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### Inter-American System

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### III INTER-AMERICAN SYSTEM

CLAUDIA MARTIN\*

#### 1. INTER-AMERICAN COURT ON HUMAN RIGHTS

During the period covered by this report, the Inter-American Court on Human Rights (hereinafter the 'Court') issued several decisions on the merits, which include: *Moiwana Village vs Suriname*, *Yakye Axa Indigenous Community vs Paraguay*, *Fermín Ramírez vs Guatemala*, *Yatama vs Nicaragua*, *Acosta Calderón vs Ecuador*, *Yean and Bosico vs Dominican Republic*, *Gutiérrez Soler vs Colombia*, *Raxcacó Reyes vs Guatemala*, and *Mapiripán Massacre vs Colombia*. Moreover, the Court, exercising its discretion to decide whether to review requests for advisory opinions, rejected consideration of two of such requests submitted by the Inter-American Commission on Human Rights and the Government of Costa Rica, respectively.

The present report will analyse current developments in the case law of the Court regarding the compatibility of corporal punishment with the American Convention on Human Rights (hereinafter 'American Convention' or 'Convention'). Also, it will review two decisions issued by this tribunal in which it provides a far-reaching protection to the collective rights of indigenous or ethnical communities.

The full text of the decisions mentioned in this report can be found in the website of the Inter-American Court at [www.corteidh.or.cr](http://www.corteidh.or.cr).

#### Corporal Punishment

In *Caesar vs Trinidad and Tobago*, the Court examined for the first time the compatibility of corporal punishment with the American Convention. The High Court of Trinidad and Tobago condemned the alleged victim in this case, Winston Caesar, for the crime of attempted rape. He was sentenced to 20 years in prison with forced labour, in addition to 15 lashes with the 'cat with nine tails'. The State's Corporal Punishment Law allows a male delinquent over the age of 18 to be beaten with a 'cat with nine tails', or with any other object approved by the President, in addition to receiving a prison sentence. The object consists of nine cords of interwoven cotton, each cord approximately 30 inches long and at least a quarter of an inch in diameter, and is discharged on the prisoner in between his shoulders and lower back. Petitioners argued, *inter alia*, that Trinidad and Tobago's Corporal Punishment Law in itself and as applied to the victim in this case violated the right not to be subject to torture or other cruel, inhumane and degrading treatment as protected by Article 5 of the American Convention.

Similar to previous cases decided against Trinidad and Tobago, the Court asserted jurisdiction despite the State's decision to denounce the American

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Convention on 26 May 1998.<sup>1</sup> The Court held that, in conformity with Article 78 of the Convention, withdrawal does not have the effect of absolving the State of the violations it committed under the Convention prior to the date on which that withdrawal came into effect. The Court observed that the majority of the alleged facts in the claim occurred between ratification and withdrawal, with a few exceptions, and so declared it had jurisdiction to review the case.

Since Trinidad and Tobago failed to contest the claims, the Court also stated that failure to do so triggers the application of a presumption according to which facts are presumed true, provided that the evidence before the tribunal is found to be consistent with those facts. And as international jurisprudence had recognised, the absence of a party in any stage of the case does not affect the validity of the outcome. Nevertheless, the Court acknowledged that, in addition to the detriment the State was causing itself, its inaction before an international jurisdiction on human rights went contrary to the objective and spirit of the American Convention.

Articles 5(1) and 5(2) of the American Convention provide for a prohibition of torture or other cruel, inhumane and degrading treatment or punishment. Moreover, it provides all persons deprived of their liberty should be treated with the proper respect inherent to human dignity. In deciding whether corporal punishment violates the preceding guarantees, the Court took into account the international community's widespread condemnation of torture and other forms of cruel punishment as inhumane and degrading. It noted an international tendency to eradicate corporal punishment and an increase in domestic tribunals declaring it cruel, inhumane, and degrading treatment. The impermissible character of corporal punishment, in times of both war and peace, thus, led the Court to conclude that a Member State of the American Convention, in compliance with its obligations derived from Articles 5(1), 5(2), and 1(1) of the Convention, has an *erga omnes* duty to abstain from imposing corporal punishment, as well as of preventing its imposition, since it constitutes cruel, inhumane and degrading treatment, regardless of the circumstances.

