

Selected developments in human rights and democratisation during 2015: The Americas

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Abstract: *This contribution traces some salient developments related to human rights and democratisation in the Americas during 2015. As to national developments, the Colombian peace process, the political crisis in Guatemala and the elections in Haiti are discussed. As to regional arrangements, the focus falls on the participation of Cuba in the Seventh Summit of the Americas, and on elections and standard-setting within the Organization of American States. A few highlights in respect of the promotion and protection of human rights in the Americas by the Inter-American Commission and Court of Human Rights are also reviewed.*

Key words: *Colombian peace process; political crisis Guatemala; elections Haiti; Seventh Summit of the Americas; OAS General Assembly; Inter-American Commission; Inter-American Court*

1 Introduction

Peace negotiations to bring to a close the longest internal armed conflict in the recent history of the continent, the long overdue re-establishment of diplomatic relations between Cuba and the United States of America, and the challenges faced by fragile democracies were among the topics on the agenda of the states and the various regional and sub-regional arrangements of the Americas during 2015. Also during this period, the Inter-American Court and Commission on Human Rights took a number of significant decisions and issued reports on gender, health and human mobility, among other issues. The review that follows includes a selection of highlights of these developments from national and multilateral perspectives as well as some comments on the setting and enforcement of standards by the regional mechanisms for the protection of human rights during 2015.

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2 Highlights on human rights and democracy issues at the national level

2.1 Colombian peace process

During 2015, significant progress was made in the peace talks between the government of Juan Manuel Santos and the guerrilla leaders of the Revolutionary Armed Forces of Colombia – People’s Army (FARC-EP), to put an end to more than five decades of internal armed conflict in Colombia. It is estimated that this armed conflict has been responsible for hundreds of thousands of deaths and the internal displacement of more than six million people. It has also had repercussions beyond the national borders with thousands of refugees fleeing to neighbouring countries.

After a preliminary confidential dialogue between the Colombian government and the FARC-EP, on 26 August 2012 the parties signed the General Agreement to End the Conflict and Build a Stable and Lasting Peace. This document set a six-point agenda for dialogue at the Table for Conversations to End the Conflict and Build a Stable and Lasting Peace in Colombia.¹ Since then, the parties have undertaken a step-by-step approach to negotiations in Havana – with the support of the governments of Cuba and Norway – in order to reach a final peace agreement. Once reached, the final agreement will require approval via plebiscite, with the participation of at least 13 per cent of the electorate, in order to enter into force.

As part of the step-by-step approach in the peace talks, on 15 December 2015 the parties released a Draft Agreement on point 5 of the agenda on victims of the armed conflict, establishing a comprehensive system for truth, justice, reparations and non-repetition of human rights violations.²

Regarding the right to truth, the Draft Agreement³ establishes a Truth, Coexistence and Non-Repetition Commission as a temporary body charged with explaining to society at large the complexity of the conflict, and the roles and responsibilities of those directly and indirectly involved. The Draft Agreement also establishes a Special Unit for the Search for Disappeared Persons in the Armed Conflict as a high-level special unit charged with coordinating a search and identification operation, without substituting or interfering with any parallel judicial investigations.

The Draft Agreement indicates that once the cessation of hostilities pursuant to international humanitarian law enters into force, the Colombian government may grant the guerrilla members entering into the peace agreement and persons accused or convicted of political crimes the

1 See <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Paginas/mesa-de-conversaciones-con-las-farc-ep.aspx> (last visited 30 July 2016).

2 Joint Communiqué 64 ‘Agreement on the Victims of the Conflict, Comprehensive System for Truth, Justice, Reparation and Non-Repetition, including the Special Jurisdiction for Peace; and Commitment on Human Rights’, Havana, 15 December 2015, available at <https://www.mesadeconversaciones.com.co/sites/default/files/joint-communique-64-december-15-2015-1450285397.pdf> (last visited 30 July 2016).

3 *Borrador conjunto del Acuerdo sobre las Víctimas del Conflicto: ‘Sistema Integral de Verdad, Justicia, Reparación y No Repetición’*, available at (Spanish only) <http://wp.presidencia.gov.co/sitios/especiales/Documents/20150921-declaracion-proceso-paz/docs/Punto5-Victimas.pdf> (last visited 30 July 2016).

'widest possible' amnesty (paragraphs 10, 23, 37 and 38 of the section on Special Jurisdiction for Peace in the Draft Agreement). The granting of amnesty or pardon does not relieve the beneficiary from contributing to ascertaining the truth about the consequences of the armed conflict on the civilian population, nor – allegedly – does it extinguish the right of the victims to reparations (paragraphs 27 and 43 of the Special Jurisdiction section). Crimes against humanity, war crimes and genocide, listed in the Rome Statute of the International Criminal Court, as well as other serious human rights violations, such as torture, extra-judicial execution, or forced disappearance are not subject to amnesty or pardon (paragraphs 22, 25 and 40 of the Special Jurisdiction section).

Regarding the right to justice of victims of human rights violations, the Draft Agreement establishes a Special Jurisdiction for Peace with a legal framework 'principally based on the international law of human rights and international humanitarian law' (paragraph 19 of the Special Jurisdiction section), applicable to all those directly or indirectly participating in the armed conflict, and 'taking precedence over other criminal, disciplinary or administrative jurisdictions acting in connection with conduct directly or indirectly linked to the armed conflict' (paragraphs 32 and 33 of the Special Jurisdiction section).

