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Article abstract

The Inter-American Commission and Court of Human Rights are two bodies of the Organization ofAmerican States (OAS) mandated to ensure the protection of human rights in the Americas. Both arehabilitated to process individual cases lodged against Member States and dealing with allegations of humanrights violations. The present review covers the case law of both bodies for the year 2007.

CHRONIQUE DE LA JURISPRUDENCE DU SYSTÈME INTERAMÉRICAIN DES DROITS DE L'HOMME (2007)

REVIEW OF THE CASE LAW OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (2007)

Par Bernard Duhaime[*] *et*
Ariel Dulitzky[**]

La Commission et la Cour interaméricaines des droits de l'homme sont deux organes de l'Organisation des États américains (OÉA) chargés de veiller à la protection des droits humains dans les Amériques. Les deux instances sont habilitées à instruire des recours individuels intentés contre des États Membres et portant sur des allégations de violations des droits de la personne. La présente chronique porte sur la jurisprudence de ces deux instances pour l'année 2007.

The Inter-American Commission and Court of Human Rights are two bodies of the Organization of American States (OAS) mandated to ensure the protection of human rights in the Americas. Both are habilitated to process individual cases lodged against Member States and dealing with allegations of human rights violations. The present review covers the case law of both bodies for the year 2007.

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I. The Inter-American Commission on Human Rights in 2007

Despite numerous important leading cases decided by the Inter-American Commission on Human Rights (IACHR),[1] its case law remains underdeveloped in the area of equal protection and non-discrimination and regarding sexual and reproductive rights. Nevertheless, the Commission can play, as it does in many other areas, an important role in developing international standards and emphasizing States' often neglected responsibility to enforce protections and guarantees for women's human rights.

In 1994, the IACHR established a Rapporteurship on the Rights of Women with an initial mandate to analyze the extent to which member State law and practices affecting the rights of women comply with the broad obligations of equality, non-discrimination, and protection against violence set forth in the *American Declaration of the Rights and Duties of Man*,[2] the *American Convention on Human Rights*[3] and the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*.[4] At their core, these instruments uphold a woman's right to equal protection, non-discrimination, and simple and effective recourse, with due guarantees, for protection against acts of violence committed against her; they also uphold the State's obligation to act with due diligence to provide redress and to prevent, prosecute and punish these acts of violence.

In 2007, the Commission published a total of 82 reports[5]: 49 on petitions that were declared admissible; 14 reports on petitions that were deemed inadmissible; 5 friendly settlement reports; and 4 reports on merits.[6] Among those decisions, several

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1 See among others, *Ana Gonzalez and others v. Mexico* (1992), Inter-Am. Comm. H.R. No. 129/99, *Annual Report of the Inter-American Commission on Human Rights: 1999*, OEA/Ser.L/V/II.106/Doc. 6, rev (rape by soldiers); *Raquel Martí de Mejía v. Peru* (1996), Inter-Am. Comm. H.R. No. 5/96, *Annual Report of the Inter-American Commission on Human Rights : 1995,* OEA/Ser.L./V/II.91/Doc. 7, rev (sexual abuse by members of security forces); *María Mamérita Mestanza Chavez v. Peru* (2000), Inter-Am. Comm. H.R. No. 66/00, *Annual Report of the Inter-American Commission on Human Rights: 2000*, OEA/Ser./L/V/II.111/Doc. 20, rev (forced sterilization of women); *X and Y v. Argentina* (1996), Inter-Am. Comm. H.R. No. 38/96, *Annual Report of the Inter-American Commission on Human Rights: 1996*, OEA/Ser.L/V/II.95/Doc. 7, rev (vaginal inspections as a condition of prison visits); *Maria da Penha v. Brazil* (2001), Inter-Am. Comm. H.R. No. 54/01, *Annual Report of the Inter-American Commission on Human Rights: 2000*, OEA/Ser./L/V/II.111/Doc. 20, rev (domestic violence); *María Eugenia Morales de Sierra v. Guatemala* (2000), Inter-Am. Comm. H.R. No. 4/00, *Annual Report of the Inter-American Commission on Human Rights: 2000*, OEA/Ser./L/V/II.111/Doc. 20, rev (discriminatory dispositions in the Civil Code).

2 OAS, Ninth International Conference of American States, Final Act, *American Declaration of the Rights and Duties of Man*, OR OEASer.LVII.23/Doc. 21 rev. 6 (1979).

3 *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123 (entered into force 18 July 1978) [*Pact of San José*].

4 *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, 9 June 1994, 35 I.L.M. 1535 (entered into force 5 March 1995)) [*Convention of Belem do Pará*].

5 See generally OAS, Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OR OEA/Ser.L/V/II.130/Doc. 22, rev. 1 (2007), online: <http://www.cidh.org/annualrep/2007eng/TOC.htm>.

6 *Nicaragua v. Costa Rica* (2007), Inter-Am. Comm. H.R. No. 11/07, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.130/Doc. 22, rev. 1 (in 2007 the

could be considered women's rights cases and can be divided into three broad categories of specific rights: 1) the rights to equality and non-discrimination; 2) the rights to physical and psychological integrity and freedom from sexual violence and; 3) reproductive and sexual rights. We will analyze those decisions in the next section.

Karina Montenegro* et al. *v. Ecuador[7]

This group of petitions dealt with female victims who, at the time of their arrest, were either pregnant or, in one case, 68 years old. Ecuadorian law provides that pregnant women and persons over 65 years of age shall not be deprived of liberty and that preventive custody shall be substituted with house arrest. Although most of the alleged victims obtained judicial orders to substitute their preventive custody with house arrest, these orders were never followed. The petitioners also argued that the detention was arbitrary, given the prison conditions in which they spent their pregnancies, gave birth, and still live with their children.

By declaring the petitions admissible, the Commission found that the detention alleged to contravene the conditions required under Ecuadorian law could constitute a violation of article 7 of the *American Convention*[8] (right to personal liberty) and article 7 of the *Convention of Belem do Pará*.[9] The Commission showed a contradictory approach to the scope of the potential violations that was both flexible and restrictive. One characteristic of the Inter-American system in general, and of the IACHR in particular, is the excessively expansive methodology it uses in dealing with petitions. Rather than restricting the consideration of cases to a limited number of potential violations, the Commission tends to analyze most of the petitions under the provisions of as many articles of the pertinent treaties as possible. Report 48/07 provides a good example of this tendency: although the petitioner did not claim violations of articles 5 (right to human treatment) and 19 (rights of the child) of the *American Convention*,[10] the Commission, invoking the principle of *iura novit curia,* considered that the conditions in which the alleged victims had spent their pregnancy, gave birth, and were raising their children could constitute a violation of those articles. This approach not only amplified the material scope of the case by including new potential violations but also the personal scope by including the children as potential victims, rather than restricting it to the mothers as originally presented by the petitioners. Using the same expansive interpretation of its own jurisdiction, and despite the fact that article 12 of the *Belem do Pará Convention*[11] grants jurisdiction

Commission issued an important decision on one of the first inter-State complaints brought by Nicaragua against Costa Rica. The complaint alleged systematic discrimination against Nicaraguan citizens living in Costa Rica. The Commission found the petition inadmissible).

7 *Karina Montenegro* et al. *v. Ecuador* (2007), Inter-Am. Comm. H.R. No. 48/07, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.130/ Doc. 22, rev. 1.

8 *Supra* note 3.

9 *Supra* note 4.

10 *Supra* note 3.

11 *Supra* note 4.

to the IACHR to hear claims regarding potential violations of article 7 of that treaty,[12] the Commission also understood that the conditions of detention could constitute a violation of article 4 (b) of the *Convention of Belem do Pará.*[13]

That relaxed approach to finding additional potential violations contrasts with the Commission's silent rejection of the claims made under article 24 of the *American Convention*[14] (right to equal protection). The IACHR simply stated that the "arguments laid out by the petitioner do not tend to establish possible violations"[15] of the above article. The Commission did not consider it necessary to elaborate on its reasoning. As an admissibility decision, the Commission needed only to decide if the allegations were not "manifestly groundless or obviously out of order."[16] The Commission's flimsy reasoning makes it impossible to understand why an allegation of discrimination for a situation that negatively affects only pregnant women is manifestly groundless or obviously out of order. In the *Tellez* case[17] to be discussed later, the IACHR took the completely opposite position regarding a labour regime that applied exclusively to women. Furthermore, the Commission did not explain why the State's failure to effectively enforce a regime created to protect pregnant women in detention did not constitute a potential violation of the equal protection clause.

Report 48/07 simultaneously illustrates the diversity of instruments at the IACHR's disposal and its willingness to integrate the regional system with the universal one. The Commission admitted the case for potential violations of rights protected under the *American Convention*[18] and the *Convention of Belem do Pará.*[19] While the Commission correctly noted that is not appropriate to enforce the *U.N. Convention on the Elimination of all Forms of Discrimination Against Women*,[20] it maintained that "nevertheless, said instrument may be used in its interpretation of provisions contained in the *American Convention* and the *Convention of Belem do Pará*."[21] From its very first Advisory Opinion, the Inter-American Court on Human Rights recognized that a "tendency to integrate the regional and universal systems for the protection of human rights can be perceived in the Convention"[22] and perceived

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12 *Ibid.* art. 12 ("[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party […]").

13 *Ibid*.

14 *Supra* note 3.

15 *Supra* note 7 at 68.

16 *Supra* note 3, art 47.

17 *Elena Téllez Blanco v. Costa Rica* (2007), Inter-Am. Comm. H.R. No. 29/07, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.130/ Doc. 22, rev. 1.

