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Diego Rodriguez-Pinzon

American University Washington College of Law, drodrig@wcl.american.edu

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IV INTER-AMERICAN SYSTEM

DIEGO RODRÍGUEZ-PINZÓN*

In this report, I will refer to recent developments in the case law of the Inter-American Commission on Human Rights (hereinafter 'Commission' or 'Inter-American Commission' or 'IACHR') of the Organization of American States (OAS). The following are the current members of the Inter-American Commission: Felipe Gonzalez (Chair, Chile), Paulo Sergio Pinheiro (First Vice-Chair, Brazil), Dinah Shelton (Second Vice-Chair, US), Rodrigo Escobar Gil (Colombia), José de Jesús Orozco Henríquez (Mexico), Luz Patricia Mejía (Venezuela) and Maria Silvia Guillén (El Salvador).

Five cases are reported below. The first one refers to a case against Mexico that was rejected by the Inter-American Court for lack of competence *ratione temporis*, and was subsequently reported by the Commission in a decision in the merits. The second case is a decision against the United States in a death penalty case that was dealt with previously by the International Court of Justice (ICJ). The third case refers to a property rights claim against Argentina, in which this country was found not to be in violation of the American Convention. The fourth case deals with a petition against Uruguay regarding violation of minimum standards for preventive detention, and the last case focuses on the forced conscription of minors in Paraguay.

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

Alfonso Martín Del Campo Dodd, Case No. 12.228, Report No. 117/09, 19 November 2009

On 29 May 1992, Alfonso Martín del Campo Dodd was taken to a Mexico City police station after he approached police officers on the street, claiming that he had been awakened by his sister screaming, captured in his home by men wearing stockings over their heads, and shoved in a car trunk. Martín del Campo Dodd discovered his sister and brother-in-law had been murdered, and was then taken to a police station where he was beaten by police until he confessed to his family's murder. He subsequently retracted his confession, but it was not taken into account by the courts, and he was sentenced to 50 years in jail. Although the State agreed that Officer Sotero

* Diego Rodríguez-Pinzón is Professorial Lecturer in Residence of American University Washington College of Law (WCL) and Co-Director of the Academy on Human Rights and Humanitarian Law at WCL, Washington, USA. He wants to thank Caitlin Shay for her research support.

Galvan Gutierrez ‘abused or improperly exercised his office by arbitrarily detaining the complainant (...) [and] his attitude violated human rights because it was an abuse of a complainant’s physical integrity’, it stated that this was an ‘isolated incident’. The State also claimed that Martín del Campo Dodd was given due process of law in domestic courts, and that torture was never proven.

In July 1998, Martín del Campo Dodd lodged a complaint against Mexico at the Inter-American Commission on Human Rights alleging that Mexico had unlawfully arrested, tortured, and imprisoned him for 50 years, in violation of the American Convention on Human Rights’ (hereinafter ‘American Convention’) guarantees to humane treatment (Article 5), personal liberty (Article 7), a fair trial (Article 8) and judicial protection (Article 25).

The IACHR agreed that that ‘Mexico City’s judicial police arbitrarily detained Alfonso Martín del Campo Dodd on May 30, 1992, and subjected him to torture and other forms of cruel, inhuman and degrading punishment (...) to force him to confess to the previous night’s murder (...). The guarantees of due process were denied, especially the right to presumption of innocence.’ The IACHR found violations of Articles 5, 7, 8(1)-(3) and 25 of the American Convention, and Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. Additionally, ‘The Mexican State therefore incurred in a violation of Article 1(1) of the American Convention, as it failed to comply with its obligation to respect and ensure Mr Alfonso Martín del Campo Dodd’s rights to personal liberty, humane treatment, due process and judicial protection.’

In Report No. 63/02, the IACHR recommended that Mexico take measures to release Martín del Campo Dodd, review the judicial process used against him, nullify his confession, conduct an impartial investigation into the actors who committed human rights violations, and take measures to prevent a recurrence of these types of violations.

After the IACHR determined that Mexico had not complied with its recommendations, it sent the case to the Inter-American Court of Human Rights (hereinafter ‘the Court’) on 30 January 2003. The Court found that it did not have jurisdiction to decide the merits of the claim, based on the legal principle *ratione temporis*. Despite objections by Mexico, the IACHR determined that pursuant to Article 51(2) of the American Convention, the IACHR may follow-up on its recommendations when the Court decides it is not able to decide on the facts of the case. In Report No. 117/09, the IACHR noted that Mexico had not complied with its original recommendations, reiterated those recommendations, and decided to publish its report.

Medellín, Ramírez Cardenas and Leal García, Case No. 12.644, Report No. 90/09, 7 August 2009

During the 1990s, José Medellín, Rubén Ramírez Cardenas, and Humberto Leal García were arrested for separate murders. Although all were Mexican nationals, none

were informed of their rights under Article 36 of the Vienna Convention to contact and receive assistance from the Mexican consulate. Each was eventually appointed counsel, but the lawyers that all the men received were incompetent. Subsequently, Medellín, Ramírez, and García were all sentenced to death.

