

11. **The Inter-American Human Rights System: Activities from Late 2000 through October 2002**

By: Richard J. Wilson and Jan Perlin*

General 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). See Richard J. Wilson and Jan Perlin, *The Inter-American Human Rights System: Activities During 1999 through October 2000*, 16 AM. U. INT'L L. REV. 315 (2001). Almost all of the information contained in this article comes from the published annual reports of the Commission and Court for the relevant periods, plus additional posted information on published reports and decisions found on the web sites 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. 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. (Comm. AR 21, 954).

I. Actions of the Inter-American Court of Human Rights

A. Peru's Return to the System, and Decisions Dealing with Peru

[Readers interested in these developments should consult the full version of this article.]

B. Decisions in Other Contentious Cases on the Merits

In the past, the Court has traditionally 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, the Court now permits full participation of both the Commission and representatives of the victims 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 I, D.

1. *Bamaca-Velasquez Case (Guatemala)* (Merits and Reparations) -- The victim in this case was a guerrilla

* Professor Wilson is a professor of law and is the Director of the International Human Rights Clinic at American University Law School. Ms. Perlin is an attorney/consultant working on justice reform and human rights. The full version of this article will be published in the American University International Law Review in 2003. The full version of this article is also available on the ACLU website (www.aclu.org)

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, (hereafter, 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. Though his remains were never recovered, this case had provoked an international response well before the Court's judgment was issued in November 2000. Judgment of November 25, 2000.

The attention was due to the efforts by his widow, Jennifer Harbury, a Texas attorney who had met Efraín Bámaca while he was living clandestinely in the Guatemalan countryside, to find him after his capture. 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 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 first inspection by civilian authorities of all the military installations in Guatemala. The inspections were carried out 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. As it turns out, the government's statement was limited 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 historical truth to be established by Guatemalan national courts, despite the fact that they 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. (para. 89)

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 used by the Guatemalan military, including the use of violence and intimidation to frustrate judicial investigations and judgments. The testimony is corroborated by both the Recuperation of Historical Memory Report of the Archbishop's human rights office and that of the Guatemalan Truth Commission, issued in 1998 and 1999, respectively, and 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, (para. 125) 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.” (para. 132). Given the fact that Bámaca was held clandestinely for at least four months by the military 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). (paras. 143-4).

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 17 years that he was separated from his family before his death. The Court rejected that assertion, and accepted the Commission’s explanations that his absence was entirely due to considerations of safety for his family, who would have been targeted due to 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 finds an Article 5(2) (torture) violation and an Article 5(1) (right to respect for physical, mental and moral integrity) 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 Rights formulated in two cases against Turkey.¹ (fn. 110) It requires an analysis of the intimacy of the family relationship generally, and between individual family members and the victim, 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. (para. 163) Making special mention of the efforts expended by Jennifer Harbury to find her

husband, the consistent obstacles created by the State, and the anguish generated by the ignorance of his whereabouts, the Court found that both she, Bámaca’s father and his siblings were victims of an Article 5 violation.(para 165-6)

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. It rejected a claim under Article 3 (right to juridical personality), noting the absence, in the Inter-American Convention on Forced Disappearance of Persons (1994), 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.” (para. 201)

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 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 finds 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.” (para. 207)

“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. (para. 208, emphasis added)”

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.” (para 211).

The contribution of the *Bamaca Velasquez Case* to the scheme of reparations can be found in the creative proffer of evidence by the Commission, which paints a vivid picture of the suffering caused to the victim and his family. Reparations, Judgment of February 22,

2001. 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 been, 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; 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 “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, 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.” Compensation for moral damages in the amount of \$25,000 were awarded to Bámaca’s father for his suffering at the knowledge at 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.²

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 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. 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, so that the award is divided evenly among his surviving wife, his father and his siblings. Jennifer Harbury also was awarded lost wages, in consideration of having suspended her employment to dedicate herself to the search for her husband from 1992-1997, and for related health costs; for example, the illness provoked by her hunger strike directed at learning the whereabouts of her husband. In all, money damages were awarded in the amount of \$475,000.00.

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 inclusion of the Bamaca case in the report of the Guatemalan Historical Clarification Commission was cited 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.” Bamaca, Reparations Judgment, para. 71. 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 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.

Against this background, the Court ordered the Guatemalan State to adopt all legislative or other measures necessary measures 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) (Merits and Reparations)* --The Court's decision on merits and reparations in *Baena Ricardo et al. Case (270 Workers v. Panama)*, Judgment of February 2, 2001, 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.

