

IN THE WAKE OF DISCUSSIONS ON REFORMING THE INTER-AMERICAN HUMAN RIGHTS SYSTEM. Behind the Scenes at the OAS*

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THE HISTORY AND NATURE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The Inter-American System and its member states, institutionalized in the 1948 Charter of the Organization of American States (OAS), are in the midst of debate and negotiations to reform their highly-praised, long fought for, and on occasions, highly criticized, system to protect and defend human rights in the hemisphere. The Inter-American System, as structured by the OAS, is the world's oldest regional organization, and has provided and continues to provide valuable lessons for the application and for the respect of international law, despite the sometimes conflictual nature of the relations between member states, the OAS organs, and the Inter-American statutes. Today, the issue on the discussion table is human rights. The dynamic of the debate and the resolve of the actors involved will surely take international human rights legislation to unexplored territories.

It is inevitable in an arena governed by international law, that a system comprised of governments which aims to protect individuals from abuses perpetrated by those very governments, is somewhat contradictory. This contradiction is further complicated when those same accused governments must work for the system to operate even more effectively, and which must, sometimes against their immediate interests, face legislation they may have helped draft. This is an unresolved dilemma of international law, holding member states at check against their own legislation.

* *The view herein contained in no way reflect those of the International Human Rights Law Group and are solely those of the author.*

The Inter-American Human Rights System (IAHRS) dates back to the signing of the Declaration of the Duties and Rights of Man in 1948, when the member states of the system unanimously showed their approval for the 38 Articles enumerating each of the duties and rights. Since 1969, the year of its introduction, the American Convention on Human Rights, has been ratified by 25 of 35 OAS member states.¹ The sticking point, however, is whether or not to give the Inter-American Court on Human Rights jurisdiction over cases, obligating members to adhere to decisions (an important legitimization of the system).² As might be expected, fewer states have agreed to make that step. Seventeen member states of 25 which have ratified the Convention, today accept jurisdiction of the Court. The United States and Canada, two of the most prominent and active members of the OAS, have neither ratified the Convention nor accepted jurisdiction of the Court.

Nevertheless, the IAHRS³ has witnessed a steady growth in acceptance among human rights actors as the most viable and worthwhile mechanism to handle human rights affairs in the hemisphere. Its track record in confronting human rights abuses, especially during the 1970s and 80s when abusive dictatorships plagued the hemisphere, is positive. Despite the low number of cases actually reaching the Court since the system's birth, the Commission and Court have set significant precedents in human rights jurisprudence, suggesting that the system, given the proper environment, encouragement, political support, and adequate funding, is an effective mechanism to bring justice and retribution to victims.

The progressive changes in the political environments in most Latin American countries, including the fall of dictatorial regimes and the appearance of more open political societies, have increased the viability of consensus on the respect and adherence to international laws and standards. Further, the rise in democratic forms of government and institutions, makes international human rights law more viable. It's simply easier today for states to agree on the need to address delicate internal subjects such as torture, disappearances, and other systemic human rights violations, than it was two decades ago.

What is not so simple, however, is the process through which the past is examined, *what* exactly gets examined, and *who* is held accountable. And while we would hope to see human rights violations sharply decline in this new democratic era,

1. The states to have ratified the Convention are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, Uruguay, and Venezuela.
2. Further, a debate exists whether to also make Commission recommendations binding.
3. Here we refer to the "formal" institutions, i.e. the Commission and Court on Human Rights, as well as the member states, and to "informal" institutions such as non-governmental organizations (NGOs) bringing cases before these organs.

human rights violations continue to occur even under publicly elected governments. As concerns the past, many of today's governments and administrations must answer to accusations to which they may or may not have been accomplices. Certain countries, especially those having lived through severe systematic violations of human rights, are stigmatized by their past, and are unable to shake the huge public outcry against the abuses committed by sometimes still-existing institutions and individuals. Many such countries have developed a forward-looking agenda concerning human rights, attempting to put their past behind them, and shifting their focus and resources to training present and future human resources in the observation and respect for human rights.

As concerns present day violations of human rights, many newly democratized countries have not yet developed strong democratic governing institutions, and in many cases, existing institutions are still systematically violating basic human rights. Political organizations, minority groups, women, children, and prison inmates are just but a few of the systematically victimized individuals of the hemisphere. Each of these affected groups is testimony that there is still much to be done to deepen human rights protection in the Americas. States often argue that, in this new era, a shift of resources is warranted from processing cases of "past" abuses, to human rights education, arguing that training and education of government personnel and of civil society is the key to stopping human rights abuses before they occur. What is unclear, however, is how much the OAS organs (and which ones) should be involved in such training, and how much of it should be the responsibility of the member states.

