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In this report I will discuss several cases recently decided by the Inter-American Commission on Human Rights (hereinafter ‘Commission’).

The first case, Manuel Cepeda Vargas vs Colombia, discusses the widespread violence against leaders of the Unión Patriótica (UP) in Colombia and is an example of a case that was referred to the Court after the State did not comply with its 'substantive recommendations'. The Unión Patriótica was formed in May 1985 as a result of peace negotiations between the Revolutionary Armed Forces of Colombia (FARC) and the government. The Commission found in its proceedings that the State failed to use due diligence in the investigation, prosecution, and punishment of those responsible for the 1994 extrajudicial execution of Senator Cepeda, a high-profile member of the Unión Patriótica, particularly considering that precautionary measures (interim measures issued by the Commission itself) had been in place since October 1992. Among other things, the Commission requested that the State adopt measures to prevent the occurrence of politically-motivated violence and, in particular, violence against members of the Unión Patriótica. This case could serve as a reference for future cases regarding other individuals of the UP that could be submitted to the Court in the future, in a similar way to 'pilot judgements' issued by the European Court on Human Rights.

The second case, Grand Chief Michael Mitchell vs Canada, illustrates an instance where the Commission issued a decision in favour of the State under the American Declaration of the Rights and Duties of Man (hereinafter ‘Declaration’). This case is also interesting because the analysis allows for a number of possible interpretations. While this could be problematic in that it does not provide a clear legal framework for States to follow when passing and implementing non-discriminatory legislation, it allows academics, advocates, and practitioners to study the various interpretations of this decision and discuss the relative merits of each. Hopefully, when the Commission is next presented with the issues raised in this case, it will consider the responses to the
decision in *Grand Chief Michael Mitchell* and will provide a narrower legal framework for interpreting and implementing Article XIII of the Declaration, consistent with the purpose and spirit of Inter-American jurisprudence.

The last two cases – one about an inadequate investigation into police abuse in Brazil and the other about freedom of expression in Ecuador – look at the procedures the Commission follows when determining not to submit a case to the Court. According to Article 44 of the Commission's Rules of Procedure, if the Commission 'considers that the State has not complied with the recommendations of the report (...) it shall refer the case to the Court, unless there is a reasoned decision (...) to the contrary.' In neither case does the Commission provide a detailed public explanation of why it chose not to refer the case. Although not explicitly required by Article 44, such a decision should be released into the public domain so that advocates, citizens, and States can better understand how the Inter-American system functions.

The full text of the decisions are available at: www.cidh.org/casos.eng.htm.

**Manuel Cepeda Vargas vs Colombia, Case No. 12.531**, submitted to the Inter-American Court on Human Rights, 14 November 2008

On 1 December 2008, the Commission filed an application with the Court in Case No. 12.531 – *Manuel Cepeda Vargas* after finding that the Colombian State had not complied with its 'substantive recommendations'. The Commission had found violations of Articles 1 (Obligation to Respect Rights), 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 11 (Right to Privacy), 13 (Freedom of Thought and Expression), 16 (Freedom of Association), 22 (Freedom of Movement and Residence), 23 (Right to Participate in Government), and 25 (Right to Judicial Protection) arising out of the State's failure to use due diligence in the investigation, prosecution, and punishment of those responsible for Senator Cepeda's extrajudicial execution; its failure to 'adopt the measures necessary to protect [his] life'; and its failure to provide adequate reparations.

The Commission based its decision to take the case to the Court on the 'need to obtain justice and reparations for the victim's next of kin' and because the case is 'emblematic of the situation of members of the Unión Patriótica' who suffer harassment, persecution, and attacks, the perpetrators of which enjoy impunity (para. 4). Senator Cepeda was the leader of the National Directorate of the Colombian Communist Party and a high-profile member of the Unión Patriótica. His case had originally been joined with that of other members of the Unión Patriótica, but was separated in December 2005 while the parties in Case No. 11.227 pursued a friendly settlement. Even before receiving the original petition in December 1993, the Commission requested precautionary measures to protect three leaders of the Unión Patriótica, including Senator Cepeda.

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1 Press Release No. 57/08.
In addition to carrying out a 'thorough and impartial investigation for the purpose of prosecuting and punishing', providing reparations to the victim's next of kin, and covering litigation costs, the Commission requested that the Court order four other measures. First, the Commission recommends that the State adopt measures to prevent the occurrence of similar events, especially as they relate to politically-inspired violence and, in particular, to members of the Unión Patriótica. Second, the Commission would like the State to take measures to restore Senator Cepeda's good name. Third, the Commission recommends that measures be taken to guarantee the security of the victim's next of kin to prevent them from being forced into exile. Fourth, the Commission would like the State to take measures of rehabilitation to assist the victim's next of kin.2

On 26 November 2001, Hutchins Caron & Associés filed a petition with the Commission on behalf of Grand Chief Michael Mitchell, a member of the Mohawk First Nations indigenous community in Canada. Petitioner alleged that Canada violated his right to 'take part in the cultural life of [his] community' as protected by Article XIII of the Declaration by requiring him to pay a customs duty on goods he sought to bring from the United States to Canada to trade with other members of the Iroquois community. On 25 July 2008, the Commission found in favour of the State after concluding that Petitioner had not proven that the trade restrictions imposed were 'discriminatory or disproportionately restrictive of the petitioners' cultural and trade practices.'

