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III INTER-AMERICAN SYSTEM

DIEGO RODRÍGUEZ-PINZÓN

The following are recent cases decided by the Inter-American Commission on Human Rights. First, we have included the case *Mary and Carrie Dann vs United States* concerning the rights of indigenous communities in the United States. This case raises interesting legal questions, specially regarding the notion of 'full informed and mutual consent' on the part of the indigenous communities as a pre-requirement to any measure or action by States that may affect indigenous territories or lands.

The next two cases, *Finca 'La Exacta' vs Guatemala*, and *Waldemar Gerónimo Pinheiro and José Víctor Dos Santos vs Paraguay*, are a sample of some of the manifest human rights violations that still exist through the Americas. While it has been argued that in recent years the Commission increasingly receives cases that not necessarily involve violations of the most basic rights, we continue to see practices in several States that reminds us that the most fundamental rights are still under siege in the Americas. Persistent practices such as police brutality, violent repression of social protest, judicial corruption, among others, are threatening the weak democracies of the region. However, we have not included cases from Colombia, as it is well known that this country has, by far, the worst human rights situation of the hemisphere.

1. **MARY AND CARRIE DANN VS UNITED STATES, IACHR, REPORT NO. 75/02, CASE 11.140 – DECISION ON 27 DECEMBER 2002**

1.1. **Facts/Background**

On 2 April 1993, the Indian Law Resource Center (Petitioners) filed a petition to the Inter-American Commission (Commission) on behalf of Mary and Carrie Dann (Danns), against the United States. Petitioners allege violations of Articles II, III, VI, XIV, XVIII, and XXIII of the American Declaration.

Mary and Carrie Dann are members of the Western Shoshone aboriginal people who reside on a ranch in Crescent Valley, Nevada. Petitioners asserted that relations between the Western Shoshone and the United States are governed by the 1863 Treaty of Ruby Valley, a peace treaty between the parties. Petitioners claimed that the Danns have used and occupied the lands in question since time immemorial and it is the sole means of their

support. They asserted that their use of the lands had gone undisturbed and unchallenged until the early 1970s when the United States, through the Department of the Interior began taking or threatening to take actions to impede the Danns' use and occupation of the lands. Petitioners contended that these actions included gold mining, which allegedly was given the go ahead by the US Government; imposition of State hunting laws on the Western Shoshone, which impeded their subsistence hunting; and the impounding and sale of the Danns' livestock on two occasions.

Petitioners asserted that the US has relied on a 1966 ruling of the Indian Claims Commission (ICC)¹ that the Western Shoshone title had been extinguished by acts of 'gradual encroachment' by non-Indians. They contested the validity of these proceedings and did not accept the money awarded by the ICC.

The State argued that the matters raised do not involve human rights violations, but rather involve lengthy litigation of land title and land use questions that have been and still are subject to careful consideration by all three branches of the United States Government. The State asserted that the Danns have title, ownership and possession of the lands constituting their ranch in Nevada, which have been patented by their father. The State also indicated that as long as the Danns comply with the requirements of the Bureau of Land Management (BLM), they are eligible for a permit to graze their livestock on public lands.

Further, the State emphasised that the US courts concluded that Western Shoshone title has been extinguished and barred by the ICC proceedings. The ICC found an inverse condemnation (a method by which the government obtains title to property through the exercise of sovereign powers) based upon the settlement of the West, requiring just compensation, which was ultimately awarded. The State argued that merely because the Danns disagree with the final decision of the ICC and believe it to be wrong does not mean that the decision is incorrect. With regard to petitioner's claim that the Danns lacked representation before the ICC, the State claimed that the issue was raised before and addressed by the ICC. The ICC legislation itself addresses who among the many Shoshone Indians was qualified to represent their interests.

The Commission found that the United States has failed to guarantee the Danns' right to property in conditions of equality in violation of Articles II, XVIII and XXIII of the American Declaration.

¹ In 1946, the US created the ICC under the Indian Claims Commission Act to determine and compensate Indian land claims. The Commission noted that according to information on the record, publicists have over the years criticised the ICC on various grounds; the fact that it allowed an individual or small group to present a claim on behalf of a whole tribal group without the consent of the group.