What is certain is that despite the democratization wave of the 1980s and 90s, human rights abuses perpetrated by state institutions are still an important problem of the hemisphere and need local, regional, and international attention. Whether focusing on existing or surfacing cases, or on education, or both is the answer, will be left for the system's human rights actors to determine. The IAHR is by mandate, faced with a multi-faceted task. It must uncover and bring past violations to justice, as well as monitor present violations. Further, it must develop an agenda to encourage and promote training in human rights to avoid future violations. A balanced formula to achieve all of these goals has yet to be introduced.

Why is this reform discussion happening today?

The discussion of the need to reform the system is not recent. Nor is it directly linked, as we might expect, to the present democratic era. The actors involved in human rights work in the hemisphere have long-requested reforms to the system. Included in their discussion are proposed reforms to regulations and/or to the statutes of the system (although reforms to the statutes are not widely supported by members states or non governmental organizations). Perhaps what the new era *has*

introduced to the system, is a new context in which reform proposals are more resonant to those in a position to make changes, namely to the personnel of the organs of the system and to the representatives of the member states.

Also, the increased network of communications, thanks to the democratization process in Latin America, and to rapid technological advances in communications, has extended once inaccessible lobbying forums to civil society institutions such as non governmental organizations (NGOs). The extensive work of such institutions serves to further press and sometimes influence reforms, as is witnessed by the growing presence of NGOs at all levels of operations, including in grassroots work documenting abuses, to the processing of casefiles at the highest organizational level of the system's organs. The NGO presence has been so influential, that the OAS (the IACHR in particular), recognizing the important contribution of the non-governmental sector to the human rights debate, has formally invited NGO representatives and experts on human rights to sit in on reform discussions. The OAS General Assembly (GA) meeting in Lima (June 1997) further emphasized the importance of this consultative resource in the reform process, and in a resolution supported by several member states, stated that NGOs should be consulted in future studies of the system.⁴

Internal discussions of the staff of the Inter-American Commission on Human Rights and the Court, have also spearheaded attempts to bring reform issues to the foreground. Even states, responding to the growing importance of human rights law, have beefed up their foreign ministries with more qualified and specialized personnel to lend advise on human rights issues. All of the actors seem to agree (although on specific issues they may have highly diverging interests and opinions), that changes are due to the hemisphere's human rights system, and that it needs to go towards some new ground, capacitating state bureaucracies, facilitating case-work for the organs, and ultimately, improving the systematic respect for the rights of the hemisphere's inhabitants.

Two important meetings were recently held at the OAS to discuss reforming the human rights system. The first, sponsored by the Inter-American Commission, took place in December of 1996, to which experts and non-governmental actors of the system were formally invited to address the issues they felt needed attention. A second meeting, held in April of 1997, following the OAS Secretary General's reform recommendations, opened the floor to the member states to put forth their recommendations on reforming the system. The public, not formally invited to the meeting, attended in observer capacity.⁵

4. Canada, supported by Costa Rica, Nicaragua, Argentina, and the United States presented a resolution insisting that the Inter-American Institute, and other non-governmental organizations be included in future discussions concerning reforms to the system.

5. Neither Commission nor Court personnel were invited to the April meeting although some personnel did attend of their own volition.

Finally, the GA meeting in Lima in June of 1997, the most important meeting forum of the hemisphere's diplomats, further considered the agenda items developed at the two above-mentioned meetings. The stage is now set for deepening the reform process and making the first steps towards improving the system.

The proposed reforms, who they affect, and who is pressing for them

The proposed reforms stem from various sources. First from the ongoing discussions among all of the actors concerning the day-to-day functioning of the system, its weaknesses and its strengths. Second from the organs' personnel, who have pushed for debate and have suggested that now is the time to reform the system. Third, from the recent essay released by the office of the OAS Secretary General laying out a series of recommendations to reform the system and its organs. And finally from the reaction to the debate of the member states, who have in many cases recently hired human rights experts at their OAS embassies, and have generated their own reform agendas.

