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The Inter-American Human Rights System: Activities from Late 2000 Through October 2002

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THE INTER-AMERICAN HUMAN RIGHTS SYSTEM:

ACTIVITIES FROM LATE 2000 THROUGH OCTOBER 2002

RICHARD J. WILSON* AND JAN PERLIN**

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INTRODUCTION

This article continues our analysis of the activities of the two principal human rights organs of the Organization of American States ("OAS"): the Inter-American Court of Human Rights ("the Court"), and the Inter-American Commission on Human Rights ("the Commission").¹ Almost all of the information contained in this

1. See Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities During 1999 through October 2000*, 16 AM. U. INT'L L. REV.

article comes from the published annual reports of the Commission and the Court for the relevant periods, plus additional posted information on published reports and decisions found on the websites for both entities. As in our previous coverage of the work of these bodies, our intention is not to provide an exhaustive catalog of all activity during the relevant time period. We will not, for example, systematically examine the important decisions by the Commission and Court to issue precautionary and provisional measures, respectively, although those decisions take on increasing importance, particularly after the decision of the International Court of Justice in the *LaGrand Case*,² in which the court held that its own provisional measures, issued against the United States to prevent the execution of a German national in Arizona, were binding. Nor will we, for example, examine the important resolutions of the OAS in the area of human rights. Our intent here is to provide readers, particularly non-Spanish speaking human rights lawyers and general readers, with a sense of the highlights and directions of the Commission and Court.

The single most significant system-wide development in 2001 and 2002 was the entry into force of the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, which acquired more than enough ratifications for entry into force on September 14, 2001.³

I. ACTIONS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

This section will first address the issues and cases arising from Peru's attempted repudiation of the Convention and subsequent reaffirmation of the Court's jurisdiction. It will then continue by discussing the extensive body of work of the Court during the

315 (2001) (highlighting actions of the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights).

2. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, para. 109 (June 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (last visited Jan. 24, 2003).

3. Inter-American Convention On The Elimination Of All Forms Of Discrimination Against Persons With Disabilities, June 7, 1999, available at <http://www.oas.org/juridico/english/ga-res99/eres1608.htm> (last visited Nov. 21, 2002).

relevant time period in the following order: 1) decisions on the merits (some of which reach conclusions on reparations in the same decision), 2) advisory opinions, 3) separate decisions on reparations, 4) decisions on admissibility (preliminary objections), and 5) new cases accepted by the Court but not yet decided at any stage. Because the decisions range across a number of doctrinal areas of human rights law, discussion of individual decisions is not in order of their perceived importance but in the order in which the Court decided them.

A. PERU'S RETURN TO THE SYSTEM AND DECISIONS DEALING WITH PERU

On January 23, 2001, after former President Fujimori's flight to Japan and the establishment of an interim government, Peru notified the Court that it had repudiated, by legislative act, the prior notice of withdrawal from its jurisdiction⁴ and reestablished its recognition of the Court's competence. Peru's reaffirmation of its acceptance of the Court's jurisdiction is also manifest in the collaborative approach it has taken on pending cases. At the same time, the facts underlying the cases provide insight into how the previous administration had attempted to legitimize government actions by giving them the patina of legality, all the while employing repression to maintain power.

1. Barrios Altos Case (Chumbipuma Aguirre y Otros vs. Perú)

The facts set out in the merits judgment of the *Barrios Altos Case*⁵ refer to the assassination-style summary execution of fifteen persons and the wounding of four others at a neighborhood fundraising party in 1991. The assassins were an "elimination squad" of Peruvian military intelligence operatives known as the "Grupo Colina." Investigations showed the operation was planned as a reprisal against the Shining Path group. The home the squad raided was a suspected meeting place for Shining Path members or sympathizers. Peru

4. Wilson & Perlin, *supra* note 1, at 323-24.

5. Barrios Altos Case (Chumbipuma Aguirre y Otros v. Peru) Judgment of May 14, 2001, Inter-Am. Ct. H.R. (Ser C) No. 75 (2001), *available at* <http://www1.umn.edu/humanrts/iachr/C/75-ing.html> (last visited Jan. 23, 2003).

recognized its international responsibility and offered to initiate friendly settlement negotiations in 2001.

The Court called for a hearing to explore Peru's request. At the session, Peru expressed its desire to normalize relations with the Court and to give priority to resolving pending cases. "The government's strategy in the area of human rights," Peru's representatives stated, "is based on recognizing responsibility, but above all, by proposing integrated procedures for attending to the victims based on three fundamental elements: the right to truth, the right to justice and the right to obtain fair reparation."⁶

The significance of this case lies in the Fujimori government's elaborate ten-year effort to cover up the truth and promote impunity prior to the new government accepting responsibility before the Court. As early as one week after the Barrios Altos attack, Peruvian senators had published information on the case and named an investigative commission. The dissolution of the national congress some months later and the enactment of additional legal barriers frustrated attempts to complete the criminal investigation. The most far-reaching of these measures were two amnesty decrees that, together, operated to give blanket amnesty to security forces and government officials for any alleged human rights violations, regardless of whether official investigations were pending. Initially, the amnesty had only included the members of the security forces and civilians that were the subject of complaints, investigations, procedures, sentences, or that were serving prison sentences for human rights violations.⁷

Trial Judge Antonia Saquicuray found the amnesty provisions, Law 26479, contrary to constitutional guarantees and international obligations.⁸ She continued the investigation of the *Barrios Altos Case* that she had initiated the same year the amnesty law was passed, in 1995. While her judgment was on appeal, a subsequent law attempted to remove the dispute from the judicial sphere entirely. Law 26492 decreed that the amnesty law was not subject to judicial review, and that the law itself was of immediate and

6. *Barrios Altos Case*, para. 35.

7. *Id.* para. 2(j).

8. *Id.* para. 2(k).

obligatory application.⁹ This second decree also broadened the previous amnesty to cover all members of the military, police, or civilian government functionaries who might be the subject of prosecution for human rights violations committed between 1980 and 1995, even if there had been no charges filed. An appeals court affirmed the validity of the new decree and rejected Judge Saquicaray's judgment.¹⁰ The national justice system abandoned the *Barrios Altos* case until 2001, when Peru conceded the invalidity of the amnesty laws and agreed to work toward the abolition of all obstacles to the investigation, prosecution, and sanction of those responsible for those violations of the right to life and physical integrity.

The Court took the opportunity to announce a definitive position on the right to accountability for serious human rights violations. In a section titled, "The Incompatibility of Amnesty Laws with the Convention," the Court declared the following:

This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of these violations prohibited because they violate non-derogable rights recognized by international human rights law.¹¹

Later in the judgment, the Court concluded:

Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.¹²

9. *Id.* para. 2(m).

10. *Id.* para. 2(n).

11. *Id.* para. 41.

12. *Barrios Altos Case*, para. 44.

The Court thus concluded that these self-amnesties are violative of the right to a simple and effective judicial remedy for human rights violations, under Articles 8 and 25 of the American Convention on Human Rights (“American Convention”).¹³ The Court determined that these rights are likewise implicated in the Convention obligations under Articles 1(1) and 2, which commit the State to respect the rights to a fair trial and a judicial remedy, and to take appropriate measures to achieve those ends. Impunity, the Court reasons, is anathema to the protection of these rights.

Nevertheless, this decision fails to disqualify the promulgation of amnesties altogether. It implicitly leaves the door open to amnesties designed to further purposes other than impunity, such as reconciliation or political transition from a repressive regime to one that promises respect for human rights in the future. However, the limitation on self-amnesties remains, which requires that a successor government with no relationship to the underlying human rights violations must enact any potentially valid amnesty law. To date, the Inter-American system has not reviewed an amnesty meeting these limited conditions.

The implications of the Court’s reasoning for Peru’s transition were made clear when, in a judgment interpreting the *Barrios Altos* decision,¹⁴ the Court explained that the incompatibility of Peru’s amnesty laws with the Convention constituted a finding of general application, and not limited to the case at hand. The Court referred the Commission, which had requested the interpretation, to the portion of its judgment concluding that the amnesty laws lack judicial effect because, by their very nature they deny the obligation to enact legal measures to ensure the rights protected by the Convention and to investigate and punish those responsible. The Court reasoned that these amnesty laws have the general effect of undermining the State’s obligation to implement human rights treaty

13. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1114 U.N.T.S. 123 [hereinafter *American Convention*], available at <http://www.itcilo.it/english/actrav/telearn/global/ilo/law/oashr.htm> (last visited Jan. 21, 2003).

14. *Barrios Altos Case*, Interpretation of the Judgment on the Merits (Art. 67 American Convention on Human Rights), Judgment of Sept. 3, 2001, Inter-Am Ct. H.R. (Ser. C) No. 83 (2001), available at <http://www1.umn.edu/humanrts/iachr/C/83-ing.html> (last visited Jan. 21, 2003).

commitments, as a matter of conventional and customary international law.¹⁵

Once Peru assumed its responsibility for the violations of the right to life, physical integrity, due process, and judicial remedy and agreed to submit the case to its judgment, the Court rendered the final decision. Reparations were left for a separate proceeding in accordance with Court Rule 52(2).

The reparations decision¹⁶ noted Peru's report that, in compliance with the merits judgment, it had created a Truth Commission for the purpose of clarifying the facts and corresponding responsibilities underlying the human rights violations committed between May, 1980 and November, 2000. This decision also noted that Peru had entered into an "Agreement on Integral Reparations for the Victims and their Family in the case of Barrios Altos."¹⁷

The Court validated the Agreement, which provided for substantial money damages (\$175,000 for each victim, with one survivor receiving \$250,000),¹⁸ in addition to health, education, and job training benefits for surviving relatives. A series of reparatory measures were directed at dismantling the legal tools of impunity. To that end the agreement commits Peru to implement the Court's order on the "inefficacy" of the amnesty laws, to codify the crime of extra-judicial execution, and to initiate the process of signature and ratification of the International Convention on the Imprescriptability of Crimes Against Humanity. Interestingly, neither the Court nor the agreement call specifically for the repeal of the amnesty laws, which implies that there is more than one available mechanism for invalidating the effect of those laws, and that the choice is up to the country itself on how it will achieve compliance.

Other reparatory measures included an order that the government comply with the Court's determination that the amnesty laws are *per*

15. *Id.* paras. 16-17.

16. Barrios Altos Case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of Nov. 30, 2001, Inter-Am Ct. H.R. (Ser. C) No. 87 (2001), available at <http://www1.umn.edu/humanrts/iachr/C/87-ing.html> (last visited Nov. 30, 2002).

17. *Id.* paras. 10-11.

18. Throughout this article, all money amounts denote U.S. dollars.

se violative of the Convention, the official publication of the Court's judgment, a public and official apology, a request for a pardon from the victims and their families, and a statement of the State's determination to prevent such acts from being repeated in the future. The Agreement also provided for the construction of a monument to remember the victims.

Additional reparations cases from Peru, discussed below, include measures similar to those provided for here. They reflect an effort to socialize the values contained in the Court's decisions, and to give some direct remedies to the victims that will affect their future well-being. However, the reparations measures in other cases are not nearly as far-reaching as those that rule inadmissible existing national legislation, as in the case of *Barrios Altos*.

2. *The Constitutional Court Case*¹⁹

Like the *Barrios Altos Case*, the *Constitutional Court Case* reflects the Fujimori government's practice of exercising arbitrary power under the guise of legality. Alberto Fujimori was elected president in 1990, after which he substantially "reformed" both Congress and the courts. A new constitution adopted in 1993 contained a provision that would permit Fujimori's candidacy for a second consecutive five-year presidential term beginning in 1995. In 1996, the Lima Bar Association filed suit before a newly named seven-member Constitutional Court in which it challenged the legitimacy of interpreting the new constitutional provisions to grant Fujimori an additional term of office. This case arose from the subsequent set of complex interactions and infighting between the Constitutional Court, some of whose members acted to try to prevent Fujimori's unilateral exercise of power and the Congress.

The Constitutional Court had drafted a majority decision, the effect of which would have been to nullify the validity of a second presidential term for Fujimori. Magistrates from that court fielded a complaint before the legislature charging that one of their colleagues, who disagreed with the decision, had improperly leaked the draft

19. Constitutional Court Case, Judgment of Jan. 31, 2001, Inter-Am Ct. H.R. (Ser. C) No. 71 (2001), available at <http://www1.umn.edu/humanrts/iachr/C/71-ing.html> (last visited Jan. 15, 2003).

decision to the press. The complaining magistrates also documented acts of intimidation from other sources. Two dissenting magistrates, in turn, denounced in a letter to the legislature, irregularities in the majority's decision-making process in the case. In a subsequent vote on the matter, confusion reigned when some of the magistrates recused themselves, others abstained, and the remaining three magistrates, once again constituting a majority, reiterated their decision to deny Fujimori a second presidential term. The legislature ultimately dismissed these same three magistrates, and it is that action which was challenged before the Court.

The dispute was played out in the legislature where a commission originally designated to hear the complaint about the alleged leak, ended up impugning the actions of the complaining judges. Without providing any meaningful opportunity for a defense and exceeding the powers it was originally granted to investigate, the congressional commission levied charges against the three magistrates who had voted to limit the executive's ability to maintain itself in power, and summarily dismissed them.

On August 14, 2000, prior to considering the merits of the case, the Inter-American Court ordered provisional measures in favor of one of the judges, Delia Revoredo Marsano, and her family, who suffered persecution, harassment, and threats related to her actions in the matter. The Peruvian government failed to appear at the evidentiary hearings or to offer any argument on the merits. The Court made the final judgment public on January 31, 2001. However, nine days before the Court issued the judgment, the newly designated Peruvian government notified the Court that its legislature had overturned the legislative decree purporting to revoke the Court's jurisdiction. The legislative decree charged the executive branch with nullifying the decree's effects in order for Peru to fully re-establish its adherence to the contentious jurisdiction of the Court.

The Inter-American Court, auguring its final decision, offered some wisdom on what it characterized as a "political" trial:

Under a rule of law, the impeachment proceeding is a means of controlling senior officials of both the Executive and other State organs exercised by the Legislature. However, this control does not mean that the organ being controlled – in this case the Constitutional Court – is subordinate to the controlling organ – and the supervised entity – in this case the Legislature; but rather that the intention of the latter is that an

organ that represents the people may examine and take decisions on the actions of senior officials.²⁰

The Court found violations of Article 8 (fair trial) based on the Peruvian legislature's arbitrary actions, including its lack of impartiality, and the denial of the right to a defense for the judges. The victims' right to a predetermined, competent, independent, impartial tribunal free from external pressures was also violated when some of the congresspersons who formed the investigative commission that dismissed the magistrates had themselves petitioned to uphold the law allowing Fujimori's reelection. The investigative committee had also ignored the irregular actions of the dissenting magistrates, initially denounced before the legislature by the magistrates who were later removed.

The right to a defense was undermined when the legislature exceeded its mandate without prior notice or authorization; when the dismissed justices had not been permitted to confront and question the witnesses on whose information the accusation was based; and when they were initially given only forty-eight hours to respond to the charges. That period of time was later extended for one week, but it expired on the very same day that the charges were finalized. Moreover, the Court found that the resolution dismissing the justices was entirely unsubstantiated.

The Court also found a violation of Article 25 (judicial remedy), and in so doing asserted that judicial recourse should be available to defendants in political trials in order to guarantee due process without undermining the political nature of the oversight powers the Constitution conceded to the legislative branch.²¹ In this same vein, the Court rejected the claim that Article 23 political rights were violated.

The Court noted that Peru's congress had revoked the resolutions dismissing the three justices on November 17, 2000 and awarded the victims lost wages and costs. Claims for expenses associated with one victim's flight to Costa Rica where she received political

20. *Constitutional Court Case*, para. 63.

21. *Id.* paras. 93-94.

asylum, and business losses attributed to the harassment and persecution suffered by her and her spouse were rejected.

*3. Ivcher Bronstein Case*²²

Baruch Ivcher Bronstein was another victim of political persecution of the Fujimori government. The Court found violations of Articles 20 (right to nationality), 8 (fair trial), 25 (judicial remedy), 12 (expression and thought), 21 (private property) and 1(1) (respect and guarantee of rights). As the President and Director of a private television station, and under his editorial authority, he aired programs reporting complaints of torture and executions carried out against members of the Military Intelligence Service ("MIS") and implicating the then-advisor to the MIS, Vladimiro Montesinos, in widespread corruption. One program aired the testimony of a former member of the MIS forces who stated members of her own institution had tortured her.

Peruvian authorities denied Mr. Ivcher, a naturalized Peruvian citizen, his right to nationality when they declared his Peruvian naturalization void. A Peruvian court denied his right to property when, on the basis of his status as a foreigner, it subsequently ordered that he be divested of his majority shares in a television station where he served as President and Director. The Court pointed out that the process followed for voiding the naturalization decree conflicted with that prescribed by Peruvian law, was invoked by an incompetent authority, and that the administrative and judicial processes employed violated due process guarantees. The Court declared the act voiding Mr. Ivcher's naturalization arbitrary, in violation of Article 20(3) of the Convention.

Concerning Mr. Ivcher's property rights, the Court held that it should not be limited to examining only the formal circumstances of the expropriation, but that it should also consider the facts and circumstances that in reality provoked the civil court judgment. The Court relied on recent jurisprudence from the European Court of Human Rights in pursuing this approach.

22. *Ivcher Bronstein Case*, Judgment of Feb. 6, 2001, Inter-Am Ct. H.R. (Ser. C) No. 74 (2001), available at <http://www1.umn.edu/humanrts/iachr/C/74-ing.html> (last visited Jan. 21, 2003).

The Peruvian civil court applied the law prohibiting foreigners from owning any communications media and divested him of his majority ownership in the company. After examining the circumstances surrounding the judicial declaration suspending his right to hold controlling shares in the company and ordering the election of a new board, the Court determined that it was the State's intention to deprive the victim of his property rights as a shareholder, albeit a minority one. The Court cited jurisprudence from the International Court of Justice for the proposition that shareholder rights can be distinguished from ownership rights in a company and concluded that the civil court judgment had denied Mr. Ivcher his right to property by denying him the opportunity to exercise his shareholder rights to participate in board elections and receive dividends.

The facts and circumstances surrounding these events also substantiated the Court's conclusion that voiding the victim's nationality was an indirect means of restricting Mr. Ivcher's right to freedom of expression, as well as that of others who worked at the station and did investigative reporting for the program "Counterpoint," that aired the complaints of torture and other wrongdoing. The Court found that interference with the station's operations also affected the right of other Peruvians to receive information in order to exercise their political options and participate fully in a democratic society.

A legislative resolution prior to the issuance of the Court's judgment reinstated the victim's nationality and resolved to award Mr. Ivcher \$20,000 for moral damages and \$50,000 for costs and expenses. The resolution further held that the State must facilitate the conditions for him to recuperate, his losses, which include the use and enjoyment of his rights as a majority shareholder in the media company. The Court also referred resolution of damages for lost dividends and earnings to the competent national authorities.

This reparations arrangement was the subject of yet another judgment interpreting that order.²³ The Court reiterated its

23. Ivcher Bronstein Case, Interpretation of the Judgment on the Merits (Art. 67 American Convention on Human Rights) Judgment of Sept. 4, 2001, Inter-Am Ct. H.R. (Ser. C) No. 84 (2001), *available at* <http://www1.umn.edu/humanrts/iachr/C/84-ing.html> (last visited Jan. 21, 2003).

determination that material damages should be awarded according to Peruvian law on the subject, by means of petitions the victim filed before the competent national authorities. The Court repeated its assertion that its decision was clear and consistent as to Peru's obligation to indemnify the material damages suffered by Mr. Ivcher by providing him with the opportunity to recover "the use and enjoyment of his rights as a majority shareholder . . . as he was until August 1, 1997."²⁴

4. Other Reparations Cases from Peru

In *Cesti-Hurtado*²⁵ the victim had been arbitrarily detained and held by order of the military courts under Peru's anti-terrorist laws. Unlike the *Ivcher Bronstein* case, the Court did not find a violation of the right to property. Nevertheless, the victim claimed damages incurred for lost income from his family business, for which he was the legal representative and general director. He asserted that due to his arbitrary detention, he lost income in the amount of \$6,000,000, suffered resulting damages in the amount of \$4,000,000, and losses of other expenditures in an attempt to minimize the damage to his business.

The Court again referred the determination of material damages to the domestic legal system, and ordered fixed amounts to compensate the victim and his family for moral damages, and costs and expenses related to litigating this case in the domestic and international jurisdictions. The Court explained that the nature of the reparations sought required the expertise of specialized national institutions with knowledge of mercantile and commercial law to determine an appropriate award.

The reparations decision in *Durand and Ugarte*²⁶ is based on an out-of-court agreement between the parties that the Court later

24. *Id.* para. 20.

25. *Cesti Hurtado Case*, Reparations (Art. 63(1) American Convention on Human Rights) Judgment of May 31, 2001, Inter-Am Ct. H.R. (Ser. C) No. 78 (2001), available at <http://www1.umn.edu/humanrts/iachr/C/78-ing.html> (last visited Jan. 21, 2003); see also Wilson & Perlin, *supra* note 1, at 324-325 (discussing the decision on the merits).

26. *Duran and Ugarte Case*, Reparations (Art. 63(1) American Convention on Human Rights) Judgment of Dec. 3, 2001, Inter-Am Ct. H.R. (Ser. C) No. 89

confirmed. The agreement followed Peru's regime change, and provided for a monetary award of \$125,000 to the victims' families, the provision of health benefits, psychological support, job training, and a housing subsidy. In addition, the agreement committed the government to publishing the merits judgment in the official Peruvian digest of jurisprudence and to issue and publish an official apology and commitment of non-repetition. Finally, as in all of the reparations cases, the Court ordered that the State of Peru investigate and sanction those responsible for the death of Nolberto Durand and Gabriel Pablo Ugarte, and to make all necessary efforts to locate the victims' remains and return them to their families for burial. This last commitment repeats the decision of the Court on the merits, and is significant because it arises out of a process of negotiation between the parties.

Luis Cantoral Benavides was arbitrarily detained for nearly four and one-half years, tortured, tried in violation of due process guarantees, and sentenced under the authority of Peru's former anti-terrorist laws. In the reparations decision bearing his name,²⁷ the Court alluded to the legislation granting pardons to prisoners unjustly imprisoned and sentenced for treason or terrorist acts. The legislation restricts relief to those whom the designated national commission, "reasonably presumes had no links of any kind with terrorists, or their activities or organizations . . ."²⁸

As in other cases discussed below, the victim's family members received compensation for material and moral damages they suffered as a consequence of the documented violations. The only dispute as to damages concerned the State's insistence that it could not fully provide reparations for medical services and university education so long as the victim resided abroad. After being released from prison, the victim left Peru to live in Brazil, and two of his brothers left the

(2001), *available at* <http://www1.umn.edu/humanrts/iachr/C/89-ing.html> (last visited Jan. 21, 2003).

27. Cantoral Benavides Case, Reparations (Art. 63(1) American Convention on Human Rights) Judgment of Dec. 3, 2001, Inter-Am Ct. H.R. (Ser. C) No. 88 (2001), *available at* <http://www1.umn.edu/humanrts/iachr/C/88-ing.html> (last visited Jan. 21, 2003).

28. *Id.* para. 75.

country for Bolivia. The State argued that it was unable to pay for medical and education costs in another country.

Nevertheless, the Court ordered a monetary award of \$10,000 for future medical expenses, justified by the testimony of psychological experts, to the victim and his mother. The Court stated that the victim could not be compelled to return to Peru in order to receive reparations. The Court also reimbursed the family for the cost of travel to visit Luis in jail during his incarceration, his medical costs while in jail, and the cost of medical and psychological attention for his mother and twin brother, both of whom were seriously affected physically and emotionally by Luis' circumstances.

