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Inter-American System

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Recommended Citation

Rodriguez-Pinzon, Diego, "Inter-American System" (2006). *Articles in Law Reviews & Other Academic Journals*. 1758.

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IV INTER-AMERICAN SYSTEM

Diego Rodríguez-Pinzón

1. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

During 2005, the Inter-American Commission on Human Rights (IACHR or Commission) of the Organization of American States (OAS) continued to discharge its mandate by reviewing and processing individual cases and closely monitoring the general human rights situation in several States of the region. The Commission is currently composed of Commissioners Víctor E. Abramovich Cosarín, Evelio Fernández Arévalos, Paolo Carozza, Freddy Gutiérrez, Florentín Meléndez, Paulo Sérgio Pinheiro and Clare K. Roberts.

Recently, Eduardo Bertoni, the first Special Rapporteur for Freedom of Expression of the IACHR, announced his resignation from the position. This was the first Rapporteurship of the Commission entrusted to a full time expert who is not a member of the Commission and Mr. Bertoni was the first Rapporteur. It remains to be seen what the future of the recently established mechanism will be.¹

General Activities during the Second Semester of 2005

During the Fall of 2005, the Inter-American Commission developed a wide variety of activities related with the promotion and protection of human rights. Additionally to processing and adjudicating individual cases, the IACHR also expressed its public concern in certain situations, resorting to press releases, among others. For example, the Commission publicly celebrated the ratification of Inter-American treaties by OAS member States or other advances in human rights issues, and often expressed concern over current country conditions. At its headquarters in Washington, DC, the IACHR held several activities which included reporting on the human rights situation of the Americas at the conclusion of its session on 28 October and expressing concern about harassment of political dissidents in Cuba on 29 July.

The IACHR also referred specifically to the human rights situation in Haiti. The Commission made the following statements regarding Haiti: called for greater international action on 22 April; expressed concern over the situation of Yvon Neptune, former Prime Minister of Haiti, on 6 May; released preliminary observations on its 15 April on-site visit to Haiti on 6 June; deplored escalating violence on 23 June; and called for immediate measures to quell unprecedented violence on 22 July. The Commission also performed a visit to Haiti together with the UNICEF Regional Office in Latin America and the Caribbean on 2-5 November. On 16 December, the IACHR indicated that it was alarmed by the retirement of five Supreme Court judges. Also in Hispaniola, the Special Rapporteur on the rights of

¹ Information about the Rapporteur can be found on the following website: www.cidh.oas.org/relatoria/index.asp?IID=1.

persons deprived of freedom of the IACHR expressed its profound concern at the violent events at the Higuey prison in the Dominican Republic on 8 March.

Regarding the State of Colombia, the IACHR made the following statements: issued a press release regarding the Adoption of Colombia's 'Law of Justice and Peace' on 15 July; stated on 25 July that the armed conflict aggravates the discrimination and violence suffered by Colombian women; and deplored the assassination of 14 police officers in Colombia on 4 August. On 8 November, the IACHR Rapporteurship on the rights of persons deprived of freedom and the Office of the United Nations High Commissioner for Human Rights announced a visit to Colombia on 9-16 November.

Elsewhere in South America, the IACHR made visits and released comments on countries' recent events. On 30 June, the IACHR welcomed recognition of international responsibility by Venezuela in the case of *Blanco Romero et al.* Mr. Clare K. Roberts made a promotional visit to Brazil on 30 June after that State recognised land rights of the Ingarikó, Makuxi, Taurepang, and Wapixana indigenous peoples of Brazil. Regarding Argentina, on 19 October the IACHR voiced its concern over the deaths and injuries that occurred at the Magdalena prison and expressed its satisfaction at the State's acknowledgment of liability in the AMIA case on 4 March.

The IACHR reported on two countries in Central America. The Rapporteur made a visit to the Republic of Guatemala in late July and expressed deep concern about the violent events that occurred in four Guatemalan prisons on 16 August. The IACHR hailed Honduras's ratification of the Inter-American Convention on the Forced Disappearance of Persons on 15 July. The Commission and its Rapporteurship on the Rights of Women also celebrated Jamaica's ratification of the 'Convention of Belém do Pará' on 5 January 2006.