Formally, we are talking about reforms to the regulations that govern the functioning of the Inter-American Commission and the Inter-American Court on Human Rights. These are the principle organs which conduct human rights casework, resolve disputes out of court, and in the few cases which reach the Court, pass judgements. Informally, however, we are speaking of a much larger affected group, including the individuals presenting cases, and the organizations which in most cases represent those individuals and do much of the legal groundwork of the system. We are also speaking about the role of member states in the system (formal members of the system), who in all cases brought before the Commission are the accused party, and hence have much political capital at stake. The member states, it should be emphasized, are also the very same member states who are now considering and drafting reforms to the system. The system, hence, has an inherently complex dynamic of contradictory interests and *formal* and *informal* elements which it must maintain in constant balance. The degree to which this balance is achieved greatly influences and shapes the system's human rights arena.

The principle institutions targeted by the reforms are the Inter-American Commission on Human Rights sitting in Washington DC, a sort of filtering legal mechanism to determine which cases merit attention, and which conducts much of the investigation of the cases or settles cases out-of-court, and the Inter-American Court on Human Rights located in San José Costa Rica, which judges unresolved cases forwarded to the Court by the Commission. However, it is not entirely clear which of the two organs, if either, or if both, is in most need of reform, if it is simple regulatory operations and communications between the organs which need review, or if the problem lies somewhere in the wordings of the statutes which gov-

ern them. Depending on what member state you approach, which organ personnel you question, or what non-governmental organization or person you ask, you are likely to get some very fundamentally different viewpoints about reforming the system.

What is of crucial relevance, however, is that the ones to make decisions about the reforms are not necessarily the only affected actors of the system. In fact, the ones ultimately making these decisions, the member states, are *interested* formal actors of the process. This presents a further complication for the system, since the member states will necessarily weigh heavily any potential threats to internal political issues when considering reforms. A further concern, especially among the NGO community's actors, is that the *informal* point of view may be unheeded in the attempt of potentially targeted states to clear their responsibilities towards victims of human rights abuses. This is not to say that we should preclude that all states are attempting to cover up human rights abuses, since if this were the case, this discussion could not advance as it is advancing. In fact, in many cases some of the most progressive reform proposals are coming from some of the most historically abusive member states, which shows us that some states hold the ideals and principles behind human rights legislation, above the disregard sometimes shown for human rights by their own institutions. However, and unavoidably, the underlying contradiction and conflict between *formal* and *informal* elements of the system, still exists.

What follows is a look at some of the specific reform proposals, particularly those which have generated lengthy debate among the actors involved. Depending on which way the debate turns, the eventual reforms stand to greatly alter the way business is done at the OAS human rights organs. As we have already mentioned, the Inter-American Human Rights System is a model for international law which continues to offer examples of ways to approach the delicate balances of international relations; this reform process is no exception and will surely be closely followed by human rights officials throughout the world.

Promotion vs. Protection

Article 41⁶ of the American Convention of Human Rights reads:

The main functions of the Commission shall be to **promote**⁷ respect for and **defense** of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- a. to develop an awareness of human rights among the peoples of America;

6. Points have been abbreviated.

7. Bold added by author for emphasis.

- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights; ...

In the wake of the reform discussion, this Article and its implications to the IAHRs, have been the subject of *great* debate between OAS member states, so much so that its interpretation took up most of the April three-day meeting and resulted in two resolutions to determine just how the article should be read, and what it implies for the day-to-day operations of the Inter-American Commission on Human Rights and for the general workings of the IAHRs.

The key underlying issue for most states lies in a newly emphasized distinction between *promotion* and *defense* (or *promotion* and “*protection*”, as most are now referring to the dual duties). This distinction, although not necessarily intended by the original drafters of the Article, has gained recent widespread support in the speak of member states, non-governmental experts, and NGOs involved in the debate. It seems that what once were two inter-twined and complimentary concepts, have become separated and differentiated and have evolved into two distinct alternative strategies. The direction of the debate suggests that each of these strategies must independently find operational funds and political support from the OAS and from member states.

The debaters categorize public awareness activities regarding human rights, such as education, television spots, personnel training, conferences, etc. as “*promotion*” of human rights, and substantive case-work, i.e. the reception and investigation of actual human rights abuse cases by the Commission as a different category of operations called “*protection*” or “*defense*” of human rights.

This distinction is crucial for the present and future agenda setting of the Commission, and has become the object of minute scrutiny, as the member states prepare draft resolutions of policy commitments and future reforms. Especially when one considers the ability (or inability) of the existing human rights system to meet the demand for human rights services in the hemisphere, it is essential that the work of the Commission be clearly delineated, properly staffed, and adequately financed. As new proposals for permanent staff appear, as budgets are reviewed, and as reforms to regulations and perhaps even to statutes arise, the distinction between *promotion* and *protection*, however real or not, will greatly impact the effectiveness of the Commission to carry out its mandate.

