

CONFIDENTIALITY IN THE PROCEEDINGS AS A TOPIC IN THE DISCUSSION OF REFORM*

Denise GILMAN

"Where there is no publicity, there is injustice. Publicity is the very soul of justice".

JEREMY BENTHAM¹

I. INTRODUCTION

Issues relating to the confidentiality of the individual petition proceedings before the Inter-American Commission on Human Rights (the "Commission" or the "Inter-American Commission") and the Inter-American Court of Human Rights (the "Court" or the "Inter-American Court") have been a topic of significant discussion and even controversy during the debate on the reform of the Inter-American human rights system. The various meetings of experts held to discuss a possible reform of the system have included on their agendas the question of confidentiality in individual petition proceedings.² States and non-governmental organizations ("NGOs") alike have also made their views known on the subject in other fora.³

Issues relating to the question of confidentiality have also arisen in relation to other functions of the bodies of the inter-American system, such as reporting on the general human rights situation in countries. However, this Article will be limited to

* The opinions expressed in this Article are those of the author alone and are not to be attributed to the Organization of American States or any of its bodies.

1. J. Bentham, 4 *The Works of Jeremy Bentham*, Published Under the Superintendence of his Executor John Bowring 316 (1962).
2. *See, e.g.*, Draft Agenda for the Special Session of the Commission on Juridical and Political Affairs on Evaluation and Improvement of the Inter-American Human Rights System with the Participation of Governmental Experts, OEA/Ser.G, CP/CAJP-1162/97 rev. 1 corr. 1, February 27, 1997.
3. For example, during the 1997 General Assembly of the Organization of American States held in Lima, Peru, several NGOs circulated a letter from the Ministry of Foreign Affairs of Mexico to human rights organizations in Mexico, in which the Mexican Government established its position on reform. Similarly, a group of NGOs issued a document stating that the criteria guiding the reform process should include transparency in the procedures of the inter-American human rights bodies.

a discussion of confidentiality in individual petition proceedings. After suggesting a paradigm of analysis, this Article will proceed to highlight topics of debate regarding the confidentiality of publicity of the proceeding of the inter-American human rights system during the different stages of those proceedings. In making recommendations on these topics, the Article will draw upon the experience of the universal, African and European human rights systems in handling individual cases as well as upon the experience of the inter-American system.

II. PARADIGM FOR THE DEBATE AND ANALYSIS

It is tempting, at first glance, to announce a polemic in the positions of the different users of the inter-American human rights system in relation to the question of the confidentiality of its proceedings. From this perspective, it would be suggested that the NGOs who litigate individual cases and who consider themselves watchdogs of the system favor reforms which would make public all phases of the proceedings. On the other hand, the States involved in litigation would seek reform providing further safeguards and stricter rules guaranteeing the confidentiality of the proceedings before the inter-American system.

However, upon a more profound analysis of the positions of the NGOs and the States, it becomes clear that the polemic does not exist in such polar terms. The States do not suggest that all procedures should be confidential. In fact, at the Seminar on the Inter-American System for the Promotion and Protection of Human Rights organized by the Commission and held in early December, 1996 (the "December Seminar"), representatives of several States stated their support for the publication of Commission reports.⁴ Other State representatives suggested that portions of the proceedings now considered confidential be made public at least to the parties. For example, one State representative suggested that the parties should receive the minutes of Commission debates and decisions regarding the referral of cases to the Court.⁵

Nor do the NGOs suggest that the reforms should eliminate all confidentiality in the Inter-American system for processing individual cases. No NGO has suggested, for example, that the parties to a case before the Commission should be allowed to freely publish the written briefs of the opposing party which they receive from the Commission. Other proposals made by the NGOs suggest that documents and

4. See Conclusions of the Inter-American Commission on Human Rights and Minutes of the Presentations of the Participants, Seminar on the Inter-American System for the Promotion and Protection of Human Rights 46, 51, OEA/Ser/L/V/II.95, Doc. 28, 11 March 1997 (hereinafter December Seminar Conclusions).

5. *Id.* at 53.

information relating to certain phases of the proceedings should be made available to the parties only with a proviso warning that such material should not be made public.

The consideration of the question of confidentiality as part of the reform process thus should not pit two supposedly opposing positions against one another in an attempt to establish a winning position which will govern all case proceedings before the Inter-American system. Rather, the various stages of the case proceedings before the two bodies of the inter-American human rights system should be examined separately, considering the purpose of each stage and the nature of each of the bodies. The analysis should take into account the language and spirit of the American Convention and the varying levels of confidentiality or publicity which might be employed, as well as the objectives sought to be achieved by providing for confidentiality or publicity.

The consideration of the degree of publicity to be permitted in the individual petition proceedings before the inter-American system also necessarily touches upon various principles recognized under international law, including the American Convention on Human rights (the "Convention"). Those principles include the right to open and transparent judicial proceedings as a component of the right to a fair trial and the right to freely receive and impart information.⁶ Due emphasis should be placed on these general principles, to the extent to which they illuminate the debate regarding confidentiality and publicity in the proceedings before the inter-American system. A focus on these principles suggests that the analysis should be guided by the importance of maximizing publicity to the extent possible.

A proper analysis along these lines requires clarifying that there exist at least three different levels of publicity which might be intended when questions of confidentiality or publicity are raised. The first level includes the communications of decisions or information only to the parties to the proceeding. At this level, the information provided to the parties is not made public either by the parties or by the bodies of the inter-American system. The second level provides for establishing the public nature of certain information or decisions relating to proceedings before the inter-American system. At this level, the parties would be free to discuss and publicize the information in question, but the system's institutions would not provide

6. The American Convention on Human Rights provides that, "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal... for the determination of his rights and obligations". The Convention further sets forth the general principle that criminal proceedings shall be public. The Convention also provides that: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds". American Convention on Human Rights, arts. 8(1), 8(5), 13 (hereinafter American Convention), in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Serv.L.V/II.92, doc. 31 rev. 3, May 3, 1996 (hereinafter Basic Documents).

the information to the public. At the third level, the bodies of the inter-American human rights system would themselves make information public, either by providing information or materials to those who request them or by publishing that information for distribution.⁷

The analysis of issues relating to confidentiality with a view to reforming the inter-American human rights system also requires defining generally the objectives which are meant to be achieved through confidentiality or publicity. Publicity in any jurisdictional or quasi-judicial system which analyses and disposes of cases serves society which has a legitimate interest in learning about specific cases and the application of justice generally. The bodies of the inter-American system have highlighted the importance of ensuring that a society may become informed about such matters. In this connection, the Inter-American Court has observed that "a society that is not well informed is not a society that is truly free".⁸

Publicity further aids in ensuring that a judicial or quasi-judicial system works effectively and fairly by permitting scrutiny of the actions of the tribunal. In regard to the inter-American system, it should be noted that the Inter-American Commission and Court are public international entities. They are owned and supported by the citizens of the members States of the OAS who have a right to learn how they are being served and how their money is spent. Transparency also provides greater equality between the parties to a case, strengthening the opportunity for both parties to make the arguments necessary to the presentation of their case and to participate equally in the proceedings.

Furthermore, in the inter-American human rights system, publicity in relation to individual petitions proceedings serves largely as the engine which allows the system to function for the protection of human rights in the hemisphere. The international pressure created by publicity surrounding human rights cases, and their treatment by inter-governmental bodies such as the Commission and the Court, forces States in the Americas to address human rights violations.⁹ States are more free to act in ways which violate human rights without such international pressure, particularly given the often relatively weak effect of domestic pressure in the OAS member States. Given the fact that the inter-American system possesses no physical

7. For example, this information might be published in a formal OAS document. It might also be disseminated through press releases and through the OAS Department of Public Information. Certain information might be brought to the attention of the General Assembly of the OAS through the intermediary of the Secretary General of the OAS, either in the Commission's annual report of independently.

8. I/A Court H.R., Advisory Opinion OC-5/85, November 13, 1985, "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)", par. 70.

