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Inter-American System

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IV INTER-AMERICAN SYSTEM

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The Inter-American Commission on Human Rights (hereinafter 'Inter-American Commission' or 'Commission') has submitted substantially more cases for consideration by the Inter-American Court on Human Rights (hereinafter 'Inter-American Court' or 'Court') since the amendment of its Regulations in 2001. As a result, the Court decides more cases and issues more judgements, making the reporting on every case decided by this regional court more difficult. Therefore, in the future, this section will mainly focus on the relevant developments in the case law of the Court and will only refer to the facts of the cases if necessary. As in previous years, however, I will continue to list the cases decided in the corresponding period for informational purposes.

During the period covered by this report, the Court issued several decisions on the merits, which include: *De la Cruz Flores vs Peru*, *Carpio Nicolle vs Guatemala*, *Lori Berenson Mejía vs Peru*, *Hermanas Serrano Cruz vs Peru*, *Huilca Tecse vs Peru*, *Masacre de Mapiripán vs Colombia*, and *Caesar vs Trinidad y Tobago*. Moreover, the Court continues to review requests for *Advisory Opinion 19 and 20*, submitted by Venezuela and the Inter-American Commission, respectively.

The present report will analyse current developments in the case law of the Court regarding *de novo* review of admissibility issues, the scope of the jurisdiction *rationae temporis* of the Court and the protection afforded by the right to freedom of expression under the American Convention on Human Rights (hereinafter 'American Convention' or 'Convention').

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.

1. DE NOVO REVIEW OF ADMISSIBILITY ISSUES

Since its initial decision in *Velásquez Rodríguez*,¹ the Court has asserted its jurisdiction to review all aspects of a case, including 'the procedural rules that justify its hearing a case and (...) all procedural norms involved in the 'interpretation or application of (the) Convention'. On this basis, the Court developed a practice for reviewing *de novo* admissibility issues, particularly those related to the exhaustion of domestic remedies already adjudicated by the Commission. This review was initiated by the submission of preliminary objections from the concerned State. The *de novo* review of admissibility issues was criticised because it added to the existing time delay for the Court to decide cases once submitted for consideration.

¹ Inter-American Court of Human Rights, *Velásquez Rodríguez* Case, Preliminary Objections, Judgement of 26 June 1987, Series C, No. 1, para. 29.

Most recently, however, in *Herrera Ulloa, Tibi* and *Serrano Cruz*² the Court appears to have reversed this practice by ruling that the findings of the Commission must be given weight unless there is reason that justifies reexamination. The importance of this new approach is undeniable; however, to avoid duplications and additional delays, the Court should also consider making use of the provision in its Regulations denoting appropriate weight to the assessment of the evidence made by the Inter-American Commission.³

2. SCOPE OF THE JURISDICTION RATIONAE TEMPORIS OF THE COURT

In the *Serrano Cruz Case vs El Salvador*, the Court revisited the issue regarding its jurisdiction *rationae temporis* to hear a case on forced disappearances which occurred before the accused State accepted the contentious jurisdiction of the Court. The Court had the chance to review this issue in *Blake vs Guatemala*,⁴ but decided the case on other facts. Also, the issue was present in *Trujillo Oroza vs Bolivia*⁵ and *Molina Theissen vs Peru*,⁶ but the States involved accepted international responsibility for the alleged disappearances and therefore the Court never had to rule on its jurisdiction to hear these cases.

The facts in *Serrano Cruz* transpired during the internal armed conflict in El Salvador, which extended from 1980-1991. Between 27 May and 9 June 1982, the Atlacatl Battalion carried out a military operation known as 'Operación Limpieza' or 'la Guinda de Mayo' in several municipalities of the Department of Chalatenango, including San Antonio de la Cruz where the two victims in this case, Ernestina and Erlinda Serrano Cruz, and their next of kin resided. As a result of this operation, members of the Serrano Cruz family left the village to protect their life. Only the mother of the victims and one of their siblings were able to pass through the military forces that surrounded the village. The remaining of the Serrano Cruz family, including the father, Ernestina, Erlinda and two of their siblings, escaped into the mountains toward a close village, where they arrived after walking for days. While hiding from the military forces, Ernestina and Erlinda remained alone as their father and brother went to look for water and their sister relocated to a different place to avoid risking the security of the whole family with her crying baby. The victims in this case were discovered and later taken by soldiers from the Atlacatl Battalion. Since then, the fate of Ernestina and Erlinda, who were 7 and 3 when kidnapped, remains unknown. After the end of the conflict in El Salvador, the girls' parents initiated judicial actions to investigate their destiny to no avail.

