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### Inter-American System

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## IV INTER-AMERICAN SYSTEM

DIEGO RODRÍGUEZ-PINZÓN

The Inter-American Commission on Human Rights (hereinafter 'Commission') of the Organization of American States recently released its 2001 Annual Report. In this review I will refer to the individual complaints (Chapter III of the Report) decided by the Commission on the merits. The Commission included 29 decisions accepting petitions (admissible), nine decisions rejecting petitions (inadmissible), eight friendly settlements (seven on Ecuador and one Argentina) and four reports on the merits of cases. The Commission also submitted four cases to the Inter-American Court on Human Rights during 2001. In its 2000 Annual Report the Commission included 22 reports on the merits and in 1999 and 1998 it released 30 and 25 reports on the merits, respectively.

The following are the cases decided on the merits in 2001:

- 1 *Dayra María Levoyer Jiménez vs Ecuador* (Case No. 11.992, Inter-Am. C.H.R., Annual Report 2001, OEA/Ser./L/V/II.114, doc. 5 rev., 16 April 2001)

*Facts of the Case*

Mrs. Dayra María Levoyer Jiménez, companion of the accused drug trafficker Hugo Jorge Reyes Torres, filed a petition against the State of Ecuador for violations of Articles 5, 7, 8, 21, and 25 of the American Convention. The Commission earlier ruled that the case was admissible. The Commission found in her favour on all charges except that under Article 21.

Mrs. Jiménez was arrested without a warrant on 21 June 1992, and was held *incommunicado* for 39 days. She was subsequently held without conviction for six years before being released. On 7 April 2000, after attempts to reach a friendly settlement with the State were found to be unsuccessful, Mrs. Jiménez filed a request with the Commission to begin an examination of her case on the merits.

The charges listed in the warrant, which was issued on 30-31 July 1992, were for drug trafficking, acting as a 'front', illicit enrichment, and asset laundering (*conversion de bienes*). Mrs. Jiménez filed four writs of *habeas corpus* with the President of the Supreme Court of Justice, which were not ruled upon. A fifth writ was filed in April 1998, requesting that the Mayor release Mrs. Jiménez immediately. This writ was denied by the Constitutional Court. However, in June 1998, the Second Division of the Constitutional Court found that the terms specified in the law had been exceeded and reversed the prior decision by ordering Mrs. Jiménez's immediate release. All charges were thereby dismissed.

The State still argued that domestic remedies have not been exhausted since the appeals and consultation process is still ongoing for each charge.

*Article 7(2) and 7(3) – Legality of the detention*

To determine the legality of the detention, the Commission considered three factors: 1) what are the 'conditions established beforehand by law', 2) are such conditions

consistent with the provisions of the Convention, and 3) have such provisions been observed here. According to the Commission, it is established in Article 56 of the Ecuadorian Code of Criminal Conduct that detention without a warrant is only permitted when an individual is caught while committing a crime or when a 'serious presumption of responsibility exists'. The Commission considered it is empowered to interpret the 'serious presumption' language for consistency with the Convention provisions, and does so by finding that this definition is left to the police officer's discretion. This, in effect, is a violation of Articles 7(2) and 7(3) as such since the Convention requires the law to 'precisely and in specific detail' establish the conditions for an arrest to take place. Thus, the Commission considered the arrest of Mrs. Jiménez to be a violation of Articles 7(2) and 7(3) for not being made on the grounds set forth in Ecuador's Constitution, and because Article 56 of the Ecuadorian Code of Criminal Conduct is 'a vague and general prescription' that does not conform to what is required by the American Convention.

Additionally, the Commission found that the *incommunicado* detention of Mrs. Jiménez for 39 days violated Article 7(2) by contravening the State law specifying a maximum 24-hour holding period without a charge. Finally, the Commission concluded that a police station, such as that where Mrs. Jiménez was held, is not a suitable facility for pre-trial detention.