In regard to the application of 'judicial corporal punishment' in Trinidad and Tobago, the Court concluded that this practice, though a reflection of institutionalised violence authorised by law, is, nonetheless, a violation of the Convention. As such, the Court held corporal punishment by flogging constitutes a form of torture and, therefore, a *per se* violation of the rights protected by Article 5(1) and 5(2) of the American Convention.

As to the particular circumstances of the victim in this case, the Court stated it was reasonable to assume that the pain and the physical damage caused by the beatings were exacerbated by the anxiety, stress and fear experienced during the period in which Mr. Caesar was waiting for his punishment in the prison, and even more so when he was exposed three or four times to the suffering of the other prisoners who underwent similar punishments. Consequently, the Court held the sentence was executed in a way that seriously humiliated Mr. Caesar, since it was done in front of at least six people and in the conditions previously specified. As such, the Court concluded that the corporal punishment applied to the victim constituted a form of torture and, as a result, a violation of his right to physical, mental and moral integrity as protected by Article 5 of the American Convention.

<sup>1</sup> The withdrawal became effective one year after, that is to say 26 May 1999. See, in general, *Hilaire et al. vs Trinidad and Tobago*, Judgement of 21 June 2002, Series C, No. 94 (2002).

Additionally, in light of the incompatibility between Trinidad and Tobago's Corporal Punishment Law and the American Convention, once the Convention was in effect for the State, the Court concluded the government should have adapted its legislation to conform to the obligations established in said agreement. Therefore, its failure to do so violated Article 2 of the Convention in relation to Articles 5(1) and 5(2) of the same.

### **Rights of Indigenous or Ethnic Communities as a Vulnerable Group**

Three recent judgements of the Inter-American Court, namely: *Moiwana Village vs Suriname*, *Yakye Axa Indigenous Community vs Paraguay*, and *Yatama vs Nicaragua*, rule on the rights of indigenous or ethnic communities and provide a broader scope of protection to those groups given their particular vulnerable nature. In this regard, in *Yakye Axa Indigenous Community*, the Court expressly stated that to effectively protect the rights of the indigenous community involved in this case, the particular characteristics that distinguish this community from the general population needed to be taken into account when establishing the scope of protection afforded by the American Convention and domestic law.

Due to space constraints and the extension of each judgement, this report will only examine the first two judgements. The *Yatama Case*, which relates to the right of indigenous communities to exercise their political rights without discrimination, will be reviewed in more detail in a future submission.

In *Moiwana Village vs Suriname*, the events transpired during Sgt. Major Désiré Bouterse's military control of Suriname from 1982 to 1987 and in the midst of an internal armed conflict with the Jungle Commando, an insurgent guerilla group that rose to oppose the authoritarian government and which operated mainly in the eastern part of the country where the victims in this case inhabited. On 29 November 1986, the village was surrounded, its property burned, its inhabitants killed, and those whose lives were spared, escaped to surrounding territories including the French Guyana. Among the dead were at least 39 victims, including men, women and children, whose remains were never recovered and their perpetrators were never brought to justice by the Surinamese Government. As a consequence of the cultural particularities of the tribal community, the injustice that resulted from the government's inaction deprived the citizens from carrying on with their lives. The survivors and the family members of those who died claimed that until justice put at ease the spirits of the dead and the proper burial rituals allowed the lives of the current members to continue on unburdened, the N'djuka tribe's beliefs prohibited them from returning to the abandoned village of Moiwana. Moreover, testimony indicated the villagers feared for their physical safety, particularly taking into account that the detective who began to carry out an investigation was killed and many other people involved in the case suffered threats to their life and had to flee the country.

The victims, their families, and organisations, such as Moiwana '86 and the Moiwana Association, persistently and frequently petitioned the government for redress. Their concerns were particularly heightened in light of approval of an amnesty law that would ultimately pardon the perpetrators. Despite all these efforts, the State failed to carry out an investigation into the facts that transpired in the Moiwana Village and award appropriate reparations to the victims or their next of kin.