18 *Supra* note 3.

19 *Supra* note 4.

20 *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 at 193 (entered into force 3 September 1981) [*CEDAW*].

21 *Supra* note 7 at para. 52.

22 *Other treaties subject to the advisory jurisdiction of the Court (Art. 64 American Convention Human Rights)* (1982), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (Ser A) No. 1, at paras. 41, 43, OEA/Ser.L/V/III/9/Doc.13.

the "need of the regional system to be complemented by the universal."[23] The Commission often states that

> due regard should […] be given to other relevant rules of international law applicable to member states against which complaints of violations […] are properly lodged as well as developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions. [Those d]evelopments […] may in turn be drawn from various sources of international law, including the provisions of other international and regional human rights instruments […].[24]

Jessica Gonzales and Others v. United States[25]

In June 1999, Jessica Gonzales' estranged husband abducted her three daughters, in violation of a domestic violence restraining order. Ms. Gonzales repeatedly called and met with the police to report the abduction and restraining order violation. The petition claimed that the police failed to respond to her urgent calls. Ten hours after her first call to the police, Ms. Gonzales' estranged husband arrived at the police station and opened fire. The police immediately shot and killed Mr. Gonzales, and then discovered the bodies of the Gonzales daughters (7, 8 and 10) in the back of his pickup truck. There was never a criminal investigation into the deaths of the three minors. Ms. Gonzales filed a civil lawsuit against the police, but in June 2005, the United States Supreme Court allegedly validated the law enforcement officials' conduct by holding that Ms. Gonzales was not entitled under the United States Constitution to have the restraining order enforced by the police.

This is the first complaint brought by a domestic violence victim against the United States for alleged international human rights violations. The Commission is the only international organization that has compulsory jurisdiction to hear and decide on individual complaints for alleged human rights violations committed by the United States: when it does so, it assesses whether the State has violated its obligations under the *American Declaration*,[26] a source of legal obligations for all OAS Member States.[27]

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23 *Ibid*.

24 *Michael Domingues v. Unites States* (2002), Inter-Am. Comm. H.R. No. 62/02, at paras. 44-45, *Annual Report of the Inter-American Commission on Human Rights: 2002*, OEA/Ser.L/V/II.117/Doc. 1, rev. 1 [footnotes omitted].

25 *Jessica Gonzales and Others v. United States* (2007), Inter-Am. Comm. H.R. No. 52/07, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.130/Doc. 22, rev. 1.

26 *Supra* note 2.

27 *Jessica Gonzales*, *supra* note 25 at 56. See also among others *Juan Raul Garza v. United States* (2001), Inter-Am. Comm. H.R. No. 52/01, *Annual Report of the Inter-American Commission on Human Rights: 2000*, OEA/Ser./L/V/II.111/Doc. 20, rev; *Michael Domingues*, *supra* note 24; *Napoleon Beazley v. United States* (2003), Inter-Am. Comm. H.R. No. 101/03, *Annual Report of the Inter-American Commission on Human Rights: 2003*, OEA/Ser.L/V/II.118/Doc. 5, rev. 2; *Cesar Fierro v. United States* (2003), Inter-Am. Comm. H.R. No. 99/03, *Annual Report of the Inter-American Commission on Human Rights: 2003*, OEA/Ser.L/V/II.118/Doc.5, rev. 2.

The Government argued that no provision of the *American Declaration*[28] imposes an affirmative duty on States to prevent the commission of individual crimes by private parties such as the criminal murders at issue in this case. The Commission did not respond directly to the question of whether the *American Declaration*[29] imposed an affirmative duty to prevent crimes by private parties. By referring the question to the merits phase, it simply stated that

> the scope of this obligation in the present case can and will be reviewed in light of the circumstances of the facts alleged, the jurisprudence of the Inter-American system of human rights and its application to countries which have not ratified the American Convention. The allegations of the parties in this case do not indicate the petition is manifestly groundless or out of order […].[30]

Interestingly, in a footnote, the Commission referred to two Colombian cases where the Court found the State in violation of the *American Convention*[31] for actions committed by paramilitaries groups acting at least with the acquiescence of the State.[32] The Commission has consistently established that any interpretation and application of the *Declaration*[33] should pay due regard to other relevant rules of international law. In particular, this includes the *American Convention*,[34] which, according to the Commission, may be considered in many instances to represent an authoritative expression of the fundamental principles set forth in the *American Declaration.*[35]

Nevertheless, the Commission did not elaborate on why the Court's case law in applying the *American Convention*[36] is relevant to interpreting the *Declaration*[37] in the present case. Particularly, there is no mention of the fact that the *Declaration*[38] lacks an equivalent to article 1 (1) of the *Convention*,[39] the cornerstone of the Court's argument to attribute responsibility to the State for the actions of private actors. In the

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28 *Supra* note 2.
29 *Ibid*.
30 *Jessica Gonzales*, *supra* note 25 at 56.
31 *Supra* note 3.
32 *Mapiripán Massacre Case (Colombia)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 134, at para. 111, *Annual Report of the Inter-American Court of Human Rights: 2005*, OEA/Ser.L/V/II.124 (2006); *Pueblo Bello Massacre Case (Colombia)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 140, at para. 123, *Annual Report of the Inter-American Court of Human Rights: 2006*, OEA/Ser.L/V/II.127 (2007).
33 *Supra* note 2.
34 *Supra* note 3.
35 *Supra* note 4. See OAS, Inter-American Commission on Human Rights, *Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OR OEA/Ser.L/V/II.106/Doc. 40, rev (2000) at 38; *Garza*, *supra* note 27 at. paras. 88-89 (confirming that while the Commission clearly does not apply the *American Convention* in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the *Declaration*).
36 *Supra* note 3.
37 *Supra* note 2.
38 *Ibid*.
39 *Supra* note 3.

Velásquez Rodriguez case, the Inter-American Court effectively held that "when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention […] the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction" as established in article 1 (1) of the *American Convention*.[40] Nor did the Commission take the opportunity to mention how the State's duties in relation to a massacre perpetrated by paramilitary groups with State acquiescence in the context of an armed conflict is similar to the killing of three children by their father as in this case. The Commission did not make reference to its own *Report on Access to Justice for Women Victims of Violence in the Americas.*[41] In that report, the IACHR not only identified some of the crucial problems facing female victims of violence, but also provided an extensive development of the applicable legal standards, including the existence of positive State obligations to prevent, investigate and punish incidences of violence against women. It is surprising that the Commission chose not to refer to its own findings, but instead quoted the two above-mentioned court decisions that applied different instruments and were adopted in completely different factual circumstances.

The Commission observed that the petitioners alleged

> that the police authorities engage in a systematic and widespread practice of treating domestic violence as a low-priority crime, belonging to the private sphere, as a result of discriminatory stereotypes about the victims. These stereotypes influence negatively the police response to the implementation of restraining orders. The failures in the police response affect women disproportionately since they constitute the majority of victims of domestic violence. The deficiencies in the State response allegedly have a particularly alarming effect on women that pertain to racial and ethnic minorities, and lower-income groups.[42]

It is not clear if the Commission was restating the petitioners' position or if it was making factual or legal determinations that hint at the types of issues that it will consider in its decision at the merits phase.

In this case, the petitioners challenged both the actions and omissions of the State of Colorado and of the United States Supreme Court. Thus, the *Gonzalez* case, like others related in the present article, will require the Commission to clarify the scope of human rights obligations in the context of federal states. This is a matter of extreme importance in the Americas given that six OAS member States are federal States[43] and the majority of the population protected by the Inter-American human rights system lives in federal States. To interpret the obligations from the *American*

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40 *Velásquez-Rodríguez Case (Honduras)* (1988), Inter-Am. Ct. H.R. (Ser. C) No. 4, at para. 176, *Annual Report of the Inter-American Court of Human Rights : 1988,* OEA/Ser.L/V/III.19/Doc.13.

41 OAS, Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, OR OEA/Ser.L/V/II, Doc. 68 (2007).

42 *Jessica Gonzales*, *supra* note 25 at 58.

43 Argentina, Brazil, Canada, Mexico, the United States, and Venezuela.

Declaration[44] for federal States, the Commission considered it appropriate in at least one occasion to compare a specific rule – the right to elect representatives to the federal legislative branch by the residents of the city where the federal government had its seat – that exists in other American federal countries.[45] In the only decision where the Commission took issue with the U.S. federal distribution of competences, the IACHR found that the U.S. had violated its international obligations by allowing the decision of whether homicides committed by minors deserved the death penalty to remain in the hands of individual states rather than of the federal government.[46] In many federal countries, the enactment of criminal legislation is eminently a local rather than a central government matter.[47] The categorical conclusion reached by the IACHR would force federal states such as Mexico and the United States to modify this constitutional distribution of authority, which is, in turn, the result of complex institutional balancing and historical practice. It remains to be seen whether, in the *Gonzalez* case, the Commission will use the practice of other American federal States regarding legislation on violence against women as an interpretative tool and whether it will consider the possibility of using the federal clause of the *American Convention*[48] to shed light upon the obligations arising from the *American Declaration.*[49]

Paulina del Carmen Ramírez Jacinto v. Mexico[50]

The *Ramirez* friendly settlement agreement between the petitioners and the State of Mexico constitutes one of the most important cases related to sexual and reproductive rights that has been decided and approved by the Commission to date.[51]

On 31 July 1999, Paulina del Carmen Ramírez Jacinto, then fourteen years old, was raped in her home. The incident was immediately reported to the Public Prosecutor specializing in sexual crimes and domestic violence. The rape resulted in a pregnancy, which Paulina and her mother decided to abort. Article 136 of the *Baja California Criminal Code* makes rape cases one of the exceptions in which abortion is

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44 *Supra* note 2.

