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### Inter-American System

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on 'Sovereignty, Responsibility, and National Minorities'. This statement addresses some very delicate issues, in particular the principles underlying the role of states in relation to their 'kin' in neighbouring countries.

Relating to the status of 'kin-states', the statement emphasised that 'protection of minority rights is the obligation of the State where the minority resides'. This is followed by a warning: 'History shows that when States take unilateral steps on the basis of national kinship to protect national minorities living outside of the jurisdiction of the State, this sometimes leads to tensions and frictions, even violent conflict. I am therefore obliged to focus special attention on situations where similar steps, without the consent of the State of residence, are contemplated'.

The statement also contains some interesting statements about the instrument of bilateral treaties that many States have used to secure the rights of their 'kin' in neighbouring States: 'Bilateral treaties can serve a useful function in respect of national minorities in the sense that they offer a vehicle through which States can legitimately share information and concerns, pursue interests and ideas, and further protect particular minorities on the basis of the consent of the State in whose jurisdiction the minority falls. However, the bilateral approach should not undercut the fundamental principles laid down in multilateral instruments. In addition, States should be careful not to create such privileges for particular groups which could have disintegrative effects in the States where they live'.

This statement clearly comes against the background of the Hungarian Government policy towards the Hungarians living in neighbouring countries. Hungary adopted an 'Act on Hungarians Living in Neighboring Countries' (the so-called Status Law), which provides privileges (including financial ones) for ethnic Hungarians living in Romania, Slovakia, Ukraine and some other States. This has caused considerable tensions with these neighbouring States.

The previous and present HCNMs were together at the official opening ceremony of the South East European University in Tetovo, Macedonia, on 20 November 2001. The previous HCNM, Max van der Stoep, had made great efforts to create this multi-lingual university (teaching will be in English, Albanian and Macedonian) as a means to reduce inter-ethnic tensions between the Albanian and Macedonian ethnic groups in Macedonia. The university is fully funded by foreign donors. A total of 33 million euros have been pledged so far.

## IV INTER-AMERICAN SYSTEM

DIEGO RODRÍGUEZ-PINZÓN

### I NEW RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Inter-American Commission on Human Rights (Commission) adopted its new Rules of Procedure, which entered into force on 1 May 2001. The new Rules are the single most important instrument governing the Commission's individual petition

system for human rights violations in the Americas. Below I discuss the most relevant reforms in the new Rules of Procedure, which include a new admissibility procedure, strengthening certain aspects of the merits phase, new criteria for the referral of cases to the Court, and a new follow-up procedure to review state compliance of decisions previously taken by the Commission. The new Rules of the Commission can be found at the following webpage: <http://www.cidh.oas.org/Básicos/basic16.htm>.

### *1.1 Admissibility Phase*

Articles 30, 36 and 37 of the new Rules of the Commission establish a separate admissibility phase in the procedure. The new Rules have separated the admissibility and merits phases in individual petitions. The Commission has recently implemented such a practice, but it issued the formal regulation in order to clarify the procedure for parties in a dispute. A very important characteristic of the new provision is that it establishes strict deadlines for the parties to submit responses. This important feature seeks to avoid further delays in the examination of cases due to this 'new' phase of the individual complaint procedure. Furthermore, the Commission created a Working Group on Admissibility to deal with this phase of the proceedings, which is expected to expedite the decisions on these matters.

The new admissibility phase is governed by Article 28 (Requirements for the Consideration of Petitions), Article 30 (Admissibility Procedure), and Article 37 (Decision on Admissibility) of the new Rules. However, Article 31 (Exhaustion of Domestic Remedies), Article 32 (Deadline for the Presentation of Petitions), and Article 33 (Duplication of Procedures) of the new Rules have not substantially modified the main admissibility requirements established in the American Convention and in the former Regulations of the Commission.

Article 28 (Requirements for Consideration of Petitions) establishes the requirements for the submission of petitions and Article 29 (Initial Processing) describes the procedure that the Secretariat must follow as soon as it receives a petition. In Article 29 there appears to be a slight but significant change that suggests that in some cases petitioners may have only one chance to present a petition that adequately satisfies Article 28. This could happen if the Commission decides not to exercise the discretion granted by the new Rules to request the petitioner to complete a submission that does not comply entirely with Article 28. Under Article 33 of the former Regulations, the Commission was compelled to ask the petitioner to complete the requirement omitted in the petition.