9. In part, the States react to avoid possible political sanctions by the General Assembly of the OAS or by its individual member States. In practice, such political sanctions are rarely forthcoming.

means of enforcement of its decisions and recommendations, publicity and the resulting scrutiny serve as crucial spurs to compliance. Publicity of current or past proceedings, in turn, stimulates further awareness of the system thereby strengthening its effects on future human rights situations and cases.

Publicity of the proceedings before the inter-American system also serves several practical purposes. It creates public awareness of the jurisprudence and functioning of the bodies of the system, thereby allowing greater access to the system by an expanded set of users. Finally, publicity regarding the processing of a specific case by the inter-American system may serve to draw out witnesses of persons possessing evidence regarding that case of similar cases.

On the other side, the objective most frequently invoked in support of maintaining a certain level of confidentiality in the proceedings of the inter-American system is that of allowing States the opportunity to defend themselves and even to resolve human rights situations before facing international recrimination. At least in an initial stage, confidentiality may encourage States to address human rights cases by providing a confidential and non-hostile forum where solutions to such matters can be discussed. States may be more willing to take steps to resolve human rights situations if they can be assured that their actions will not be made public and perhaps treated as an admission of responsibility. Even this use of confidential procedures does seem to assume that the threat of possible future publicity will play an important role in encouraging a State to act in an initial confidential stage.

Confidentiality may also serve in the inter-American human rights system to protect victims, petitioners and witnesses in cases brought before the system. In some countries in the Americas, such persons may still be subject to serious reprisals, sometimes violent, if their participation in or relation to an international human rights proceedings becomes known. This goal of protection can often be obtained, however, by establishing special exceptions to general rules providing for publicity in cases where such publicity might create a situation of danger. In other cases, publicity may actually provide protection for individuals involved in human rights cases. International attention focused on a possible situation of danger often creates an incentive for the protection of the individuals involved.

Finally, the confidentiality established in relation to certain activities of the bodies of the inter-American system, including deliberations on cases and the preparation of decisions and reports, seeks to protect the integrity of the decision-making processes. Confidentiality in this context serves to ensure that, at the moment of deliberation and decision, those bodies are not affected by improper external influences but rather make their own reasoned decisions based on a full and open debate. A further aim of confidentiality in these stages is to maintain the equality of the parties by ensuring that neither party exerts undue influence in the decision-making process and that neither party receives notice of the outcome or probable outcome of the decision-making process before a decision is formally issued.

III. PROCEEDINGS BEFORE THE COMMISSION

For purposes of applying the analysis suggested above, this Section divides the proceedings of the Commission into segments. The concrete issues which have arisen in the debate regarding the publicity of proceedings will be discussed as they relate to each of the following stages of the proceedings before the Commission: 1) the initial processing of an individual petitions before a decision is reached;¹⁰ 2) the admissibility decision; 3) the Article 50 Report, and 4) the Article 51 Report and subsequent related proceedings. The proceedings relating to the presentation of and litigation of cases before the Court will be discussed in the following Section.

a. Initial Processing of an Individual Petition

During the debate over reform, users of the inter-American system have complained that the current rules regarding confidentiality during the initial processing of a petition by the Commission are not clear. The Convention makes no mention of the confidentiality of these proceedings. The Statute and Regulations of the Commission simply provide that the members of the Commission and its Secretariat may not breach the confidentiality of any information considered confidential by the Commission, without defining what that confidential information might be.¹¹

The level of publicity provided during the processing of an individual petition must at a minimum include the transmittal of the communications and evidence presented by each party to the other. The individual petition proceedings before the Commission are quasi-judicial and result in a decision which affects the rights of the parties to a case before it. To maintain the equality of the parties, each side must be fully aware of the arguments and evidence presented to the Commission by the other party, as well as any procedural requests made by that party.

The Commission currently transmits the written briefs and the evidence presented by one party to the other. However, progress is still being made in implementing full transparency of the proceedings between the parties. For example, the Commission just recently adopted a policy requiring that the Commission Secretariat notify a party regarding requests for extension of time presented by

10. This discussion will treat only the basic initial processing of a petition before the Commission. Other specific components of the processing of a petition, such as requests for precautionary measures and friendly settlement proceedings, raise additional issues regarding confidentiality and publicity. Those questions will not be covered in this Article, although it is suggested that at least the results of those proceedings should be publicized by the Commission.

11. See Statute of the Inter-American Commission on Human Rights, art. 9(3) (hereinafter Commission Statute), in Basic Documents; Regulations of the Inter-American Commission on Human Rights, art. 13(3) (hereinafter Commission Regulations), in Basic Documents.

the other side and the Commission's decision on such requests. The parties to individual petition proceedings still approach the Commission to discuss the decisions which will be adopted by the Commission in their cases. The Commission has not always avoided *ex parte* communications by inviting the other party to be present or by communicating the content of such discussions to the other party. Greater care must be taken by the Commission in this area.

In discussing case proceedings, the NGOs have also insistently mentioned the need for the Commission to allow the parties to access the Commission's files relating to a case. In practice, the Commission has not received requests from petitioners or States to access files at the Commission. However, understanding that the parties should be informed of all briefs and evidence presented by the other party, the Commission has, upon occasion, provided by mail a complete copy of all of the communications transmitted by the Commission from one party to another in a case, at the request of the involved State or petitioner. The objective of providing confidentiality for Commission deliberations would dictate that private internal memoranda between members of the Commission Secretariat and the Commission and other similar information should be excluded from any file accessed by the parties.

It should be noted that, although *ex parte* communications cannot be allowed, not every communication to the Commission regarding a case involves an *ex parte* communication, relating to the merits or procedure of the case, which must be made available to the litigants. In addition to serving as a quasi-adjudicatory body in an individual petitions proceeding, the Commission also serves as an investigative body and as a facilitator of friendly settlements.¹² The Commission engages in preliminary investigations, which may include interviews with persons with knowledge about a case, perhaps even with the presence of one of the parties to the case. So long as these investigations and interviews are of a preliminary nature and do not end in statements or other evidence to be used in deciding the case, they need not be formally communicated to the parties or to the party not present. Similarly, the Commission may hold conversations with one of the parties to a case for the purpose of furthering friendly negotiations. The content of such a conversation need not, and in some cases should not, be made known to the other party.

As to the second level of publicity, the parties should probably not be allowed complete freedom to make public all of the information and evidence to which they are privy. The parties probably should not be allowed, for example, to publish the contents of the briefs of the opposing party or to characterize that party's position of arguments in a specific manner. This minimal level of

12. See American Convention, arts. 48(1) (d), (f).

confidentiality is appropriate in the proceedings before the Commission, which are not, after all, completely of a judicial nature. The concerns regarding public accountability and public awareness are thus not fully applicable in the stage of the processing of an individual petition before the Commission. Some confidentiality at this stage does not preclude greater public participation and awareness in later stages of the proceedings in the inter-American system, such as with the publication of the Commission's reports or in the fully jurisdictional proceedings before the Court. In addition, as suggested above, some confidentiality in these early stages of the proceedings may encourage States to act more openly and to seek to resolve human rights situations presented as cases. This possibility becomes more likely if the specific arguments of the State are not made public, which might have the effect of making certain hard-line positions more difficult to modify or of chilling the State from conceding certain points to the opposing party.

However, it is submitted that the parties should be allowed to make public some information about the proceedings. For example, they should be permitted to announce that they have filed a complaint and to describe the case they have denounced and the violations they have alleged. This information could then be published by the press if it attracted sufficient interest. Allowing the publication of such minimal information about the case should not prejudice the opportunity to obtain cooperation from the State involved and would allow the public to learn what types of cases are being brought, against which countries, etc. Limiting the parties' rights to air their views in this manner would discourage the filing of complaints, undermining the success of the system.

