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Inter-American System

Claudia Martin

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V INTER-AMERICAN SYSTEM

CLAUDIA MARTIN

During the period covered by this report, the Inter-American Court of Human Rights has issued three decisions, one on reparations in the *Las Palmeras* Case, and two on the merits in the *Cantos* and the *Five Retired Persons* cases. A short description of these last two cases is included in this report. In addition, this report also covers a description of the most important issues reviewed by the Court in Advisory Opinion 17.

Finally, it is worth noting that the Court is currently in the process of deciding whether it will take up a request for a new Advisory Opinion submitted by Mexico. Advisory Opinion 18 raises issues related to the working rights of immigrants residing in countries of which they are not nationals, in particular those that hold an irregular immigration status.

The full text of the reported decisions and the information regarding Advisory Opinion 18 can be found on the website of the Inter-American Court of Human Rights at www.corteidh.or.cr.

I. Cantos vs Argentina Case, Judgment of 28 November 2002

The Inter-American Commission on Human Rights ('Commission') submitted this case against the Argentine Republic ('State') alleging violations of the rights of José María Cantos, the owner of an important business group in the Santiago del Estero province of Argentina, citing the rights to a fair trial and to judicial protection contained in Articles 8 and 25 of the American Convention on Human Rights ('American Convention') and the right to property established in Article 21, all of them in relation to the obligation to respect and ensure provided in Article 1(1) of that treaty.

Mr. Cantos' businesses suffered financial losses due to a Revenue Department ('Department') search of his administrative offices and seizure of his business documents, in March 1972, based on alleged violations of the Stamp Act. As a result, Mr. Cantos filed multiple actions against the Department. Subsequently, Mr. Cantos was subjected to 'systematic persecution and harassment by State agents', including *incommunicado* detention of himself and his minor sons, and the commencement of multiple criminal charges against him, all of which resulted in acquittals.

On 15 July 1982, the Government of Santiago del Estero signed an agreement with Mr. Cantos, acknowledging its debt to the company and establishing compensation and terms of payment. Upon the expiration of the agreed time period for payment, Mr. Cantos filed suit against the province and the State in the Argentine Supreme Court on 4 July 1986. The representatives of the Province and the State entered preliminary objections arguing that the agreement was illegitimate and invalid, and that the statute of limitations had expired on any possible cause of action that Mr. Cantos

may have had. On 4 December 1986, the Supreme Court joined the objections to the merits stating that it was necessary to determine whether the agreement was valid before applying the appropriate statute of limitations.

On 3 September 1996, the Supreme Court rejected the case, holding that the statute of limitations barred litigation on the agreement, and ordered Mr. Cantos to pay costs totaling approximately USD 140,000,000.00, which included filing fees and the fees of the attorneys and experts who participated in the proceedings. Further, due to his failure to pay the judicial fees, a 'general restraining order' was issued, preventing Mr. Cantos from engaging in business.

On 7 September 2001, the Inter-American Court of Human Rights ('Court') pronounced its judgment on preliminary objections posed by the State. The State's first objection opposed the Court's competence to hear the case, arguing that the rights at issue were those of a legal entity and thus not protected under the Convention. The State argued that Article 1(1) of the Convention refers to the rights of 'persons', and that Article 1(2) states that '[f]or the purpose of th[e] Convention, 'person' means every human being'. The Court rejected this argument based on the premise that, under specific circumstances, the human rights protections of the Convention extend to persons whose rights are 'encompassed in a legal figure or fiction created by the same system of law', such as the case of a corporation.

The State further argued that the Court did not have jurisdiction to hear this case because it did not have competence *rationae temporis*. The State supported this position with the argument that upon its ratification of the American Convention on 5 September 1984, it recognised that the Court's jurisdiction 'would only take effect with regard to acts that occurred after the ratification of the said instrument'. The Court held that it only had jurisdiction over all events that took place after the State's ratification of the American Convention; therefore, it decided that it would only consider the violations to this treaty that might have arisen out of the litigation of the case before the Supreme Court.