In 2003, the International Court of Justice issued a judgment in *Avena*, filed by Mexico on behalf of Medellín and others, which found that the United States violated Article 36(1)(a)-(c) of the Vienna Convention 'to inform detained Mexican nationals of their rights (...) to notify the Mexican consular post of their detention and (...) to enable Mexican consular officers to arrange for legal representation of their nationals.' Despite a memorandum by President Bush promising that the United States 'would discharge its international obligations by having state courts give effect to the ICJ's decision', the Texas Supreme Court and the US Supreme Court ruled that the ICJ decision was non-binding for the State court's rule against successive *habeas corpus* petitions. The three petitioners filed claims at the Inter-American Commission on Human Rights under Articles I (right to not be arbitrarily deprived of life), XVIII (right to fair trial, appeal, and effective remedy), XXV (right to humane treatment in custody) and XXVI (due process and right to not receive cruel, infamous, or unusual punishment) of the American Declaration of the Rights and Duties of Man (hereinafter 'American Declaration'), which were consolidated into one case on 15 January 2008.

Although the United States argued that domestic remedies had not been exhausted and that the IACHR did not have jurisdiction to hear Vienna Convention issues because it is not a human rights treaty, the IACHR released Preliminary Report No. 45/08 stating that the petitioners' claims were admissible and that if the United States executed the men 'it would commit an irreparable violation of their right to life.' The IACHR requested new sentencing hearings that afforded the men due process and fair trial protections.

The IACHR 'appl[ie]d a heightened level of scrutiny (...) [because] the right to life is widely-recognized as the supreme right of the human being' and found 'that the imposition of the death penalty in the instant case involves an arbitrary deprivation of life, prohibited by Article I of the Declaration.' The IACHR prescribed that the petitioners' death sentences be vacated, that they receive a new trial with competent representation, and that the United States review its laws, procedures and practices to protect foreign nationals and advise them of their right to access their consulate, especially in capital crimes. Despite this recommendation, Medellín was executed on 5 August 2008, but no dates had been set for the other two petitioners.

The United States did not reply to a request to present information on compliance with Report No. 31/09, which was sent to it on 27 May 2009, so the IACHR ratified its conclusions, reiterated its recommendations, and published its report. It noted that by allowing Medellín's execution 'the United States failed to act in accordance with its fundamental human rights obligations as a member of the Organization of American States' and that the United States should provide reparations to Medellín's family.

***Josefina Ghiringhelli de Margaroli and Eolo Margaroli*, Case No. 11.400, Report No. 5/09, 16 March 2009**

The Margaroli's property was subject to partial expropriation by the Argentine Government in 1979, for which they received compensation in 1985. However, Margaroli's refused to relinquish the property because the building on it had not been demolished, in accordance to the court's judgment. In 1989, three years after the judgment, the petitioners submitted an invoice for demolition. However, the Municipality of Buenos Aries then declared that the property was unencumbered because it was no longer a public utility. The Municipality denied further execution of the expropriation, saying that it was never fully completed and title was not passed, and was granted a judgment by the court for the petitioners to pay costs. This decision was overturned by the National Civil Appeals Chamber based on the notion of *res judicata* since a previous judgment granting compensation to the Margaroli's was final. The Supreme Court overturned this because the application of *res judicata* here would violate reasonableness principles, since the 'direct and indirect effects disappeared [when the expropriation was cancelled], as did the obligation to compensate the petitioners for the expropriated strips as well as for the damages occasioned thereby.'

The petitioners alleged violations against Argentina for violating Article 8.1 (right to fair trial) and Article 21 (right to property) of the American Convention on Human Rights. On 27 September 1999, the case was ruled admissible.

The IACHR noted that Argentina submitted a reservation to the American Declaration, which stated 'questions relating to the Government's economic policy shall not be subject to review by an international tribunal. Neither shall it consider reviewable anything the national courts may determine to be matters of "public utility" and "social interest", nor anything they may understand to be "fair compensation"'. Considering this reservation, the IACHR did not comment on just compensation, and found no violation of Article 21.2 of the American Convention, since the Margaroli's received some compensation after the initial expropriation. Article 8's guarantee to a fair trial was also not violated, as the petitioners' did not respond to all domestic rulings in a timely manner, and the length of the proceedings was largely due to the petitioners' actions. Therefore, Argentina is not in violation of the American Convention.

***Jorge, José, and Dante Peirano Basso*, Case No. 12.553, Report No. 86/09, 6 August 2009**

Beginning 8 August 2002, brothers Jorge, José, and Dante Peirano Basso were held in 'preventative detention' in Uruguay for four years and two months without formal charges. When charged on 19 October 2006, the brothers, owners of the Banco *de Montevideo*, were accused of 'fraudulent insolvency' that facilitated a breakdown in the Uruguayan economy. In the politically charged atmosphere of the case, the State justified the brothers' continued detentions by citing the complexity and severity of

the charges against them, their flight risk, and the threat of public unrest if they were released.