Some States have expressed concern during the debate over reform regarding such a position on the confidentiality of the proceedings. They have suggested that they are stripped of the opportunity to defend themselves when the press publishes information relating to individual petitions processed by the Commission.¹³ They argue that States are sometimes declared guilty by the press before the Commission has an opportunity to reach a decision on State responsibility.¹⁴ However, the publication of information regarding the filing of a petition or the existence of a case before the Commission should not be seen as a finding of responsibility or as a sanction. Pursuant to the Convention and the jurisprudence of the inter-American system, the Commission's decision to process an individual petition does not constitute a finding of State responsibility nor even a decision finding the petition admissible. The publication of basic information about the existence of a case in the press or elsewhere simply provides the public with important information. Nor is the State left defenseless

13. December Seminar Conclusions, *supra* note 4, at 52.

14. *Id.*

to react to such publication. The State itself may always issue information to the press presenting its views on the case and noting that the Commission has not reached a conclusion on State responsibility.

For a brief period beginning in 1995, the Commission included a paragraph regarding confidentiality in its letter notifying petitioners that the Commission had opened a case which would probably preclude even this minimal type of publicity by the parties. That clause stated: "I also wish to advise you that all proceedings before the Inter-American Commission on Human Rights are strictly confidential. Any breach of that confidence could therefore cause a case to be suspended."¹⁵

Yet, no norm of the Convention or the Statute or Rules of the Commission provides a basis for an interpretation which establishes that the Commission proceedings are "strictly confidential". Nor is such complete confidentiality justified by the goals that some level of confidentiality might serve. Furthermore, the position taken by the Commission in this letter would seriously alter the quality of the parties. The Commission warns only the petitioners about the confidentiality of the proceedings, and a breach in confidentiality would result in a negative consequence only for the petitioners. According to the letter, upon a breach, the Commission would dismiss the case brought by the petitioners. No similar punishment exists as against the States who seek to have closed those cases brought against them.

The confidentiality clause may have been inspired by the practice of the European Commission of Human Rights (the "European Commission"). That body warns petitioners filing a complaint regarding the confidentiality of its proceedings and requires petitioners to "declare that they will respect the confidentiality of the proceedings before the Commission".¹⁶ The European Commission reserves the right to dismiss cases where it considers that improper publicity constitutes an abuse of the right of petition.¹⁷ In establishing the confidentiality of its proceedings in its jurisprudence, the European Commission relies on a provision of the European Convention on Human Rights which provides that the European Commission shall meet *in camera*.¹⁸ The Rules of Procedure of the European Commission then further define and clarify what is meant by the Confidentiality of the proceedings.¹⁹

15. See Internal Commission Secretariat Memo dated May 24, 1995 (Emphasis added).

16. Rules of procedure of the European Commission of Human Rights, Rule 44(2) (e) (hereinafter European Commission Rules), in 33rd Yearbook of the European Convention on Human Rights.

17. See Francis G. Jacobs & Robin C.A. White, *The European Convention on Human Rights* 345 (2nd ed. 1996).

18. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 33 (hereinafter European Convention).

19. European Commission Rules, Rule 17(1), (2).

The American Convention, on the other hand, does not make any provision for confidentiality and does not establish even that the Commission shall meet privately or *in camera*. The Commission's regulations do provide that the Commission's meetings will be closed and that it shall deliberate in private.²⁰ Yet, unlike the European Commission, the American Commission has never issued any further rules or any jurisprudence interpreting the language regarding private deliberations and meetings in a manner which would require confidentiality of the proceedings in general. It would probably be inappropriate to develop such a broad and significant interpretation on the basis of a norm which does not derive from the Convention but rather from the Commission's own regulations.

It is also suggested that the European system has adopted an excessively expansive interpretation of the rules regarding private deliberations and meetings, which should not be duplicated in the inter-American system. The norms regarding confidential deliberations simply codify the principle that the deliberations of a decision-making body should be private so as to be protected from all outside influence and to allow a full exchange of view among the members. This rationale for confidentiality does not apply to the processing of a case outside of the deliberations of the decision-making body. Rather, it requires a logical leap to suggest that a norm establishing confidential deliberations should also be extended to make all proceedings confidential. There exists no policy reason or other justification for making that leap in the inter-American system.

In any case, a review of the European Commission Rules of procedure and jurisprudence shows that even the level of confidentiality intended in the European system is not complete nor as inclusive as that suggested by the letter used temporarily by the Inter-American Commission. The European Commission Rules provide that, "[a]ll deliberations of the Commission shall be and shall remain confidential", and that "[t]he contents of all case-files, including all pleadings, shall be confidential".²¹ The cases dismissed by the European Commission for breach of confidentiality tend to involve disclosures of specific documents of Commission decisions from the file or detailed descriptions of actual or invented responses of the other party.²² The European Commission

20. See Commission Regulations, art. 16(3), 46(3). Hearings on individual cases are also held in private unless the parties agree to another arrangement. See *id.*, art. 770(2).

21. European Commission Rules, Rule 17(1), (2).

22. See Eur. Comm. H.R., *Malige v. France*, Application N° 26135/95, Decision of March 5, 1996, D.R. 84-B, 156 (petitioner published the questions put to the Government by the Commission, mischaracterized publicly the status of the proceedings and predicted how the Government would reply in the case); Eur. Comm. H.R., *Drozd v. Poland*, Application N° 25403/94, Decision of March 5, 1996, D.R. 84-B, 114 (petitioner made public the Commission's decision to request information from the Government and the Government's request for an extension of time); Eur. Comm. H.R., *Familiapress Zeitungs v. Austria*, Application N° 20915/92, Decision of March 3, 1995, D.R. 80-B, 74 (petitioner made public the Commission's confidential provisional decision on the merits).

specifically clarified in one case that the rule of confidentiality, "has been consistently interpreted by the Commission to mean that the *contents of the case-files* in all applications before it are to be treated as confidential."²³ It is suggested above that disclosure by the parties to the public of the contents of the parties' briefs or other parts of the case files before the Inter-American Commission might properly be prohibited, while still allowing the parties to speak publicly about more general information.

This approach also approximates that employed by the African Commission on Human and People's Rights (the "African Commission"). The African Commission's policy holds that the parties may publicly reference and discuss cases pending in its proceedings, although the Commission itself may not release any information.²⁴

The Inter-American Commission Secretariat no longer includes the portion of the letter referring to the confidentiality of the proceedings, and no case has ever been dismissed by the Commission on the grounds of a breach of confidentiality. It is suggested that the Commission should not return to the invocation of language requiring absolute confidentiality. The Commission should instead draft clear rules for the processing of individual petitions which would prevent disclosures of specific information in the case files but which would allow the parties to make public general information about the cases which they litigate before the Commission.

The Commission may even wish to raise publicity to another level and adopt the practice of acting affirmatively to provide basic information about the various cases which it is processing in press releases and/or in its annual reports. Several other international human rights bodies have established such a practice. For example, the United Nations Human Rights Committee publishes, in its annual reports, information on the status of communications received, the issues and rights involved in such cases and jurisdictional question.²⁵ Similarly, the European Commission makes public general information about all of the cases it is processing, including statistics regarding the total number of cases being processed, the number of cases brought against each member State, the number of cases decided in a given year, etc.... Furthermore, after each period of sessions, the European Commission publishes a press release which lists each case considered by the Commission during that period of sessions and announces any

23. Eur. Comm. H.R., *X v. Austria*, Application N° 4835/71, Decision of 20 March 1972 (emphasis added).

24. See Material for International Legal Seminar with Members of the African Commission on Human and People's Rights, organized by the Center for Justice and International Law and held October 1-2, 1996; Interview with Julia Harrington, recent staff lawyer at the Secretariat of the African Human Rights Commission, July 1, 1997 (hereinafter Interview with Julia Harrington).

25. Dominic McGolrick, *The Human Rights Committee* 131 (1994).

decision taken. This information also includes the name of each case and a brief description of the facts and violations alleged.²⁶

The Commission currently does not publish information about the status of pending cases. The Commission's annual report does not contain any statistics of other information regarding the type of cases being processed, although it does provide figures for the number of cases opened by the Commission during the corresponding year and the total number of pending cases. The Commission issues a press release at the end of each period of sessions. However, that press release carefully avoids discussion of any individual cases or petitions or decisions taken on such matters. Occasionally the Commission mentions, in its press releases, the initiation or progress achieved in a case in friendly settlement proceedings, but no further information regarding the case is provided.

