

# THE FUTURE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

*Thomas BUERGENTHAL and Douglass CASSELL*

The purpose of the Inter-American Human Rights system, as stated in the Preamble to the American Convention on Human Rights (“the Convention”),<sup>1</sup> is “to consolidate in the hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man”.<sup>2</sup>

In the decade since the Inter-American Court of Human Rights (“the Court”) decided its first contentious case on the merits,<sup>3</sup> the system has shown potential –still largely unrealized– to achieve this purpose. In this essay, which presumes the reader’s familiarity with the norms of the Convention and of the American Declaration of the Rights and Duties of Man (“the Declaration”),<sup>4</sup> and with the formal roles of the Court and of the Inter-American Commission on Human Rights (“the Commission”),<sup>5</sup> we comment on the system’s performance in practice and offer suggestions for improvement. In brief, we argue as follows:

1. OAS, OFFICIAL RECORDS, OEA/Ser.K/XVI/1.1, doc. 65, Rev. 1, Corr. 2 (1970), *opened for signature*, Nov. 22, 1969, *entered into force*, July 18, 1978, *reprinted in* 9 I.L.M. 673 (1970) and in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, Updated to May 1996, OAS (1996) (hereinafter “BASIC DOCUMENTS”), at 25.
2. For purposes of interpreting the treaty under the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31(1), this provision reflects the “object and purpose” of the Convention, as do the criteria of democracy and human rights referred to in arts. 29(c) and (d) and 32 (2) of the Convention. *E.g.*, Advisory Opinion OC-5/85, “Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,” 1985 ANN.REP.INT.-AM.CT.H.RTS. (hereinafter “ANN.REP.”) 21 at 31 para. 41 (1986).
3. Velásquez Rodríguez, 1988 ANN.REP. 35. The Court had previously ruled a contentious case inadmissible. Government of Costa Rica (in the matter of Viviana Gallardo et al.), Order of September 8, 1983, 1984 ANN.REP. 40, at 41.
4. Res. XXX, *Final Act of the Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948*, at 38 (OAU 1948), *reprinted in* BASIC DOCUMENTS, note 1 *supra*, at 17.
5. See generally, *e.g.*, Thomas Buergenthal and Dinah Shelton, PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS (4th rev. ed. 1995); Thomas Buergenthal, Claudio Grossman and

1. The system's actual performance falls far short of its formal promise, largely for lack of political will on the part of OAS member states.
2. Despite trends toward democratization, the hemisphere still needs and will continue to need an effective Inter-American Human Rights system. Democratization has been uneven and in some places remains fragile, and even mature democracies need regional human rights oversight.
3. If the system is to meet the needs of the future, it should be consolidated and made uniform, its institutions and means strengthened, and its procedures for individual cases improved.

## I.

### THE SYSTEM IN PRACTICE: ACCOMPLISHMENTS AND FAILURES

In practice the system can claim important accomplishments in the protection of human rights. For example:

- Disappearances during Argentina's Dirty War "declined precipitously" once the Junta agreed to an on-site visit by the Commission, and "virtually ceased" after the Commission conducted its visit in 1979.<sup>6</sup>
- The Commission responds promptly to requests for emergency measures to protect the lives of persons who have been threatened; in the great majority of such cases, states agree to Commission requests for security measures, and the persons are not harmed.<sup>7</sup>

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Pedro Nikken, *MANUAL INTERNACIONAL DE DERECHOS HUMANOS* (1990); Cecilia Medina, *THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM* (1988); Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 *AM.J.INT'L L.* 231 (1982); Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 *AM.J.INT'L L.* 828 (1975); see also Pedro Nikken, *LA PROTECCIÓN INTERNACIONAL DE LOS DERECHOS HUMANOS: SU DESAROLLO PROGRESIVO* (1987).

6. Maria Bartolomei and David Weissbrodt, *The Impact of Factfinding and International Pressures on the Human Rights Situation in Argentina, 1976-83*, in Frank Newman and David Weissbrodt, *INTERNATIONAL HUMAN RIGHTS LAW: POLICY AND PROCESS* (2ND ED. 1996) 361, 366.

7. See, e.g., 1996 *ANN.REP INT.-AM.COMM'N H.RTS.* (hereinafter "ANN.REP."), at 28-35. Few individuals covered by Commission requests for precautionary measures appear to have been harmed subsequently. In Colombia, however, "Josué Giraldo Cardona, a human rights activist . . . who was covered by Commission precautionary measures issued in 1995, was killed on October 13, 1996. . . . As a result, on October 18, 1996, the Commission asked the Court to adopt provisional measures on behalf of the other members of the human rights organization which Josué Giraldo had served. . . ." *Id.* at 655.