Citing the disintegration of the entire family as a consequence of these violations, the profound effect on all of the family members both collectively and individually, and the drastic alteration of Luis' potential life plan and previous expectations, the Court awarded \$60,000 to Luis, \$40,000 to his mother, and \$20,000 to his twin brother as compensation for non-material damages.

In other reparations, the Court reiterated its order that the State investigate the facts underlying these human rights violations, identify those responsible and sanction all of them appropriately, noting that leaving those violations unpunished promotes impunity and represents a failure of the State's obligation to guarantee the full and free exercise of rights under the Convention. The power of the Court to supervise compliance with its judgments raises the question of how the Court will effectively determine whether sufficient efforts have been made to identify human rights violators and sanction them. Currently, the Court's reparations decisions demand concrete results, and its monitoring of compliance with those judgments has increased over time.

B. DECISIONS IN OTHER CONTENTIOUS CASES ON THE MERITS

Traditionally, the Court considered contentious cases in three procedural stages: admissibility (called preliminary objections by the Court), merits, and reparations. At each procedural stage, the parties submitted written pleadings and made oral arguments. As a result of

changes to their Rules of Procedure in 2000,²⁹ the Court now permits full participation of both the Commission and the victims' representatives in all stages of the proceedings, although victims still do not have standing to take a case to the Court; only the Commission or states may take such action. The decisions below are those contentious cases that survived decisions on admissibility and resulted in a judgment by the Court. In a new procedural development, the Court sometimes decided both the merits and reparations in a single decision, thus obviating the traditional third procedural step. Those decisions are noted here, while traditional, third-stage reparations decisions are discussed below in Section D.

1. *Bamaca-Velasquez Case*³⁰ (*Merits and Reparations*)

This case involved a guerrilla combatant, captured during battle, tortured, and then murdered by the military. The search for Efraín Bámaca involved Guatemala's judiciary, their Human Rights Ombudsman's Office, the Guatemalan Historical Clarification Commission ("Truth Commission"), the United Nations Human Rights Verification Mission in Guatemala, all three branches of the United States government, and the Inter-American human rights system, not to mention the efforts of non-governmental organizations, the press, and independent film-makers. This case provoked an international response before the Court issued its judgment in November 2000, even though his remains have never been found.

The attention was due to the efforts to find him after his capture by his widow, Jennifer Harbury, a Texas attorney who had met Efraín Bámaca while he was living clandestinely in the Guatemalan countryside. The pressure she exercised on the U.S. government led to the exposure of CIA practices that used known human rights violators, suspected of being complicit in the death of U.S. citizens, as paid informants. Her efforts generated a congressional intelligence oversight board investigation of CIA information-gathering

29. Rules of Procedure of the Inter-Am. C.H.R., available at <http://www.cidh.oas.org/Basicos/basic16.htm> (last visited Jan. 21, 2003).

30. *Bamaca Velasquez Case*, Judgment of Nov. 25, 2000, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000), available at <http://www1.umn.edu/humanrts/iachr/C/70-ing.html> (last visited Jan. 21, 2003).

practices. She fought for and achieved the declassification of official U.S. government documents, as well as an acknowledgment by the U.S. government that it knew Bámaca had been held in captivity for a time before being executed. That perseverance also led to the civilian authorities' first inspection of all the military installations in Guatemala. The civilian authorities carried out the inspections in a single day in 1994 without prior official notice, primarily as a symbolic gesture in the search for her missing husband.

This case was one of a number of cases in which Guatemala recognized its international responsibility.³¹ As it turns out, the government limited its statement to a general understanding that the government hoped to reach friendly settlements. However, that recognition did not include the concession of the facts as alleged by the Commission. The government seemed to prefer to let the Guatemalan national courts establish the historical truth, despite the fact that the national courts had been manifestly ineffective for the previous seven years during which domestic proceedings had been pending, and the eight years since his disappearance. This argument is akin to that of the former Minister of Defense who, in 1995, declined to allow the State prosecutor access to an army barracks to conduct an exhumation pursuant to credible information that Bámaca was buried there, asserting that jurisdiction had been transferred to the Truth Commission.³²

The Court proceeded to hear the merits of the case because of the continuing existence of a factual dispute. The Commission alleged that the victim was captured during a battle between guerrilla forces and the Guatemalan military, in March 1992, and that he was held in captivity, tortured, and eventually killed. The record as a whole presents a chilling and detailed account of the counter-insurgency tactics the Guatemalan military used, including the use of violence and intimidation to frustrate judicial investigations and judgments. Both the Recuperation of Historical Memory Report of the Archbishop's human rights office and that of the Guatemalan Truth

31. See Wilson & Perlin, *supra* note 1, at 341-42 (describing the decision of the Guatemalan government to accept responsibility in a number of cases, then pending before the Commission).

32. *Bamaca Velasquez Case*, para. 88.

Commission, issued in 1998 and 1999, respectively, corroborate the testimony, and it is admitted to the record.

In resolution of the factual dispute, where the State essentially argued that the practice of using captured guerrilla members as intelligence sources was entirely voluntary, and that the existence of prisoners of war was an exceptional circumstance unique to this case,³³ the Court found, on both circumstantial and direct evidence, that the Guatemalan military had systematically engaged in a practice of forced disappearances of members of the guerrilla forces by, “detaining them clandestinely without advising the competent, independent and impartial judicial authority, physically and mentally torturing them in order to obtain information and, eventually, killing them.”³⁴ Given the fact that the military clandestinely held Bámaca for at least four months after his capture and prior to his death, the Court also found a violation of Article 7(2) (illegal detention as a violation of personal liberty).³⁵

Rebutting the State’s factual assertions again, the Court found that both Bámaca and his family members were victims of violations of the right to humane treatment. The State had argued that Bámaca did not have a close relationship with his family members due to the nearly seventeen years that he was separated from his family before his death. The Court rejected that assertion and accepted the Commission’s explanations that Bámaca’s absence was entirely due to considerations for his family’s safety, who would have been targeted because of his involvement with the guerrillas had he communicated with them. In its analysis, the Court points to the novelty of direct testimonial evidence concerning the treatment of a disappeared person while in captivity, and found Article 5(2) (torture) and Article 5(1) (right to respect for physical, mental and moral integrity) violations against his family members, as victims in their own right.

The test for finding inhumane treatment with regard to next of kin is based on recent jurisprudence of the European Court of Human

33. *See id.* para 125 (noting that the State argued that if Bámaca Velasquez was, in effect, a prisoner of war, it was an exception and not common practice).

34. *Id.* para. 132.

35. *Id.* paras. 143-44.

Rights formulated in two cases against Turkey.³⁶ It requires an analysis of the intimacy of the family relationship generally, and between individual family members and the victim. It should also analyze the degree to which the family member witnessed the facts around the disappearance, the family member's involvement in attempts to obtain information about the fate of their relative, and the State response to those efforts.³⁷ Making special mention of the efforts Jennifer Harbury expended to find her husband, the consistent obstacles the State created, and the anguish the ignorance of his whereabouts generated, the Court found that both she, Bámaca's father, and his siblings were victims of an Article 5 violation.³⁸

The Court also found violations of the right to life, to a fair trial, judicial protection, and of Articles 1, 2, 6, and 8 of the Inter-American Convention To Prevent and Punish Torture.³⁹ It rejected a claim under Article 3 (right to juridical personality), noting the absence in the 1994 Inter-American Convention on Forced Disappearance of Persons⁴⁰ of any reference to juridical personality as a characteristic of that violation. The Court did not deem it to be an element of the right to life either. The right to truth was deemed to be subsumed in the right to "obtain clarification of the facts relating to the violations and corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention."⁴¹

Finally, the Court once again took up the issue of the applicability of international humanitarian law norms and treaties to its decisions. Both the State and the Commission agreed that the Court could use the Geneva Conventions, and the provisions of Common Article 3, to

36. *Timurtas v. Turkey*, available at <http://hudoc.echr.coe.int/Hudoc2doc2/HEJUD/200207/timurtas.batj.doc> (last visited Feb. 9, 2003); see also *Çakici v. Turkey*, para. 98, available at <http://hudoc.echr.coe.int/Hudoc2doc2/HEJUD/200105/cakici%20%20batj%20-%2023657jv.gc%20080799e.doc> (last visited Feb. 9, 2003).

37. *Bamaca Velasquez Case*, para. 163.

38. *Id.* paras. 165-66.

39. Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, OAS Treaty Series No. 67, reprinted in 25 I.L.M. 519 (1986).

40. Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, reprinted in 33 I.L.M. 1529 (1994).

41. *Id.* para. 201.

interpret obligations under the American Convention. The Commission alleged that Article 29 permits the interpretation of rights under the Convention to avoid diminishing rights guaranteed by other international conventions to which Guatemala is a party. The Court's findings are worth reiterating here:

*The Court considers that it has been proved that . . . an internal conflict was taking place in Guatemala . . . As has previously been stated . . . , instead of exonerating the State from its obligations to respect and guarantee human rights, this fact obliged it to act in accordance with such obligations. Therefore, and as established in Article 3 common to the Geneva Conventions of August 12, 1949, confronted with an internal armed conflict, the State should grant those persons who are not participating directly in the hostilities or who have been placed hors de combat for whatever reason, humane treatment, without any unfavorable conditions. In particular, international humanitarian law prohibits attempts against the life and personal integrity of those mentioned above, at any place and time.*⁴²

Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, *it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.*⁴³

As a consequence, the Court ruled that there was a violation of Article 1(1) (obligation to respect and ensure rights protected under the Convention) for the general impunity with regard to these violations. As in *Paniagua Morales*, the Court defined impunity as:

the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations and total defenselessness of victims and their relatives.⁴⁴

42. *Id.* para. 207 (emphasis added).

43. *Id.* para. 208 (emphasis added).

44. *Id.* para. 211 (quoting *Paniagua Morales et al. Case, Judgment of Mar. 8, 1998, Inter-Am Ct. H.R. (Ser. C) No. 37 (1998)*, available at

Judge Cançado, in his concurring opinion, reminds us that no person is an island and applauds the Court's decision to formally recognize the family members of the disappeared as victims of inhumane treatment in their own right. For his part, Judge Salgado-Pesantes argues for a more explicit doctrine on the right to truth that would give it defining characteristics beyond the existing guarantees contained in Articles 8 and 25, accounting for the fact that the right to truth has a moral component, and may imply varying degrees of responsibility.

The contribution of the *Bamaca Velasquez* case to the scheme of reparations can be found in the Commission's creative proffer of evidence, which paints a vivid picture of the suffering caused to the victim and his family.⁴⁵ Although not qualified as expert witnesses, a Guatemalan anthropologist and a Guatemalan Mayan-indigenous leader and ex-congresswoman testified in support of the reparations claim. An expert psychologist specializing in trans-cultural evaluations and treatment of trauma also testified. The three witnesses together provided the basis for determining the consequences of the victim's manner of death and how his life might have developed, had he survived. The witnesses substantiated two claims: first, concerning lost wages, that had Efraín Bámaca survived the signing of the Peace Accords, he would have been gainfully employed as a political or community leader on behalf of a reconstituted URNG;⁴⁶ and second, that as the eldest son in a Mayan-Mam indigenous family, his loss and the inability of the family to perform a ritual burial of his remains has caused a severe rupture of family cohesion and corresponding suffering.

The psychologist explained that in Mam belief and custom, the deceased members of the family remain present in the emotional

<http://www.tulane.edu/~libweb/RESTRICTED/CERIGUA/1999-0107.txt> (last visited Feb. 25, 2003).

45. *Bamaca Velasquez Case, Reparations, Judgment of Feb. 22, 2002*, Inter-Am Ct. H.R. (Ser. C) No. 91 (2002).

46. See generally *URNG Registered as Political Party*, CERIGUA WEEKLY BRIEFS, No. 1, Jan. 7, 1999, available at http://www.eecs.umich.edu/~pavr/harbury/archive/1999/cwb01_99.html#Head5 (explaining that the Guatemalan Peace Accords provided for the transformation of the Unidad Revolucionaria Nacional Guatemalteca (URNG) into a registered political party, subsequent to a period of demobilization of its guerrilla forces).

“constellation” of the surviving family’s ties. That expert testified to the importance of recovering his mortal remains, which, in the words of the family, lies in the “ability to show respect for Efraín, to have him close and to return him or take him to live with his ancestors,” and for the new generations to be able to share and learn what his life was as is the Mam tradition. Whether spiritual or metaphorical,⁴⁷ this lack of closure is experienced by the family and generates continuing anguish and anxiety for them.

The Court reiterated its rule that there is no need to prove non-material damages in the case of a victim’s parents. Those emotional ties and resulting suffering from a family member’s loss are considered a given, and are not broken by the years that they were separated. Moreover, the Court ruled, given “the particularities of the Mam ethnicity of the Mayan culture, the loss of the emotional and economic support of the oldest son signified great suffering for the Bámaca-Velasquez nuclear family.”⁴⁸ The Court awarded compensation for moral damages in the amount of \$25,000 to Bámaca’s father for his suffering due to the knowledge of what the victim had suffered, and for the anguish and vulnerability provoked by the non-protection of the State. Bámaca’s father also received a proportional share of the \$100,000 award to the victim himself, for his son’s suffering prior to his death. The victim’s siblings received awards of \$5,000 to \$20,000 each under this rubric, and his wife, \$80,000. In justifying the award, the court pointed to the extraordinary efforts of Jennifer Harbury to locate her spouse or his remains and the consistent obstacles and obfuscation by the State in resisting that search.⁴⁹

Lost wages were awarded to the victim and his surviving wife. The Court refrained from awarding lost wages for the five-year period from his capture to the signing of the Peace Accords in

47. The concurring opinion of Judge Garcia asserts that the need for burial and closure of a loved one is a universal sentiment, and not reserved to one or another culture.

48. Bámaca Velasquez Case, Reparations, Judgment of Feb. 22, 2002, Inter-Am Ct. H.R. (Ser. C) No. 91 (2002).

49. Jennifer Harbury engaged in three extended hunger strikes, one of which was held in front of public offices in Guatemala City. She also expended efforts on legal remedies inside and outside of Guatemala.

Guatemala, since arguably he would have been employed as a guerrilla commander without any remuneration. However, from the signing of the Peace Accords, and for a reasonable period of his life expectancy, the Court found that he would have been working. With no clear criteria for settling on a projection for wages, the Court awarded \$100,000 in equity.⁵⁰ In the distribution of this award, the Court noted that had he lived, Bámaca would have contributed a portion of this income to his parents and siblings and therefore, the award was divided evenly among his surviving wife, his father and his siblings. Jennifer Harbury was also awarded lost wages, in consideration of having suspended her employment to dedicate herself to the search for her husband from 1992 to 1997, and for related health costs; for example, the illness provoked by her hunger strike, which was directed at learning the whereabouts of her husband. In all, money damages were awarded in the amount of \$475,000.

In its discussion of other reparations, the Court reiterates the parameters of the right to truth as accruing to both the individual and society as a whole. The decision to frame reparations in this manner is not gratuitous. The State had previously asserted it made several efforts to further the process of identification of the remains of the dead and disappeared after the civil war. The Court cited the State's inclusion of the Bámaca case in the report of the Guatemalan Historical Clarification Commission as a form of reparation. The State also invoked the creation of a National Program to Search for the Disappeared, a National Program of Exhumations, and the proposal for a Commission on Peace and Harmony as demonstrations of the government's will to "promote and spur investigations to clarify the cases analyzed by the Court."⁵¹ Despite these assertions, to date the only success in identifying victims or calling to account those responsible for the nearly 200,000 dead and disappeared during the civil war have been made by the victims, their families, or non-governmental organizations. In fact, many of those

50. The concurring opinion of Judge Garcia disputes the relevancy of the Court's regular criteria for calculating lost wages and suggests that all awards for lost wages should be founded on equitable grounds.

51. Bámaca Velasquez Case, Reparations, Judgment of Feb. 22, 2002, Inter-Am Ct. H.R. (Ser. C) No. 91 (2002), para. 71.

individuals and organizations making efforts to clarify past violations have been subject to break-ins, harassment, threats, and assaults over the past two years, none of which have resulted in arrests or convictions.

The Bámaca case is emblematic of the human rights and humanitarian law violations committed during the war, where the State systematically violated the right to life of civilians and defenseless combatants. The Truth Commission's recommendations, based on a finding that 93% of the victims were killed or disappeared by State agents, have yet to be complied with by the State.⁵²

Against this background, the Court ordered the Guatemalan State to adopt all legislative or other measures necessary to adapt the Guatemalan legal framework to international human rights and humanitarian law norms and to fully implement those norms on the domestic level. The Court also ordered the State to find Bámaca's remains, to conduct the exhumation in the presence of his widow and family, and to hand his remains over to his family.

2. *Baena Ricardo et al. Case (270 Workers v. Panama)*

The Court's decision on merits and reparations in the *Baena Ricardo et al.* case⁵³ stands out for at least two important reasons. First, the decision deals with the largest number of individual victims before the Court in a single case – 270 state employees who were fired for their participation in a labor rights demonstration. While the Court has dealt with mass violations in the past, this is the first such case to arise in a context in which the victims were not the subject of violent state crimes or widespread civil unrest. Second, the decision deals primarily with worker's rights, an area traditionally associated with economic, social, and cultural human rights, as opposed to the Court's traditional focus on gross violations and civil and political rights.

52. Séptimo Informe del Secretario General de las Naciones Unidas sobre La Verificación de los Acuerdos de Paz de Guatemala, 1 de abril de 2001 al 30 de abril de 2002, paras. 26-27, available at www.minugua.guate.net (last visited Nov. 1, 2002).

53. *Baena Ricardo et al. Case*, Judgment of Feb. 2, 2001, Inter-Am Ct. H.R. (Ser. C) No. 72 (2001), available at <http://www1.umn.edu/humanrts/iachr/C/72-ing.html> (last visited Jan. 21, 2003).

The case arose out of a labor dispute between the Panamanian government and state employees, who were represented by the Coordinating Organization of State Enterprise Workers Unions. In November of 1990, the government rejected a petition from the Coordinating Organization that raised concerns and demands of the union collective. Subsequently, the Coordinating Organization called for a public protest march on December 4, 1990, and a twenty-four-hour work stoppage the next day. The protest march, which was intended to focus attention on the unions' demands, was carried out peacefully with the participation of thousands of workers.⁵⁴

However, in what seems to have been a bizarre coincidence, the day of the march coincided with the escape of colonel Eduardo Herrera-Hassan from a Panamanian island prison, and his subsequent forced takeover of police buildings with other dissident members of the military who were apparently attempting to carry out a coup. The union group's work stoppage, which had already begun as scheduled for December 5th, was suspended during that day to prevent its being associated with the activities of colonel Herrera-Hassan. No essential public services were interrupted during the work stoppage. U.S. military forces arrested the colonel as he attempted to mount a march on the national legislature on the morning of December 5th, and he was turned over to the Panamanian government that same day. During the critical period in question, the President of Panama, Guillermo Endara, never issued a formal state of emergency or suspension of guarantees.

The next day, December 6, 1990, the government, apparently believing there was a link between the labor action and the dissident military movement, called for the legislature to draft a bill dismissing all of the public employees who had participated in the "organization, convocation or implementation of the work stoppage of December 5, 1990" because of a belief that the workers "sought to subvert the democratic constitutional order and to replace it with a military regime."⁵⁵ Before any legislation was adopted, most of the workers suspected of a role in the work stoppage were fired based on

54. *Id.* para. 88(c).

55. *Id.* para. 88(i).

lists developed by managers in the various state agencies in which they were employed.

The Panamanian Legislative Assembly then adopted Law 25, designed to address the government's concerns, on December 14, 1990. The law explicitly provided for retroactive effect as of December 4, 1990, and the Legislative Assembly designed the law to lapse in December of 1991. Prior to the adoption of Law 25, existing labor law provisions, which were intended to provide due process in dismissal proceedings, protected most of the affected state workers. However, the procedure under Law 25 was summary and not subject to appeal. The law permitted the executive's Cabinet Council to fire any public servant who participated in actions "against democracy and the constitutional order," and the 270 workers who were the subject of this action were all formally found to have violated Law 25 on January 23, 1991.⁵⁶ No fired worker was ever charged by the government with complicity or participation in the illicit actions of colonel Herrera-Hassan.

Most of the 270 workers involved in the complaint subsequently filed all available administrative appeals, including an action of unconstitutionality of Law 25 itself. The Supreme Court of Panama found the law to be unconstitutional but held that its declaration of unconstitutionality only struck down the abstract legal rule, thus leaving the workers without a practical remedy for their firings.. Having exhausted all available domestic remedies, the 270 workers sought relief in the Inter-American human rights system.

The Inter-American Court settled two preliminary matters before addressing the specific violations of the Convention. First, it rejected Panama's argument that Law 25 had arisen in the context of a serious national emergency that justified its adoption. Panama had not declared a formal state of emergency, and any such emergency would have been subject to the provisions of Article 27 of the Convention, which governs procedures and conditions for suspension of guarantees in states of emergency.⁵⁷ Second, the facts and issues in this case presented the Court with its first opportunity to apply the Protocol of San Salvador, the Additional Protocol to the American

56. *Id.* para. 88(q).

57. *Id.* paras. 89-94.

Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Panama became a party to the Protocol in 1993, but the Protocol did not enter into force until 1999, well after the events in question here. Moreover, the treaty has limited direct enforceability through the Commission and Court.⁵⁸

The Commission argued, however, that Panama had signed the Protocol in 1988, thus incurring an international obligation not to act in violation of the object and purpose of the treaty.⁵⁹ The government of Panama argued the non-retroactivity of treaties.⁶⁰ The Court concluded, without further elaboration or analysis, that the treaty could not be applied retroactively, but that Panama's signature to the treaty nonetheless created a duty "to abstain from committing any act in opposition to the objective and purpose of the Protocol of San Salvador, even before its entry into force."⁶¹ The Court did not further articulate the nature of that duty.

The Court went on to find violations of Articles 9 (Ex Post Facto Laws), 8(1) and (2) (Judicial Guarantees), 25 (Judicial Protection), 16 (Freedom of Association), and the general obligations provided for in Articles 1(1) and 2 of the American Convention of Human Rights. It rejected the argument that Panama violated the workers' right to assembly, protected in Article 15 of the Convention, concluding that the march took place without interruptions or restrictions, that the workers' dismissal was based only on the work stoppage and not the march, and that no other proof was offered of

58. See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," art. 19(6), O.A.S. Treaty Series No. 69 (1988), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser.L. V/II 82 Doc. 6 rev. 1 at 67 (1992) (stating that the Commission and Court may hear individual complaints that address violations of the right of unions to organize and the right to education as those rights are articulated in the Protocol, but the Commission and the Court are limited by the guidelines set out in Articles 44 through 51 and 61 through 69 of the American Convention on Human Rights), *available at* <http://www.itcilo.it/english/actrav/telearn/global/ilo/law/oasadd.htm> (last visited Jan. 21, 2003).

59. *Baena Ricardo et al. Case*, para. 95.

60. *Id.* para. 96.