Petitioner claimed the right to trade with other indigenous First Nations based on historic practices and customs, arguing that trade is an essential distinguishing element of Mohawk culture in that it is 'central to Mohawk cultural identity and integrity' and necessary for the preservation of both. Petitioner claimed this right only insofar as the trade is conducted with other First Nations and expressed a willingness to so limit the community's right by requiring trade licenses and the use of bonding trucks to transport goods to specific destinations. Petitioner argued that the nations of the Iroquois Confederacy, to which the Mohawk belong, did not historically pay tolls or tribute when trading with each other. In fact, Petitioner argued, the right of the Iroquois to bring their goods across the border duty-free was specifically and explicitly recognised in the Utrecht and Jay Treaties.

The State set forth five main counter-arguments. First, the State argued that there were no culturally significant aspects to the trade, such as the nature or purpose of the goods traded. Second, the State claimed that even if the trade at issue is culturally significant and would otherwise be protected, reasonable limits on individual rights are permissible. Third, the State argued that the goods were purchased from suppliers

2 The full text of the Application to the Inter-American Court can be found at: www.cidh.org/demandas/.
in the United States and that the trade at issue was only one small transaction in a much larger intra-cultural trade. Fourth, the State claimed that trade within a cultural group is too broad a right to protect because, by allowing all communities to trade without government restrictions as long as they only engage in inter-cultural trade, the Commission would effectively negate the State's ability to regulate trade. Fifth, the State argued that not imposing trade restrictions on indigenous communities will unfairly disadvantage other members of society by providing a competitive advantage to, in this case, the Mohawk.

After stating that the Declaration should be interpreted and applied in the context of other treaties, customs, and relevant sources of international law, the Commission found that the United Nations Human Rights Committee's ('Committee') interpretation of Article 27 of the International Covenant on Civil and Political Rights (ICCPR) was persuasive. The Committee's interpretation is that a minority group's economic activities are protected by Article 27 if they are an essential element of the minority group's culture.

Applying this principle, the Commission found that trade is protected under Article XIII in two situations: 1) where culturally significant aspects of trade reflect a distinctive aspect of a culture, such as trade in a significant product or a culturally significant trading practice; and 2) where trade restrictions have the effect of disproportionately restricting or discriminating against a trade practice. After laying out these two grounds of protection the Commission concluded that the first cannot serve as an independent ground of protection.

The Commission's ruling that Article XIII prohibits trade restrictions that have the effect of disproportionately restricting or discriminating against the trade practices of an indigenous community is consistent with the Committee's interpretation of Article 27 ICCPR. In Lansman vs Finland, the Committee found that 'measures with only a limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.' This two-prong test is incorporated into Article XIII and extended to protect indigenous communities from discriminatory legislation and non-discriminatory legislation that nevertheless has a disproportionate impact on an indigenous community.

However, as partially recognised by the Commission, Article XIII is broader in that it also protects culturally significant aspects of trade. Although the Petitioner did not claim to have traded a 'significant product', he claimed that there is a historically significant trading practice amongst First Nations dating back to before the Settlers

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3 Article 27 provides: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

arrived and subsequently protected in the Utrecht and Jay Treaties, as well as the Canadian Constitution and various sources of international law.

**Antonio Ferreira Braga vs Brazil, Case No. 12.019, Report No. 35/08, 18 July 2008**

In April 1993, Mr Antonio Ferreira Braga was arrested without a warrant, and not in *fragrant delicto*, and was tortured in order to extract a confession of stealing a television. During a visit to the police station, a group of human rights monitors, local government, and the bar association found Mr Braga tied up and wrapped in a rug. According to a medical examination he had been subjected to electric shock, beating with a cane, and semi-asphyxiating and had not been given anything to eat or drink for over 24 hours. An investigation began two days later, a final sentence was handed down in July 1996, and the sentence was confirmed in May 1999. However, the following month the judge ruled that enforcement of the sentence was time barred because of the time elapsed between the date of the complaint and the date of conviction.

On 18 July 2008, the Commission, after reviewing the case, published Report No. 35/08 after the Brazilian State failed to comply with the Commission’s recommendations in Case No. 12.019 – Antonio Ferreira Braga. The Commission chose not to submit the case to the Court and voted to publish it in its Annual Report. Consequently, the Commission decided to ‘evaluate the measures taken by the Brazilian State until the recommendations have been fulfilled in their entirety’ (para. 151).