- Friendly settlements of human rights complaints against states such as Argentina<sup>8</sup> and Guatemala<sup>9</sup> have been achieved with Commission assistance, while Argentina,<sup>10</sup> Suriname<sup>11</sup> and Venezuela<sup>12</sup> have accepted international responsibility for specific human rights violations before the Court.
- The Court became the first international tribunal to develop a legal theory to hold states accountable for disappearances, and in its first two cases pioneered new ground by awarding substantial damages to next of kin of the disappeared.<sup>13</sup>
- The Court recently secured the freedom of a university professor who had been wrongfully imprisoned in harsh conditions for several years.<sup>14</sup>
- The Court's jurisprudence is increasingly taken into account by national courts in Latin America;<sup>15</sup> for example, its advisory opinion that compulsory licensing of journalists violates freedom of expression under the Convention was cited by the

8. *E.g.*, *Verbitsky v. Argentina*, 1994 ANN.REP.COMM'N 40. In the *Garrido and Baigorria Case*, Argentina first accepted its international responsibility before the Court, 1996 ANN.REP.CT. 75, 80 para. 27, and then agreed with the Commission on a proposed settlement of the amount of damages. 1996 ANN.REP.COMM'N 35.
9. *Pablo v. Guatemala (Colotenango Case)*, 1996 ANN.REP.COMM'N 447.
10. *Garrido and Baigorria*, note 8 *supra*.
11. *Aloeboetoe et al. Case*, 1991 ANN.REP. 57, 61-62 para. 22. Agreement was not reached, however, on the amount of damages, which was later set by the Court. 1993 ANN.REP. 61.
12. Venezuela "accept[ed] the international responsibility of the State" in the *El Amparo Case*, 1995 ANN.REP. 23, at 27 para. 19. However, there was no agreement on the amount of damages, which was later set by the Court. 1996 ANN.REP. 159.
13. *Velásquez Rodríguez*, 1988 ANN.REP. 35 (merits), 1989 ANN.REP. 123 (damages); *Godínez Cruz*, *id.* at 15 (merits), 141 (damages).
14. Art. 63.1 of the Convention provides in part that if the Court finds a violation, it "shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated." Where the violation is a wrongful denial of liberty, the Court may thus order the release of the victim. The Court exercised this remedial power for the first time in its September 17, 1997 Judgment on the merits of the *Loayza Tamayo case*, in which it directed Peru to release the victim from prison "dentro de un plazo razonable." *Sentencia de 17 de septiembre de 1997*, at 35 para. 84, 36 para. 5 (Spanish). On October 16, 1997, Peru did so. *Chicago Tribune*, Oct. 17, 1997, section 1, p. 28.
15. *But see* Case N° 334-95, Corte de Constitucionalidad de Guatemala, Mar. 26, 1996, 1996 GACETA DE LA CORTE DE CONSTITUCIONALIDAD 50. There lawyers from the Human Rights Office of the Archbishop challenged as unconstitutional a 1995 law, Decreto 14-95, extending the death penalty to certain kidnappings and related crimes. They relied in part on art. 4.2 of the American Convention on Human Rights, which provides that in states that have not abolished the death penalty, it "shall not be extended to crimes to which it does not presently apply." They also relied on art. 46 of the Constitution of Guatemala, which provides that human rights treaties ratified by Guatemala prevail over internal law. ("*Preeminencia del Derecho Internacional*. Se establece el principio general de que en materia de derechos humanos, los tratados y convenciones aceptados y ratificados por Guatemala, tienen preeminencia sobre el derecho interno.") Despite this constitutional provision, the Court ruled that its competence was limited to analysis of the compatibility of norms of inferior rank with constitutional norms, and that the American Convention is not a "parameter of constitutionality" ("no es parámetro de constitucionalidad"). *Gaceta* at 52. For this among other reasons, the Court rejected the claim of unconstitutionality. *Id.*

Constitutional Chamber of the Supreme Court in invalidating Costa Rica's licensing law,<sup>16</sup> and its advisory opinion on the enforceability of the Convention right of reply was relied upon by the Supreme Court of Argentina in ruling that right directly enforceable under Argentine law.<sup>17</sup>

Unfortunately, such achievements have been the exception rather than the rule. The remedies provided by the system in practice have usually proved too little, too late. Granted, no international human rights system could realistically have prevented or stopped the massive loss of life caused by human rights violations under repressive regimes and internal conflicts in the Americas in recent decades. But a system more credibly supported, funded and designed might have saved countless lives and secured justice in many cases, thereby deterring violations.

The system's failures begin at its first line of defense: the states. Rather than carry out their duties to take reasonable measures to prevent, investigate, prosecute, punish and compensate violations,<sup>18</sup> some states have themselves committed massive violations. Others have tolerated patterns of serious violations. Nearly everywhere, security forces continue to enjoy a considerable measure of impunity for violations of human rights.<sup>19</sup> And in the face of such widespread failures, still other states decline to support the OAS regional machinery, by failing to ratify OAS human rights treaties or to accept the Court's contentious jurisdiction.<sup>20</sup>

The system's failures continue at the regional level. In addition to the lack of universal participation in the Convention and Court, the following sections discuss the system's chronic and severe shortfalls in material resources and diplomatic support; its inconsistent selection of judges, commissioners and staff; and its allocation of

16. Advisory Opinion OC-5/85, note 2 *supra*; Sentencia N° 2313-95, of May 12, 1995, of the Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, in the case of Róger Ajún Blanco, Acción de Inconstitucionalidad N° 421-S-90 contra Art. 22 Ley Orgánica Colegio de Periodistas. Characterizing the Inter-American Court's opinion as "muy extensa y rigurosa en el tratamiento del tema," the Costa Rican Court saw no "necesidad de un pronunciamiento duplicado," since Costa Rica had sought the Inter-American Court's advisory opinion and was therefore bound by it. Expediente 421-S-90 at 42, 44, 42-45.