The Draft Agreement establishes a complex organic framework for the functioning of the Special Jurisdiction for Peace, including an Investigation and Indictment Unit and a number of justice chambers: the Chamber for the Acknowledgment of Truth and Responsibility; the Chamber for Amnesty and Pardon; the Chamber for the Determination of Legal Status; and the Tribunal for Peace, with a First Instance and a Review Instance. These bodies are entrusted with the administration of two types of proceedings, namely, (a) the proceeding for cases involving the acknowledgment of truth and responsibility; and (b) the proceeding for cases involving the lack of acknowledgment of truth and responsibility (paragraphs 45 and 46 of the Special Jurisdiction section).

The Draft Agreement provides that in cases involving a lack of acknowledgment of truth and responsibility, the Tribunal for Peace shall prosecute the individuals in question pursuant to the principles of due process of law and, if convicted, they will receive ordinary sentences for the crimes committed, of up to 20 years' imprisonment. In cases involving the acknowledgment of truth and responsibility, the individuals tried will receive non-custodial sentences of between five and eight years (paragraphs 54 and 60 of the Special Jurisdiction section).

Regarding the victims' rights to reparations, the Draft Agreement provides for individual and collective restitution, compensation, rehabilitation, satisfaction and non-repetition, as well as measures for peace building. The language used covers vulnerable populations and groups particularly affected by the conflict with a differentiated gender approach.

At the time of its adoption, some local human rights organisations hailed point 5 of the Draft Agreement as an historic landmark in conflict resolution because of the comprehensive system of truth, justice, reparation and non-repetition for accountability in cases involving human

rights violations and breaches of humanitarian law, and the participation of victims' representatives during the negotiation process.⁴

Other organisations have been less optimistic when predicting the effectiveness of the institutions proposed. For instance, it has been argued that, when establishing individual responsibility for serious crimes, the courts will not be at liberty to consider the information received or uncovered by the new Truth Commission. It has also been argued that sanctions provided for in the so-called Special Jurisdiction for Peace are hardly proportionate to the severity of the crimes perpetrated during the conflict (Amnesty International 2016). Others have challenged the language defining the responsibility attributable to commanding officers in the commission of human rights violations; and the lack of criteria to secure effective, independent and impartial compositions for the Peace Tribunal and the chambers of the Special Jurisdiction (Human Rights Watch 2015).

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has indicated that, although the integrated system offers a unique opportunity to address victims' rights, considerable planning is still required in order to overcome the foreseeable challenges faced at the budgetary, financial and operational levels to ensure the implementation of the agreement. Ensuring the system's legitimacy and credibility will require transparent selection processes for its administrators; co-operation with institutions dealing with victims and the judiciary; and incentives and guarantees for the participation of state actors, the FARC-EP and other parties. In its view, the successful implementation of the agreement and the sustainability of peace will ultimately depend on whether Colombian society can finally overcome conflict-related violence and structural human rights violations.⁵

In principle, point 5 of the Draft Agreement is to be commended for its rights-based approach in the pursuit of truth, justice and reparations for individual and collective victims of serious human rights violations, grounded on the Rome Statute and other human rights and humanitarian law treaties. In practice, Colombia is no stranger to the challenges derived from the establishment of a special jurisdiction to review the situation and potential criminal liability of the participants in this protracted armed conflict. In fact, the imposition of reduced sentences in exchange for the acknowledgment of individual responsibility echoes the still on-going experience under the Law of Justice and Peace adopted in 2005 to enable the demobilisation of paramilitary groups, with mixed results.⁶

Aside from the challenges derived from the administration of justice through a special jurisdiction, the success of the system envisaged by point

4 See, for instance, Comisión Colombiana de Juristas, Press Release of 21 December 2015, available at (Spanish only) http://www.coljuristas.org/documentos/comunicados_de_prensa/acuerdo_sobre_victimas_necesario_y_oportuno.pdf (last visited 30 July 2016).

5 UN Human Rights Council, Thirty-first Session, Report of the United Nations High Commissioner for Human Rights, Addendum: Situation of human rights in Colombia, A/HRC/31/3/Add.2 15 March 2016, paras 4 and 8.

6 See, for instance, IACHR Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia, OEA/Ser.L/V/II.Doc. 49/13, 2013, ch 3, available at <http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf> (last visited 30 July 2016).

5 of the Draft Agreement will depend on the safeguards ensuring that vulnerable groups – in particular peasant communities, afro-descendants, indigenous peoples, displaced persons and human rights defenders – are not again victimised by the parties in the conflict; and that Colombian society at large show its rejection of war and violence and its commitment towards non-repetition.

The chance to deactivate, by peaceful means, one of the factors contributing to the persistence of an armed conflict that for many decades has been the backdrop of extreme violence against the civilian population is vital for the future of Colombia. It is equally vital for its neighbours and the region as a whole, who have a stake in the process in terms of their collective aspiration of becoming a continent freed from armed conflict.

2.2 Political crisis in Guatemala

During 2015, Guatemala underwent what the UN Office of the High Commissioner for Human Rights⁷ and the Inter-American Commission on Human Rights⁸ chose to define as one of its most serious political crises in decades.

Reports issued by the Public Prosecutor's Office and the International Commission against Impunity⁹ in April and May 2015 uncovered a customs fraud implicating high-level officials in the executive branch. As a result, a protest movement involving diverse sectors of society gathered momentum and demonstrated for weeks in front of the presidential palace in Guatemala City and across the country to show their discontent. Protesters called for an end to corruption and demanded the resignation of government officials. Vice-President Roxana Baldetti was forced to resign because of her alleged involvement in the corruption case.

By 21 August 2015, pressure from influential sectors of society and media coverage of corruption cases prompted impeachment proceedings against President Otto Pérez Molina. A few days later his immunity from prosecution was lifted by Congress, and he resigned on 3 September 2015, whereafter he was detained and tried for his alleged participation in the customs fraud network.