Article 23 (Presentation of Petitions) expressly allows a petitioner to claim violations not only of the American Declaration of the Rights and Duties of Man and the Convention, but also of other regional human rights instruments. These include the Additional Protocol to the Convention in the Area of Economic, Social and Cultural Rights, the Protocol to the Convention to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women. Similarly, Article 27 (Condition for Considering the Petition), which refers to

the conditions for considering petitions, requires that the alleged human rights violations be among those protected in the applicable documents listed in Article 23.

Article 30 sets forth the procedure and the deadlines for the consideration of admissibility of the petition. This provision provides that after a petition has been filed before the Commission, the State concerned must respond to the information submitted to it by the Commission within two (2) months. Extensions can be granted, but in no case will the State be granted extensions that exceed a total of three (3) months since the first request for information was sent to the State. However, such extensions will be granted only in exceptional cases, and they must be 'duly founded'. The Commission may request additional information from the parties or call for hearings for purposes of admissibility. Once it has considered the position of the parties, the Commission will make a decision of admissibility or inadmissibility and will publish the report. Only then will an admissible petition be registered as a 'case', and the phase on the merits will begin (Article 37).

### *1.2 Proceedings on the Merits*

Article 38 (Procedure on the Merits), Article 39 (Presumption), Article 41 (Friendly Settlement), and Article 42 (Decision on the Merits) are the most relevant provisions regarding the merits phase. According to the new Rules, after declaring a petition admissible, the Commission will set a period of two (2) months for the petitioners to submit additional observations on the merits. It will then forward the petitioner's response to the State for its response within two (2) months. Prior to taking a decision in the merits, the Commission may request additional information or call for hearings on the case. Consequently, the filing and exchange of information in any case should not exceed a total of nine (9) months (plus the time the Commission may take to process and forward observations from the parties) from the day the petition was filed until the Article 50 report is adopted. In its former Regulations, the Commission often exceeded its time-frame, due to the Secretariat's practice of transmitting cases several times to both parties for additional information, or tolerating undue delays by the parties in the proceedings. For example, all cases published by the Commission in its 1994 Annual Report exceeded the 240-day time frame. In fact, most cases took at least two (2) years to be decided by the Commission.

In cases where the State fails to appear at the proceedings, the Commission applies the presumption of veracity for nonappearance under Article 39 of its new Rules (former Article 42 of the Regulations) in respect of the facts alleged by the petitioner. This means that if the State fails to respond within the two-month limit, Article 39 presumes that the facts submitted by the petitioner are true as long as other evidence does not lead to a different conclusion. The procedure on the merits allows the petitioner and the State to submit further information, evidence, and arguments.

Article 41 of the new Rules no longer requires precision in the position of the parties to enter a friendly settlement phase. Under Article 38, the parties must be available to reach a friendly settlement within a certain period of time. If the parties reach an amicable solution, the Commission will conclude the proceedings by issuing a final report on the settlement. If there is no friendly settlement, the Commission will issue a decision on the merits.

### 1.3 *Commission's Hearings*

Chapter VI of the new Rules improves the procedures to carry out hearings before the Commission. The requirements in the new Rules are more rigorous and formal than those of the old Regulations. The requirements, such as clear time frames and a level of specificity required from witness testimonies, focus on the need to have a more rigorous and reliable procedure to gather evidence.

The Commission implemented these changes to improve the reliability of its findings in a case so that the Court could afford the necessary legal and evidentiary value if the cases are eventually submitted for its review. There has been a long standing tension between the Commission and the Court lengthy and redundant proceedings. Both the Court and the Commission reviewed the same issues of fact and law in many cases because the Court refused to rely on the Commission's findings given the Commission's unreliable proceedings. It is now expected that the Court will rely on the Commission's findings of fact and law, at least regarding the admissibility of petitions.

### 1.4 *Referral of Cases to the Court*

Article 44 of the new Rules establishes that, in principle, cases shall be referred to the Inter-American Court of Human Rights (Court or IACtHR), unless a majority of the Commission decides otherwise. Paragraph 1 of Article 44 states that

[i]f the State in question has accepted the jurisdiction of the Inter-American Court in accordance with Article 62 of the American Convention, and the Commission considers that it has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it shall refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary.