#### *Articles 7(5) and 2 – Deprivation of personal liberty*

The function of Article 7(5) is to enforce the State's duty to guarantee the rule of law. A person held without trial is presumed innocent until proven otherwise, and a trial to determine their innocence or guilt must be provided within a reasonable time. This determination is made on a case-by-case basis using a two part test: 1) is the deprivation of liberty without conviction justified in the light of sufficient criteria, determined objectively and reasonably by preexisting legislation, and 2) have the judicial authorities acted with due diligence in the advancement of the judicial proceedings. Without such justification, the accused must be released.

Although the seriousness of the offense and severity of the sentence are factors that may be considered, they are not dispositive. The preexisting legislation in this respect is Article 114 of the Ecuadorian Criminal Code, which states that persons held for more than one-third of the maximum sentence for a conviction for the charged offense who have not had their case discontinued or been committed to trial shall be immediately released. Further, those persons held for more than one-half of the maximum sentence for the charged crime who have not been sentenced shall be immediately released. Both of these requirements are subject to an exception that excludes persons charged with crimes under the Narcotics and Psychotropic Substances Act, such as Mrs. Jiménez.

The maximum sentence for the crimes with which Mrs. Jiménez was charged is eight years, which makes her six-year detention a violation of both clauses of Article 114. The exception to this article was invalidated by the Inter-American Court in the 1997 *Suárez Rosero Case*, where the language was held to be a *de jure* violation of the American Convention Article 7(5) obligation to render effective in domestic law the right to personal liberty.

According to the Commission, any extension of a preventive detention of an individual that goes beyond that permitted by domestic law constitutes a *prima facie* violation of Article 7(5), regardless of the nature of the offense or complexity of the case. Accordingly, Article 114 was rescinded by the Constitutional Court of Ecuador in December 1997. Thus, Mrs. Jiménez was held for six months (prior to her June 1998 release) in violation of the requirement that she be judged in a reasonable time or released under Articles 7(5) and 7(2).

Because the State failed to provide adequate domestic measures to ensure Article 7(5) in this matter they violated Article 2 of the Convention. Also, failure to arraign Mrs. Jiménez immediately after she was detained constituted a further violation of Article 7(5).

#### *Articles 7(6) and 25 – Incommunicado Detention and Habeas Corpus*

Any person deprived of personal liberty has the right under Article 7(6) to have recourse to a competent court. Article 28 of the Ecuadorian Constitution permits recourse to the Municipal Authority in such cases, but not to a court. The Commission found a violation of Article 7(6) for the State's failure to provide adequate recourse to a competent court, and further urged the State to take necessary steps in revising their legislation to provide judicial recourse in cases of deprivation of personal liberty.

Additionally, Article 25 of the Convention provides that individuals have the right to 'simple and prompt recourse (...) to a competent court or tribunal' when they feel that their personal liberties are being deprived. The Commission specified that, although Article 458 of the Ecuadorian Code of Criminal Procedure requires a judge to decide *habeas corpus* requests within 48 hours, a mere formality without effective implementation does not satisfy Article 25.

The Commission considered that the four initial *habeas corpus* filings were ignored or denied with delay in violation of Article 25.

#### *Article 5(2a) – Cruel, Inhumane, and Degrading Treatment*

The psychological suffering associated with *incommunicado* detention is considered an 'exceptional instrument' that has grave effects on the detained person. The Commission considered that the deprivation of outside communication allows to conclude that the detainee has been subjected to cruel and inhumane treatment. The prolonged *incommunicado* detention of Mrs. Jiménez was a violation of her rights under Article 5(2a).

#### *Article 8(1) – Determination of Guilt within a Reasonable Time*

According to the Commission, individuals are guaranteed the right to a hearing within a reasonable time under Article 8(1). Reasonableness is determined by 1) the complexity of the matter; 2) the procedural activity of the individual concerned and 3) the conduct of the judicial authorities.