The dispute here arose out of a labor dispute between the Panamanian government and state employees, represented through the Coordinating Organization of State Enterprise Workers Unions. In November of 1990, the government rejected a petition from the Coordinating Organization raising concerns and demands of the union collective, after which the Organization called for a public protest march on December 4, 1990, followed by a 24-hour work stoppage the next day. The protest march, which was intended to focus attention to the unions' demands, was carried out peacefully with the participation of thousands of workers. (Judgment, at 88(c))

However, in what seems to have been a bizarre coincidence, the march coincided with the escape on the same date by colonel Eduardo Herrera-Hassan from a Panamanian island prison, followed by his subsequent forced takeover of police buildings with other dissident members of the military. The union group's

work stoppage, which had begun as scheduled on 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. The colonel was arrested by U.S. military forces while attempting 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." (Judgment, at 88(i)). Most of the workers suspected of a role in the work stoppage were fired before any legislation was adopted, based on lists developed by managers in the various state agencies in which they were employed.

The Panamanian Legislative Assembly 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 law was designed to lapse in December of 1991. Prior to the adoption of Law 25, existing labor law provisions 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 "that attempt 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. (para. 88(q)) 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 subsequently found the law to be unconstitutional, but held that its declaration of unconstitutionality only struck down the abstract legal rule, thus leaving the concrete firings of the workers unresolved by the Panamanian courts. Having exhausted all available domestic remedies, the 270 workers sought relief in the Inter-American human rights system.

The 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 implementation. No formal state of emergency had been declared by Panama, 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. (paras. 89-94). 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 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. (AR 2001, 944) Moreover, the treaty has limited direct enforceability through the Commission and Court.³

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. The government of Panama argued the

non-retroactivity of treaties. (Judgment, at paras. 95-98) The Court concluded, somewhat cryptically and 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." (Judgment, at para. 99). The Court did not further articulate the nature of that duty.

The Court then 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 Convention. 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, nor that any other proof was offered of interference with the right to "peaceful assembly, without arms," protected in Article 15. (148-150)

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." 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.” (para. 156) In reaching its conclusions on the right to association, the Court drew heavily from a previous decision from the International Labor Organization (ILO) Labour Union Freedom Committee, case N/1569, which dealt with the same facts, and to which no objection was raised by the State. (paras. 162-165, 171).

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.” 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 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, [sic] penal matters, as in all of these other domains.” (para. 125).

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.” 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.” (para. 128-129) 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). (paras. 131-134).

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” 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.

3. *The Last Temptation of Christ Case (Chile) (Merits and Reparations)* -- This case deals with Chile’s prior censorship of the film of the same name. Judgment of February 5, 2001. 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 application of a 1974 law and a 1980 Constitutional provision, both part of the Pinochet legacy.

The case originally was 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 Commissioner, José Zalaquett. Expert testimony went to 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.

The State did not contest the facts, but 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 Article 13 (freedom of expression). The Court reminded Chile that human rights violations are not attributable only to one or another branch of government, but that they 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. (para. 72)

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." (para. 79)

The State was ordered to modify its legal framework to remove prior censorship provisions, which violate the obligation to respect and guarantee the right to freedom of expression and thought under the Convention, (Articles 1(1) and 2) and 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 \$4,290.00.

4. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Merits and Reparations)* -- 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, which 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 concession from operation, the community sought the protection of the Commission and Court. The case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, is the first substantive decision of the Court in the area of indigenous rights.

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. 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. (para. 115) The Court first reviewed the domestic norms of Nicaragua and concluded that there are protections under that law for indigenous communal real property. (para. 116-122) However, the procedure for titling of such lands

is not clearly regulated, (para. 123) 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 should a request for demarcation and titling be submitted.” (para. 124) Even the State’s own evidence showed “legal ambiguities” in the titling of indigenous communal lands. (para. 125) Finally, since 1990, no land title deeds have been issued to indigenous communities. (para. 126) This led the Court to conclude that “there is no effective procedure in Nicaragua for delimitation, demarcation, and titling of indigenous communal lands.” (para. 127)

As to the effectiveness of the *amparo* remedy, the Court noted its previous jurisprudence recognizing that the remedy, being simple and brief, meets the required characteristics for effectiveness. (para. 131) Moreover, the Nicaraguan *amparo* remedy itself provides for conclusion within 45 days. In the instant case, two separate actions were filed, one which initially took eight days, but the review of which took more almost a year and a half. (para. 132) The second action took nearly a year from the time of filing until a decision was reached. (para. 133) Neither of these unjustified periods of delay respect the “principle of a reasonable term” protected by the Convention. (para. 134) The State incurs 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. (paras. 135-139)

