2008

Inter-American System

Diego Rodriguez-Pinzon

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev

Part of the Human Rights Law Commons
In this report I will refer to several notable recent activities of the Inter-American Commission on Human Rights (hereinafter 'Inter-American Commission' or 'Commission' or 'IACHR'). Of special significance is the appointment on 21 July 2008 of Catalina Botero Marino, a Colombian human rights expert, as Special Rapporteur for Freedom of Expression. Since 2005, Ms Botero has worked as an Auxiliary Magistrate in the Constitutional Court of Colombia and is a founding member of a prestigious Colombian non-governmental organisation, De Justicia. She has also distinguished herself with an outstanding professional career in the academic field and in the Office of the People's Defender of Colombia. The IACHR indicated it gave particular consideration to her extensive knowledge about the right to freedom of expression as well her strategic vision and work plan for the Office of the Special Rapporteur. Ms Botero will act as a full time independent Rapporteur responsible for safeguarding the protection and promotion of freedom of thought and expression in the region. It is worth mentioning that the seven Commissioners of the IACHR are elected by the OAS General Assembly to fill non-paid part-time positions. The Special Rapporteur is the only Commission Rapporteur with a full-time appointment.

1. THE 'RETURN DIRECTIVE' OF THE EUROPEAN PARLIAMENT

States to hold illegal immigrants for six months, extendable by another 12 months in certain cases, and allow children, whose only crime is residence without the required documents, to be held in detention camps until their deportation. Recalling basic principles of international law including the obligation not to return persons at risk of persecution in their home countries, the obligation to put in place safeguards to protect individuals eligible to seek asylum, the prohibition to detain persons unless in exceptional circumstances and as briefly as possible, and the obligation to provide special guarantee to migrants in a vulnerable condition, the Commission exhorted the Parliament and Council of the European Union, as well as member States, to modify the 'Return Directive' to bring it into conformity with international human rights standards for the protection of migrants.

The European Union 'Return Directive' was the result of a long-debated compromise between State parties. No extreme position was thus embodied in the Directive. Certain political groups such as the Green party still rejected the Directive as they believed it failed to grant adequate protections to immigrants. Alternatively, the United Kingdom, which allows unlimited periods of detention, opted out of the Directive because it imposed a much stricter standard than its domestic law.

The IACHR concerns about the Directive are shared by NGOs such as Amnesty International. The Commission addressed the 6-12 month detention period by emphasising that States should only detain a person in exceptional circumstances and for a brief period of time. Likewise, Amnesty International claimed that this period was excessive and disproportionate. This issue indeed appears to be the most detrimental to the protection of migrants' human rights.

The Commission also showed concern for the lack of protection given to migrants in special and vulnerable situations, such as children. In the same vein, Amnesty International argued that the Directive lacked sufficient guarantees for unaccompanied children.

The Commission further underscored the international obligations of all States not to return persons at risk of persecution in their home countries. This non-refoulement principle is deeply grounded in the legal culture of most European States and is supported by the lengthy case-law of the European Court on Human Rights. The Directive fully recognises this principle. However, this principle may be in jeopardy, since in the future the European Parliament, jointly with the Council, will decide which countries are deemed 'safe' for purposes of asylum. One may be concerned about the effectiveness and lawfulness of deferring such a task to a legislative body. Hopefully, the European legislative institutions will use this power with wise discretion and allow necessary case-by-case determinations.

---


3 Idem.
It is important to note that the Directive includes a 'most favourable clause', in other words, States may not invoke the Directive to lower any existing protection standards already in domestic law. Domestic law nonetheless can be modified to adopt the more stringent standards of the Directive, defeating the purpose of the aforementioned clause.

In sum, while the Directive provides European States with what they believed are very needed tools to tackle the immigration problem in Europe, it raises significant questions under existing international human rights law. From a practical perspective, it may also worsen the already precarious situation of migrants in Europe. The Commission and the Inter-American Court have themselves applied more protective standards regarding American States. This creates a reasonable expectation of similar protection of migrants from the Americas in the European region. Furthermore, while this action by the Commission resembles the 'spousal' of international claims for injury of aliens, it is now adopting a new contemporary modality of 'diplomatic protection,' involving regions of the world and not only States.