In addition to addressing other preliminary objections raised by Suriname, the Court once again reviewed its jurisdictional power to hear a case involving a State that had not yet ratified the American Convention and accepted the Court's contentious jurisdiction when the violations alleged in the complaint occurred. Similar to previous cases decided on the matter, such as *Serrano Cruz vs El Salvador*, the tribunal held it would hear the facts of the case only in regard to continuing violations. Therefore, while Suriname's military attack on the village of Moiwana and the deaths that resulted from that attack could have entailed violations to the rights of the members of the N'djuka tribe, the Court stated it would limit its jurisdiction to the related continuous violations that followed Suriname's 1987 ratification. Those violations included the lack of investigation and the denial of justice, as well as the forceful displacement of the community from its ancestral lands, which the members continue to suffer.

Initially, the Court addressed the consequences of the lack of investigation and the denial of justice on the members of the community. In this respect, it ruled that failure by Suriname to carry out a proper investigation into the facts that resulted in the death of thirty-nine members of the community and the forced displacement of the survivors constituted a violation of their right to physical, mental and moral integrity on several grounds. The Court first found that the lack of a serious and thorough investigation, in addition to causing anguish for the victims and their next of kin, had a severe impact upon the Moiwana villagers given the notions of justice and collective responsibility shared by the N'djuka people. Under this cultural tradition, if a member of the tribe is deprived of his or her life, the spirit does not rest until justice is accomplished. Next, the failure of the State to return the remains of the villagers killed in the military attack or indicate where they have been buried constitutes an additional source of suffering for the N'djuka people because it prevents the community to honor their deceased loved ones according to their traditions. The N'djuka people follow specific and complex rituals that must be provided upon the death of a community member; failure to comply with those rituals is considered a profound moral transgression that may anger the spirit of the individual who died and other ancestors of the community, leading to 'spiritually-caused illnesses' that can affect the whole community. Finally, as a consequence of the lack of investigation, the members of the Moiwana community remained separated from their ancestral lands, thereby inflicting an additional cause of anguish upon those individuals who are unable to practice their customary means of subsistence and livelihood. The Court concluded that failure of Suriname to carry out an effective investigation caused the Moiwana community members to endure significant emotional, psychological, spiritual, and economic hardship, which amounts to a violation of Article 5(1) of the American Convention, in relation to Article 1(1) of this treaty.

Second, the Court addressed the impact the lack of investigation had on the forced displacement of members of the Moiwana Village from their ancestral lands. The Court considered that until justice is obtained, the members of the community will not return to reside in their lands. As long as the perpetrators of the killings are not identified and punished, the community members are unable to appease the spirits of their deceased relatives, purify their traditional land, and stop fearing other attacks will be carried out against the village. Since this situation prevents the members of the community from moving freely within the State and from choosing their place of residence, as well as deprives those members who are still exiled in

French Guyana from their right to enter and remain in their country, the Court found a violation of the right to freedom of movement, as protected by Article 22 of the American Convention. In reaching this conclusion, the Court found that the UN Guiding Principles on Internal Displacement can be used to define the scope of Article 22 in the context of forced displacement.

Third, the Court held that the State's failure to ensure an effective investigation also entailed a violation of the right of the community to use and enjoy their traditional lands. The Court applied its previous holding in the *Mayagna Awas Tingni Community* Case, recognising the right of indigenous groups to a communal right to property under Article 21 of the American Convention,<sup>2</sup> to the tribal Mowiana community. In this respect, it reasoned that the members of this community, the N'djuka people, like the indigenous groups, 'possess an "all-encompassing relationship" to their traditional lands, and their concept of ownership is not centered on the individual, but rather on the community as a whole'.<sup>3</sup> Thus, the Court concluded that the impossibility of the members of the community to return to their lands deprives them of their right to property as provided by Article 21 of the American Convention.

