

American University Washington College of Law

## Digital Commons @ American University Washington College of Law

---

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

---

2007

### Inter-American System

Diego Rodriguez-Pinzon

Follow this and additional works at: [https://digitalcommons.wcl.american.edu/facsch\\_lawrev](https://digitalcommons.wcl.american.edu/facsch_lawrev)



Part of the [Human Rights Law Commons](#), and the [Indian and Aboriginal Law Commons](#)

---

### III INTER-AMERICAN SYSTEM

DIEGO RODRÍGUEZ-PINZÓN\*

As usual, in this Chapter Claudia Martin and I report on the latest news of the work of both the Inter-American Commission on Human Rights (hereinafter 'Commission') and the Inter-American Court on Human Rights (hereinafter 'Court'). This time we are once again devoting our attention to the work of the Commission in the context of recent developments in the Inter-American Human Rights System.

#### 1. MODIFICATIONS TO THE COMMISSION'S REGULATIONS

The regional mechanisms have been adapting to a series of measures reforming some very important aspects of its supervisory tools, including modifications to the Regulations of the both by the Commission and the Court. In October 2006, the Commission made several changes to its Regulations seeking to improve the transparency and efficacy of its proceedings and decisions. One of the most significant modification adopted is related to public access to hearings. Article 66 of the new Regulations establish that

[h]earings shall be public. When warranted by exceptional circumstances, the Commission, at its own initiative or at the request of an interested party, may hold private hearings and shall decide who may attend them. This decision pertains exclusively to the Commission, which shall notify the parties in this regard prior to the beginning of the hearing, either orally or in writing. Even in these cases, the minutes shall be prepared in the terms set forth in Article 68 of these Rules of Procedure.

This a very important aspect that will certainly have significant repercussions on the political dynamics of the system, and will particularly increase the impact that hearings before the Commission could have in inducing better protection of human rights in specific cases or improvement of general situations in some States. It is well

---

\* Diego Rodríguez-Pinzón (JD, LL.M., S.J.D.) is Professorial Lecturer in Residence and Co-Director of the Academy on Human Rights and Humanitarian Law of American University Washington College of Law, and *ad hoc* Judge of the Inter-American Court on Human Rights. He wants to thank Rosemarie Salguero for her research support.

known that enforcement of international human rights standards and decisions is ultimately supported by public accountability. Any instrument that enhances the possibilities of further public scrutiny and review, will increase pressure on situations where human rights are in danger.

Also, these modifications bring additional public scrutiny on how the hearings themselves are carried out, creating a need for the Commission to be particularly careful on how these proceedings are conducted. This should have a positive effect on the quality of the evidence received in cases before the Commission that could subsequently be used by the Court once cases are filed in that tribunal for further judicial proceedings. It is to be expected that this improvement will contribute to better articulate the work of the Commission and the Court, allowing the latter to give full legal effect to evidence received by the former, therefore expediting the processing of cases and saving scarce time and resources in both organs.

## 2. 2006 REPORT OF THE INTER-AMERICAN COMMISSION

The Commission recently adopted its 2006 Annual Report which will be presented to the General Assembly of the Organization of American States (OAS) in June 2007.

During the 2006 reported year, the Commission met three times, twice in Washington, DC and once in Guatemala for a special session. During the 124th regular period session, held in Washington, DC from 27 February to 17 March 2006, the Commission elected its new board of officers: Evelio Fernández Arévalos (Paraguay), President; Paulo Sérgio Pinheiro (Brazil), First Vice-President, and Florentin Meléndez (El Salvador), Second Vice-President. Members Clare K. Roberts (Antigua & Barbuda), Freddy Gutiérrez Trejo (Venezuela), Víctor Abramovich (Argentina), and Paolo Carozza (United States) also sit on the Commission. Furthermore, the Commission selected Ignacio Álvarez (Venezuela), to be the Special Rapporteur for Freedom of Expression.

Between 3 and 13 March 2006, the Commission convened 61 hearings concerning individual petitions and cases, precautionary measures, and general and specific situations of human rights in various countries and regions. The Commission held hearings on the human rights situations in Bolivia, Colombia, Guatemala, Haiti, Mexico, Peru, and Venezuela. In addition, the Commission met with the Permanent Representatives of the member States of Central America to exchange information on human rights in that subregion.