² Inter-American Court of Human Rights, *Herrera Ulloa* Case, Judgement of 2 July 2004, Series C, No. 107, para. 87; Inter-American Court of Human Rights, *Tibi* Case, Judgement of 7 September 2004, Series C, No. 114, para. 55; Inter-American Court of Human Rights, *Serrano Cruz* Case, Preliminary Objections, Judgement of 23 November 2004, Series C, No. 118, para. 141.

³ See Article 44 of the Rules of Procedure of the Inter-American Court.

⁴ Inter-American Court of Human Rights, Judgement of 24 January 1998, Series C, No. 36.

⁵ Inter-American Court of Human Rights, *Trujillo Oroza* Case, Judgement of 26 January 2000, Series C, No. 64.

⁶ Inter-American Court of Human Rights, *Molina Theissen* Case, Judgement of 4 May 2004, Series C, No. 106.

Before the Inter-American Court, petitioners and the Commission argued that the facts in this case entailed a forced disappearance and in consequence they alleged violations to the rights to life (Article 4), not to be tortured (Article 5), and liberty (Article 7), in connection with Article 1(1) of the American Convention. In addition, they argued violations of the rights to due process and effective remedy (Articles 8 and 25), the rights of the family, right to a name and the right of the child (Articles 17, 18, and 19) in connection with Article 1(1) of that treaty.

Among others, the State challenged the jurisdiction of the Court on the basis of a temporal restriction incorporated in its declaration recognising the compulsory jurisdiction of this tribunal. The limitation stated that El Salvador accepted the jurisdiction of the Court only in regard to cases arising out of events subsequent to, and out of acts which began to be committed after, the date of deposit of its declaration of acceptance. El Salvador submitted its acceptance of the jurisdiction of the Court on 6 June 1995.

In regard to this argument, the Court first stated that Article 62(2) expressly authorises States to restrict the scope of their acceptance of the jurisdiction of this tribunal. However, the Court has the power to decide whether States' restrictions are compatible with the American Convention. Moreover, this power is not overcome by the fact that other State Members of the Organization of American States have not objected to the legality of the restriction. Next, the Court acknowledged the application of the principle of non-retroactivity enshrined in Article 28 of the Vienna Convention on the Laws of Treaties to States' acceptance of its jurisdiction. In that regard, the Court stated that this tribunal will only exercise jurisdiction in relation to facts that happened after that acceptance, except in the case of a 'continuous violation'.

In applying these principles to the restriction under analysis, the Court established that the limitation was compatible with the American Convention because Article 62(2) authorises temporal restrictions. It is relevant to note in regard to this holding that the Court, in previous cases, has suggested that Article 62(2) included an exhaustive list of permissible restrictions therefore making invalid any limitation not specifically enumerated in that provision.⁷ By reading the language of Article 62(2), however, it is not apparent that the temporal restriction incorporated by El Salvador fits clearly in the restrictions stated in that provision.

Finally, the Court concluded that it lacks jurisdiction to hear the facts of the case related to the disappearance of the minors, in particular the alleged violations to Articles 4, 5, 7 and 1(1) because they arose out of acts which began to be committed before the date of deposit of El Salvador's acceptance to its jurisdiction. However, the Court found that it has jurisdiction to hear the facts related to the lack of appropriate investigation into the disappearance of the victims since several remedies were submitted after the date of such acceptance. Therefore, it concluded that it would review the alleged violations to Articles 8 and 25, in relation to 1(1) of the American Convention. In relation to the alleged violations to Articles 17, 18 and 19 of the American Convention, the Court found in a later decision on the merits that it lacked jurisdiction to hear these complaints since they arose out of acts which began to be committed before the acceptance of the jurisdiction of the Court by El

⁷ See, for example, Inter-American Court of Human Rights, *Juchter Bronstein* Case, Judgement of 24 September 1999, Series C, No. 54, para. 36.

Salvador. In that decision, however, the Court found jurisdiction to hear the alleged violation of Article 5 of the Convention in regard to the victims' next of kin.