Publication by the Commission of basic data about the nature and status of the cases it is processing would allow the public important access to the workings of the Commission and to information relating to the nature of human rights cases being denounced in the hemisphere. It would further ensure greater accuracy in the description of cases and their status before the Commission to the public. It might also address some of the difficult questions regarding publicity by the parties by limiting the incentive for the parties to engage in their own publicity. Finally, in a system which takes many years to complete the processing of a case, it would provide the parties with important information about the status of their cases and any decisions taken during the long interim between the filing of a petition and the final decision of the Commission. Access to this information would, in turn, limit the need for the parties go engage in personal communications with the members of the Commission or its Secretariat to learn the status of their cases.

The Secretary General of the Organization of American States ("OAS"), in the paper he prepared in contribution to the reform debate, recommended such a yearly publication of information about the Commission's current docket of cases. He noted that such a publication "could be a barometer for the nature, extent, and kinds of human rights challenges just over the horizon, and a tool to continually fine-tune the protection mechanism".²⁷

b. Admissibility

Admissibility questions have begun to play an increasingly significant role in the proceedings before the Commission and in its jurisprudence. Previously, the Commission held few cases inadmissible and generally included its discussion of

26. See Temporary European Commission Internet Site, <http://194.250.50.201>.

27. Toward a New Vision of the Inter-American Human Rights System, presented to the Permanent Council of the Organization of American States, OEA/Ser.G/CP/doc.2828/96, November, 26, 1996, p. 27.

the rationale for admitting a case with its decision on the merits. Partly in response to the reform process and to the critiques formulated by users of the system, the Commission has begun preparing independent admissibility decisions. The increasing importance of the role of admissibility decisions implies a corresponding increased need to establish the confidential or public nature of those decisions.

Yet, the Commission has not established clear rules, and the Convention and Commission Regulations provide no guidance on this topic. The Commission has begun a trend of permitting the maximum amount of publicity for those decisions, including formal publication in its annual reports.²⁸ In the last several years, the Commission has published all of its decisions on admissibility. However, in the past, the Commission on several occasions adopted admissibility decisions which it decided not to make public. Those admissibility decisions were generally, but not in every case, transmitted automatically to both parties.²⁹

It is submitted that, at a minimum, the Commission's admissibility decisions should always be transmitted to the parties to a case. The admissibility decision resolves important questions about the feasibility of a case and determines whether the case will or will not be decided by the Commission. Both parties must be informed of this decision and the reasoning behind it.

Admissibility decisions should also be considered public and should be published by the Commission. Admissibility decisions create important jurisprudence on difficult and crucial issues such as the meaning of the exhaustion of domestic remedies requirement. Publicity of the Commission's interpretations on these issues will allow petitioners and States alike to more effectively litigate cases before the Commission. Access to these decisions will also allow the public to carry out its vital watchdog function over this important gate-keeping function of the Commission.

This practice would be consistent with that of the other regional human rights systems which publish at least the majority of the reports on admissibility of

28. See Annual Report of the Inter-American Commission on Human Rights 1996, OEA/Ser. L/V/II.95, doc. 7 rev., March 14, 1997. Recently, the Commission has also begun to order immediate publication of admissibility reports in special circumstances. See I/A Comm. H.R., Report N° 39/96 (Case 11.673, Argentina), October 15, 1996. However, this publication generally consists of informal distribution by the Commission to interest persons. Formal publication by the Commission of the admissibility decision occurs with the publication of the annual report. As will be suggested in relation to the publication of the Commission's final Article 51 report, the Commission may wish to implement a practice of publishing its admissibility decisions, in a press release or other formal OAS document, immediately upon adoption.

29. In at least one case (10.843, Chile), the Commission sent the petitioners a letter informing them that the Commission had adopted a report on admissibility (Report 19/95) but did not transmit the text of the decision with this letter. The Commission subsequently agreed to send the petitioners a copy of the decision.

inadmissibility which they prepared independently from their decisions on the merits.³⁰

On the other hand, the United Nations Human Rights Committee has published many of its inadmissibility decisions but does not, as a rule, publish its admissibility decisions.³¹ However, the Optional Protocol to the International Covenant on Civil and Political Rights, which governs the work of the Committee, differs greatly from the instruments governing the regional systems on the publication question. The Optional Protocol does not provide explicitly for publication of any of the decisions on individual petitions and provides only for submission of the final decisions of the Committee to the parties. The Committee thus has acted progressively in publishing any decisions at all.³² The fact that it does not publish more information regarding admissibility reflects the nature of the individual petitions system established in the Optional Protocol. The practice of the United Nations Human Rights Committee cannot be seen as a valid precedent for suggesting non-publication of admissibility decision in the Inter-American system.

At some point in the development of the Commission's individual petition work, it may become nearly impossible to publish all of its admissibility decisions because of the sheer number of such decisions. A rule could eventually be adopted which would order publication of only those admissibility decisions which provided jurisprudence on new and important questions of law or which would otherwise be important for the furtherance of the protection of human rights in the hemisphere.³³ The Commission has not yet reached the point where its workload would require such a rule. At the current time, any rule allowing discretion in relation to the publication of admissibility decisions might lead to the politicization of the publication decision.

c. Article 50 Report

Questions regarding the confidential nature of the initial report prepared by the Commission at the end of the initial processing of an individual petition (the

30. See European Commission Rules, Rule 17(2); Jacobs / White, *supra* note 17, at 345; Interview with Julia Harrington. The African Commission's discussion finding a petition admissible is included in its final report on the merits and thus is not published independently. The African Commission's decisions declaring a petition inadmissible are authorized for publication and are included in the Commission's annual report. In practice, actual publication of that annual report for widespread distribution has been rare because of a lack of financial resources.

31. McGoldrick, *supra* note 22, at 130; Hurst Hannum, *Guide to International Human Rights Practice* 48 (2d ed. 1992). The United Nations Human Rights Committee often includes a discussion of its decision finding a case admissible in the text of its final decision on the merits.

32. *Id.* at 131.

33. Of course, even if the Commission eventually decides not to publish all of its admissibility decisions, it should still always communicate its decisions on admissibility to the parties.

Article 50 report) have caused much debate in recent years and during the reform process. The structure and procedure established in the Convention make clear that the Article 50 report is a provisional report which is not public and should not be published by the Commission. The confidentiality of the report of the Commission at this stage is mandated by the fact that “[t]he possibility of a solution of the matter with the cooperation of the State is not yet discarded”.³⁴ The system provides for the subsequent preparation of a more definitive report (the Article 51 report) which the Commission may decide to publish.³⁵

The Commission, until recently, understood that although the Article 50 report was not public and could not be published, it should be sent to both parties. However, in its Advisory Opinion OC-13/93, the Court decided that the Commission should send the Article 50 report only to the State involved in a case.³⁶ The Court based this holding on the language of Article 50(2) of the Convention which provides that, “[t]he report shall be transmitted to the states concerned, which shall not be at liberty to publish it”. As a result of this decision, the Commission now sends the Article 50 report only to the State involved. The Commission communicates to the petitioner that the Commission has adopted an initial Article 50 report without more. The petitioner does not receive the text of the report and does not learn whether the Commission has concluded that the State has violated the Convention.³⁷

During the debate over reform, a certain consensus has developed favoring the reinstatement of the practice of sending the Article 50 report to the petitioner in a case as well as to the State concerned, with a warning to both parties regarding the non-public nature of the document.³⁸ This consensus is based on the questionable nature of the Court’s rationale in arriving at a contrary holding and on an analysis of the structure and objectives of the inter-American individual petition system.