Very importantly, the Commission approved the 'Report on the Situation of Human Rights Defenders in the Americas', which stresses the legitimacy of the work that human rights defenders perform in assisting the States fulfil their obligation to protect human rights. It also received general information on the rights of the indigenous peoples of Mesoamerica, the situation of displaced women in Colombia,

the problem of 'feminicide' or 'femicide' through out the Americas, conditions of detention in Argentina, Chile and El Salvador, and held hearings to address the situation of migrant workers and child labour in Latin America.

The Commission noted the progress made in the region in advancing human rights and implementing the recommendations of the Commission. In accordance with Commission's recommendations, Argentina annulled the laws called *Obediencia Debida* and *Punto Final*, ('Due Obedience' and 'Final Stop'), Peru adopted a National Human Rights Plan, and Chile implemented broad constitutional reform including the adoption of the Family Violence Law. Jamaica ratified the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women, the *Belem do Pará Convention*, and Mexico approved a National Program for Human Rights. In Brazil, constitutional reform was approved that seeks to modernise the judicial system and expand the judicial mechanisms available to prevent impunity for violations of human rights, and finally, Uruguay attained concrete results in locating and identifying persons who were disappeared during the military dictatorship.

A very significant event in 2006 was the Commission's 125<sup>th</sup> session which took place in Guatemala City. It is the first time it held an ordinary session outside its base in Washington, DC. The Commission, in response to an invitation from the Government of Guatemala, met from 17–21 July in Guatemala. On that occasion the Commission held protocol meetings with the President of the Republic and other high-ranking State authorities. It also met with various organizations in Central America to discuss human rights issues in the region, an opportunity not often afforded to organisations in the region due to resources.

The Commission held 10 hearings on important issues including problems with free trade agreements and human rights, the status of collective property rights of indigenous peoples, problems with community media, intra-family or domestic violence issues, and the predicament of persons affected by open-air mining concessions. The Commission held hearing in the first inter-State complaint filed in the Inter-American system between Nicaragua and Costa Rica. Hearings were also held on the status of human rights in specific countries. Honduras' detention of women and treatment of *campesinos* and indigenous communities was examined. In El Salvador, trade union rights and the obstacles to the investigation and punishment of human rights violations in the country were also considered.

During the two weeks of the 126<sup>th</sup> session held in Washington, DC, the Commission held 48 hearings on pending individual cases and petitions, and on general situations of human rights in several States of the hemisphere. In particular, the Commission received information on the process of demobilisation of the illegal armed groups in Colombia, the implementation of the National Human Rights Plan and a Truth and Reconciliation Commission (CVR) in Peru, and the creation of the National Commission to Search for Disappeared Persons in Guatemala. The Commission learned about the slave labour in Brazil, the status of human rights defenders in

Venezuela, the social conflict in in the state of Oaxaca, Mexico, the agrarian policy and indigenous rights in Chiapas, Mexico, and on the performance and future of the Special Prosecutor for Social and Political Movements of the Past (FEMOSPP) in Mexico. Additionally, hearings were held on the human rights situation of people who live near the border between Ecuador and Colombia.

The Commission also noted the significant progress achieved in the region. Presidential elections were held in 12 countries over the course of the past year, an important sign of stability and democracy in the region. The President of Chile stated that Chile will comply with the judgement of the Inter-American Court of Human Rights regarding non-applicability of the amnesty law for violations of human rights committed during the military dictatorship. The Supreme Court of Argentina also said it would comply with the provisional measures of the Inter-American Court of Human Rights with regard to its penitentiary system in Province of Mendoza. Bolivia ratified the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, and Brazil continues to reform its domestic legislation in order to comply with the international standards on domestic and family violence against women. In Peru, the Constitutional Court declared the practice of *detención en firme*, or prolonged detention, to be unconstitutional. Finally, the opening of nine new penitentiaries in the Dominican Republic has improved the detention conditions of a sizeable number of persons deprived of their liberty.