The Inter-American Commission applies the *pro homine* principle conferring ‘the broadest rule and most extensive interpretation’ of rights of the individual under preventative detention. It also noted that the Inter-American Court of Human Rights, the European Court, the International Covenant on Civil and Political Rights, the Body of Principles for the Protection of all Persons, and the Tokyo Rules all abide by the notion that preventive detentions should be limited to exceptional circumstances and closely monitored to ensure due process is protected.

The IACHR determined that since the Supreme Court considered this detention on five occasions and only gave legal justification for one of those times, it violated due process rights to have a fair judge presume innocence and to rule on an articulated, substantiated ground. Even if a preventative detention was initially necessary, the proportionality principle for these detentions was violated after the defendants remained in prison for longer than two-thirds of the minimum sentence for the crime of which they were accused. Since the defendants were eventually allowed 48 hours a week away from prison and observed the requirements of the release, proving they were not a flight risk, there were no grounds for continued preventative detention. As such, the IACHR found that Uruguay violated ‘the right to personal liberty [Article 7(2), (3), (5) and (6)], to a due process [Article 8(1) and (2)] and the commitment to guarantee that the competent authority shall enforce such rights [Article 25(1) and (2)]’ of the American Convention on Human Rights. The IACHR further found that the Prison System Humanization and Modernization Act and the Prison System Decongestion Act were discriminatory and violated Article 2 of the Convention’s obligation ‘to adopt, such legislative or other measures as may be necessary to give effect to those rights or freedoms nationwide.’

On 1 May 2007 Commissioner Gutierrez issued a dissenting vote to Report No. 35/07. On 11 May 2007 the IACHR issued Resolution 2/07, in which it ‘reject[s] imaginative elaborations by Commissioner Gutierrez (...) meant to give a political tinge to the decision by the Commission (...) [which] denote lack of professionalism and responsibility, and are inconsistent with the duty of members of the Commission.’

The IACHR concluded that Uruguay is in compliance with its first recommendation to release the brothers. They were released on bail in December 2007, although petitioners complained that bail conditions prevent them from leaving Montevideo. The second recommendation required Uruguay to amend its laws to be compatible with personal liberty guarantees in the American Convention. The IACHR indicated it would decide whether Uruguay is in compliance of this recommendation based on whether it passes certain bills that were before the legislature.

Victor Hugo Maciel, Case No. 11.607, Report No. 85/09, 6 August 2009

Victor Hugo Maciel was conscripted into the Paraguayan armed forces at the age of 15, but died while doing ‘punishment exercises’ for his unit. Although the Recruitment

and Mobilization Department found Maciel fit for service, an autopsy revealed that at the time of conscription, he was in the chronic stage of Chagas' disease, which causes heart irregularities. On 2 October 1995, the same day Maciel died, a military investigation was requested into the facts, but it was dismissed on 4 December 1995. The ordinary courts also opened criminal proceedings, but the case did not move forward for nine years.

On 14 March 1996, a petition was filed with the Inter-American Commission on Human Rights against the Paraguay alleging violations of rights to life, humane treatment, personal liberty, and a fair trial, the rights of the child, and the right to judicial protection, enshrined in Articles 4, 5, 7, 8, 19 and 25, respectively, of the American Convention on Human Rights. The IACHR determined the case met admissibility requirements for jurisdiction, deserved an exception to the exhaustion of domestic remedies, was filed in a reasonable time, and alleged remediable facts. Paraguay responded to accusations by pointing to the openness in which the military investigated the matter, noting the efforts the State had made to reform its policies to prevent child conscription, and questioning whether Maciel's conscription was really against his parent's will and his death occurred as they claimed.

The IACHR noted a number of organisations and international agreements that recommend 18 as the minimum age for people to enter the armed forces, and that require special treatment for younger children if they are permitted. Although the Paraguayan Constitution meets this standard, it often violates these precepts in reality. The Joint Inter-Institutional Committee, established in 2001 in accords with the initial friendly settlement procedure, found numerous violations of international law and the presence of child soldiers, many with medical issues, in Paraguay's armed forces.

The IACHR concluded that Maciel's parents objected to his conscription, but even if it had been voluntary, Paraguay should not have admitted Maciel under its own laws. Even if Maciel had been of age, Paraguay could have prevented Maciel's death if it had conducted a proper medical exam, and realised Maciel was unfit for the physical exercises that caused his death. Because the military case was dismissed and the ordinary court case stalled for nine years, due process was also violated. As such, Articles 4, 5, 7, 8, 19 and 25 of the American Convention were violated.

On 22 March 2006, the parties reached a friendly settlement. The IACHR noted that Paraguay satisfied its obligation to recognise its international responsibility for the death. It took satisfaction measures by erecting a Victor Hugo Maciel Plaza and providing the family pecuniary damages. It also made effective guarantees of non-repetition. For its obligation to provide justice and fully investigate Muciel's death, Paraguay has taken positive steps, but has not fully satisfied such commitment.