The Commission had found violations of Articles 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8(1) (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the Convention in relation to its obligation to adopt effective measures to prevent, investigate, prosecute, and punish under Articles 1(1) and 2. The Commission also found violations of Articles 1 (duty to prevent and punish torture), 6 (obligation to take effective measures to prevent and punish), 7 (duty to train police officers), and 8 (obligation to conduct an impartial examination) of the Inter-American Convention to Prevent and Punish Torture (Torture Convention). The Commission found no violation of Articles 4 and 11 of the Convention because the alleged victim was not arbitrarily deprived of his life or his privacy as interpreted in the case-law.

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5 Petitioner argues that Article III of the Jay Treaty granted ‘full Liberty of coming and going on account of Trade’ without ‘any Molestation or Hindrance’. The State contends that Article III of the Jay Treaty was only intended to apply to the fur trade and to personal goods brought over for personal use, that the Mohawk were not parties, that it was not implemented, and that it has been superseded by intervening events, inconsistent legislation and subsequent treaties (also applicable to the Utrecht Treaty).

6 Petitioner claimed that the Canadian Constitution protected his right to trade freely across the international border with the United States. The State pointed out that the Supreme Court of Canada ruled that Mohawk do not have a constitutionally protected indigenous right to bring goods into Canada without paying taxes and tariffs.

7 ‘[A] judicial proceeding does not constitute, in itself, an unlawful attack on the honor or dignity of a person.’ *Cesti Hurtado* Case, Judgement of 29 September 1999, Series C No. 56, paras 177–178.
Commission also held that the alleged violations of the American Declaration of the Rights and Duties of Man were subsumed by the rights protected in the Convention as those rights were 'substantially identical' (para. 30).

The Commission made four recommendations to the State. First, that the State give legal effect to the obligation to investigate and effectively punish those responsible for the alleged victim's unlawful detention and torture. Second, the Commission recommended that the State conduct an investigation to establish the civil and administrative responsibilities related to the unreasonable delay, especially on the part of the judiciary, and to punish any negligence found. Third, the Commission recommended that adequate reparation be given, including pecuniary compensation. Forth, the Commission recommended that the State train civil police officers in the fundamental rights protected by the Convention.

After the Commission's report was submitted to the State in November 2007, the petitioners filed additional information indicating that Mr Braga had received threats, moved several times, and that the petitioners had no contact with him since preparing the final briefs in 2003. Although the petitioners indicated their desire to refer the case to the Court, the Commission chose not to do so in February 2008 and requested that the State submit a report remarking on its compliance with the Commission's recommendations. After receiving the State's observations in April and June of 2008, the Commission went on to find that none of its recommendations had been met.

First, the Commission found that there is still a statute of limitations in torture cases and that the State consequently failed to adopt necessary measures to give legal effect to the obligation to investigate and effectively punish those responsible. As the Commission put it:

[A]ny statute of limitations provisions or other domestic legal obstacles whose purpose is to obstruct the investigation and punishment of those responsible for human rights violations are inadmissible. (para. 108)

Second, the Commission found that the State had not conducted an investigation into the unreasonable delay, and therefore failed to meet this recommendation. Third, the Commission found that no reparation had been made. Forth, the Commission found that the State has not provided civil police officers with the necessary human rights training.

The Commission did not go back and consider whether the case should be submitted to the Court. According to Article 44 of the Commission's Rules of Procedure, if the Commission 'considers that the State has not complied with the recommendations of the report (...) it shall refer the case to the Court, unless there is a reasoned decision (...) to the contrary.' Article 44 then discusses five considerations that the Commission should bear in mind: the position of the petitioner, the nature and seriousness of the violation, the need to develop or clarify the case-law, the future
effect of the decision within the legal systems of the member States, and the quality of the evidence available.

The Commission provided no public explanation of why it chose not to refer the case when requested by the petitioners in February 2008. While it can be assumed that the Commission sought to continue discussions with the State, a reasoned decision is required by the Rules of Procedure and such a decision should be released into the public domain so that human rights defenders, States, advocates, and other interested persons can better understand how the Commission decides to send a case to the Court. This is particularly relevant once the Commission has formally determined that the State has not complied with most its recommendations. The Commission can continue to monitor compliance with its recommendations until they are met, at which point the question of referral is moot. Therefore, the only reading of Article 44 that gives it meaning requires that the Commission conduct a new determination of whether to submit the case to the Court each time it evaluates the State's compliance with its 'Article 50' recommendations. It is not clear from this report how the Commission is assessing when not to send a case to the Court.