### 3. INDIVIDUAL CASES IN THE COMMISSION'S PROCEEDINGS

The Commission continues to be very active in the processing of individual cases. During 2006, a total of 87 reports were published by the Commission in its Annual Report. The Commission decided the admissibility of 69 petitions: Argentina had 6 admissible cases and 2 inadmissible cases filed against it. El Salvador had 4 admissible and 1 inadmissible cases filed against it. Chile and Ecuador both had 1 admissible case and 1 inadmissible case against it. Brazil had 6 admissible cases, Canada had 2 admissible cases, Colombia had 5 admissible cases, Guatemala had 4 admissible cases, Honduras had 4 admissible cases, Mexico had 4 admissible cases, Panama had 2 admissible cases, Uruguay had 2 admissible cases, United States had 4 admissible cases, and Venezuela had 7 cases. Costa Rica, Nicaragua and Haiti each had 1 admissible case, while Peru had 4 inadmissible cases.

The following friendly settlement cases were published: Brazil's Emasculated children of *Maranhao* Case, Colombia's *Germán Enrique Guerra Achuri* Case, and Venezuela's *Sebastián Echaniz Alcorta* and *Juan Víctor Galarza Mendiola* Case. Ecuador engaged in four settlements with José René Castro Galarza, Lizandro Ramiro Montero Masache, Myriam Larrea Pintado, and Fausto Mendoza Giler and Diógenes

Mendoza Bravo. Peru also engaged in three friendly settlements with Rómulo Torres Ventocilla, Miguel Grimaldo Castañeda *et al.*, and Alejandro Espino Méndez *et al.*

The merit cases published include *Simone André Diniz vs Brazil*, *Oscar Elias Biscet et al. vs Cuba*, *Lorenzo Enrique Copello Castillo et al. vs Cuba*, *Tomas Lares Cipriano vs Guatemala*, *Franz Britton vs Guayana*, *Derrick Tracey vs Jamaica*, *Miguel Orlando Muñoz Guzmán vs Mexico*, and *Tomás Eduardo Cirio vs Uruguay*.

The following is a selection of three cases recently reported by the Commission, one on admissibility and two on the merits. They are interesting examples of the type of issues that the Commission continues to address in its own individual complaint procedure.

*Admissibility Case: Isamu Carlos Shibayama et al. vs United States (Report No. 26/06, Petition 434-03)*

The Commission found valid jurisdiction over the United States with regard to the petitioners' claims of violations of their rights under Article I (right to life), II (right to equality before the law), V (right to protection of honour, personal reputation, and private and family life), VIII (right to fair trial), XII (right to education), XIV (right to work and fair remuneration), XXV (right to protection from arbitrary arrest) and XXVI (right to due process).

Mr Shibayama and his family were seized in Peru by the United States in 1944, and held in internment camps in Texas because they are of Japanese ancestry. Despite their Peruvian citizenship, they were held captive for two years. Upon their release in 1946, they were labelled 'illegal aliens' in the United States and refused re-entry by Peru. While Mr Shibayama's parents were granted retroactive US permanent residence status from the date of their entry in 1944, Mr Shibayama and his brothers were denied permanent resident status until 1956, without the benefit of retroactivity. No explanation was given. This denial of retroactivity made them ineligible 32 years later for restitution provided by the Civil Liberties Act of 1988 (CLA) to persons of Japanese descent interned during World War II. While the petitioners' mother filed for and received restitution payments of USD 20,000 and an apology under the Act, the petitioners' were denied relief because at the time of the internment, they were not US citizens or permanent residents. Subsequently, a class action suit was filed by Latin Americans of Japanese descent who had been interned, and was settled by some of the parties for USD 5,000 per person. The petitioners refused the settlement and filed their own suit in district court based on US constitutional law, civil rights law and humanitarian law. They claimed the settlement is a violation of equity before law since they are only receiving a quarter of the redress money provided for in the CLA. They also were not granted an apology for the wrongs committed against them during their internment.

The case was transferred to US Federal Claims Court, which could only address their CLA claims, and not their constitutional, civil rights and humanitarian rights

issues. The US Federal Claims Court dismissed their action. The petitioners contended that they had exhausted their domestic remedies because they run a risk of being sanctioned for a frivolous lawsuit if they appeal the decision in District Court, who already ruled on these issues in cases involving other Latin Americans of Japanese descent. The District Court dismissed those claims, and the US Supreme Court denied review.