Alejandro Maldonado Aguirre, a former Constitutional Court judge, was sworn in as President, days before the general election that had been scheduled for September 2015. Comedian James Ernesto Morales Cabrera was elected President in the second round held in October 2015¹⁰ and was due to take office in January 2016.

7 OHCHR Guatemala 'A Guatemalan awakening: The revolt for justice and change, available at <http://www.ohchr.org/EN/NewsEvents/Pages/AGuatemalanawakening.aspx> (last visited 30 July 2016).

8 IACHR Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion OEA/Ser.L/V/II.Doc. 43/15, 31 December 2015, paras. 54-63, available at <http://www.oas.org/en/iachr/reports/pdfs/Guatemala2016-en.pdf> (last visited 30 July 2016).

9 CICIG *Financiamiento de la Política en Guatemala*, 2015, available at http://www.cicig.org/uploads/documents/2015/informe_financiamiento_politicagt.pdf (last visited 30 July 2016). See also CICIG *Informe de la Comisión Internacional contra la Impunidad con Ocasión de su Octavo Año de Labores*, available at http://www.cicig.org/uploads/documents/2015/COM_085_20151113_VIII.pdf (last visited 30 July 2016).

10 Tribunal Supremo Electoral de Guatemala, *Memoria de las Elecciones Generales y de Diputados al Parlamento Centroamericano 2015*, available at <http://www.tse.org.gt/MEMORIA-ELECTORAL-2015.pdf> (last visited 30 July 2016).

2.3 Electoral calendar in Haiti

During 2015, Haiti failed to fulfil the objectives set out in its parliamentary and presidential electoral calendar. Low voter participation, irregularities denounced by candidates and violence interfered with the elections scheduled for August, October and December 2015.

In March 2015, following consultations with the Provisional Electoral Council and political parties, President Martelly issued an electoral decree and published the electoral calendar, calling for three rounds of polls for 2015. On 11 May, the Provisional Electoral Council launched the candidate registration period for the presidential race scheduled for October. By 20 May, a record number of 70 candidates had applied for registration and a final list of over 50 candidates – excluding some high-profile names of people who had allegedly failed to submit financial probity certifications – was drawn up.¹¹

On 9 August 2015, the first round of parliamentary elections was held amidst disruption and violent incidents. On 25 October 2015, the first round of presidential elections and the second round of legislative and municipal elections were held. There were a few violent incidents, and opposition candidates and national election observers denounced fraud. As no candidate received a majority vote in the first round, a run-off was scheduled for 27 December 2015; but opposition candidate Jude Celestin refused to participate. Amid growing tension and violent incidents between protestors and the police, the Provisional Electoral Council postponed and finally cancelled the elections.

Despite the mandates of the UN Stabilisation Mission in Haiti (MINUSTAH) and the Organization of American States (OAS) to contribute to the upholding of democracy in Haiti, there is growing consensus among analysts that pressure exerted by the international community on the government to ensure a degree of institutional stability has led most Haitians to believe that the elections reflect the will of international donors rather than their own.¹² This belief has translated into a steady decrease in electoral participation – which has fallen to well below 25 per cent – with further political instability.

3 Highlights on regional arrangements

3.1 Seventh Summit of the Americas and the participation of Cuba

On 10 and 11 April 2015, the states of the region gathered for the Seventh Summit of the Americas, Prosperity with Equity, held in Panama City. This forum, first established in 1994, congregates heads of state and government from the member states of the OAS.¹³

11 UN Security Council, Report of the Secretary-General on the United Nations Stabilisation Mission in Haiti, S/2015/667, 31 August 2015, paras. 3, 4 and 7, available at <https://minustah.unmissions.org/sites/default/files/n1525971.pdf> (last visited 30 July 2016).

12 See, for instance, Inter-American Dialogue 'Beyond MINUSTAH: What can Latin America do for Haiti?' available at <http://www.thedialogue.org/blogs/2016/02/beyond-minustah-what-can-latin-america-do-for-haiti/> (last visited 30 July 2016).

Through a number of official preparatory meetings and side forums and events involving the participation of civil society and other actors, the states of the region agreed on a number of mandates for action¹⁴ addressing issues of health, education, energy, the environment, migration, security, citizen participation, and democratic governance. The implementation of the mandates for action is to be overseen by the OAS, the Economic Commission for Latin America and the Caribbean (ECLAC), the Pan-American Health Organisation (PAHO), the Inter-American Development Bank (IDB), the World Bank, the Development Bank of Latin America (CAF), and other multilateral financial and technical assistance institutions.

Cuba joined the meeting for the first time in the Summit's history. Following on the announcements made in December 2014,¹⁵ Cuba and the United States held several rounds of negotiations during the first half of 2015 as part of the process of normalisation of their diplomatic relations that had been suspended since 1961. The steps taken included, amongst others, the removal of Cuba from the List of State Sponsors of Terrorism drawn up by the US Department of State;¹⁶ the reopening of their respective embassies in Havana and Washington DC on 20 July 2015; and the establishment of a bilateral commission with an agenda for establishing relations in areas such as environmental protection, health, science and law enforcement.¹⁷ However, concern remains regarding the continuation of the US economic embargo on Cuba and the impact on the enjoyment of human rights on the island, as consistently indicated by the Inter-American Commission on Human Rights (Inter-American Commission) in its reports.¹⁸