The Court’s decision on this point may be questioned on several grounds. First, the Court’s decision is based, in part, on an incorrect application of the principle of

34. Pedro Nikken / Edmundo Vargas Carreño, *Relationship Between the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights* 14 (May 3-4, 1990).

35. *See* American Convention, arts. 50, 51.

36. *See* I/A Court H.R., OC-13/93, July 16, 1993, “Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 46, 47, 50 and 51 of the American Convention on Human Rights)”, part. 48.

37. *See* Procedure and Practice of the Inter-American Commission on Human Rights (IACHR) in the Processing of Individual Petitions, Informational Document Prepared by the Executive Secretariat of the Commission at the request of the Committee on Juridical and Political Affairs of the Organization of American States 10, OEA/Ser.G, CP/CAJP-1131/96 (November 22, 1996). [hereinafter Procedure and Practice of the Inter-American Commission]

38. December Seminar Conclusions, *supra* note 4, at 6.

“equality of the parties”.³⁹ The Court held that, because the language of the Convention prevents the State in question from publishing the Article 50 report, the principle of equality of the parties also prevents the Commission from “publishing” the report, in this case to the petitioners. However, the Commission is not a party to the controversy. The parties to the proceedings before the Commission are the petitioner or State bringing a petition and the State alleged to have committed a human rights violation.

Second, the Court confuses the publication of the Article 50 report with the transmittal of the report to the parties. The Convention language, in Article 50(2), providing that the State concerned will not be authorized to publish the report indicates that the report must not be made public. The Commission’s transmittal of the Article 50 report to the petitioners would not entail making the report public and would thus not constitute a “publication” of the report within the meaning of Article 50(2). In reaching its conclusion in OC-13, the Court failed to distinguish between the varying levels of confidentiality and publicity possible.

It could be argued, nonetheless, that the language in Article 50(2) providing for transmittal to the States is exclusive. This interpretation would suggest that, since the Convention provides explicitly for transmittal to the State concerned but makes no mention of transmittal to the petitioner, the Commission should not send the Article 50 report to the petitioner. Such an interpretation might be supported by reference to Article 49, the immediately preceding article relating to friendly settlement reports. That Article expressly provides for the transmittal of a friendly report to the petitioner as well as to the States parties to the Convention. However, absent an express conventional prohibition on transmittal, given that the spirit of the Convention and the inter-American system as well numerous practical reasons call for such a rule.

The most important reason for transmitting the Article 50 report to the petitioners lies in the importance of maintaining the equality of the parties. The objective of allowing the State involved one more chance to resolve the situation with the recommendations of the Commission in a confidential setting may be respected while also providing the petitioners with procedural footing equal to that of the State by sending the Article 50 report to both parties and strictly prohibiting its publication by either party. Inequality here is not purely theoretical but rather may present real problems. For example, upon receiving an Article 50 report, States sometimes decide to enter into friendly settlement negotiations. The petitioner faces a serious disadvantage in settlement negotiations where he does not have knowledge of the Commission’s decision regarding State responsibility nor of the contents of the Commission’s initial report.

39. OC-13/93, July 16, 1993, par. 48.

Also, the role of the petitioners may be crucial at this stage of the proceedings, and it is important that they have full knowledge of the decision of the Commission and an equal opportunity to participate in the proceedings. For example, upon receiving a response from the State to the Article 50 report, the Commission will prepare a definitive Article 51 report which will contain its conclusions as to whether a violation occurred and continues to exist and, usually, a decision as to whether the State involved has complied with the recommendations made in the Article 50 report. To reach these decisions, the Commission must have current information about the case and must be able to critically analyze the response of the State.

The petitioners should assist in providing the necessary information. Given the limits on its investigative ability, the Commission depends on the adversarial process and the information submitted by both parties to reach its conclusions. Currently, at the Article 50 stage of the proceedings, the Commission must rely solely on the State's response in making important decisions. Thus, for example, in a case involving arbitrary detention, the State may inform the Commission that the alleged victim has been released. Without the assistance of the petitioner, the Commission will have little opportunity to corroborate or discredit that information.

The Commission has recently adopted a practice whereby, upon receipt of the State's response to the Article 50 report, the Commission will formulate specific questions to the petitioners regarding that response and any other matter of importance to aid in the preparation of the Article 51 report.⁴⁰ However, such a proceeding has not yet been implemented in practice and its success will necessarily depend on the skill of the lawyers of the Commission Secretariat in drafting the questions to be posed. The practice might provide some assistance in solving the problem of lack of information, but it will not be as effective as a more adversarial process in which each party comments on the information provided by the opposing party. It will also leave intact the situation of inequality of the parties.

A further problem present itself when the Commission decides to send a case to the Court. The Commission must make its decision as to whether to submit a case to the Court during this period of confidentiality surrounding the Article 50 report and before preparation of the Article 51 report. The inter-American system has recognized that the petitioners before the Commission play an important role in proceedings before the Court and have certain rights in those proceedings.⁴¹ Even

40. The Commission decided to adopt this practice during its 95^o Period of Sessions held in February, 1997.

41. The European human rights system has also recognized, since the processing of the first case by the European Court of Human Rights, the importance of allowing the original petitioners to participate in

under the current regimen which does not allow the possibility of a petitioner bringing a case to the Court directly and does not provide for independent petitioner standing once before the Court, the petitioners serve as assistants to the Commission in the litigation of cases before the Court, participating actively in all stages of the written and oral proceedings. However, by making confidential the proceedings which take place subsequent to the preparation of the Article 50 report, the petitioner is limited in his ability to make recommendations to the Commission as to whether a case should be referred to the Court.

The petitioner is further precluded from participating in the preparation of the application to the Court, one of the most crucial stages in the litigation of a case before the Court. The Article 50 report of the Commission serves as the basis for the application prepared by the Commission, although additional work and changes generally must be executed in the preparation of the application. The application to the Court, in turn, sets the framework for the litigation of the case before the Court. Without access to the Article 50 report, the petitioner cannot make suggestions regarding the Commission's legal arguments, presentation of facts, etc.... for the preparation of the application to the Court. This difficulty limits the ability of the petitioner to have an effective voice in the litigation of the case before the Court and also handicaps the Commission, which must work without important information which might be provided by the petitioner.

The Commission's Regulations establish that when the Commission decides to refer a case to the Court, the Executive Secretary shall notify the petitioner and the alleged victim and offer "the opportunity of making observations in writing on the request submitted to the Court".⁴² This article could provide the Commission with a tool for enlisting the effort of the petitioners in developing an application to the Court by allowing the Commission to send the application to the petitioners for comment before sending it to the Court. The Commission could argue that, although it may not provide the petitioners with a copy of the Article 50 report, it may nevertheless provide them with a copy of the draft application to the Court.

However, such an interpretation probably is not tenable, at least in light of the current holding of the Court. That jurisprudence suggests that the Commission's findings and conclusions are to be maintained confidential during the entire stage of the proceedings governed by Article 50. Pursuant to this logic, the Commission's conclusions may not become public in any form, even to the

a case brought before the Court. In the case of *Lawless v. Ireland*, the European Court noted that: "the court must bear in mind its duty to safeguard the interests of the individual... and the whole of the proceedings in the Court... are upon issues which concern the applicant". See Eur. Court H.R., *Lawless v. Ireland* (N° 1), Decision of November 14, 1960, 1 E.H.R.R. 1.

42. Commission Regulations, art. 75.

petitioners, until the next stage is reached, through either the preparation of the Article 51 report or submission of the case to the Court. According to this theory, the Commission's Rule would be seen as allowing transmission of the application to the petitioners only after it had been submitted to the Court. Such an interpretation finds support in the language of the article referenced, which makes reference to the "request submitted to the Court"⁴³ rather than to the application to be submitted.

The Court's decision in OC-13 regarding the nature of the Article 50 report also created significant difficulties with the Commission Rules directly relating to the transmission and publication of its reports. Those difficulties might be corrected in the reform process. The Court found Article 47(6) of the Commission's Regulations to be incompatible with its interpretation of Article 50 of the Convention. Article 47(6) of the Commission's Regulations provided, at the time, that "[t]he report shall be transmitted to the parties concerned, who shall not be authorized to publish it". The Court concluded that the Regulation improperly directed the Commission to send the report to the petitioners as well as to the State.