The question most asked is *Should the Commission divert its already scarce resources used in case-processing functions (protection) to take on promotional issues?* This point is especially important considering that the Commission is already overloaded with an 860 case backlog. I.e., should the Commission reduce

casework and consider developing a new *promotional* agenda, including such work as public relations, education, regional seminars, etc.. Further, should promotional and protection issues be considered as mutually exclusive, or should they always maintain a complimentary balance. To further complicate matters, it is not clear what the future of the Commission's budget will be, whether it can expect to receive increased funding, or if it will simply have to make do with its present resources.⁸

How do the member states line up on this issue and what is at stake for each? Most states have gone along with this distinction, yet the reasons behind their rhetoric vary greatly. It has been suggested by some who favor *protection* duties that the entire debate over the distinction between *promotion* and *protection* was generated by a handful of member states who have a large number of cases before the Commission (Peru for example with 108 cases before the Commission, and a leading state in support of the shift to promotion), and who are burdened by the fact that they are always targeted for abuses of human rights, and also by states such as Mexico, who generally, and like several other states of the system, resist involvement in internal affairs by outside institutions, and would like to see the Commission focus more on promotional functions than on working through cases. Venezuela, focusing on the importance of educational efforts, also strongly supported the *promotional* debate. A handful of other states, meanwhile, fear that a shift to promotional activities would reduce the important *protection* aspects of the Commission's work.

Wherever each party stands on the *promotion vs. protection* debate, it can only be deduced that if all things remain the same, i.e. if the Commission's budget were to stay as it is (without considering the ramifications of a budget cut), then each dollar diverted to *promotion* would necessarily come from a dollar previously allotted to *protection*. This would naturally take the focus away from the many cases some states have before the Commission, and make the already overloaded case docket further burdened.

There is definitely something to be said about the need for *promotional* activities to increase. The argument of member states such as Peru to encourage the shift *do* ring true, even to those states refusing to see *protection* diminish due to increased *promotion*. Member states who are fighting for an increase in the *promotional* nature of the Commission's work suggest that the hemisphere is living in a new era in which democratic institutions are flourishing, and dictatorships that once governed most of the region have nearly all come undone. They sometimes further argue that the entire human rights mechanism was created to meet the demands of

8. The Commission receives funding mainly from the OAS operational budget, however, outside funding does exist and could be increased if the states agree to modify its mandate.

what *was*, in essence, a very different political arena.

In that context, and as state institutions begin to rebuild their foundations and deepen democratic institutions, a strong program of civic education on human rights could be of great utility to *promote* human rights in the hemisphere. In other words, we are in an era favoring the increased education of citizens in human rights, and through education we can expect the respect for such rights to improve. Essentially, the argument is that we are in a new era, and that in this era, a new human rights system is needed (focusing on *promotion* and not on *protection*). The resolution stemming from the April meeting, widely supported by member states, clearly emphasizes the need to help stimulate consciousness through education, diffusion of information, scholarships, internships, and exchange of experiences regarding human rights, all *promotional* in nature.

The NGO community, despite that it has no *formal* voice in the system, has not been absent from debate, leading the argument that the new speak of *promotion* is an attempt by certain member states to divert the Commission and Court away from pending and future cases. NGOs have strongly lobbied member states, to support their position. One prominent NGO argues that shifting the human rights system into *promotional* activities will not necessarily reduce the abuses taking place in certain systematically abusive institutions such as the police and military, nor will it assist to reduce the still growing backlog of cases presently at the Commission. From the position of NGOs working on cases, while educational programs are important and could potentially help reduce future abuses of human rights, the Commission should nevertheless commit its agenda to *protection* while *promotional* issues could be more efficiently delegated to some other body.

States such as Argentina, Canada, Colombia, Costa Rica, the United States, and Venezuela (which has also lobbied for increased promotion) lobbied strongly for the inclusion of wording in the resolution text so that *no shift* of the Commission's activities towards *promotion* be at the expense of *protection* activities. This raises the inevitable question of funding for the Commission and its mandate. If no monies should be diverted, then an increase to either of the Commission's intertwined functions is necessarily a decrease to the other, making the resolution useless if the OAS does not accompany it with an increase in the budget of the Commission. Presently, however, there is no indication that the budget of the Commission will increase.⁹

It seems then, that we are heading into a new era for the Commission, where changes are both inevitable and welcome, yet funding to finance new activities is scarce, which raises the question of *how* committed the states are to the reforms if

9. Discussions at the General Assembly in Lima (June 1997) indicated that the Commission's budget would not be altered for the upcoming year.

they will not actively support a budget increase. Either *promotion* and/or *protection* activities will necessarily be altered, most likely increased but not diminished (assuming more funds are eventually generated). What remains unclear, however, is how much of the new activities, especially as concerns promotional issues, will fall on the Commission. While states like Peru and Mexico were hoping to see the Commission shift resources from protection to promotion, if promotional activities are delegated to outside sources, they may even actually see a shift in the opposite direction, i.e. towards more protection.