- 13 The 2015 Summit of the Americas was attended by the Presidents of Panama, Juan Carlos Varela; Colombia, Juan Manuel Santos; Ecuador, Rafael Correa; Brazil, Dilma Rousseff; Mexico, Enrique Peña Nieto; the United States, Barack Obama; Argentina, Cristina Fernández de Kirchner; Guatemala, Otto Pérez Molina; Venezuela, Nicolás Maduro; Honduras, Juan Orlando Hernández; Peru, Ollanta Humala; Bolivia, Evo Morales; Uruguay, Tabaré Vázquez; El Salvador, Salvador Sánchez Cerén; Nicaragua, Daniel Ortega; Haiti, Michel Martelly; Dominican Republic, Danilo Medina; Cuba, Raul Castro; and the Prime Ministers of Canada, Stephen Harper; Trinidad and Tobago, Kalma Persad-Bissessar; The Bahamas, Perry Christie; Jamaica, Portia Simpson-Miller; Saint Vincent and the Grenadines, Ralph Gonsalves; Barbados, Freundel Stuart; Antigua and Barbuda, Gaston Browne; Grenada, Keith Mitchell; and Saint Lucia, Kenny Anthony.
- 14 Seventh Summit of the Americas 'Prosperity with equity: the Challenge of co-operation in the Americas' Mandates for Action OEA/Ser.E, Panama, 2015, available at http://www.summit-americas.org/vii/docs/mandates_en.pdf (last visited 30 July 2016).
- 15 See The White House, Press Release, Fact Sheet: Charting a new course on Cuba, 17 December 2014, available at <https://www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba> (last visited 30 July 2016).
- 16 US Department of State, Press Statement, Rescission of Cuba as a State Sponsor of Terrorism, 29 May 2015, available at <http://www.state.gov/r/pa/prs/ps/2015/05/242986.htm> (last visited 30 July 2016).
- 17 Ministry of Foreign Affairs of Cuba, Special Section Cuba-United States, Cuban Chancellor receives US Secretary of State, Havana, 14 August 2015, available at <http://cubaeeuu.cubaminrex.cu/article/recibe-canciller-cubano-al-secretario-de-estado-de-los-estados-unidos> (last visited 30 July 2016).
- 18 See IACHR Annual Report 2015 ch IV, Countries, Cuba, paras 18-20, available at <http://www.oas.org/en/iachr/docs/annual/2015/TOC.asp> (last visited 30 July 2016).

3.2 Organization of American States

On 18 March 2015, during the XLIX Special General Assembly, the member states of the OAS elected Luis Almagro to succeed José Miguel Insulza as Secretary-General of the organisation for a five-year term commencing on 26 May 2015. In his acceptance speech, Secretary-General-elect Almagro - a former Minister of Foreign Affairs of Uruguay - identified democracy, human rights, security and integral development as the key priorities in the Americas. Referring to the budgetary difficulties and the criticism faced by the organisation, Almagro stated that he did not intend 'to be the administrator of the crisis of the OAS, but the facilitator of its renewal' and called for hemispheric unity under the objectives established in the Strategic Vision of the OAS adopted in 2014.¹⁹

On 16 June 2015, at the 45th Regular General Assembly, the member states of the OAS elected Enrique Gil Botero (Colombia), Esmeralda Arosemena de Troitiño (Panama), Margarette May Macaulay (Jamaica) and Francisco José Eguiguren Praeli (Peru) to serve in their personal capacity as members of the Inter-American Commission. Their four-year term will start on 1 January 2016 and end on 31 December 2019. In the same session, the OAS General Assembly elected four new judges to the Inter-American Court: Elizabeth Odio Benito (Costa Rica); Patricio Pazmiño Freire (Ecuador); Eduardo Vio Grossi (Chile); and Eugenio Zaffaroni (Argentina). Their six-year term will start on 1 January 2016 and end on 31 December 2021.

The election of four new commissioners and judges for the Inter-American Commission and Court, respectively, will significantly modify the current makeup of the seven-member composition of each human rights supervisory organ. Prior to the election, an independent panel of experts, convened and endorsed by civil society organisations, publicly advised the OAS to establish an *ad hoc* advisory committee to review the suitability of candidates and to provide guidance to states during the election process, in light of the experience gathered by the European Court of Human Rights and the International Criminal Court.²⁰ The human rights community of the Americas has long called for safeguards to ensure the transparent selection of suitable and competent candidates with a balanced approach in terms of gender and ethnicity.

Also during the 45th General Assembly, the OAS member states adopted the Inter-American Convention on Protecting the Human Rights of Older Persons.²¹ The purpose of this instrument is to promote, protect and ensure the recognition and full enjoyment and exercise, on an equal

19 OAS AG/RES 1 (XLVII-E/14) Guidelines and Objectives of the Strategic Vision of the Organization of American States, adopted at the plenary session of the OAS General Assembly, 47th Special Session, held on 12 September 2014, Washington DC OEA/Ser.P AG/RES.1, available at <http://www.oas.org/consejo/GENERAL%20ASSEMBLY/47SGA.asp> (last visited 30 July 2016).

20 Final Report of the Independent Panel for the Election of Inter-American Commissioners and Judges, June 2015, available at <https://www.opensocietyfoundations.org/sites/default/files/iachr-panel-report-eng-20150603.pdf> (last visited 30 July 2016).

21 Inter-American Convention on Protecting the Human Rights of Older Persons, adopted at the 45th Regular Session of the OAS General Assembly in Washington DC on 15 June 2015, available at http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp (last visited 30 July 2016).

basis, of all human rights and fundamental freedoms of older persons, in order to contribute to their full inclusion, integration and participation in society, with a differentiated treatment. The Convention was signed by Argentina, Brazil, Chile, Costa Rica and Uruguay and requires the ratification by two signatory countries in order to enter into force.