3. THE RIGHT TO FREEDOM OF EXPRESSION

In 2004 the Court decided *Herrera Ulloa vs Costa Rica* and *Canese vs Paraguay*, in which, for the first time, it defined the scope of permissible restrictions to the right of freedom of expression when a public figure or public matters are at stake. In light of existing case law developed by other international human rights systems, in particular the European Human Rights System, the Inter-American Court held that under Article 13 of the American Convention, States must provide a higher threshold of protection to speech that promotes the debate on issues regarding public figures and public affairs.

In *Herrera Ulloa*, the petitioner was a journalist who worked in the political section of *La Nacion*, a well reputable newspaper in Costa Rica. From May to December 1995, Mr. Herrera Ulloa wrote several articles, which included partial reproductions of information published by some European newspapers regarding a Costa Rican diplomat who represented Costa Rica before the International Organization of Atomic Energy. The articles reported that Mr. Félix Przedborski, the diplomat representing Costa Rica on a *pro bono* basis, was involved in several illicit acts, particularly related to corruption and similar charges. In reaction to the publication of the articles in *La Nacion*, Mr. Przedborski brought criminal and civil actions against the journalist who wrote the pieces and sued the newspaper for civil damages alleging that his reputation had been affected by the information published by *La Nacion*.

Mr. Herrera Ulloa was convicted and found guilty of defamation. He was ordered to pay a fine and publish the paragraphs of the judgement that stated his liability in the newspaper's section where the controversial articles were reported. Moreover, he was found civilly liable together with *La Nacion* and ordered to pay damages to the plaintiff in the case. In addition, this judgement ordered *La Nacion* to replace the link between the articles and Mr. Przedborski's name in its online edition with a new link between the articles and the paragraphs of the decision that stated liability. Finally, Mr. Herrera Ulloa had to register his name in the 'National Register for Delinquents', as established in Costa Rican domestic legislation for those who have been convicted of criminal offenses.

Before the Inter-American Court, petitioners and the Commission argued the violation of several rights protected by the American Convention on Human Rights, including Articles 13 and 2, which enshrine the right to freedom of expression and the duty to adopt domestic legislative or other measures to ensure the rights protected in that treaty, respectively. First the Court emphasised that the issue at stake was not whether the publication of the articles violated domestic legislation, but if the criminal and civil convictions given to Mr. Herrera Ulloa violated his right to freedom of expression as protected by the American Convention. Second, the Court reinforced its previous case law stating that the right to freedom of expression under the American Convention has an individual and social dimension. These dual dimensions require the State to ensure that no one is arbitrarily limited or impeded in expressing his or her own thoughts and to respect the collective right to receive any information and to have access to the thoughts expressed by others. Then, the

Court underscored the importance of freedom of expression for the consolidation of a democratic society and the central role that the media and journalists play in ensuring the exercise of the collective right to freedom of expression.

Next, the Court analysed whether, in light of the protection afforded by Article 13 of the American Convention, the criminal and civil sanctions imposed upon Mr. Ulloa were permissible restrictions to his right to freedom of expression. In this respect, the Court held that for these restrictions to be permissible they must: 1) be expressly established by law; 2) pursue a legitimate goal, such as preserving the reputation of others, national security, public order, or public health and morals; and 3) be necessary in a democratic society. In following the case law developed by the European Court, the Court stated that 'necessary in a democratic society' must be interpreted as satisfying a 'pressing social need'.

Furthermore, the Court ruled that, under Article 13(2) of the American Convention, speech related to public officials or other persons who exercise public functions must be afforded a wider margin of protection due to its crucial role in promoting democratic control through public opinion about the transparency of the government and the conduct of governmental actors. Though public officials still enjoy the protection of their reputation, the scope of this protection must be established in accordance with the principles of democratic pluralism. Public officials or those exercising public functions have voluntarily exposed themselves to close scrutiny and greater criticism since they have left the private sphere and entered the sphere of public debate.

In applying these principles to the facts of the case, the Court held that the civil and criminal sanctions given to Mr. Herrera Ulloa were incompatible with Article 13(2) of the Convention because the articles published by the petitioner related to a public official, an Ambassador of Costa Rica, and to issues of public interest, namely the activities carried out by this official while enjoying the immunities and other privileges provided by the State as a result of his position. In addition, the conviction of the petitioner was based on the fact that he could not prove the truthfulness of the information reported in the articles, thereby imposing an excessive limitation to this right to freedom of expression. The consequence of this sanction created a restriction which is not permitted by Article 13(2) because it carried a dissuasive and frightening effect upon journalists, hindering the debate on issues of public interest for society.