The proposition also arose (proposed by the United States, supported by NGOs, and in accordance with the opinion of many member states), that the *promotional* work should not be a task of the Commission, but assigned to some other OAS organ, or even contracted-out to outside organizations. Costa Rica is strongly in favor of this proposition and is home to one of the most likely candidates to assume such a task, the Inter-American Institute of Human Rights. The Inter-American Institute of Human Rights, with a budget several times larger than that of the Commission, would be in a better position to assume promotional responsibilities.

Other OAS organs which might collaborate in the promotion of human rights are the Unit for the Promotion of Democracy, the Inter-American Indian Institute, the Inter-American Commission of Women, the Inter-American Children's Institute, the Inter-American Institute of Human Rights, the Inter-American Council for Education, Science, and Culture, or the Inter-American Juridical Committee. While seemingly an interesting proposition, the states in favor of the *promotional* shift in the Commission's work, Peru and Mexico, do not seem to favor such a proposal as it would not necessarily reduce protection activities of the Commission.

Finally, it should be noted that each member state, according to the Convention, is responsible for internal promotion of human rights. Given the meager budget of the Commission to comply with this responsibility, it would be reasonable to assume that the greater part of the costs of promotional issues *in situ* would naturally fall on the member states themselves. How committed to this obligation the states are in practice, varies greatly between states.

Admissibility of cases before the Commission

The issue of admissibility of cases before the Commission is a highly contentious one and is key to the smooth functioning of the case processing mechanism. As the system presently operates, the Commission rules only on the '*In*-admissibility' of cases and not on "admissibility". This is an important distinction, since ruling on "inadmissibility" requires the initiation *on the part of the Commission* of a formal rejection process, as opposed to insisting that the *petitioner go through a process* of admissions before the case is even recognized as "a case" by the Commission. The implications of each are very significant to the casework at the Commission and to

the access for the petitioner to the hemisphere's human rights judicial mechanism. "Inadmissibility" rulings assume admissibility until otherwise indicated, giving cases the benefit of time without delay. Should the Commission push for "admissibility", the fear of those representing petitioners is that cases will have to go through a lengthy and perhaps politicized procedure of admissions, possibly jeopardizing the petitioner's access to the system.

Conversely, many states protest that petitioners without a substantial case often publicize their petitions to the press, when in fact they have merely sent a letter of protest to the Commission. The Commission will eventually reject the case as inadmissible, however, in the meantime, the press wrongly publishes that this party has a case against the state in question, when in fact no such case exists.

Many states argue, as does the Secretary General's paper, that the present system is vague concerning the "admissibility" or "inadmissibility" of cases, and that the entire admissions procedure needs a make-over. While this may be true, NGOs operating in the system take a different position and actually prefer the more flexible procedures which now exist. The NGO concern is that a switch to "admissibility" rulings will hinder access of cases to the Commission, delaying cases due to bureaucratic inefficiencies to channel them through the already over-loaded system. Further, "admissibility" qualifications may favor the accused party by burdening the alleged victim with the obligation of "winning" admissibility, as opposed to the now existing benefit of the doubt given to the alleged victim, until otherwise ruled inadmissible. Another fear of NGOs is that switching to admissibility rulings may be a way for the Commission, pressured by member states or by their own inability to absorb more work, to block cases from coming to the system.

Recently, the admissibility/inadmissibility debate has translated into cases where the Commission has ruled on "admissibility". However, this practice has not yet been incorporated into formal Commission procedures and is still being debated.

The admissibility question was not discussed at the experts meeting for lack of time but should be a topic of great debate which will surely arise in the near future.