1.2. Precautionary Measures

On 16 August 1993, petitioners requested the Commission to issue precautionary measures to stop the United States from impounding their livestock while the petition was pending. Petitioners informed the Commission that the US BLM intended to impound the livestock on a portion of the Western Shoshone ancestral land. They contended that the Danns have grazed their livestock on the land for generations and that these actions could be devastating to them.

On 28 June 1999, the Commission, pursuant to Article 29(2) of the earlier Regulations, requested the United States 'to stay its intention to impound the Danns' livestock until the Commission has an opportunity to fully investigate the claims raised in the petition'. On 9 August 2000, petitioners presented a 'Request for Additional Precautionary Measures'. According to the petitioners, two bills were being introduced in the US Congress which, if enacted, 'would authorise the disposal to private interests of land that included the land used and occupied by the Danns, and would authorise the distribution of the funds awarded by the ICC but never accepted by the Western Shoshone people'.

The United States, in its response to the Commission, responded that 'out of respect for the Commission', it had initiated an interagency dialogue, but would not stay the actions of the BLM. With regards to the legislation, the United States contended that even if enacted it would cause no irreparable harm to the Danns and therefore their request for precautionary measures had no basis in law or fact.

1.3. Positions of the Parties

Petitioners claimed that the State had violated the Danna's right to property, to equality under the Law, to cultural integrity, to self-determination, and to judicial protection and due process of law.

Petitioners claimed that the State has violated the Danns' right to property by reason of the limitations placed on their use and occupation of the ancestral land. Petitioners indicated that the Danns have a right to the land based upon the Western Shoshone's traditional use and occupation of the lands; the 'customary land tenure system'. The Danns have a right to the lands as members of the Western Shoshone people.

They also argued that the US has not disputed the traditional land tenure, but that the Western Shoshone property rights have been extinguished as a result of statutorily based claims proceedings. The US courts have never ruled on the extinguishments, but disposed of the Danns' domestic claims based on interpretations of the Indian Claims Commission Act. Furthermore, regarding the United States' claim that the Danns have not pursued 'individual aboriginal title' under domestic law, the petitioners

explained that doing so would have separated them from the treaty-based Western Shoshone nation claim.

Petitioners challenged the State's interference as discriminatory, in violation to the right to equality under the law. They claimed that the theory of 'gradual encroachment' by non-indigenous persons constitutes a non-consensual and discriminatory transfer of property rights in favour of non-indigenous interests. They identified as a further source of discrimination the absence of substantive protections for indigenous property rights that are equal to the protections accorded to non-indigenous forms of property. Petitioners argued that the Western Shoshones were not provided with just compensation that is otherwise required for in the taking of non-indigenous property.

The methods by which the US determined the extinguishments of compensation for the Western Shoshone lands show that the US has failed to support and protect indigenous land rights to the same extent of other property rights. They indicated that the Danns were not permitted to intervene in the ICC proceedings and were prevented from dismissing their lawyer when they decided that he was not acting in their best interests. They contrast this to general property law, according to which property rights ordinarily can only be extinguished or condemned through 'careful, rigorous proceedings in which all interested parties are entitled to be heard through counsel of their own choosing'.

Petitioners argued that these violations more broadly interfere with the Danns' right to cultural integrity affirmed in Article XXII (right to property), Article III (right to religious freedom), Article VI (right to family and protection thereof), and Article XIV (right to take part in the cultural life of the community). Petitioners asserted that the US is actively attempting to deprive the Danns of their traditional lands and that the Western Shoshone culture is dependant on that land. Specifically, the US has threatened civil and criminal penalty notices for the use of their traditional lands, threatened to confiscate their livestock, impeded the gathering of subsistence foods, and limited access to sacred sites.

Petitioners also argued that the US violated the Danns' right to self-determination under international law, in two respects, by depriving the Danns of their land and resources and therefore their means of livelihood, and by excluding the Danns from participating in decisions that affect their lands and natural resources. Petitioners contended that the US failed to consult with the Danns regarding decisions affecting their enjoyment of traditional lands. Petitioners asserted that without a full and fair opportunity to be heard and to genuinely influence the decisions affecting them, the Danns and other Western Shoshone groups are unable to exercise their right to self-determination as guaranteed by international law.