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 capable of having value.” (para. 144) 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.” (para. 148) 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.” 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. (para. 153)

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.⁴ (para. 156) The Court “dismissed” the violation of those rights, however, because there were no grounds for the violations set out in the Commission’s brief. (para. 157)

The Court reached the issue of reparations in this decision as well, 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 15 months, “with full participation by the Community and taking into account its customary law, values, customs and mores.” The State is further barred from interference with the property right pending its full establishment. (para. 164) 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.” 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 appointed for this case by Nicaragua, dissented on most issues.

In September of 2002, the Court requested provisional measures of protection under Article 63(2) of the Convention. It ordered the State to 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.

5. *Las Palmeras Case (Colombia)(Merits and Reparations)* – The decision of the Court in the *Las Palmeras Case*, Judgment of December 6, 2001, seemed straightforward on the facts but provoked an odd set of opinions on the merits. The case involved an attack on a rural schoolhouse in Las Palmeras, Colombia by military and police forces. In its decision on admissibility, the Court held that it was barred from direct application of international humanitarian law. 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. (paras. 49-66) 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 as that before the Court. The Inter-American 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. (paras. 33-34) This conclusion as to the effects of a decision by a domestic administrative tribunal seems to fly in the face of the consistent previous practice of the Court to demand 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. 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.

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. (para. 45) The Court concluded, 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." (para. 46) 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 and the judges' involvement in the selection of an 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 (Admissibility, Merits and Reparations)* –

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*. The cases were later consolidated for disposition on merits and reparations under the name *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Judgment of June 21, 2002 The cases present complex issues on treaty application and treaty reservations, all arising from aggressive efforts by Trinidad 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.⁵ The Commission and Court nonetheless continue to apply the Convention to all cases pending before those bodies that arose when the Convention was in effect.

The major issue in the preliminary objections stage, common to all three cases, was the validity of a reservation formulated by Trinidad at the time of its acceptance of the jurisdiction of the Court. 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 the 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 on the Court's competence, holding that the

Court cannot be deprived of its jurisdiction by unilateral acts of the State once that jurisdiction has been accepted. (paras. 81-83, *Hilaire*).

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." (para. 88) The Court also rejected the government's alternative argument, that if the Court found the reservation incompatible with the Convention, the State's intention was not to accept the jurisdiction of the Court at all. (para. 91) 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, in the exercise of its contentious jurisdiction, of "all efficacy." (para. 91-92) The Court reached similar decisions on preliminary objections in the *Constantine et al.* and *Benjamin et al.* cases.

The merits decision in *Hilaire et al.*, by virtue of its consolidation with other cases, dealt with a total of 32 defendants on death row in Trinidad, all of whom appear as victims before the Court. (para. 3) At the outset of its opinion, the Court noted that it had issued provisional measures to prevent execution of the alleged victims, but that on June 4, 1999, Trinidad had executed Joey Ramiah, one of the individuals protected by provisional measures. (paras. 26-33) 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 direct order of the Court" directing the issuance of provisional measures to preserve Ramiah's life. (para. 198-200)

The heart of the opinion, however, goes to both substantive and procedural questions on the mandatory application of the death penalty by Trinidad. 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, (para. 103) as well as Article 4(2), which limits death sentences to "the most serious crimes." (para. 106) 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." (para. 99, quoting from OC-3/83) 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. (para. 116)

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." (para. 148). 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 challenge to certain aspects of the death penalty. (para. 152). 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. (para. 186-188)

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. (para. 169) 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 31 individuals who had petitioned the Commission for protection and barred, on grounds of equity, their resentencing 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*, Order of the Inter-American Court of Human Rights of September 3, 2002, Provisional Measures, *James et al. Cases*, the Court continued provisional measures for another 39 individuals still under sentence of death in Trinidad.

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. The opinion, *Legal Status and Human Rights of the Child*, defines a

“child” as person who have not yet reached his or her 18th birthday. (para. 42) 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. (para. 55) The opinion elaborates the meaning of the term “best interests of the child” and discusses the duties of families, society and the State in relation to children. (paras. 56-91) It delineates the rights of the child in judicial and administrative proceedings. (paras. 92-136) 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. The Court accepted the request, which will become Advisory Opinion OC-18.

D. Decisions on Reparations Only

[Readers interested in these developments should consult the full version of this article.]