45 See *Statehood Solidarity Committee v. United States* (2003), Inter-Am. Comm. H.R. No. 98/03, at para. 108, *Annual Report of the Inter-American Commission on Human Rights: 2003*, OEA/Ser.L/V/II.118/Doc. 5, rev. 2 (comparing the situation of Washington, D.C. with Mexico, D.F., Brasilia, Caracas, Buenos Aires, and Ottawa).

46 *Roach and Pinkerton v. United States* (1987), Inter-Am. Comm. H.R. No. 3/87, at para. 63, *Annual Report of the Inter-American Commission on Human Rights 1986-1987*, OEA/Ser.L/V/II.71/Doc. 9, rev. 1.

47 See for example, article 23 of the Mexican Constitution and article 22 of the Brazilian Constitution. See also article 75 of the Argentinean Constitution and article 156 of the Venezuelan Constitution.

48 *Supra* note 3, art. 28.

49 *Supra* note 2.

50 *Paulina Del Carmen Ramirez v. Mexico* (2007), Inter-Am. Comm. H.R. No. 21/07, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.130/Doc. 22, rev. 1.

51 The Human Rights Committee decided a case with some similarities, see Human Rights Committee, *Karen Noelia Llantoy Huamán v. Peru*, HRC Communication No. 1153/2003, UN HCR, 85th Sess., UN Doc. CCPR/C/85/D/1153/2003 (2005).

legal.[52] On 3 September 1999, the Public Prosecutor's Office granted them the necessary authorization for the intervention to be performed at a public hospital. She received an appointment for October 1st and remained at the hospital until October 8th, during which time the procedure was not performed and she was unjustifiably forced to fast. Once again, Paulina and her mother went to the Public Prosecutor's Office, which repeated the order for the medical procedure to be performed. Following that, the State Attorney General took Paulina and her mother to a Roman Catholic priest. On 13 October 1999, Paulina was readmitted to the hospital. The next day, two women with no connection to the health services visited her while her mother was not present. Invited by the hospital's director to visit, these women showed Paulina violent videos of abortion procedures in order to dissuade her from terminating her pregnancy and subsequently did the same with her mother. On 15 October 1999, moments before the surgical intervention was to take place, the director of the General Hospital met with Paulina's mother to describe the alleged risks of the procedure. He also said in the event of Paulina's death, her mother would be solely responsible. This biased and imprecise information succeeded in scaring the mother, who decided to ask the medical staff to refrain from proceeding with the operation. Based on these facts, the petitioners brought the case to the Commission and reached a friendly agreement after long negotiations with the State.

Because the parties reached such a settlement agreement, the Commission could not rule on the merits of the petition. The proper interpretation of article 4 of the *Convention* – stating that "every person has the right to have his life respected. This right shall be protected by law and, *in general, from the moment of conception*"[53]– remains for another occasion.[54] Particularly, the Commission will need to decide how that article connects to other articles of the *American Convention*,[55] including those that protect the physical, moral and psychological integrity of women and their rights to equal protection, privacy and dignity, among others.

Despite that the Commission did not have the opportunity to rule on the merits, it did say that

> the *Convention of Belem do Para* states that the victims of sexual violence are entitled to the recognition, enjoyment, exercise, and protection of all

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52 ("[a]bortion shall not be punishable: […] When the pregnancy is caused by rape […], provided that the abortion is carried out within the first ninety days of gestation and the incident was duly reported, in which case it may be performed on the sole condition that the incident is verified by the Public Prosecutor's Office").

53 *Supra* note 3, art. 4 [emphasis added].

54 *Baby Boy v. United States of America* (1981), Inter-Am. Comm. H.R. No. 23/81, *Annual Report of the Inter-American Commission on Human Rights:1980-1981*, OEA/Ser.L/V/II.54/Doc. 9, rev. 1 (one should recall that the Commission had already ruled that the U.S., by allowing legal abortions, was not in violation of the American Declaration); *James Demers v. Canada* (2006), Inter-Am. Comm. H.R. No. 85/06, at para. 45, *Annual Report of the Inter-American Commission on Human Rights: 2006*, OEA/Ser.L/V/II.127/Doc. 4, rev. 1 (in the Demers case, the Commission also declared inadmissible the claims that abortion, as it is regulated in Canada, violated the rights of "hundreds of thousands of unborn children and their mothers").

55 *Supra* note 3.

> their human rights, including the civil, political, economic, social, and cultural rights enshrined in regional and international human rights instruments. The Commission also underscores that women cannot fully enjoy their human rights without having timely access to comprehensive health care services, and to information and education in this sphere. The IACHR also notes that the health of sexual violence victims should be treated as a priority in legislative initiatives and in the health policies and programs of Member States.[56]

The delicate language chosen by the Commission shows that the Inter-American body was not prepared to make explicit references to the existence of sexual and reproductive rights, even if abortion is a legal possibility, at least in the case of pregnancies resulting from rape.

This is not the first time that the Commission has been precluded from ruling on the merits of petitions dealing with sexual and reproductive rights; several other petitions have also concluded in friendly settlement. In the *Carabantes Galleguillos* case, the Commission approved a friendly settlement agreement concerning a petition challenging the decision of a private school to expel a student for becoming pregnant.[57] The IACHR also adopted a friendly settlement report in the *María Mamérita Mestanza Chávez* case, which involved a woman's death resulting from a forced sterilization.[58] In the *Sanchez Villalobos* case, petitioners challenged the complete ban of *in vitro* fertilization in Costa Rica. The Commission declared the petition admissible in 2004. It has not issued a decision on the merits to date.[59]

As mentioned in other cases, as reflective of common Inter-American practice, the petitioners alleged a long list of potential violations from a variety of instruments, many of them outside the jurisdiction of the Commission.[60] Pursuant to articles 48 (1)(f) and 49 of the *American Convention*,[61] the Commission should approve friendly settlements reached "on the basis of respect for the human rights

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56 *Paulina Del Carmen Ramirez, supra* note 50 at para 19.

57 *Mónica Carabantes Galleguillos v. Chile* (2002), Inter-Am. Comm. H.R. No. 33/02, *Annual Report of the Inter-American Commission on Human Rights: 2002*, OEA/Ser.L/V/II.117/Doc. 1, rev. 1.

58 *María Mamérita Mestanza Chávez v. Peru* (2003), Inter-Am.Comm. H.R. No. 71/03, *Annual Report of the Inter-American Commission on Human Rights: 2003*, OEA/Ser.L/V/II.118/Doc. 5, rev. 2.

59 *Ana Victoria Sanchez Villalobos and Others v. Costa Rica* (2004), Inter-Am. Comm. H.R. No. 25/04, *Annual Report of the Inter-American Commission on Human Rights:2004*, OEA/Ser.L/V/II.122/Doc. 5, rev. 1.

60 *Pact of San José*, *supra* note 3, art. 1, 5, 7, 8, 11-12, 19, 25; *Convention of Belem do* Pará, supra note 4, art. 1-2, 4, 7, 9; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"*, 17 November 1988, O.A.S.T.S. No. 69, art. 10 (entered into force 16 November 1999) [*Protocol of San Salvador*]; *CEDAW*, *supra* note 20, art. 12; *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3, art. 19, 37, 39 (entered into force 2 September 1990); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 art. 9, 17, 24 (entered into force 23 March 1976); *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. A/810 (1948) 71.

61 *Pact of San José*, *ibid*.

recognized in [the *American*] *Convention*."[62] Petitioners alleged violations of several OAS and U.N. human rights treaties. Nevertheless, in Report 21/07 the Commission did not rule on whether it had jurisdiction to approve a friendly settlement for alleged violations of universal treaties outside its own material jurisdiction. Nor did the Commission address the alleged violations of article 10 of the *San Salvador Protocol*[63] or articles 1, 2, 4 and 9 of the *Belem do Para Convention*,[64] despite that those treaties do not grant the Commission jurisdiction to receive individual complaints regarding those specific articles. The Commission most likely did not feel that it was necessary to address this jurisdictional issue given the fact that many other articles alleged by the petitioners fell under the Commission's jurisdiction.

An additional observation regarding the legal characterization of the complaint is that the Commission declared that it

> has repeatedly stated that protecting and promoting the rights of women is a priority for OAS member states, with the goal of ensuring the full and effective enjoyment of their basic rights, in particular the rights of equality, to freedom from discrimination, and to a life free from gender-based violence.[65]

That statement is important because the petitioners, despite their long list of potential violations, did not include an allegation of the violation of article 24 of the *American Convention*[66] that guarantees the right to equal protection.

The question of federal and local relations also resurfaced in this case, since the petition challenged the actions and omissions of the authorities of the State of Baja California. The achievement of friendly settlements in cases involving acts at the provincial level has proven to be extremely difficult. Results have been mixed, and the Commission and the Court reached diametrically opposite decisions in at least one occasion.[67] Contrary to those experiences, the federal and local authorities in Mexico engaged in discussions with the petitioners to reach an agreement in the *Ramirez* case. In this friendly settlement agreement signed by the federal government, the local authorities assumed most of the obligations (in eleven out of twelve clauses). The Commission, in turn, accepted the agreement and stated that

> [t]he achievements secured through the actions and good disposition of the two parties in this matter offer a significant example to be followed in

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62 *Ibid.*, art. 48 (1)(f).