2. IACHR CONDEMS THE EXECUTION OF JOSÉ ERNESTO MEDELLÍN AND HELIBERTO CHI ACEITUNO

On 6 August 2008, the Inter-American Commission issued a press release condemning the judicial execution by the United States of the Mexican Citizen José Ernesto Medellín, in contempt of the precautionary measures the IACHR granted in his favour on 6 December 2006, based on the recommendations of its report on the merits, dated 24 July 2008. The report stated that the United States violated Articles I (right to life), XVIII (right to a fair trial) and XXVI (due process of law) of the American Declaration of the Rights and Duties of Man. The IACHR also determined that under Article 36(1) of the Vienna Convention on Consular Relations, Mr Medellín's right to consular notification and assistance had been violated. The Commission deplored the United States' failure to recognise the Commission's request to vacate the death penalty imposed on Mr Medellín and to hold a new trial.

Moreover, on 8 August 2008, the IACHR condemned the judicial execution by the United States of the Honduran citizen Heliberto Chi Aceituno in defiance of the precautionary measures the Commission granted in his favour. Mr Chi Aceituno alleged violations of due process since he had not been informed of his right to consular assistance. Despite the IACHR request to preserve the life and physical integrity of the beneficiary pending the Commission's decision on the merits of the case, Mr Chi was executed on 7 August 2008. The Commission opined that the United States' failure to protect a condemned prisoner's life pending review of his petition contravenes its international legal obligations by undermining the effectiveness of the Commission's
procedures thus depriving condemned persons of their right to petition before the IACHR system.

It is to be noted that the International Court of Justice found the United States in violation Article 36(1) of the Vienna Convention on Consular Relations in 2004.\(^4\) The Court stated that in the case of violations of the Vienna Convention, the United States should provide, by means of its own choosing, review and reconsideration of the sentence. The US Supreme Court in *Medellin*\(^5\) indicated that legislative action would be necessary to compel the state of Texas to comply with such international judgements. The US Congress has not yet acted in this regard. On 5 August 2008, the US Supreme Court declined to order a last minute stay in the *Medellin* Case,\(^6\) disregarding the Provisional Measures issued by the International Court of Justice (ICJ).\(^7\) Justice Breyer stated in his dissenting opinion that the execution of Mr Medellin 'will place this Nation in violation of international law'.\(^8\)

3. **INDIVIDUAL CASES DECIDED BY THE COMMISSION**

*Dudley Stokes vs Jamaica*, Case 12.468, Report No. 23/08, 14 March 2008

On 14 January 2004, a petition was filed against the State of Jamaica on behalf of Mr Dudley Stokes alleging violation of Article 13 (freedom and thought and expression) of the American Convention on Human Rights.

On 17 September 1987, Mr Dudley Stokes, Editor-in-Chief of three important newspapers owned by the Gleaner Company published in *Star* (one of these 3 newspapers) a news report referring to an investigation conducted by the United States federal authorities with regard to kickbacks allegedly paid by American firms to Jamaican State Officials, including Mr Eric Abrahams while he served as Jamaican Minister of Tourism. The news report was reprinted a second time in *Daily Gleaner* on 19 September 1987. Mr Abrahams filed a claim before the Supreme Court against the Gleaner Company and Mr Strokes alleging the news reports were libellous. On 17 July 1996, the Jamaican Supreme Court ordered the defendants to pay the sum of Jamaican Dollar 80.7 million in compensatory damages to Mr Abrahams. On 31 July 2000, the Court of Appeal of Jamaica issued a judgement reducing the amount of compensatory damages to JD 35 million. And on 14 July 2003, the Judicial Committee of the Privy Council issued an order affirming the judgement of the Court of Appeal of

---

\(^4\) *Avena and Other Mexican Nationals* (Mexico vs US), 31 March 2004, ICJ 12.


\(^7\) 552 U. S., at (slip op., at 8–27).

\(^8\) 554 U. S., at (slip op., at 4) (Breyer, J., dissenting).
The petitioner first contended that the State of Jamaica violated Article 13 of the American Convention to the detriment of Mr Stokes on the ground that the amount of damages awarded restricts the right to freedom of expression to a greater extent than is necessary because it is not a proportionate punishment and is not closely tailored to the accomplishment of a legitimate aim.

The petitioner subsequently argued that the finding of liability for the reproduction of information supplied by a third party has a chilling effect on the right to freedom of expression, and encourages self-censorship by journalists and editors. It was also alleged by the petitioner that in the legal proceedings leading to the award of damages to Mr Abrahams, the Jamaican courts failed to apply the 'actual malice' test, namely to prove that in disseminating the news story the journalist had the specific intent to inflict harm, was fully aware that the news was false, or acted with gross negligence in efforts to determine the truth. Finally, petitioner maintained that the damages awarded against Mr Stokes are disproportionate and of such character that they undermine the interest and the right of the Jamaican populace to be informed of actions of their public officials.