61. *Id.* paras. 98-99.

interference with the right to “peaceful assembly, without arms,” protected in Article 15.⁶²

The Court’s findings as to violations of Article 9, on ex post facto application of laws, would seem patently self-evident in the context of the blatant violations perpetrated in the adoption and implementation of Law 25, were this situation not so common throughout the world. The clarity of the violation here hopefully provides a solid framework for analysis of such *post hoc* attempts by governments to punish dissident behavior in the future. The same seems true with the violations of the right to freedom of association, protected by Article 16, which the Court properly read as “the ability to constitute labour union organizations, and to set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right.”⁶³ So long as each person is free to join or not, labor unions have a basic right “to constitute a group for the pursuit of a lawful goal.”⁶⁴ In reaching its conclusions on the right to association, the Court drew heavily from a previous decision by the International Labor Organization (“ILO”) Labour Union Freedom Committee, case no. 1569, which dealt with the same facts, and to which the State raised no objection.⁶⁵

The Court’s application of the fair trial guarantees of Article 8, however, was more adventurous. The Court noted that the due process provisions of Article 8(1) explicitly apply not only in criminal proceedings but to “the determination of . . . rights and obligations of a civil, labor, fiscal, or any other nature.”⁶⁶ The Court, however, quoted that language to conclude that “the range of due process guarantees established in section 2 of Article 8 of the Convention is applied to the realms to which reference is made in

62. *Id.* paras. 148-50.

63. *Id.* para. 156.

64. *Id.*

65. *Baena Ricardo et al. Case*, paras. 162-65, 171. It would seem that the government of Panama had at least a colorable claim as to duplication of procedures under Article 33 of the Commission’s Rules of Procedure, which would have barred the Commission from considering the petition. No such claim was raised.

66. *Id.* para. 125.

section 1 of the same Article . . .” and that “the individual has the right to the due process as construed under the terms of Articles 8(1) and 8(2) in both, penal matters, as in all of these other domains.”⁶⁷

The Court does not discuss or distinguish the explicit language of section 2 of Article 8, which refers to persons “accused of a criminal offense,” invokes the presumption of innocence in such proceedings, and details the rights of the “accused.”⁶⁸ For its analytical base, it relies on decisions of the European Court of Human Rights that extend similar provisions of the European Convention on Human Rights to “disciplinary proceedings.”⁶⁹ The Court apparently concludes that the flawed administrative procedures for dismissal of the 270 workers are just such proceedings, thus entitling the workers to the explicit guarantees of section 8(2), as well as the general protections of section 8(1).⁷⁰

The Court’s decision reached the issue of reparations, pursuant to Article 63(2) of the Convention, in addition to the merits. The Court found the violations discussed above and ordered the following restitution: (1) that the 270 workers, or their heirs if they are deceased, be paid indemnification of back wages “and other labour rights”⁷¹ under domestic law; (2) that the workers be reinstated or provided with comparable employment alternatives, or where that is not possible, provided with an indemnity for termination of employment; (3) that the workers each be paid \$3,000 in moral damages; (4) and that the group of 270 workers be paid \$100,000 as reimbursement for expenses in seeking protection of their rights, and their representatives be paid \$20,000 for the cost of internal and international proceedings.⁷²

67. *Id.*

68. *See id.* paras. 122-34 (discussing Article 8 ramifications).

69. *Id.* paras. 128-29.

70. *See id.* paras. 131-34 (noting the distinction between disciplinary and punitive power as such that punitive power may only be exercised subject to due process limitations).

71. *Baena Ricardo et al. Case*, para. 214(6).

72. *Id.* para. 214(7)-(9).

3. *The Last Temptation of Christ Case*

This case dealt with Chile's prior censorship of the film of the same name.⁷³ The Commission alleged violations of freedom of thought, expression, religion and conscience, under Articles 12 and 13 of the Convention. The complaint points to the Chilean Supreme Court's affirmation of an absolute ban on the film *The Last Temptation of Christ* in 1997, based on the application of a 1974 law and a 1980 Constitutional provision, both part of the Pinochet legacy.

The case was originally taken to the Commission by an association of Chilean lawyers in representation of some of its members. *Amici* briefs to the Court from other interested parties supported their position, and various legal experts testified on both sides, including the recently named Inter-American Human Rights Commission member, José Zalaquett. Expert testimony addressed the issue of how the Court should deal with a constitutional provision and its implementing legislation, both of which effectively violated Convention guarantees. Some experts argued that a domestic constitutional reform would be necessary, while others asserted that a legislative reform would suffice, and still others urged that the law was sufficient to protect rights, but that the Supreme Court had misapplied it. These positions reflected divergent views on the effect and interpretation of international human rights law in domestic legal systems.

A significant component of this debate centered on the Chilean Supreme Court's determination of the parameters of the constitutional right to "honor" and the relationship of that term to religious freedom, to the detriment of both the right to choose one's religion, or lack thereof, and to the freedom of expression. The facts of the case reflect the heated social debate around this issue in Chile, with some litigants at the national level bringing actions by or on behalf of Jesus Christ, the Catholic Church, and in their own names. Despite approval of a Constitutional reform by one chamber of the Congress, at the time the Court heard the case final congressional action was still pending.

73. "The Last Temptation of Christ" Case Judgment of Feb. 5, 2001, Inter-Am Ct. H.R. (Ser. C) No. 73 (2001), available at <http://www1.umn.edu/humanrts/iachr/C/73-ing.html> (last visited Jan. 21, 2003).

The State did not contest the facts, but it refused to accept international responsibility by alleging that the current government had introduced a constitutional reform that would remedy the situation domestically. The Court concluded that a system of prior censorship existed in Chile and that its application in the present case resulted in a violation of the freedom of expression protections guaranteed by Article 13 of the American Convention of Human Rights. The Court reminded Chile that human rights violations are not merely attributable to one or another individual branch of government, but rather accrue to the State as a whole. The judgment pointed to the fact that the Constitutional provision, Article 19 section 12 of the Chilean Constitution, establishes prior censorship for films and, consequently, qualifies the actions of both the Executive and the Judiciary, thereby generating State responsibility.⁷⁴

On the other hand, the Court found there was no violation of the right to freedom of religion, because the censorship of *The Last Temptation of Christ* “did not deprive or diminish any person’s right to keep, change, profess or promote their religion or beliefs with absolute freedom.”⁷⁵

The State was ordered to modify its legal framework to remove prior censorship provisions, which were found to violate the obligation to respect and guarantee the right to freedom of expression and thought under the Article 13 of the Convention and the general obligations of Articles 1(1) and 2 of the Convention.⁷⁶ The State was also ordered to permit the showing of the film. The judgment was deemed to be sufficient reparation, and costs were awarded, in equity, in the amount of \$4,290.⁷⁷

74. *Id.* para. 72.

75. *Id.* para. 79.

76. *Id.* para. 103.

77. *Id.*

4. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*⁷⁸

The indigenous peoples of the Awas Tingni community live in the richly forested Atlantic coastal region of Nicaragua, an area that they have occupied with other tribal peoples since antiquity. Their traditional communal lands were not formally demarcated, but demarcation only became important when the Nicaraguan government agreed to a massive logging concession to a Korean lumber company, Sol de Caribe S.A., or SOLCARSA. Having unsuccessfully exhausted all available domestic remedies to prevent the operation of concession, the community sought the protection of the Commission and Court. The case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* is the first substantive decision of the Court in the area of indigenous rights.⁷⁹

The Court found violations of Articles 25 (Judicial Protection) and 21 (Property). Article 25 provides for “simple and prompt recourse . . . to a competent court or tribunal for protection of . . . fundamental rights” in domestic law or the Convention.⁸⁰ The Court analyzed the issue from two perspectives, first as to the land titling procedure in Nicaragua and second as to the effectiveness of the relevant domestic remedy, *amparo*, to meet the requirements of Article 25.⁸¹ The Court first reviewed the domestic norms of Nicaragua and concluded that there are protections under that law for indigenous communal real property.⁸² However, the procedure for titling of such lands is not clearly regulated,⁸³ and the Court accepted the conclusions of the expert witnesses that “there is a general lack of knowledge, an uncertainty as to what must be done and to whom

78. The Case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Aug. 31, 2001, Inter-Am Ct. H.R. (Ser. C) No. 79 (2001), available at http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html (last visited Jan. 21, 2003).

79. See Wilson & Perlin, *supra* note 1, at 331 (discussing admissibility of the case to the Court).

80. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 144, arts. 21, 25.

81. *Mayagna (Sumo) Awas Tingni Community*, Inter-Am Ct. H.R. (Ser. C) No. 79, para. 115.

82. *Id.* paras. 116-22.

83. *Id.* para. 123.

should a request for demarcation and titling be submitted.”⁸⁴ Even the State’s own evidence showed “legal ambiguities” in the titling of indigenous communal lands.⁸⁵ Finally, since 1990, no land title deeds had been issued to indigenous communities.⁸⁶ This led the Court to conclude that “there is no effective procedure in Nicaragua for delimitation, demarcation, and titling of indigenous communal lands.”⁸⁷

As to the effectiveness of the *amparo* remedy as a means for judicial protection of tribal rights, the Court noted its previous jurisprudence recognizing that the remedy, being simple and brief, meets the required characteristics for effectiveness.⁸⁸ Moreover, the Nicaraguan *amparo* remedy itself provides for conclusion within forty-five days. In the instant case, however, two separate actions were filed, one which initially took eight days, but the review of which took more almost a year and a half.⁸⁹ The second action took nearly a year from the time of filing until a decision was reached.⁹⁰ Neither of these unjustified delays respect the “principle of a reasonable term” protected by the Convention.⁹¹ The State incurred additional violations of Articles 1(1) and 2 of the Convention for its failure to designate and implement an effective remedy in its domestic norms.⁹²

Article 21 of the Convention protects the right to “property” without further definition. The Court synthesized a definition of property from its other decisions: “those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all moveables and immovables, corporeal and incorporeal elements and any other intangible object

84. *Id.* para. 124.

85. *Id.* para. 125.

86. *Id.* para. 126.

87. *Mayagna (Sumo) Awas Tingni Community*, Inter-Am Ct. H.R. (Ser. C) No.79, para. 127.

88. *Id.* para. 131.

89. *Id.* para. 132.

90. *Id.* para. 133.

91. *Id.* para. 134.

92. *Id.* paras. 135-39.

capable of having value.”⁹³ Applying that definition to the evolving interpretation of the Convention, the Court concluded that “article 21 of the Convention protects the right to property in a sense that includes, among others, the rights of members of the indigenous communities within the framework of communal property.”⁹⁴ Thus, the members of the Awas Tingni community have “a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities.”⁹⁵ That right, in turn, gave the community the right to have their lands delimited, and during that process, to prevent the State itself, or third parties acting with State acquiescence, from actions which would “affect the existence, value, use or enjoyment” of the area where the community lives.⁹⁶

The Court limited its decision to these two violations, although the Commission had alleged the breach of several other Convention provisions in its final pleadings.⁹⁷ The Court “dismissed” the violation of those rights, however, because the Commission’s brief had failed to provide grounds for the violations.⁹⁸

The Court reached the issue of reparations in this decision as well by applying Article 63 of the Convention. It required that the State create an effective mechanism for demarcation and titling of indigenous communal property, and that the State carry out that process within fifteen months, “with full participation by the Community and taking into account its customary law, values, customs and mores.”⁹⁹ The State was further barred from interference

93. *Mayagna (Sumo) Awas Tingni Community*, Inter-Am Ct. H.R. (Ser. C) No.79, para. 144.

94. *Id.* para. 148.

95. *Id.* para. 149.

96. *Id.* para. 153.

97. *See id.* para. 156 (noting that the Commission alleged violations of a combination of the following articles of the Convention: Article 4 (Right to Life), Article 11 (Right to Privacy), Article 12 (Freedom of Conscience and Religion), Article 16 (Freedom of Association), Article 17 (Rights of the Family), Article 22 (Freedom of Movement and Residence), and Article 23 (Right to Participate in Government)).

98. *Id.* para. 157.

99. *Id.* para. 167.

with the property right pending its full establishment.¹⁰⁰ The Court found that the Commission had not proven material damages, but found that the community had suffered “immaterial” (non-pecuniary) damages that require a State investment of \$50,000 “in works or services of collective interest for the benefit of the Awas Tingni Community.”¹⁰¹ It also ordered payment of an additional \$30,000 to the community and its representatives for expenses and costs. Judge Montiel Argüello, the *ad hoc* judge Nicaragua appointed for this case, dissented on most issues.

In September of 2002, more than a year after its initial judgment, the Court requested Nicaragua to provide provisional measures of protection under Article 63(2) of the Convention. It ordered that the State prevent any further exploitation of natural resources within the communal lands of the Awas Tingni Community, that the Community be permitted to participate in the planning and implementation of any measures affecting its lands, and that the State investigate and sanction any of the wrongs alleged in the request for provisional measures.¹⁰²

5. Las Palmeras Case

The decision of the Court in the *Las Palmeras Case*¹⁰³ seemed straightforward on the facts but provoked an odd set of opinions on the merits. This case involved an attack by military and police forces on a rural schoolhouse in Las Palmeras, Columbia. In its decision on admissibility, the Court held that it was barred from direct

100. *Id.* para. 164.

101. *Id.* para. 157.

102. *Resolucion de la Corte Interamericana de Derechos Humanos de 6 de Septiembre de 2002, Medidas Provisionales Solicitadas por los Representantes de las Victimas Respecto de la Republica de Nicaragua, Comunidad Mayagna (Sumo) Awas Tingni* [Resolution of the Inter-American Court of Human Rights of Sept. 6, 2002, Provisional Measures Sought by the Representatives of the Victims Respecting the Republic of Nicaragua, Mayagna (Sumo) Awas Tingni Community].

103. *Las Palmeras Case*, Judgment of Dec. 6, 2001, Inter-Am Ct. H.R. (Ser. C) No. 90 (2001), available at http://www.corteidh.or.cr/seriecing/serie_c_90_ing.doc (last visited Jan. 21, 2003).

application of international humanitarian law.¹⁰⁴ As to the relatives of those who had been killed in that attack, the Court found violations of the right to judicial guarantees and judicial protection, under Articles 8(1) and 25(1) of the Convention.¹⁰⁵ The case, however, had three interesting aspects, from an analytical perspective.

First, the Court was deeply divided over the legal effects of a domestic decision by Colombia's Administrative Law Court of the Council of State, the domestic forum of final appeal in administrative matters. That court had upheld a lower court ruling finding State responsibility for the same incident at issue before the Court. The Court found that by virtue of the fact that the issue had been "definitively settled under domestic law," State responsibility "became *res judicata*," because the Court did not need to provide "approval" or "confirmation" of the domestic tribunal's conclusion.¹⁰⁶ This conclusion regarding the effects of a decision by a domestic administrative tribunal flies in the face of previous practice of the Court which demanded that individual perpetrators of human rights violations be investigated, prosecuted, and punished, and not merely that the State accept responsibility for its wrongs.

Second, the reasoning of the judgment on the issue of legal effects of the domestic decision deeply fractured the Court, provoking responses from five of the judges in two separate opinions. The gist of those opinions was that the Court could and should have found separate and distinct violations of international law by the State, particularly as to Article 4, which protects the right to life.¹⁰⁷ The separate opinions are not characterized as dissents; such is seldom the case in the Court's contentious jurisprudence. However, the separate opinions take strong issue with the judgment itself, leaving one to wonder what constitutes a "majority" view of the law when five of seven judges write to distance themselves from the Court's "*per curiam*" decision.

104. See Wilson & Perlin, *supra* note 1, at 331-32 (discussing the admissibility decision by the Court).

105. *Las Palmeras Case*, Inter-Am Ct. H.R. (Ser. C) No. 90, paras. 49-66.

106. *Id.* paras. 33-34.

107. See *Las Palmeras Case*, Preliminary Objection, Judgment of Feb. 4, 2000, Inter-Am Ct. H.R. (Ser. C) No. 67 (2000), available at http://www.corteidh.or.cr/seriecing/serie_c_67_ing.doc (last visited Jan. 21, 2003).

Third, in its extended discussion of the factual evidence, the Court rejected the Commission's assertion that one of the victims had been summarily executed. The Commission based that claim on testimony from an internationally recognized forensic ballistics expert suggested by the Court.¹⁰⁸ The Court held, with no discussion, that the expert's conclusion, though included in his report to the Court, was "not based on any reasoned logic, and therefore lacked any evidentiary value."¹⁰⁹ Given the Court's generally solicitous consideration of evidence under its rules and practice, this curt dismissal of expert findings is troubling, particularly given the Court's increased reliance on expert testimony in its contentious jurisprudence. Here, the holding seems particularly unusual, given the judges' involvement in the selection of the very expert they later criticize. The Court ordered the case to proceed to the reparations stage.

6. *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*

[Me] During 2001 and 2002, the Court decided both the admissibility and merits of a collection of death penalty cases from Trinidad and Tobago ("Trinidad"). The Court first considered Trinidad's preliminary objections in three separate cases, the *Hilaire Case*, the *Benjamin et al. Case*, and the *Constantine et al. Case*.¹¹⁰ The cases were later consolidated for disposition on the merits and reparations under the name *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*.¹¹¹ All of these cases present complex issues

108. *Las Palmeras Case*, Inter-Am Ct. H.R. (Ser. C) No. 90, para. 45.

109. *Id.* para. 46.

110. The Court rendered all three judgments on preliminary objections in these cases on September 1, 2001. See *Hilaire Case*, Preliminary Objections, Judgment of Sept. 1, 2001, Inter-Am Ct. H.R. (Ser. C) No. 80 (2001); *Benjamin et al. Case*, Preliminary Objections, Judgment of Sept. 1, 2001, Inter-Am Ct. H.R. (Ser. C) No. 81 (2001); *Constantine et al. Case*, Preliminary Objections, Judgment of Sept. 1, 2001, Inter-Am Ct. H.R. (Ser. C) No. 82 (2001), available at http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html (last visited Jan. 21, 2003).

111. *Hilaire, Constantine and Benjamin et al. Case*, Judgment of June 21, 2002, Inter-Am Ct. H.R. (Ser. C) No. 94 (2002), available at http://www.corteidh.or.cr/Serie_c_94_ing.doc (last visited Jan. 21, 2003); see also Wilson & Perlin, *supra* note 1, at 344-46 (providing the decisions by the

of treaty application and treaty reservations, arising from Trinidad's aggressive efforts to defend its death penalty regime. Because of its desire to speed up executions, Trinidad withdrew its ratification of the Convention on May 26, 1999, one year after its announced intention to do so.¹¹² The Commission and Court nonetheless continue to apply the Convention to all pending cases that arose when the Convention was in effect.¹¹³

The major issue in the preliminary objections stage, common to all three cases, was the validity of a reservation Trinidad formulated at the time it accepted the Court's jurisdiction. The reservation stated that the Court would only take jurisdiction to the extent that it was consistent with the Constitution of Trinidad. Because the Constitution of Trinidad permits the death penalty, Trinidad attempted to invoke the reservation as a bar to the Court's exercise of jurisdiction in death penalty cases. Alternatively, it argued that the Court would still lack jurisdiction if it struck down the reservation as incompatible with the object and purpose of the Convention, because the original declaration was conditioned on that reservation, and the declaration itself would therefore be null and void *ab initio*. The Court rejected both positions, relying on decisions in Peruvian cases that had held that the Court cannot be deprived of its jurisdiction by unilateral acts of the State once that jurisdiction has been accepted.¹¹⁴

Trinidad's reservation, the Court held, would totally subordinate the application of the Convention to the domestic law of Trinidad and Tobago, subject to the disposition of the domestic courts.¹¹⁵ The

Commission in other death penalty cases from the Caribbean region during 1999 and 2000).

112. See generally Natasha Parassram Concepcion, Note, *The Legal Implications of Trinidad & Tobago's Withdrawal From the American Convention on Human Rights*, 16 AM. U. INT'L L. REV. 847 (2001) (discussing the legal effects of Trinidad's withdrawal).

113. See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 337 (3rd ed. 2002) (noting that even after the denunciation took full effect Trinidad was still subject to the petition procedure of the Commission for violations of the American Declaration of the Rights and Duties of Man).

114. *Hilaire, Constantine and Benjamin et al. Case*, Inter-Am Ct. H.R. (Ser. C) No. 94, paras 81-83.

115. *Id.* para. 88.

Court also rejected the government's alternative argument, that if the Court found the reservation incompatible with the Convention, the State's intention was to not accept the jurisdiction of the Court at all.¹¹⁶ It asserted that the State's argument would allow it to decide the scope of its acceptance of the contentious jurisdiction of the Court in every specific case, to the detriment of the exercise of the contentious function of the Court. Such discretionary power would deprive the Court of "all efficacy" in the exercise of its contentious jurisdiction.¹¹⁷ The Court reached similar decisions on preliminary objections in the *Constantine et al.* and *Benjamin et al.* cases.¹¹⁸

The merits decision in *Hilaire, Constantine and Benjamin et al.*, by virtue of its consolidation with other cases, dealt with a total of thirty-two defendants on death row in Trinidad, all of whom appeared as victims before the Court.¹¹⁹ At the outset of its opinion, the Court noted that despite the issuance of provisional measures to prevent execution of the alleged victims, on June 4, 1999, Trinidad executed Joey Ramiah, one of the individuals protected by provisional measures.¹²⁰ Later in its decision, the Court found that Ramiah's execution violated the right to life in Article 4, and also found a separate violation of Article 4 in the State's "disregard of a

116. *Id.* para. 91.

117. *Id.* para. 92.

118. The logic of the Court in striking down Trinidad's reservation seems equally applicable to U.S. treaty reservations that attempt to limit application of ratified human rights treaties to the scope of the application of the U.S. Constitution. For example, the reservation to Article 7 of the International Covenant on Civil and Political Rights, states that the meaning of the term "cruel, inhuman or degrading treatment or punishment" in the Covenant "means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." See *U.S. Reservations, Understandings, and Declarations, International Covenant on Civil and Political Rights*, in HUMAN RIGHTS: DOCUMENTARY SUPPLEMENT 75 (Louis Henkin et al. eds. 2001).

119. *Hilaire, Constantine and Benjamin et al.*, Case, Inter-Am Ct. H.R. (Ser. C) No. 94, para. 3.

120. *Id.* paras. 26-33; see also Schabas, *supra* note 110, at 335-36 (noting that Trinidad raised the same arguments as it had in the Court – jurisdiction limited to that protected in the Trinidad constitution – to argue that the Commission lacked the power to issue binding provisional measures). It also notes a second execution in violation of the provisional measures, that of Anthony Briggs on July 28, 1999. *Id.*

direct order of the Court” directing the issuance of provisional measures to preserve Ramiah’s life.¹²¹

The heart of the opinion, however, goes to both substantive and procedural questions regarding Trinidad’s mandatory application of the death penalty. The Court held that mandatory death sentences for all persons convicted of murder in Trinidad violates the Convention’s Article 4(1) protection against “arbitrary” imposition of the death penalty,¹²² as well as Article 4(2), which limits death sentences to “the most serious crimes.”¹²³ Uniform death sentences for all murder convictions, without recognition that there are varying degrees of seriousness for the crime of murder, does not sufficiently limit the application of capital punishment in a treaty “designed to bring about its gradual disappearance.”¹²⁴ In reaching its conclusions, the Court cited decisions from the Human Rights Committee and the Supreme Courts of India, South Africa, and the United States. Because it found violations of Articles 1(1) and 2 along with those of Article 4, the Court struck down Trinidad’s death penalty law as facially violative of the Convention.¹²⁵

The Court also found serious procedural flaws in Trinidad’s death penalty law. The Court addressed what it called the due process “bundle of rights and guarantees” that take on particular importance when life is at stake because of the “exceptionally serious and irreparable nature of the death penalty.”¹²⁶ Thus, it found violations of Articles 7(5) and 8(1) of the Convention due to the failure of Trinidad’s domestic law to protect the right to trial within a reasonable time; violations of Articles 8 and 25 due to the lack of access to adequate legal assistance for the presentation of constitutional motions on review; and the facial invalidity of a provision of Trinidad’s constitution that bars domestic constitutional

121. Hilaire, Constantine and Benjamin et al. Case, Inter-Am Ct. H.R. (Ser. C) No. 94, paras. 198-200.

122. *Id.* para. 103.