17. Advisory Opinion OC-7/85, "Enforceability of the Right of Reply or Correction," 1986 ANN.REP. 49; Ekmedjian c. Sokovich, Gerardo y otros, Corte Suprema de Justicia de Argentina, Caso N° E.64.XXIII, Sentencia del 7 de julio de 1992, discussed in Buergenthal and Shelton, note 5 *supra*, at 456-61, and in Thomas Buergenthal, *La Jurisprudencia Internacional en el Derecho Interno*, in LA CORTE Y EL SISTEMA INTERNACIONAL DE DERECHOS HUMANOS (Rafael Nieto Navia, ed., 1994), at 67, 76-85.

18. Convention art. 1.1; see generally Velásquez Rodríguez, note 3 *supra*, 1988 ANN.REP. at 70 paras. 166 and 167, 71 para. 174, 72 paras. 176 and 177.

19. See generally Douglass Cassel, *Lecciones de las Américas: Lineamientos para una Respuesta Internacional ante la Amnistía de Atrocidades*, 24 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS XX (forthcoming 1997).

20. Only 25 of the 35 OAS member states have ratified the Convention and only 17 have accepted the contentious jurisdiction of the Court. 1996 ANN.REP. COMM'N 771.

too many, sometimes conflicting roles to the Commission. As a result, the individual case system:

- resolves too few cases,
- suffers lengthy delays,
- lacks investigative capacity,
- lacks transparency and due process,
- lacks consistent, good faith participation and compliance by states,
- results in too few cases coming before the Court,
- relies on NGO lawyers to assist the Commission in presenting cases to the Court, thereby undermining the Commission's appearance of impartiality,
- has led the Court, which should be an appellate body, to act as a trial court, engaging in fact-finding for which it is poorly equipped, and
- lacks monitoring and follow-up by OAS political bodies to promote compliance with Commission recommendations and Court orders.

At the root of many of these problems is a lack of political will among OAS member states. Yet the system is not doomed to fail. As noted above, the Commission and Court can point to remarkable achievements. Moreover, by streamlining and upgrading procedures and methods of work, they can reduce delays while improving the quantity and quality of their output. In fact, to some extent both have begun to improve procedures and practice in recent years.

### **a. Lack of OAS Material and Diplomatic Support for the System.**

The Commission and Court suffer chronic and severe shortfalls in material resources and diplomatic support. For the last two decades, even when confronting thousands of cases and massive violations of human rights, the Commission has had only ten to twelve staff attorneys to cover its manifold responsibilities throughout the hemisphere. At times the Court has been so underfunded that it was forced to suspend publication of some proceedings, and published others only through financial support from the European Union.<sup>21</sup>

Both bodies are also forced by budgetary constraints to meet infrequently. In 1996, even after recent budget increases, the Commission and Court each met only four times for a total of approximately six weeks.<sup>22</sup> The Court has been a part-time tribunal ever since the OAS General Assembly in 1979 rejected its proposed statute, which contemplated a full-time (or at least half-time) court.<sup>23</sup>

21. See 1995 ANN.REP. at 17.

22. See 1996 ANN.REP. COMM'N. at 15; 1996 ANN.REP. CT. at 12, 15, 17 and 19.

23. "The draft Statute presented to the OAS General Assembly by the Court in 1979 envisaged a permanent tribunal consisting of full-time judges. . . . But the General Assembly found this proposal

The Commission's lack of resources and the Court's scant availability combine to discourage the Commission from sending cases to the Court. In other words, the cart drives the horse: rather than expand the Court's work to meet a growing case load, its case load is held down by resource constraints.

Granted, both bodies have received recent budget increases, at a time when the OAS as a whole has been experiencing a fiscal crisis, and when human rights violations are less severe than in earlier years. While this is encouraging, it only narrows the gap between the system's limited resources and the expansive demands rightfully placed upon it.

By comparison, the European Commission on Human Rights, which has no function other than an individual case system, now numbers more than 30 members, who meet 16 weeks each year, working in small panels, with the support of a staff three times as large as that of the Inter-American Commission.<sup>24</sup>

Diplomatically some states honorably defend the system against recurring attacks designed to weaken it, often launched by states recently the subjects of adverse country or case reports. Yet the fact that the OAS as a whole has insisted on a system with such limited capacity to protect human rights, speaks volumes about the willingness of member states to make the system effective. It is politically easier for states to keep the Court and Commission underfunded, in order to limit their protective capacities, than to go on record in opposition to their protective activities; the result, however, is the same.

## **b. Inconsistent Selection of Judges, Commissioners and Staff.**

Despite sound formal criteria for judges and commissioners,<sup>25</sup> the persons actu-

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unacceptable, ostensibly at least on the ground that a full-time court would be too expensive and was unjustified until the Court had a substantial case load." Buergethal, note 5 *supra*, 76 AM.J. INT'L L. at 232-33. The General Assembly has not since authorized a full-time Court.