The State indicated that neither Article 13(2) nor 13(3) mentioned damages award as a factor in limiting freedom of expression and that the award of damages by an independent and impartial court cannot constitute a violation of Article 13(3) of the Convention. The State also asserted that the damages awarded against Mr Stokes, albeit very high, were proportional to the particular circumstances. Addressing petitioner's claim concerning the 'actual malice' standard, the State contended that it was not incorporated into Article 13 of the Convention and was therefore not binding. The State further argued that there is no standard in the American Convention requiring the adoption of laws that exempt a journalistic medium from liability because it reproduces information published in another medium.

The Commission reiterated that freedom of expression is not an absolute right and that Article 13(2) indicates the possibility of establishing restrictions such as 'respect for the rights or reputation of other' provided these restrictions are not stricter than necessary. The Commission also indicated that statements concerning individuals who exercise functions of a public nature should be accorded certain latitude as it is an essential element of a truly democratic society. The Commission found that Article 13(2) requirements that the restriction should be provided by law with the aim of protecting the honour and reputation of other individuals were satisfied in the present case.

With respect to the question whether the restriction was necessary, the Commission considered that the determination of liability, not having been contested by the petitioner, should only assess the question whether the damages awarded were more than necessary to compensate Mr Abrahams. The Commission noted
that the jury was given standard instruction to determine the quantum grounded on 'reasonableness and proportionality' and that it is incumbent on domestic courts to assess the numerous factors required for evaluation. Given that there were no reported procedural irregularities in the evaluation and that Mr Strokes had reasonable access to domestic courts to challenge the Court's determination of civil damages, the Commission considered that the Jamaican domestic courts effectively applied existing standards that took into account the principle of proportionality. The Commission further reaffirmed that the issue of whether the grounds given in a decision are adequate and sufficient is one to be decided in the initial stages of litigation within the domestic jurisdiction of each State.

The Commission thus concluded that the State of Jamaica did not violate the right to freedom of thought and expression enshrined in Article 13 in relation to Article 1(1) of the American Convention.

**Leydi Dayan Sanchez vs Colombia, Case 12.009, Report No. 43/08, 23 July 2008**

On 12 May 1998, a petition was filed on behalf of Leydi Dayán Sánchez and her family against the State of Colombia. It alleged that State agents were responsible for the death of the 14-year old girl, Leydi Dayán, in March 1998 in Barrio El Triunfo, Bogotá, Colombia, which violated Article 4 (right to life), Article 8 (right to a fair trial), Article 25 (right to a judicial protection), Article 19 (right of the child) and Article 1(1) (obligation to protect and to ensure the rights enshrined in the Convention) of the American Convention on Human Rights.

On 21 March 1998, Leydi Dayán, her younger brother and two friends were sitting in the street when a vehicle and motorcycle carrying two armed men appeared. Thinking they were *militias*, the children started running away. On the same day, the district police had been informed that 15 armed youth had been seen in the neighbourhood. When the police arrived, they saw people running, including Leydi Dayán and her friends, and pursued them. In their pursuit, the police patrols shot Leydi Dayán in the head. The child subsequently died from her injury after she was brought to the hospital. On 6 July 2000, in a trial before a military court, police officer Juan Bernado Tulcan Vallejos was acquitted of the charge of negligent homicide. On 15 May 2001, the Superior Military Tribunal confirmed the acquittal. The case was opened by the Commission on 9 October 2002 and was declared admissible in Report 43/02.

**Article 4 and 19**

The petitioners argued that the State was responsible for the death of Leydi Dayán because its agents, the law enforcement officers caused her death, and because the facts were never fully reviewed in the judicial proceedings, thus violating Article 4 (right to life). The petitioners further alleged that the State is also responsible for violating
Article 19 (rights of the child), since it failed to take appropriate measures to safeguard the victim, a minor, against the disproportionate response of agents of the State.

The Commission underscored the importance of the right to life and the corollary duty of States to prevent situations that could lead, by action or omission, to the infringement of the right. The Commission also stressed that Article 19 requires the State to grant special protection to children, an obligation that goes beyond the general obligation enshrined in Article 1(1). Citing the UN Code of Conduct for Law Enforcement Officials, the Commission recalled that the use of force by law enforcement officials in the course of duty must be necessary and proportionate to the ends. The Commission further stressed that the Code expressly states that special efforts should be made to exclude the use of firearms against children.