Though the Court found a violation of Article 13 of the American Convention, it decided not to rule on the application of Article 2 of that treaty, thereby rejecting the opportunity to pronounce on whether Costa Rican legislation authorising the imposition of sanctions to journalists who report on public figures or issues of public interest is compatible with the Convention.

In *Canese vs Paraguay*, the Court addressed a violation to Article 13, but in the context of speech delivered in a political campaign. Mr. Ricardo Canese, the petitioner in this case, is an engineer and an expert on the *Itaipu Hydroelectric Power Plant*, a binational undertaking by Brazil and Paraguay. In 1993, Mr. Canese was nominated as a presidential candidate by *Asunción para Todos*, a civic movement. During the campaign the petitioner was interviewed by two newspapers in regard to Mr. Juan Carlos Wasmosy, the leading candidate in the election contest. In those interviews, Mr. Canese indicated that Mr. Wasmosy had earned his wealth as a result of his association to President Stroessner, a former dictator. Moreover, he stated that Mr. Wasmosy's relationship with Stroessner had secured him the presidency of

CONEMPA, a Paraguayan company engaged in the construction of ITAIPU and which gave substantial bribes to Stroessner. Mr. Wasmosy was later elected President of Paraguay.

Three months after the publication of the interview by the *Noticias* and *ABC* newspapers, Mr. Canese was sued for defamation by members of the Board of Directors of CONEMPA. The plaintiffs alleged that Mr. Canese's statements were defamatory for the company and affected them personally in their position as directors of CONEMPA. Mr. Canese was convicted for defamation, given four months imprisonment and ordered to pay a fine and civil damages. Also, he was impeded from leaving his country as a consequence of the criminal sanction imposed upon him.⁸

Similarly to *Herrera Ulloa*, the Court underlined the dual dimension of the right to freedom of expression under the American Convention and the importance of this right for the consolidation of a democratic society. In addition, it underscored the relevance of freedom of expression in the context of a political campaign as an essential tool to promote the education of the electorate, strengthen the political debate among participating candidates and political parties, and assist in scrutinising the platforms presented by the candidates, thereby allowing for greater transparency and control of the elected authorities. The Court concluded that it is crucial to protect and ensure the political debate that precedes the election of national authorities and that consequently, the free exchange of ideas and information regarding candidates and political parties among the media, the other candidates and political parties as well as other interested persons must be guaranteed.

Next, the Court stated that Mr. Canese's statements in regard to CONEMPA relate to issues of public interest and that they were made in the context of a political campaign, with respect to a presidential candidate who was a public figure and with the intention of challenging the character of this candidate to become president of the country. Furthermore, the Court restated the principles set out in *Herrera Ulloa* and indicated that, under Article 13(2) of the American Convention, speech related to public officials or other persons who exercise public functions must be afforded a wider margin of protection due to its crucial role in promoting democracy. Moreover, though public officials enjoy the protection of their reputation, the scope of this protection must be established in accordance with the principles of democratic pluralism. Public officials or those exercising public functions have voluntarily exposed themselves to close scrutiny and greater criticism since they have left the private sphere and entered in the sphere of public debate. Therefore, in the context of a political debate, public officials, politicians and even private persons who carry out activities subject to public scrutiny must accept a broader margin of tolerance for criticism than that afforded to private individuals.

In applying these principles to the facts of the case, the Court held that the conviction of Mr. Canese and the restriction from leaving his country imposed, as a result of statements made in the context of an electoral campaign and in regard to another candidate was an unnecessary and excessive sanction. Moreover, these measures restricted the open debate in regard to issues of public interest and limited

⁸ The conviction for defamation and civil liability as well as the order not to leave the country were later reversed by the Supreme Court of Paraguay, after the case had been submitted for consideration to the Inter-American Court.

the enjoyment of Mr Canese's right of freedom of expression for the remaining of the political campaign. In consequence, the Court concluded that there was no pressing social need in this case that would justify the restrictions applied to the petitioner in the case and therefore the sanctions imposed upon Mr. Canese were disproportionate to the aim they pursued. Lastly, the Court found that the sanctions also constituted indirect means of restrictions on the petitioner's right to freedom of expression. Thus, the Court found a violation of Articles 13(2) and 13(3) of the American Convention.

Similarly to Herrera Ulloa, the Court also decided not to pronounce itself on the alleged violation of Article 2 of the American Convention.