Regarding the rights to judicial protection and due process of law (Article XVIII), petitioners argued that the Danns were denied participation or adequate representation in the proceedings before the ICC. In those

proceedings, the US and the attorney purporting to represent the Western Shoshone 'conceded and formally stipulated' that the Western Shoshone land rights had been 'extinguished' on 1 July 1872, under a theory of 'gradual encroachment' by non-Native Americans. The Danns claimed not to have authorised or participated in these proceedings and were not entitled to intervene to challenge the stipulation by the Western Shoshone attorney. They also argue that the attorney, the US Government and the US courts misled the Western Shoshone concerning the effect of their judgments on Western Shoshone land rights.

With respect to the petitioner's contention that the US violated the right to property under Article XXIII of the American Declaration, the State argued that the provision is concerned with the rights of individuals and not a separate entity such as an Indian tribe. The State also asserted that it is not bound by the American Convention, and that in any case the Convention deals with rights of individuals and not separate entities.

1.3.1. Procedural History of the Western Shoshone and Dann Land Claims

In 1951, the Temoak Band filed a claim with the ICC on behalf of the 'Western Shoshone Identifiable Group' arguing that the United States had taken a vast expanse of Western Shoshone ancestral territory in Nevada and California. In 1962, the ICC found that title to most of the land was extinguished by gradual encroachment. In 1974, the Danns attempted to intervene to remove a portion of land from the pending process. The ICC rejected the intervention.

Outside of the process of the ICC, the US brought an action in trespass against the Danns. The Danns claimed aboriginal title. The US District Court rejected the argument on the grounds that their title had been extinguished. The Ninth Circuit reversed and remanded on the ground that the extinguishment had not been litigated or decided. The District Court once again found that the title was extinguished. The Ninth Circuit again reversed. The Supreme Court found that there was payment for the land when the monies were deposited in an account in the US Treasury.

1.4. Analysis

The Commission stated that it was competent to determine the allegations against the United States pursuant to Article 20 of the Commission's Statute and Article 23 of the Commission's Rule of Procedure, which establish that for all those OAS Member States that have not ratified the American Convention, the Commission may examine communications submitted to it and other information available and make recommendations to such States when it considers this appropriate.

The Commission also clarified that in interpreting and applying the Declaration it was necessary 'to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly'. According to this approach, the Commission considered it appropriate to take into account in the determination of this claim 'the developing norms and principles governing the human rights of indigenous peoples'.

The Commission then examined the claim that the Danns had not been afforded equal treatment under the law regarding the determination of their property rights in the Western Shoshone ancestral land. The Commission found that the question of extinguishment of the Shoshone to the ancestral land was not based on a judicial evaluation of the evidence, but rather upon apparently arbitrary stipulations between the US Government and the Temoak Band regarding the extent and timing of the loss of indigenous title to the land.

The Commission found that the implementation of the ICC process by the United States was a commendable initiative, but that these processes were not sufficient to comply with contemporary international human rights norms, principles, and standards that govern the determination of indigenous property interests.

Furthermore, the Commission noted that under Articles XVIII and XXIII of the Declaration, determinations dealing with indigenous lands need to be based upon a process of fully informed and mutual consent on the part of the indigenous community. All members of the community must be afforded the effective opportunity to participate individually or as collectives. There is no evidence that appropriate consultations were held with the Western Shoshone at the time that certain significant determinations were made, notably, the Danns were not allowed to intervene at the ICC.

Also, there was a denial of the right to an effective and fair process in compliance with the norms and principles under Articles XVIII and XXIII of the Declaration by virtue of the fact that the issue of extinguishment was not litigated before or determined by the ICC. This finding is based upon the fact that the ICC did not take an independent review of the evidence. The determination was based on a stipulation between the State and purported Shoshone representatives.

The Commission concluded that the Danns were not afforded the same protections with regard to their land, as others in the US Under prevailing common law in the US, including the 5th Amendment, the taking of property by the Government requires a valid public purpose and the entitlement of owners to notice, just compensation, and judicial review. The Danns received none of these protections. Further, while compensation was awarded by the ICC, it was based on arbitrary dates and did not include interest from the date of alleged extinguishments.