The State contended that it acted reasonably in light of the complexity of the case by rapidly moving through the tribunals. The Commission considered this assertion insufficient and found that the eight years since initiation of the case is 'well beyond the

principle of reasonable time within which to resolve a case'. Thus, the Commission considered these actions to be a violation of Article 8(1).

*Article 8(2) – Principle of Presumption of Innocence*

Mrs. Jiménez maintained that her presumption of innocence under Article 8(2) was violated because her preventive detention for an indefinite period was equivalent to an anticipation of punishment, which is prohibited under universally accepted legal principles. The Commission considered that the State violated the presumption of innocence requirement of Article 8(2).

*Article 8(4) – Non bis in idem*

Article 8(4) acts as a safeguard against multiple trials for the same offense. Mrs. Jiménez was tried for the offense of asset laundering twice by the same judge of the Superior Court of Quito, and once by a judge of the Eighth Criminal Court. The additional trials were based on expanded investigation reports. The Commission decided that these simultaneous trials for the same offense constituted a violation of Article 8(4).

*Article 21 – Right to Own Property*

Mrs. Jiménez contended that her confiscated property would not be returned to her if her case is provisionally dismissed as distinguished from if it reaches a final judgment. In the latter case, her goods would be returned to her. However, she argues that if no final judgment is reached, the goods will not be returned, thus violating Article 21. The Commission rejected this charge and pointed out that a final judgment has the same effect as a definitive dismissal, and that both bear *res judicata* effect. Thus, in either case, the goods should be returned to Mrs. Jiménez in accordance with Article 21.

*Conclusion and Recommendations*

The Commission concluded that the State violated the right to human treatment (Article 5), the right to personal liberty (Article 7), the right to due process (Article 25), and the general obligation to respect and ensure these rights under Article 1(1) of the American Convention. The Commission thereby recommended that the State 1) grant full reparations and adequate compensation to Mrs. Jiménez; 2) order an investigation to determine responsibility for the violations herein identified and punish the individuals responsible and 3) take necessary steps to reform the *habeas corpus* legislation and enact such reforms with immediate effect.

- 2 *Extrajudicial Executions and Forced Disappearances of Persons, Peru* (Case 10.247, Inter-Am. C.H.R., Annual Report 2001, OEA/Ser./L/V/II.114, doc. 5 rev., 16 April 2001)

*Facts*

The Inter-American Commission received twenty-five petitions alleging human rights violations of 119 people by the State of Peru between 1984 and 1993. Under Article 40 of the American Convention, and based on the common fact patterns and alleged

perpetrator of these abuses, the Commission decided to combine these twenty-five cases to discern a joint resolution.

The claims allege the existence of a systematic practice of extrajudicial, summary or arbitrary executions or forced disappearances by agents of the State during a period of political instability. Information supporting this allegation is contained in the Commission's 1993 *Report on the Situation of Human Rights in Peru*. Additionally, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Bacre Waly Ndiaye, submitted a 1994 and 1995 report discussing the *rondas campesinas* and the death squads committing human rights violations in Peru. These reports were considered by the Commission in making its final determination.

The alleged acts took place while Peru was in a state of emergency due to the closing down and occupation of the Congress and Supreme Court on 5 April 1992. Insurgent group members, or those linked to them, were targeted as part of the State's counter-insurgency efforts. The United Nations Working Group on Enforced or Involuntary Disappearances received over 3,000 cases during this time period, largely related with the Government's fight against *Sendero Luminoso* (Shining Path).

However, a significant number of cases involved persons not connected to any subversive groups, such as those who, for instance, reached a checkpoint and failed to produce valid identification. Additionally, most of the acts were carried out by agents of the State with no attempt to hide their official capacity. Witnesses were present in most cases when uniformed agents arrived to seize the alleged suspect. After the suspect was detained, the family was unable to obtain information about their loved one since the State often denied their detention.