NGOs and the Inter-American Human Rights System

The IAHRs depends greatly on the contribution and efforts of non-governmental organizations to actually bring cases to the organs of the system. Arguably, as some actors might suggest, they may even contribute too much to the process. NGOs do much of the groundwork of case investigation and legal preparation, long before the submission of cases for consideration and follow-up by the Commission and Court. In large part, the 860 case backlog presently at the Commission is due to increased NGO activity in recent years. While not formally part of the admissions process of a case, NGOs provide a filtering stage, working with clients to determine the feasi-

the feasibility and admissibility of their complaints to the system. They accomplish much of the grassroots networking to identify abuses of human rights, and thereby eliminate much of the work that would otherwise be left to the already overloaded Commission staff. As the system works today, NGO input is a necessary component of the system. It simply could not function properly without NGOs given the present resources of the Commission available to carry out its mandate.

Some of the NGOs presently working in Washington, DC and throughout Latin America, due to their proximity, exposure and experience before the Commission and Court on Human Rights, have close relations with many of the actors involved in the process of admitting and trying cases. The NGO presence helps carry cases through the system, pushing for resolutions on issues, and keeping the system in a sort of "bureaucratic check". The OAS human rights organs personnel work very closely with NGO lawyers representing clients before the Commission, and are permanently communicating information regarding cases to clients through the NGO reps. In practice, the dynamic between the NGO representatives and the OAS organ personnel is collegial, resulting in highly valued legal debate and discussion, as well as providing a necessary government-civil society dialogue mechanism. The degree to which this mechanism is biased in favor of the NGO position, however, lies at the heart of some member states' opposition to NGO formal or even informal participation in the system.

Nevertheless, NGO experience and fluid communications with the OAS organs, as they know the works of the Commission inside and out, are an invaluable asset to those individuals approaching the human rights system from a distance, i.e., the alleged abused. As individuals who submit complaints before the Commission are usually simply too far removed from international institutions and do not have the know-how or financial means to access international arenas, the groundwork of NGOs plays a pivotal role in the effective functioning of the system. They are a sort of *informal* lubricant of the operational components of the *formal* human rights system.

The *informality*, however, of NGO participation in the system remains, from their own point of view, a hindrance to justice for victims. As the *states are always the accused party*, NGOs are always *defenders* of alleged victims. This places NGOs in the uncomfortable and difficult position of being *informal* actors in a system *formally* run by their adversaries, namely the member states. While few states systematically treat the NGO community as adversarial (some do), NGO participation in the system is not always welcomed, especially by those states with many cases before the Commission. As the April 1997 meeting showed, some states would clearly prefer to sideline NGOs at OAS forums. A last-minute attempt by Mexico (supported by Peru) to bar the public (and hence, NGOs) from the April meeting, however, was rejected by other member states.

Most states, despite their interested stake in the matter, prefer to admit NGOs to OAS forums whenever possible. Argentina, Canada, Colombia, Costa Rica, Nicaragua, Paraguay, the United States, and Venezuela, have been strong proponents of creating some sort of access mechanism to hear the opinions of NGOs in the system's affairs. It is such states who defeated the motion set forth by Mexico to bar the public from plenary room discussion in the April 1997 meeting, and who at the Lima GA meeting in June 1997 helped push for continued human rights reform consultation with NGOs. It should be noted, however, that even countries like Argentina, which collaborate and periodically consult with NGOs on their human rights positions, on some matters, such as the presence of NGOs before the Inter-American Court on Human Rights, prefer to take a more conservative stance, and would not necessarily like to see NGOs formally present at case trials before the Court.

Most states recognize the important role played by NGOs in the IAHRs. In fact, many have been supportive of NGOs and have sought consultation with some of the more experienced NGOs, such as the Center for Justice and International Law (CEJIL), the leading NGO bringing cases before the system with offices in several Latin American countries. State-NGO dialogue and collaboration has produced some very worthwhile materials and proposals to the system. As the quality of human rights legal jurisprudence of the system has benefited from the dynamics of NGO-Commission dialogue, so has the human rights background and specialty of member states' ministry personnel increased, as a response to the increased presence of qualified NGO human rights personnel.

In one very specific proposition directly affecting NGOs in the system, Mexico led a proposition to restrict NGO participation before the organs to those NGOs having offices in the country of question (the country against which a case is filed), and only allowing the participation of those NGOs officially sanctioned by the state in question. The argument which quickly arose opposed to this proposition, is that the state gains excessive veto-power over the legitimization of potentially active NGOs in their territory, and can hence control the number of petitions filed against them by refusing to sanction certain NGOs. Further, some argue that the proposition would go against Article 44 of the Convention, giving "Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization", the right to "lodge petitions with the Commission containing denunciations or complaints of this Convention by a state Party".