With regard to allegation of violation of Article 8 (right to a fair trial) of the Convention, the Commission argued that the procedures followed by the Supreme Court were in violation of the right to a hearing 'within a reasonable time'. The Commission supported this argument, asserting that although the case was complex and the Supreme Court requested the gathering of a large body of evidence, it finally decided the case on a procedural issue that was the basis of a preliminary objection submitted in September 1986. In its decision in September 1996, the Supreme Court held that the matter was time barred without taking into account that evidence and in complete disregard for the principle of 'procedural economy'. With respect to the procedural activity of the plaintiff, the Commission argued that, with the exception of a postponement that occurred as a result of an attempt by Mr. Cantos to settle the case out-of-

court, he worked 'strenuously and relentlessly' on his legal suit. Finally, the Commission alleged that the judicial authorities delayed the proceedings on several occasions either by suspending proceedings or by taking excessive time to make decisions on procedural aspects of the case.

The Commission further argued that while Mr. Cantos petitioned the Supreme Court for permission to litigate without the advance payment of filing fees, his requests were denied five times. The Commission argued that Mr. Cantos' petitions should have been granted, as they are guaranteed under Article 8 of the Convention. The fact that Mr. Cantos was made to pay the expenses of the 'needless prosecution and proceedings', the Commission argued, was a violation of the right to recourse in a court of law under Article 25 of the Convention.

The Commission also argued that the State violated Mr. Cantos' due process rights recognised in Articles 8 and 25 of the Convention, by 'den[ying] the legal efficacy of the agreement that the *de facto* Governor had signed with Mr. Cantos'. The Commission alleged that the Supreme Court's failure to arrive at the objective truth was due to its failure to attend to relevant arguments and evidence.

Last, the Commission requested that the Court hold that the State had violated Articles XVIII (right to a fair trial) and XXIV (right of petition) of the American Declaration of the Rights and Duties of Man ('American Declaration').

The State attempted to rebut these arguments, in turn arguing that there was no violation of the reasonable time principle despite the fact that the proceedings spanned the course of ten years. The State argued that in an 'ordinary civil action' proceeding, such as the proceeding brought by Mr. Cantos, it is the duty of the plaintiff to move the case forward. The State asserted that the time required to decide a case as complex as the one under analysis is five years. However, given the fact that Mr. Cantos failed to move the case along for a total of an additional five years, the final decision was only reached ten years after the petition was initially submitted to the Supreme Court. In regard to the complexity of the case, the State contended that while the Supreme Court's decision was ultimately that the case was time-barred, it was necessary for this Court to examine the evidence surrounding the legitimacy of the agreement to decide that matter. Once the Supreme Court decided that the agreement was invalid, it then applied the applicable statute of limitations to the facts. The State further argued that the Supreme Court issued timely responses to all of Mr. Cantos' petitions, 'no matter how out of order or dilatory they may have been'.

With respect to the issue of the imposition of the payment of judicial fees by Mr. Cantos, the State asserted that under Argentine law 'the filing fee shall be the costs of trial and shall ultimately be paid by the parties, at rates that the law shall dictate'. The State asserted that the denial of Mr. Cantos' applications for a waiver of filing fees did not in any way impede his access to the courts, since his failure to pay the fees did not affect the delivery of an

opinion by the Supreme Court. In the same vein, Argentine law provides that professional fees are to be percentages of the amount of relief claimed. Therefore, the amount set by the Supreme Court was based on the large amount of relief that the petitioner was claiming.

Finally, regarding the Commission's arguments under the American Declaration, the State asserted that the Court did not have competence *ratione materiae* to apply such an international instrument in a contentious case.

The Court first referred to the application of the American Declaration to this case. In that respect, it stated that since the alleged violations of the Declaration referred to acts that took place before the State accepted the contentious jurisdiction of the Court, it did not have to rule on such allegations. Instead, the Court decided that it would only apply the American Convention.