To further complicate matters, the State passed Act No. 26.479 (the 'Amnesty Act') in 1995, which granted amnesty to all members of security forces and civilian personnel accused, investigated, indicted, prosecuted, or convicted for violations of human rights between 1980 and 1995. Also, Act No. 26.492 prevented the judiciary from ruling on the legality of this law.

#### *Preliminary Objections on Exhaustion of Domestic Remedies*

According to the Commission, the State has the benefit of raising the exhaustion of remedies requirement, and thus may expressly or tacitly waive that right. The objection must be timely submitted during the first stages of the procedure. Also, the State must explain what domestic remedies are available and make a showing of their effectiveness. The Commission applied Articles 46(2)(c) and (a) and found that the State did not invoke this objection in a timely manner during the first stages of the procedure, and thus implicitly waived its right to raise such objection. Additionally, between seven and sixteen years passed for each of these complaints and none has reached final judgment, constituting an 'unwarranted delay in rendering final judgment'. Furthermore, the normal six-month time limit for submission of a complaint is not relevant as a result of the application of the Article 46(2)(c) and (a) exceptions. Also, the Commission attempted a friendly settlement of the claims under Article 48(1)(f) but was unsuccessful.

*Evidence*

The Commission asserted that special standards for evaluating evidence in a human rights court exist, which empower them to 'weigh the evidence freely and to determine the amount of proof necessary to support the judgment'. The Commission thereby relied on the aforementioned reports to discern a pattern of systematic disappearances caused by the State. Those facts that have been alleged in the petition, which the State has not responded to within the maximum time frame allowed by Article 34(5), 'shall be presumed to be true'. According to the Commission, the burden of proof in cases of detention or systematic practice of the human rights violations lies with the State. Therefore, the Commission presumed that the victims were executed or disappeared by acts of Peruvian State agents and the State has the burden to present evidence on the contrary to avoid responsibility. Due to the lack of active participation by the State, and because of its lack of response, or an ambiguous or elusive response to the allegations, the Commission concluded that the allegations in the complaint were true.

*Discussion*

Taking the facts as true and undisputed by the State, and rejecting the State's exhaustion of domestic remedies defense, the Commission found clear evidence of a systematic policy by the State to conduct extrajudicial executions and disappearances, and to cover up those human rights violations.

Articles 4(1) and 1(1) of the American Convention, as well as common Article 3 of the Geneva Conventions and the 1979 Peruvian Constitution recognise the right to life of all persons. The Commission concluded that the State and the parties acting through it acted in violation of the obligation to protect the right to life through the execution and forced disappearance of persons. The State did not protect these victims by adopting measures to prevent these practices, ending the practices once they had begun, or adopting measures to punish the perpetrators of these violations after their commission. Thus, the State violated Article 4 of the American Convention.

Articles 7(1) – (3) guarantee protection of the right to personal liberty. Detention without legal justification or for improper purposes violates the right to personal liberty. The Commission considered the fact that Peru was in a state of emergency at the time of these illegal detentions and thus would find some justification for a suspension of laws under Article 27. However, the exception to the protection of personal liberty is not a blanket provision, and 'can never be total'. The sole purpose of a detention under these circumstances must be the prevention of flight of a suspected criminal. The presumption of innocence remains despite the use of this exception, thus requiring prompt delivery to trial of any detainee. Furthermore, under Articles 7(5) and (6), kidnapping itself is a form of illegal deprivation of liberty since by nature it prevents the detainee from being heard before a judge. Thus, the Commission indicated that the State acted in violation of Article 7.

Article 5 guarantees the right to humane treatment, including freedom from torture. The Commission found that the alleged disappearances created psychological torture for both the direct victims and their families, who were unaware of their fate. Additionally, the State did not challenge allegations of physical abuse marks on several

of the corpses, nor did it challenge the allegations of torture. Thus, the Commission concluded that the State had violated Article 5.