24. In 1995, a typical recent year, the Commission held eight sessions of two work weeks each, for a total of 16 weeks, or an average of 1.33 weeks per month. European Commission of Human Rights, SURVEY OF ACTIVITIES AND STATISTICS 1995, at 7. Its permanent secretariat consisted of a Secretary, six deputies and 39 staff members of applications units, not counting numerous administrative personnel. *Id.* at 4-6. In addition, the Commission was assisted by 24 temporary personnel. *Id.* at 6.
25. Judges of the Court must be "jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions" in their home or nominating states, Convention art. 52.1; Court Statute art. 4.1, and they and their staff must "conduct themselves in a manner that is in keeping with the office of those who perform an international judicial function," Court Statute art. 20.1. Members of the Commission likewise "shall be persons of high moral character and recognized competence in the field of human rights," Convention art. 34; Commission Statute art. 2.1, and must "conduct themselves in their public and private life as befits the high moral authority of the office and the importance of the mission." Statute art. 9.4. In addition, art. 71 of the Convention provides that the position of judge or commission member "is incompatible with any other activity that might affect the

ally selected have not consistently met the high standards of professionalism and human rights expertise required for the system to succeed.<sup>26</sup>

In view of the closed and politicized selection procedures used by the OAS, this should hardly be surprising. States often vote on the basis of regional blocs or diplomatic *quid pro quo*'s, such as exchanges of support for candidates to other OAS bodies, that have nothing to do with human rights credentials. Proposals to publicize the list of candidates proposed by states, and to solicit comments on their qualifications from bar associations, law school deans and other institutions, have not to date been accepted.

Commission staff are chosen by the OAS Secretary-General through an even less transparent selection process, sometimes burdening the Commission with staff whose work does not contribute to its efficiency.

### c. A Commission With Too Many Tasks.

The Commission is spread too thin among too many tasks to perform them all well. Its main function is "to promote respect for and defense of human rights".<sup>27</sup> Pursuant to this mandate its principal responsibilities include processing individual cases by investigation, facilitation of friendly settlement, reports and recommendations; as well as country reports, on-site visits, investigations and recommendations on thematic issues, requests for information from states, drafting and proposing new human rights instruments, promoting awareness of human rights, advisory assistance to states, requests for advisory opinions from the Court, and referring and litigating contentious cases before the Court.<sup>28</sup> These multitudinous responsibilities far outstrip the Commission's limited material and human resources.

The already overburdened Commission would be stretched beyond the breaking point, if the recent proposal by some states that it prepare country reports on all OAS member states were to be adopted. It is true that Commission country reports included in its annual report have been sporadic<sup>29</sup> and controversial for lack, until recently, of clear and objective criteria for selection of states. However, a more feasible response was adopted by the Commission in 1996, when it identified four criteria. It now reports on states: (1) whose governments

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independence or impartiality of such judge or member, as determined in the respective statutes." See Court Statute art. 18; Commission Statute art. 8; Commission Regulations art. 4.

26. See, e.g., Douglass Cassel, *Somoza's Revenge: A New Judge for the Inter-American Court of Human Rights*, 13 HUMAN RTS.L.J. 137 (1992).

27. Convention art. 41.

28. E.g., Convention art. 41; Statute arts. 1, 18-20.

29. In 1995 the Commission's annual report contained no country reports at all. The Commission later explained that it had "suspended" the reports in order to reexamine its selection criteria. 1996 ANN.REP. at 649.

are not freely elected, (2) where rights have been suspended in whole or part by states of emergency and the like, (3) where there are serious accusations of mass and gross violations of human rights, or (4) which are in a process of transition from any of the first three situations.<sup>30</sup> In addition, the Commission intends to develop further criteria "to highlight measures taken by states which demonstrate a commitment to improving respect for human rights".<sup>31</sup>

Even if the Commission had sufficient resources and control of its staff, which it does not, some of its roles are conflicting. For example, it is charged both to process individual cases and to promote human rights. Successful promotional activities, aside from diverting scarce Commission resources, depend on close cooperation between the Commission and governmental entities, NGO's, the media and academic institutions. Yet a Commission which today declares a government guilty of human rights violations is unlikely tomorrow to receive cooperation from that same government for promotional activities. This is especially true of governments, like some in the Americas, which still view human rights complaints against them as unfriendly acts.

The close personal contacts between commissioners and representatives of governments and NGO's required for effective promotional programs are also difficult to reconcile with the appearance and reality of independence and impartiality required for the quasi-judicial resolutions of individual cases. This is particularly so because representatives of governments and NGO's are frequently involved in both promotional and individual case activities. In the exercise of their quasi-judicial functions, commissioners should in effect act as judges. When judges exercise extra-judicial functions they are drawn into personal, social and political contacts that cannot but affect their appearance of impartiality.

#### d. The Individual Case System.

The system's lack of resources, its inconsistent selection of judges, commissioners and staff, and the excessive burdens it places on the Commission, are particularly deleterious for the individual case system, as follows:

- **Too Few Decisions.** The Commission decides few of the cases brought to the system, and the Court even fewer. By late 1996, for example, the Commission had over 800 cases on its docket, including 133 opened that year alone. However, reported its Chairman, it had issued, at most, only 20 case reports per year.<sup>32</sup> In fact, 1996 was an unusually productive year; the Commission reported

30. 1996 ANN.REP. at 650.

31. *Id.*

32. Comisión Interamericana de Derechos Humanos, SEMINARIO SOBRE "EL SISTEMA INTERAMERICANO DE PROMOCIÓN Y PROTECCIÓN DE LOS DERECHOS HUMANOS," 2 AL 4 DE DICIEMBRE DE 1996, CONCLUSIONES DE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS Y MINUTAS DE LAS EXPOSICIONES REALIZADAS POR LOS PARTICIPANTES, OEA/Ser/L/V/II.95, Doc. 28, 11 marzo 1997 (1997) (hereinafter "Seminario"), at 14.



on 31 individual cases.<sup>33</sup> Still, at that rate, even if no new cases are filed, the Commission will require a quarter of a century to eliminate its backlog.