The Commission thus concluded that the Colombian State did not respect the right to life of Leydi Dayán, as the agents it authorised to use force did not strictly comply with the international standards on necessity, exceptionality and proportionality regarding the use of that force.

The Commission also held that the State was responsible for violating Article 4 since it did not act with due diligence in investigating the events, and prosecuting and punishing those responsible. The Commission concluded that the means undertaken by the State of Colombia to determine the criminal responsibility of the agent involved in the minor's death and to punish him failed to be adequate and effective.

*Article 8 and 25*

Furthermore, the petitioners submitted that the use of military jurisdiction constitutes a violation of the right to fair trial (Article 8), since there is no guarantee of independence and impartiality under that tribunal. Jurisdiction was found under the Ministry of Defense and the Executive Branch rather than under the Judicial Branch. The petitioners also argued that the investigation undertaken to clarify the circumstances of the death of Leydi Dayán was arbitrary, since a large part of the evidence produced was not taken into account and because the courts refused to order the gathering of evidence that would have been decisive in clarifying the events. This refusal to act resulted in the denial of justice, both procedurally and substantively. According to the petitioners, these failures resulted in the violation of Articles 8 and 25 (right to judicial protection) in conjunction with the general obligation to respect and ensure enshrined in Article 1(1).

The State argued that military criminal courts provided appropriate and effective means to administer justice in this case. It also contended that the decisions regarding the acquittal of the police officer were based on the principle of in *dubio pro neo* as there were continuing doubts as to who fired the shot that killed the minor Leydi Dayán and could not be interpreted as a sign of impunity. Addressing the petitioners' submission concerning the denial of justice, the State reported that the preliminary investigation of police official Juan Bernado Tulcán Vallejo had been ordered by the
District Procurator of Bogotá and that charges were filed against him. The Procurator Delegate for the National Police however declared the charges null and void on the basis of an incomplete determination of the conduct in question.

Citing previous decisions, the Commission noted that given its nature and structure, the military criminal justice system does not meet the standard of independence and impartiality set in Article 8(1) of the American Convention. Consequently, the Commission reasoned that entrusting the military criminal justice system with the investigation of the involvement of police officials in the circumstances surrounding the death of Leydi Dayán violated the principles of a hearing before a competent and impartial tribunal, of due process, and of access to adequate legal remedy. The Commission was also of the opinion that the absence of an investigation of the facts, prosecution and sentencing by a regular court of law entailed a violation of Articles 8 and 25 of the Convention in conjunction with the general obligation to respect and to ensure set out in Article 1(1).

Proceedings subsequent to the adoption of report No. 5/06 pursuant to Article 50 of the Convention
Following the adoption by the Commission on 28 February 2006 of Report 05/06 concluding that the State of Colombia was responsible for violating Article 4, 8, 19, and 25 of the Convention in conjunction with Article 1(1) to the detriment of Leydi Dayán Sánchez, the Colombian Government took a number of steps in order to comply with the Commission's recommendations. In the light of the following efforts undertaken by the State of Colombia, namely the initiation of the action for review in the general jurisdiction, the acts of restoration of the memory of Leydi Dayán Sánchez, the training of the National Police on the use of firearms in keeping with the principles of necessity, exceptionality, and proportionality, and the payment of compensation to the relatives of the victim, the Commission decided on 26 November 2007, not to refer the case to the Inter-American Court of Human Rights. In support of this decision, the Commission highlighted the decision of the Criminal Cassation Chamber of the Honorable Supreme Court of Justice which admitted the case for review, overturned the acquittals based on the conclusions of Report 05/06, and referred the proceedings to the Office of the Prosecutor General to initiate a new investigation based on the general jurisdiction.

The Commission recommended that an impartial and effective investigation in the general jurisdiction with a view to prosecuting and punishing those responsible in the death of Leydi Dayán Sánchez and compensating the victim’s relatives.

Sergio Emilio Cadena Antolínez vs Colombia, Case 12.448, Report No. 44/08, 23 July 2008
On 22 October 2002, a petition was filed in the Inter-American Commission claiming that the Republic of Colombia is responsible for the denial of access to an effective
judicial remedy to determine the rights of Sergio Emilio Cadena Antolínnes due to the lack of compliance with a judgement handed down by the Constitutional Court. On 24 February 2004, the Commission declared the case admissible in its Report 01/04 on the basis that Articles 8(1) and 25 had been violated. However at the merits stage, the petitioners also requested the Commission to find the State responsible for the violation of the right to property (Article 21) and for failing to enact domestic provisions to bring into effect the rights protected in the Convention, with prejudice to the victims.