In this way the Commission appears to change its traditional practice of referring only few cases to the Court.

This provision establishes the principle that all cases involving States that have accepted the Court's jurisdiction must be referred to the Court, unless an absolute majority of the Commission (four (4) Commissioners) decide, with a reasoned statement, that the case should not be submitted. In fact, the petitioners have the right, under Article 43(3) of the new Rules of Procedure of the Commission, to present their views and arguments on whether the case should be referred to the Court. It remains to be seen how the Commission and the Court will deal with the increasing workload that this new practice will produce for these organs, given the limited amount of resources the OAS allocates to the inter-American human rights machinery.

Article 44 also provides some criteria that should guide the Commission's decision to refer a case to the Court: 'a) the position of the petitioner; b) the nature and seriousness of the violation; c) the need to develop or clarify the case-law of the system; d) the future effect of the decision within the legal systems of the member States; and e) the quality of the evidence available'. It is to be expected that the criteria previously

developed may be the basis of the ‘reasoned decision’ of a majority of the Commission not to send certain cases to the Court.

### 1.5 *Follow-up*

The new Rules created a follow-up procedure which did not exist in the former Regulations. Article 46 regulates the Commission’s inherent supervisory role in order to ensure State compliance with the Commission’s decisions in individual cases. According to this new procedure, the Commission may recommend suitable follow-up measures, such as requesting further information from the parties and holding hearings regarding compliance with a previous decision of the Commission. The IACHR will report on the progress of State compliance with its recommendations or with the terms of a friendly settlement in specific cases. This new procedure suggests that the decisions of the Commission in individual cases are not mere recommendations without binding character, but that States should comply with those decisions if they want to avoid further scrutiny in those cases.

### 1.6 *Final Comment*

The new Rules of Procedure of the Commission are an important effort to improve the predictability, transparency and judicial certainty of the individual complaint procedure of the inter-American system. The new Rules indicate that the Commission is willing to strengthen the judicial dimension of its adjudicatory powers and, therefore, to enhance its effectiveness through this jurisdiction.

There is still little practice under these new Rules to understand the real impact of the modifications. We expect far reaching implications of many of the provisions we have mentioned above, especially those that define the criteria to lodge an application before the Court and of the new admissibility stage of the individual complaint procedure before the Commission.

In a following review of the inter-American system we will include a detailed reference to the importance of the changes adopted in the new Rules of Procedure of the Court.

## 2 RECENT PRACTICE ON ADMISSIBILITY REGARDING THE ‘FOURTH INSTANCE FORMULA’

The Commission developed the so-called ‘fourth instance formula’, whereby it finds that decisions of impartial and independent domestic courts are not subject to scrutiny under the American Convention. The ‘fourth instance formula’ was initially developed in *Wright vs Jamaica* (Case No. 9260, Inter-Am. C.H.R. 154, Annual Report 1987-1988, OEA/Ser.L/V/II.74, doc. 10 rev. 1 (1988)), and it was clearly explained in *Marzioni vs Argentina* (Case No. 11.673, Inter-Am. C.H.R. 76, Annual Report 1996, OEA/Ser.L/V/II.95, Doc. 7 rev. (1997)).

The Commission crafted the formula pursuant to Article 47(b) of the Convention to dismiss any claim that would argue exclusively on the basis of a judicial error. However, the formula does not apply when there is violation of due process, discrimination, or a

violation of other rights recognised by the Convention. In *Marzioni vs Argentina*, a former worker that was seeking compensation from his employer for a work-related disability claimed that Argentina's tribunals wrongly applied the laws governing damages in labour disputes. The Commission ruled that it could not review the alleged judicial error and consequently declared the petition inadmissible. In explaining the 'fourth instance formula', the Commission also relied upon jurisprudence of the European Court and Commission on Human Rights.