2. FINCA 'LA EXACTA' VS GUATEMALA, IACHR, REPORT NO. 57/02, CASE 11.382 – DECISION ON 21 OCTOBER 2002

2.1. Facts/Background

The Center for Human Rights Legal Action (Petitioners) submitted a petition to the Commission alleging that the State of Guatemala (State) violated the rights of the workers on the Finca 'La Exacta', (workers) when the Guatemalan police raided the estate, leaving three dead and eleven seriously injured. Petitioners further alleged that the State failed to provide access to justice and to judicial protection for the Workers, in connection with the raid and other claims of the workers.

Petitioners claimed that in early 1994, the workers began to organise and protest their working conditions. Because neither the State labour courts, nor the estate management took any action, the Workers occupied the estate on 17 July 1994. On 24 August 1994, State security forces invaded the estate and used excessive force, killing three persons and injuring eleven others. They argued that the State failed to properly investigate these acts and punish the perpetrators. They further argued that with regard to their labour demands, they were denied due process, an opportunity to be heard, and adequate judicial remedies.

The State argued that the petition was inadmissible for failure to exhaust domestic remedies. It indicated that it was in the process of a proper investigation, which has not been carried out. The State further claimed that the police entered the estate with a court order and were met by occupants with weapons.

The Commission concluded that Guatemala violated Articles 1, 4, 5, 8, 16, 19 and 25 of the American Convention of Human Rights.

2.2. Admissibility

The Commission found that the complaint met the formal requirements for admissibility. With regard to the exhaustion of domestic remedies, the Commission found that this requirement was not applicable in this case, stating that 'the Government must demonstrate not only that an adequate remedy is available under domestic law, but that such remedy is 'effective'. Petitioners contended that they were not afforded the right to due process nor the opportunity to be heard for the settlement of their claims, and that the labour courts were guilty of excessive and unwarranted delays in taking action on these claims. The State only supplied a one-sentence response to this claim. Thus, the State failed to fulfil its burden to prove that its remedies are effective and being applied. Therefore, the Commission found petitioners excused from the exhaustion requirement with regard to these claims.

As for the violations that allegedly resulted from the events of 24 August 1994, the State argued that there are criminal proceedings underway, barring the Commission from hearing the case. The Commission stated that there has been an undue delay in the criminal proceedings. While the Criminal Code of Procedure of Guatemala states that preliminary proceedings should take no longer than six months after defendants are identified, two years elapsed since the violence without any formal accusations. Additionally, the Office of the Public Prosecutor has requested four extensions in the preliminary phase.

Furthermore, it was made clear that no impartial investigation and prosecution will take place. The Director of the National Police publicly stated that the police would not carry out an investigation of the matter. Statements of key witnesses have not been taken and crucial evidence has not been taken. The Commission held: 'there is no evidence that a complete and adequate judicial investigation will be carried out in the near future'.

2.3. Merits

The Commission proceeded to analyse whether in the present case, the State violated the right to life and to respect of personal integrity, the right to freedom of association, the rights of the child and the right to due process and judicial protection.

2.3.1. Right to Life and Right to Respect of Personal Integrity

Excessive Use of Force

According to the record, at least 215 agents of the National Police, including two helicopters, invaded Finca 'La Exacta' using teargas and firearms against the Workers. Three workers were killed and eleven others seriously injured. In addition, numerous observers, including the Counsel for Human Rights of Guatemala, concluded that the police used excessive force. The State argued that the actions were necessary to protect the private property of the estate owners and was subject to arrest warrants for 111 of the workers. The Commission concluded that excessive force was used in this case and that when excessive force is used, any deprivation of life is arbitrary.

The Commission cited international standards providing that firearms should only be used against persons 'when there is danger to life'. The Commission rejected the State's allegation that the workers had lethal weapons and found that the State had not provided evidence that the police had reason to believe their lives or the lives of others were in danger.

The Commission pointed out that according to international standards governing the use of force by law enforcement officials in the performance of their duty 'the use of force should be necessary and proportionate to the needs of the situation and the objective to be achieved'. In the present case, the police attempted to negotiate at the gates of the estate for one or two

hours, and when the workers refused to leave, the police forced their way in with a tractor. Then the police began attacking them with firearms and air support. This demonstrates that the police attacked the workers without first ascertaining whether the use of extreme force was necessary.