Individual Complain Procedure

Conscientious Objection of Compulsory Military Service

There is a very interesting development in the case law of the Commission. The Commission recently published on its website the final public report on the merits (so-called 'Article 51 Report') of the case *Cristián Daniel Sahli Vera et al. vs Chile*.² This is an important case because it is the first time the Commission deals with conscientious objection of obligatory military service, and because it is one of the few cases in which the Commission has published a decision on the merits where it finds there is no violation of the American Convention on Human Rights. In the Commission's practices, most of the cases where there is not an arguable claim under the Convention are usually declared inadmissible in the preliminary phase. This practice has created some confusion because it is not clear if the rejected petitions were manifestly unfounded or if the Commission was simply issuing anticipated decisions on the merits earlier in its proceedings in cases with no violations for reasons of procedural economy. Whatever the practice, it created additional political drawbacks for the Commission by giving the appearance that the Commission would rarely fail to find violations of the Convention in the cases it reviews. Furthermore, it limited the guidance that its case-law could provide to

² Report No. 43/05, Case 12.219-Chile available at www.cidh.org/annualrep/2005eng/Chile.12219eng.htm

determine the interpretation and scope of obligations under the Convention, which is one of the most important purposes of the Commission's individual complaint procedure.

The case of *Cristián Daniel Sahli Vera et al. vs Chile* dealt with the State's alleged violations of the rights of three young Chilean men: Cristián Daniel Sahli Vera, Claudio Salvador Fabrizzio Basso Miranda, and Javier Andrés Garate Neidhardt. The violations were argued under Articles 1(1), 2, 11 and 12 of the American Convention for the State's failure to adopt legislation to the detriment of the alleged victims who were facing the obligation of fulfilling their military service, to which they expressed their total conscientious objection.

Petitioners contended that the alleged victims were under the obligation to comply with the compulsory military service upon turning 18 years old. The three young men submitted requests to the Recruitment Department of the Chilean General Bureau on Mobilization indicating their conscientious objection to the compulsory military service. The Petitioners contended that the three young men never received a response to their requests and then later were included in a mandatory call for military service. The young men did not present themselves at the time and date summoned. The young men filed a writ to protect their rights before the Court of Appeals in Santiago that was denied. The young men later filed an appeal to set this decision aside, but with no success.

The Petitioners argued that the State violated the alleged victims' rights regarding freedom of consciousness under Article 12. Petitioners argued that the Chilean Government does not have legislation regarding a person's right to invoke conscientious objection as an exception to compulsory military service. The only exceptions permitted by law are based on disability or a person's special characteristics or privilege. Petitioners argued that by this lack of legislation and the fact that the Chilean courts do not provide for conscientious objection as an expression of their right under Article 19(6) of the Chilean Constitution, the State is denying the alleged victims their expression as a fundamental right to 'determine the way of life of their own existence'.

The Petitioners also argued that the State violated the alleged victims' rights regarding arbitrary and abusive intrusions into their private life under Article 11. Petitioners argued that the right to privacy 'constitutes a space of moral autonomy within which each individual can develop without being subject to arbitrary meddling, all those matters that are a manifestation of such decisional autonomy which represent his or her particular personal identity'. The Petitioners claimed that private life 'covers the physical and moral integrity of a person'. Petitioners argued that the alleged victims were denied the opportunity to determine their own way of life, since the goals of compulsory military, *i.e.* the security of the State, is not proportional to the limits of their freedoms and rights under Articles 12 and 11 of the Convention. Petitioners further alleged that the State violated its obligation not to violate human rights and that its failure to adopt domestic legislation regarding a conscientious objection exception to compulsory military service violates Article 2 of the Convention.