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 a reform designed to streamline case processing, develop evidence more methodically, promote transparency, and provide for greater victim participation in each stage of the proceedings. The new Commission Rules now contemplate more specific procedures for evidence production, detail the stages of case processing, provide for friendly settlement negotiations at any point in the process, and create 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 Perú, 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, provoking a new sensitivity to due process issues and their relationship to human rights protections. Moreover, the new Rules of Procedure provide for the Commission to 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.⁶ In 2000 a Report from the Office of the Special Rapporteur on Freedom of Expression was published, “... 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.” (Annual Report, 2000, Volume III, para. 2).

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. In 2001, the Commission also created a Human Rights Defenders Functional Unit within the Executive Secretary's office in Washington. (AR 2001, at 20, 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.⁷ 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.⁸

Finally, 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, both in 2001. 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 US following September 11, 2001. Cases reflecting the development of the human rights situation in Colombia, Guatemala and Perú 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 equal protection (Article 24). Guatemala defended cultural relativism poorly and failed to win out. The Commission upheld a challenge in support of the legal recognition of women's capacity to develop socially, economically and politically in Guatemalan society.

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 the remaining recommendations be fulfilled.

The challenged provisions of Guatemalan law established distinctions based on gender restricting the ability of women to represent the marital union, and giving almost exclusive power to 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 restricting married women's right to "exercise a profession or maintain employment where it does not prejudice her role as a mother and home-maker." (para. 2) In addition, a husband was permitted to prohibit his wife "from realizing activities outside the home, as long as he provides for her and has justified reasons." (para. 2). Other provisions give primary responsibility to the husband for representing their children and administering their property, and permitted that "a woman, by virtue of her sex may be excused from exercising certain forms of guardianship". (para. 2)

The Guatemalan Supreme Court upheld these provisions, despite its recognition that the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 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.” (para. 3, 34)

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 Convention. 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 were applicable to her. Just as the State of Chile had argued before the Inter-American Court in *The Last Temptation of Christ Case*, discussed above, 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 CEDAW definition 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.*” (CEDAW, Article 1. Emphasis added)

The movement in support of equality for women has long recognized that many domestic laws purporting to protect women in fact limit opportunities to act as full members of society. CEDAW’s discrimination definition 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.” (para. 38)

The report also notes that “the gender-based distinctions under study have been upheld 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.” (para. 37) However, Guatemala’s Constitutional Court, the Commission observed, had “made no attempt 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.” (para. 37) 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 Convention.

The Commission found violations of Articles 1(1) (obligation to respect and ensure rights), 2 (obligation to enact legal protection measures), 24 (equal protection) and 17(4) of the Convention, “read with reference to the requirements Article 16(1)” of CEDAW. The Commission also found that Article 11 (right to privacy) rights were implicated because the code provisions unduly restricted the individual right to “pursue the development of one’s personality and aspirations, determine one’s identity, and define one’s personal relationships.” (para. 46) 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.” (para. 48)

Guatemala exchanged a series of communications with the Commission purporting to demonstrate its compliance with the Commission’s recommendations. (para. 57-76) However, the Commission noted that some

discriminatory provisions had not yet been remedied, 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 excusing women from guardianship responsibilities. (para. 79-80) 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. (para. 81-82)

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*, Report No. 54/01, Case 12.051 (April 16, 2001, the victim charged that Brazil had, for years, condoned the domestic 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, with numerous additional medical ailments. Her complaint is based on the failure to finalize any judgment against her ex-husband 15 years after his near fatal shooting attack of her. Consequently, she alleged violations of Articles 1(1), 8, 24 and 25 of the American Convention; Articles 3, 4 (a) to (g), 5 and 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, (Belém do Pará Convention); * Brazil ratified in 1992. and articles of the American Declaration. The Commission found

violations of Articles 1(1) (obligation to protect rights), 8 (fair trial) and 25 (judicial remedy), and of Article 7 of the Belém do Pará Convention, insofar as Article 7 obligates the State to act to protect the rights contemplated in Articles 3 and 4 (a) – (g) of that instrument. The Commission also concluded that Articles II (right to equality) and XVII (right to recognition of juridical personality and civil rights) of the American Declaration were violated.