63 *Protocol of San Salvador*, *supra* note 60.

64 *Supra* note 4.

65 *Supra* note 50 at para 18.

66 *Supra* note 3.

67 On this matter, see more specifically *Paulo C. Guardatti v. Argentina* (1997), Inter-Am. Comm. H.R. No. 31/97, *Annual Report of the Inter-American Commission on Human Rights: 1997,* OEA/Ser.L/V/II.98/Doc. 6, rev; *Garrido and Baigorria (Argentina)* (1998), Inter-Am. Ct. H.R. (Ser. C) No. 39, *Annual Report of the Inter-American Commission on Human Rights: 1998*, OEA/Ser.L/V/III.43/Doc. 11. See also *Emasculated Children Of Maranhao v. Brazil* (2006), Inter-Am. Comm. H.R. No. 43/06, *Annual Report of the Inter-Commission on Human Rights: 2006*, OEA/Ser.L/V/II.127/Doc. 4, rev. 1.

> other cases – both those that involve Mexico as well as other cases from other regions and countries of the hemisphere. In particular, the IACHR appreciates the active and direct interest of the representatives of the federal government and of the government of Baja California, pursuant to the terms of [a]rticles 1, 2, and 28 of the *American Convention.*[68]

The Commission advanced an important understanding of the federal clause included in article 28 of the *American Convention*[69] in a way that does not limit the responsibility of the federal government. On the contrary, the Commission maintained that "in a federally structured country such as Mexico, national and local authorities alike are obligated to uphold in full the rights enshrined in the *American Convention*."[70] In what appears to be a message intended to all the federal states in the Americas, the Commission noted with approval "the joint, complementary work carried out by the federal and local authorities – each within its sphere of competence."[71]

The agreement reached shows the potentiality of the friendly settlement process in the Inter-American System and the extent to which the parties are willing to go beyond the traditional concept of reparations.[72] Actually, friendly settlement has

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68 *Paulina Del Carmen Ramirez, supra* note 50 at para 25.

69 *Supra* note 3.

70 *Paulina Del Carmen Ramirez, supra* note 50 at para 25.

71 The Commission appears to be echoing the practice of many different United Nations organs that had call on federal States to engage in close cooperation and coordination among their different authorities and organizations for the effective implementation of the provisions of treaties within the different units of each federation. See Committee on Economic, Social and Cultural Rights, *Concluding observations: Australia*, UN ESCOR, 1993, UN Doc. E/C.12/1993/9 at para. 13; Human Rights Committee, *Concluding observations: Germany*, UN ESCOR, 2004, UN Doc.. CCPR/CO/80/DEU, at para. 12; Human Rights Committee, *Concluding observations: Switzerland*, UN ESCOR, 2001, UN Doc. CCPR/CO/73/CH, at para. 6; Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: Addendum Visit to Argentina*, UN ESCOR, 2003, UN Doc. E/CN.4/2004/3/Add.3; Human Rights Committee, *Concluding Observations: Brazil*, UN ESCOR, 1996, UN Doc. CCPR/C/79/Add.66; Human Rights Committee, *Concluding Observations: Australia*, UN ESCOR, 2000, UN Doc. A/55/40, at paras. 498-528.

72 In the *Ramirez* case, the Mexican federal government and the state Government of Baja California agreed to pay the victim and her son damages covering the legal and medical expenses; assistance for maintenance expenses and with necessities and school supplies and a sum for moral damages. The state Government also committed to provide health and psychological services and support with educational costs up to higher education. In addition, the Government of Baja California handed over a computer and printer and lump sum to help Paulina del Carmen Ramírez Jacinto in setting up a microenterprise. The Government of Baja California offered a Public Acknowledgement of Responsibility in accordance with the terms agreed with the victim and published it in the local newspapers as well as in the Official Gazette of the State. The parties created a working committee to prepare draft legislation and the Government of Baja California committed to submit to and promote before the State Congress those legislative proposals. Additionally, the local government agreed to schedule training courses for its employees to be conducted by the petitioners. The federal Government committed to conduct a national survey regarding medical assistance in cases of domestic violence, and to measure progress with the implementation of the National Program for the Prevention and Attention of Domestic, Sexual, and Violence against Women. The federal government also undertook to prepare a circular in order to strengthen their commitment toward ending violations of the right of women to the legal termination of a pregnancy. Finally, the federal government, through the National

become a characteristic feature of proceedings before the Inter-American Commission.[73]

Marcia Barbosa de Souza v. Brazil[74]

In another case of violence against women, the Commission declared admissible a petition against Brazil. Ms. Marcia Barbosa de Souza was found dead in a vacant lot in Joao Pessoa, capital of the state of Paraiba, on 18 June 1998. The local police investigation attributed responsibility for the crime to a state legislator, said to be the alleged victim's lover. The prosecutor was barred from bringing a criminal action against that person, given his legislative immunity, as the state legislature had not granted authorization for the proceeding. A constitutional amendment in 2001 permitted criminal actions against legislators without prior authorization by the Legislative Assembly. Nonetheless, the competent authorities in the State of Paraiba did not take any new initiative in the criminal action until March 2003. A jury trial was scheduled to take place in September 2007 (more than nine years after the crime) when the Commission ruled on the admissibility of the petition.

The Commission rejected the claims of the alleged violations of the rights enshrined in articles 3, 4, and 5 of the *Convention of Belem do Para.*[75] The IACHR correctly pointed out that article 12 of the *Convention of Belem do Para*[76] establishes that only violations of article 7 of that *Convention*[77] are actionable before the organs of the Inter-American system. This decision openly contradicts what the Commission established in its Report 48/07 summarized earlier, where the IACHR admitted a complaint of a violation of article 4 (b) of the *Belem do Para Convention.*[78]

In contrast with the silent rejection of the equal protection claim made in Report 48/07, the Commission found necessary to explain in the *Barbosa* case its reasoning for admitting the allegations of a potential violation of article 24 of the *American Convention*,[79] the right to equality before the law. It stated that the petitioner's allegation is based on facts that occurred in a context of impunity

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Center for Gender Equality and Reproductive Health, committed to conduct a review of books, indexed scientific articles, postgraduate theses, and documented governmental and civil society reports dealing with abortion in Mexico, in order to prepare an analysis of the information that exists and detect shortcomings in that information.

73 See Nicolás de Piérola & Carolina Loayza, "La Solución Amistosa de Reclamaciones ante la Comisión Interamericana de Derechos Humanos" [The Friendly Settlement of Complaints before the Inter-American Commission on Human Rights] (1995) 22 Revista del Instituto Interamericano de Derechos Humanos 175; Jorge Ulises Carmona Tinoco, "La Solución amistosa de Peticiones de derechos humanos en el ámbito universal y regional, con especial referencia al sistema interamericano," [The Friendly Settlement of Human Rights Petitions in the Universal and Regional Spheres, with Special Reference to the Inter-American System] (2005) 5 Anuario Mexicano de Derecho Internacional 83.

74 *Marcia Barbosa De Souza v. Brazil* (2007), Inter-Am. Comm. H.R. No. 38/07, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.130, Doc. 22, rev. 1.

75 *Supra* note 4.

76 *Ibid.*, art 12.

77 *Ibid*., art. 7.

78 *Ibid*., art. 4; *Karina Montenegro*, *supra* note 7 and accompanying text.

79 *Supra* note 3.

regarding violent acts by the justice administration, thus disproportionally affecting women as a group and allowing for the repetition of these acts. Within this pattern of impunity, attitudes based on socio-cultural discriminatory concepts that affect mainly women can be found in judicial employees. This pattern allegedly resulted in extreme and unjustifiable procedural dilates in cases of violence against women – as is argued in this one – despite the legislative reform regarding parliamentary immunity in 2001.

A plausible explanation of the differences between Reports 48 and 38 involve the extreme difficulties facing the Commission when dealing with allegations of equal protection and non-discrimination. In 2007 alone, the Commission declared inadmissible claims of unequal treatment or discrimination in 13 petitions. In the same year, admitted claims made under the equal protection clause in 7 petitions. The IACHR did not deem necessary to elaborate on its reasoning in most of the unequal protection inadmissibility decisions but did include an explanation in most of the petitions admitted under article 24.

Elena Téllez Blanco v. Costa Rica[80]

The petitioners contended that the alleged victim, a worker for the centers or shelters established by the Patronato Nacional de la Infancia (PANI), had an excessive, disproportionate working day which often extends to 24 hours a day for 11 consecutive days. The alleged victim was employed as a "substitute aunt" at one of the shelters or residences for children, where she cared for an average of 10 to 20 children, ranging from infants to adolescents. The very name of the position they held indicated that they were reserved for women and that, in practice, all the "substitute aunts" were women. The petitioners argued that both PANI and the judicial authorities had a stereotyped notion of women, whereby "in their role as mothers", they were obliged to look after their children 24 hours a day and do household chores without the right to time off.

A group of employees filed an *amparo* petition and an unconstitutionality action with the Constitutional Chamber of the Supreme Court, which found partial merits in the action. The decision established that the type of work was part of an exceptional work regime, and thus the working conditions and the work hours required of the substitute aunts were not in violation of the law. The Chamber further decided that this type of work day was necessary for the proper development of the minors, who need continuous daily care. It also determined that the work day should be 12 hours instead of 24, which had the effect of making the contested legal provision unconstitutional, and it granted the right to higher wages for the additional hours in the working day, during which the substitute aunts had to be available. The petitioners further alleged that, despite the Constitutional Chamber's decision, the substitute aunts were still instructed to maintain the working schedule of eleven consecutive days, with a working day that in fact extended to 24 hours, from Monday to Sunday. They stated that, given this situation, the Employees Union of PANI filed

[80] *Supra* note 17.

a second unconstitutionality petition. The Constitutional Chamber declared that there was no infringement of the fundamental rights of the substitute aunts, since the established twelve hour working day was being observed, and that their work day was being recognized, as was their availability and stay at the workplace, by payment of the appropriate wages.