The Court, during the nine years following its first judgment in 1988, never ruled on the merits or on damages in more than four cases per year. In those nine years, the Court decided only nine cases on the merits;<sup>34</sup> it also separately ruled on damages in seven of them.<sup>35</sup> Even so, the Court in 1996 reported difficulties in complying with its duties under the Convention, "owing to its volume of work and the large number of witnesses and experts it was obliged to hear at its public hearings".<sup>36</sup> Of course, much of the Court's time is consumed by preliminary objections,<sup>37</sup> some of which are frivolous,<sup>38</sup> and by precautionary measures.<sup>39</sup> Plainly significant reforms are needed if the individual case system is to address more than a token sample of the cases filed with the Commission.

• **Delays.** Complainants face years of delay before the Commission, and years more if their cases are sent to the Court. Delays before the Commission are due mainly to its infrequent meetings and limited staff, compounded by the fact that states often request and are granted or simply take lengthy extensions of time. As a result, it is rare for a case to reach a final ruling in less than two and a half years. This is true even if the initial complaint is based on a thorough investigation by the victim's lawyers and is accompanied by extensive documentation. If

33. 1996 ANN.REP. at 47-49. However, eight of these were rulings that cases were admissible and were thus not final dispositions. *Id.* at 99, 234, 272, 466, 476, 514, 528 and 535.

34. The Court decided one case on the merits in 1988, two in 1989, none in 1990, one in 1991, none in 1992, none in 1993 (although one case was disposed of on the basis of preliminary objections, 1993 ANN.REP. at 25), one in 1994, three in 1995 and one in 1996. 1988 ANN.REP. at 35; 1989 ANN.REP. at 15, 69; 1991 ANN.REP. at 57; 1994 ANN.REP. at 21; 1995 ANN.REP. at 23, 41 and 135; 1996 ANN.REP. at 75.

35. The Court issued two judgments on damages in 1989, two in 1990, one in 1993 and two in 1996. 1989 ANN.REP. at 123, 141; 1990 ANN.REP. at 53, 69; 1993 ANN.REP. at 61; 1996 ANN.REP. at 159, 179.

36. 1996 ANN.REP. at 22-23.

37. In 1996, for example, the Court issued four judgments on preliminary objections, 1996 ANN.REP. at 29, 43, 59, 97, as well as two orders rejecting requests for "nullification" of those judgments. *Id.* at 111, 217.

38. *See, e.g.,* Neira Alegría Case, Order of July 3, 1992, Declaration by Judge Thomas Buergenthal, characterizing a state's request for revision and interpretation of a judgment in the instant case as "an abuse of the judicial process," and observing, "A government . . . has the right to resort to every legitimate judicial remedy and procedure . . . What it may not do is interpose manifestly ill-founded and trivial motions whose sole purpose can only be to disrupt and delay the orderly and timely completion of the proceedings. Such tactics violate the object and purpose of the human rights machinery established by the Convention. . . ." 1992 ANN.REP. 75, at 85.

39. In 1996, the Court ruled on provisional measures in seven cases, 1996 ANN.REP. at 83, 87, 89, 119, 127, 137, 151, and later extended the measures in three of those cases, *id.* at 197, 201, 205. *See generally* Thomas Buergenthal, *Interim Measures in the Inter-American Court of Human Rights*, in R. Bernhardt, ed., *INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS* 69 (1994).

the case is referred to the Court, delays will be years longer, due in part to the fact that the Court has to embark on what for all practical purposes is a trial *de novo*.

Worse, many cases are never resolved by the Commission. They linger on for years until the victim gives up, often without any decision having been made either on admissibility or merits. In 1996 the Commission commendably resolved five, long-pending disappearance cases from Guatemala. However, the inefficiency of prior practice is exemplified by the fact that three of these cases had been pending before the Commission for 14 years,<sup>40</sup> one for 13 years<sup>41</sup> and one for five years.<sup>42</sup>

Such delay is unconscionable and inexcusable. Delay compels victims and families to endure years of psychic distress without even moral vindication. Delay allows evidence to grow stale, so that by the time the Commission finally recommends that the state comply with its duties to investigate and prosecute, the practical possibilities of doing so are significantly diminished. And delay undermines the credibility of the system, thereby eroding its deterrent value, discouraging victims from using it, and causing governments to question the competence of those who administer it.

• **Lack of Investigative Capacity.** Despite its formal mandate to investigate complaints, the Commission has scant capacity to conduct investigations; indeed, for most cases, it has no resources to conduct an investigation. With rare exception, overburdened staff attorneys have neither time to conduct investigations nor budget for travel or forensic examinations.

As a result, the Commission is usually forced to rely almost entirely on submissions by the parties. If complainants hope to prove their cases, they must do so themselves. Many victims and survivors of modest means—peasants, workers, students, teachers or widows—are thus effectively denied access to meaningful relief. Only where NGO's provide legal assistance, or in those rare cases where the victim is affluent, does the victim have the means to investigate and prove up a case. The majority have no such chance.

• **Lack of Due Process.** Formally the system seeks to employ its means fairly.<sup>43</sup>

40. Pradesaba, Case N° 8074, 1996 ANN.REP. at 287; Marroquín, Case N° 8075, *id.* at 298; Lemus García, Case N° 8076, *id.* at 309.