After highlighting that Articles 8(1) and 25 of the American Convention protect the right of access to a court, the Court held that the court fees and consequential late fees imposed on the victim in this case were unreasonable and therefore a violation of those provisions. To support this holding, the Court asserted that while the right to access to the courts is not absolute, the limitations imposed must be proportional to the aims sought. In this case, the Court found that there was no proportionality between the fees and the aims sought by Argentine law. Further, the Court held that the right to access to the courts is not satisfied by the mere fact that a final ruling is pronounced by a court. The risk of being forced to pay excessive sums compounds the impediment to access to the courts. The Court applied the same reasoning in finding that the way in which professional fees were calculated imposed a disproportionate burden on Mr. Cantos.

Dealing with the issue of the right to obtain a decision from the courts within a reasonable time, the Court held that considering the 'complexity of the case and the plaintiff's failure to take action to move the case forward, the overall duration of the litigious proceedings would not be significant enough for a finding that the articles that protect access to the courts and judicial guarantees have been violated'.

The Court further found that the judgment of the Supreme Court of Argentina did not *per se* violate the Convention. The Court reasoned that this would be the case, only if the judgment was arbitrary. The Court found that the judgment was based on an application of the law of nullity and validity of legal acts and thus not arbitrary.

In relation to the violations found by the Court, it relied on Article 63(1) to determine that the State was obligated to pay reparations to Mr. Cantos and end the consequences of the violations.

In applying this provision, the Court ordered the State to: (1) forgive the filing fee and any related fines; (2) set a reasonable honoraria for the lawyers that participated in the domestic proceedings; (3) pay the fees and costs of

all experts and attorneys of the State and the Province; and (4) lift all attachments, encumbrances, and other measures previously imposed to guarantee payments by Mr. Cantos. The Court did not order 'moral reparations' for the suffering of Mr. Cantos and his family, contending that the Court's judgment in his favor represents, in itself, a type of satisfaction and therefore such moral reparation.

II. 'Five Retired Persons' (Cinco Pensionistas) Case vs Peru, Judgment of 28 February 2003

The Inter-American Commission on Human Rights submitted this case against Peru ('State') alleging violations of the rights of five retired individuals to property (Article 21), judicial protection (Article 25), and progressive development (Article 26) under the American Convention, all in relation to the general obligations to respect and ensure (Article 1(1)) and to adopt all necessary domestic measures (Article 2) to guarantee the rights protected in that treaty. Petitioners also argued a violation of the right to a fair trial (Article 8) under the American Convention.

The victims in this case, Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Alvarez Hernández, Reymert Bartra Vásquez and Maximiliano Gamarra Ferreyra, worked in the *Superintendencia de Banca y Seguros* ('SBS'), an autonomous agency of the State in charge of supervising the functioning of banks and insurance companies, for more than 20 years and retired between 1975 and 1990.

In 1981, the organic law of SBS amended the applicable rules that regulated labour relations in this agency. Until then, workers' rights at SBS were regulated by the rules applicable to public employees; in the future, however, labour relations were to be regulated by the rules applicable to workers in the private sector. This amendment included an exception for a group of workers whose retirement plans were regulated under Decree 20.530, who will be allowed to remain under the public employee regulations or to move on to the new system. The petitioners in this case decided to continue with the old system and therefore remained subject to the application of Decree 20.530 in relation to their pension rights. Decree 20.530 gave retired workers the right to a pension in an amount that would be adjusted according to the salary increases received by those employees occupying the same or analogous positions occupied by the retirees at SBS at the time they decided to retire.

Until April and September 1992, the victims in this case received pension payments that were in agreement with the rules provided in Decree 20.530. Afterwards, however, the amount of their pensions was reduced 78 per cent without prior notice or other legal notification. In October 1992, the State adopted Decree-Law 25.792, in which Article 5 provided that retired workers from SBS that had previously benefited from Decree Law 20.530 would be in the future paid by the Ministry of Economy and Finances and that their

pension amounts would be fixed in accordance with the salary received by the employees of such agency. The application of Decree Law 25.792 to the victims in this case provided legal justification for the reduction of the amount of their pensions.