4 Highlights on regional human rights protection and promotion

4.1 Inter-American Commission on Human Rights

During 2015, as part of its mandate to promote human rights, the Inter-American Commission issued an important number of thematic reports with standards relating to children, women, lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, indigenous peoples, migrants, and persons deprived of their liberty. Some of these reports had a special focus on these cross-cutting issues in specific states, as was the case with the situation of indigenous women and girls in Canada and migrant children in the United States.

In its report on Canada,²² the Inter-American Commission highlights the situation of indigenous women and girls as one of the most disadvantaged groups in society, with poverty and racial discrimination aggravating their vulnerability. The findings in the report reveal that indigenous women are disproportionately affected as victims of homicide and violence, and that there is a lack of due diligence by local authorities in the investigation and prosecution of these types of cases.

It is worth noting that in June 2015, after the release of the report, the government of Canada launched an independent national inquiry²³ with a mandate to examine the greater vulnerability of indigenous women and girls, the systemic causes of violence, and the impact of policies and practices by state institutions charged with policing, child welfare, and the administration of justice.

In its report on the situation of refugee and migrant families and unaccompanied children in the United States,²⁴ the Inter-American Commission addresses immigration detention, immigration proceedings, deportation, and the removal of migrants in light of the apprehension of a record number of unaccompanied children between October 2013 and September 2014, on the US-Mexico border. The recommendations in the report call for an end to the practice of automatic and arbitrary immigration detention of families. The Commission also recommends the treatment of unaccompanied Mexican children with the same safeguards and procedures applicable to unaccompanied children from non-contiguous countries; the investigation of claims of abuses and

22 IACHR *Missing and murdered indigenous women in British Columbia, Canada* OEA/Ser.L/V/II. Doc. 30/14, 2015, available at <http://www.oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf> (last visited 30 July 2016).

23 Government of Canada, *Independent National Inquiry into Missing and Murdered Indigenous Women and Girls*, available at <https://www.aadnc-aandc.gc.ca/eng/1448633299414/1448633350146> (last visited 30 July 2016).

24 IACHR *Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of Americas* OAS/Ser.L/V/II 155, July 2015, available at <http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf> (last visited 30 July 2016).

mistreatment committed by US border agents; and the safeguarding of due process guarantees and the best interests of the child in immigration proceedings.

The current context in the so-called northern triangle of Central America - El Salvador, Guatemala and Honduras – has forced many to flee their communities in search of international protection because of transnational organised crime and local gangs (*maras*). Many of these migrants are women and children and unaccompanied children. These patterns of displacement flow towards Mexico and ultimately the United States, where migrants remain deprived of their liberty while a decision on their status is made. As the Inter-American Commission warns, the situation requires addressing poverty, economic and gender inequality, discrimination and violence in the migrants' countries of origin.

Within the framework of the Commission's mandate to monitor the human rights situation in OAS member states and the follow-up on compliance with Precautionary Measure 409/14, a report on the disappearance of 43 students of the rural school Raúl Isidro Burgos in Ayotzinapa, Mexico, was issued. According to the available information, during the night of 26 September 2014 municipal police officers, allegedly in collusion with members of organised crime, attacked a group of approximately 80 students travelling by bus from Iguala to Chilpancingo in the state of Guerrero. As a result, six students died, 14 were injured, and 43 students were missing, with no further clarification of the reasons for the attack. In early October 2014, the Inter-American Commission issued a precautionary measure requesting Mexico to establish the whereabouts of the missing students, to protect the lives and physical integrity of the surviving students and to report on the judicial investigation into the events.²⁵ A few days later, the Commission signed an agreement with the state and the representatives of the missing students, to appoint the Interdisciplinary Group of Independent Experts (GIEI, its acronym in Spanish) in order to provide technical assistance to Mexico in the search for the missing students and the judicial investigation.²⁶ On the basis of a number of on-site observations in Mexico, the GIEI issued a preliminary report²⁷ examining the contradictory accounts in the judicial files of the events that took place on the day of the attack; and the deficiencies in the search for the students during the crucial 72 hours after the disappearances. The GIEI made a number of recommendations on the unification of the multiple parallel investigations; the plausible lines of investigation that had not been pursued; the need for accountability for the acts and omissions of local

25 IACHR Resolución 28/2014 Medida Cautelar No.409/14 Estudiantes de la Escuela Rural 'Raul Isidro Burgos' respecto del Estado de México, 3 de octubre de 2014, available at (Spanish only) <http://www.oas.org/es/cidh/decisiones/pdf/2014/MC409-14-ES.pdf> (last visited 30 July 2016).

26 IACHR, Press Release 117/14, 'IACHR makes an urgent call on the Mexican state regarding the murder and disappearance of students' 10 October 2014, available at http://www.oas.org/en/iachr/media_center/PReleases/2014/117.asp (last visited 30 July 2016); Press Release 136/14 'IACHR makes official technical co-operation agreement about Ayotzinapa students in Mexico' 18 November 2014, available at http://www.oas.org/en/iachr/media_center/PReleases/2014/136.asp (last visited 30 July 2016).

27 GIEI Ayotzinapa Report. Research and Initial Conclusions of the Disappearance and Homicide of the Normalistas from Ayotzinapa, available at http://media.wix.com/ugd/3a9f6f_e1df5a84680a4a8a969bd45453da1e31.pdf (last visited 30 July 2016).

authorities; and the importance of continuing with the search for the disappeared students according to new hypotheses on their whereabouts. Since the presentation of the report in October 2015, the mandate of the GIEI, initially fixed for six months, has been extended.