123. *Id.* para. 106.

124. *Id.* para. 99.

125. *Id.* para. 116.

126. *Id.* para. 148.

challenge to certain aspects of the death penalty.¹²⁷ Finally, the Court found that the failure to provide for a “fair and transparent procedure” for pursuit of amnesty, pardon, or commutation of death sentences violated Articles 4(6) and Article 8’s due process guarantees.¹²⁸

Article 5 of the Convention protects against cruel, inhuman, or degrading punishment or treatment. The Court concluded that the shocking prison conditions in which death sentenced inmates live constitute a violation of that article.¹²⁹ Again, the Court relied on jurisprudence from the European Court of Human Rights and the Human Rights Committee in reaching its conclusions.

The Court went on to order reparations in its merits judgment. It barred Trinidad from application of the death penalty law that violated the Convention, and it ordered Trinidad to adopt graduated categories of murder. It ordered the retrial of all thirty-one individuals who had petitioned the Commission for protection and barred, on grounds of equity, their re-sentencing to death, even if they were again convicted. The Court ordered payment of \$50,000 for the support and education of Joey Ramiah’s son, and \$10,000 to his mother. It directed Trinidad to bring its prison conditions into compliance with relevant international human rights norms. Finally, the Court ordered \$13,000 in expenses for the representation of the victims in international proceedings before the Court. Although three judges wrote separate opinions on various aspects of the judgment, none dissented from the Court’s conclusions.

In September of 2002, the Court rescinded orders for provisional measures in favor of two individuals who had been resentenced to manslaughter. In the same decision, *James et al. Cases*,¹³⁰ the Court continued provisional measures for another thirty-nine individuals still under sentence of death in Trinidad.

127. *Hilaire, Constantine and Benjamin et al.*, Case, Inter-Am Ct. H.R. (Ser. C) No. 94, para. 152.

128. *Id.* paras. 186-88.

129. *Id.* para. 169.

130. *James et al. Case*, Provisional Measures, Order of Sept. 3, 2002, available at <http://www.corteidh.or.cr/index-ingles.html> (last visited Jan. 21, 2003).

C. ADVISORY OPINIONS

In a relatively short time period for the Court, it accepted a request from the Commission for Advisory Opinion OC-17 on March 30, 2001, and rendered its decision on August 28, 2002, a year and a half later.¹³¹ The opinion, *Legal Status and Human Rights of the Child*, defines a “child” as person who has not yet reached his or her eighteenth birthday.¹³² The opinion finds that children are rights-holders themselves, and not merely objects of the law, although different treatment of minors and adults is not *per se* discriminatory.¹³³ The opinion elaborates upon the meaning of the phrase “best interests of the child” and discusses the duties of families, society, and the State in relation to children.¹³⁴ It also delineates the rights of the child in judicial and administrative proceedings.¹³⁵ The opinion, in short, provides a rich synthesis of the existing international human rights protections of children.

In May of 2002, the government of Mexico sought an advisory opinion on the rights of migrants in general, and particularly migrant workers.¹³⁶ The Court accepted the request, which will become Advisory Opinion OC-18.

D. DECISIONS ON REPARATIONS ONLY

The Court’s judgments on reparations reflect the increasing recourse of litigants to the creative use of expert witnesses. Also reflected in these decisions is the State representatives’ active participation in the process. Certainly, the Peruvian and Guatemalan

131. Advisory Opinion OC-17/2002, Aug. 28, 2002, solicited by the Inter-American Commission on Human Rights, *Condición Jurídica y Derechos Humanos del Niño* (Legal Condition and Human Rights of the Child), available at http://www.iin.oea.org/Corte_interamericana_derechos_humanos.pdf (last visited Feb. 9, 2003).

132. *Id.* para. 42.

133. *Id.* para. 55.

134. *See id.* paras. 56-91.

135. *See id.* paras. 92-136.

136. Inter-American Court of Human Rights, Press Release CDH-CP-06/02 ENGLISH, July 15, 2002, available at http://www.corteidh.or.cr/prensa_ing/cp_06_02_eng.html (last visited Jan. 21, 2003).

governments and their new policies of engagement with the Inter-American system have contributed to this new emphasis.

1. Reparations Cases Arising from Earlier Judgments

The reparations decisions in this section correspond to contested cases with previous merits determinations by the Court. These include two cases from Guatemala: *The Street Children Case (Villagran-Kramer)*, involving the murder of children by State security forces; and the *Panel Blanca Case (White Van Case)*, involving the abduction, torture, and murder of numerous individuals by State police forces. *Trujillo Oroza*, a case of forced disappearance from Bolivia, is also discussed in this section.

The Court ordered Guatemala to pay reparations in the "*Street Children Case*," *Villagran Morales et al. v. Guatemala*.¹³⁷ This case dealt with the torture and murder committed by State authorities of five children who were living on the street at the time they were taken into State custody. The Court first addressed the issue of monetary damages. In calculating the earning potential of the murdered children, all of whom had minimum educations and occasional employment, the Court used the monthly minimum wage for non-agricultural activities in Guatemala, which translated, in 1990, to about \$81.¹³⁸ Given the life expectancies of the children in Guatemala in 1990, which ranged from about forty-eight to fifty years,¹³⁹ the Court awarded damages of between about \$28,000 and \$32,250 to the families of the victims.¹⁴⁰ The Court also awarded non-pecuniary damages to the families, including damages for both the victims' loss of life and the suffering of their families. Thus, reparations to the heirs and assigns of the victims were between \$23,000 and \$30,000, while mothers and grandmothers were awarded \$26,000 each. Siblings received \$3,000 each.¹⁴¹

137. The "Street Children" Case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of May 26, 2001, Inter-Am Ct. H.R. (Ser. C) No. 77 (2001), available at http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html (last visited Jan. 21, 2003).

138. *Id.* para. 81.

139. *Id.* para. 69.

140. *Id.* para. 82.

141. *Id.* para. 93.

In other reparations, the Court ordered Guatemala to adopt measures to protect the rights of the child, consistent with Article 19 of the Convention. The Court ordered Guatemala to provide resources to transfer the remains of one of the victims to a place of burial chosen by his next of kin and to designate an educational center with a name allusive to the victims and a plaque in their honor. The State must also investigate the facts of this case and identify and punish those responsible for offenses against the victims.¹⁴² Judge Cancado Trindade wrote a long separate opinion on the concepts of victimization, suffering, and rehabilitation of child victims of human rights violations, while Judge de Roux wrote on his own concept of non-pecuniary damages in cases such as this.

The reparations decision in *Trujillo Oroza v. Bolivia*¹⁴³ represented the final phase of the first case at the Court against Bolivia, involving a single disappearance thirty years ago. The victim, Jose Carlos Trujillo Oroza, was twenty-two years old and a university student in Santa Cruz, Bolivia when he was last seen in government custody in February of 1972.¹⁴⁴ As in other reparations decisions, the Court first determined who the appropriate beneficiaries or “injured parties” were, particularly when the victim was missing and presumed dead. The immediate family of the victim is included in this group of beneficiaries, which is made up of children, parents, and siblings.¹⁴⁵ In this case, the material or pecuniary damages amounted to \$3,000 in costs for the search for the victim, \$20,000 in medical expenses for the mother of the victim, and \$130,000 in lost earnings for the victim, who would have graduated from college with a life expectancy of sixty-four.¹⁴⁶ Non-pecuniary damages, which are to compensate for pain and suffering as well as alterations in the lifestyle of the surviving family members, amounted to \$100,000 for the victim himself (paid to the mother), \$80,000 to the mother,

142. *Id.* para. 123.

143. *Trujillo Oroza Case, Reparaciones* (Art. 63(1) American Convention on Human Rights), Judgment of Feb. 27, 2002, Inter-Am Ct. H.R. (Ser. C) No. 92 (2002). *See also* Wilson & Perlin, *supra* note 1, at 333 (discussing Bolivia’s acceptance of state responsibility in the *Trujillo Oroza Case*).

144. *Id.* para. 53(a).

145. *Id.* para. 57.

146. *Id.* para. 75.

\$25,000 to the adoptive father, and \$20,000 each to two brothers, for a total of \$245,000.

The Court also ordered other forms of reparation. First, it called on Bolivia to use all necessary means to locate the remains of the victim and return them to the family. Second, the Court required the government to codify the offense of forced disappearance of persons, particularly since it had ratified the regional treaty on that subject. Third, the government was required to investigate, identify, and punish the responsible persons. Fourth, the decision of the Court on the merits in this case was to be published in the official national legal newspaper for legal notices. Fifth, the government was expected to adopt legislation to prevent the recurrence of such offenses that occurred in the present case. Finally, the government was required to name a school in Santa Cruz, the victim's hometown, for the victim.¹⁴⁷

The final reparations judgment against Guatemala during this period was the *White Van* case.¹⁴⁸ Despite having been decided on the merits in 1998 based on facts occurring in 1987-88, the reparations stage was delayed further because there were difficulties in locating the victims or their surviving family members. The Court charged the Commission with finding the beneficiaries and ordered the State to issue a public media announcement to that end. Family members of all six murdered victims gave testimony at the hearing. Three of the four survivors, all previously victims of arbitrary detention, were never located.

The facts of this case involved the arbitrary detention of ten civilians who were seen being forced into a white van by Treasury Police. Six of these victims' bodies were later found with signs of torture, and two of the survivors had signs of torture. The coincidence in circumstances and *modus operandi* led to the conclusion that the perpetrators were State agents able to act with impunity in broad daylight. A report reflecting the limited investigations of the Guatemalan National Police corroborated the

147. *Id.* paras. 94-122.

148. The "White Van" Case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of May 25, 2001, Inter-Am Ct. H.R. (Ser. C) No. 76 (2002), available at http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html (last visited Jan. 21, 2003).

involvement of State agents in these detentions and deaths, while the testimony of other witnesses demonstrated the intimidation of judges involved in the investigation of the case and the ineffectiveness of *habeas corpus* relief in Guatemala during that period.

Two expert witnesses also testified. One, an economist, offered a detailed analysis of the calculation of lost wages that would account for changes in circumstances affecting the projection of average wages at different points in time. The expert also projected changes in wage-earning capacity of people throughout their careers, among other variables. As a result of his testimony, the Court employed a more sophisticated analysis in its calculations, resulting in greater damage awards for the beneficiaries.

The psychological expert substantiated the causal relationship between the underlying violation and the psychosomatic illnesses that affected victims and surviving family members, restricting their ability to function normally and to realize their full potential on both economic and affective levels. As a result, the Court ordered non-material or moral damages represented by physical and emotional pain, suffering and trauma, and the resulting dispersion of family members, along with material damages represented by lost wages and costs associated with the underlying violations, such as the victims' exhumation and burial or the survivors' medical treatment.

Attorney's fees were also awarded, and the Court ordered the State to investigate and punish those responsible, including taking legislative, administrative, or any other type of necessary steps to guarantee the certainty and publicity of a detainee registry, to avoid violations in the fashion documented in the *White Van Case*.

2. Reparations Decisions Based on Agreement of the Parties

As in the Peruvian case of *Barrios Altos*, the following reparations judgments were the product of some level of agreement between the accused State, the victims, their representatives, and the Commission.¹⁴⁹ While the scope of agreement varies, ranging from a

149. Durand and Ugarte Case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of Dec. 3, 2001, Inter-Am Ct. H.R. (Ser. C) No. 89 (2001), paras. 17, 19, available at <http://www1.umn.edu/humanrts/iachr/C/89-ing.html> (last visited Jan. 21, 2003).

detailed document signed by the concerned parties in the *Barrios Altos Case* and *Durand and Ugarte* to stipulations on the credibility of testimony in support of the damage claims in the *Caracazo Case*, the reparations judgments reflect the spirit of overall cooperation with the Court. As a result, the work of the Court centers on legally substantiating the basis, amount, and distribution of the award.

In the *Caracazo Case*,¹⁵⁰ Venezuela conceded responsibility on the merits and later agreed to accept as credible the testimony proffered by the victims in the reparations stage, so long as it was sworn to before a notary public. The Court applied the doctrine of *estoppel* when faced with a later retraction by Venezuela as to its accord with the facts in regard to the scope and conditions of beneficiary family members. In this connection, the Court elaborated on its rules for evaluating evidence in reparations cases. The decision states that the failure to answer a demand or the abandonment of a factual defense will result in the presumption of the truth of those uncontested facts, in the absence of full proof to the contrary, so long as other evidentiary indicia support the allegations.¹⁵¹

In the Court's evaluation of the evidence, it resorted to the use of factual presumptions to further substantiate the award of damages, especially where documentation was unavailable. This approach seems to have been due, in large part, to the massive numbers of persons affected, the State's previous efforts to obscure the facts, and the need to achieve parity for the forty-four victims¹⁵² and their family members, all of whom were damaged by a single course of State action.

The presumptions posited that: 1) persons who had disappeared under violent circumstances and who have been missing for many years are presumed to be dead; 2) working adults with family spend most of their income on their families; 3) the victims' family members assume the burial costs; 4) anyone who reaches the age of majority engages in income-generating activity that is remunerated,

150. *Caso del Caracazo, Sentencia sobre Reparaciones de 29 de agosto de 2002* [Reparations Judgment of August 29, 2002]; see also Wilson & Perlin, *supra* note 1, at 332-33 (providing the underlying facts of the Del Caracazo case).

151. *Case del Caracazo*, para. 54.

152. The estimated number of dead was 276, but only forty-four are identified victims in this action.

at the very least, at the rate of the legal minimum wage in that country, and even where there is evidence of unemployment or informal or unstable employment, the presumption would persist; and, 5) that human rights violations and a reigning situation of impunity cause pain, anguish, and sadness to the victims and their surviving family members alike.

These presumptions reflect a fundamental value determination for the need to indemnify the ongoing consequences of the violations. They take into account the devastating circumstances of surviving family members who have not only lost a contributing member of their household, but who have also been deeply disturbed by the inability to find or bury the remains of their loved ones, or to see that justice is done.

Expert psychologist testimony offered by the Commission provides the basis for evaluating the moral or non-material damages to surviving family members. It traced the cycle and nature of trauma, and went so far as to quantify the cost of psychological treatment, offering estimates of \$1,500 to \$3,200 per year for individual and family therapy, although these specific amounts were not recouped in the Court's final order. While the psychologists recognized the therapeutic value of testimony before the Court, they attested to the legitimacy of the reports of psychosomatic illnesses and depression that result from the trauma of losing a close family member, as well as the resulting effect on the ability of surviving family members to work, maintain familial or emotional ties, or to move their lives forward. Consequently, the marginal economic status of the victims families in this case is compounded twofold, first by the untimely death of an economic contributor to the household, and second by the long-lasting and debilitating psychological effects that are caused by the loss of a close family member in the circumstances of an unresolved trauma. The Court's consideration of these less tangible consequences is especially encouraging when the projection of lost wages as a measure of damages will always be less for victims of lower economic means.

The State practices that foreclosed family members' access to information about the fate of the victims, and the failure to investigate and punish those responsible for the deaths, disappearances or injuries, constituted a separate violation of fair

trial rights and the right to a judicial remedy. These rights, the Court ruled, accrue to both the victims and their family members under Articles 8 and 25 of the Convention. The Court found that victims' family members directly suffered material and non-material damages on this account. Expert legal testimony offered by the victims' representatives pointed to the legal mechanisms that helped to perpetuate the denial of due process and also recommended specific reforms. These violations were specifically addressed in the reparations order,¹⁵³ which assessed the expenses incurred by family members who unsuccessfully sought redress through the justice system as well as the moral or non-material consequences of the State's failure to respond.

Non-material damages were determined in equity as financial compensation, provision of services, public acknowledgment of the acts and their consequences, and the public commitment to take all necessary measures to prevent their repetition. Some of the aggravating circumstances affecting non-material or moral damages included the following: 1) the suffering of the victims before their death or disappearance, 2) the fact that some of the victims were children, 3) the continuing suffering of surviving victims who endured permanent injury, and 4) the pain and loss suffered by individual family members, and the family unit as a whole. In this connection, the Court ordered a thirty percent increase in the damage amount for those cases where the remains of the victims were never recovered. Some of the no-repetition measures ordered echoed the concerns of the expert legal witness, who addressed a number of structural obstacles to accountability. The Court ordered that the State take a series of steps on policy and implementation levels in order to ensure that the security forces refrain from using excessive force in the future. Other non-repetition measures ordered by the Court address the dignity of the victims, the search for and burial of the dead and disappeared, and the investigation, prosecution and sanction of those responsible for the underlying violations.

The award for costs and expenses is also worth mentioning, given the key role of the victims group *Comité de Familiares de las Víctimas de los Sucesos de Febrero - Marzo de 1989*

153. *Caso del Caracazo*, paras. 67, 74.

("CONAVIC"),¹⁵⁴ which made it possible for forty-four victims and their families to pursue this process over thirteen years, beginning with efforts to seek redress at the national level. The Court awarded CONAVIC \$75,000 for costs and expenses, and an additional \$10,000 in anticipation of the work necessary to facilitate compliance with the Court's judgment. This award is significant compared with past awards for attorney's fees or costs, and reflects the importance of local organization in bringing and litigating cases of massive human rights violations in the Inter-American system.

All in all, the Court ordered an extraordinary \$5,667,300 in damages and costs of \$3,921,500, which were directed at non-material or moral damages. By far the largest single award of damages in the Court's history was its award of \$2,310,000 in equity damages for the suffering of the victim's family members generated by the violations.

E. DECISIONS ON ADMISSIBILITY

The Court accepted some of Argentina's preliminary objections and rejected others in the case of *Cantos v. Argentina*.¹⁵⁵ The case is another one of first impression, in this case involving the questions of violations committed against a business entity. Jose Maria Cantos was the owner of a large business group, a collection of companies located in the province of Santiago del Estero, Argentina. In March of 1972, the provincial Revenue Department, while investigating alleged tax violations, searched the administrative offices of Cantos' companies, during which officers seized all of the accounting documentation, company books, records and receipts, as well as some shares and securities without formal inventory by the authorities. Following these seizures, the companies suffered serious financial losses due to the fact that Mr. Cantos lacked access to the business records that the government had seized.

154. Committee of Family Members of the Victims of the Events of February-March, 1989.

155. Cantos Case, Preliminary Objections, Judgment of Sept. 7, 2001, Inter-Am Ct. H.R. (Ser. C) No. 85 (2001), available at http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html (last visited Jan. 21, 2003).

Cantos pursued various legal remedies for his losses, both administrative and criminal. Although he achieved an agreement in 1982 with the provincial government that acknowledged its debts to his group and agreed to pay restitution, the government did not repay its debt, and he subsequently pursued additional remedies. Ultimately, in September of 1996, the Supreme Court of Justice of Argentina ruled against Cantos' various claims and ordered him to pay costs, which the court set at approximately US \$140,000,000.¹⁵⁶

The Court addressed two questions: 1) whether a legal entity such as Campos' companies had standing for protection under the Convention; and 2) whether State liability would lie for events prior to Argentina's acceptance of the Court's jurisdiction on September 5, 1984. As to the first question, Argentina referred to the language of Article 1(2) of the Convention, which states that the term "person" in the Convention means "every human being."¹⁵⁷ Argentina asserted that a legal entity does not have human rights.¹⁵⁸ The Court noted the interpretation of "person" in reports of the Commission, where the Commission found that the use of the word "does not include legal entities."¹⁵⁹

The Court observed that, "in general, the rights and obligations attributed to companies become rights and obligations for the individuals who comprise them or who act in their name or representation."¹⁶⁰ Further, the Court asserted that the interpretation of the Convention advanced by the government "leads to unreasonable results, because it implies removing an important group of human rights from protection by the Convention."¹⁶¹ Although the Convention has not expressly recognized the figure of legal entities, an individual may be able to resort to the Inter-American system "when [fundamental human rights] are encompassed in a legal figure or fiction created by the same system of law."¹⁶² Finally, because Mr.

156. *Id.* para. 2.

157. *Id.* para. 22.

158. *Id.* para. 27.

159. *Id.* para. 23.

160. *Id.* para. 27.

161. *Cantos Case*, Inter-Am Ct. H.R. (Ser. C) No. 85, para. 28.

162. *Id.* para. 29.

Cantos submitted virtually all of the actions filed in Argentina in his “own name and in the name of his companies,” the Court could examine the rights of Mr. Cantos in those terms.¹⁶³ The Court referred to its own prior jurisprudence in the *Ivcher Bronstein Case*, as well as similar holdings of the European Court of Human Rights, in which human rights tribunals adjudicated violations of the individual rights of shareholders in a company.¹⁶⁴ The Court thus rejected the objection of Argentina.

As to Argentina’s acceptance of the Court’s jurisdiction, Argentina explicitly asserted that the jurisdiction of the Court “would only take effect with regard to acts that occurred after the ratification” of the Convention.¹⁶⁵ Based on that reservation, the Court explicitly rejected jurisdiction as to all acts occurring in the 1970s and the agreement with the provincial government in 1982.¹⁶⁶ As to any ongoing illegality, the only ongoing facts under review are those occurring after September 5, 1984.¹⁶⁷ The 1996 judgment of the Supreme Judicial Court, however, falls within the Court’s jurisdiction.¹⁶⁸

The Court’s new limitation on its jurisdiction as to ongoing violations is a deeply troubling aspect of this opinion. Although the limitation purports to be grounded in the specific wording of the Argentine limitation on acceptance of the Court’s jurisdiction, it threatens to undermine the firmly established jurisprudence of the Court on ongoing violations, which had, until this decision, clearly extended the Court’s jurisdiction to acts occurring before a State’s formal ratification of the Convention. This is perhaps most clearly demonstrated in the cases of disappearances, where the State’s failure to produce the person or to begin a process of accountability due to its own actions was seen as a single and continuing course of State misconduct, both before and after Convention ratification, which sensibly gave rise to the doctrine of ongoing violations. The

163. *Id.* para. 30.

164. *Id.* para. 29, n.11.

165. *Id.* para. 32.

166. *Cantos Case*, para. 38.

167. *Id.* para. 39.

168. *Id.* para. 40

facts and legal posture of this case make it hard to distinguish from the Court's prior decisions, which the Court neither addresses nor distinguishes. With these limitations, the Court will now take up the merits.

The *19 Merchants Case (Alvaro Lobo Pacheco et al. v. Colombia)*¹⁶⁹ is simple and straightforward on admissibility issues. Factually, the case involves the 1987 assassination of nineteen merchants in two separate incidents in a rural area of Colombia controlled by paramilitary forces acting with the cooperation or tolerance of the Colombian military forces in the area. Neither military nor civilian trials of the perpetrators had been completed a decade later, when the petitioners sought review before the Commission.

The Commission decided to take the case to the Court on January 19, 2002, the same day that Colombia submitted its response to the Commission's previous (and presumably adverse) confidential report, issued under Article 50 of the Convention. This was also the last day of the three-month period in which the Commission, under the strict provisions of Article 51 of the Convention, must decide to submit a case to the Court.

Colombia argued that the Commission had deprived Colombia of due process because it could not have reviewed the government's response with care and consideration before proceeding to the Court. The Commission responded that the only reason it had to act as it did was because Colombia had asked for a lengthy extension of time to submit its response. Consequently, the extension corresponded with the last day of the time period, and that the response was, in any event, inadequate to address the Commission's concerns. The Court agreed, rejected the State's objection, and ordered the case to proceed on the merits.