Mr Sergio Emilio Cadena Antolínnes was an employee of the Banco de la República and was dismissed without just cause. At the time of the dismissal, Mr Cardena Antolínnes was protected by a collective bargaining agreement that established the obligation of the Banco de la República to provide a retirement pension to those employees wrongfully dismissed. After the issue was considered by the 20th Labor Court of Bogotá Circuit and the Superior Court of the Judicial District of Bogotá, the Supreme Court found in favour of the Banco de la República and dismissed all the plaintiff's claims. Mr Cadena Antolínnes's acción de tutela (a special injunctive remedy or 'amparo') before the Jurisdictional Disciplinary Court of the Judiciary Council of Cundinamarca was denied. On 13 November 2001, the Constitutional Court reversed the Jurisdictional Court of the Superior Council of the Judiciary, quashed the decision of the Labor Chamber of Cassation, and ordered that Mr Cadena Antolínnes's rights to due process and equal treatment be protected. Despite the Constitutional Court's ruling, the Labor Chamber of Cassation decided to uphold the original judgement. On 17 February 2004, the Constitutional Court issued a writ of mandamus ordering the Banco de la República to comply with its decision.

The petitioners submitted that the State failed to comply with its obligation to guarantee effective judicial protection when it did not ensure the effectiveness of, and compliance with, the domestic decision within a reasonable term, and when it did not carry out a full, impartial, and effective investigation pursuant to the provision of Articles 8 and 25. The State, in turn, claimed that there has been no violation of said rights and guarantees given that the tutela petition lodged by Mr Cadena Antolínnes was ruled in his favour and eventually led to the effectiveness (vindication) of his claim. Noting that from the beginning of the judicial process until the proper disbursement of the payment, eight years went by and that this delay was attributable to the conflict of jurisdiction and ruling of the high courts (known as the 'train crash' effect), the Commission reasoned that, under these circumstances, the lodging of an action for a prompt and simple remedy such as the tutela petition under Colombian law does not result in the protection of fundamental rights and constitutes therefore a violation of Article 25 in connection with Article 1(1). The Commission nonetheless considered that, given the features of the case, it was not appropriate, in the light of Article 8, to examine State responsibility for the alleged omission to investigate the conduct of
the judicial officers involved in the interpretation of substantive norms, and judicial actions.

The petitioners further maintained that Article 25 is closely linked to Article 1(1), which assigns the duty to States to design and embody in legislation an effective recourse and to ensure the due application of domestic law by its authorities. In this respect, the petitioner alleged that the State of Colombia failed to adopt as part of its domestic law, pursuant to Article 2 of the Convention, legislative and administrative measures, through statutory law to make the judgement of the Constitutional Court enforceable. The State affirmed that Article 86 of the Constitution has sufficient provisions for the tutela to be an effective tool for the protection of fundamental rights and that it is materially not possible to regulate fundamental rights by a statutory law. The Commission was of the opinion that the failure to comply with these obligations did not necessarily occur because of a legislative deficiency. Consequently, in the instant case there was no failure to comply with Article 2.

Furthermore, the Commission rejected Mr Cadena Antolínez claim that since his right to a pension was recognised in the tutela judgement, the pension thus became his property and consequently his right to property was violated when the Labor Chamber of Cassation of the Supreme Court of Justice did not follow the ruling of the Constitutional Court. Instead, the Commission found that the State had complied with its obligation to disburse the pension payments owed to Mr Cadena Antolínez, and that therefore there no longer existed any grounds to claim that there had been a violation of Article 21.

Proceedings subsequent to the adoption of Report No. 57/07 pursuant to Article 50

In the light of the effort undertaken by the Colombian Government to transfer the Commission's Report 57/07 to each judge who sits in the High Courts of the Republic in order to prevent similar situations in the future and given the limited influence of the government over an independent judiciary branch, the Commission decided not to submit the case to the Court on 8 November 2007.

Recommendations

The Commission recommended the Colombian State to adopt necessary measures to avoid future violations of the right to judicial protection enshrined in the Convention. With respect to the non-pecuniary damage caused to Mr Cadena as a result of the violation of his right to judicial protection, the Commission was of the opinion that its report constituted reparation in itself.