Finally, the Commission considered the *Montaña plan*, the plan of action prepared by the police prior to the events of 24 August 1994. The Commission found that the plan considered 'the use of extreme force' and 'sufficient safeguards were not provided to ensure proportionality and the necessity for the force used'. The Commission thus held that the police used excessive force and arbitrarily deprived the three killed Workers of their lives. The police also violated the right to physical, mental, and moral integrity of the Workers.

Torture of Diego Orozco García

According to the record, Mr. García was taken from the estate alive in one of the helicopters used in the operation, and his body was later found 60 kilometres from the estate. The forensic report concluded that he had died in part from a bullet wound in the chest. It also indicated that Mr. García's hands and chest had been tied and he had been dragged on a rough surface before dying. The Commission concluded that these acts constituted torture in violation of Article 5(2) of the American Convention and of the Inter-American Convention to Prevent and Punish Torture.

2.3.2. Right to Freedom of Association (Article 16)

After organising into a union in February 1994, the Workers petitioned the labour courts to institute proceedings with regard to a labour dispute with the owners and administrators of the estate. In early March, the owners and administrators began to dismiss workers who signed a petition to initiate a collective bargaining process. The workers filed suit with the Second Labour Court for reinstatement. The courts took no action and the owners and administrators refused to reinstate the workers or discuss their claims. On 17 July 1994, the Workers occupied the estate.

The Commission, after examining the plan and the police operation, together with the collaboration of the owners of the State and other neighbouring State owners, found that the police did not act objectively as law enforcement officials, but acted to achieve the aim of the estate owners in their efforts to take reprisal against the union. The Commission found that the action taken to suppress the union's activities was a violation of Article 16 of the Convention.

2.3.3. Rights of the Child (Article 19)

Article 19 of the American Convention requires that special measures be taken to prevent children from being victims of violence. Because the plan

of the security forces did not provide for any protective measures for the children present at the *finca*, the Commission found that the State of Guatemala violated this provision.

2.3.4. Right to Due Process and Judicial Protection (Articles 8 and 25)

The Commission examined whether the State of Guatemala violated Articles 8 and 25 of the American Convention with respect to both the labour demands of the Workers and the violence committed on 24 August 1994.

Denial of Justice with Respect to the Labour Claims of the Workers on Finca 'La Exacta'
The Commission found that the State violated Articles 8 and 25 with regard to the labour claims of the workers. According to the Guatemalan Labour Code, once a petition is submitted, the competent judge 'is required to convene a conciliation tribunal within 12 hours'. It also establishes that '[t]he resulting conciliation procedure may not last more than 15 days'.

In the present case, the domestic courts never ruled on the petition presented by the workers. After the admission of the case, the Second Labour Court took no measures to move it forward for several months, and later notified the workers that the case had been transferred to the Sixth Labour and Social Welfare Court of Guatemala City. More than two years after the filing, the Guatemalan courts had not processed the claims. Consequently, the Commission concluded that the State, in violation of Article 8 of the Convention, had denied the workers the possibility of a hearing within a reasonable time.

Further, the courts never granted a hearing or resolved the case arising from the dismissal of the workers who formed the labour association and joined the petition in connection with the collective labour dispute. The Commission stated that 'the dismissed workers were not given an opportunity to be heard nor were they given access to a prompt and effective remedy', and concluded that this denial of access to justice constituted a violation of Articles 8 and 25(1) of the Convention.

Denial of Justice with Respect to the Violations Committed on 24 August 1994

The Commission also concluded that the provisions of Articles 8 and 25 were violated with respect to the violations of rights committed on 24 August 1994. It noted that more than two years after the raid, no charges have been brought against any suspect and the case was still in the preliminary stage. The investigation carried out in this case shows a lack of access to an effective remedy. Key witnesses were not questioned and those that gave testimony of alibis were not questioned as to those alibis. Further, the Commission concluded that the State attempted to obstruct any investigation.

2.3.5. Obligation to Respect Rights (Article 1)

Finally, the Commission found the State of Guatemala responsible for the violation of Article 1(1) of the American Convention because it did not ensure 'the free and full exercise of the rights guaranteed in the Convention'. Additionally, it concluded that Guatemala was in violation of the Convention because of its 'failure to fulfil its responsibility to respect the rights recognised in the Convention'.