On a more critical note, however, as some states and actors of the system will argue, NGO influence can also be invasive and take over the formal mechanisms of the system. One prominent argument put forth by states against NGO participation in the case process, is that NGOs are so closely involved with the Commission's attorneys that they influence or even dictate Commission decisions regarding cases. While this would be hard to prove, the fact of the matter is that NGOs serve as informal direct advisors to the Commission on many issues.

Another important element of NGO participation concerns the effectiveness and know-how of NGOs in general. While some NGO representatives are very well instructed, and assist the system, many others are alien to it, and by filing unwarranted or ill-prepared cases, only serve to further clog the already over-burdened caseload. The Commission regularly receives poorly prepared cases, having to go through a lengthy review process of what often turn out to be rejected submissions. This serves as a strong argument for more stringent admissibility criteria which we have already discussed above.

What is clear is that with the rising strength of Civil Society organizations, and the growing presence of NGOs in local, regional and international arenas, the impact of their work is more and more resonant in Inter-American Human Rights issues. The NGO presence was never so felt as it was during the OAS GA meeting in Lima in June of 1997. A candidate from Guatemala to the Inter-American Commission on Human Rights, with a questionable human rights record, had apparently secured his vote having heavily lobbied member states before the GA. The vote was derailed at the last minute, however, due to a strongly fought NGO lobby against his nomination. In this landmark instance, NGOs were able to directly influence member states and block the vote by a one-vote margin against the candidate. The influence of NGOs in the system, as manifested in this case, and in addition to their indispensable contribution in casework cannot be ignored. An NGO presence and inclusion in the system, whether formal or informal, warrants at least an extensive and fair debate.

The NGO community recently prepared draft legislation which they expect to present to the member states to push for consultative status before the human rights organs. Should this idea take with the states, we may see, as in the case of the European Human Rights System, that NGOs may finally become formal actors within the system.¹⁰

Ultimately, the question of NGO participation goes beyond whether they should or should not have a *formal* presence in the halls of OAS buildings. The fact of the matter is that NGOs *are* a necessary element and *sine qua none* of the system, and without them, the effectiveness of the system would be greatly reduced. The member states realize this situation and are, for the most part, cooperative and willing to explore ways of incorporating NGOs, whether formally or informally as was the case of the Experts meetings in December of 1996, the April meeting of 1997, and

10. Through a 1994 petition presented by Canada to consider NGO consultative status, a working group consisting of representatives from Argentina, Brasil, Canada, Colombia, Chile, Ecuador, El Salvador, United States, Mexico, Nicaragua, Peru, Dominican Republic, St. Lucia, Uruguay, and Venezuela, was created to study the issue. A resolution finally appeared in July 1997 recognizing the important contributions of NGOs in the system and emphasizing the need for continued OAS-NGO collaboration, however, the resolution failed to give NGOs consultative status.

the Lima GA, respectively. Some states, however, resent the NGO presence in the system, and will likely continue their opposition to formalizing its presence, despite the fact that it is an intrinsic and inalienable part of the system.

Nomination of Staff and Staff Self-Administration

The issue of staffing of the organs of the system is another that presents endless debate. No one would question the importance of having highly articulate and instructed legal representatives serving for each of the organs of the system. However, as is apparent in the debate, the independence of these individuals, at least in theory, creates inconveniences for some states. If we go back to the dilemma of having a system in which member states check themselves, a Commission with too much independence could be a potential threat to the member states.

The question of *who* holds the hire-fire power, and *who* determines what is done with the budget is as important as any other issue currently under review, and as the quality of the Commissioners improves, becomes a more and more prominent and complex issue. A possible fear of some states (Mexico is a leading opponent in giving budgetary and hire-fire power to the Commissioners), is that elected Commissioners would be freed from following the political position of the states that nominated them, and would use funds of the organs as a force against the interests of the states. This fear would presuppose that Commissioners now tend to favor their nominating states to such a degree that states have control over the work they do, which in practice (and this is sustained by the opposition), is simply not the case. Therefore, giving them more independence would not necessarily change their position *vis à vis* their nominating state or any other state.

Commissioners have generally *not* systematically followed the positions of their states, nor are they considered by NGOs or other experts, as biased in favor of these. Once elected, these individuals generally stick to their agenda, working through the Commission's overloaded caseload, independent of what individual states might will. A current aide to one of the Commissioners indicated that one solution to the potential politicization of the Commissioners would be to extend mandates of the Commissioners so as to not overlap with their electing governments' presidential terms. Whether Commissioners do or do not feel pressure to side with their nominating state is left to further inquiry, however, the question of budget control is of more immediate concern to the debate.