41. Orellana Stormont, Case N° 9120, 1996 ANN.REP. at 320.

42. Cruz Sosa, Case N° 10.897, 1996 ANN.REP. at 394.

43. For example: Art. 34 of the Commission's Regulations contemplates a complaint procedure in which each party is given an opportunity to respond to the submissions of the other prior to a Commission resolution. Art. 11.1 of the Court Statute requires judges to take an oath to exercise their functions "honorably, independently and impartially." Art. 66.1 of the Convention requires that "[r]easons shall be given for the judgment of the Court." Art. 21 of the Commission's Regulations also sets forth procedures for members to explain their votes.

In practice, however, Commission procedures are so lacking in transparency, consistency and reliability as to raise issues of due process, while the juridical quality of its decisions, until recently, was so weak as to undermine respect for its legitimacy.<sup>44</sup>

One critical problem is the extensive practice of *ex parte* communications between commissioners and representatives of governments and NGO's. In part, this stems from the Commission's formal procedures. Under its Regulations as recently revised in light of an advisory opinion of the Court,<sup>45</sup> once a case under the Convention results in a draft report by the Commission, that draft is made available only to the government, not to the complainant. Typically the government then responds to the Commission, which responds in turn—all on an *ex parte* basis—while the complainant's lawyer, formally at least, is kept entirely in the dark. This parody of due process typically goes on for six months or longer, and takes place at a point when the Commission is making critical decisions, e.g., whether to refer the case to the Court, to publish a final report, or to treat the state as having responded adequately to its recommendations.

Even more problematic is the pervasive practice of informal *ex parte* contacts with the Commission by both government and NGO representatives. Many governments leave it to their OAS representatives—the ambassadors accredited to the Organization—rather than to qualified lawyers to handle cases before the Commission. Few of these diplomats have the professional qualifications or staff to litigate these cases properly. In consequence, they do what they know best:

44. Compare, e.g., the Commission's conclusory 1992 condemnation of a Salvadoran amnesty law, Las Hojas, Case N° 10.287, 1992-93 ANN.REP. at 83, with its eloquent and articulate 1996 analysis of a Chilean amnesty law, Hermosilla et al., Case N° 10.843, 1996 ANN.REP. at 156.

45. This practice is recent and stems from an unfortunate interpretation of Article 50 of the Convention, made by the Inter-American Court in its Advisory Opinion OC-13/93, "Certain Attributes of the Inter-American Commission on Human Rights," 1993 ANN.REP.CT. 47, 56 paras. 48-49. Prior to the Advisory Opinion, Commission Regulation art. 47(6) provided that the Commission's preliminary report "shall be transmitted to the parties concerned, who shall not be authorized to publish it." *Id.* at 49. Article 47(6) has now been amended to provide only that the report "shall be transmitted to the interested States, which shall not be authorized to publish it." This tracks the language of Convention art. 50.2, which does not expressly exclude transmission of the report on a confidential basis to the complainant and which, but for the Court's opinion, need not and should not be so construed.

Indeed, the European Convention on Human Rights has been construed in a manner opposite to the advisory opinion of the Inter-American Court. Art. 31.2 of the European Convention similarly provides that the European Commission's report shall be "transmitted to the States concerned, who shall not be at liberty to publish it." In its Judgment of 14 November 1960 on Preliminary Objections in the Lawless Case, the European Court of Human Rights held that it was not competent to pass upon Rule 76 of the European Commission's Rules of Procedure, which permitted the Commission to communicate its report to the applicant and to inform him that he may submit observations which the Commission would then take into account. See Vincent Berger, CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS (1989) at 6.

they address a stream of diplomatic notes to the Commission, some irrelevant and others at times even harmful to the legal posture of their case.<sup>46</sup> They also seek to establish *ex parte* contacts with the staff of the Commission or individual commissioners to obtain inside information or in one way or another to influence the outcome of cases on some basis other than the evidence in the file and the applicable law. These efforts are at times successful, if only because the procedure before the Commission tends to be quite informal at different stages of the proceedings.

Such *ex parte* contacts are not the exclusive preserve of the diplomats. Human rights NGO's which file cases also seek to bypass the formal process. Given the way the system operates, this is often the only way for them to find out what is happening to their cases and to push the Commission to act on them.

• **State Non-Participation.** States often fail even in the minimal obligation to participate in Commission proceedings, or do so only with undue delay and partial cooperation—although their participation has improved in recent years. In the ten years from 1986 through 1995, states failed to participate in 122 of the 218 cases—more than half—reported by the Commission.<sup>47</sup> In the last half of that decade, however, state participation in reported cases greatly improved to over 80%. Still, this must be viewed with caution, pending data on the far larger number of unreported cases. In any event, in view of the treaty commitments of OAS member states, there is no valid reason for *any* non-participation by states.

• **Commission Role Conflicts.** On the one hand, the Commission purports to render impartial opinions on cases before it, often brought by NGO's. On the other hand, before the Court, it tends to act as an advocate for the complainant, often retaining the very NGO lawyers who litigated the case before the Commission as advisers to assist in presenting the case to the Court. This role reversal does not inspire confidence among states in the Commission's impartiality when further cases against that same state come before the Commission. Nor does it inspire confidence among states in the Commission's independence from the NGO's.