Article 3 guarantees the right of every person to be recognised juridical personality before the law. The Commission found that the disappearance of persons denies such right and thus concluded that the State violated Article 3.

Article 19 guarantees the rights of the child. Four of the twenty-five cases refer to the abuse of the human rights of minors. Taking the allegations as true, the Commission concluded that the State violated Article 19 by failing to guarantee the protection of minors from torture and execution.

Articles 25(1) and 8(1) provide the right to judicial protection and a fair trial. Formal protection without effective implementation is not a sufficient guarantee of these rights. The Inter-American Court has held that when a protected right or liberty has been violated, '[t]he State has a legal duty (...) to take reasonable steps (...) to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation'. An investigation must include an adequate autopsy, collection and analysis of all physical and documentary evidence, and statements from witnesses. The Commission concluded that the State violated Articles 25(1) and 8(1) due to the lack of effective investigation and the significant delays involved, which prevented the families from receiving adequate due process.

Finally, the Commission concluded that the State failed to meet its obligations under the American Convention and thus, is in violation of Article 1(1). These obligations include respecting the rights and freedoms of individuals within their jurisdiction, and ensuring their free exercise of these rights and freedoms.

#### *Conclusion and Post-Conclusion Activities*

The Commission concluded that the State of Peru is responsible for violations of the right to life, the right to a fair trial, the right to judicial protection, the right to personal liberty, the right to humane treatment, the duty to prevent and punish torture, the right of recognition of persons before the law, the rights of the child, and the duty to respect the rights enshrined in the Convention. Therefore, the Commission recommended that the State: 1) void any judicial decision or legislation that tends to impede investigation into the actions herein described; 2) carry out a complete and impartial investigation of these executions and disappearances; 3) adopt measures that will adequately compensate victims' families and 4) accede to the Inter-American Convention on Forced Disappearance of Persons. In April 2001, the State of Peru established a Truth Commission to review the activities of the State between May 1980 and December 2000. 'The Truth Commission will prepare proposals for full reparations and the restoration of dignity to the victims of severe violations of human rights, and their relatives'. Also, an investigation by the Public Defender into the disappearance of persons between 1980-1996 has been launched. Peru also signed the Inter-American Convention on Forced Disappearance of Persons in January 2001, and is awaiting Congressional ratification.

Consistent with Article 46, the Commission will continue to evaluate measures taken by the State to implement these recommendations, and requests quarterly reports from the State.



3 *Milton García Fajardo et. al. vs Nicaragua* (Case No. 11.381, Inter-Am. C.H.R., Annual Report 2001, OEA/Ser./L/V/II.114, doc. 5 rev., 16 April 2001)

### *Facts*

A petition was filed on behalf of 142 dismissed customs office workers in Nicaragua on 7 June 1994. After unsuccessful negotiations with the Ministry of Labour, these workers went on strike in May of 1993. The Ministry found that Article 227 of the Labour Code prohibited public or social service workers from striking, and thus held the strike to be illegal. On petition to the Court of Appeals seeking an Amparo remedy, the workers received an interlocutory decision ordering the customs service to suspend any dismissal of its workers. Nevertheless, the customs service did dismiss these 142 workers, made up of mostly local labour leaders. The petition also stated that the police used excessive force during the strike on 9 and 10 June 1993. Approximately one year after the Amparo remedy was filed, the Supreme Court of Justice ruled in favour of the Ministry of Labour and confirmed the illegality of the strike, largely based on evidence from a strike that took place in 1992 that involved criminal activity.

The petitioners argued that the State of Nicaragua violated their rights to humane treatment (Article 5), a fair trial (Article 8), compensation (Article 10), freedom of association (Article 16), and judicial protection (Article 25). The State contended that this case should be dismissed since it is a duplicate proceeding with the present ILO Trade Union Freedom Committee case, and that the petitioners failed to exhaust domestic remedies prior to filing this petition. Additionally, the State claimed that the workers committed criminal acts during the strike, that the strike was illegal, and that most workers have been reinstated to their jobs.