Petitioners filed multiple *amparo* actions against SBS, which were granted by the Peruvian courts. Though those courts ordered SBS to reinstate the payment of the amount that they had received until 1992, this institution failed to comply with the orders. On January 2002, the Peruvian Congress passed a law that derogated Article 5 of Decree-Law 25.792. Afterwards, SBS issued resolutions recognising the right of the five victims in this case to have the amount of their pensions set according to the rules of Decree Law 20.530. In addition, it reintegrated the sums of money that they had not received from 1992 until 2002, without the payment of interest. Though the five petitioners in this case have been paid their pensions accordingly since then, SBS has cautioned them that its decision was subject to the outcome of the Court's final ruling in this matter.

The Commission and the petitioners argued that the reduction of the pensions without any prior notice was a violation of the right to property as provided by Article 21 of the American Convention. In addition, as established in Article 29(b) of the American Convention, the scope of the right to property must be determined in accordance with the provisions of the Peruvian Constitution and the interpretation of domestic courts, which have stated that pension rights are recognised property rights that cannot be altered by subsequent amendments to the social security laws. Moreover, the Commission and the petitioners alleged that the reduction of the victims' pensions was not based on public utility or the social interest as requested by Article 21, that the measure was adopted in violation of the right to a fair trial and that it was unreasonable.

The State argued that there is no violation of the right to property because this right can be limited on the basis of the social interest. The pensions of the five petitioners were reduced in accordance with the appropriation law of 1991, postponed until 1992, which was declared constitutional by the Peruvian Constitutional Tribunal. Therefore, the application of Article 5 of Decree Law 25.792 had no effect on the reduction of the amounts of their pensions. The only action that was based on that decree law was the transfer of payments from SBS to the Ministry of Economy and Finance, a decision that was legally permissible because the public administration has the power to establish the agency that would be in charge of paying the pensions of the retirees. Furthermore, that decision was based on the fact that SBS had adopted the scheme of the private sector to regulate its labour relations and the five petitioners in this case had decided to remain in the old scheme that was only applicable to public employees.

The Court ruled that the issues at stake with respect to the right to property in this case were: 1) whether pensions can be considered a

recognised property right and the legal meaning of such statement; and 2) whether there are parameters the State had to follow to determine the amount of the petitioners' pension and, in such case, whether or not those pension rights could be the subject of permissible limitations.

With respect to the first issue, the Court stated that both the Peruvian Constitution and the Peruvian Courts interpreting the provisions of that Constitution had concluded that pension rights are recognised property rights of which petitioners cannot be deprived because they are considered as forming part of their assets. Therefore, and in application of Article 29(b) of the American Convention, which provides that '[n]o provision of this Convention shall be interpreted as (...) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party', the Court ruled that Article 21 of that treaty in this case had to be interpreted according to the scope of the Peruvian domestic law. On those bases, it concluded that petitioners' pension rights were in fact recognised property rights, which encompassed the right to have the amount of those pensions to be adjusted according to the salary increases received by current employees occupying the same or analogous positions occupied by the retirees at the time they retired.

In relation to the second issue, the Court stated that though there was a certain ambiguity as to the legal parameters to be followed to adjust the pensions of the former SBS employees, the State followed for years a practice of adjusting those pensions according to the salary increases received by current employees of SBS occupying similar positions to those occupied previously by the petitioners. This practice was also confirmed in different decisions adopted by the Peruvian Courts in the claims filed by those petitioners.

Furthermore, the Court recognised that the right to property can be subject to permissible limitations under Article 21 of the American Convention. In that respect, pension rights, as property rights, can also be subject to those limitations; therefore, under certain circumstances, States may justify the need to reduce the amount of pensions or subject them to other changes. However, those limitations can only be applied when they are prescribed by law, are implemented in compliance with that law, and further one of the aims provided for in Article 21 of the American Convention, that is to say public utility or the social interest. From the facts of this case, the Court concluded that the Peruvian State failed to comply with those requirements and therefore the reduction of the petitioners' pensions was arbitrary. In addition, the State failed to comply with the decisions of the Peruvian tribunals.

Even though the State remedied the situation of the petitioners and recognised their right to receive pension amounts equivalent to the salary received by current SBS employees, the Court still found a violation of the right to property under Article 21 of the American Convention. In addition,

it ruled that the decision of SBS to condition payment of the pensions on the outcome of the final ruling of the Court should have no effect for the future given the conclusions reached by the Court in this case.