The perceptual problem is aggravated by the particular milieu of Commission litigation. Most important cases before the Commission are filed by a small

46. For an illustration see the Neira Alegría case, Judgment of Dec. 11, 1991 on Preliminary Objections. In 1989 the state, in what appeared to be *pro forma* pleadings, "contended that domestic remedies had not been exhausted, but . . . a year later, . . . it asserted the contrary to the Commission, as it now does to the Court. International practice indicates that when a party in a case adopts a position that is either beneficial to it or detrimental to the other party, the principle of estoppel prevents it from subsequently assuming the contrary position." 1991 ANN.REP. 77, at 82 para. 29. In part for that reason, the Court rejected the preliminary objection. *Id.* at 83 para. 31.

47. The tabulation, taken from the Commission's Annual Reports from 1986-87 through 1995-96, is on file with the authors.

number of Washington-based human rights NGO's which know the system. These NGO's handle the cases on a *pro bono* basis, in part because the Inter-American Human Rights system, unlike its European counterpart, does not make any provision for legal aid for needy petitioners. The cases tend to come to these Washington-based NGO's either directly or through loosely affiliated local human rights NGO's in the affected countries.

Diplomats representing their countries before the OAS tend to see these Washington NGO's as troublemakers or worse, in part because the lawyers filing these cases are frequently the same lawyers who handled earlier cases against their countries. It is not uncommon to hear some diplomats express the view that the NGO's have ulterior political or financial motives. These perceptions stem in part from lack of awareness that the Washington-based NGO's were specifically or principally set up to file cases before the Commission, that their funding comes from foundations and that as a rule they have no agenda other than advancement of human rights.

Some representatives of Washington-based NGO's do, however, have close personal or professional relations with the affiliated local human rights NGO's whose leadership is or may be perceived as identified with opposition political parties in one country or another. The public pronouncements these representatives of Washington-based NGO's sometimes make in these countries in the presence of the leaders of their local affiliates strengthen the perceptions of some governments that all human rights efforts are driven by political motives. Indeed, as a rule, local human rights NGO's in the Americas are not always careful to avoid politicization of their human rights campaigns. But it is probably also true that human rights activities, regardless of how non-political, are still seen in many Latin American countries as politically inspired.

Especially in this context, the Commission's use of NGO lawyers on its litigation team before the Court undermines its appearance of impartiality. This is not to suggest anything unethical in the practice, nor that the Commission has much choice, given its current role and resources. The Commission's staff is too small to carry the burden before the Court while also discharging its other responsibilities. Adequate funding could overcome the problem but has not to date been forthcoming. As long as the Commission maintains full control over the content of the briefs and the manner in which the case is presented to the Court, it does no wrong in relying on outside lawyers.

Yet it cannot be denied that this practice creates the impression of too cozy a relationship between the Commission and the NGO lawyers. Moreover, the Commission has not always adequately controlled the conduct of NGO lawyers on its litigation team, thereby angering some governments and reinforcing their perceptions that the Commission is the *alter ego* of the NGO's. As discussed in part 3 below, the time has come to adopt a better approach.

- **State Non-Compliance.** States routinely disregard Commission recommendations, and often delay in complying even with Court judgments.<sup>48</sup> When the Commission finally does resolve a case, many states ignore its findings and recommendations. Resolutions on cases not referred to the Court are reported *en masse* to the OAS General Assembly in the Commission's annual report. Rarely even debated by the General Assembly, they attract little public attention and as a rule remain unenforced. States which lose cases before the Commission therefore have little incentive to appeal to the Court. The victim is thus left with a moral victory –important to many victims who have nowhere else to turn for authoritative vindication– but nothing more.

- **Fact-Finding.** Deficiencies in Commission procedures and practices have forced the Court, which should be mainly an appellate body to resolve questions of law, to become a trial court, causing a duplication of fact-finding functions between Commission and Court, in a system which can ill afford such a luxury.

- **OAS and Compliance.** The OAS routinely fails even to monitor, let alone to encourage compliance with Commission recommendations and Court judgments.<sup>49</sup>

#### e. Lack of Political Will

The root of many of these problems is a lack of political will among OAS member states. Over the years governmental attitudes have spanned the gamut from overt hostility to simmering resentment to benign neglect, tempered on occasion by shining examples of commitment to the human rights values espoused in the OAS Charter, Declaration and Convention.

This lack of enthusiasm is hardly surprising. By definition human rights restrain governments, while protecting people they view as irritating if not dangerous. This inherent tension, however, varies in intensity. Two decades ago the Inter-American system confronted a plethora of military regimes. Ironically, in those years the Commission largely escaped criticism by OAS member states. Military regimes either saw it as a mere nuisance posing no real threat and paid it little attention, or were too diplomatically vulnerably to attack it. Democratic coun-

48. For example, not until 1996 did the Court finally close the Velásquez Rodríguez and Godínez Cruz Cases, 1996 ANN.REP. 26, in which the final Judgments on reparations had been entered six years earlier. 1990 ANN.REP. 53, 69.

49. For example, in its Annual Report for 1990 presented to the 1991 OAS General Assembly, the Court reported the refusal by Honduras to comply with its Interpretation Judgments on damages in the Velásquez Rodríguez and Godínez Cruz disappearance cases. 1990 ANN.REP. at 14-15, 85, 89. Yet the General Assembly's resolution on the Court's Annual Report made no mention of this failure to comply; nor did it even generally urge states to comply with judgments of the Court. 1991 ANN.REP.CT. 11.

tries supported it because they opposed military regimes. Besides, the Commission did not threaten them because, of necessity, it focused on massive violations.