The United States argued the Commission lacked jurisdiction because the Commission was created 13 years after the petitioners were allegedly abducted. Also, the State claims that the petitioners have failed to demonstrate that the alleged facts are 'continuing violations' that occurred on and after the date the State assumed its commitments under the relevant treaty. The United States asserts it has already offered the petitioners redress for the alleged events, and the petitioners have failed to exhaust their domestic remedies since the petitioners could have appealed the Federal Claims Court decision to the US Court of Appeals.

The Court found that it is competent *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci* to consider the petition. The United States ratified the OAS charter on 19 June 1951 and has been a member State of the Organization of American States ever since, although it is not a party to the American Convention. Pursuant to the OAS Charter, all member States pledge to respect the human rights of individuals that, in the case of States that are not parties to the American Convention, are established in the American Declaration. In accordance with Article 20(a) of its Rules of Procedure, the Commission is authorised to consider violations of Articles I, II, III, IX, XVIII, XXV and XXVI of the American Declaration when it exercises its jurisdiction with respect to States that are not parties to the American Convention (*ratione materiae*). The petitioners have alleged violations of their rights to equal treatment, to a fair trial, and to due process of law under Articles II, XVII and XXVI of the American Convention, therefore, the Commission has found itself competent to address aspects of the petitioners' claims since petitioners were under the authority and control of the United States when the facts allegedly occurred (*ratione loci*), and their subsequent efforts to obtain reparations under the CLA fall within an appropriate time frame (*ratione temporis*). In addition, the Commission concluded that the petitioners were excused from exhausting domestic remedies (a condition of Article 31.1 of the Rules of Procedure) on the grounds that such remedies, on the information presented, would have no reasonable prospect of success.

Having concluded that it is competent to examine the petitioners claim under Articles II, XVII and XXVI, the Commission decided to proceed with the analysis of the merits of the case and publish the admissibility report in its Annual Report to the General Assembly of the OAS.

*Merit Case: Simone André Diniz vs Brazil (Report No. 66/06, Case 12.001)*

In the case of Ms Simone André Diniz, the Commission examined the conduct of private persons, and found that the acts of private persons can create an international responsibility under the American Convention if the State lacked the due diligence to prevent the violation or to respond to the action, as required by the Convention in Articles XXIV (right to equal protection), XXV(right to judicial protection) and VIII (right to a fair trial). The Commission also found the State breached its obligation to adopt provisions of domestic law pursuant to Article II (domestic legal effects) and Article 1(1) (obligation to respect rights).

Ms Simone claimed she was refused a job as a domestic employee because of her race. She responded to an advertisement, listing a preference for a white domestic worker, and was told she did not meet the requirements of the job after she indicated her race. Ms Simone reported the crime to the police as a violation of Brazilian law 7716/89, which criminalises racial discrimination. Discrimination cases in Brazil have a very high evidentiary standard that require intent to discrimination and direct evidence of the discriminatory act. Ms Simone argued that the police inquiry, which included interviews with the accused employer where she admitted to publishing the advertising listing the preference and with having a negative experience with black employees, had sufficient and adequate evidence for prosecuting under Article 20(2) of law 7716/89. The State disagreed, found 'no basis for the complaint' and archived the police inquiry.

During an on-site visit to Brazil in 1995, the Commission found that Afro-Brazilians' rights to dignity, non-discrimination and equality are consistently undermined in almost all sectors of society including education and employment opportunities. In particular, Afro-Brazilians have limited access to the legal system and despite Brazil's attempt to criminalise racism, enforcement is rare. Instead, many complaints of racial discrimination are classified as racial insults and other racial defamatory comments (*injuria racista*), which are not criminal in nature. While crimes of racism are prosecuted by means of public criminal actions, claims of defamatory language are prosecuted by means of private criminal actions and have a statute of limitations of six months. Also, due to the institutional racism that still exists within the police department, investigations of racial crimes are often suspended or only partially completed.

In light of its investigation, the Commission found that Brazil violated Ms Simone's right to equality before the law and judicial protection, and the right to a fair trial when it archived her police inquiry for lacking a foundation with which to make a claim, despite the employer's admission of racial intent. This non-appealable decision by the Brazilian authorities denied Ms Simone an opportunity to prove before a criminal court that she was a victim of racial discrimination, and rendered the anti-discrimination law ineffective. The automatic archiving of racism complaints also kept the judiciary from considering whether there was malicious or deceitful intent.