The State rejected any possibility of a friendly settlement. Furthermore, the petitioners argued that there is no proceeding before the ILO regarding this particular issue.

The Commission concluded that, with respect to all 142 complainants, the State violated the right to a fair trial, judicial protection, and the economic, social, and cultural rights protected by Articles 8, 25, and 26 of the American Convention. Additionally, the Commission concluded that, with respect to 13 complainants, the State violated the right to humane treatment under Article 5.

The Commission published this report in accordance with Article 51(3) based on information that the State has not implemented the Commission's recommendations as of 6 July 2001.

### *Discussion*

The Commission found that the State violated the right to humane treatment in Article 5 based on evidence that the police used excessive force on peaceful protestors. The Commission relied on evidence from news reports and from a report that one security force agent was convicted of abuse of authority during the strike.

The Commission also found that the State violated the right to a fair trial embodied in Articles 8(1) and 25 based on the nearly one-year delay between the filing of the Amparo remedy and the decision of the Supreme Court. Nicaraguan law requires the Supreme Court to decide an Amparo petition within 45 days of filing. According to the

Inter-American Court, there are three issues when determining the 'reasonable time' for a decision by a court: 1) the complexity of the matter; 2) the judicial activity of the interested party and 3) the behaviour of the judicial authorities. The process involved in this case was straightforward and did not require many special measures. Thus, there is no justification for this delay.

Additionally, the State violated Article 25(2)(c) by ignoring the June 1993 Court of Appeals decision ordering the suspension of dismissals, the clarification decision of that same court the following week, the Director General of Labor's order to reinstate the workers, and the September, 1993 order by the Supreme Court to comply with the Court of Appeals suspension. This refusal to comply on the part of the State rendered ineffective the judicial recourse of the parties, and thereby violated the Article 25 requirement of free access to judicial recourse.

The Commission rejected the petitioner's claim that the State violated the right to compensation for miscarriage of justice (Article 10). Although the Commission agreed that the *Amparo* remedy ruling by the Supreme Court restricted the petitioners rights, it did 'not constitute a conviction based on a miscarriage of justice under [this article]'.

The Commission found that the State violated the Article 26 protection of economic, social and cultural rights by curtailing worker's rights. Although Nicaragua is a State Party to the Protocol of San Salvador, which recognises and protects these rights, it has not yet ratified it. However, Article 18 of the Vienna Convention on the Law of Treaties requires States that have signed a treaty, despite the lack of ratification, to refrain from implementing legislation that would contravene the purpose of the treaty. The measures adopted by the State here contravened the purpose of the Protocol.

The Commission rejects the petitioner's claim that the State violated the Article 16 right to free association. According to the Commission, the fact that the customs workers were dismissed as a result of the strike does not necessarily imply that the State prevented them from associating to strike or that they were prevented from exercising their rights as members of a union.

#### *Conclusion and Recent Developments*

The Commission found that the State violated the right to humane treatment in Article 5 with respect to 13 petitioners. Additionally, the Commission found that the State violated the rights to a fair trial, judicial protection, and economic, social and cultural rights, under Articles 8, 25, and 26 of the American Convention with respect to 142 petitioners. Finally, the Commission found that the State violated its generic obligations under Article 1(1). The Commission rejected the petitioner's claims of a right to compensation and freedom of association under Articles 10 and 16. The Commission recommended that the State conduct complete, impartial and effective investigations into those who inflicted injury upon the 13 petitioners whose Article 5 rights were violated during the strike, and punish those responsible. Additionally, the State should adopt measures to provide timely and adequate compensation for the 142 victims whose human rights were violated herein.