**Rafael Ignacio Cuesta Caputi vs Ecuador, Case No. 12.487, Report No. 36/08, 18 July 2008**

On 18 July 2008, the Commission published Report No. 36/08 after finding that the Ecuadorian State had failed to meet its recommendations in Case No. 12.487 – **Rafael Ignacio Cuesta Caputi**. The Commission had found violations of Articles 1(1) (Obligation to Respect Rights), 8 (Right to a Fair Trial), 13 (Freedom of Thought and Expression), and 25 (Right to Judicial Protection) of the Convention arising out of the State's failure to conduct an adequate investigation of those responsible for sending a bomb that exploded in Mr Cuesta Caputi's hands when he sought to open a package allegedly containing videotapes. Mr Cuesta Caputi, news director of **TC-Televisión**, had previously received threats telling him to be silent after he had criticised the 21 January 2000 coup d'état on television.

The Commission cited various stages of the investigation as problematic. Several pieces of evidence that might link the coup participants to those responsible for sending the bomb were not pursued. For example, the origins of the calls to **TC-Televisión** were not investigated, taking the statement of the only person to see the individual who mailed the bomb without a judicial officer present who could direct the statement was not examined. The group that claimed responsibility (the Popular Fighters Group) was not investigated. The handwriting on the package was not examined, the origin of the bomb materials was not studied, possible suspects named in public were not investigated and those who had taken part in the coup were not summoned.

Furthermore, the Commission highlighted that the case was under investigation for three years and three months. In order to determine what constitutes a reasonable time period for conducting an investigation, the Commission considered three
aspects of the case: the complexity of the issue, the promptness of the interested party in pursuing proceedings, and the conduct of the judicial authorities. Looking at the fact that only one person was involved, the motives seemed clear, and there were leads that were not pursued, the Commission found that the ‘level of complexity of the case does not justify the omissions of the investigation’ (para. 82). It also found that Mr Cuesta Caputi was not responsible for pursuing the proceedings as it was a criminal investigation and that the authorities ‘did not act with the necessary diligence’ (para. 82).

On three occasions Ecuadorian authorities recognised that the investigation had been inadequate. First, on 30 August 2000, the judge ordered the preliminary stages of the proceedings to be reopened after the government attorney concluded that the investigation had been inadequate. Second, on 10 January 2005, the prosecutor refrained from issuing any indictments because he found that it was not possible ‘to establish the participation and responsibility of the alleged perpetrators, accomplices, and accessories, because they had not been fully identified at the summary stage’ (para. 60). Third, on 23 December 2005, the judge issued a stay of proceedings after finding that the parties responsible could not be established.

In relation to Article 13, the Commission found that the State’s failure to carry out a complete investigation ‘constitutes a violation of freedom of expression and of the right of all citizens to receive freely information and ideas’ and that the State ‘had the obligation to investigate promptly and diligently the events described, and to identify and punish those responsible in order to protect the right of Mr. Cuesta Caputi to freedom of thought and expression’ (paras 24 and 99). In basing the State’s violation of Article 13 on the failure to conduct an adequate investigation, the Commission pointed to the resulting ‘chilling effect on the free exercise of the right’ (para. 105).

The Commission found that it was not necessary to reach the alleged violation of Article 5 because it had already found violations of Articles 8, 13, and 25. The report simply states that ‘the allegations of the petitioner regarding violations of that Article were subsumed in the considerations with respect to Articles 8.1, 25 and 13’ (para. 125). There is no other explanation of why the State did not violate Article 5.

The Commission recommended that the State publicly acknowledge international responsibility; carry out a complete, impartial, and effective investigation; and grant adequate reparation to Mr Cuesta Caputi. On 8 January 2007, the petitioners requested that the case be submitted to the Court.

During its 127th regular sessions in March 2007, the Commission decided not to submit the case to the Court. The only indication of why it made this decision states that the Commission ‘took into account, among other things, the evidence available in the case file’ (para. 116). Although there is no requirement that the ‘reasoned decision’ required by Article 44 of the Rules of Procedure be publicised, the desired effect of such provision – arguably increasing costs of international adjudication for States that clearly violated human rights law – may be diminished due to the lack of
transparency. Furthermore, the lack of clarity also negatively affects the predictability of the proceedings for all parties involved in litigation, therefore affecting the 'rational' variable in the decision-making process of the actors, which is crucial to, for example, improve the chances for an early friendly settlement.

Although the parties subsequently requested a suspension of proceedings in order to pursue a friendly settlement, no agreement was reached and, on 19 October 2007, the petitioners again requested that the Commission submit the case to the Court. The Commission instead published Report No. 36/08, reiterated its recommendations, set the case for inclusion in its Annual Report, and indicated that it will 'continue to evaluate the measures adopted by the State' (para. 128). The Commission either did not reevaluate the case after this new request or chose not to provide a public explanation of its evaluation.