However, Article 47(6) did not apply to the Article 50 report but rather applied to the second of the successive stages provided for in Articles 50 and 51 of the Convention. Article 47(6) follows Article 47(2) of the Regulations which provides for the preparation of a second report if, within a period of three months from the date of the transmittal of the report of the Commission to the States concerned, the matter has not been settled or submitted to the Court. Although the Commission's Regulations are somewhat confused on this point, an uninterrupted reading of the entirety of Articles 46 and 47 shows that paragraph 6 of Article 47 applies to the second (Article 51) report.

Nonetheless, the Commission changed its regulations in an effort to conform to the Court's OC-13 opinion. The Commission amended Article 47(6) of its regulations but did not change the position of that paragraph within the order of Articles 46 and 47. Thus, Article 47(6) now provides for transmittal only to the States concerned, but this provision applies erroneously to the Article 51 report. The Commission's regulations remain unclear on the question of who must receive the Article 50 report.

It would be highly desirable for the Court to reconsider its position on the confidentiality of the Article 50 report in light of the considerations which have arisen out of the reform debate. The Commission should also review and revise

43. It should be noted, however, that this interpretation makes the article superfluous, since the Court transmits a copy of the application, upon receipt, to the petitioners and victims. See Rules of Procedure of the Inter-American Court of Human Rights, art. 28 [hereinafter Court Rules of Procedure], in Basic Documents.

its Regulations taking into account the same criteria and noting the inconsistencies which the current rules create. The most favorable outcome from such a reexamination would be the development of clear rules providing for the transmission of the Article 50 report to the petitioners as well as to the States involved, with a warning to both parties that they must not make the report public.⁴⁴ Some commentators have suggested that such a practice might be risky, because the petitioners should be expected to reveal the decision once they obtain it. However, there also exists the distinct possibility that State agents may reveal an Article 50 report. Yet, the report is automatically transmitted to the State. The practice of the Commission on this point should not be based on an assumption that the petitioners will breach confidentiality by releasing the report to the public.

A similar change is currently in progress in the European human rights system, which is the closest analogue to the inter-American system for the purpose of studying this stage of the proceedings. The European system also provides for an initial report by the European Commission which, according to the European Convention on Human Rights, "shall be transmitted to the States concerned, who shall not be at liberty to publish it".⁴⁵ This language is, of course, very similar to the language found in Article 50 of the American Convention.

The European Commission previously interpreted this norm to preclude it from transmitting the report to the petitioners. Then, in 1994, Protocol 9 entered into force. Protocol 9 allows for individuals to present their cases directly to the Court, without the European Commission acting as intermediary, as against those countries which have accepted the Protocol does not make any provision for the transmittal of the initial Commission report to the petitioners. However, beginning with the entry into force of Protocol 9, the Commission has adopted the practice of transmitting its report to the petitioners, with a prohibition on its publication, in cases involving countries which have ratified that instrument.⁴⁶

44. After the Court's decision in OC-13, the Secretary of the Court prepared an article suggesting a reform to Articles 46 and 47 of the Commission's Regulations. Like the Court's OC-13 opinion, this article confused the order of the provisions of Articles 46 and 47 and concluded that Article 47(6) applied to the report prepared under Article 50 of the Convention. The article suggested that Article 47(6) should be moved to follow immediately after the discussion of the preparation of the Article 50 report in Article 46 of the Commission's Regulations. However, the reform suggested left the wording of Article 47(6) intact. The changes proposed by the Secretary of the Court would thus provide for the transmittal of the Article 50 report to the petitioners as well as to the State. See Manuel E. Ventura-Robles, *Los Artículos 50 y 51 de la Convención Americana sobre Derechos Humanos*, In *La Corte y el Sistema Interamericano de Derechos Humanos* 553, 564 (Rafael Nieto Navia, ed., 1994).

45. European Convention, art. 31(2).

46. The European Commission of Human Rights: Organization, procedure and activities, European Commission Internet Site, <http://194.250.50.201>; D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* 594 & n. 3 (1995).

The European Commission's new practice recognizes that the language of the European Convention, which closely parallels the language of the American Convention, does not preclude the transmittal of the initial confidential report to the petitioner to allow fully-informed petitioner participation during crucial moments in the proceedings, such as at the moment of deciding whether the case will be sent to the Court. Petitioner knowledge and an opportunity to participate at that juncture are equally important regardless of whether the petitioner may independently decide to submit the case to the Court or whether he must petition the Commission to send an application to the Court and then assist with the preparation of the application. The new European practice which grew out of the adoption of Protocol 9 also rejects the concern that disclosure to the petitioners will necessarily prejudice the non-public nature of the proceedings surrounding the initial report. The European Commission has considered sufficient a warning to the petitioners, as well as to the State, regarding the confidentiality of the report. There appears to exist no reason which would militate against extending to all petitioners in the European and inter-American systems the logic currently employed in the European system to permit the transmittal of the initial report to some petitioners.

d. Article 51 Report

The Court's decision in OC-13 also had an important impact on the Commission's procedure after adoption of the Article 51 report. In OC-13, the Court clarified that, even after adoption of the second Article 51 report, the Commission must usually still make an additional decision before completing its individual petition proceedings. The Commission must wait for the response of the State to the Article 51 report in order then to determine whether the State has taken adequate measures to implement the Commission's recommendations. Only at that point may the Commission decide whether it will publish the report.⁴⁷ Partly because of the increased attention placed on Commission procedures as a result of the reform process, the Commission has modified its practice to closely follow this procedure prescribed by the Court.⁴⁸

However, that procedure present several new problems relating to confidentiality. First, what is the status of the Article 51 report after its promulgation but before the Commission takes a final decision regarding its publication? Second, what is the status of an Article 51 report which has been approved for publication but which has not yet been published by the Commission?

The Commission currently sends a copy of the Article 51 report, upon its adoption, to both the petitioner and the concerned State with the proviso that the

47. OC-13/93, July 16, 1993, pars. 52-54.

48. See Procedures and Practices of the Inter-American Commission, *supra* note 37, at 10.

report is confidential until such a time as the Commission decides to publish it.⁴⁹ The Commission again notifies the parties when it takes the decision to publish the report and allows the parties to make the report public at that time. The Commission does not itself provide for the publication of the report until such time as it published its annual report. This practice is new and has been subject to some criticism.

The language of Article 51 and an analysis of the objectives of this stage of the proceedings support the Commission's practice of sending both parties a copy of the Article 51 report immediately upon adoption, without waiting for the Commission to approve its publication. However, the Commission should perhaps reconsider its decision to order the parties not to publish the report. Article 51 contains no language similar to that of Article 50 providing that the report shall be transmitted "to the states concerned, which shall not be at liberty to publish it" This fact suggests that the report may properly be sent to both parties and that the parties do not face any restriction on their liberty to publish the report.

Of course, Article 51(3) also includes language indicating that, after the time period prescribed in the Article 51 report for compliance with the Commission's recommendations has expired, the Commission "shall decide... whether to publish its report". It might be argued that this language establishes the non-public nature of the report until such time as the Commission decides publication. However, that interpretation would again confuse the different possible levels of publication. Publication by the Commission itself should be distinguished from permitting publicity regarding the Article 51 report. The decision to be adopted by the Commission pursuant to Article 51(3) relates to its publication of a document and does not restrict prior publicity of the document by third parties.

In analyzing the objectives of the Article 51 stage of the proceeding, it might be suggested, however, that the language in Article 51(3) directs the Commission to make the prior decision as to whether the Article 51 report should be made public before publicity by third parties could be permitted. This interpretation would find support in the fact that the publication of the Article 51 report serves as a kind of "sanction of a moral and political nature, before the inter-American community and before public opinion".⁵⁰ Publicity of any kind, and the resulting sanction, perhaps must await the Commission's decision regarding State compliance with its recommendations provided in the Article 51 report.