The State thereafter instructed its Interior Minister to begin the recommended investigations into these violations. The Commission found, however, that '[c]riminal action needs to be brought, and the judicial authorities will be responsible for the

proceedings'. The use of administrative personnel to carry out these investigations is insufficient.

*Dissent of Commissioner Dr. Julio Prado Vallejo*

Commissioner Prado Vallejo argued that the State violated Articles 8(1) and 10 of the American Convention. Article 8(1) requires judges to give rulings based on the evidence in the record and not based on personal motivations or knowledge unrelated to the case. Because the Supreme Court in this case based their decision in part on acts that allegedly took place prior to those at issue in the case, the Commissioner concluded that the court committed a miscarriage of justice and violated the petitioners' right to a fair trial. As a result, the Commissioner concluded that the petitioners' should be provided adequate reparations by the State for this harm, pursuant to Article 10 of the American Convention.

4 *Joseph Thomas vs Jamaica* (Case No. 12.183, Inter-Am. C.H.R., Annual Report 2001, OEA/Ser./L/V/II.114, doc. 5 rev., 16 April 2001)

*Facts/Background*

Joseph Thomas was convicted on 11 October 1996 for the January 1995 capital murder of Arthur McFarlane and Junior Spencer, which took place during an armed robbery. He was identified by two witnesses without an identification parade, and was brought to trial in 1996.

Capital murder in Jamaica includes murder pursuant to a robbery, and carries a mandatory death sentence. This mandatory provision was stipulated in the pre-Independence Constitution of Jamaica and, under Jamaican law, is not subject to challenge.

Mr. Thomas was convicted of capital murder and sentenced to death by hanging. His appeal to the Court of Appeal of Jamaica was dismissed in December 1997, and his petition for Special Leave to Appeal as a Poor Person to the Judicial Committee of the Privy Council was dismissed in April 1999. He did not pursue a Constitutional Motion in the domestic courts due to his indigence and the fact that legal aid is not available for these proceedings. Thus, the law firm of Campbell Chambers, on behalf of Mr. Thomas, filed this petition with the Commission.

Mr. Thomas contended that the State of Jamaica violated Articles 4, 5, and 8 of the American Convention by imposing a mandatory death penalty, preventing access to mercy proceedings, subjecting him to inhumane detention conditions and style of execution, and permitting a conviction without an identification parade and with biased jury instructions.

The State argued that their mandatory death penalty is applied only to the most serious crimes, such as this one. Also, they contended that full access to mercy proceedings is available, that the conditions of detention are not inhumane, that death by hanging involves no less humanity than other forms of execution, and that it is for the domestic appeals court to decide questions of fair trial, not for the Commission.

The Commission concluded that the State violated Mr. Thomas' rights under Articles 1, 2, 4, 5, and 8 of the American Convention.

*Discussion*

The Commission found that the petition was admissible and that there was no need to exhaust domestic remedies since the State did not raise this claim as a defense and therefore has explicitly or tacitly waived it. The Commission reviewed the merits under a standard of heightened scrutiny, whereby the parties' allegations were subjected to an enhanced level of scrutiny to ensure that any death sentence levied complies with the American Convention.

The Commission concluded that the State violated Mr. Thomas' rights under Articles 4(1), 5(1), 5(2), 8(1), as well as 1(1) and 2 of the Convention, by imposing a mandatory death sentence for his crime. The Jamaican court sentenced Mr. Thomas 'based solely upon the category of crimes for which he had been found responsible', and failed to take into account any mitigating circumstances in accordance with the requirement that death sentences be individualised. This broad application goes against the requirement that the death penalty be applied in a restrictive fashion.

Article 4(6) provides the right of those sentenced to death to 'apply for amnesty, pardon, or commutation of sentence'. The Commission found that the State violated this provision based on the inability of Mr. Thomas to adequately or effectively participate in the mercy process. Jamaican law formally adheres to Article 4(6), however, these legal requirements were never extended to Mr. Thomas.