The Commission and the petitioners also argued a violation of the right to an effective remedy as guaranteed by Article 25 of the American Convention. They alleged that the State failed to comply with the decisions issued by the Peruvian courts and therefore it violated its obligation to ensure that remedies granted to the victims be enforced, as requested by the abovementioned provision. In addition, though the State finally began to comply with those decisions in 2002, it conditioned its compliance on the outcome of the final ruling of the Court. Thus, according to the Commission and the petitioners, there has not been yet full compliance with the orders issued by Peruvian courts.

The State rejected those arguments, alleging that orders issued by the Peruvian courts against SBS were in fact complied with by that institution. In fact, after the adoption of those orders, SBS paid petitioners the claimed amount of their pensions until Decree Law 25.792 was passed. That decree established that petitioners' pensions would be paid in the future by the Minister of Economy and Finance and that the amount of those pensions would be set in accordance with the salaries received by the employees of that agency. Petitioners, argued the State, failed to challenge that decree and to bring suit against the Minister of Economy and Finance. In consequence, since they failed to exhaust domestic remedies, they cannot claim that the Peruvian State has not complied in full with the decisions of the domestic courts. Thus, there is no violation of the right to an effective remedy.

To determine whether or not there was a violation of Article 25 of the American Convention, the Court analysed the facts argued according to three different periods of time. First, the Court reviewed the facts that transpired since petitioners' pensions were reduced until April-October 1992. In that period, as a consequence of the decisions issued by Peruvian courts, SBS proceeded to pay petitioners the same amount they had received before the reduction took place. SBS paid petitioners' pensions until the adoption of Decree Law 25.792 which transferred such payment to the Minister of Economy and Finance. During that period the Court found that the State had in fact enforced the decisions of domestic courts and that no violation of Article 25 had taken place.

Next, the Court analysed the facts that occurred between the adoption of Decree Law 25.792 and the derogation of Article 5 of that decree, which applied to the petitioners in this case, in January 2002. The Court concluded during that period that the State failed to enforce the decisions of the domestic courts. The argument that the petitioners did not challenge the decree or bring suit against the Ministry of Economy and Finance was rejected because domestic courts did in fact order both the SBS and the Ministry of Economy and Finance to comply with their decisions. Therefore,

the Court found that there was a violation of Article 25 during this period of time.

Finally, the Court reviewed the period of time that started with the derogation of Article 5 of Decree Law 25.792 and the subsequent resolutions of SBS establishing the reinstatement of the payment of petitioners' pensions according to the claimed amounts and continued until the decision of the Court. During this period, the State complied with the decisions of the domestic courts and therefore the Court found no violation of Article 25 of the American Convention.

The Commission and petitioners also alleged a violation of Article 26 of the American Convention which essentially provides for an obligation to adopt measures with a view to achieving progressively the full realisation of the economic, social and cultural rights set forth in the Charter of the Organization of American States. They argued that this obligation implies that States must move progressively toward the full realisation of economic, social and cultural rights, including the right to social security. Any regressive measure that affects those rights, unless it is absolutely necessary, reasonable and justified on the basis of the interest of society, violates the progressive obligation set forth in Article 26. The reduction of petitioners' pensions was a regressive measure which was not justified by the State though it affected petitioners' right to social security. Thus, the Commission and petitioners argued that there was a violation of Article 26.

The State rejected this argument alleging that petitioners' right has not been affected and that no regressive measure has been implemented because they are currently receiving pensions that are equivalent to the salaries paid to current employees of SBS. Moreover, the obligation of Article 26 cannot be interpreted in a way that prevents States from establishing permissible limitations to pension rights.

The Court concluded that the duty of progressive development provided for in Article 26 of the American Convention must be analysed in the context of the access to economic, social, and cultural rights, including the right to social security, by the general population and not in light of the particular situation of a small group of individuals as is the case in this complaint. Therefore, the Court rejected the request to rule on the progressive development of economic, social and cultural rights in Peru, in the framework of this case.