The disappearance of the Ayotzinapa students gained global notoriety as an example of the extreme violence by organised crime in collusion with local state officials in Mexico. Based on official figures, the Inter-American Commission has stated that in certain areas of the country, disappearances have reached critical levels, with more than 20 000 cases recorded, and consistent information on the direct participation, acquiescence or tolerance of state agents.²⁸

As part of its mandate to process individual petitions on the violation of the American Declaration of the Rights and Duties of Man against states that have not yet ratified the American Convention on Human Rights, the Inter-American Commission during 2015 issued and published three reports on the merits relating to the United States. These three reports refer to the application of the death penalty in violation of the right to due process and a fair trial. In two of the cases, the Commission found that non-nationals charged with the commission of crimes punishable by death in the United States had not been afforded access to effective court-appointed counsel and to consular notification and assistance.²⁹ In the third case, the Commission found that a national had not been afforded access to effective court-appointed counsel and that the United States had failed to respond to allegations and evidence ‘concerning possible racial discrimination’ (paragraph 146) during the judicial proceedings.³⁰ As in previous cases concerning due process violations in death penalty cases under the American Declaration, the Commission concluded in the three reports that the imposition of capital punishment in these circumstances constituted a violation of the right to life.

Regarding its mandate to examine claims on the violation of the American Convention and other Inter-American human rights treaties, the Inter-American Commission decided to make public two reports on the merits during 2015. One of the cases involved the violation of the rights to privacy and equality before the law of two members of the Mexican armed forces who had been discharged on account of their testing HIV positive.³¹ The Commission decided to publish the report on the grounds that the Mexican state had fully complied with the recommendations first issued in this case in 2011 regarding the provision of comprehensive medical

28 IACHR Press Release ‘IACHR publishes report on the situation of Human Rights in Mexico’ 2 March 2016, available at http://www.oas.org/en/iachr/media_center/PReleases/2016/023.asp (last visited 30 July 2016).

29 IACHR Report 11/15 Case 12.833 Merits (Publication), Felix Rocha Diaz, OEA/Ser.L/V/II.154 Doc 5, 23 March 2015, available at <http://www.oas.org/en/iachr/decisions/2015/USPU12833EN.pdf> (last visited 30 July 2016); Report 79/15 Case 12.994, Merits (Publication), Bernardo Aban Tercero, OEA/Ser.L/V/II.156 Doc 32 28 October 2015, available at <http://www.oas.org/en/iachr/decisions/2015/USPU12994EN.pdf> (last visited 30 July 2016).

30 IACHR Report 78/15 Case 12.831, Merits (Publication), Kevin Cooper, United States OEA/Ser.L/V/II.156 Doc 31, 28 October 2015, available at <http://www.oas.org/en/iachr/decisions/2015/USPU12831EN.pdf> (last visited 30 July 2016).

31 IACHR Report 80/15 Case 12.689 Report on Merits (Publication), JSCH and MGS, Mexico, OEA/Ser.L/V/II.156 Doc. 33, 28 October 2015, available at <http://www.oas.org/en/iachr/decisions/2015/mxPU12689EN.pdf> (last visited 30 July 2016).

services for the victims; their being reinstated into the armed forces; the compensation of material and non-material damages caused by their discharge; and the adoption of domestic legislation providing that testing positive for HIV may only serve as a ground for discharge if it results in the loss of functionality to perform actions in the line of duty.

In 12 cases on the merits concerning Bolivia, Brazil, Ecuador, Guatemala, Honduras, Nicaragua, Peru and Venezuela, the Inter-American Commission decided not to publish its reports and instead to refer these matters to the contentious jurisdiction of the Inter-American Court of Human Rights (Inter-American Court). The cases involve issues relating to extrajudicial executions, forced disappearance, slave labour, freedom of expression, physical integrity in connection with reproductive rights and non-discrimination, due process of law, and access to justice.

4.2 Inter-American Court of Human Rights

During 2015, the Inter-American Court delivered 16 judgments on preliminary objections, merits and reparations, and two judgments on the interpretation of previous decisions. The judgments on the merits involved the application of the American Convention on Human Rights and other Inter-American human rights treaties to issues relating to non-discrimination, gender, indigenous rights, forced disappearances, extrajudicial execution, freedom of the press, political participation and due process of law. Some of the more significant decisions in terms of development of Inter-American standards are summarised below.

In its judgment in the case of *Cruz Sanchez & Others v Peru*,³² the Inter-American Court examined the death of three Tupac Amaru Revolutionary Movement (MRTA) members in the context of a hostage rescue operation known as *Chavin de Huantar*, and considered whether the acts and omissions of the state agents involved were compatible with the American Convention and the applicable rules of international humanitarian law. The operation was carried out by Peruvian special forces on 22 April 1997 in order to rescue 72 hostages held by 14 MRTA members at the Japanese embassy in Lima. The judgment acknowledged that at the time of the events there was an internal armed conflict in Peru,³³ and that the state was entitled to use force with the specific objective of ensuring the release of the hostages who had been held at the embassy for almost four months, always within the framework of international humanitarian and international human rights law.

According to the initial reports issued by the security forces, all 14 MRTA members involved in the hostage taking had been killed in the confrontation during the rescue operation. However, it was later established that at least one of the three MRTA members whose case was brought before the Inter-American Court had been killed while in the custody of the state and not in combat, as previously reported. Therefore,

32 Inter-American Court Case of *Cruz Sánchez & Others v Peru*. Judgment of 17 April 2015 (Preliminary Objections, Merits, Reparations and Costs) Series C No 292, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_292_esp.pdf (last visited 30 July 2016).