In its 2003 brief, the State reported it was attempting to reform its military recruitment programme to become mostly voluntary and would only resort to a lottery if it was unable to recruit the minimum number of persons needed. The State also confirmed that it did not have legislation regarding a conscientious objection exception to compulsory military service. While the State recognised that the

freedom of conscience and the right to express religious beliefs are protected by the Chilean Constitution and Article 12 of the Convention, it stressed that this freedom and right must be read in the context of Article 1(4) of the Chilean Constitution, which outlines the State's duty to provide national security to the nation and protect the population. Thus, the State indicated a link between the obligations and rights of Chilean citizens requiring them to 'bear certain public burdens for the common good'. The State reported that 'compulsory military service is a restriction on the right of freedom on conscience and religion that is based on the duty of citizens to contribute to the security and order of the country, and that the unchanging value of security and the objective of national defense legitimate this state practice, in keeping with the convention'.

The State also contended that there was no violation of rights in the case of the alleged victims since they had not received a summons from the Armed Forces or any court, or suffered any threat, coercion, or deprivation of liberty in any way for the facts that lead to this petition. Thus the State considered the Petitioner's case as unfounded and unjustified, and as such should be inadmissible. The State stated that there was no violation to the right to privacy given that compulsory military service is not an arbitrary or abusive demand on the alleged victims' privacy.

The Commission framed the issue as whether Articles 11 and 12 of the Convention create a right to conscientious objection as an exception to compulsory military service when the domestic law does not provide for one. The Commission reviewed Chilean domestic and international law to assess this issue. Chilean law does exempt certain people from compulsory military service; however, it does not exempt those who simply put forth a conscientious objection exception without being in a religious order. The law states that once a young man or woman turns 18 years old, their names are included in a database and may be called up for a two years of service up until age 30.

The Commission took into account both the United Nation's and the European system's treatment of the right to conscientious objector status. The UN system considers the right to conscientious objection to military service as a legitimate exercise of the right to freedom of thought, conscience and religion as articulated in Article 18 of the International Covenant on Civil and Political Rights and Article 18 of the Universal Declaration of Human Rights. While the Covenant does not specifically mention conscientious objection, the UN Human Rights Committee has indicated that the right can be derived from Article 18 where the use of lethal force may conflict with the freedom of conscience. The European Commission on Human Rights and the European Court of Human Rights have considered cases dealing with the conscientious objection exception to compulsory military service and neither body has found that such a right exists under the European Convention.

The Commission then assessed the issue of whether Article 12 of the Convention comprises a right to a conscientious objection exception to compulsory military service. When read with Article 6(3), the Court determined that Article 12 provides a right to conscientious objector status in those countries where they are recognised. The Commission, relying on UN and European system decisions, was unwilling to create a right to conscientious objector status where it is not recognised by domestic law.

The State argued that the Convention provides limitations to the rights of the freedom of consciousness under Article 12, namely the security of the State. The State indicated that compulsory military service is necessary to preserve national

security. The Commission concluded that where there is no conscientious objector status in national law, the international human rights institutions cannot find a violation of the right to freedom of thought, conscience or religion. In the present case, the Commission found that the Convention does not prohibit obligatory military service; thus, there is no violation of the alleged victims' rights under Article 12 of the Convention.

The Commission also found that the legislation that criminalises the failure to comply with compulsory military service does not interfere with the alleged victims' rights to maintain a private life. Given that the Convention does not prohibit obligatory military service and it explicitly recognises the existence of military service in countries where there is no exception based on conscientious objection (Article 6(3)), the Commission found no violation of Article 11 of the Convention.

The Commission concluded that Chile was not responsible for violations of the right to freedom of conscience or the right to protection of privacy as protected in Articles 11 and 12 of the Convention.

Inadmissible Cases

The Commission published several inadmissibility decisions on its website. These decisions provide additional guidance about the limits of the jurisdiction and competence of the Commission's individual complaint procedure. The application of the rule of exhaustion of domestic remedies, the fourth instance formula and the competence of the Commission to review alleged violations of the rights of corporations under the Convention, are all issues that continue to form the main basis for rejection of petitions in the Inter-American System. The following are examples of the latest practice of the Commission in this regard.

