making recommendations to the Minister of Natural Security as to whether a person sentenced to death should benefit from the President's discretionary power of amnesty, pardon or commutation of sentence. However, the domestic law does not prescribe guidelines for the authorities to exercise that discretion and does not guarantee offenders an effective opportunity to participate in the process.

The Court concluded that the State lacked procedural standards to ensure the alleged victims' right to request amnesty, pardon, or commutation of sentence. The individual mercy petitions recognised in the State's Constitution should be exercised through fair and adequate procedures that respect minimum due process rights as prescribed in Articles 4(6) and 8 of the American Convention. These provisions place a positive duty on the State to implement a fair and transparent procedure to ensure that persons sentenced to death may submit all favourable evidence and effectively participate in such a procedure. Since Trinidad and Tobago's procedure for granting mercy was

characterised by a lack of transparency, lack of available information, and lack of participation by the victims, the Court found that the State had violated Articles 4(6) and 8, in connection with Article 1(1) of that treaty.

As stated earlier, the Court issued a provisional measure, requesting the State to preserve the life of Joey Ramiah while his case was pending in the Commission and later in the Court. The State failed to comply and executed the alleged victim. The Court held that this action constituted an arbitrary deprivation of the right to life, thereby violating Article 4 of the American Convention. In its assessments, the Court reiterated that the State may not invoke provisions of its domestic law to justify a failure to comply with its international obligations.

With respect to reparations awarded under Article 63(1), the Court held that the State must refrain from the future application of the *Offences against the Person Act*. Also, in accordance with Article 2 of the American Convention the State must bring its laws into compliance with this treaty and international human rights norms within a reasonable time. The State must undertake legislative reform to establish different categories of murder that account for the particular circumstances of the crime and the offender. The Court also ordered that once reforms are implemented, the alleged victims should be retried in light of the new legislation. In addition, the Advisory Committee must resubmit the cases of the victims to the authority competent to render a decision on mercy, which should be conducted in accordance with the due process guaranteed in the American Convention. Furthermore, as part of the reparations, the Court held that regardless of the outcome of the new trials, the State should refrain from executing the victims. Moreover, the Court ordered the State to bring prison conditions into compliance with the relevant international human rights norms.

Additionally, the Court awarded USD 50,000 to the wife and son of Joey Ramiah and USD 10,000 to his mother as compensation, on the ground of equity, for the arbitrary deprivation of his life while he was under the protection of provisional measures issued by the Court. Finally, the Court awarded the total sum of USD 13,000 for the expenses incurred by the representatives of the victims in the course of the international proceedings before the Court.

## V AFRICA

RACHEL MURRAY

### I ORGANIZATION OF AFRICAN UNITY/AFRICAN UNION

The Council of Ministers met at their 76<sup>th</sup> Ordinary Session in Durban, South Africa, from 28 June - 6 July 2002. During this session they held a Special Session on the African Union from 1 - 2 July to finalise the transformation of the Organization of African Unity (OAU) into the African Union (AU) so far, examining the Draft Rules of Procedure of the Assembly, Executive Council and Permanent Representatives' Committee and Statutes of the Commission; and considering the Mechanism for Conflict under the OAU. The deliberations of the Ordinary Session resulted in a number of