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 Convention. The record reflects that the Brazilian justice authorities demonstrated a patent reluctance to punish the petitioner’s husband for her attempted murder, despite more than sufficient evidence. In determining admissibility, the Commission found that the obligations to protect rights under the American⁹ and Belém do Pará¹⁰ Conventions 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 had tried to get her to declare him beneficiary of a life insurance policy one week before the shooting. He was proven to have lied on several occasions as to the circumstances of the assault, which he asserted was perpetrated by thieves. There were witness statements implicating him in the crime.¹¹

A guilty verdict eight years after the fact resulted in a 15-year sentence that was reduced to 10 years on appeal. The Commission noted that the eight-year delay alone in obtaining the first conviction constituted a denial of Article 8 and 25 rights and Article 1(1) obligations. Three years later, the guilty verdict was overturned based on a time-barred challenge alleging faulty jury instructions. At his subsequent trial, in 1996, the defendant was again sentenced, this time to a 10-year and 6-

month prison term. His appeal from that conviction has been pending since April 1997, and so the conviction was not yet 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." (para. 56) This finding is based on the circumstances relating to the assault on the petitioner, on national statistics concerning violence against women, and on the State's lethargic response to that violence.¹² The factual information confirming a pattern of State tolerance of violence against women also supports findings of the violation of the equal protection provision of the American Declaration and Convention. The Commission's analysis corresponds here to a definition of domestic violence that includes violence against women, "condoned by the state or its agents regardless of where it occurs." (Art. 2 Belém do Pará Convention).

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*, Report 53/01, Case 11.565 (April 4, 2001). The names used are pseudonyms., the victims, three Tzeltal indigenous women, were gang raped and subjected to other torture by soldiers while

being illegally detained and questioned in a language they did not speak¹³ at a military checkpoint in 1994. 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 here in the section on women rights for two reasons: first, because the Commission reiterates in clear terms its analysis of rape as a form of torture; and, second, because the State's response to the allegations demonstrates the kind of subtle bias that prevents rape from being 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 events alleged had ever occurred. 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 their designated 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 presented by the victims 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, the testimony is

substantiated by 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*.

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.” (para 69) That request came a substantial time after the incident had occurred and in spite of the fact that the first medical examination, conducted 20 days after the incident, and qualified as in-depth and professional by the Commission, had been ratified in the Mexican civilian courts. (para. 63) Furthermore, the report of the medical examination documented the fear and anguish that these young women had 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. According to the Commission’s Report, “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.’” (fn. 14)

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, also a woman, characterizing her behavior as “haughty and intimidating.” (para.66)

Rather than conduct a serious investigation, the State used the case as a staging ground for discrediting the EZLN and those the State suspected were their sympathizers. At the same time, the State ignored the evidence and the consequences of what these three young women had suffered.¹⁴ The Commission “establishe[d] that, as a result of the humiliation create 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.” (para. 42)

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, and reiterated its own previous findings that “military courts do not meet the requirements of independence and impartiality imposed under Article 8(1) of the Convention.” (para. 81) It also reiterated findings and recommendations of the United Nations Special Rapporteur for Torture with regard to Mexico,¹⁵ 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. (para. 79)

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,¹⁶ the decisions of the International Criminal Tribunal for 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.” (para. 51). Finally, we are reminded 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.”¹⁷

The Commission found violations of the petitioners’ rights under Article 5 (right to humane treatment) and Article 11(2) (right to privacy). The mother of the three victims was also found to have 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.” A violation of the rights of the child was also found with regard to the 16-year old victim. The Commission also recognized violations of Articles 8 and 25 of the American Convention, and 6 and 8 of the Convention Against Torture, 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 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, 2000.¹⁸

C. Decisions on Capital Punishment and Related Issues

Cases involving the death penalty and related 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,¹⁹ three cases on admissibility,²⁰ and at least 26 reported and other new cases involving requests for the issuance of precautionary measures.²¹ 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. (Edwards, 107; Knights, 57; Thomas, 90; Domingues, 38) The Caribbean decisions on the merits all share virtually identical issues and resolution on a set of issues common to all three countries. First, the 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 Convention, but also of Article 5 (protection against cruel, inhuman or degrading punishment or treatment) and Article 8 (right to a fair trial).²² (Knights, 78; Lamey, 143; Thomas, 108)

Second, the cases shared conclusions as to the absence of an adequate system for the exercise of mercy in capital cases through pardon, commutation or amnesty, which violates

the explicit terms of Article 4(6) of the 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. (Edwards, 168; Knights, 105; Lamey, 166; Thomas, 120) 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 Convention. (Edwards, 198; Knights, 129; Lamey, 202; Thomas, 135)