169. Alvaro Lobo Pacheco and Otros (19 Comerciantes) v. Columbia, Case 11.603, Report No. 112/99, OEA/Ser.L/V/II.106 Doc.3 rev. at 204 (1999), available at <http://www1.umn.edu/humanrts/cases/112-99.html> (last visited Jan. 21, 2003).

F. NEW CASES TAKEN TO THE COURT

The Annual Reports of the Commission for 2000 and 2001, as well as various press releases of the Court during 2001 and 2002, document a number of other cases under consideration by the Court, none of which have yet resulted in published decisions on admissibility, merits, or reparations. Cases will be identified below, with the date on which the Court originally received the case from the Commission and the subject matter of the dispute.

-*Walter David Bulacio v. Argentina*, January 24, 2001 – torture and death of victim, who was taken into police custody on the way to a rock concert;

-*Myrna Mack v. Argentina*, June 19, 2001 – extrajudicial killing of anthropologist by military officers;

-*Juan Humberto Sanchez v. Honduras*, September 8, 2001 – arrest, torture, and extrajudicial killing by military officers;

-*Torres Benvenuto et al. v. Peru (Five Pensioners Case)*, December 4, 2001 – dispute over pension benefits;

-*Maritza Urrutia v. Guatemala*, January 9, 2002 – detention, torture, forced publication of a false statement;

-*Peace Community of San Jose de Apartado Case*, June 7, 2002 – paramilitary attack on Colombian village;

-*Center for Re-education of Minors Case*, May 20, 2002 – conditions in juvenile detention center in Paraguay, where deaths resulted from three separate fires; due process in placement of minors in a juvenile facility;

-*Ricardo Cenese v. Paraguay*, June 12, 2002 – restrictions prohibiting presidential candidate from leaving the country as a result of conviction for defamation of another candidate;

-*Lori Berenson v. Peru*, July 19, 2002 – U.S. citizen tried by military court in Peru for treason; due process and fair trial issues; conditions of confinement;

-*Massacre of Plan de Sanchez*, July 31, 2002 – attack by Guatemalan military on Mayan indigenous community.

II. ACTIONS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

A. INTRODUCTION

In May and June, 2001, amended Rules of Procedure came into effect for the Inter-American Commission and Court, respectively. They represent the culmination of reforms designed to streamline case processing,¹⁷⁰ develop evidence more methodically,¹⁷¹ promote transparency,¹⁷² and provide for greater victim participation¹⁷³ at each stage of the proceedings. The new Commission Rules now contemplate more specific procedures for producing evidence, detailing the stages of case processing, providing for friendly settlement negotiations at any point in the process, and creating a presumption that all cases will be referred to the Court if recommendations to the State go unheeded.

A resolution of the OAS has called for an increased budget for the Commission and the Court, to respond to their increasing activities and responsibilities with regard to the protection of human rights, including providing greater access for individuals to the Inter-American human rights system. The work of the Commission during the period under review reflects this new focus. The volume of case reports has increased and includes a number of older cases. Meanwhile, new cases are being more systematically processed under the new procedural rules.

The governments of Peru, and more recently Mexico, have gone through regime and policy changes, reflected in their new government's openness to human rights concerns. In general, moves towards democratic consolidation have generated significant changes in the legal systems of the primarily non-English speaking countries in the system. Most are engaged in a reform of criminal procedure,

170. See generally Rules of Procedure of the Inter-Am. C.H.R., arts. 29,30,36, 38(3), 41, 43-46 (2001), available at <http://www.cidh.oas.org/Basicos/basic16.htm> (last visited Jan. 21, 2003).

171. See *id.* arts. 38, 40, 44(2)(e), 46, 62-63, 72.

172. See *id.* arts. 29, 42(4), 44, 60, 62-64, 66, 68.

173. See *id.* arts. 41(5), 43(3)(a), 44(2)(a), 71.

provoking a new sensitivity to due process issues and their relationship to human rights protections. Moreover, the new Rules of Procedure provide that the Commission follow-up on its decisions and evaluate compliance. These changes should translate into more sophisticated analyses in the Commission and Court decisions of due process rights and the right to a judicial remedy.

Several thematic reports will also provide a framework for the consideration of newly admitted petitions on freedom of expression, migrant rights, and the rights of the child. Reports on these themes have been published or are forthcoming.¹⁷⁴ In 2000, the Office of the Special Rapporteur on Freedom of Expression published a report to be used “as a fundamental reference tool to guide the development of laws on freedom of expression and as a guide to the interpretation of Article 13 of the American Convention on Human Rights.”¹⁷⁵ Pursuant to OAS resolutions in 2001, reports on the rights of all migrants and their families and on the situation of human rights defenders in the Americas are forthcoming.¹⁷⁶ In 2001, the Commission also created a Human Rights Defenders Functional Unit within the Executive Secretary’s office in Washington.¹⁷⁷

174. See, e.g., Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, *available at* <http://www.cidh.oas.org/annualrep/2000eng/chap.6a.htm> (last visited Jan. 21, 2003); see also Legal Bases, Functions and Activities of the IACHR During 2001, OEA/Ser.L/V/II. 114 doc. 5 rev. (2001), para. 35 (reporting that the Inter-American Development Bank and the Organization of American States agreed to strengthen the office of the Rapporteur on the Rights of Child), *available at* <http://www.cidh.oas.org/annualrep/2001eng/chap.2.htm> (last visited Jan. 21, 2003).

175. Office of the Special Rapporteur for Freedom of Expression, para. 2, *available at* <http://www.cidh.oas.org/Relatoria/English/AnnualReports/AR00/Introduction2000.htm> (last visited Jan. 21, 2003).

176. See, e.g., The Human Rights of all Migrant Workers and Their Families, AG/RES. 1775 (XXXI-O/01), *available at* <http://www.oas.org/juridico/english/ga01/agres1775.htm> (last visited Jan. 21, 2003); Human Rights Defenders in the Americas: Support for the Individuals, Groups, and Organizations of Civil Society Working to Promote and Protect Human Rights in the Americas, AG/RES. 1818 (XXXI-O/01), *available at* <http://www.oas.org/juridico/english/ga01/agres1818.htm> (last visited Jan. 21, 2003).

177. Legal Bases, Functions and Activities of the IACHR During 2001, *supra* note 174, para. 36.

The Commission continued its strong work in the area of indigenous rights as well. In late 2000, the Commission published a report on the situation of indigenous peoples in the Americas.¹⁷⁸ In March of 2001, it published a comprehensive set of authorities and precedents in international law for the long-pending American Declaration on the Rights of Indigenous Peoples.¹⁷⁹

Finally, in 2001, the Commission continued its focus on human rights in specific countries of the Americas, publishing its fifth report on Guatemala and its third report on Paraguay. In both its 2000 and 2001 Annual Reports, the Commission documented developments on human rights in Colombia and Cuba, and in the 2000 Annual Report, it followed up on its own recommendations to the governments of the Dominican Republic, Paraguay, and Peru.

This section begins with a review of cases on women's rights and the death penalty during the period under review, followed by human rights issues in the United States following September 11, 2001. Cases reflecting the development of the human rights situation in Colombia, Guatemala, and Peru follow. Finally, there is a brief discussion of other cases presenting novel issues, followed by a short preview of cases that have been admitted for the Commission's consideration in the future.

B. CASES INTERPRETING WOMEN'S RIGHTS IN THE INTER-AMERICAN SYSTEM

Governments often justify gender distinctions based on cultural difference. In the case of *Maria Eugenia Morales de Sierra v. Guatemala*, a former deputy ombudswoman and Guatemalan attorney, challenged articles of the Guatemalan Civil Code as discriminatory and violative of the right to family (Article 17) and to

178. The Human Rights Situation of the Indigenous People in the Americas, OEA/Ser./L/V/II. 108 Doc.62 (2000), available at <http://www.cidh.oas.org/Indigenas/TOC.htm> (last visited Jan. 21, 2003).

179. Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples, OEA/Ser./L/V/II. 110 Doc. 22 (2001), available at <http://www.cidh.oas.org/Indigenas/Indigenas.en.01/index.htm> (last visited Jan. 21, 2003).

equal protection (Article 24).¹⁸⁰ Guatemala defended cultural relativism poorly and failed to prevail. The Commission upheld a challenge in support of the legal recognition of women's capacity to develop socially, economically, and politically in Guatemalan society.¹⁸¹

The report, issued in January 2001, references an earlier decision on related issues and notes that Guatemala complied with many of the previous recommendations through the enactment of legislative reforms. At the same time the Commission urged that Guatemala fulfill the remaining recommendations.

The challenged provisions of Guatemalan law established distinctions based on gender which restricted the ability of women to represent the marital union, and gave almost exclusive power to the husbands for administering marital property. Other provisions "confer[red] upon the wife the special 'right and obligation' to care for minor children and the home," and restricted married women's right to "exercise a profession or maintain employment where it does not prejudice her role as a mother and homemaker."¹⁸² In addition, the law permitted a husband to prohibit his wife "from realizing activities outside the home, as long as he provides for her and has justified reasons."¹⁸³ Other provisions gave primary responsibility to the husband for representing their children and administering their property, and permitted that "by virtue of her sex, a woman may be excused from exercising certain forms of guardianship."¹⁸⁴

The Guatemalan Supreme Court upheld these provisions, despite its recognition that the Convention on the Elimination of all Forms of

180. Maria Eugenia Morales de Sierra v. Guatemala, Case 11.625, Report No. 28/98, Inter-Am. C.H.R., OEA/ser.L/V/II. 95 doc.7 rev. at 144 (1997) (noting that the Commission required a concrete victim for the case processing, whereupon the petitioner lent her name to the action), *available at* <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Guatemala11.625.htm> (last visited Jan. 21, 2003). Prior to that time, the petition had been brought as a general matter, by the Center for Justice in International Law (CEJIL).

181. *Id.* para. 45.

182. *Id.* para. 2.

183. *Id.*

184. *Id.*

Discrimination Against Women ("CEDAW")¹⁸⁵ formed part of Guatemalan national law. The judges held that the provisions appropriately "provided for judicial certainty in the allocation of roles within the marriage."¹⁸⁶

The petitioner disputed those arguments, asserting that the relationship between the objective sought and the means employed were disproportionate and, indeed, violated the rights to equal protection and family under the American Convention on Human Rights. The victim claimed that although her husband had not enforced any of the prerogatives the law afforded him, she was, nevertheless, adversely affected. As a working mother, wife, and the co-owner of joint marital property, those provisions of the Civil Code applied to her. Just as the State of Chile argued before the Court in *The Last Temptation of Christ Case*, the Guatemala Government communicated its acknowledgment of the inconsistency between the code provisions and both national and international legal obligations, but stated that the executive was unable to contravene the determination of the nation's highest court.

The Commission's analysis employed CEDAW's definition of discrimination and pointed out that it was more complete than prior understandings of discriminatory behavior. The definition of discrimination under CEDAW includes:

*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social and cultural, civil or any other field.*¹⁸⁷

The movement in support of equality for women has long recognized that many domestic laws purporting to protect women in fact limit their opportunities to act as full members of society.

185. Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 27 U.S.T. 1909, T.I.A.S. No. 8289, 1249 U.N.T.S. 14 [hereinafter CEDAW], available at <http://193.194.138.190/html/menu3/b/1cedaw.htm> (last visited Jan. 21, 2003).

186. *Maria Eugenia Morales de Sierra*, Case 11.625, paras. 3, 34.

187. CEDAW, *supra* note 185, art. 1 (emphasis added).

CEDAW's definition of discrimination takes that reality into account when it includes not only gender restrictions or exclusions, but all types of distinctions based on gender. The Commission concluded that, "the overarching effect of the challenged provisions is to deny married women legal autonomy."¹⁸⁸

The Commission also noted that courts have upheld "the gender-based distinctions under study as a matter of domestic law essentially on the basis of the need for certainty and juridical security, the need to protect the marital home and children, respect for traditional Guatemalan values, and in certain cases, the need to protect women in their capacity as wives and mothers."¹⁸⁹ However, the Commission observed that Guatemala's Constitutional Court "made no effort to probe the validity of the assertions or to weigh alternative positions, and the Commission is not persuaded that the distinctions cited are even consistent with the aims articulated."¹⁹⁰ Thus, the Commission found that the gender-based distinctions were neither proportional nor reasonably justifiable, resulting in a violation of petitioner's rights under the American Convention.

The Commission found violations of Article 1(1) (obligation to respect and ensure rights), Article 2 (obligation to enact legal protection measures), Article 24 (equal protection), and Article 17(4)¹⁹¹ of the American Convention, "read with reference to the requirements Article 16(1)" of CEDAW.¹⁹² The Commission also found that right to privacy under Article 11 was implicated because the code provisions unduly restricted the individual right to "pursue the development of one's personality and aspirations, determine

188. *Maria Eugenia Morales de Sierra*, Case 11.625, para. 38.

189. *Id.* para. 37.

190. *Id.*

191. See American Convention, *supra* note 13, art. 17(4) ("The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage and in the event of its dissolution.").

192. *Maria Eugenia Morales de Sierra*, Case 11.625, para. 45; see also CEDAW, *supra* note 185, art. 16 (1) (mandating that states shall "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations").

one's identity, and define one's personal relationships."¹⁹³ The Commission noted that, "married women such as [the petitioner] are continuously impeded by the fact that the law does not recognize them as having legal status equivalent to that enjoyed by other citizens."¹⁹⁴

Guatemala exchanged a series of communications with the Commission purporting to demonstrate its compliance with the Commission's recommendations.¹⁹⁵ However, the Commission noted that Guatemala had not yet remedied some discriminatory provisions, including the chapeau of one of the articles of the domestic legislation that refers "to the duty of the husband to protect and assist his wife within the marriage" without imposing a similar condition on the wife and a provision that excludes women from guardianship responsibilities.¹⁹⁶ The Commission noted that the duty to protect and assist "is consistent with the nature of the marital relationship," and it should not be implied as being the sole duty of the husband. With regard to the special relief from guardianship duties for women, the Commission asserted that it is irrelevant if it is seen as an obligation or a privilege. It is, nevertheless, discriminatory based on conceptions of gender that presume women are inherently weak or incapable.¹⁹⁷

Two other cases illustrating patterns of discrimination against women reveal the prejudices associated with gender-based violence and the consequences they generate. The first relates to domestic violence in Brazil. The second involves the illegal detention, rape, and torture of three Tzeltal sisters by soldiers in the Mexican State of Chiapas.

In the case of *Maria Da Penha Maia Fernandes v. Brazil*,¹⁹⁸ the victim charged that Brazil had, for years, condoned the domestic

193. *Maria Eugenia Morales de Sierra*, Case 11.625, para. 46.

194. *Id.* para. 48.

195. *Id.* para. 57-76.

196. *Id.* paras. 79-80.

197. *Id.* paras. 81-82.

198. *Maria Da Penha Maia Fernandes v. Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000), available at

violence she suffered at the hands of her husband. She was the victim of a 1983 murder attempt by her former husband, which left her paraplegic, and with numerous additional medical ailments. Her complaint is based on the failure to finalize any judgment against her ex-husband fifteen years after he shot and nearly killed her. Consequently, she alleged violations of Articles 1(1), 8, 24 and 25 of the American Convention; Articles 3, 4(a)-(g), 5 and 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, (“Belém do Pará Convention”);¹⁹⁹ and articles of the American Declaration of the Rights and Duties of Man²⁰⁰ (“American Declaration”).²⁰¹ The Commission found violations of Articles 1(1) (obligation to protect rights), 8 (fair trial), and 25 (judicial remedy), and violations of Article 7 of the Belém do Pará Convention, insofar as Article 7 obligates the State to protect the rights contemplated in Articles 3 and 4(a)-(g) of that instrument.²⁰² The Commission also concluded that Brazil violated Articles II (right to equality) and XVII (right to recognition of juridical personality and civil rights) of the American Declaration.²⁰³

The Commission’s analysis focuses on both the underlying act and the judicial proceedings, despite the fact that the assault occurred in 1983, before Brazil was party to the American Convention.²⁰⁴ The record reflects that the Brazilian justice authorities demonstrated a patent reluctance to punish the petitioner’s husband for attempted

<http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Brazil12.051.htm>
(last visited Jan. 22, 2003).

199. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, entered into force Mar. 5, 1995, 35 I.L.M. 1534 (1994) [hereinafter *Belém do Pará Convention*], available at <http://www.oas.org/cim/English/Convention%20Violence%20Against%20Women.htm> (last visited Jan. 22, 2003).

200. American Declaration of the Rights and Duties of Man, O.A.S. RES. XXX, OEA/Ser.L.V/II. 82 Doc. Rev. 1 at 17 (1992), available at <http://www.oas.org/juridico/english/ga-res98/eres1591.htm> (last visited Jan. 22, 2003).

201. *Maria Da Penha Maia Fernández*, Case 12.051, para. 2.

202. *Id.* para. 60.

203. *Id.*

204. *See id.* para. 60 (indicating that Brazil ratified the American Convention in 1992).

murder, even though there was more than sufficient evidence. In determining admissibility, the Commission found that the obligations to protect rights under the American Convention and Belém do Pará Convention²⁰⁵ are of a continuous nature. Therefore, the violations persist in time, despite the fact that Brazil's adherence to those Conventions occurs well after the underlying acts.

The victim was shot while she was asleep. There was a history of previous violent assaults by her husband, and he tried to persuade her to declare him the beneficiary of her life insurance policy one week before the shooting. The prosecutors proved that he lied on several occasions as to the circumstances of the assault, including his assertion that thieves perpetrated the crime. Also, there were witness statements implicating him in the crime.

A guilty verdict eight years after the fact resulted in a fifteen-year sentence that was reduced to ten years on appeal. The Commission noted that the eight-year delay alone in obtaining the first conviction constituted a denial of rights under Articles 8 and 25 and the obligations under Article 1(1). Three years later, a court overturned the guilty verdict based on a time-barred challenge alleging faulty jury instructions. At a subsequent trial, in 1996, the defendant was again sentenced, this time to a ten-year and six-month prison term. His appeal from that conviction has been pending since April 1997; thus, the conviction was not final when the Commission decided the case.

The petitioner asserted that the circumstances of this case, and the general pattern of impunity in cases of domestic violence in Brazil, demonstrate the State's systematic failure to take effective measures to prevent and punish this type of violence that disproportionately affects women. The Commission's finding that the State violated its duties to prevent, punish, and eradicate violence against women under the Belém do Pará Convention is based on an analysis of the facts that discerns a "general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors."²⁰⁶ The Commission based this finding on the circumstances relating to the assault on the petitioner, national

205. *See id.* (noting that Brazil ratified the Belém do Pará Convention in 1995).

206. *Maria Da Penha Maia Fernández*, Case 12.051, para 56.

statistics concerning violence against women, and the State's lethargic response to that violence.²⁰⁷ The factual information confirming a pattern of State tolerance of violence against women also supported findings of the violation of the equal protection provisions of the American Declaration and American Convention. The Commission's analysis corresponds here to a definition of violence against women "condoned by the state or its agents regardless of where it occurs."²⁰⁸

The final recommendations refer to the obligation of the State to provide a civil remedy to victims. A recommendation is also made to train justice-sector functionaries, and the public as a whole, on how to respond to cases of violence against women, and to establish more fluid mechanisms for preventing, investigating, prosecuting, and punishing such crimes.

In the case of *Ana, Beatriz, and Cecilia Gonzalez Perez v. Mexico*,²⁰⁹ soldiers gang raped three Tzeltal indigenous women and subjected them to other torture. In 1994, the victims were illegally detained and questioned in a language they did not speak at a military checkpoint.²¹⁰ This assault occurred in the Mexican State of Chiapas, four months after the armed rebellion by the Ejercito Zapatista de Liberacion Nacional began there. The military courts definitively closed the investigation in 1996, citing a lack of evidence. Despite the influence of both racist and political perspectives in this case, it is included in this section concerning women's rights for two reasons: first, the Commission reiterated in clear terms its analysis of rape as a form of torture; and secondly, the

207. See *id.* paras. 45-49 (citing studies indicating the high number of domestic attacks on women in Brazil and the disproportionate number of women victims). Seventy percent of criminal complaints relating to domestic violence are put on hold with no conclusion being reached, and only two percent of the complaints result in a conviction. *Id.* Brazil repealed the "honor defense" justification for wife killing only a decade ago, in 1991, although the defense was still asserted without judicial censure at trial. *Id.* para. 47.

208. Belém do Pará Convention, *supra* note 199, art. 2.

209. *Ana, Beatriz, and Cecilia Gonzalez Perez v. Mexico*, Case 11.565, Report No. 53/01, OEA/ser.L/V/II.111 doc. 20 rev. at 1097 (2000), available at <http://www.cidh.oas.org/women/Mexico11.565eng.htm> (last visited Jan. 21, 2003).

210. See *id.* para. 31 (noting that the victims' statement revealed that they did not speak Spanish and only understood the language to a very limited extent).

State's response to the allegations demonstrated a subtle bias that prevents the crime of rape from being accurately understood for what it is – the assertion of power through an act of violence.

Despite a detailed report by a medical doctor showing physical evidence of the gang rape and offering detailed testimony by the victims, the State asserted that the intention of the petitioners was to mislead the Commission and denied that the alleged events actually occurred.²¹¹ The State claimed that military checkpoints for purposes of public security were permitted under the Mexican Constitution and that the accusations were an offense to the honor of the armed forces. The State pointed to both the military court's investigation and the failure of the victims to re-submit to a gynecological examination by the State's experts as evidence of the falsity of the claim. In short, the State's defense related essentially to its comparative estimation of the character of the accusers and the accused.

Much of the evidence the victims presented to the civilian justice authorities and later transferred to the military courts is reproduced in the Commission's report. The testimony gives compelling and detailed accounts of the entire incident, including the detention, gang rape and intimidation, including accusations that the three young victims were supporters of the insurgent indigenous group in the region. Furthermore, a medical report of a gynecological examination carried out according to guidelines contained in the United Nations Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment substantiated the testimony.

The Commission concluded that the Public Prosecutor for Military Justice "completely ignored the evidence submitted by victims and proceeded to order another gynecological examination for them."²¹² That request came a substantial time after the incident had occurred, although the Commission qualified the initial medical examination conducted twenty days after the incident, and the Mexican civilian courts ratified it. Furthermore, the report of the medical examination documented the fear and anguish that these young women had

211. *Id.* para. 21.

212. *Id.* para. 69.

already suffered upon experiencing a gynecological examination for the first time, under these circumstances. The government's assertion that the victims would have to submit to another such examination was truly a second attempt to victimize them.

In this connection, the attitude of the military justice authorities, as represented by the State, is notably preoccupied with the honor of the military and its mission. The Commission noted that:

The State maintains that: it is incomprehensible that accusations would be leveled against institutions that are in good standing and enjoy a good reputation such as the Mexican Army, without any evidence other than rumors that merely create insecurity from a legal standpoint and are a most shameful attack against the institutions responsible for National Security, which were moved to the conflict zone for the sole purpose of fulfilling their duty, that is, their constitutional mission of protecting the internal security of the Nation, within a system based on a rule of law and respect for human rights such as exists in Mexico.²¹³

The State based its insistence that the charges were an attempt to impugn the honor of the Mexican armed forces on the denials of the accused and the statements of persons living in the area where the checkpoint was located. Those civilian declarations gave general observations concerning the behavior of the soldiers and asserted that they had never seen members of the military mistreat girls, nor had they heard any rumors to that effect. If the allegations were truthful, the State argued, the victims would have no problems resubmitting to a second medical exam. The report of the military authorities also ridiculed the petitioners' "alleged" attorney, characterizing her behavior as "haughty and intimidating."²¹⁴

Rather than conduct a serious investigation, the State used the case as a staging ground for discrediting the Zapatista National Liberation Army ("EZLN") and those who the State suspected were its sympathizers. At the same time, the State ignored the evidence and the consequences of what these three young women had suffered.²¹⁵

213. *Id.* para. 21, n.14.