The State's obligation to respect the rights and freedoms recognised in the Convention was not satisfied by merely initiating a brief police inquiry. An adequate legal response would be a public criminal action, which gives the judge an opportunity to assess the case.

Since the events of this case took place prior to the date when Brazil accepted the jurisdiction of the American Court of Human Rights, the Inter-American Commission decided not to submit this case to the Court. However, the Commission made a number of recommendations, including fully compensating the victim in both moral and material terms by publicly acknowledging international responsibility, granting financial assistance so that the victim can begin or complete higher education, establishing a monetary value to be paid for moral damages, make legislative and administrative changes needed to make anti-racism laws effective, conduct a complete and impartial investigation in Simone's case, promote awareness campaigns against racial discrimination and racism. Due to Brazil's lack of compliance with the confidential report's recommendations of the Commission, it decided to publish its conclusions and recommendations in its annual report, in accordance with Article 45(3) of its Rules of Procedure.

*Derrick Tracey vs Jamaica (Report No. 61/06, Case 12.447)*

The Court found the State of Jamaica violated Articles 8(1), 8(2)(c)-(f), (h) and Article 25 of the American Convention for failing to provide the petitioner a fair trial. Mr Tracey claimed he was coerced into confessing to a crime, was denied due process when his appointed legal counsel was given a day to present his case, and was denied legal counsel altogether for an appeal of his judgement to a higher court.

Mr Tracey was convicted of aggravated robbery and illegal possession of a fire arm, and sentenced to two 15-year prison terms. Mr Tracey claimed that the police, through mistreatment that included causing him to bleed from his head and ears, coerced him into confessing to the crime. This confession was used in his trial despite Mr Tracey's failed attempts to have the arresting officers be present at his trial to corroborate his coercion claim. He was not given an attorney until the first day of his trial, 21 months after his arrest, and his attorney failed to take a statement from him. As a result, Mr Tracey argues he was denied effective justice.

After his conviction, the petitioner filed an application for legal representation and a leave to appeal to the Court of Appeals of Jamaica. Both requests were denied. He then appealed to a three-judge panel of the Court of Appeals of Jamaica, and again his requests for representation and leave to appeal were denied. He made other attempts to pursue an appeal, including a letter to the President of the Court of Appeals of Jamaica and to the Independent Jamaican Council for Human Rights, but did not find any relief.

While the State acknowledged that it could not provide counsel for an appeal, it argued that the lack of legal counsel did not constitute a violation of the right to a fair

trial. The application for leave to appeal is a single process with a single form, and therefore, the State asserts that Mr Tracey did not exhaust his legal remedies since he did not file the form. The State asserts that the 21 month delay in Mr Tracey's trial was due to the State's attempt to find him a lawyer, but that the State has now remedied the system in order to provide legal aid as quickly as possible. Lastly, the State found the trial adequately addressed Mr Tracey's claim of coerced confession on direct and cross-examination of a police officer and found the claim without merit.

The Commission found that Mr Tracey's claims were not inadmissible for failing to exhaust domestic remedies because it had not been shown that a further appeal would constitute an effective or available remedy regarding the issues raised before the Commission. The Commission reasoned that the existence of a higher court does not satisfy a convicted person's right to appeal. Rather the higher court must have jurisdictional authority to take up the merits of case and court must be fair, impartial and independent. The seriousness of the charges against Mr Tracey and the severity of the penalties implicate the fair trial provisions of Article 8, including the right to counsel, which applies to all stages of a criminal proceeding, including an appeal to a higher court. The Commission found that since Mr Tracey was not provided access to counsel from the outset of the criminal proceeding, including during his questioning by the police, nor for his subsequent appeal efforts, he was denied access to justice under Article 8.

The Commission recommended a re-trial for Mr Tracey in accordance with the fair trial protections of the American Convention. It also recommended the adoption of legislation to ensure that indigent criminal defendants are afforded legal counsel in circumstances necessary to ensure a right to a fair trial, and to ensure that any confession of guilt is given in an environment free of coercion of any kind.