Finally, petitioners but not the Commission alleged a violation of the right to a fair trial, in particular the right to a competent, independent and impartial tribunal as protected by Article 8(1) of the American Convention. They argued that their cases were transferred to provisional judges as part of the reorganisation of the judiciary that took place in 1994 and taken out of the jurisdiction of the established courts. These provisional judges were highly dependent on the Executive branch and therefore lack the necessary impartiality and independence to satisfy the standards of fair trial guaranteed in that provision. The Commission, on the other hand, alleged

that petitioners could raise this new allegation before the Court because it was based on the same facts submitted by the Commission in its petition. In addition, the Court could also consider the application of this provision even it had not been raised by the parties to this case on the basis of the *iura novit curia* principle.

The Court held that it is impermissible for the parties to raise new facts beyond those included in the initial petition presented to this tribunal, with the exception of those subsequent facts that took place after such petition was submitted. With respect to the law, however, petitioners have the power to argue the violation of additional rights to those alleged by the Commission in its petition, as long as the petitioner's arguments are based on the same set of facts submitted to the Court. This holding is based on the fact that individuals are the ones entitled to claim all the rights enshrined in the American Convention; a different interpretation would only establish an undue restriction to their condition of subjects of international law.

Notwithstanding this statement, the Court held that it was not necessary to decide on the alleged violation of Article 8 of the American Convention.

The Court ultimately found additional violations of the general obligations to respect and ensure provided in Article 1(1) and to adopt all the necessary measures to ensure the protection of the rights contained in the American Convention guaranteed in Article 2 of that treaty.

Lastly, the Court ruled under Article 63(1) that the State had to make reparations for the violations of the rights protected under Articles 21, 25, 1(1) and 2 of the American Convention. In that respect, it held that though its ruling constituted in itself a type of reparation, the State still had to compensate to the non-material damage suffered by the petitioners in this case; thus, it ordered the State to pay, within a one-year period, USD 3,000 each as reparation for such damages. Also, the Court ordered the State to pay, within six months, USD 13,000 for expenses and USD 3,500 for costs incurred in the proceedings. Furthermore, the Court held that any monetary consequences that could arise out of the violation of the right to property of the petitioners should be decided according to domestic law and by domestic courts. Finally, the Court ordered the State to proceed to investigate and sanction those responsible for not enforcing the decisions adopted by the Peruvian Courts.

III. Advisory Opinion No. 17, Legal Status and Human Rights of the Child, adopted on 28 August 2002

On 30 March 2001, under Article 64(1) of the American Convention on Human Rights, the Inter-American Commission on Human Rights requested the Inter-American Court of Human Rights to issue an Advisory Opinion interpreting whether Articles 8 and 25 of that Convention impose limitations to the discretion of States to adopt special measures of protection for children, as provided in Article 19 of that treaty. In addition, it requested

that the Court express general and valid criteria on this matter in conformity with the framework of the American Convention.

The Commission made its request on the basis of certain interpretative principles applied by some States when adopting special measures for children that may weaken their right to a fair trial. These interpretative principles include: (1) minors are unable to fully understand their actions and thus their participation, personally or through a representative, is reduced in civil and criminal proceedings; (2) decision-makers assume that minors are unable to understand their actions fully and attach less importance to procedural guarantees when deciding the 'best interests of the child'; (3) the child's family situation becomes a central factor in deciding the child's responsibility when placed in administrative or criminal proceedings; and (4) the child's situation may be used to justify measures usually reserved for criminal punishment.

The Commission also requested that certain specific measures be analysed for their compatibility with Articles 8 and 25 of the Convention, including: (1) decisions, absent due process, to remove children from their families based on the family's financial inability to provide for education or maintenance; (2) deprivation of the liberty of children based upon a determination that they have been abandoned or are prone to fall into situations of risk or illegality; (3) the acceptance of criminal confessions from minors without due process; (4) lack of representation of minors in judicial or administrative proceedings; and (5) determination of the rights and liberties of minors without the right to be heard personally.