Following its consistent case law, the Court found that lack of an effective investigation of the facts that transpired in the Mowiana Village and punishment of the perpetrators entailed additional violations to Articles 8(1), 25, and 1(1) of the American Convention. Though the amnesty law passed in 1989 was not applied to the facts of the case, the Court anticipated that application of this law would not serve as a justification to excuse a State's compliance with the Court's orders to investigate and punish the perpetrators of human rights violations.

As part of the reparations, the Court established an amount for monetary compensation that Suriname must provide to the victims in this case. Moreover, it ordered the State to investigate the events complained of, prosecute and punish those responsible, and locate and identify the deceased's remains. Moreover, the Court disposed the State to adopt all the necessary measures to ensure the delimitation, demarcation and collective titling of the ancestral lands of the community and refrain from actions that would affect the existence, value, use or enjoyment of that property until the rights of the community are secured. Furthermore, it ordered the State to guarantee the safety of community members who decide to return to Mowiana. Also, the Court disposed the State must establish a developmental fund of USD 1,200,000 to invest on health, housing and educational programmes for the Mowiana community members. Finally, as a measure of satisfaction, it requested the State to publicly recognise international responsibility for the facts that transpired in this case, issue an apology to the Mowiana community members in the presence of the leader of the N'djuka people, and build a monument honoring the victims and place it in a suitable public location.

In *Indigenous Community of Yakye Axa vs Paraguay*, the Court examined Paraguay's efforts to process the indigenous community's claim for territorial vindication. While the parties both agreed the community was entitled to the land, the Commission argued the State had failed to guarantee this recognised right to the ancestral property given that as of 1993 the Yakye Axa's request to regain the traditional lands had been pending. Finding the State had no justification for the

<sup>2</sup> *Mayagna (Sumo) Awas Tingni Community vs Nicaragua*, Judgement of 31 August 2001 Series C, No. 79.

<sup>3</sup> *Mowiana Village vs Suriname*, Judgement of 15 June 2005, Series C, No. 124, para. 133.

delay, the Court concluded the community's inability to take possession of the land had led to its nutritional, medical and sanitary crisis, which, in turn, threatened its integrity and physical survival.

As of the end of the 19th century, the survival of the indigenous community of Yakye Axa was challenged when large areas of their traditional territories were sold through the London stock exchange. During this same time, and as a result of the acquisition of these lands by British businessmen, missionaries of the Anglican Church attempted to evangelise and pacify the community. In 1979, the Anglican Church bought several pieces of land and encouraged members of indigenous communities, including the Yakye Axa community, to relocate to the acquired farms. The transfer did not improve the living conditions of the community and its members decided to relocate back to their traditional habitat. They then initiated the process to vindicate their right to the ancestral lands according to domestic law and proceedings. Though their legal entity as a community was duly recognised by the Paraguayan State, the members of the Yakye Axa community have been unable to return to their traditional lands due to the opposition from private owners who currently hold the land in dispute. As a consequence, the members of the community have settled on the side of the highway close to their traditional lands. Since then, the members of the community live in the most strenuous conditions, without access to adequate food, housing, clean water, sanitary services, and health services. These conditions have led the members of the community to suffer from malnourishment and various diseases.

First, the Court found that the delay in the domestic proceedings as well as the failure to respect minimum due process rights in the criminal proceeding instigated against several members of the community violated Articles 8(1), 25 and 1(1) of the American Convention.

Next, the Court held that Paraguay violated the rights to property and to life as a result of its actions and omissions in this case. In determining Paraguay's violation of the indigenous community's right to property, the Court turned to Agreement No. 169 of the ILO to highlight its interpretation of Article 21 of the American Convention. According to its previous case law, the Court restated that the close relationship between the indigenous community and the land must be recognised and understood as the fundamental base of the group's culture, spiritual life, integrity, economic survival, and cultural preservation. Therefore, Article 21 must be interpreted broadly enough to encompass the protection of such a relationship.