The Commission's jurisprudence has become increasingly symbiotic with that of national reviewing courts in the death penalty area, at least as relates to the Caribbean. On March 11, 2002, Great Britain's Privy Council roundly endorsed the analysis of the Commission in a series of decisions striking down the mandatory death penalty in Belize, Saint Lucia, and Saint Christopher and Nevis.²³ 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 Committee, and the European Court of Human Rights.²⁴ This reliance on international and comparative sources contrasts sharply with that of the United States Supreme Court in its own death penalty jurisprudence.²⁵

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 Convention in one of the Jamaican cases. (Lamey, 178, 188) In the *Thomas* case, the Commission also found a violation of the right to a fair trial, protected by Article 8 of the Convention, when the trial judge demonstrated bias in an instruction to the jury regarding his belief in the defendant's guilt. (Thomas, 138, 144) 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 (Edwards et al., at 225), nor did it address an allegation that Jamaica's method of execution by hanging constitutes a violation of Article 5(2) of the Convention. (Thomas, 136)

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. (Knights, 136; Lamey, 225, 226) 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). (Lamey, 215) 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 defense counsel's failure to raise claims of prejudicial publicity during trial, coerced confessions, inhumane 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." (Edwards, para. 208-215) 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. (Lamey, 217) 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. (Graham, 58-59; Martinez-Villareal, 64)

One other Caribbean death penalty case deserves mention. The *Roodal* decision on admissibility is the first published case against Trinidad and Tobago since its denunciation of the Convention. (see discussion above) As such, the petitioner's lawyers grounded their claims on violations of the American Declaration rather than the Convention. (para. 2) The Commission

accepted jurisdiction of the case and agreed to its admissibility based on the violations of the Declaration, having reached a similar conclusion some time ago as to the United States, also a non-State-party to the Convention but still, like Trinidad, a member of the OAS. (para. 24) 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. (para. 25)

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 with their home country's consulate, and, if the detainee so requests, to promptly notify consular officials of the detention. In both of the cases pending before the Commission, the individual petitioners are Mexican nationals. (Martinez-Villareal, 69; Suarez-Medina). 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 issued by the Commission 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 18 at the time the alleged offense is 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. (para. 60) Despite repeated requests to the government of the United States and the State of Texas for precautionary measures (paras. 5-29), Mr. Sankofa was executed on June 22,

2000.²⁶ 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 courts, culminating in the denial of review by the United States Supreme Court of a decision of the Nevada Supreme Court that deeply divided over the question of the application of the International Covenant on Civil and Political Rights provisions prohibiting the execution of persons under 18 at the time of their alleged crimes, but upheld the conviction.²⁷ The Commission found that the imposition of the death penalty on children under 18 at the time of their conduct violates both customary international law and *jus cogens* norms. (para. 84-85) To justify this conclusion, the Commission exhaustively reviewed international law and standards, as well as the law and practice of nations. (para. 40-83)

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. (para. 26, 89) After that report was issued, the government apparently filed an extensive pleading urging the Commission to “withdraw” its report, combined with “supplemental observations.” (para. 90). The Commission rejected the government’s assertions, explicitly finding that the U.S. could not legitimately claim to be a persistent objector to the norm barring the execution of juveniles. (para. 85, 102) 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*²⁸ and *Stanford v. Kentucky*.²⁹ The question seems likely to reach the Supreme Court this term, and the potential influence of the Commission’s decision in *Domingues* cannot be overstated.

One other issue common to two cases before the Commission is not likely to be reviewed by the U.S. Supreme Court. 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 XXVI of the Declaration. (Graham, para. 60, 65; Martinez Villareal, para. 70). That issue was again rejected by the United States Supreme Court in the Fall 2002 term, over only one dissent, in a case involving a Florida death row inmate who has spent 27 years awaiting execution.³⁰

In *Garza v. United States*, the Commission found violations of Articles XVIII (Right to a Fair Trial) and XXVI (Right to Due Process of Law) when the sentencing jury in Texas heard evidence of four unadjudicated murders in Mexico. (para. 102-110) 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 35 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. (para. 94-95). One Commissioner, Helio Bicudo from Brazil, expressed his view, here and in all subsequent death penalty cases of the Commission, that the death penalty had been abolished through the evolution of the practice of the Inter-American system. (e.g., Edwards, Knights, Lamey and Thomas).

When it takes up 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) because Mr. Sankofa was procedurally barred from producing strong evidence of his actual innocence of the crimes of which he was convicted. (para. 58-59). These same provisions 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. (para. 66-68) In both cases, the issues mentioned here are related closely to claims of ineffective assistance of counsel, mentioned above.