49. As noted above, when the Commission modified Article 47(6) of its Regulations to comply with the Court's decision in OC-13, the Commission unwittingly created a norm which suggests that the Article 51 report might only be transmitted to the State. The current Article 47(6) of the Regulations thus does not reflect the practice of the Commission and should be seen as an error.

50. Nikken & Vargas Carreño, *supra* note 34, at 15.

However, the publicity sanction actually comes with the final decision by the Commission to publish and the Commission's publication of the report in an official OAS document which is presented to the political bodies of that organization. Publication of the Article 51 report by third parties before the Commission's decision serves as a means of providing information to the public, does not bear the formal imprimatur of the Commission or the OAS and should not be seen as a sanction. In fact, the sanction of official publication of a negative report by the Commission may not occur at all if the State complies with the Commission's recommendations after the preparation of the Article 51 report and before the final decision on publication.

In addition, the Article 51 report fixes the final position of the Commission. The report is not a confidential work in progress but rather a final decision of the Commission. After its preparation, the State's "only alternative is that of subjecting itself to the decision of the Commission within the time period set out or of facing the consequences of the publication of the report".⁵¹ By the time the Article 51 report has been prepared, the State has already had an opportunity to resolve the situation in a confidential setting. As a final decision of a quasi-judicatory body, the Article 51 report should be public. Publicity at this juncture might even encourage compliance with the final recommendations of the Commission.

The final decision regarding publication by the Commission is then made after consideration of the question of whether or not the State has complied with the Commission's recommendations. The report formally published by the Commission may or may not differ from the original Article 51 report made public by third parties, based mainly on the State's actions in response to that Article 51 report. But, no harm results from that situation. The public simply receives more complete information.

The length of the proceedings before the Commission constitutes a final factor which suggests that the Article 51 report should be made public even before the Commission's decision on publication pursuant to Article 51(3). The Article 50 and 51 proceedings now require three separate decisions in the final stages of the Commission's proceedings: 1) the adoption of the Article 50 report; 2) the adoption of the Article 51 report, and 3) the decision on publication. Given that the Commission meets only in a limited number of sessions during the year, the decision to publish an Article 51 report frequently will not occur until one full year after the adoption of the original Article 50 report. The Commission has sought to alleviate this problem in some cases by adopting its final decision regarding publication in a telephone conference immediately upon expiration of

51. *Id.*

the period provided to the State in the Article 51 report rather than waiting for the next period of sessions. This procedure abbreviates the final proceedings by several months. However, the publication of the Article 51 report by the parties upon its adoption would provide a more meaningful limit on the delay in the proceedings before the Commission, which are regularly criticized for their length.

The decision to allow the parties to publish the Article 51 report before the Commission's final decision on publication would be similar to the positive policy adopted by the African Commission. In the African human rights system, the decisions of the African Commission on individual communications must undergo a review by the Assembly of Heads of State, the political body of the Organization of African Unity, before they may be officially published by the Commission.⁵² However, the African Commission has considered that the parties to the case may make the decision before formal publication by the Commission.⁵³

At the next stage, during the interim between the Inter-American Commission's decision to publish and the actual publication by the Commission, the parties should have the opportunity to make the report public. The Commission's decision to authorize the highest level of publicity through actual publication also necessarily includes a decision to allow for the public nature of the document. The physical publication is a logistical question which should in no way delay the execution of the Commission's decision to make public and to publish the report. This has been the policy adopted by the Commission thus far.

Considerations relating to the length of the proceedings again support this practice. The Commission generally publishes its final decision on individual petitions only in its annual report, which is published each March or April.⁵⁴ As a result of the calendar of the Commission's sessions, a Commission decision in a case often would not be published in the annual report until one year and one half after the adoption of the original Article 50 decision.⁵⁵ The parties should be allowed to make the decision public before the actual publication so as to ameliorate the difficulties which arise as a result of the length of the proceedings.

52. African Charter on Human and People's Rights, art. 59, 21 I.L.M. 58 (1982).

53. Interview with Julia Harrington.

54. In a few special cases, the Commission has also published its decisions on cases separately from the annual report. See, e.g., I/A Comm. H.R., Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, doc. 10 rev. 3, 29 November 1983.

55. For example, if the Commission adopts an Article 50 report during its September/October period of sessions, it will generally adopt an Article 51 report during its February period of sessions. Because the decision on publication must await the expiration of the period of time granted to the State for compliance with the Commission's recommendations, it will be impossible to publish the decision in that year's annual report. The publication therefore will not occur until the following March or April.

The Commission should further consider providing for its own publication of the Article 51 report immediately upon adopting the decision to publish, independent from and prior to eventual publication in the annual report. This publication of the report could occur, for example, in the form of a press release containing the text which would be issued immediately upon the decision to publish. The United Nations Human Rights Committee has adopted such a practice of publishing its final decisions as press communiqués at the end of each period of sessions as well as in its annual reports.⁵⁶ The Commission has recently begun, in a few cases, to disseminate its final decisions immediately upon approval for publication. However, this dissemination tends to be ad hoc. The Commission has not yet developed a practice of immediate formal publication, through press releases otherwise.

The Article 51 stage of the proceedings presents one additional question regarding confidentiality and publication. Under what circumstances should the Commission order the publication of an Article 51 report pursuant to Article 51(3)? At the December Seminar, several experts representing academic and governmental institutions suggested that the Commission should publish its final Article 51 reports in all cases.⁵⁷ The Convention does not require publication of all final reports but rather allows the Commission to decide the issue of publication, based upon the alternative most favorable for the protection of human rights.⁵⁸

However, a Commission policy decision to abolish its discretion and to publish all reports might be positive. The publication of the Commission's final report serves as an important recognition of the rights of victims of human rights violations and as a form of reparation. The publication of all reports would provide important guidance to the public regarding the jurisprudence of the Commission on both procedural and substantive matters. It would also obviously continue to serve as a form of sanction for any State found responsible for violations which does not comply with the recommendations of the Commission to repair those violations. If the Commission published all of its final reports, some would also certainly include recognition of partial or full compliance by States with the recommendations made by the Commission in the Article 50 and 51 reports. Publication of such information might serve as an incentive to States to comply with Commission recommendations.

56. McGoldrick, *supra* note 25, at 130.

57. See December Seminar Conclusions, *supra* note 4, at 46, 48.

58. OC-13/93, July 16, 1993, par. 54.

IV. PROCEEDINGS BEFORE THE COURT

An analysis of the proceedings before the Court presents fewer difficulties regarding confidentiality and publicity, because cases pass through fewer discreet stages in the proceedings before the Court. There does not exist before the Court a process of escalating pressure on States for compliance through the different procedural stages, such as exists at the Commission level. The few confidentiality issues which exist thus remain constant throughout the proceedings and do not vary with different objectives sought to be achieved in different procedural moments. This Section will nonetheless briefly discuss the problems which have arisen relating to confidentiality in litigation before the Court.

The Convention makes no provision for the confidentiality or publicity of the proceedings before the Court. The Court's Statute and Regulations provide that the Court's hearing will be public and that its deliberations will be private.⁵⁹ The Court's decision or judgment in a case is announced at a public hearing.⁶⁰ The Court's decision and voting remains confidential until the parties are officially notified of the judgment.⁶¹ These rules on confidentiality and publicity have not engendered debate as they simply codify well-accepted norms relating to the necessity of confidentiality in deliberations and of publicity for judicial hearings and judgments.

However, the question of the confidential or public nature of the documents and written briefs presented to the Court during the proceedings on a case, including the original application, has presented greater difficulties. The documents submitted in the major written proceedings are transmitted to the State concerned and to the Commission, as well as to the petitioner before the Commission and the victim.⁶² The most basic level of publicity has thus been established. However, the Court appears to be unwilling to allow any greater level of publicity.