The State insisted that the petitioner was not a party to either of these two proceedings, and furthermore, the petition lodged with the Commission did not indicate at any point that Mrs. Tellez was a party to any of these proceedings. The State maintained that although the judgments of the Constitutional Chamber of the Supreme Court have an *erga omnes* effect, some of the rights claimed by the petitioner were not examined in the *amparo* action the Commission accepted the petitioners' claim that the *amparo* action was brought by the Employees' Union of the Patronato Nacional de la Infancia*,* and in procuring any type of improvement in working conditions for the group of persons employed as substitute aunts by PANI, thus represented the interests of Ms. Tellez within Costa Rica. The IACHR has consistently held the importance of granting standing to labour unions to represent the interests of unionized workers in courts. In cases such as this one, where civil and political rights are intertwined with economic, social and cultural rights, and where multiple persons are affected by the same situation, the Commission has insisted that there should be adequate mechanisms for judicial protection to guarantee collective litigation.[81]

The Commission rejected the State contention that the petition was inadmissible because it did not characterize a violation of the principle of equality and non-discrimination by gender. According to the State the "substitute aunts program" was an exceptional regime, established by law, especially due to the fact that these workers play a role of the utmost importance for the benefit of minors in a vulnerable situation. The differences with other labour regimes were reasonable and objective, the end pursued was a legitimate purpose and there was a payment for the hours of availability that met the requirements of rationality. The Commission, to the contrary, accepted the idea that a "violation of [a]rticle 24 of the [*Convention*] […] could be established if it were proven that the workload to which Mrs. Tellez Blanco is subject has a disproportionate impact on women, since only women occupy the '[a]unt' positions."[82] It appears that the Commission opened the possibility of finding violations of the equal protection clause only by establishing a disproportionate impact on women, without requiring that the impact be negative or assessing whether there could be reasonable explanations for those differences. The dissenting Commissioners rejected this idea of finding potential violations of article 24 in abstract. They argued that if Ms. Téllez was a victim of discrimination based on the exclusive contracting of women for the position of surrogate aunt, then men would be possible victims of exclusion by not being permitted access to employment of this

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[81] See OAS, Inter-American Commission on Human Rights, *Access to justice as a guarantee of economic, social and cultural rights: a review of the standards adopted by the Inter-American system of human rights,* OR OEA/Ser.L/V/II.129 (2007).

[82] *Elena Téllez Blanco*, *supra* note 17 at para 62.

type; however, this would not constitute the basis for a discrimination claim in the case of Ms. Téllez. To the extent that the petitioners argued instead that the employment conditions and work hours of Ms. Téllez and other surrogate aunts constituted a discriminatory treatment against them in comparison to men, the dissenting Commissioners maintained that the petitioners had not alleged facts that would show, statistically or otherwise, such a difference in treatment between men and women in sufficiently comparable situations. The dissenting Commissioners did not make the connection between the two arguments made by the petitioners, that only women were being hired to an exceptional and harsh labour regime, nor did they explain why that situation could not be analyzed as a disproportionate impact case.

The Commission also accepted with a strong dissent of three members that the facts could constitute a violation of the right to physical integrity. The dissenting Commissioners understood that the scope of article 5 of the *Convention*[83] was not intended to govern ordinary labour relations or to impose specific standards on States with respect to employment conditions and working hours in the framework of labour contracts, whether in the public or the private sector. The minority understood that "there exist international standards on such issues and a system for their international supervision, particularly in the framework of the International Labour Organization."[84] In their opinion, they did not address why they could not use these ILO standards to interpret article 5, as does the Inter-American system with their agreement, in many other areas. Nevertheless the dissenting Commissioners accepted the possibility of the application of article 5 to labour conditions in certain special situations – for example, in situations where specific, extreme working conditions that harm a person's physical, psychological, or moral integrity were coupled with circumstances that made the employment relationship a form of, or analogous to, involuntary servitude. In the case presented here, however, the petitioners had not alleged any facts that present such special circumstances. It is not clear why, for the minority, this type of extreme labour conditions would not qualify as a violation of article 6 that bans involuntary servitude and forced or compulsory labour, rather than of article 5.

The Commission declared the petition inadmissible under article 7 of the *Convention of Belem do Para*[85] without giving much explanation. It is not clear why the allegation that the labour regime had a disproportionate impact on women did not qualify as a potential violation of the *Belem do Para Convention.*[86] It is important to recall that the *Convention*[87] establishes the right of women to live without discrimination and that in this case, the Commission admitted that there could be a violation of the principle of non-discrimination. In both the *Marcia Barbosa de Souza* and *Karina Montenegro* et al. cases summarized earlier, the IACHR specifically admitted *Belem do Para Convention*[88] claims for facts "affecting disproportionably

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83 *Supra* note 3.
84 *Elena Téllez Blanco*, *supra* note 17.
85 *Supra* note 4.
86 *Ibid*.
87 *Ibid*.
88 *Ibid*.

women as a group."[89] It is hard to reconcile these three apparent contradictory approaches to the *Belem do Para Convention.*[90]

II. La Cour interaméricaine des droits de l'homme en 2007

En 2007, la Cour interaméricaine des droits de l'homme a rendu douze décisions dans le cadre d'affaires contentieuses[91], dont deux décisions portant sur l'interprétation de décisions passées[92]. La Cour a également adopté 33 résolutions de suivi de mise en œuvre de jugements rendus antérieurement[93], de même que 36 résolutions de mesures provisoires (rendues par la Cour ou son Président)[94]. La présente section portera plus particulièrement sur cinq décisions traitant d'un thème d'importance capitale pour l'hémisphère, à savoir la protection du droit à la vie et la protection judiciaire s'y rapportant, dans trois contextes plus spécifiques, à savoir ceux de la lutte contre l'impunité, de la fourniture de soins de santé et de l'application de la peine de mort[95].

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89 *Marcia Barbosa De Souza*, *supra* note 74 au para. 51.

90 *Ibid*.

91 Voir généralement OÉA, Cour interaméricaine des droits de l'homme, *Annual Report of the Inter-American Court of Human Rights: 2007*, OEA/Ser.L/V/II.130 (2007), en ligne : OÉA <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202007%20ING.pdf>. Pour accéder aux décisions de la CIDH, voir en ligne : OÉA <http://www.corteidh.or.cr/casos.cfm>.

92 Ces décisions sont : *Affaire des employés renvoyés du Congrès (Aguado – Alfaro* et al*.) (Pérou)* (2007), Inter-Am. Ct. H.R. (Sér. C) nº 174, *Annual Report of the Inter-American Court of Human Rights : 2008*, OEA/Ser.L/V/II.134 (2009); *Affaire La Cantuta (Pérou)* (2007), Inter-Am. Ct. H.R. (Sér. C) nº 173, *Annual Report of the Inter-American Court of Human Rights : 2008*, OEA/Ser.L/V/II.134 (2009). Ce dernier jugement est abordé plus amplement dans Bernard Duhaime et Ariel E. Dulitzky, « Chronique de la jurisprudence du système interaméricain en 2006 » (2006) 19 :2 R.Q.D.I. 331 à la p. 354.

93 Voir OÉA, Cour interaméricaine des droits de l'homme, « Jurisprudence monitoring compliance with judgments », en ligne : Inter-American Court of Human Rights <http://www.corteidh.or.cr/supervision.cfm>.

94 Voir OÉA, Cour interaméricaine des droits de l'homme, « Jurisprudence provisional measures », en ligne : Inter-American Court of Human Rights <http://www.corteidh.or.cr/medidas.cfm>.

95 Le présent article ne traite pas des affaires suivantes : *Affaire Zambrano-Vélez (Équateur)* (2007), Inter-Am. Ct. H.R. (Sér. C) nº 166, portant entre autres sur les états d'exception et la suspension de droits, de l'*Affaire Bueno-Alves (Argentine)* (2007), Inter-Am. Ct. H.R. (Sér. C) nº 164, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007) (sur l'interdiction de la torture); *Affaire Cantoral-Huamaní et García-Santa Cruz (Pérou)* (2007), Inter-Am. Ct. H.R. (Sér. C), nº 167, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007) (sur la liberté d'association); *Affaire Chaparro Álvarez y Lapo Íñiguez (Équateur)* (2007), Inter-Am. Ct. H.R. (Sér. C) nº 170, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007) (sur le droit à la propriété). Ces décisions ont cependant fait l'objet de l'article de Claudio Nash R. et Claudia Sarmiento R., « Reseña de la Jurisprudencia de la Corte Interamericana de Derechos Humanos (2007) » (2008) 4 Anuario de Derechos Humanos, en ligne : <http://www.anuariocdh.uchile.cl>. Le présent article ne traitera pas non plus de l'*Affaire du peuple Saramaka (Suriname)* (2007), Inter-Am. Ct. H.R. (Sér. C) nº 172, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007).

Affaire du massacre de La Rochela (Colombie)[96]

La Cour eut à se prononcer relativement au massacre commis en 1989 dans le district de La Rochela, en Colombie, contre plusieurs magistrats chargés d'enquêter les circonstances entourant un massacre faisant l'objet d'une autre décision de cette même Cour, soit l'*Affaire des dix-neuf marchands*[97]. L'État reconnut d'emblée que ces magistrats avaient été arrêtés et exécutés par des paramilitaires colombiens; il reconnut également partiellement sa responsabilité à l'égard de certaines des violations alléguées par la Commission et les représentants des victimes.