Articles 5(1) and (2) provide the right to have physical, mental, and moral integrity respected and to be free from cruel, unusual, or degrading punishment or treatment. The Commission found that the State violated these provisions by subjecting Mr. Thomas to numerous unsanitary or inhumane conditions while in detention, including a lack of functioning toilets, no electric light, and poorly cooked food rations. The testimony of the State directly contradicted that of Mr. Thomas regarding prison conditions; however, the Commission accepted the testimony of Mr. Thomas because it applied specifically to his prison conditions, as distinguished from the State's general description of prison conditions.

Article 8 provides the right to a fair trial. The Commission founds that the State violated this right when the judge in Mr. Thomas' case 'manifestly violated his obligation of impartiality' during his jury instructions, and based on the absence of an identification parade. The judge's instructions to the jury included the statement: 'I do not anticipate you having any problem there that it was the accused who killed him'. The Commission concluded that in an objective light, these jury instructions created a clear danger of bias and inhibited trial by an impartial tribunal.

*Conclusions and Recommendations*

The Commission concluded that the State violated Mr. Thomas' rights under Articles 4(1), 5(1), 5(2), 8(1), 1(1), and 2, with regard to the imposition of a mandatory death sentence. Further, the State violated Mr. Thomas' rights under Articles 4(6), 1(1), and 2, with regard to the failure to provide an effective right to apply for pardon, amnesty, or commutation of sentence. The State also violated Mr. Thomas' rights under Articles 5(1), 5(2), and 1(1), with regard to the conditions of his detention. Finally, the State violated Mr. Thomas' rights under Articles 8(1), 8(2), and 1(1), with regard to the improper jury instructions provided during his trial.

The Commission recommended that the State: 1) grant Mr. Thomas a re-trial in accordance with the due process protections of Article 8 or, if not feasible, release him with compensation; 2) adopt legislative measures to ensure that the death penalty is not imposed in contravention to the requirements of Articles 4, 5, and 8; 3) adopt legislative measures to ensure that the right to apply for mercy under Article 4(6) is given effect and 4) adopt legislative measures to ensure that Mr. Thomas' detention conditions comport with the standards of humane treatment required by Article 5.

*Concurring Opinion of Commission Hélio Bicudo*

Commissioner Bicudo agreed with the findings of the Commission, but elaborated on the use of the death penalty in the Americas, concluding that '[t]he elimination of a life could be deemed torture or cruel, inhumane or degrading treatment' under the American Convention. The Commissioner believes that the tolerance of the death penalty expressed in the American Convention should not be construed to mean that it does not violate the right to life or the right to freedom from torture also expressed therein.

## V AFRICA

RACHEL MURRAY

### 1 ORGANIZATION OF AFRICAN UNITY/AFRICAN UNION

The African Committee of Experts on the Rights and Welfare of the Child under the African Charter on the Rights and Welfare of the Child met for the first time from 29 April – 2 May 2002. It reviewed its draft Rules of Procedure, which are to be further amended at the next meeting of the Committee, and Draft Guidelines for Initial Reports of State Parties.

### 2 AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The 31<sup>st</sup> Ordinary Session of the African Commission was held from 2 – 16 May in Pretoria, South Africa. It was attended by a large number of NGOs and over 30 States. A number of NGOs applied for observer status and the Commission granted this to five organisations. Affiliated status was granted to the national human rights institutions from Mauritius, Cameroon and Togo.

Reports submitted by States under Article 62 of the Charter and examined at the session were those of Mauritania, Lesotho, Cameroon and Togo.

Among statements and requests by NGOs to the Commission were concerns of the situation in numerous African States including Burkina Faso, Kenya, Mauritania, Nigeria, Tanzania and Zimbabwe. Following the trend at previous sessions, States requested, and were permitted, to respond to allegations raised by these organisations. In their interventions some States also responded to decisions which had been made by the Commission on communications brought against them. NGOs also made requests