Finally, the Commission has increased pressure on the all 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 US 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." (para 66) 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 was executed in Texas after the issuance of repeated 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 grounded solely on the binding nature of the issuance of precautionary measures by the Commission.³¹

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 aircraft 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 concludes that although the U.S. 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 U.S. 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. (AR 2001, at 670).

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 is scheduled to release a major study on the topic of terrorism in the very near future.

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.³² The petition here was filed on behalf of a group of unnamed by clearly identifiable individuals, all detainees at Guantanamo Bay, Cuba. The Guantanamo petition was coordinated by the Center for Constitutional Rights, based in New York City, 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 petition was dismissed for want of jurisdiction because “the military base at Guantanamo Bay, Cuba is outside the sovereign territory of the United States.”³³ 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. 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.” 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: “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.”

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. 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.”³⁴

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 designation has the legal effect of leaving the detainees without any legal protection for so long as armed conflict continues. 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 U.S. 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 are taken into custody by the Immigration and Naturalization Service (INS) for minor immigration rule violations such as visa overstays 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. 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 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.”

E. Cases Arising in Colombia’s Internal Armed Conflict

[Readers interested in these developments should consult the full version of this article.]

F. Cases Reflecting the Continuing Consequences of Guatemala’s Internal Armed Conflict

[Readers interested in these developments should consult the full version of this article.]

G. Cases from Peru

[Readers interested in these developments should consult the full version of this article.]

H. Other Reported Cases

[Readers interested in these developments should consult the full version of this article.]

I. Friendly Settlements

[Readers interested in these developments should consult the full version of this article.]

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 the 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, Panamá, Paraguay, Peru, St. Lucia, Trinidad and Tobago, Uruguay and Venezuela.

Endnotes

¹ Eur.Court HR, *Timurtas v. Turkey*, Judgment of 13 June 2000; and Eur. Court HR, *Çakici v. Turkey*, Judgment of 1 July 1999, para. 98.

² 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. See *Harbury v. CIA*, 403 U.S. 536 (2002).

³ Article 19(6) of the Protocol provides 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.

⁴ The Commission alleged violations of “a combination” of the following articles of the Convention: 4 (Right to Life), 11 (Right to Privacy), 12 (Freedom of Conscience and Religion), 16 (Freedom of Association), 17 (Rights of the Family), 22 (Freedom of Movement and Residence), and 23 (Right to Participate in Government). Para. 156.

⁵ For an excellent treatment of the legal effects of Trinidad's withdrawal, see Natasha Parassram Conception, *The Legal Implications of Trinidad &*

Tobago's Withdrawal From the American Convention on Human Rights, 16 AM. U. INT'L L. REV. 847 (2001).

⁶ See, e.g. *Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere*, AR 2000, at 1415.

⁷ *The Human Rights Situation of the Indigenous People in the Americas*, 20 October 2000. (full cite on web)

⁸ *Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples*, 1 March 2001.

⁹ Brazil ratified in 1992.

¹⁰ Brazil ratified in 1995.

¹¹ The Commission concluded that the 1984 police investigation provided clear and decisive evidence “for concluding the trial and proceedings.” (para. 39)

¹² The Report cites studies indicating the “high number of domestic attacks of women in Brazil”, the disproportionate number of women victims in these cases, the fact that 70% of criminal complaints relating to domestic violence are put on hold with no conclusion being reached, and only 2% result in a conviction. 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. (paras. 45-49).

¹³ The victims' statement revealed that they speak their own indigenous language and understand only some Spanish, but do not speak it. (para. 31).

¹⁴ At present, representatives of the Mexican Government and the petitioners are engaged in discussions regarding compliance with the Commission's recommendations for reparations and a criminal investigation in the civilian courts, according to CEJIL's 2001 Annual Report, (Center for Justice and International Law), page 104.

¹⁵ 1998 Report

¹⁶ The complete title is Report Submitted by Radhika Coomaraswamy, Special Rapporteur on violence against women, including its causes and consequences, in accordance with Resolution 1997-44 of the Commission, E-CN.4/1998/54, January 26, 1998.

¹⁷ Fn. 26, citing the Special Rapporteur on Violence Against Women.