33 Comisión de la Verdad y Reconciliación del Perú, Informe Final, 2003, volume I, chapter 1.1 'Los períodos de la violencia' 54 and 55, available at (Spanish only) <http://cverdad.org.pe/ifinal/> (last visited 30 July 2016).

the Inter-American Court found that the state was responsible for the violation of the right to life protected in article 4 of the American Convention. Regarding the other two alleged victims in the case, the Court considered that the evidence available was not sufficient to ascertain the circumstances of the deaths and, therefore, no violation of the right to life under the American Convention could be found. Instead, the Court established that the state had failed to conduct a proper investigation and to ensure due process and judicial protection for the victims' family members.

This judgment follows previous decisions by both the Inter-American Court and Commission when interpreting the obligation to respect and ensure the right to life under the American Convention in a manner complementary to the rules of international humanitarian law in cases involving combat situations between state security forces or their proxies and armed groups in Argentina, Guatemala and Colombia. In this case, however, the Court chose not to follow its - until now - constant practice of granting monetary compensation for material and moral damages as part of the reparations in cases involving the commission of extrajudicial executions. In their respective separate dissenting opinions, Judges Vio Grossi and Ferrer Mac-Gregor Poisot expressed the view that the publication of the judgment in itself was insufficient as a reparation and that monetary compensation for the moral damage caused to the victims' family members should have been awarded, in line with the historical approach of the Inter-American Court *vis-à-vis* the reparation of the violation to the right to life and judicial protection.

In its decision in the case of *López Lone & Others v Honduras*,³⁴ the Inter-American Court examined the arbitrary removal from office of four judges who – as members of a pro-democracy association – had publicly contradicted the official position of the Supreme Court justifying the ousting of President Zelaya in 2009,³⁵ and instead identified it as a *coup d'état*. In retaliation, the four judges were subjected to disciplinary proceedings and removed from office by the Supreme Court.

Based on the wide condemnation by the international community of President Zelaya's ousting - including strong pronouncements by the OAS General Assembly and Permanent Council and by the UN General Assembly - the Inter-American Court considered that the events of June 2009 indeed constituted a *coup d'état* and that the victims had been removed from office as a consequence of expressing their views on the impact the *coup d'état* would have on the rule of law in Honduras.

The Inter-American Court found that the removal from office of the victims violated the principles of legality and due process of law, and the rights to freedom of expression, freedom of association, and participation in government provided for in articles 8, 13, 16 and 23 of the American

34 Inter-American Court, case of *López Lone & Others v Honduras*, Preliminary Objection, Merits, Reparations and Costs. Judgment of 5 October 2015, Series C No 302, available at (Spanish only) http://www.corteidh.or.cr/docs/casos/articulos/seriec_302_esp.pdf (last visited 30 July 2016).

35 For an account of the events of June 2009 in Honduras and the reaction of the Inter-American system, see IACHR 'Honduras: Human rights and the *coup d'état* OEA/Ser.L/V/II. Doc. 55, 2009, available at <http://www.cidh.org/countryrep/Honduras09eng/Toc.htm> (last visited 30 July 2016).

Convention. The Court explained that these rights could be subjected to restrictions compatible with the treaty, among them those limiting their exercise by officials from the judicial branch, particularly judges. In fact, in the case of members of the judiciary, restrictions on freedom of expression, association and participation in political parties may be pertinent and necessary to ensure the integrity of the administration of justice within the rule of law. However, the Inter-American Court considered that in times of serious democratic crises, any restriction on individual rights that may interfere with the judges' actions to uphold democracy should be lifted. In its view, in this case any impediment to expressing views on the illegality of the 2009 *coup d'état* would contradict the independence that the members of the judiciary, as one of the branches of government, must enjoy. Thus, the Inter-American Court concluded that the conduct of the victims in this case could not be construed as contrary to their roles as judges nor be subject to restrictions and disciplinary proceedings. As part of the reparations, the Court ordered Honduras to reinstate the four judges and to provide them with compensation for material and moral damages.

As acknowledged in the judgment itself, this is the first opportunity where the Inter-American Court has addressed the right of officials from the judicial branch to gather, express their views and exercise their political rights in terms of participation in and access to public service and the so-called 'right to defend democracy'. The case is significant in view of the mutually-reinforcing nature of democracy, the rule of law and the independence of the judicial branch.

In the case of *Gonzales Lluy & Others v Ecuador*,³⁶ the Inter-American Court examined the rights to life, physical integrity, and education *vis-à-vis* non-discrimination in a case involving the infection of a child with HIV and the exclusion she suffered on account of her health, in particular regarding her schooling. As a three year-old, the victim was diagnosed with thrombocytopenic purpura and received an urgent blood transfusion at a Red Cross blood bank, without prior basic safety HIV testing. The Inter-American Court found that inadequate state supervision had resulted in the administration of a contaminated transfusion, with permanent consequences for the victim's physical integrity and a severe risk to her life. Thus, the state was found to have failed to fulfil its obligation to monitor and supervise the provision of health care services, within the framework of the right to personal integrity and the obligation not to endanger life, in violation of articles 4 and 5 of the American Convention. This finding is in line with previous decisions of the Inter-American Court relating to the lack of due diligence in the control of third party providers of health services, always within the obligation to ensure the rights to life and physical integrity under the American Convention.³⁷ As in previous cases where the Inter-American Court has established state responsibility

36 Inter-American Court *Gonzales Lluy & Others v Ecuador* Judgment of 1 September 2015 (Preliminary objections, merits, reparations and costs) Series C No 298, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_298_ing.pdf (last visited 30 July 2016).