214. *Id.* para. 66.

215. *See* Ctr. for Justice & Int'l Law, Ann. Rep. (2001), at 104 (stating that presently, representatives of the Mexican Government and the petitioners are engaged in discussions regarding compliance with the Commission's

The Commission "establishe[d] that, as a result of the humiliation created by this abuse, [as perceived by the community they lived in] the Gonzalez Perez sisters and their mother had to flee their habitual residence and their community."²¹⁶

On the issue of fair trial and judicial remedy, the Commission determined that an investigation and trial in the military justice system of a case concerning criminal conduct against civilians is inconsistent with a democratic rule of law. It also reiterated its own previous findings that "military courts do not meet the requirements of independence and impartiality imposed under Article 8(1) of the American Convention."²¹⁷ It also reiterated findings and recommendations of the United Nations Special Rapporteur for Torture with regard to Mexico,²¹⁸ asserting that the pattern of impunity for torture committed by the Mexican military required that all alleged infractions involving personnel from that institution be tried in civilian courts, even those arising in the discharge of their official duties.²¹⁹

The Commission went on to cite the Belém do Pará Convention, the Inter-American Convention to Prevent and Punish the Crime of Torture, the U.N. Special Rapporteur on Violence Against Women,²²⁰ the decisions of the International Criminal Tribunal for

recommendations for reparations and a criminal investigation in the civilian courts), *available at* <http://www.cejil.org/english/report/Informe%20Cejil%20INGLES%202001.pdf> (last visited Jan. 22, 2003).

216. *Ana, Beatriz, and Cecilia Gonzalez Perez*, Case 11.565, para. 42.

217. *Id.* para. 81.

218. Question of the Human Rights of All Persons Subjected to Any Form of Detention or Prison, in Particular, Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: Report of Special Rapporteur Nigel Rodley, submitted pursuant to of Commission on Human Rights Resolution 1997/38, E/CN.4/1998/38/Add.2, Jan. 14, 1998, *available at* <http://www.hri.ca/fortherecord1998/documentation/commission/e-cn4-1998-38-add2.htm> (last visited Jan. 23, 2003).

219. *Ana, Beatriz, and Cecilia Gonzalez Perez*, Case 11.565, para. 79.

220. Radhika Coomaraswamy, Report of the Special Rapporteur on Violence Against Women, Including Its Causes and Consequences, submitted in accordance with Commission resolution 1997/44, E/CN.4/1998/54, Jan. 26, 1998, *available at* <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c90326ab6dbc2af4c125661e0048710e?Opendocument> (last visited Jan. 23, 2003).

the Former Yugoslavia, and its own jurisprudence to reaffirm that rape is a form of violence prohibited under international law. Moreover, the Commissioners concluded that the rapes committed in this case were acts of torture because the assault took place, “as part of an illegal interrogation conducted by military officers in a zone of armed conflict, and [during which they] were accused of collaborating with the EZLN.”²²¹ Finally, the Commission noted that:

Perhaps more than the honour of the victim, it is the perceived honour of the enemy that is targeted in the perpetration of sexual violence against women; it is seen and often experienced as a means of humiliating the opposition. Sexual violence against women is meant to demonstrate victory over the men of the other group who have failed to protect their women. It is a message of castration and emasculation. It is a battle of men fought over the bodies of women.²²²

The Commission found violations of the petitioners’ rights under Article 5 (right to humane treatment) and Article 11(2) (right to privacy). It also found that the mother of the three victims suffered inhumane treatment because she had to “stand by helplessly and witness the abuse of her three daughters by members of the Mexican Armed Forces and then to experience, along with them, ostracism by her community.”²²³ With regard to the sixteen-year old victim, the Commission found that there was a violation of the rights of the child under the American Convention.²²⁴ The Commission also recognized violations of Articles 8 and 25 of the American Convention, and Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture,²²⁵ with regard to the failure to investigate, prosecute, and punish the perpetrators. Furthermore, the Commission reiterated its recommendation to carry out “a complete, impartial and effective

221. *Ana, Beatriz, and Cecilia Gonzalez Perez*, Case 11.565, para. 51.

222. *Id.* para. 51, n. 26.

223. *Id.* para. 53.

224. *See id.* paras. 55-61 (discussing the violation of the rights of the child protected under Article 19 of the American Convention).

225. Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser.L/V/II.82 doc.6 rev. at 83(1992), *available at* <http://www.oas.org/juridico/english/Treaties/a-51.html> (last visited Jan. 23, 2003).

investigation within the regular criminal courts in Mexico,” and unequivocally declared that their recommendation would in no way be satisfied by re-opening a military investigation into the case, as Mexico had suggested in a communication dated October 2000.²²⁶

C. DECISIONS ON CAPITAL PUNISHMENT AND RELATED ISSUES

Cases involving the death penalty and procedural aspects of its administration assumed a high profile in the Commission's contentious jurisprudence during 2001 and 2002, including its referral of the case against Trinidad and Tobago, *Hilaire et al.*, to the Court, as discussed above. All of the capital punishment cases arose in the United States and four countries of the English-speaking Caribbean region: the Bahamas, Trinidad and Tobago, Jamaica and Grenada. In all, the Commission decided six cases on the merits,²²⁷

226. See *Ana, Beatriz, and Cecilia Gonzalez Perez*, Case 11.565, paras. 78-82 (discussing the inappropriateness of military jurisdiction to judge facts in the present case). The Commission also noted that one of its previous reports on the Situation of Human Rights in Mexico cited that impunity for torture was “commonplace,” and that it is often used “during preventive detention and preliminary investigation phases, as a way of obtaining confessions and/or intimidation.” *Id.* para. 87.

227. *Michael Edwards et al. v. The Bahamas*, Cases 12.067, 12.068, 12.086, Report No.48/01, Inter-Am. C.H.R., OEA/ser.L/V/II.111 doc. 20 rev. at 603 (Apr. 4, 2001), *available at* <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Bahamas12.067.htm> (last visited Jan. 23, 2003); *Juan Raul Garza v. United States*, Case 12.243, Report No. 52/01, Inter-Am. C.H.R., OEA/ser.L/V/II.111 doc. 20 rev. at 1255 (Apr. 4, 2001), *available at* <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/USA12.243.htm> (last visited Jan. 23, 2003); *Donnason Knights v. Grenada*, Cases 12.028, Report No.47/01, Inter-Am. C.H.R., OEA/ser.L/V/II.111 doc. 20 rev. at 841 (Apr. 4, 2001), *available at* <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Grenada12.028.htm> (last visited Jan. 23, 2003); *Leroy Lamey et al. v. Jamaica*, Case 11.826, 11.843, 11.846, Report No. 49/01, Inter-Am C.H.R., OEA/ser.L/V/II.111 doc. 20 rev. at 996 (Apr. 4, 2001), *available at* <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Jamaica.11.826.htm> (last visited Jan. 23, 2003); *Joseph Thomas v. Jamaica*, Case 12.183, Report No.127/01, Inter-Am. C.H.R., OEA/ser.L/V/II.114 doc. 5 rev. (Dec. 3, 2001), *available at* <http://www1.umn.edu/humanrts/cases/127-01.html> (last visited Jan. 23, 2003); *Michael Domingues v. United States*, Report No. 62/02, Case 12.285 (Oct. 22, 2002), *available at*

three cases on admissibility,²²⁸ and at least twenty-four new cases involving requests for the issuance of precautionary measures.²²⁹ This section explores some of the common and unique themes in those cases.

All of the Commission's decisions now share the common articulation of the "heightened scrutiny" standard for review of capital cases, which requires international human rights bodies to take a "restrictive approach" in its review of cases involving the imposition of the death penalty.²³⁰ The Caribbean decisions on the merits all share virtually identical issues and resolution. First, the

<http://www.cidh.oas.org/annualrep/2002eng/USA.12285.htm> (last visited Jan. 23, 2003).

228. Gary T. Graham (Shaka Sankofa) v. United States, Case 11.193, Report No. 51/00, OEA/ser.L/V/II.111 doc. 20 rev. at 387 (June 15, 2000), *available at* <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Admissible/USA11.193.htm> (last visited Jan. 23, 2003); Ramon Martinez-Villareal v. United States, Case 11.753, Report No. 108/00, OEA/ser.L/V/II.111 doc. 20 rev. at 409 (Dec. 4, 2000), *available at* <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Admissible/USA11.753.htm> (last visited Jan. 23, 2003); Balkissoon Roodal v. Trinidad and Tobago, Case 12.147, Report No. 89/01, OEA/ser.L/V/II.114 doc. 5 rev. (Oct. 10, 2001), *available at* <http://www1.umn.edu/humanrts/cases/89-01.html> (last visited Jan. 23, 2003).

229. *See* Rules of Procedure of the Inter-Am. C.H.R., art. 25 (stating that the Commission is permitted to issue precautionary measures in "serious and urgent cases" in order to "prevent irreparable harm to persons"); *see also* Ann. Rep. of the Inter-Am. C.H.R. 2000, Vol. 1, OEA/ser.L/V/II.111, doc. 20 rev. 16 (Apr. 16, 2001) (stating the Commission sought precautionary measures in two capital cases from Grenada (*Rudolph Baptiste* and *Donnason Knights*), two cases from Jamaica (*Denton Aitken* and *Dave Sewell*), two cases from Trinidad and Tobago (*Bakisson Roodal* and *Sheldon Roach*), and ten cases from the United States (*Douglas Christopher Thomas*, *Juan Raul Garza*, *Shaka Sankofa*, *Victor Saldaño*, *Michael Domingues*, *Miguel Angel Flores*, *Johnny Paul Penry*, *James Winston Chambers*, *Alexander Williams*, and *Jose Jacobo Amaya Ruiz*); Ann. Rep. of the Inter-Am. C.H.R. 2001, Vol. 1, OEA/ser.L/V/II.114, doc. 5 rev. 1 (16 April 2002), at 77, 83-84, 84-85 (discussing how the Commission sought precautionary measures in one capital case from Guyana (*Daniel and Cornell Vaux*), four capital cases from Trinidad and Tobago (*Arnold Ramlogan*, *Beemal Ramnarace*, *Takoar Ramcharan*, and *Alladin Mohamed*), and three cases from the United States (*Thomas Nevius*, *Robert Bacon Jr.*, and *Gerardo Valdez Maltos*); *James Rexford Powell v. United States*, Precautionary Measures issued on September 19, 2002 (on file with the authors); *Javier Suarez-Medina v. United States*, Precautionary Measures issued on July 29, 2002 (on file with the authors).

230. *E.g.*, *Edwards et al.*, Cases 12.067, 12.068, 12.086, para. 110.

cases all raise the question of the mandatory application of the death penalty and the absence of individualized sentencing which the Commission held, in each case, to constitute not only a violation of the right to life in Article 4 of the American Convention, but also a violation of Article 5 (protection against cruel, inhuman or degrading punishment or treatment) and Article 8 (right to a fair trial).²³¹

Second, the cases all concluded that the absence of an adequate system for the exercise of mercy in capital cases through pardon, commutation, or amnesty, violates the explicit terms of Article 4(6) of the American Convention. The Commission also rejected governments' assertions that commutation powers exercised by the executive infused the review of death sentences with a sufficient element of discretion to permit the initial automatic death sentence for murder.²³² Finally, all petitioners prevailed on the question of the adequacy of the conditions of confinement on death row while awaiting execution, which were found to violate Article 5 of the American Convention.²³³

The Commission's jurisprudence has become increasingly synergistic with that of national reviewing courts in the death penalty area, at least as related to the Caribbean. On March 11, 2002, Great Britain's Privy Council roundly endorsed the Commission's analysis in a series of decisions striking down the mandatory death penalty in Belize, Saint Lucia, Saint Christopher, and Nevis.²³⁴ In reaching its decision, the Privy Council, in addition to its strong reliance on the Commission, relied upon relevant jurisprudence from South Africa, the United States, India, Canada, England, the Human Rights

231. *Cf. id.*, paras. 124-54 (stating that the Commission performed the same analysis and reached the same conclusions under the American Declaration of the Rights and Duties of Man because the Bahamas is not a party to the American Convention).

232. *Id.* para. 168; *Knights*, Cases 12.028, para. 105; *Lamey et al.*, Case 11.826, 11.843, 11.846, para. 166; *Thomas*, Cases 12.028, para. 120.

233. *Knights*, Cases 12.028, para. 129; *Lamey et al.*, Case 11.826, 11.843, 11.846, para. 202; *Thomas*, Cases 12.028, para. 135.

234. *Reyes v. The Queen* [2002] 2 A.C. 235, 254-55 (Belize), available at <http://www.ijchr.com/Patrick%20Reyes%20v%20the%20Queen.htm> (last visited Jan. 23, 2003); see also *Regina v. Hughes* [2002] 2 A.C. 259 (Saint Lucia); *Fox v. The Queen* [2002] 2 A.C. 284 (Saint Christopher and Nevis); Alex Bailin, *The Inhumanity of Mandatory Sentences*, CRIM. L. REV. 641 (2002).

Committee, and the European Court of Human Rights.²³⁵ This reliance on international and comparative sources contrasts sharply with that of the United States Supreme Court in its own death penalty jurisprudence.²³⁶

In the Jamaican cases, delay in bringing the accused before a judge after arrest, and in the length of time from arrest to trial, gave rise to violations of Articles 7(5) and 8(1) of the American Convention.²³⁷ In the *Thomas* case, the Commission also found a violation of the right to a fair trial, protected by Article 8 of the American Convention, when the trial judge demonstrated bias in an instruction to the jury regarding his belief in the defendant's guilt.²³⁸ Due to its disposition of the cases on other grounds, the Commission declined to reach the issue of prolonged post-conviction detention in the Bahamas cases,²³⁹ nor did it address an allegation that Jamaica's method of execution by hanging constitutes a violation of Article 5(2) of the American Convention.²⁴⁰

Flaws in the provision of counsel, which was available only through legal aid to legally indigent defendants in the cases under consideration, gave rise to a number of violations. The unavailability of legal aid for constitutional motions played a part in two of the Caribbean decisions, giving rise to violations of Article 25.²⁴¹ In *Lamey*, the Commission found that undue delay in providing access to legal aid gave rise to violations of Articles 8(2)(d) and (e).²⁴² On the other hand, in two cases, the Commission rejected the claims of ineffective assistance of counsel. In *Edwards et al.*, the petitioners raised issues about domestic defense counsel's failure to raise claims of prejudicial publicity during trial, coerced confessions, inhumane

235. See *Reyes*, 2 A.C. at 248-56.

236. Richard J. Wilson, *The Influence of International Law and Practice on the Death Penalty in the United States*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT (James R. Acker et al. eds., 2d ed., forthcoming 2003).

237. *Lamey et al.*, Case 11.826, 11.843, 11.846, paras. 178, 188.

238. *Thomas*, Case 12.183, paras. 138, 144.

239. *Edwards et al.*, Cases 12.067, 12.068, 12.086, para. 225.

240. *Thomas*, Case 12.183, para. 136.

241. *Knights*, Case 12.183, para. 136; *Lamey et al.*, Case 11.826, 11.843, 11.846, paras. 225-26.

242. *Id.* para. 215.

treatment by the police, and failure to call a medical doctor to attest to the mistreatment. The Commission concluded that those issues "are more appropriately left to the domestic courts."²⁴³ The issue of ineffective assistance of counsel for failure to investigate viable defenses, raised in *Lamey*, gave rise to the only finding of no violation by the Commission where the claim had not been adequately preserved in the domestic legal system.²⁴⁴ In two U.S. cases in which the petitions were found to be admissible, claims of ineffective assistance of court-assigned counsel will be reviewed by the Commission in the merits stage.²⁴⁵

The *Roodal* decision on admissibility is the first published case against Trinidad and Tobago since its denunciation of the American Convention. As such, the petitioner's lawyers grounded their claims on violations of the American Declaration rather than the American Convention.²⁴⁶ The Commission accepted jurisdiction of the case and agreed to its admissibility based on violations of the Declaration, having reached a similar conclusion some time ago as to the United States, which is also a non-State-party to the Convention but, like Trinidad, is a member of the OAS.²⁴⁷ Nonetheless, the Commission added potential violations of the Convention for its future consideration of the merits, given the fact that some of the misconduct alleged arose before the effective date of Trinidad's denunciation.²⁴⁸

The U.S. cases also presented some common themes. Two of the cases present questions as to the application of the Vienna Convention on Consular Relations to foreign nationals on death row in the United States. Under that treaty, detaining officials are required to promptly inform a detained foreign national of the right to contact his home country's consulate, and, if the detainee so requests, to promptly notify consular officials of the detention. In

243. *Edwards et al.*, Cases 12.067, 12.068, 12.086, paras. 208-15.

244. *Lamey et al.*, Case 11.826, 11.843, 11.846, para. 217.

245. *Graham*, Case 11.193, paras. 58-59; *Martinez-Villareal*, Case 11.753, para. 64.

246. *Roodal*, Case 12.147, para. 2.

247. *Id.* para. 24.

248. *Id.* para. 25.

both of the cases pending before the Commission, the individual petitioners are Mexican nationals.²⁴⁹ In Mr. Suarez-Medina's case, his execution proceeded after the issuance by the Commission of precautionary measures on his behalf, thus giving rise to oral arguments before the Commission in its October 2002 regular session as to whether precautionary measures the Commission issued are legally binding as a matter of international law.

Another issue common to two cases before the Commission is that of the execution of juveniles who were below eighteen at the time the alleged offense was committed. In its admissibility decision in *Graham (Shaka Sankofa)*, the Commission signaled that it would again take up the question of the legitimacy of the juvenile death penalty in international human rights law.²⁵⁰ Despite repeated requests to the government of the United States and the State of Texas for precautionary measures, the State of Texas executed Mr. Sankofa on June 22, 2000. The case is still pending before the Commission on the merits.

On October 22, 2002, the Commission decided the question of the legitimacy of the juvenile death penalty under international law in *Michael Domingues v. United States*. That case had already undergone extensive domestic consideration in the U.S. courts, culminating in the denial of review by the United States Supreme Court of a decision of the Nevada Supreme Court. The state court was deeply divided over the question of the application of the International Covenant on Civil and Political Rights provisions prohibiting the execution of persons under eighteen at the time of their alleged crimes, but upheld the conviction.²⁵¹ The Commission found that the imposition of the death penalty on children under eighteen at the time of their conduct violates both customary international law and *jus cogens* norms.²⁵² To justify this conclusion,

249. *Martinez-Villareal*, Case 11.753, para. 69.

250. *Graham*, Case 11.193, para. 60.

251. *Domingues v. Nevada*, 114 Nev. 783, 961 P.2d 1279 (1998), *cert. denied* 528 U.S. 963 (1999).

252. *Domingues*, Case No. 12.285, para. 84-85.

the Commission exhaustively reviewed international law and standards, as well as the law and practice of nations.²⁵³

Curiously, the United States, unlike its engagement with other death penalty issues before the Commission, failed to express its views at all in this litigation until after the Commission had issued an initial report unfavorable to the government.²⁵⁴ After the Commission issued the report, the government apparently filed an extensive pleading urging the Commission to “withdraw” its report, combined with “supplemental observations.”²⁵⁵ The Commission rejected the government’s assertions, explicitly finding that the United States could not legitimately claim to be a persistent objector to the norm barring the execution of juveniles.²⁵⁶ The issue of the validity of the juvenile death penalty already has narrowly missed review by the U.S. Supreme Court on two occasions in 2002, in *Patterson v. Texas*²⁵⁷ and *In re Stanford*.²⁵⁸ If and when the question reaches the Supreme Court, the potential influence of the Commission’s decision in *Domingues* cannot be overstated.

The U.S. Supreme Court is not likely to review the other issue common to two cases before the Commission. In *Graham* and *Martinez-Villareal*, the Commission will again address the issue of the “death row phenomenon,” whereby the petitioner alleges that the prolonged wait for execution in death row conditions can itself constitute cruel, infamous or unusual punishment under Article

253. *Id.* paras. 40-83.

254. *Id.* paras. 26, 89.

255. *Id.* para. 90.

256. *Id.* paras. 85, 102.

257. See *Patterson v. Texas*, 123 S. Ct. 24 (2002) (Stevens, Ginsburg, and Breyer, JJ., dissenting) (arguing that it would be appropriate for the Court to revisit the issue regarding the execution for the crimes committed when the offender is below the age of eighteen in light of the “apparent consensus that exists among the States and in the international community” as to the impropriety of the death penalty for juveniles).

258. See *In re Stanford*, 123 S. Ct. 472 (2002) (Stevens, Souter, Ginsberg, and Bryer, JJ., dissenting) (dissenting from the denial of a petition for writ of habeas corpus asking to stay the execution because the defendant was a juvenile at the time of his crimes).

XXVI of the American Declaration.²⁵⁹ The U.S. Supreme Court again rejected that issue in the Fall 2002 term, over only one dissent, in a case involving a Florida death row inmate who has spent twenty-seven years awaiting execution.²⁶⁰

In *Juan Raul Garza v. United States*,²⁶¹ the Commission found violations of Articles XVIII (Right to a Fair Trial) and XXVI (Right to Due Process of Law) of the American Declaration when the sentencing jury in Texas heard evidence of four unadjudicated murders in Mexico.²⁶² Although the Commission recommended commutation, the government went ahead with Garza's execution on June 19, 2001. The execution followed that of Timothy McVeigh by one week, making it the second federal execution after a delay in application of the federal death penalty for over thirty-five years. Despite the petitioner's argument that federal inaction on the death penalty over that long a time was a *de facto* abolition of the death penalty, the Commission rejected that argument as a basis for violation of Article I (right to life) of the Declaration.²⁶³ One Commissioner, Helio Bicudo from Brazil, expressed his view that the death penalty had been abolished through the evolution of the practice of the Inter-American system.

When it deals with the issues on the merits, the Commission will also grapple in the *Sankofa* case with questions of violations of the rights to fair trial and due process (Articles XVIII and XXVI of the Declaration, respectively) because Mr. Sankofa was procedurally barred from producing strong evidence of his actual innocence of the crimes for which the court convicted him.²⁶⁴ These same provisions

259. *Graham*, Case 11.193, paras. 60, 65; *Martinez Villareal*, Case 11.753, para. 70.

260. See *Foster v. Florida*, 123 S. Ct. 470, 471 (2002) (Bryer, JJ., dissenting) (stating that the Court should review the case on the grounds that having a person on death row wait for twenty-seven years before the execution may constitute "cruel and unusual punishments" prohibited under the Constitution).

261. *Juan Raul Garza v. United States*, Case No.12,243, Report No. 52/01, OEA/Ser.L/V/II. 111 Doc. 20 rev. at 1255 (2000), available at http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/USA12.243.htm#_ftnref1 (last visited Jan. 23, 2003).

262. *Id.* paras. 102-110.

263. *Id.* paras. 94-95.

264. *Id.* paras. 58-59.

will come into play in *Martinez-Villareal*, where the Commission will decide the effects of mental illness amounting to incompetence to stand trial or to be executed.²⁶⁵ In both cases, the issues mentioned here are closely related to claims of ineffective assistance of counsel, mentioned above.