Tout comme dans l'*Affaire des dix-neuf marchands*, la Cour reconnut que les faits avaient eu lieu dans un contexte de paramilitarisme d'État et que la Colombie devait être tenue responsable de l'existence de ce contexte propice aux violations des droits de la personne. La Cour considéra entre autres que l'État avait contribué de façon active à la création de ce contexte, par l'adoption de lois établissant et autorisant les activités de tels groupes[98]. Elle considéra également qu'il n'avait pas adopté de mesures pour protéger la population civile contre les risques inhérents à l'existence de ce contexte. La Cour ajouta que, dans ce cadre, de nombreuses violations étaient spécifiquement orchestrées contre des juges et des magistrats, ce qui avait eu pour conséquence d'intimider et de décourager ceux-ci de remplir diligemment leurs fonctions.

Tout comme dans l'affaire précitée, la Cour réitéra la responsabilité de l'État pour les violations commises par des membres des forces paramilitaires agissant avec l'appui, l'acquiescence, la participation ou la coopération des forces de sécurité étatiques[99]. Plus spécifiquement, la Cour conclut que l'opération paramilitaire de La Rochela visant à arrêter les magistrats, à détruire leurs documents et à les exécuter sommairement, avait été planifiée conjointement avec certains membres des forces armées colombiennes, ce que l'État avait d'ailleurs reconnu. Il fut également établi que ces groupes paramilitaires patrouillaient le secteur conjointement avec certains membres des forces armées, utilisaient leurs bases, leurs armes et leurs véhicules.

Enfin, il fut établi que les paramilitaires avaient spécifiquement ciblé les victimes, en raison de leur participation dans l'enquête de l'*Affaire des dix-neuf marchands*, les ayant interrogées à ce sujet avant de les abattre. La Cour conclut que l'État avait ainsi violé le droit à la liberté, le droit à la vie et le droit à l'intégrité physique des victimes[100].

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96 *Affaire du massacre de La Rochela (Colombie)* (2007), Inter-Am. Ct. H.R. (Sér. C) n° 163, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007).

97 *Affaire des dix-neuf marchands (Colombie)* (2004), Inter-Am. Ct. H.R. (Sér. C) n° 109, *Annual Report of the Inter-American Court of Human Rights:2004*, OEA/Ser.L/V/III.65/Doc. I.

98 Diverses lois adoptées dans les années 1960 autorisaient en effet la création et l'armement de groupes d'autodéfense, plus tard appelés paramilitaires. Ces lois prévoyaient, entre autres, que ces groupes seraient formés par les forces armées, recevraient des ordres de celles-ci et participeraient conjointement à leurs opérations.

99 Sur le sujet plus large de l'imputabilité, voir Dinah Shelton, « Private Violence, Public Wrongs and the Responsibility of States » (1989-90) 13 Fordham Int'l L. J. 1.

100 *Supra* note 3, art. 4-5, 7.

Il est particulièrement intéressant de constater que l'État fut non seulement considéré comme étant responsable de la violation du droit à la vie des magistrats exécutés, mais également des survivants, étant donné la magnitude du massacre et considérant que les responsables de l'opération avaient l'intention et l'objectif de tuer tous les magistrats présents[101]. La Cour interaméricaine conclut que les survivants n'avaient échappé à la mort que de façon fortuite et avaient donc subi, eux aussi, une violation de leur droit à la vie. Ce faisant, la Cour adopta une approche semblable à celle de la Cour européenne des droits de l'homme dans les affaires *Acar* et al. *c. Turquie* et *Makaratzis c. Grèce*[102].

L'État fut également tenu responsable de la violation du droit à l'intégrité de toutes les victimes en raison de l'angoisse subie lors de l'arrestation, dans l'attente de leur exécution inévitable. Il en fut de même pour les survivants qui subirent de nombreuses blessures lors du massacre, qui assistèrent à l'exécution de leurs collègues et qui s'attendaient ensuite à recevoir un coup de grâce. Il est décevant de constater cependant que la Cour qualifia ces violations d'atteintes à l'intégrité personnelle des victimes, sans spécifier si elles constituaient des actes de torture au sens de la *Convention*[103].

La Cour considéra enfin que la Colombie avait violé le droit aux garanties judiciaires et à la protection judiciaire des victimes considérant les retards considérables dans l'enquête relative au massacre, le manque de protection efficace des victimes malgré les plaintes existant à leur endroit, l'assassinat de témoins clefs, les retards dans l'exécution des ordres de capture, etc. Par ailleurs, notant que l'affaire avait été instruite en partie dans le cadre de l'application de la loi dite de « Justice et Paix »[104], traitant de la démobilisation, de la réinsertion et de la sanction de paramilitaires, la Cour, sans se prononcer sur la conformité de cette loi avec la *Convention*[105], formula, à la demande des parties, diverses recommandations relatives à l'application de cette loi. Elle rappela de façon générale qu'en appliquant cette loi, l'État se devait de respecter et garantir le droit à la protection judiciaire des victimes d'actes commis par les paramilitaires, qu'il devait assurer des enquêtes rapides et efficaces à cet égard et qu'il devait imposer, par la voie de processus judiciaires, des sanctions proportionnelles à la nature des actes commis en accord avec des objectifs clairs et compatibles avec la *Convention*. Bien que ces recommandations constituent

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[101] Plus particulièrement, les assaillants avaient exécuté l'opération méthodiquement, attachant les victimes et les enfermant dans des véhicules, s'assurant ainsi qu'elles ne pourraient échapper aux coups de feu. De plus, les paramilitaires avaient ensuite « achevé » les blessés d'un coup de grâce et n'étaient partis qu'après s'être assurés d'avoir tué tous les magistrats.

[102] *Acar* et al. *c*. *Turquie*, nº 36088/97 et 38417/97, [2005] C.E.D.H., en ligne : Cour européenne des droits de l'homme <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=774363&portal=bkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, au para. 77 ; *Makaratzis c*. *Grèce*, nº 50385/99, [2004] XI C.E.D.H. aux para. 51- 55.

[103] La Cour aurait pu, selon nous, qualifier les actes perpétrés directement contre les magistrats comme des actes de torture. Voir par exemple à ce sujet Peter Kooijmans, Special Rapporteur, *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* ESCOR , 42nd Sess., UN Doc. E/CN.4/1986/15 (1985).

[104] Ley de justicia y paz de 2005, diario oficial 45.980, Oficina Alto Comisionado para la Paz.

[105] *Supra* note 3.

un *obiter dictum*, il aurait été souhaitable que la Cour précise plus avant sa réflexion à ce sujet. Rappelons à cet égard que certaines de ces recommandations avaient été formulées par la Commission dans le cadre de rapports très détaillés portant sur ce processus de démobilisation[106].

Affaire Escué-Zapata (Colombie)[107]

Une affaire similaire fut soumise à la Cour relativement à l'enlèvement et l'exécution d'un chef autochtone colombien par des membres des forces armées colombiennes en 1988. L'État reconnut en partie sa responsabilité pour la violation du droit à la vie et à l'intégrité de la victime, mais refusa d'admettre que cette violation s'inscrivait dans un contexte de persécution visant certains peuples autochtones colombiens.

De toute évidence, une telle reconnaissance aurait pu avoir d'importantes conséquences à d'autres égards ou dans d'autres contextes judiciaires. En effet, elle aurait pu par exemple servir de fondement contextuel à des allégations de crimes contre l'humanité ou de génocide[108] pouvant être portées devant une instance habilitée à recevoir ce type d'affaires. De même, une telle reconnaissance aurait pu sous-entendre, selon nous, une atteinte à la *Convention 169 de l'OIT concernant les peuples indigènes et tribaux dans les pays indépendants*[109]. En effet, il serait raisonnable de conclure que des attaques perpétrées contre des dirigeants autochtones puissent constituer une violation au droit de ces peuples d'avoir des institutions et d'exercer leurs droits, tel que le garantit cet instrument (art. 4 et suivants), de la même manière que des attaques dirigées contre des journalistes ou des chefs syndicaux puissent constituer des violations du droit à la liberté d'expression ou à la liberté d'association, ce qui a été reconnu à maintes reprises par les instances interaméricaines se prononçant sur la *Convention américaine*. La Commission a souvent considéré, en effet, que ce type de crimes perpétrés contre des

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[106] Voir à ce sujet OÉA, Commission interaméricaine des droits de l'homme, *Report on the Demobilization Process in Colombia 2004*, Doc. off. OEA/Ser.L/V/II.120/Doc. 60 (2004), en ligne : Commission interaméricaine des droits de l'homme <http://www.cidh.org/countryrep/Colombia04eng/toc.htm>; Commission interaméricaine des droits de l'homme, *Report on the Implementation of the Justice and Peace Law*: *Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*, Doc. off. OEA/Ser.L/V/II/Doc. 3 (2007), en ligne : Commission interaméricaine des droits de l'homme <http://www.cidh.org/pdf%20files/III%20Informe%20proceso%20desmovilizacion%20Colombia%20rev%2017%20ENG.pdf>. Voir aussi Bernard Duhaime, « Commission interaméricaine des Droits de l'Homme en 2005 : enjeux » (2005) 1 Asymétries, analyses de l'actualité internationale 138.

[107] *Affaire Escué-Zapata (Colombie)* (2007), Inter-Am. Ct. H.R. (Sér. C) n° 165, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007).