37 See, for instance, Inter-American Court case of *Suarez Peralta v Ecuador*, Judgment of 21 May 2013 (Preliminary Objections, Merits, Reparations And Costs) Series C No 261, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_261_ing.pdf (last visited 30 July 2016).

and addressed issues relating to access to health by invoking the right to physical integrity under article 5 of the American Convention, the separate opinions in this judgment revisit the ornamental debate on direct justiciability of socio-economic rights under article 26 of the American Convention. In this composition, Judge Porto, on the one hand, does not support the direct justiciability of socio-economic rights under article 26, and favours the pragmatic connectivity with the right to life or the right to personal integrity (paragraph 30 of the separate opinion), while Judge Ferrer Mac-Gregor Poisot (Judges Robles and Caldas concurring), on the other hand, contends that by not basing its finding on an expansive interpretation of article 26 of the American Convention, the Court fails to deliver in full an analysis of the duty to ensure the right to health (paragraph 13 of the *Lluy* case, citing paragraph 57 of his concurring opinion in the case of *Suárez Peralta*).

The judgment also examined the decision of the school authorities to exclude the victim from attending classes on account of a potential risk to the health of other students and their best interests. The Inter-American Court found that school authorities had failed to show that the differentiated treatment of the victim was justified and that the purpose and the effect of the exclusion were not discriminatory. The Court stated that stereotypical presumptions concerning the possible risks related to HIV were not appropriate to ensure the legitimate objective of protecting the best interests of the child, and that precisely this principle could not be invoked to justify discrimination against another child owing to her health status. Thus, in this case, far from adopting measures to combat the prejudice surrounding HIV, the school had actually reinforced the stigma associated with such illnesses. The Inter-American Court found that the state had failed to ensure article 13 of the Protocol of San Salvador, in relation to articles 19 and 1(1) of the American Convention in terms of the right not to be discriminated against on the basis of health in the context of the education system. The Court stated that various vulnerability factors and the risk of discrimination intersected in this case: the victim's condition as a child, a female, a person living in poverty, and a person living with HIV. Apart from the payment of compensation, the reparations ordered by the Court included the provision of medical and psychological treatment, a scholarship, and decent housing for the victim. The Court also ordered the state to train health officials on best practices and on the rights of patients with HIV.

During 2015 the Inter-American Court once more addressed the issue of the lack of due diligence by the state in the prevention and investigation of femicides in the context of violence against women, the growing number of vicious killings, and structural gender discrimination and stereotyping. In line with its 2014 decision in the case of *Maria Isabel Veliz Franco v Guatemala*,³⁸ and based on the grounds originally established in the *Campo Algodonero* case in 2009,³⁹ the Inter-American Court examined the conduct of state agents in the prevention and investigation of a young woman's initial disappearance and violent homicide in the case of *Claudina Velásquez Paiz & Others v Guatemala*,⁴⁰ and found serious violations of the

38 Inter-American Court case of *Veliz Franco & Others v Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 19 May 2014, Series C No. 277, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_277_ing.pdf (last visited 30 July 2016).

Convention of Belem do Para and the American Convention. The reparations granted on behalf of the victims, including the family members of Claudina Velásquez Pais, are also in line with previous decisions in terms of compensation for material and moral damages, symbolic measures, education to eradicate gender discrimination, specialised training of state officials involved in the prevention and investigation of these types of cases, and the adoption of legislative and policy measures to establish a search mechanism for victims.

4.3 Working Group of the Protocol of San Salvador

The Working Group to Examine the Periodic Reports of the States Parties to the Protocol of San Salvador (WGPSS), a specialised monitoring mechanism composed of independent experts, government experts and representatives from the Inter-American Commission created by AG/RES 2262 (XXXVII-O/07), published a report compiling all progress indicators to measure compliance with social, economic and cultural rights protected under the Protocol of San Salvador.⁴¹ The WGPSS initially drafted progress indicators to measure compliance with the rights to education, social security and health that were formally adopted in 2011 by the OAS General Assembly (AG/RES 2713 XLII-O/12). Progress indicators to measure compliance with a second group of rights in the Protocol, including the right to work, trade union rights, the right to a healthy environment, the right to food, and the right to the benefits of culture, were also drafted by the WGPSS and adopted by the General Assembly two years later, in 2014 (AG/RES. 2823 XLIV-O/14). The WGPSS designed an important number of structural, process and outcome indicators, arranged into three conceptual categories, including the incorporation of rights, financial context and budgetary commitment, and state capabilities. These conceptual categories are to be considered in light of the principles of equality and non-discrimination, access to justice, and access to information and participation. The information submitted by state parties must also take into consideration gender equity, special needs groups (children, the elderly, persons with disabilities), and ethnic diversity (indigenous peoples and Afro-descendants, in particular) as cross-cutting issues.

The WGPSS met for its first two monitoring sessions in February and October 2015 at OAS headquarters in Washington DC and received official delegations from Bolivia, Colombia, Ecuador, Mexico, Paraguay and Uruguay to discuss the very first national reports on compliance with the rights to social security, health and education on the basis of the progress indicators compiled in the report. The submission of national reports and the monitoring of progress on the basis of the indicators accepted by

39 Inter-American Court case of *González & Others ('Cotton Field') v Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 16 November 2009. Series C No. 205, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf (last visited 30 July 2016).

40 Inter-American Court case of *Velásquez Paiz & Others v Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 19 November 2015. Series C No 307, available at (Spanish only): http://www.corteidh.or.cr/docs/casos/articulos/seriec_307_esp.pdf (last visited 30 July 2016).

41 WGPSS, Progress Indicators for Measuring Rights under the Protocol of San Salvador, OEA/Ser.D/XXVI.11, 2015, available at http://www.oas.org/en/sedi/pub/progress_indicators.pdf (last visited 30 July 2016).

consensus at the OAS General Assembly at the proposal of the WGPSS constitute a significant landmark in the protection of economic, social and cultural rights in the Americas.

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