Finally, the Commission has increased pressure on all the OAS countries to honor its issuance of precautionary measures in all cases, but particularly in capital punishment cases where execution is imminent. It has expressed its displeasure with failure by the U.S. government to take precautionary measures in stronger and stronger terms, including its stern rebuke to the United States in *Garza*, where it found that the government's failure to honor such requests "undermined" the Commission's ability to investigate and "effectively deprives condemned prisoners of their right to petition in the inter-American human rights system."²⁶⁶ In one hearing before the Commission at its October 2002 regular session of meetings, the Commission heard arguments from the parties in *Suarez-Medina v. United States* as to whether the Commission's precautionary measures had binding legal effect in international law. In that case, Mr. Suarez-Medina's execution took place in Texas after the issuance of requests for precautionary measures to the U.S. government. This issue may take on increasing importance in the United States in the wake of a decision in the U.S. Supreme Court in October, 2002, in which two Justices dissented from denial of a request for stay of execution solely because they believed the court should address the issue of the binding nature of requests for precautionary measures by the Commission.²⁶⁷

D. ACTIONS ON THE U.S. RESPONSE TO THE ATTACKS OF SEPTEMBER 11, 2001

The Commission has responded in two distinct contexts to the actions of the United States government in the wake of the tragic events of September 11, 2001, when commercial aircrafts

265. *Id.* paras. 66-68.

266. *Id.* para. 66.

267. *See Powell v. Cockrell*, 123 S. Ct. 31 (2002) (denying the application for stay of execution).

commandeered by terrorists targeted the World Trade Center and the Pentagon, and thousands of civilians lost their lives. First, in its Annual Report for 2001, the Commission noted that the United States took “exceptional measures” after the tragic events of September 11, 2001. The Commission further concluded that although the United States is a party to the International Covenant on Civil and Political Rights, it “has not notified the UN Secretary General in accordance with Article 4 of the Covenant of any resort by it to emergency measures that might justify derogation from the United States’ obligations under that treaty.” While the United States has no reporting obligations under the American Convention because it is not a party to that treaty, the Commission reiterated its oft-stated conclusion that the United States is “subject to the fundamental rights of individuals” contained in the OAS Charter and the American Declaration of the Rights and Duties of Man.²⁶⁸

Second, the Commission issued requests for precautionary measures under Article 25 of its Rules of Procedure in two situations where targeted groups sought the Commission’s protection. The Commission is no stranger to issues arising from terrorist attacks, having dealt with terrorism on a regular basis for some time throughout Latin America. The Commission, in fact, recently released a major study on the topic of terrorism, entitled, “Report on Terrorism and Human Rights.”²⁶⁹

In the first and most notable of the cases, the Commission issued a request for precautionary measures to the United States on behalf of detainees in Guantanamo Bay, Cuba. While the Commission’s requests for precautionary measures often do not attract either media or academic attention, this request received widespread coverage.²⁷⁰

268. See Annual Report of the Inter-American Commission on Human Rights 2001, OEA/Ser.L/V/II.114 doc. 5 rev. (2001), available at <http://www.cidh.oas.org/annualrep/2001eng/TOC.htm>.

269. OAS, Report on Terrorism and Human Rights, Oct. 22, 2002, OEA/Ser.L/V/II.116, available at <http://www.cidh.oas.org/Terrorism/Eng/toc.htm> (last visited Feb. 26, 2003).

270. See, e.g., *Inter-American Commission on Human Rights (IACCommHR)*, Washington, Decision of 12 March 2002, 23 HUM. RTS. L. J. 15 (2002) (asking the U.S. government to clarify the legal status of the detainees); see also Dinah Shelton, *The Legal Status of the Detainees at Guantanamo Bay: Innovative Elements in the Decision of the Inter-American Commission on Human Rights of 12 March 2002*, 23 HUM. RTS. L.J. 13 (2002); Inter-American Commission on

The petition was filed on behalf of a group of unnamed but clearly identifiable individuals, all detainees at Guantanamo Bay, Cuba. The Center for Constitutional Rights, based in New York City, coordinated the Guantanamo petition in collaboration with the Center for Justice and International Law ("CEJIL") in Washington and a small group of legal academics and students. The action was taken in parallel with a federal petition for habeas corpus pursuant to 28 U.S.C. § 2241, filed on behalf of named detainees at Guantanamo. The federal court dismissed the petition for want of jurisdiction because "the military base at Guantanamo Bay, Cuba is outside the sovereign territory of the United States."²⁷¹ The Commission suffers no such lack of jurisdiction, as its powers reach to extraterritorial acts of nations, particularly in the Americas.

The Commission's request to the United States seeks the protection of precautionary measures under Article 25 of the Commission's Rules of Procedure.²⁷² Such requests are sought in "serious and urgent cases" in order to maintain the *status quo ante* in cases before the Commission, and to protect individuals who are the subject of the litigation from "irreparable harm."²⁷³ Normally, a request for precautionary measures is sought contemporaneously with the filing of a petition for review on the merits, but in this case, the petitioners sought only precautionary measures. The Commission was emphatic in its assertion that the U.S. government has an obligation to follow their requests for such measures:

Human Rights (IACHR): Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), 41 I.L.M. 532 (2002) [hereinafter Precautionary Measures Decision] (requesting a competent tribunal to decide the legal status of the Guantanamo Bay detainees after reviewing international humanitarian law); United States (U.S.): Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba [Apr. 15, 2002] 41 I.L.M. 1015 (2002) [hereinafter U.S. Response to Request] (responding to the call for precautionary measures by stating that the IACHR has no jurisdiction to apply international humanitarian law to the detainees, and that precautionary measures are unnecessary because the legal status of the detainees is already clear).

271. *Rasul v. Bush*, 215 F. Supp.2d 55, 72 (D.C. 2002). This case is currently pending before the U.S. Court of Appeals for the D.C. Circuit. See *Habib v. Bush*, Case Nos. 02-5284 and 02-5288 (Consolidated).

272. Rules of Procedure of the Inter-Am. C.H.R., art. 25.

273. *Id.*

The Commission notes preliminarily that its authority to receive and grant requests for precautionary measures . . . is, as with the practice of other international decisional bodies, a well-established and necessary component of the Commission's processes. Indeed, where such measures are considered essential to preserving the Commission's very mandate under the OAS Charter, the Commission has ruled that OAS members are subject to an international legal obligation to comply with a request for such measures.²⁷⁴

The statement that a request for precautionary measures creates "an international legal obligation to comply" is tantamount to an assertion that the Commission's requests are binding on the countries to which they are issued. The United States asserts in its pleadings to the Commission, however, that, by virtue of its status as a non-State party to the American Convention, the Commission lacks jurisdiction over it, lacks jurisdiction to render any opinion that implicates the application of international humanitarian law, lacks the power to issue binding precautionary measures, and lacks the need to intervene because the detainees' legal status is clear and they are being well-treated.²⁷⁵ After submission of additional arguments from the petitioners, the Commission issued an additional communication to the United States on July 23, 2002, stating that "the Commission remains of the view that it has the competence and the responsibility to monitor the human rights situation of the detainees and in so doing to look to and apply definitional standards and relevant rules of international humanitarian law in interpreting and applying the provisions of the Inter-American human rights instruments in times of armed conflict."²⁷⁶

The core of the Commission's ruling lies in its conclusion that the executive branch of the U.S. government is not entitled to unilateral and unreviewable designation of the Guantanamo detainees as unlawful combatants under international humanitarian law. Such

274. Precautionary Measures Decision, *supra* note 270, at 532.

275. See U.S. Response to Request, *supra* note 270 (outlining the U.S. argument against the Commission and its call for preliminary measures).

276. Letter from Ariel Dulitzky, In-charge of the Executive Secretariat, Inter-American Commission on Human Rights, to the Center for Constitutional Rights, July 23, 2002 (containing text of a communication of the same date from the Commission to the U.S. government).

designation has the legal effect of leaving the detainees without any legal protection for so long as armed conflict continues, and the definitions of "armed conflict" and its termination are also left to the executive branch's discretion. The detainees are entitled, the Commission concludes, to access to a "competent tribunal" to determine their legal status. The Commission's interpretation of international humanitarian law is relatively new, but its interpretation of its own norms by use of other treaties and treaty body decisions is hardly unique in the Commission's history, nor in that of other international tribunals. The Commission heard arguments in its October 2002 regular session on the status of the detainees, and the United States reiterated its legal position before the Commission.

The second petition for precautionary measures was filed in June 2002, on behalf of "INS detainees ordered deported or granted voluntary departure." This group is composed of foreign individuals, mostly men of Middle Eastern or Asian nationality, in the United States. These people were taken into custody by the Immigration and Naturalization Service ("INS") for minor immigration rule violations such as visa overstay and then kept in custody indefinitely, without criminal charges or the opportunity to leave voluntarily for their home countries. The INS holds closed hearings in these matters, does not release the names of the individuals in question, and refuses to provide public information on the conditions of their confinement or their treatment in custody. The detainees have no effective legal means of challenging their detention.

After repeated requests for information to the United States went unanswered, the Commission issued a request for precautionary measures on September 26, 2002.²⁷⁷ The request noted that the government had failed to clarify or contradict the petitioners' assertions that there is no basis under domestic or international law for continued detention of these persons, that there is no public information on the treatment of these detainees in custody, and that the detainees have no basis for challenging their status. The request for precautionary measures seeks to protect the detainees' "right to personal liberty and security, their right to humane treatment, and

277. Letter from Ariel Dulitzky, In charge of the Executive Secretariat, Inter-American Commission on Human Rights, to Gay McDougall, International Human Rights Law Group (Sept. 26, 2002).

their right to resort to the courts for the protection of their legal rights, by allowing impartial courts to determine whether the detainees have been lawfully detained and whether they are in need of protection.”²⁷⁸

E. CASES ARISING IN COLOMBIA’S INTERNAL ARMED CONFLICT

The Commission’s cases from Colombia address violence by paramilitary forces and the military, and charge State responsibility for carrying out, or collaborating in and covering up extrajudicial executions and violations to physical integrity. As in other civil war contexts, the State invokes military jurisdiction in connection with the complaints against its members. The Commission reiterates in all three cases the rule that military courts are unsuitable forums, and therefore inadequate to provide judicial remedies for human rights violations “allegedly committed by members of the armed forces or with their collaboration or acquiescence.”²⁷⁹ Consequently, the Commission ruled as inadmissible the allegations that domestic remedies have not been exhausted, and it found violations of the right to a fair trial and judicial protection.

The facts in these three cases all occur in the context of Colombia’s armed conflict. In the *Riofrio Massacre Case*, the petitioners allege that the Colombian army “sponsored, permitted and covered-up” the summary execution of thirteen persons by a group of armed men, some of whom were dressed in military uniforms, in a village in the Cauca region of Colombia.²⁸⁰ According

278. *Id.* at 2.

279. *Riofrio Massacre v. Columbia*, Case 11.654, Report No. 62/01, para. 28, OEA/ser.L/V/II. 111 doc. Rev. at 758 (2000), available at <http://www.cidh.oas.org/annualrep/2001eng/chap.3b.htm> (last visited Jan. 23, 2003); *Leonel de Jesús Isaza Echeverry. v. Colombia*, Case 11.712, Report No. 64/01, Case 11.712, para. 22, OEA/ser.L/V/II. 111 doc. rev. at 797 (2000), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Colombia11.712.htm> (last visited Jan. 23, 2003); *Carlos Manuel Prada Gonzalez and Evelio Antonio Bolaño Castro v. Colombia*, Case 11.710, Report No. 63/01, para. 26, OEA/ser.L/V/II. 111 doc. rev. at 781 (2000), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Colombia11.710.htm> (last visited Jan. 23, 2003).

280. *Massacre*, Case 11.654, para. 9.

to testimonies, five hours after this armed incursion began, an army anti-terrorist battalion entered the town and staged a mock military engagement to cover up the murders and later released a statement that army units had killed thirteen ELN guerrillas in a skirmish. The proceedings in a military court concerning criminal responsibility were still pending seven years later, without any final resolution.

The second case involved the killing of two militants belonging to a political organization with ties to the ELN.²⁸¹ The petitioners asserted that Carlos Manuel Prada and Evelio Antonio Bolaños were in Urabá to negotiate the demobilization of armed members of the ELN, who had decided to join the political wing of that group. Petitioners stated that the victims had made efforts to inform the local army commanders of their presence and purpose in the area, and that they believed that those efforts had been successful. The two men were dressed in civilian clothes and carried only pistols for protection. Finally, they asserted that one of the victims, when confronted by a military patrol, removed his white shirt and waved it as a sign of surrender. Physical evidence supports the conclusion that the two men were summarily executed.

In this case, the State rejected conditions of a friendly settlement set by the petitioners. Petitioners proposed that the State acknowledge its responsibility; refer the criminal investigation to the regular justice system; establish a committee to ensure reparations, including "political reparations" to the CRS (Corriente de Renovación Socialista); restore the historical memory of the victims; create strategies to prevent future violations of this type; and put in place protective measures for surviving family members and witnesses to the events. The issue of military jurisdiction was the sticking point. Despite the civilian Attorney General's finding that members of the military were "participants in the events leading to the death of the presumed victims,"²⁸² and that there was corroborative evidence of petitioners' version of events, the State said its hands were tied by a judicial decision ordering the case to be heard in the military jurisdiction. The military court, in turn, ruled that the deaths had occurred in combat during military operations.

281. *Gonzalez and Castro*, Case 11.710.

282. *Id.* para. 15.

The State asserted that without a conviction, it could not accept international responsibility.

The third case concerned the execution of one person and assaults on his family members.²⁸³ Members of an army battalion entered the victim's home, shot him as he attempted to get up from a chair, and then fired a fatal shot as he tried to crawl away. The victim's elderly mother and four-year old daughter were wounded by a grenade thrown into the house as soldiers left the location. This case was also referred to a military court, which, the State maintained, should not be ruled ineffective or unfair as a general matter. The State also asked that administrative proceedings and orders disciplining some of those accused be taken into account in the Commission's assessment of the adequacy of the remedy. After seven years of proceedings, the military court ruled that the accused members of the military acted in justifiable self-defense.

In all three cases, there are disputed facts with diametrically opposing versions. Although civilian investigations support the petitioners' version of events, the military courts discounted them. Again, in all three cases the Commission analyzed the evidence and the investigative proceedings and found that, for purposes of exhaustion of remedies, the military court option is inadequate. Concerning the underlying violations, the Commission found that with regard to the actions of the military and the paramilitary forces, the State was responsible for having perpetrated the crimes. Based on a previous study of the human rights situation in Colombia,²⁸⁴ the Commission applied a presumption of State responsibility for paramilitary actions when members of paramilitary groups and the army carry out joint operations with the knowledge of superior officers, under the theory that in those circumstances, the paramilitaries are State agents.

The Commission also repeats its analysis of State responsibility for the denial of due process rights and the right to an effective remedy under Articles 8 and 25 of the Convention. Citing the Court's

283. *Echeverry*, Case 11.712.

284. See Third Report on Human Rights in Colombia, OEA/ser.L/V/II. 102 doc. 9 rev. 1 (1999) (reviewing the status of human rights in Columbia), *available at* <http://www.cidh.org/countryrep/Colom99en/table%20of%20contents.htm> (last visited Jan. 23, 2003).

judgment on the merits in *Durand y Ugarte*, the definitions of due process and effective judicial remedies are tied to the legitimacy of the process and its result. "A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable."²⁸⁵ The Commission recalls the unreasonable delays in resolving the cases (up to seven years), as well as its prior determinations that military jurisdiction is an executive branch institution unrelated to the judiciary and without professional career judges. Such tribunals have failed to perform the prosecutorial function in a manner appropriate to the accusatory role.²⁸⁶ These characteristics mark military courts as *prima facie* partial and lacking in independence.²⁸⁷

These inherent failings also mean that the military tribunals should not be allowed to adjudge civilians, or crimes against them. The Commission stated:

Military penal justice system shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the function assigned by law to the military forces. Consequently, civilians must be excluded from military jurisdiction, and only the military shall be judged for the commission of crimes or offenses that by their own nature, attempt against legally protected interests of military order.²⁸⁸

The Commission noted that the Colombian Constitutional Court concurred with this analysis when it ruled that in serious crimes any link between the charged offense and the scope of military functions is dissolved, requiring the case to be heard in the civilian criminal courts. The Commission called on the State to enforce that judgment.

F. CASES REFLECTING THE CONTINUING CONSEQUENCES OF GUATEMALA'S INTERNAL ARMED CONFLICT

The Commission's 2000 Annual Report includes several cases from Guatemala concerning violations arising from the actions of

285. *Echeverry*, Case 11.712, para. 24.

286. *Ana, Beatriz, and Cecilia Gonzalez Perez*, Case 11.565, para. 81.

287. *Id.*

288. *Gonzalez and Castro*, Case 11.710, para. 41.

State sponsored paramilitary groups during the internal armed conflict in Guatemala. Of particular note is the discussion in *Remigio Domingo Morales, et. al. v. Guatemala*,²⁸⁹ on the operation of the Civil Defense Patrols (“*Patrullas de Auto Defensa Civil*,” or “PACs”), which were employed by the military as part of its counter-insurgency strategy. The facts relate to the extra-judicial execution of fifteen persons and the attempted execution of seven others, all of whom had expressed their opposition to the patrols. Some of the victims had previously served on the patrols and wished to discontinue their service, while others refused to join. As a result of that opposition, the military threatened the victims, and attempts were made on all their lives. Of the fifteen murders and seven attempted murders, all remain unpunished nine years after the fact.

All of the incidents took place between 1990 and 1993, many years after the military defeated the guerrilla forces, and only a few years before the Peace Accords put a formal end to the war in 1996. In this respect, it is disturbing to note that the Commission still found it necessary, in 2001, to recommend that the Guatemalan State “effectively avoid the resurgence and reorganization of the Civil Self-Defense Patrols.” The United Nations Verification Mission in Guatemala (MINUGUA), which was responsible for verifying compliance with the peace accords, had similar misgivings. In its latest human rights report covering the period ending in June 2002, the Mission observed that:

Many former CVDC²⁹⁰ members and former Military Commissioners have preserved leadership roles in municipal governments, development

289. Cases: 10.626 *Remigio Domingo Morales and Rafael Sanchez*; 10.627 *Pedro Tau Cac*; 11.198(A) *Jose María Ixcaya Pixtay et. al.*; 10.799 *Catalino Chochoy, Jose Corino Thesen and Abelino Baycaj*; 10.751 *Juan Galicia Hernández, Andres Abelino Galicia Gutierrez and Orlando Adeldo Galicia Gutierrez*; and 10.901 *Antulio Delgado*, Report No. 59/01, OEA/ser.L/V/II.111 doc. 20 rev. at 953 (2000), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Guatemala10.626.htm> (last visited Jan. 23, 2003).

290. *Comites Voluntarios de Defensa Civil* (Voluntary Civilian Defense Committees). The formation of these committees was initiated by the military in the early 1980s, and they were informally designated as PACs or *Patrullas de Autodefensa Civil* (Civilian Self-Defense Patrols). In 1983, a decree was issued by the then *de facto* military government, baptizing them as CVDC’s and officially recognizing their existence.

councils, local security councils, or as auxiliary mayors in the communities where they committed serious crimes during the conflict. They often exercise leadership in authoritarian ways, using intimidation to resolve disputes in their favour, and preying on fears that they could resort to violence, as in the past. These practices and their continuing participation in "social intelligence" activities of the Army's Division for Civilian Affairs seem to suggest ongoing ties to the military and the need for further change.²⁹¹

In the early 1980's, the military used intimidation and violence to force communities to form PACs. The military created, trained, and supervised these local patrols. The patrollers perpetrated threats and violence, provided information to local army commanders, and engaged in detentions. The Inter-American Court of Human Rights found the PACs responsible for the kidnapping and death of a U.S. citizen. Denunciation by a patroller was a death sentence, and refusal to participate in the patrols was taken as an admission of being part of, or sympathetic to, the guerrillas. Patrollers were also used as human shields and compelled to participate in executions and acts of torture against their neighbors. In this respect, patrollers were both victims and perpetrators of human rights violations.

The Commission cites to evidence from Guatemala's Historical Clarification Commission Report²⁹² ("CEH Report"), the Archdiocese Recuperation of Historical Memory Report ("ODAHG Report"), the reports of the Independent Expert on Human Rights in Guatemala, Guatemala's Human Rights Ombudsman, and the Commission's own prior reports on Guatemala. The information contained in those reports gave a rich context for understanding how the PACs operated, and demonstrated that they committed systematic human rights violations with the support and acquiescence of the State. Indications of PAC participation in systematic violence included CEH conclusions that the PACs were responsible for twenty-one percent of extra-judicial executions committed during the war, some of which were carried out by the PACs themselves, while

291. Thirteenth Report of Human Rights, MINUGUA, para. 51., *available at* <http://www.minugua.guate.net> (last visited Mar. 1, 2003).

292. *Guatemala Memory of Silence*, (Feb. 2002), *available at* http://shr.aaas.org/guatemala/ceh/grmds_pdf/index.html (last visited Nov. 23, 2002).

others were committed in conjunction with military commissioners or regular army forces. During 1982 and 1983, approximately eighty percent of the rural male population was organized into PACs. Citing the CEH Report,²⁹³ the Commission concluded that “the main purpose of the PAC was to marshal the civil populace against the guerrilla movements and to gain physical and psychological control over the population.”

The Commission also cited these reports to demonstrate the justice system’s ineffectiveness and general inoperability during the period in question, particularly with regard to human rights violations. As a consequence, the Commission rejected the government’s objection on admissibility grounds for failure to ever file a criminal complaint. The Commission noted the “atmosphere of impunity,” continuing threats, and the failure to resolve any of these cases of attempted or completed extrajudicial executions nine years after the perpetrations, as additional indicia of the inability to provide an adequate remedy.

The Commission held against the State for violations of the rights to life, liberty, humane treatment, respect for physical integrity, due process, lack of a judicial remedy, and the general obligation to respect and ensure these rights under the Convention. The Commission also found violations under the Inter-American Convention against Torture and reiterated its recommendations that the State investigate and punish those responsible; provide reparations to victims and their families, and take effective measures to prevent a resurgence of the PACs. Finally, the Commission urged Guatemala to promote and implement the principles contained in the U.N. Declaration on the right and responsibility of individuals, groups, and institutions to promote and protect universally

293. Interestingly, both the Commission and the Court have referred to the CEH Report as an authoritative source of information on Guatemala, despite the limitation in the CEH’s mandate that it have no judicial effect. That restriction has been meaningless in reality because an agreement cannot limit the power of an independent judge to determine what evidence in that report is relevant and how to weigh it. Nevertheless, references in Guatemalan national legislation to the terms of the CEH’s mandate could arguably have that effect, at least in the Guatemalan courts. An analysis of the consistency of such a requirement with due process obligations under international law would make for an interesting study. In any event, the report is comprised of some hearsay evidence, given that the CEH maintained the anonymity of its sources. This means that it is best used for establishing patterns of action and general tendencies.

recognized human rights and fundamental freedoms. The State's response to the recommendations on the initial Article 50 report added no new elements in response to the documented violations.