The Commission initially requested that the Court interpret certain provisions of the American Convention, but later it expanded its request to include the interpretation of other treaties, in particular the Convention on the Rights of the Child, alleging that these treaties could contribute to establish the scope of the provisions of the American Convention. The Court held that under its advisory jurisdiction it can interpret any human rights treaty in which a member State of the Inter-American System is a Party; therefore, considering that the Convention on the Rights of the Child has been ratified by almost all the members States of the Organization of American States, the Court asserted its jurisdiction to deal with the issues submitted by the Commission. In addition, the Court suggested that it would also take into consideration a broader international *corpus iuris* regarding the rights of the child in interpreting Article 19 of the American Convention.

Ultimately, the Court concluded that there were no other procedural considerations to reject the request and asserted jurisdiction to proceed with the advisory opinion submitted by the Commission.

With respect to the structure of its opinion, the Court decided first to analyse certain substantial concepts that would provide the appropriate framework and then to consider the procedural matters submitted for its

consideration in the Commission's request. In that context, it analysed the following issues:

A. *Definition of Child*

To fulfill the aims of the Advisory Opinion, the Court enunciated parameters for the term 'child', as used, but yet undefined, in Article 19 of the American Convention. Relying on the Convention of the Rights of the Child ('CRC'), the Beijing Rules, the Tokyo Rules, the Riyadh Guidelines, and its own case law for guidance, the Court chose to include all those under the age of 18 in the definition of child. In addition, it concluded that those considered children are subjects entitled to rights, not only objects of protection.

B. *Equality*

The Court further found it necessary to define the meaning and scope of the 'principle of equality' with respect to children. In that regard, it stated that not all differences in treatment were *per se* discrimination, nor were they *per se* violations of the Convention. Thus, differentiated treatment granted to minors on the basis of their special conditions cannot be considered discriminatory, but rather a measure to better ensure the full exercise of the rights recognised for children. To support its conclusion, the Court cited one of its previous holdings, reasoning that 'there would be no discrimination (...) when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule'.

C. *Best Interests of the Child*

The Court emphasised throughout the Advisory Opinion that decisions affecting children should be made with reference to the 'best interests of the child'. To ensure that this fundamental principle is observed, both Article 3 of the CRC and Article 19 of the American Convention require that States provide 'special care' and adopt 'special measures of protection' for children. In the end, the Court concluded that 'best interest of the child (...) entails that children's development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children's lives'.

D. *Duties of the Families, Society, and the State*

The Court first asserted that the adoption of special measures of protection for children is a responsibility of the State, the family, the community and the society to which the children belong. In addition, it stated that the State

should strive for the protection of minors by strengthening the unity of family, as the Court finds it to generally be the best means to ensure the rights of children. The family unit, it was held, is expected to provide the greatest protection against 'abuse, abandonment and exploitation'. With respect to the scope of the concept of family, the Court stated that it should be understood in a broad sense as including all those linked by close kinship.

The Court further asserted that children have the right to live with their family. Separation from family should only occur if there are justified reasons based on the best interest of the child to adopt such a measure. Lack of material resources of the family, for example, cannot be the only reason to support an administrative or judicial decision for separating a child from his or her family. In sum, children should remain with their families unless there are exceptional circumstances, and if so, separation should be temporary.

Next, the Court stated that to fulfill its obligations to protect children and their families, the State must put in place institutions that are properly qualified and have adequate staff, suitable means, and proven experience in such tasks.

Fourth, the Court held that in relation to children, the right to life provided in Article 4 of the American Convention includes an affirmative duty for States to adopt all necessary measures to ensure that minors' lives develop under 'decent conditions'. In addition, States must also make all possible efforts to ensure the protection of children's economic, social and cultural rights. Among them, the right to education stands out as one of the most crucial obligations that States must comply with in respect to children because full exercise of this right 'contributes to the possibility of enjoying a dignified life and to prevent unfavorable situations for the minor and for society itself'. In conclusion, the Court referred to education, along with health care, as the 'key pillars' to ensure the enjoyment of a decent life by children.

Finally, according to Articles 19, 17 and 1(1) of the American Convention, States have positive obligations to adopt all the necessary measures to protect the rights of children. In particular, States must protect children from mistreatment by any source, including public authorities, individuals, or government entities. Moreover, in addition to civil and political rights, States have a positive duty to ensure children's economic, social and cultural rights. Lastly, States must recognise the crucial role of family for the well-being of children by providing special measures to strengthen family unity.