3. **WALDEMAR GERÓNIMO PINHEIRO AND JOSÉ VÍCTOR DOS SANTOS VS PARAGUAY, IACHR REPORT NUMBER 77/02, CASE 11.506 – DECISION ON 27 DECEMBER 2002.**

3.1. *Facts/Background*

On 11 May 1995, Waldemar Gerónimo Pinheiro and José Víctor Dos Santos, both Brazilian nationals, submitted a petition against the Republic of Paraguay to the Inter-American Commission on Human Rights claiming that Paraguay has incurred in international responsibility for the delay in the legal action brought against them and for the prolonged pre-trial detention that they were subjected to.

Mr. Pinheiro argued that he was imprisoned in pre-trial detention for over ten years accused of a homicide, but that he was never convicted. He also claimed that there was no evidence against him, that his file was lost three times and he had not been granted parole. He further indicated that he was unable to afford the costs of his defense.

Mr. Dos Santos claimed that he was arrested as a suspect in a homicide and was tortured by the State (requiring five months hospitalisation). He also indicted that he was imprisoned for over ten years in pre-trial detention, that he was never convicted, nor granted parole, and that he could not afford his defense.

The State categorically denied Dos Santos' accusations of torture. The State asserted that he was in pre-trial detention on charges of double homicide since 1988, but was released in July 1995, by virtue of a *habeas corpus* order of the Supreme Court of Justice. It stated that no case file on Dos Santos exists.

The State claimed that Pinheiro had been imprisoned since 6 June 1985, charged with the crime of homicide related to robbery. He indicated that he was sentenced to 30 years in prison, on 17 March 1995, but that the case is pending on appeal. The State thus asserted that domestic remedies were not exhausted.

The Commission concluded that the State of Paraguay violated Article XXV (protection from arbitrary arrest) and Article XXVI (due process of law) of the American Declaration with respect to acts occurred prior to

24 August 1989. It also established a violation of Article 7 (right to personal liberty) and Article 8 (right to a fair trial) regarding the acts occurred after the American Convention entered into force for Paraguay.

3.2. Admissibility

The Commission declared the case admissible. It found that the petitioners were exempted from the requirement to exhaust domestic remedies due to the unjustified delay of the judicial proceedings.

3.3. Merits

The Commission analysed whether in the present case, the rights to personal liberty, to humane treatment, to a fair trial, and to access to a simple and effective judicial remedy had been violated.

3.3.1. The Right to Personal Liberty – Violation of Article XXV of the American Declaration and Article 7(2) and (3) of the Convention

The Commission first analysed the provisions of the Paraguayan legislation in force at the time of the arrests to determine whether the arrests fulfilled the 'conditions established beforehand by law.' The Commission applied a three-part test in deciding whether the deprivation of liberty was consistent with Article 7(2) and (3) of the American Convention: (1) to determine whether the arrest is materially and procedurally legal, the first part of the test explored at the compatibility of the arrest with domestic law; (2) the second part of the test analyses domestic law in light of the American Convention to ascertain whether the arrest is arbitrary; and (3) if the detention complies with the two previous requirements, the third part of the test analyses whether the application of the law to the specific case is arbitrary.

The Arrest of Waldemar Gerónimo Pinheiro

The Commission first analysed the Paraguayan Constitution which states: '[t]he arrest of persons may take place only by reason of a written order issued by a competent authority, except in the case of being caught in the act of committing a crime'. From the record, it is clear that Pinheiro was not caught in the act of committing the crime, in that he was arrested on 1 July 1985, and the crime occurred in 6 June 1985. The Commission then considered whether the arrest took place on a written order. While there was a police report in the file stating that Pinheiro was a material accomplice to the homicides, there was no arrest warrant, as required by the Code of Criminal Procedure. Thus, since the procedural requirements of the Paraguayan law were not met, the Commission concluded that the arrest was

illegal and in violation of Article XXV of the American Declaration and Article 7(2) and (3) of the American Convention.