A recently admitted case addressing the issue of the PACs demonstrates the State's ambivalence in dealing with rights violations from the civil war period. Guatemala continues to deny its primary responsibility for the actions of these paramilitary organizations. In *Tomás Lares Cipriano v. Guatemala*,²⁹⁴ the State accepted its international responsibility by omission for its failure to respect and guarantee the rights of the victim (Article 1(1)), and it conceded that the events as described by the petitioner had, in fact, occurred. A friendly settlement has not materialized, despite the expressed will of the petitioners. It is unclear from the record whether Guatemala is indeed willing to reach such an agreement. The State has argued that domestic remedies have not been exhausted, and that the State is willing to pursue the investigation and prosecution of those responsible. In this regard, the State seems to confuse the issue of political will with the effective implementation of judicial or other remedies for rights violations. Government is not based solely on good faith, but must rely on functioning institutions capable of taking legitimate and credible actions to respect and guarantee rights.

In *Tomas Lares Cipriano*, the victim publicly refused in 1993 to continue to participate in the so-called "Voluntary Civilian Defense Committees," ("CVDC") citing provisions of the Guatemalan Constitution on freedom of association. Other members of his community, including members of a local human rights group, also protested. Those who renounced their participation for the first time complained of having already given thirteen years of service patrolling. Although the State had asserted their participation was not obligatory, in practice, it was compelled under threat of violence and death. Just as in the *Remegio Morales* case, Mr. Lares suffered death threats for his protest prior to being assassinated. As of the date of the admissibility report in February 2002, one person was sentenced

294. Case 11.171, Informe No. 13/02, (2002), available at <http://www.cidh.org/annualrep/2002sp/guatemala.11171.htm> (last visited Nov. 23, 2000).

for the crime, and four arrest warrants were pending for nine years against the remaining accused.

Two other cases from Guatemala, *Ileana del Rosario Solares Castillo, et. al. v. Guatemala*,²⁹⁵ and *Oscar Manuel Gramajo Lopez v. Guatemala*,²⁹⁶ document the unresolved instances of four forced disappearances of three women and one young man, which occurred in Guatemala's capital city in 1983. The State security forces perpetrated the disappearances.

Both cases reflect the same ambivalence by the government towards these past crimes as in the previous cases discussed above. The State reported that it would agree to follow the Commission's previous recommendations to investigate and prosecute the crimes, and that it would provide reparations. However, the State then proceeded to request that the Commission provide the identity and addresses of the victim's family members. The Commission's response was terse and direct: "The Commission believes that the fact that more than 17 years after the events described herein the State still lacks even the most basic information about the identity and whereabouts of the victims' families reinforces all the Commission's conclusions in this report."²⁹⁷

The Commission found violations of the victims' right to life, humane treatment, personal liberty, and fair trial and judicial protection. There is no additional information, to date, on their fate.

G. CASES FROM PERU

The case of *Extra-Judicial Executions and Forced Disappearances*²⁹⁸ combines 120 cases involving victims of the

295. Case 9111, Report No. 60/01, OEA/ser.L/V/II.111 doc. 20 rev. at 903 (2000), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Guatemala9111.htm> (last visited Jan. 23, 2003).

296. Case 9207, Report No. 58/01, OEA/ser.L/V/II.111 doc. 20 rev. at 918 (2000), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Guatemala.9207.htm> (last visited Jan. 23, 2003).

297. *Castillo, et al.*, Case 9111, para. 49.

298. *Extrajudicial Executions and Forced Disappearances v. Peru*, Case 10.247 et al., Report No. 101/01, OEA/ser.L/V/II.114 doc. 5 rev. (2001), available at

Fujimori regime into a single case from Peru. The individual cases, initiated by six different Peruvian human rights organizations, were joined for common disposition. The pattern of repressive counterinsurgency tactics endorsed by the former Peruvian government, including forced disappearances, had been acknowledged in previous Commission reports.²⁹⁹ The Commission previously found that a pattern of forced disappearances existed in Peru between 1989 and 1993. The circumstances of the victims in this case further corroborated this pattern, and the decision expanded the time period to cover the years between 1984 and 1989.³⁰⁰

The Commission sustained all of the violations alleged. Given the disposition of the new government to assume State responsibility for such cases, the remaining issue is the scope of that responsibility. The large number of victims in this case, the larger number of affected family members, and the impending recommendations of Peru's national Truth Commission on reparations for all of those affected by violations during the Fujimori regime may result in significant disbursements over a short period of time. The extent of these monetary reparations would be particularly troubling for the new Peruvian government facing serious economic challenges. Moreover, the court system may find it difficult to try and punish perpetrators in each of the thousands of cases of executions, forced disappearance, and torture that the Truth Commission may register.

The conversation between Peru and the Commission about the manner of compliance with the recommendations in this case gives a glimpse as to how this debate will proceed. For the 120 victims in the case under discussion, the Commission recommended that Peru:

1. Void any judicial decision, internal measure, legislative or otherwise, that tends to impede the investigation, prosecution, and punishment of the persons responsible for the summary executions

<http://www.oas.org/cidh/annualrep/2001eng/Peru10247.htm> (last visited Jan. 23, 2003).

299. See Report on the Situation of Human Rights in Peru (1993) (discussing the Commission's identifications of human rights problems in Peru), available at <http://www.iachr.org/countryrep/93PeruS&E/index.peru.htm> (last visited Jan. 23, 2003).

300. *Extrajudicial Executions and Forced Disappearances*, Case 10.247 et al., para. 179.

and forced disappearance of the victims indicated at paragraph 252. . . . [T]he State should also repeal Laws N° 26,479 and 26,492;

2. Carry out a complete, impartial, and effective investigation to determine the circumstances of the extrajudicial executions and forced disappearances of the victims and to punish the persons responsible, pursuant to Peruvian legislation;

3. Adopt the measures necessary for the victims' families to receive adequate and timely compensation for the violations established herein; and

4. Accede to the Inter-American Convention on Forced Disappearance of Persons.³⁰¹

The State indicated that the cases included in the Commission's report would be sent for investigation to the Truth Commission, and that proposals for full reparations for victims and their family members would be prepared on the basis of those investigations, "consistent with the third recommendation."³⁰² Peru's stated idea "is to deal in a comprehensive matter with this dimension of the human rights violations."³⁰³

This approach raises interesting issues about the scope of the right to reparations and about the appropriate process for reaching determinations on reparations. In a case from Chile discussed in this article,³⁰⁴ the Commission indicated that the failure to criminally investigate and punish human rights violators precluded the victim's right to a civil remedy for reparations. This was true, the Commission stated, despite the fact that the State had already provided reparations through its truth commission process. In these

301. *Id.* para. 253. Regarding the fourth recommendation, Peru reports that it signed the Inter-American Convention on the Forced Disappearance of Persons on January 8, 2001, and that ratification is pending in the Peruvian Congress. See Inter-Am. C.H.R., Press Release, No. 4/01 para. 19 (Mar. 9, 2001), available at <http://www.cidh.org/comunicados/english/2001/press4-01.htm> (last visited Nov. 19, 2002).

302. *Extra-Judicial Executions and Forced Disappearances*, Case 10.247 et al. para. 255.

303. *Id.*

304. See *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988) (addressing reparations), available at http://www.corteidh.or.cr/seriecing/serie_c_4_ing.doc (last visited Nov. 22, 2002).

circumstances, victims of human rights abuses may still test the sufficiency of reparations awards under standards different from those developed by the Truth Commission because existing laws allow for civil liability of the State for the actions of its agents.

As to the second recommendation concerning investigation, prosecution, and punishment, the Peruvian State considered that an initial step in addressing the recommendation was to transfer the cases to the Truth Commission.³⁰⁵ In addition, the Public Defender (Human Rights Ombudsman) has launched an investigation into the disappearance of persons in Peru from 1980 to 1996, which is a further indication of Peru's efforts to fulfill the recommendations of the Commission.³⁰⁶ Also in this regard, the Peruvian government reports that, "the Executive Branch has transmitted [the] Report . . . to the Ministries of Defense and the Interior, as well as the Judicial Branch and the Attorney General's Office, so that they may take steps consistent with their constitutional and legal responsibilities."³⁰⁷

As previous decisions of the Commission have demonstrated, investigations conducted by a truth commission are inadequate to comply with the State's obligation to provide a judicial remedy and fair trial for serious human rights violations under the Convention. The test is whether the State "use[s] the means at its disposal to carry out a serious investigation . . . to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."³⁰⁸ Consequently, the Commission will evaluate those efforts of the Peruvian government as it supervises compliance with its recommendations.

305. *Extra-Judicial Executions and Forced Disappearances*, Case 10.247 et al., para. 255.

306. *Id.* This is a reference to the human rights ombudsperson in Peru, who is called the Defensor del Pueblo. The distinction is important, as there is also a state agency called the Public Defender that provides legal representation to persons who cannot afford counsel.

307. *Id.*

308. Velasquez-Rodriguez Case, Judgment of July 29, 1988, para. 174, Inter-Am. Ct. H.R. (Ser.C) No. 4 (1988), available at <http://www.dal.ca/~wwwlaw/kindred.intllaw/velasquezrodriguezcase.htm> (last visited Jan. 24, 2003).

The Peruvian government, however, referred only to recommendations 2, 3, and 4, and failed to make any representations with regard to the repeal of the amnesty laws. Nevertheless, the later decision by the Inter-American Court in the *Barrios Altos Case*³⁰⁹ would seem to make such action imperative.

In *Pedro Pablo Lopez, et al. v. Peru*³¹⁰ and *Yone Cruz Ocalio*,³¹¹ the Commission sustained a violation of Article 3 (right to juridical personality) of the American Convention, based on the argument that “the forced disappearance of persons constitutes the negation of their very existence as human beings recognized as persons before the law.”³¹² The Court later rejected this conclusion in the *Bamaca-Velasquez Judgment*.³¹³ Nevertheless, in a concurring opinion, Judge Roux Rengifo urged the further exploration of the definition of Article 3 rights.³¹⁴

H. OTHER REPORTED CASES

Chile, yet again, provides us with a new twist on the line of cases examining amnesty provisions for human rights abuses. One issue

309. *Barrios Altos Case*, Interpretation of the Judgment on the Merits (Art. 67 American Convention on Human Rights), Judgment of Sept. 3, 2001, Inter-Am Ct. H.R. (Ser. C) No. 83 (2001), *available at* <http://www1.umn.edu/humanrts/iachr/C/83-ing.html> (last visited Jan. 21, 2003).

310. Case 11.031, Report No.111/00, OEA/ser.L/V/II.111 doc. 20 rev. at 1129 (2000), *available at* <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Peru11.031.htm> (last visited Jan. 24, 2003).

311. Case 11.099, Report No.112/00, OEA/ser.L/V/II.111 doc. 20 rev. at 1154 (2000), *available at* <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Peru11.099.htm> (last visited Jan. 24, 2003).

312. *Pedro Pablo Lopez, et al.*, Case 11.031, para. 58; *Yone Cruz Ocalio*, Case 11.099, para. 45 (citing *Velasquez-Rodriguez Case*, Judgment of July 29, 1988, para. 174, Inter-Am. Ct. H.R. (Ser.C) No. 4 (1988)).

313. *Bamaca Velasquez Case*, Judgment of Nov. 25, 2000, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000), *available at* <http://www1.umn.edu/humanrts/iachr/C/70-ing.html> (last visited Jan. 21, 2003).

314. *Bamaca Velasquez Case*, Separate Opinion of Judge de Roux Rengifo, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000), *available at* http://www.corteidh.or.cr/seriecing/VotodeRouxSerie_c_70_ing.doc (last visited Jan. 23, 2003).

left unanswered by the Inter-American Court in the *Barrios Altos* Case is squarely presented in this new challenge to the 1978 amnesty law in Chile. In the case of the forced disappearance of Samuel Alfonso Catalán Lincoleo,³¹⁵ the petitioners confront the legitimacy of the amnesty as part of a political pact intended to smooth the transition from the military dictatorship to democratic rule in 1990. This decision, issued one month before the Court's *Barrios Altos* decision, concurs in the Court's logic by declaring that amnesties and statutes of limitations that purport to shield human rights abusers from prosecution and punishment are inconsistent with the American Convention. The Commission goes even further, declaring inadmissible any defense that would permit the continued application of the amnesty law as the result of a political pact. Based on that finding, the Commission found a violation of Article 2 of the American Convention, which obligates the State to "adapt its domestic laws to the provisions of the international instrument."³¹⁶

The facts involved efforts by the victim's family members to pursue a criminal investigation and prosecution of the disappearance. Those efforts were truncated when the Supreme Court upheld a lower court decision barring the criminal action. The State presented its defense based on two circumstances. First, the State pointed to the fact that the Chilean National Truth and Reconciliation Commission had officially acknowledged State responsibility for thousands of deaths and disappearances during the military regime, the present case included, and that the Truth Commission had provided meaningful material and non-material reparations to the surviving family members. Second, the State asserted that the executive branch had the political will to prosecute the human rights abusers, as evidenced by repeated public statements by high-level officials in two successive democratic governments. The Supreme Court argued that the State could not be held responsible for the actions of an independent judiciary that continued to apply the amnesty law.

315. Samuel Alfonso Catalán Lincoleo v. Chile, Case 11.771, Report No.61/01, OEA/ser.L/V/II.111 doc. 20 rev. at 818 (2000), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Chile11.771.htm> (last visited Jan. 23, 2003).

316. *Id.* para. 3.

The Commission countered that, from the perspective of international law, the State is one entity for the purposes of complying with its responsibility for treaty obligations. It cited Article 27 of the Vienna Convention on the Law of Treaties, which provides that States Parties may not invoke provisions of their domestic laws as a justification for non-compliance with the terms of a treaty.³¹⁷ Moreover, the Commission noted that the amnesty law, passed by the *de facto* government of Augusto Pinochet, continued to be applied to protect the planners and perpetrators of the abuses in both Chile and other countries. This alluded to the arguments of the Chilean foreign ministry in opposition to Great Britain's extradition request for General Pinochet. Clearly, the reference to the amnesty as the product of a *de facto* government that has also benefited from the law's provisions, both before and after the democratic transition, implied that indeed this may be a self-amnesty of the kind the Court rejected in *Barrios Altos*.

Nevertheless, the Commission's conclusions also rejected the "political pact" defense of amnesties for violations of Articles 1(1) and 2 of the American Convention when it stated that the Truth Commission's official acknowledgment of State responsibility and the reparations provided fall short of what is required. In order for the State to comply with its duty "to ensure the full and free exercise of those rights,"³¹⁸ the remedy must include an effective investigation into the identity of the perpetrators, their prosecution and punishment, and appropriate reparations. In this regard, the Commission Cited Pedro Nikken, a former President of the Court:

The establishment of a truth commission is a plausible means, within a political negotiation to reach peace in an armed conflict, as a first step and perhaps the most tangible contribution that can be made within that scenario to combat impunity . . . [Nonetheless,] the establishment of the truth should not inhibit the judicial organs from judging and punishing the persons responsible, but outside the context of a political negotiation.³¹⁹

317. Vienna Convention on the Law of Treaties, opened for signature May 29, 1969, art. 27, 1155 U.N.T.S. 331, available at <http://www.un.org/law/ilc/texts/treaties.htm#abstract> (last visited Jan. 23, 2003).

318. *Samuel Alfonso Catalán Lincoleo*, Case 11.771, para. 77.

319. *Id.* para. 82 (alteration in original) (citation omitted).

The Commission also cites the Chilean National Truth Commission's report, which also concluded that prosecutions are a necessary element of reconciliation and the prevention of future violations.³²⁰

In *X and Z v. Argentina*,³²¹ the Commission applied the fair trial and effective recourse guarantees of the American Convention to a transnational child-custody case, in which the Argentinean court applied the Hague Convention on the Civil Aspects of International Child Abduction. The Commission found that the Hague Convention provided sufficient due process protections, and that the domestic court appropriately applied the Convention. It concluded that the State did not violate the Convention in this case.

In *Marcelino Henriquez et. al. v. Argentina*,³²² the Commission fashioned a test to analyze whether the application of a law to the circumstances of a particular case results in discrimination inconsistent with Convention protections.³²³ The test asks whether there is a reasonable justification for the distinction in treatment, and if so, whether the means employed are reasonably proportional to the end sought. This test is similar to the analysis in U.S. jurisprudence interpreting the U.S. Constitution's equal protection clause. One important difference in the Commission's analysis is that it does not provide for differing levels of scrutiny, depending on the rights affected.

The law challenged involved a provision in domestic law by which persons detained on orders of the executive during the military dictatorship in Argentina would receive reparations for that arbitrary act. The petitioner claimed that he was discriminated because he was

320. *Id.* para. 83.

321. Case 11.676, Report No.71/00, OEA/ser.L/V/II.111 doc. 20 rev. at 582 (2000), *available at* <http://www.oas.org/cidh/annualrep/2000eng/ChapterIII/Merits/Argentina11.676.htm> (last visited Jan. 23, 2003).

322. Case 11.784, Report No.73/00, OEA/ser.L/V/II.111 doc. 20 rev. at 603 (2000), *available at* <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Argentina11.784.htm> (last visited Jan. 23, 2003).

323. See American Convention, *supra* note 13, art. 24 (stating that all persons are equal before the law and that they are entitled to equal protection of the law without discrimination).

not indemnified for all of the time he spent in jail. The Commission found reasonable and proportional a distinction in the calculation of monetary awards for damages where the factual circumstances differed, and that the petitioners had not been treated differently than others in their same circumstances. The distinction rested on whether the detention was the result of an executive order, which the State argued was deemed *prima facie* illegitimate, or the result of a judicial order, which the State argued was not *prima facie* illegitimate.

The petitioner had also challenged this distinction based on the fact that the law, as applied, presented an obstacle to the State's compliance with its international obligation to provide reparations for human rights violations. The Commission noted that the law provided an administrative procedure to which the victim was free to adhere, and that the right to a judicial remedy was not precluded by the existence of an alternative option for disbursing reparations. The Commission finally concluded that the State had not violated the American Convention.

I. FRIENDLY SETTLEMENTS

Article 41 of the Commission's Rules of Procedure contemplates friendly settlement procedures.³²⁴ The parties can adopt this kind of resolution at any point in the proceedings, but all the parties must consent. The Commission may determine that the case is not susceptible to a settlement, notify the parties of that action, and in the absence of an agreement to the contrary, the case will resume processing. In the event of a settlement, the Commission is required to verify the consent of the victim or successors, and all of the agreements must be based on respect for the rights recognized in the American Declaration, the American Convention, "and other applicable instruments."³²⁵

Friendly settlements offer the victim or her family members an opportunity to receive reparations and dispense with the full litigation of the case before the Commission and the Court. The terms of these agreements vary. Foregoing litigation may mean that

324. See Rules of Procedure of the Inter-Am. C.H.R., art 41 (excluding the contemplation of friendly settlement procedures).

325. *Id.* art. 41(5).

there will be no public acceptance of international responsibility. This can occur when a State precludes such a finding by anticipating the required response and taking prompt corrective action. In other cases, the State may only accept institutional responsibility regarding its failure to investigate and punish the underlying violation, but be unwilling to concede that the State was directly responsible for perpetrating that act. In those cases where a condition of the settlement is the identification, prosecution, and punishment of the individuals criminally responsible for the facts constituting the violation, the Commission is faced with the task of measuring compliance with that commitment. In analyzing the friendly settlement decisions, all these circumstances should be taken into account.

In *Maria Merciadri de Morini v. Argentina*,³²⁶ the petitioner alleged violations of due process and equal protection, the right to participate in government, and the right to a judicial remedy. The published friendly settlement agreement dispenses altogether with a debate on international responsibility. The settlement provided for the promulgation of a law effectively enforcing a quota on women's participation in proposed party tickets for national elections. The petitioner had disputed the prior rules of implementation, which, she asserted, undermined the purpose behind requiring that thirty percent of candidates for national election from each party be women.

The detailed compromise, drafted as legislation and promulgated by then-President Fernando de la Rúa, closed gaps that effectively frustrated the opportunity for the candidacy quotas to be translated into a minimum number of sitting women politicians. The State did not dispute the legitimacy of the quota in this case, and the only substantive input on the issue of women's rights was the observation that "achieving the free and full participation of women in political life is a priority for our hemisphere."³²⁷ A recently admitted case

326. Case 11.307, Report No. 103/01, OEA/ser./L/V/II. 114 doc. 5 rev. (2001), available at <http://www.cidh.org/annualrep/2001eng/argentina11307.htm> (last visited Jan. 23, 2003).

327. *Id.* para. 16.

from Peru alleged a similar challenge to rules implementing affirmative action quotas for women in that country.³²⁸

Ecuador has by far the largest number of friendly settlement agreements during the relevant period from 2000 to 2002. This is a reflection of the stated policy of that country's Attorney General to initiate "conversations with all persons who have been victims of human rights violations, aimed at reaching friendly settlement agreements to provide reparations for the damages caused."³²⁹ The cases deal primarily with abuses by police and other security forces, including arbitrary or illegal arrest, torture, disappearance, and extra-judicial executions. The settlements provide for compensation for material, moral and consequential damages, and require the State to make efforts to investigate and punish those responsible. This last commitment is framed in the following terms:

The Ecuadorian State pledges to bring civil and criminal proceedings and pursue administrative sanctions against those persons who are alleged to have participated in the violation in the performance of State functions or under the color of public authority.

The Office of the Attorney General pledges to encourage the State Attorney General, the competent judicial organs, and public agencies or private institutions to contribute legal evidence to determine the liability of those persons.³³⁰

328. Janet Espinoza Feria et. al. v. Peru, Case 12.404, Report No 51/02 (2002), available at <http://www.cidh.org/annualrep/2002sp/peru12404.htm> (last visited Jan. 23, 2003).

329. See, e.g., Edison Patricio Quishpe Alcivar v. Ecuador, Case 11.421, Report 93/00, para. 7(I), OEA/ser.L/V/II.111 doc. 20 rev. at 503 (2000), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Friendly/Ecuador11.421.htm> (last visited Jan. 24, 2003); Byron Roberto Canaveral v. Ecuador, Case 11.439, Report No. 94/00, para. 8(I), OEA/ser.L/V/II.111 doc. 20 rev. at 509 (2000), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Friendly/Ecuador11.439.htm> (last visited Jan. 24, 2003); Manuel Inocencio Lalvay Guaman v. Ecuador, Case 11.466, Report No. 96/00, para. 13(I), OEA/ser.L/V/II.111 doc. 20 rev. at 519 (2000) (citing commonly used text for the Background section of friendly settlement agreements), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Friendly/Ecuador11.466.htm> (last visited Jan. 24, 2003).

330. See Edison Patricio Quishpe Alcivar, Case 11.421, para. 7(V); Byron Roberto Canaveral, Case 11.439, para. 8(V); Manuel Inocencio Lalvay Guaman,

The Commission is monitoring compliance with the terms of these settlements.

J. OTHER RECENTLY ADMITTED CASES

Cases admitted during the period covered by this report comprise an interesting array of social issues ranging from questions of State obligations towards HIV-positive persons, pensioners and their social security benefits, indigenous peoples, and the application of Agreement 169 of the International Labor Organization on Indigenous and Tribal Peoples to rights concerning natural resources on traditional lands. The Commission is examining immigration and nationality rights, freedom of expression for journalists and authors, political rights involving election participation, labor rights, the violation of the lawyer-client privilege, and the scope of a State's obligation to protect all these rights.

However, the customary complaints of torture, inhumane treatment based on poor prison conditions, violations by security forces and paramilitary death squads with State collaboration or acquiescence, disappearances, extra-judicial executions, arbitrary detentions, and due process violations will also continue to be the subject of Commission decisions in future reports. The countries affected are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Lucia, Trinidad and Tobago, Uruguay, and Venezuela.

Case 11.466, para. 13(V) (quoting commonly used text for the section of friendly settlement agreements addressing "Punishment of the Persons Responsible").