Benjamín Guerra Duarte vs Nicaragua, Report No. 37/05, Case 11.433³

Petitioner, Benjamin Guerra Duarte, alleged that the Nicaraguan Government wrongfully appropriated his real property in 1981 by application of confiscatory legislation. The property was later sold by the government to a private individual and then resold. Petitioner contacted the Ministry of Justice and then pursued legal means to recover his property *via* a private attorney. Petitioner contended that he has been wrongfully deprived of his property for more than 20 years and that the State itself acknowledged that Petitioner was deprived of his property.

Petitioner claimed that the State denied his rights under the American Convention on Human Rights, especially the right to private property (Article 21); the right to humane treatment (Article 5); the right to personal liberty (Article 7); the right to judicial guarantees (Article 8(1)); the right to equality before the law (Article 24); and the right to due judicial protection (Article 25). Furthermore, Petitioner alleged that the State did not meet its obligation to respect and guarantee rights (Article 1(1)) or its duty to adopt domestic legislative measures (Article 2).

The State purported Petitioner has not exhausted domestic remedies available to him. Further, the State indicated that it has offered Petitioner compensation for his real property; however, the property is not liable for restitution or return. The State reported that Petitioner's demands for compensation have ranged between USD 160,000.00 and USD 484,000.00. The State had offered Petitioner compensation for the property in hopes of settlement; however, Petitioner refused all of their offers.

³ www.cidh.org/annualrep/2005eng/Nicaragua.11433eng.htm.

The State alleged that it has not violated Petitioner's rights as he was free to choose compensation or application of common law. The Commission found that Petitioner did not pursued administrative or judicial remedies provided under Nicaraguan law, and thus the case is inadmissible under Article 46(1) of the Convention.

Carlos Iparraguirre and Luz Amada Vásquez Vásquez de Iparraguirre vs Peru, Report No. 39/05, Petition 792/01⁴

Petitioners, Carlos Iparraguirre and Luz Amada Vásquez Vásquez de Iparraguirre, alleged that the Peruvian State violated their right to a fair trial, their right to private property, and the rights to judicial protection as noted in Articles 8, 21 and 25 of the American Convention. Specifically, petitioners alleged that the State has wrongly dispossessed them of their real property *via* an adverse possession proceeding. They claimed that this proceeding was conducted in violation of procedural and substantive law. Petitioners purchased the property in June of 1971 and wanted to have the property registered to them in the Property Registry but their request was rejected since the company with whom the Petitioners contracted had gone out of business. Petitioners also alleged that this rule was applied strictly to them, where in other cases it was waived. Petitioners have brought actions to reacquire their property; however, none have been successful. The State argued that it has guaranteed the petitioners due process and judicial protection. It further argued that just because Petitioners lost their case in the Peruvian judicial system does not mean that their rights under the Convention have been violated.

The Commission recognised that domestic remedies have been exhausted and that Petitioners had 'free access' to these remedies. Nonetheless, the Commission observed that the remedies and actions used by petitioners to recover their property rights were formally inadequate in pursuing their goal. Petitioners' claims were brought before domestic courts and they received a judgement against them based on a reasonable interpretation of the law. With this interpretation, the Commission reasoned that it would be a court of 'fourth instance' because it would be reviewing decisions made by competent courts. Thus, the Commission declared their petition inadmissible as the case the Petitioners presented did not entail a violation of Articles 8, 21 or 25 of the Convention.

José Luis Forzanni Ballardo vs Peru, Report No. 40/05: Petition 12.139⁵

Petitioner, José Luis Forzanni Ballardo, argued that the State of Peru took actions to the detriment of his company TRALAPU E.I.R.L. In 1985, Petitioner had a contract with PESCAPERU (which in 1981 was transformed from a private- to a State-owned company) to transport fishmeal to the company. Petitioner never received payment for the services rendered. In 1986, Petitioner, as legal representative of TRALAPU E.I.R.L., took legal action against PESCAPERU that resulted in a judgement against PESCAPERU for the amount owed. In 1991, the State created legislation to promote private investment in State-owned companies and created a Committee to assess existing claims against State-owned companies, including PESCAPERU. In 1995, PESCAPERU sought to declare Petitioner's company's judgement void based on the fact that the new Committee should assume liability for the payment, which was

⁴ www.cidh.org/annualrep/2005eng/Peru.792.01eng.htm.