The Arrest of José Víctor Dos Santos

There was no arrest warrant for Dos Santos and there was no legal action brought against him. Rather, his detention was due to mistaken identity: a person with the same surname had been charged for double homicide. Furthermore, Dos Santos remained in detention for eight years without any proceeding to justify it. The Commission found his arrest to be arbitrary, in violation of Article XXV of the American Declaration and Article 7(2) and (3) of the American Convention.

3.3.2. Period of Pre-trial Imprisonment. Violation of Article XXV, paragraph 3 of the American Declaration and Article 7(5) of the American Convention

With regard to preventative or pre-trial detention, the Commission pointed out that Article XXV of the American Declaration and Article 7(5) of the Convention require that: (1) it must only occur on an exceptional basis; (2) it must be justified on the specific circumstances of each case; and (3) excessive prolongation must be prevented.

According to the Commission, pre-trial imprisonment should be limited to purely exceptional circumstances. The Convention requires preventive detention to be used only 'to guarantee the legal proceedings (...) or to guarantee the presence of the accused at all stages of the proceedings, as long as the same objectives cannot be achieved by any other less restrictive means.' Thus any other objective sought amounts to pre-trial punishment, which is incompatible with the American Declaration and American Convention. Additionally, pre-trial detention should only be imposed for a reasonable time; this standard 'is designed to prevent the accused from remaining a long time under accusation and ensuring that the accusation is decided on promptly'.

Concerning Mr. Dos Santos, who was detained for eight years, since there was no information that he was ever accused of a crime, the Commission found no reason to justify this measure. With regards to Mr. Pinheiro, who was accused through criminal proceedings, the ten-year period for which he was in preventative detention, 'exceed[s] all limits of reasonability'. Furthermore, the negligence evidenced by the fact that his file was lost three times supports and confirms the unreasonable length of the pre-trial detention.

Thus, the Commission found that the State of Paraguay had not demonstrated the need to detain the petitioners and that there was a violation of the above-mentioned articles.

3.3.3. The Right to a Fair Trial

The Right to a Hearing Within a Reasonable Time (Article 8(1))

In analysing the right to a fair trial within a reasonable time, the Commission noted that the Inter-American Court has indicated: 'the proceedings are over when a final, firm judgment is issued in the matter (...) including any appeals that may be filed'. In this case, petitioners remained in detention without a final judgment for eleven and seven years, respectively.

To determine whether these periods of time were reasonable, the Commission, following the European Court of Human Rights, analysed three elements: (1) the complexity of the case; (2) the procedural activities of the interested parties; and (3) the conduct of judicial authorities. The Commission found the cases not to be complex. Further, there was no evidence that petitioners delayed the proceedings. Concerning the third element, based on the facts that Pinheiro's case file was lost three times and Dos Santos was detained without a case file or any accusations against him, the Commission concluded that the conduct of the judicial authorities was negligent and that the State had violated the requirement of a reasonable time.

The Right to Presumption of Innocence (Article 8(2) of the American Convention and Article XXVI of the Declaration)

The Commission noted that the Inter-American Court has found that 'depriving a person of liberty for a disproportionate time would be the same as serving a sentence in advance of the judgment'. In the present case, the Commission found that the petitioners were punished by presuming their guilt, in violation of the principle of presumption of innocence.

3.3.4. The Right to Humane Treatment (Article 5 of the American Convention and Article I of the Declaration)

Regarding Mr. Dos Santos' claim of torture at the time of his arrest, the Commission found that it could not declare a violation of the right to humane treatment because the petitioner never presented any evidence in support of his claim, and the State categorically rejected it.

3.4. Proceedings Subsequent to Report No. 26/02

On 15 May 2002, the State sent a message to the Commission referring to the difficulties that it has encountered in attempting to fulfil some of the Commission's recommendations. The State argues that it is unable to locate the petitioners, who must be present at a judicial hearing to determine the amount of compensation. The Commission also attempted on several occasions to contact the petitioners with no success. Based on these facts and

the Commission's inability to locate the petitioners' next-of-kin, the Commission decided not to submit the case to the Inter-American Court.

Concerning the Commission's recommendations that the State of Paraguay investigate and punish those responsible for these violations and adopt measures to stop the violations from recurring, the Commission considered that some progress was achieved and trusted that Paraguay would shortly comply with them.