The inability of Commissioners and of the organ to manage its own funds, and enforce strict compliance with quality and control of its bureaucracy *has* impeded its work. The inefficiency which today exists among the personnel and bureaucracy of both organs stands to improve tremendously with the decentralization and devolution of operational and fiscal matters to the organ. However, in a moment when the Commission is sending out a message of need to reform and will to improve,

the potential dangers of a more efficient and vociferous Commission presents an understandable fear to those countries who are concerned with the ramifications of an independent and more powerful Commission, i.e. to those countries which are systematically targeted for human rights violations.

What is also of crucial importance concerning the Commissioners, is the intellectual capacity of the nominees and the process through which these are nominated. It is not debated that Commissioners should be highly qualified, however, *who* determines their qualification *is* of great contention. One contentious issue is to what degree the public has any control over the substance of the organs, i.e., over the nomination or review process of the nominees. Presently it has none. As in the above-cited case concerning the nomination and NGO lobby against the former Guatemalan Vice President, the NGO community (a public group) successfully lobbied for the no-vote of a candidate.

One of the propositions supported by the United States and refuted by Mexico is to introduce a public review process, in which candidates would be subject to an open forum of commentary from public sources before they are officially accepted for final vote by the member states. This would help weed-out candidates with questionable records before they are brought to vote and avoid past blunders of electing individuals who have been linked to dictatorial and human rights abusive governments.

Appeal for the ratification of the Inter-American Convention and the Jurisdiction of the Court

All states agree that the Inter-American System on Human Rights needs the *formal* support of all of its member states, which includes ratifying the Convention and accepting the jurisdiction of the Inter-American Court. As many of the experts on the subject will quickly suggest, the failure of some the most prominent and influential member states, such as Brazil, Canada, Mexico, and the United States, to ratify the Convention and/or accept Court jurisdiction, undermines the power of the system and questions its credibility, especially by member states who are adversely affected by the system. In the words of the Secretary General in his reform proposal essay, "the fact that some countries within our system have not yet ratified the American Convention on Human Rights is at best an unnecessary complication, and at worst an obstacle which hinders our system's consolidation."

It is perhaps not surprising that these states will not accept jurisdiction of the Court, since they are historically reluctant to allow interference by international institutions on internal matters. Since these states are also among the more active and vociferous members of the system, we have a case of the doctor refusing to take his own medicine, and risk that the patient will eventually question her prescription. Luckily, for the sake of the system, most states have gone beyond their particular

complications of adherence, and are promoting far superior commitments to the universality of the human rights at stake.

The jurisdiction of the Court, however, is a more complicated issue than the ratification of the Convention, witnessed in that only 17 of the system's 35 member states accept its jurisdiction. Court jurisdiction would mean a higher commitment to allowing international law to directly influence internal affairs. In some cases brought before the system, states have refused to adhere to the jurisdiction of the Court, or simply refused to accept its verdicts.

One of the interesting and beneficial consequences of member state adherence to the statutes of the system lies in the influence these have had on *ex post facto* legislation, especially as concerns the hemisphere's newer constitutions. Some of the states' constitutions appearing only recently, such as is the case of Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Nicaragua, and Peru, have incorporated Inter-American statutes as part of their nation's constitutional law, greatly reinforcing the laws and principles therein contained.

The Future of the System

Perhaps what is of most relevance stemming from the debate generated by the December 1996 and April 1997 meetings, the June 1997 GA, NGOs, and other consulted experts concerning the Inter-American Human Rights System, is that there is a forward-looking and energetic debate of the issues involved. There is a general consensus that *this* is a time for change, and that change is possible and necessary.

The Secretary General's paper drafted by his Human Rights Advisor introduced the issues and mobilized the discussion. Since the release of the paper in November of 1996, both formal and informal forums have appeared to shed light on the debate. What is left is for the actors involved to get to work and tackle the issues one by one as they arise. Ultimately this debate is not about states vs. NGOs or OAS organs vs. states, it's about improving a very important mechanism which we have developed over 50 years to promote and protect human rights in our hemisphere.

Partisan politics are inevitable and will continue to provide the fuel for the debate and will surely even influence the final outcome, however, all of the actors involved will do well to remember that much higher issues are at stake, issues that represent the integrity of each and every citizen of every nation of the hemisphere. Many of the actors of the system, whatever their positions, have shown that they understand these stakes. Let's hope that ultimately all of them will.