⁵ www.cidh.org/annualrep/2005eng/Peru.12139eng.htm.

eventually accepted. Following this action, the court deemed Petitioner's attachment on the bank account of PESCAPERU as void since the privatisation had not yet concluded. In 1997, TRALAPU E.I.R.L. brought action against PESCAPERU, which was declared unfounded by the Court. Petitioner, in his capacity as a legal representative of TRALAPU E.I.R.L., brought action against the judicial officials for alleged offenses against administration of justice and abuse of authority, which was found inadmissible because it was filed after the deadline had expired. Petitioner argued that despite having an initial judgement in the company's favour, he has been unable to collect because of the modification of the judgement, which he alleged constitutes *res judicata*.

Based on these facts, Petitioner claimed that the State violated his right to equal protection before the law (Article 24), his right to a fair trial (Article 8), his right to judicial protection (Article 25) and his right to property (Article 21). The State's position is that the Commission lacks jurisdiction since the American Convention deals with the rights of individuals, and as Petitioner has initiated all cases on behalf of TRALAPU E.I.R.L., the company is not a 'person' under the Convention even though it is considered its own legal entity. This given, the State contended that the facts on which Petitioner based his claim do not constitute a violation of the Convention, since it alleged a violation of the rights of a corporation.

The Commission found that it does not have jurisdiction over the rights of non-human entities, such as corporations and businesses. Since Petitioner brought his claim alleging that the State adopted measures intended to impair his company, the Commission found that rights of the Petitioner as a person are not at issue. Based on its findings, the Commission concluded the petition was inadmissible given that the Commission lacks competence to admit it.

Beatriz E. Pinzas de Chung vs Peru, Report 38/05, Petition 504/99⁶

Petitioner, Beatriz E. Pinzas de Chung, brought this claim against the State of Peru for alleged violations of her right to judicial protection (Article 25). Petitioner based her claim on an unfavourable judgement on her complaint for injuries arising from false criminal allegations against her. Petitioner further alleged that the State has violated her right to due process because of an alleged defect in the notification of an appeal filed by the opposing party.

Petitioner served on the Board of Minero Peru, S.A. During her time on the Board she proposed a 100 percent increase of employee wages, which management did not approve, in order to avert a strike. Later the company employees called a strike for 42 days, which ended with an agreement of increasing employee wages by 155 percent and economically harmed the company. The Petitioner argued that had the management accepted her original proposal, Minero Peru, S.A. would have endured less harm. Six months after the agreement, the company filed criminal charges against the members of the board alleging embezzlement and misappropriation of funds. Petitioner said that based on the criminal charges, a court ordered her detention, which was later revoked for lack of evidence to justify it. Petitioner argued that the arrest order and the four year criminal investigation she underwent damaged her honour and reputation and negatively impacted her work and home life. The charges against Petitioner were found to lack merit and her case was closed. Petitioner later filed a claim against the company for damages from the 'false and

⁶ www.cidh.org/annualrep/2005eng/Peru.504.99eng.htm.

malicious accusation against her'. The Court ordered Minero Peru S.A. to pay some of 150,000 nuevos soles for injury; however, the company appealed, and that decision was later revoked. Petitioner concluded that the State deprived her of her right to a just compensation, and that she was denied her right to a fair trial as a result of a late notice that prevented her from joining the appeal and receiving a deduction in the amount of her procedural costs.

The State contended there is no violation of Article 25 of the Convention. It further stated that Petitioner's case in domestic courts was consistent with the law, and the fact that she did not get the rulings she wanted does not constitute a violation of her right to judicial protection. The State also mentioned that the Commission cannot act as a 'fourth instance' and that Petitioner's claim should be found inadmissible.

The Commission found that the facts alleged by Petitioner could be characterised as affecting due process rights (Article 8 of the Convention). However, it considered that such facts do not add up to a violation of her rights protected by the American Convention, and that the petition is inadmissible because it would require the Commission to act as a 'fourth instance' by interpreting Peruvian Civil Procedural Code.