[108] En effet, la persécution de groupes ethniques peut constituer un crime contre l'humanité si cet acte est commis dans le cadre d'une attaque massive et systématique contre la population civile. De même, des atteintes à la vie ou à l'intégrité physique de membres de certains groupes ethniques, commises avec l'intention de détruire totalement ou en partie ce groupe, peuvent être constitutives du crime de génocide.

[109] *Convention révisée de l'OIT (n° 169) concernant les peuples indigènes et tribaux dans les pays indépendants*, 27 juin 1989, 1650 R.T.N.U. 383 (entrée en vigueur : 5 septembre 1991).

communicateurs sociaux, de même que l'impunité subséquente, pouvaient avoir un effet dissuasif (*chilling effect*) sur eux et ainsi compromettre leur capacité à poursuivre leurs activités de défense des droits de la personne, de promotion des droits des travailleurs, ou d'expression publique[110].

Or, dans la présente affaire, une preuve considérable fut admise par la Cour relativement à l'exécution de nombreux dirigeants autochtones depuis le milieu des années 1970 et à la situation de vulnérabilité de ces peuples en Colombie, basée entre autres sur de nombreux rapports de la Commission et du Rapporteur spécial sur les populations autochtones des Nations unies.

La Cour rejeta cependant, faute de preuve spécifique, l'argument de la Commission à l'effet que l'enlèvement et l'assassinat de la victime était *directement en lien* avec l'exercice de ses fonctions de dirigeant autochtone. En effet, la Cour considéra que les membres des forces armées avaient peut-être éliminé la victime parce qu'ils la soupçonnaient d'appartenir à la guérilla tout simplement. La Cour semble également avoir considéré la théorie selon laquelle les soldats auraient pu avoir opéré illégalement pour le compte d'une famille voisine avec laquelle la victime était en conflit dans le cadre d'une dispute foncière. Il est regrettable de constater qu'il fut impossible de clarifier les motifs précis expliquant l'attaque contre la victime, en raison de l'inefficacité des enquêtes qui suivirent la tragédie, ce qui, rappelons-le, constitue une violation du droit à la protection judiciaire et engageait la responsabilité de l'État.

Bien que la Cour conclut effectivement, de ce fait, à une violation du droit aux garanties judiciaires et à la protection judiciaire de la victime, et bien qu'elle considéra que la faiblesse du processus judicaire subséquent n'avait pas permis d'élucider les circonstances entourant la disparition et le meurtre de la victime[111], elle n'en déduit cependant pas que cette omission, et l'impunité en résultant, aient pu contribuer à entretenir *la situation sérieuse de violations des droits humains affligeant les peuples autochtones dans la région de la Colombie où les faits étaient reportés,* situation que la Cour avait par ailleurs considérée comme prouvée en l'instance[112]. N'aurait-on pas pu conclure que cette omission et l'impunité en résultant occasionnaient un effet dissuasif (*chilling effect*) sur les dirigeants autochtones, limitant ainsi la capacité des peuples autochtones à exercer certains leurs droits garantis par le droit international[113]?

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110 Voir à ce sujet OÉA, Commission interaméricaine des droits de l'homme, *Rapport sur la situation des défenseurs des droits de l'homme dans les Amériques*, Doc off. OEA/Ser.L/V/II.124/Doc. 5, rev. 1 (2006) aux para. 52 et s., 122 et s., en ligne : Commission interaméricaine des droits de l'homme <http://www.cidh.org/pdf%20files/DEFENDERS%20FRENCH%20COMPLETE.pdf>.

111 *Ibid*. aux para. 63, 109.

112 *Ibid*. au para. 64.

113 Voir d'une façon similaire *Victor Manuel Oropeza c. Mexico* (1999), Inter-Am. Comm. H.R. nº 130/99, *Annual Report of the Inter-American Commission on Human Rights: 1999*, OEA/Ser.L/V/II.106/Doc. 6, rev; *Hector Felix Miranda c. Mexico* (1999) Inter-Am. Comm. H.R. nº 50/99, *Annual Report of the Inter-American Commission on Human Rights: 1998*, OEA/Ser.L/V/II.102/Doc. 6, rev.

Affaire García-Prieto (Salvador)[114]

Dans le cadre de l'affaire *Garcia-Prieto* relative à la lutte contre l'impunité, la Cour ne put se prononcer sur une partie des faits allégués, soit l'enlèvement et le meurtre de la victime, puisque ces événements avaient eu lieu avant que l'État du Salvador ait reconnu la compétence obligatoire de la Cour interaméricaine[115]. Celle-ci se pencha cependant sur tous les faits subséquents à cette reconnaissance.

Ainsi, l'État fut tenu responsable des retards et de l'inefficacité de l'enquête judiciaire relative à la tragédie, en contravention du droit aux garanties judiciaires et à la protection judiciaire de la victime et de ses ayants droits. Plus spécifiquement, la Cour réitéra l'obligation qu'ont les agents de l'État de collaborer avec les instances judiciaires chargées d'enquêtes relatives à des allégations de violations des droits de la personne.

Dans l'affaire en l'instance, le ministère de la Défense n'avait pas autorisé l'accès à certains documents aux magistrats compétents. Par ailleurs, la Cour considéra que l'inefficacité des enquêtes relatives aux menaces proférées contre les membres de la famille de la victime avait également constitué une violation de leur droit à l'intégrité de la personne.

Cette décision, dont les faits sont tristement semblables à ceux de plusieurs autres affaires soumises à la Commission et la Cour interaméricaines, illustre les particularités des phénomènes d'insécurité et d'impunité qui ont marqué plusieurs États d'Amérique centrale au milieu des années 1990 dans le contexte de la difficile transition de la guerre civile à la paix et la réconciliation[116].

Affaire Albán-Cornejo (Équateur)[117]

Dans l'affaire *Albán-Cornejo,* la Cour eut à se prononcer sur l'amplitude des obligations des États dans le contexte d'allégations de négligence médicale. Les représentants de la victime prétendaient que celle-ci était décédée des suites d'une

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[114] *Affaire García-Prieto (Salvador)* (2007), Inter-Am. Ct. H.R. (Sér. C) nº 168, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007).

[115] En effet, celle-ci refuse généralement de se prononcer relativement à des faits antérieurs à la date de reconnaissance, par l'État concerné, de la compétence obligatoire de la Cour. Voir à ce sujet : *Affaire des enfants Yean et Boscio (République Dominicaine)* (2005), Inter-Am. Ct. H.R. (Sér. C) nº 130, au para. 105, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007); *Affaire Caesar (Trinité et Tobago)* (2005), Inter-Am. Ct. H.R. (Sér. C) nº 123, au para. 10, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007); *Affaire des soeurs Serrano Cruz (Salvador)* (2004), Inter-Am. Ct. H.R. (Sér. C) nº 118, au para. 66, OEA/Ser.L/V/III.65/Doc. I. Notons cependant que la pratique de la Cour à cet égard est irrégulière, voir à ce sujet Duhaime et Dulitzky, *supra* note 92 à la p. 353, à propos de l'*Affaire Almonacid-Arellano* et al. *(Chili)* (2006), Inter-Am. Ct. H.R. (Sér. C) nº 154, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007).

[116] Voir à ce sujet Due Process of Law Foundation, *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America*, 2007, en ligne : Due Process of Law Foundation <http://www.dplf.org/uploads/1190403828.pdf>.

[117] *Affaire Albán-Cornejo (Équateur)* (2007), Inter-Am. Ct. H.R. (Sér. C) nº 171, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007).

injection excessive de morphine alors qu'elle était traitée dans un hôpital privé. Bien que la Cour refusa de conclure que la mort de la victime pouvait être directement attribuable à l'État faute de preuve à cet effet, elle établit cependant que les efforts de celui-ci pour enquêter et sanctionner les personnes responsables de la tragédie étaient insuffisants et constituaient une violation du droit à un procès équitable et à la protection judiciaire. Pour ce faire, la Cour considéra entre autres les délais encourus, de même que le manque de diligence de l'État afin d'assurer la présence des suspects lors de l'enquête criminelle, ce que l'agent équatorien avait déjà reconnu lors de l'audience tenue à la Cour interaméricaine.

Sans conclure explicitement à une violation de la part de l'État à cet effet, la Cour précisa cependant que les États ont l'obligation d'établir une gestion adéquate des dossiers médicaux, de même que leur accès pour les patients concernés, dans le respect du droit à la vie privée. Elle rappela également le rôle important devant être joué par les ordres professionnels médicaux pour assurer la qualité des soins et sanctionner les médecins négligents. La Cour réitéra ses propos relatifs à l'obligation générale qu'ont les États de réglementer et superviser les soins médicaux offerts dans les établissements tant publics que privés, tel qu'établi dans l'affaire *Ximenes-Lopes (Brésil)*[118]. Elle précisa cependant que les États n'ont pas l'obligation de légiférer pour faire de la négligence médicale un crime spécifique en droit interne. Selon la Cour,

> *it is the duty of the State to decide the best way to respond, in this area, to the needs for punishment, since there is no binding agreement on the formulation of the description as in other cases in which essential elements of the criminal description, including the accuracy of autonomous descriptions, have been provided for in international instruments, for example, genocide, torture, forced disappearance, etc.*[119]

Il est troublant cependant de constater que la Cour choisit, en l'instance, de ne pas se prononcer explicitement quant à la législation équatorienne et son adéquation avec la *Convention*[120], tel que le requiert l'article 2 de cet instrument, et ce, nonobstant la reconnaissance expresse de responsabilité de l'État à cet égard. La Cour se contenta de prendre note de l'engagement de l'Équateur de réviser sa législation pénale en vigueur relative à la négligence médicale et d'y ajouter une précision suffisante pour assurer une saine administration de la justice. N'ayant pas conclu à une violation de la *Convention*[121] de la part de l'État, il sera intéressant de voir si la Cour évaluera, dans le cadre du processus subséquent de supervision de son

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118 *Affaire Ximenes-Lopes (Brésil)* (2006), Inter-Am. Ct. H.R. (Sér. C) nº 149, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.127 (2007); Duhaime et Dulitzky, *supra* note 92 à la p. 349.