Although the Paraguayan Constitution recognises the cultural identity of the indigenous people and the link they share to their lands, the Court observed such recognition is illusory if the land claimed by an indigenous community is not established or physically delineated. When there is a collision between individual and collective rights to property, such as in this case, Article 21 and the case law of the Court provide applicable principles to determine whether the restriction to the enjoyment of such rights by the parties in dispute is compatible with the Convention. Though States must take into account that by failing to recognise the ancestral rights of the community members, they could be affecting other basic rights, such as the right to cultural identity, it does not imply that community rights must prevail in every circumstance. The Court noted that when devolution of the land is not possible, the handing over of alternative lands, the payment of a just indemnification, or both, are alternatives that must be agreed upon with the

concerned communities respecting their consultation process, values, uses and customary law, as provided by Agreement 169 of the ILO.

However, in this case the State failed to follow a consultation process with the community, which resulted in its inability to reach an agreement with the community regarding the offer of alternative lands. Consequently, even though Paraguay recognised the right to property of the communities, its failure to adopt adequate legal means to guarantee the effective use and enjoyment of land to the Yakyé Axa community constituted a violation of Article 21 of the American Convention.

In addition, the Court stated that the fundamental nature of the right to life makes unacceptable any restrictive interpretation of the scope of this right. Thus, the right to life not only prohibits an arbitrary deprivation of life, but also encompasses a duty to avoid creating conditions that would prevent or impede access to a dignified existence. In this context, the Court held a State must adopt concrete and positive measures that are oriented toward the satisfaction of the right to a dignified life, especially when it involves people in risky and vulnerable situations. And in deciding whether the State generated conditions that further impeded the community members' access to a dignified life, the Court concluded that the community lived in extreme misery. The community's displacement caused them to have grave nutritional difficulties, principally as a result of inadequate environmental conditions on the land they occupied. Additionally, the members could not access adequate housing supplied with the basic services, such as clean water and sanitary services, as well as adequate education for the children and medical attention. By taking into account the aforementioned, the Court, therefore, held Paraguay had violated the right to a dignified existence. Although the Court recognised Paraguay's initiatives to provide certain basic needs to the community, the Court considered these measures were insufficient to reverse the indigenous community's vulnerable state, given the particular gravity of the case. The State argued, however, that the community members were on desolate land because they chose to be. Yet, in light of the community's prohibition to enter their traditional territory, the members installed themselves in front of it, on the side of a national road, as a part of their struggle to vindicate the land.

The Court found the State had not assumed its position of guarantor with much care and responsibility, and had not taken the appropriate measures to protect the interests of, most importantly, the children and elders. Here, the State had the obligation of providing to the community's children the basic needs to assure that the vulnerable state of the community did not affect their ability to develop. And in regards to the special considerations that deserve the people of age, the State had not adopted the measures destined to maintain their function and autonomy. Paraguay had failed to take into account that the oral transmission of the culture to new generations is principally the duty of the elders. Therefore, in light of the previous, the Court declared the State violated Article 4(1) of the American Convention by failing to adopt protective measures in light of the conditions the Yakyé Axa's were made to endure that affected their possibilities of having dignified lives.

As part of the reparations, the Court instructed the State to demarcate, provide title, and grant the ancestral lands that the indigenous community was vindicating. If that was not possible as a result of the private ownership of those lands, the State would need to look for an alternative location in consultation with the community.

The land awarded must be of a sufficient extension to ensure the sustainability and the development of the traditional forms of life of the community. The State must also establish a development fund to support the provision of clean water and sanitary services to the community in the lands that are finally allocated by the State. Additionally, the State must invest USD 950,000 in a community fund that will support the implementation of education, housing, health, and agriculture programmes. The State must also adopt all the necessary measures to ensure that the constitutional right of the indigenous groups in Paraguay to vindicate their ancestral lands is recognised in practice through an effective mechanism that respects the customary law, values, and traditional uses of these communities. Finally, the State must publish sections of this judgement in the official gazette and a nationally recognised newspaper, as well as broadcast the reading of parts of the decision in Enxet, Guaraní and Spanish, through a radio station to which members of the Yakye Axa community have access.