In the latest decisions on the admissibility of certain petitions based on the formula, the Commission has reasserted its doctrine. Furthermore, it has begun to use the formula systematically in short decisions of inadmissibility, signaling that this formula is already well-settled doctrine in the inter-American system. For example, it rejected the claims of Mr. Segura in *Segundo Wenceslao Segura vs Argentina*, Petition 0344/97, Report No. 121/01, 10 October 2001, who argued that he was left blind due to the omission of the urgent health care services of the State. The Commission found that Mr. Segura was afforded all due process guarantees in his domestic litigation and that the assessment of fact and law made by the local courts would not be reviewed by the Commission. In *Cristián Scheib Campos vs Chile* (Petition 329/01, Report No. 69/01, 14 June 2001), the Commission stated '[t]he Inter-American Commission does not have jurisdiction to act as a fourth instance with respect to decisions made by legal entities that have adopted procedures that do not reveal violations of due process or other human rights guaranteed by the American Convention. The mere disagreement on the part of the petitioners with the interpretations of the Chilean authorities is not sufficient to serve as proof of the alleged violation of the aforementioned international instrument'. In *Atanasio Franco Cano vs Paraguay*, Petition 0122/01, Report No. 120/01, 10 October 2001, the Commission similarly stated that

The IACHR believes there is no element tending to establish a violation of Articles 8 and 25 of the Convention. What the petitioner has brought before the IACHR is his disagreement with the Paraguayan courts' interpretation of certain domestic procedural rules. He also wanted the IACHR to reassess the evidence submitted to the domestic court, to determine the validity of birth certificates or the authenticity of signatures on legal documents. The IACHR is not competent to review evidence that has been assessed by local courts, unless the reported irregularities are of such gravity as to constitute a violation of the Convention. The petitioner has neither argued nor proven such allegations, and a reading of the court proceedings fails to indicate such a situation. Moreover, national courts are responsible for interpreting national procedural laws, and the IACHR is not competent to determine the correct interpretation of local provisions unless the interpretation in itself constitutes a violation of the Convention. In the instant case, the Commission does not believe that the interpretation of Paraguayan procedural and substantive provisions made by the Paraguayan judicial authorities constitutes a violation of the American Convention.

The Commission also applied the formula in *Ernesto Galante vs Argentina* (Petition 12.055, Report No. 70/01, 3 August 2001) and rejected claims of the petitioners that the decisions adopted by the local courts were manifestly arbitrary. Interestingly, this

decision provides further insight regarding the scope of the exceptions to the application of the 'fourth instance formula', and particularly what evidence must be submitted by the petitioners in order to convince the Commission that, even though due process guarantees were afforded by the local courts, their decisions would constitute a violation of one of the rights protected under the American Convention because there is evidence of manifest arbitrariness, which would render the 'fourth instance formula' inapplicable to the petition. The Commission stated

Having reviewed the record, the Commission finds that the petitioners' claims essentially pose questions of internal law which do not raise issues with respect to State compliance with Convention guarantees. (The Supreme Court of Argentina, for example, necessarily has jurisdiction to determine what constitutes a valid majority opinion.) The decisions of three levels of local courts, as well as those of the Supreme Court of Argentina are consistent in their overall approach to Mr. Galante's underlying claims. Multiple decisions at both the local and federal levels opined that the application of national law by the court of first instance had not been arbitrary. Moreover, the petitioners concentrated their arguments on alleged arbitrariness in the proceedings before the Supreme Court, linking their allegations of violations of substantive and procedural guarantees with those concerning partiality, without specifically addressing why and how the decisions of the local courts on appeal had themselves been arbitrary. Given the nature of the claims and proof in question, the Commission concludes that their admissibility is barred by Article 47(b) of the American Convention and the application of the fourth instance formula.

Given the importance of a decision of the Commission based on the 'fourth instance formula', it is useful to also bear in mind the effects of such a declaration of inadmissibility. Some of the causes or grounds of inadmissibility may be amended or completed by the petitioner, while others constitute a 'final decision' in the proceedings without any possibility for correction or amendment by the petitioner. In the first category, we can identify all formal requirements of the petition, as well as non-exhaustion of domestic remedies, which can be amended or completed by the petitioner in order to re-file the petition. In the second category, we find, among others, the rejection of a claim on grounds that the claim or matter does not characterise a violation of the Convention (Article 47(b)) as it happens in the 'fourth instance formula.' Due to the preclusive legal consequences of this second category, it is extremely important for the Commission to have close oversight on these matters. If it delegates this function to the Executive Secretariat, the Commission should reserve for itself a high degree of overview on each decision taken on individual cases. Additionally, other measures can also ensure an adequate functioning of the Secretariat. In the now defunct European Commission, for example, the Secretariat was compelled to register and process a claim if the petitioner, after being advised that its petition may not be successful, insisted on pursuing its claim.