¹⁸ The case contains a discussion of the inappropriateness of military jurisdiction to judge facts such as those arising here. See paras. 78-82. The Commission also notes 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.” (para. 87)

¹⁹ *Michael Edwards et al. v. The Bahamas*, Report No. 48/01, Cases 12.067, 12.068, 12.086 (April 4, 2001); *Juan Raul Garza v. United States*, Report No. 52/01, Case 12.243 (April 4, 2001); *Donnason Knights v. Grenada*, Report No. 47/01, Case 12.028 (April 4, 2001). *Leroy Lamey et al. v. Jamaica*, Report No. 49/01, Cases 11.826, 11.843, 11.846, 11.847 (April 4, 2001); *Joseph Thomas v. Jamaica*, Report No. 127/01, Case 12.183 (December 3, 2001); *Michael Domingues v. United States*, Report No. 62/02, Case 12.285 (October 22, 2002).

²⁰ *Gary T. Graham (Shaka Sankofa) v. United States*, Report No. 51/00, Case 11.193 Admissibility decision (June 15, 2000); *Ramon Martinez-Villareal v. United States*, Report No. 108/00, Case 11.753 Admissibility decision (December 4, 2000); *Balkissoon Roodal v. Trinidad and Tobago*, Report No. 89/01, Case 12.342 Admissibility decision (October 10, 2001).

²¹ The Rules of Procedure of the Commission permit it to issue precautionary measures in “serious and urgent cases” in order to “prevent irreparable harm to persons.” *Rules of Procedure of the Inter-American Commission on Human Rights*, in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V/1.4 rev. 8 (22 May 2001), at 127, 135. In its Annual Report for 2000, 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*). ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2000, VOL. 1, OEA/Ser.L/V/II.111, Doc. 20 rev. 16 (16 April 2001). In its Annual Report for 2001, 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*, *Takoora Ramcharan*, and *Alladin Mohamed*), and three cases from the United States (*Thomas Nevius*, *Robert Bacon Jr.*, and *Gerardo Valdez Maltos*). ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2001, VOL. 1, OEA/Ser.L/V/II.114, Doc. 5 rev. 1 (16 April 2002), at 77, 83-84, 84-85. *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.

²² In *Edwards et al. v. The Bahamas*, *id.* at para. 124-154, 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 are not a party to the Convention. The Commission looked to the terms of Articles I, XXIV, XXV and XXVI (right to life, right to juridical protection, right to an impartial hearing, right to due process of law and to human treatment, and right to petition).

²³ *Reyes v. The Queen* [2002] 2 A.C. 235, 254-255 (Belize). 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). A similar decision is likely to be forthcoming for Saint Vincent and the Grenadines. See the discussion of *Spence v. The Queen* in *Reyes*, *supra* at 268-269. See also Alex Bailin, *The Inhumanity of Mandatory Sentences*, CRIM. L. REV. 641 (United Kingdom August 2002).

²⁴ *Reyes*, *id.* at 248-256.

²⁵ 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, Robert M. Bohm and Charles S. Lanier eds., 2d ed., forthcoming 2002).

²⁶ Mr. Sankofa has been represented at the Commission by students of the International Human Rights Law Clinic at American University's law school.

²⁷ *Domingues v. Nevada*, 114 Nev. 783, 961 P.2d 1279 (1998), *cert. denied* 528 U.S. 963 (1999).

²⁸ Dissent from denial of certiorari in separate published opinions by Stevens, J. and by Ginsberg and Bryer J., at 536 U.S. ___ (August 28, 2002). Justice Stevens' dissent alluded to the "apparent consensus that exists among the States *and in the international community*" as to the impropriety of the death penalty for juveniles.

²⁹ Dissent from denial of petition for writ of habeas corpus, Stevens, J. (joined by Justices Souter, Ginsberg and Bryer), at 537 U.S. ___ (2002).

³⁰ Dissent from denial of certiorari by Bryer, J. in *Foster v. Florida*, 537 U.S. ___ (2002); concurrence in denial by Thomas, J., *id.*; statement by Stevens, J. *id.*

³¹ *Powell v. Texas*, Application for stay of execution denied by the Court. Justice Stevens and Ginsberg dissent. Unpublished order of October 1, 2002. A petition for writ of certiorari was denied the same day and Mr. Powell was executed.

³² See, e.g., Inter-American Commission on Human Rights (IACommHR), Washington, Decision of 12 March 2002, 23 HUM. RTS. L. J. 15 (2002); 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); 41 I.L.M. 532 (2002); *United States (U.S.): Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba [April 15, 2002]* 41 I.L.M.

1015 (2002).

³³ *Rasul v. Bush*, Civil Action No. 02-299, U.S. Dist. Ct. D.C., Memorandum Opinion of July 30, 2002, at 30; now pending before the U.S. Ct. of Appeals for D.C. as *Habib v. Bush*, Case Nos. 02-5284 and 02-5288 (Consolidated).

³⁴ 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 US government).