E. Judicial or Administrative Proceedings Involving Children

In relation to the procedural issues raised by the Commission in regard to the judicial or administrative proceedings involving children, the Court stated the following considerations:

1. The Court stressed the 'immaturity and vulnerability' of children, stating that they require protection to exercise their rights. As to judicial and administrative proceedings, the Court recognised that children interact within these processes differently than adults, legitimising differences in treatment corresponding to the different situations of the participants. Further, the Court concluded that while due process rights apply to all persons, those same rights require additional measures in order to be enjoyed by children.

2. The Court took notice of the fact that within the group 'children' there is great diversity in physical development and mental cognisance affecting the amount of personal participation that the child should have in proceedings. While these differences justify differing amounts of participation by children at different developmental stages, the Court asserts that the benchmark must be that there has to be 'as much access as possible by the minor to examination of his or her own case'.

3. In dealing with criminal culpability of children, the Court assessed general principles of criminal law in order to analyse the way in which the concept of children fits within these principles. The Court stated that chargeability, a person's capacity for culpability, is necessary in order to file charges against a person. It follows that since children below a certain age are generally considered to lack capacity, those children should not be criminally charged.

4. In addition, the prosecution of criminal actions committed by children requires that specialised jurisdictional bodies be put in place in order to take the special needs of children into account. The most fundamental principle when dealing judicially with children, in a criminal context, is that juvenile crimes should be limited to only those actions which are defined as crimes. Issues of poverty, disease, abandonment, family, school, and social adaptation problems, and other such issues should not be treated as crimes in the case of children, as they are not treated as such with regard to adults. Also, the Court clearly mandated that children should be heard in judicial bodies distinct from those in which adult criminal matters are heard.

Meanwhile, the Court accepted the fact that there are some situations in which it is necessary and in the best interests of the child that he or she be placed in the care of institutions with qualified staffs. Such situations include: children exposed to great risk or harm due to deviant behaviour, health problems, poor family environment, or insufficient education. In such situations, the Court respects the rights and responsibilities of parents with regard to their children and asserts that these may not be altered arbitrarily. Any such decision should be adopted in agreement with the

existing law, be reasonable, respect the best interest of the child and be subject to challenge to verify its suitability and legitimacy.

5. Additionally, the Court discussed the fact that the right to a fair trial, mandatory whenever personal liberty is at issue, is equally fundamental in the case of children. The Court clarified the extent of the rules of due process and the right to a fair trial by stating that these rules must apply in all proceedings conducted by the State or under its supervision, judicial or otherwise. Among the due process guarantees that must be respected in the case of proceedings in which children are involved are the right to a competent, independent and impartial court, the right to appeal and the right to an effective remedy.

The Court noted that due process concerns arise most commonly with children in the context of statements made by them. In these situations, the Court laid out necessary procedural safeguards, such as the possibility of remaining silent, the assistance of counsel, and the statement being made before the legal authority empowered to receive it. In evaluating statements of children, the Court highlighted the importance of underscoring the age and experience of the child, taking into account the fact that at certain ages, children may not be able to understand what they are saying. While this would apply to testimony generally, the Court cautions that this would not be an issue should the child be the accused in a criminal matter because children are excluded from participating as the accused in criminal proceedings.

Another important due process guarantee that must be respected in proceedings in which children are involved is the right to adversarial proceedings. Either the child or his or her representative should participate in all procedural acts, in particular in the collection and challenge of evidence and the statement of arguments.

An additional consideration in the case of children is that of privacy. While much administrative and judicial information is public, the Court stated that when the proceedings are addressing the issues of a child, the public nature of the proceedings should be altered. The Court did caution, however, that this should not affect the collection of evidence and other such matters, but be limited to external observance.

Finally, the Court recognised the importance of alternative mechanisms to resolve controversies in which minors are involved, but stated that those proceedings must be regulated with special consideration to ensure that the rights of children not be diminished or in any way affected.