The Court will not publish or make available any of the written documentation or pleadings in the record of a case until the conclusion of the case.⁶³ Upon completion of a case, but not before, the Court will itself generally publish the important portions of the record and will make documents available to the public.⁶⁴

59. See Statute of the Inter-American Court of Human Rights, art. 24 [hereinafter Court Statute], in Basic Documents: Court Rules of Procedure, art. 14(1), (2).

60. See Court Statute, art. 24(3); Court Rules of Procedure, art. 57(1).

61. See Court Rules of Procedure, art. 57(2).

62. See *Id.*, arts. 35, 36, 37. It is worth noting that the Court's new Rules of Procedure, effective as of January 1, 1997, do not provide for the transmission of other written proceedings, outside of the application, the answer and the briefs on preliminary objections. See *Id.*, art. 38. Previously, the Court's Regulations contained a specific rule indicating that all of the written proceedings would be transmitted to the relevant parties.

63. See Court Rules of Procedure, art. 30(3).

64. See *id.*, art. 30(1).

Furthermore, the Court appears unwilling to accept publication of documents and pleadings contained in the record by third parties, including the Commission or the original petitioners. This unwritten rule was adopted by the Court after it received a complaint regarding publicity by a State. In a 1995 letter directed to the Commission, the Court expressly asked the Commission to take measures to avoid publication of documents of a confidential nature by persons who have access to such documents. In making this request, the Court mentioned several cases in which documents were made public by the original petitioners who had been named as assistants to the Commission before the Court. It can thus be assumed that, in referring to "documents of a confidential nature", the Court was making reference to all those documents included in the record of a case before the Court.

This policy on confidentiality of the proceedings before the Court runs counter to established principles regarding the importance of publicity in Court proceedings. The European Court of Human Rights, in 1960, had already commented on its judicial character and observed that, "proceedings before the judiciary should be conducted in the presence of the parties and in public".⁶⁵ It has been noted that, "publicity is the authentic hallmark of judicial as distinct from administrative procedures".⁶⁶ The Court, as a fully judicial body, should ensure the publicity of all of its proceedings. Among other things, that publicity allows for transparency in the proceedings of the tribunal and permits the public to satisfy its legitimate interest in learning about the cases and proceedings carried on by the Court. Nothing in the structure of the inter-American human rights system or in the language or spirit of the convention suggests that these principles regarding publicity would not apply to the Court.

Current procedure before the Court recognizes the importance of public proceedings by making all hearing public. In the hearings, the parties present testimonial and other evidence and their legal arguments. The written pleadings and documents in the record, including the application to the Court, similarly include evidence and legal briefs. There appears to exist no logical reason for distinguishing between hearings and the written files, making one public and the other confidential.

Nor has the Court explained its rationale in providing for the confidentiality of the written proceedings before the Court. One of the judges of the Court touched upon this question during the December Seminar. He indicated that the proceedings before the Court should remain confidential, because any "leak" of documents or other indiscretion could cause the States to protest.⁶⁷ However, pressure from the States to

65. *Lawless v. Ireland*, Decision of November 14, 1960.

66. J. Bentham, *supra* note 1, at 316.

67. See December Seminar Conclusions, *supra* note 4, at 91.

maintain confidentiality in and of itself cannot overcome the presumption in favor of publicity in judicial proceedings. In addition, if the Court publicly adopted a normal lowering the publicity of the proceedings, the States would be on notice of that rule and probably would not question incidents involving the publicity of documents. The States have accepted the public nature of the hearings and would probably also accept the public nature of the pleadings and other documents without further difficulty. It is interesting to note, in fact, that the norm requiring publicity of the hearings, found in the Court's Statute, was approved by the member States⁶⁸ whereas the more restrictive confidentiality rules found in the Court's Rules of Procedure were promulgated by the Court alone.⁶⁹

The current rule regarding confidentiality also presents problems of enforcement. The Court may relatively easily sanction the Commission or the petitioners and victims for any "leak". The Court may issue a letter of reprimand or might even threaten and potentially carry out the dismissal of the case brought against a State. However, agents of a State involved in proceedings before the Court might also reveal information considered confidential. It is unlikely that the Court would direct a letter of reprimand to a State. Even more importantly, there exists no sanction for a State comparable to that of the threatened or actual dismissal of a case. A dismissal would adversely affect the Commission, the original petitioners and the victims who are pursuing the case but would not be prejudicial to the State, since States benefit from dismissal of cases against them.⁷⁰ Commentators who have participated in the debate on reform have noted that this problem of inequality of enforcement creates difficulties in other human rights systems as well.⁷¹ It should thus not be assumed that it can be easily eliminated.

The practice of the Inter-American Court regarding publicity diverges greatly from that of the European Court, the only other permanent regional human rights court. Upon referral of a case to the European Court, the secretariat of that body makes available to the public the report of the European Commission unless the President of the Court expressly decides otherwise.⁷² The Inter-American Court neither makes available the application, which is generally based on the Inter-American

68. See American Convention, art. 60

69. *Id.*

70. Of course, this scenario would change if States eventually began to bring cases against other States or began to appeal negative Commission decisions to the Court. To date, no State has brought a case to the Court.

71. See December Seminar Conclusions, *supra* note 4, at 51.

72. See European Court of Human Rights Rules of Court "A", Rule 29(3) and Rules of Court "B", Rule 30(3) [hereinafter European rules of Court / references hereinafter will be to Rules of Court "A"], in 33A Yearbook of the European Convention on Human Rights; Donna Gomien, David Harris, Leo Zwaak, Law and Practice of the European Convention on Human Rights and the European Social Charter 71 (1996).

Commission's report, nor the Commission's actual report. The Secretariat of the European Court also publishes a significant number of documents relating to the proceedings. Those documents in the files of the Court which are not published are made accessible to the public unless the President expressly decides otherwise.⁷³ No rule similar to that of the Inter-American Court exists prohibiting public access to documents until the conclusion of the proceedings.

V. CONCLUSION

Currently, the lack of clarity in the norms and policies regarding confidentiality in the processing of individual petitions in the inter-American system gives rise to much of the debate over the levels of confidentiality and publicity which are necessary or required at the different stages of the proceedings. The Commission and the Court should establish clear rules regarding confidentiality and publicity. Clearer policies on this matter would contribute to creating greater transparency in the inter-American system for the promotion of human rights, a goal agreed upon by State and non-governmental representatives alike.

In general, the necessary clarifications could be made through a careful review and reform of the rules of procedure of the Commission and the Court. In some cases, it would also be desirable for the Commission and the Court to reconsider and modify previous jurisprudence and interpretations on confidentiality and publicity. The Commission and the Court should engage in consultation and discussion with one another in order to formulate an integrated and consistent set of rules regarding confidentiality. The new interpretations and jurisprudence should be made public, along with the regulations of the Commission and the court, so that all users of the system and other interested persons might fully understand the confidentiality and publicity norms applicable in the inter-American system. Any jurisprudence developed in the future should also be widely distributed and published.

Based on the analysis set forth in this Article, it is suggested that a modified and clarified set of norms regarding confidentiality should include provisions indicating that the case files before the Commission, including the pleadings of the parties, must not become public although the parties should have access to that information. On the other hand, rules should exist establishing that the parties may share with the public general comments regarding the existence and nature of cases before the Commission. The Court should modify its jurisprudence and the Commission should revise its rules to provide for the transmittal of the Commission's Article 50 report to the petitioners as well as to the States concerned, with a warning to both parties

73. See European Rules of Court, Rule 56(2).

regarding the confidentiality of that report. In addition, it is recommended that the Commission codify its current practice of transmitting its Article 51 report to both parties and that it consider adopting rules allowing the parties to make that report public before the Commission's final decision on publication. The Commission should also consider establishing, in its rules of procedure, a norm requiring the publication of all Article 51 reports. Finally, the Court should take a careful look at its current rules regarding confidentiality in the written stages of its proceedings and should modify those rules to provide for truly public proceedings before the jurisdictional tribunal for the inter-American system.