119 *Affaire Albán-Cornejo*, *supra* note 117 au para. 136.

120 Ce constat est d'autant plus troublant considérant, selon les propres dires de la Cour interaméricaine, l'obligation qu'ont désormais les tribunaux nationaux de procéder à ce type d'évaluation. Voir à ce sujet Duhaime et Dulitzky, *supra* note 92 aux pp. 354-56.

121 *Supra* note 3.

jugement, les mesures législatives adoptées par l'Équateur pour se conformer à cet énoncé de principes.

Affaire Boyce* et al. *(Barbades)[122]

Dans l'affaire *Boyce* et al., première décision de la Cour relative à l'État des Barbades, la Commission et les plaignants alléguaient que celui-ci avait violé les droits à la vie, à l'intégrité physique et à un procès équitable des victimes en raison des conditions de détention de celles-ci et de leur condamnation à la peine capitale. La Cour conclut que cette peine contrevenait à l'article 4 de la *Convention*[123], puisqu'elle résultait de l'application d'une loi prévoyant automatiquement la peine de mort en cas de condamnation pour meurtre. Selon la Cour, bien que la peine de mort ne soit pas en soi incompatible avec le droit à la vie dans les États où elle n'est pas encore abolie, son application automatique pour certains crimes ne permettait pas de réserver exclusivement cette sanction pour les crimes les plus graves, puisqu'elle ne faisait aucune distinction entre les types de meurtres, rendant impossible toute individualisation du processus de condamnation, et puisqu'elle ne permettait pas de prendre en compte d'autres facteurs, tel que l'exige la *Convention*, conformément à la jurisprudence constante des instances interaméricaines sur le sujet[124].

Il convient de mentionner que, dans le cadre de plusieurs affaires individuelles, la Commission avait déjà statué sur l'incompatibilité de ce type de loi avec le droit interaméricain[125]. Une audience thématique de la CIDH avait d'ailleurs porté spécifiquement sur ce sujet lors de la 116^{e} période ordinaire de session en 2002, dans le cadre de laquelle la Commission avait déjà mis en garde l'État des Barbades

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122 *Affaire Boyce* et al. *(Barbades)* (2007), Inter-Am. Ct. H. R. (Sér. C) n^{o} 169, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007).

123 *Supra* note 3.

124 Voir entre autres Richard J. Wilson « The United States' Position on the Death Penalty in the Inter-American Human Rights System » (2001-2002) 1159 Santa Clara L. Rev. 42; Veronica Gomez, « The Inter-American System: Recent Cases » (2001) 1 Human Rights Law Review 319. Voir aussi *Restrictions to the Death Penalty (Articles 4 (2) and 4 (4) of the* American Convention on Human Rights*)* (1983), Avis consultatif OC-3/83, Inter-Am. Ct. H. R. (Sér. A) n^{o} 3, au para. 57, *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.61 (1983).

125 Voir par exemple *Desmond McKenzie c. Jamaïque, Andrew Downer et Alphonso Tracey c. Jamaïque, Carl Baker c. Jamaïque, Dwight Fletcher c. Jamaïque, Anthony Rose c. Jamaïque* (2000) Inter-Am. Comm. H.R. n^{o} 41/00, *Annual Report of the Inter-American Commission on Human Rights: 2000*, OEA/Ser.L/V/II.106/Doc. 6, rev; *Paul Lallion c. Grenade* (2002), Inter-Am. Comm. H. R. n^{o} 55/02, *Annual Report of the Inter-American Commission on Human Rights: 2002*, OEA/Ser.L/V/II.117/Doc. 1, rev. 1; *Benedict Jacob c. Grenade* (2002), Inter-Am. Comm. H. R. n^{o} 56/02, *Annual Report of the Inter-American Commission on Human Rights: 2002*, OEA/Ser.L/V/II.117/Doc. 1, rev. 1; *Dave Sewell c. Jamaïque* (2002), Inter-Am. Comm. H. R. n^{o} 76/02, *Annual Report of the Inter-American Commission on Human Rights: 2002*, OEA/Ser.L/V/II.117/Doc. 1.rev. 1.; *Denton Aitken c. Jamaïque* (2002), Inter-Am. Comm. H. R. n^{o} 58/02, *Annual Report of the Inter-American Commission on Human Rights: 2002*, OEA/Ser.L/V/II.117/Doc. 1, rev. 1.

quant à l'incompatibilité de sa loi avec la *Convention*[126], ce à quoi la délégation gouvernementale s'était fermement opposée[127].

Plus récemment, la Cour avait également statué spécifiquement sur l'illégalité de ce type de loi dans la célèbre affaire *Hilaire, Constantine, Benjamin* et al. *c. Trinité-et-Tobago*[128]. Notons ici que cette dernière décision, première à être rendue sur ce sujet spécifique par un tribunal international, a inspiré le Comité judiciaire du Conseil privé britannique et le Comité des droits de l'homme des Nations unies[129]. Malgré ces avancées importantes et la tendance affirmée des États et des instances interaméricaines d'abolir progressivement la peine de mort dans les Amériques[130], plusieurs États semblent déterminés à vouloir continuer son application, bien souvent en contravention du droit interaméricain[131].

Dans un autre ordre d'idées, la Cour conclut que l'État des Barbades avait également violé l'article 2 de la *Convention*[132] en n'ayant pas amendé la loi problématique pour la rendre conforme aux exigences de la *Convention*[133]. Il est intéressant de constater qu'en vertu de la Constitution des Barbades, il est impossible de modifier toute loi adoptée avant l'indépendance de l'État, ce qui était le cas ici et ce qu'avait même confirmé le Comité judiciaire du Conseil privé britannique. La Cour rappela cependant que les tribunaux des Barbades, le Conseil et maintenant la Cour de Justice des Caraïbes, avaient l'obligation d'évaluer non seulement la constitutionnalité des lois, mais également leur compatibilité avec la *Convention américaine*[134]. Cette approche n'est pas sans rappeler celle adoptée par la Cour dans les affaires *La Cantuta (Pérou)*[135] et *Almonacid-Arellano* et al. *(Chili)*[136] jugées l'année précédente[137].

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126 *Supra* note 3.

127 Voir à ce sujet OÉA, Commission interaméricaine des droits de l'homme, Communiqué, n° 44/02, (25 octobre 2002), en ligne : Commission interaméricaine des droits de l'homme <http://www.cidh.org/Comunicados/English/2002/44.02.htm>.

128 *Affaire Hilaire, Constantine et Benjamin* et al. *(Trinité-et-Tobago)* (2002), Inter-Am. Ct. H.R. (Sér. C) n° 94, aux para. 85-118; voir aussi Stéphane Bourgon, « Judgments, Decisions and other Relevant Materials Issued by International Courts and Other International Bodies on Human Rights » (2003) 1 Journal of International Criminal Justice 245.

129 À propos de l'impact, au sein de ces diverses instances, de la jurisprudence interaméricaine relative à la peine de mort, voir généralement Brian D. Tittemore, « The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections » (2004-2005) 13 Wm. & Mary Bill Rts. J. 445.

130 *Protocole à la Convention américaine relative aux droits de l'homme traitant de l'abolition de la peine de mort*, 8 juin 1990, O.A.S.T.S. n° 73, 29 I.L.M. 1447 (entrée en vigueur : 28 août 1991); voir aussi *Restrictions to the Death Penalty*, *supra* note 124 au para. 57.

131 Concernant les États de la Caraïbe anglophone, voir Tittemore, *supra* note 129 à la p. 516 et s. Concernant les États-Unis, voir Wilson, *supra* note 124 à la p. 1174 et s.

132 *Supra* note 3.

133 *Ibid*.

134 *Ibid*.

135 *Affaire La Cantuta (Pérou)* (2006), Inter-Am. Ct. H.R. (Sér. C) n° 162 *Annual Report of the Inter-American Court of Human Rights : 2007*, OEA/Ser.L/V/II.130 (2007).

136 *Affaire Almonacid-Arellano* et al. *(Chili), supra* note 115.

137 Voir à ce sujet Duhaime et Dulitzky, *supra* note 92 aux pp. 354-56.

La Cour se prononça enfin sur le droit à l'intégrité des détenus, considérant que le fait d'avoir enfermé les condamnés dans une cage métallique pendant trente mois constituait un traitement inhumain. Elle conclut également que le simple fait d'avoir lu aux victimes les ordonnances judiciaires relatives à leur mise à mort, alors même que des recours interaméricains étaient toujours pendants – y compris des ordonnances de mesures provisoires de la Cour – constituait non seulement une violation du droit à l'intégrité de la personne, mais aussi une violation du droit à la vie, nonobstant le fait que ces ordonnances n'aient jamais été exécutées *in concreto*, ce qui n'est pas sans rappeler le raisonnement adopté par la Cour dans l'*Affaire du massacre de La Rochela* analysée précédemment[138].

[138] *Supra* note 96.