Now that the hemisphere has moved unevenly toward democratization—only Cuba still lacks at least the forms of democracy—freely elected governments no longer enjoy immunity from scrutiny by the Commission and Court. Such governments are more sensitive to adverse findings because, unlike dictatorships, they cannot ignore public opinion. And since it is often easier to condemn the human rights messengers than to remedy endemic violations, many states have increasingly done just that. Moreover, their transitions toward democracy are so recent that many have yet to learn that losing cases before courts and commissions is part of a process that can strengthen rather than weaken democracy, the rule of law and human rights. This message is slow to find acceptance among the member states of the OAS today, in part because many of their governments still associate charges of human rights violations with the dictatorial regimes of the past. They view Commission scrutiny of their own human rights practices as an unfriendly act which impugns their democratic credentials. Hence, rather than deal with the cases lodged against them as legal problems, they frequently mount a diplomatic campaign inside and outside the OAS against the Commission or one or more of its members or staff, as well as against the human rights organizations or lawyers who file cases. There follow whispered charges and countercharges that poison the atmosphere and undermine the legitimacy of the entire human rights process.

As the hemisphere's newly democratizing states gain more experience with human rights oversight, and as the Commission improves its consistency and credibility, tensions should subside to "normal" levels. In this regard, the recent friendly settlements and recognitions of responsibility for violations, made by several states before the Commission and Court, are encouraging.<sup>50</sup>

## **f. Recent Developments**

The problems catalogued above do not doom the system to fail. Despite all the constraints, the Commission and Court have scored remarkable achievements, as noted earlier. Moreover, able and energetic commissioners and judges can, by streamlining and upgrading procedures and methods of work, decide more cases with less delay and greater reliability. Both the Commission and Court have begun to improve procedures and practice in recent years. And as noted above, states have improved their participation rate in Commission cases.

50. See notes 8-12 *supra*.

The Commission has taken steps to upgrade its professionalism, efficiency and effectiveness. For example, it has finally begun to make the issuance of preliminary rulings on admissibility standard practice, albeit only in newly filed cases.<sup>51</sup> It has also improved the juridical quality of its opinions, referred more cases to the Court,<sup>52</sup> and issued many more recommendations for emergency measures,<sup>53</sup> with literally life-saving effect. Its efforts to date deserve to be supported and to be given a chance to work, although greater improvements are needed, even within the limits of its existing, inadequate resources and its excessive tasking.

The Court, too, has adopted reforms, including independent representation of victims and their families at the reparations stage.<sup>54</sup> In 1996 it also authorized one or more judges to receive testimonial and expert evidence, at the seat of the Court or *in situ*,<sup>55</sup> but unfortunately the Court does not appear to have taken advantage of this efficiency measure in 1997.<sup>56</sup>

## II. DEMOCRATIZATION

At the time the Convention came into force in 1978 much of Latin America was governed by dictatorships. In South America such was the fate of, among others, Argentina, Brazil, Chile, Paraguay and Uruguay. Except for democratic Costa Rica, the same was true in Central America, Panama and Haiti. And Mexico's powerful one-party system brooked no political opposition of any kind. In short, Latin America was not a region receptive to effective national or international institutions for protection of human rights.

Thus, when the entry into force of the Convention made it necessary for the 1979 OAS General Assembly to adopt Statutes for the Commission and the Court, non-democratic states were a majority. Not surprisingly, attempts to use the Statutes to strengthen the Commission and Court were frustrated; for example, the Court's pro-

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51. The Commission published only two reports finding cases admissible in 1993, none in 1994 and one in 1995, but eight in 1996. 1993 ANN.REP. at 312, 334; 1995 ANN.REP. at 125; 1996 ANN.REP. at 99, 234, 272, 466, 476, 514, 528, 535.

52. See 1996 ANN.REP. CT. at 24-25.

53. See 1996 ANN.REP. at 28-35.

54. Art. 23 of the Court Rules of Procedure, effective Jan. 1, 1997, provides, "At the reparations stage, the representatives of the victims or their next of kin may independently submit their own arguments and evidence." 1996 ANN.REP. 221, 229.

55. Decision of the Court, June 26, 1996, 1996 ANN.REP. at 155.

56. The new authorization was promptly implemented in one case. Genie Lacayo Case. Order of July 8, 1996, 1996 ANN.REP. 157. However, it does not appear to have been used since. See, e.g., Caso Suárez Rosero, Sentencia de 12 de noviembre de 1997, at p. 6 para. 22; Caso Castillo Paez, Sentencia de 3 de noviembre de 1997, at 6 para. 28.



posal to establish itself as a full-time tribunal, and the Commission's effort to gain the right to name its own executive secretary, were blocked in committee.

The regional reality was epitomized by the fact that during that week-long General Assembly meeting in La Paz, Bolivia, the host country experienced two military coups. Although Bolivia, to be sure, held the Latin American record for military coups, coups and military regimes were commonplace in the region, and democracies the exception.

Today the situation is quite different. Indeed, some now argue that because all but one of the states in the hemisphere have become democratic, the time is ripe for a major overhaul of the Inter-American Human Rights system.<sup>57</sup> It is true that all OAS member states except Cuba now have elected, civilian governments. It is also true that current realities invite a reassessment of the system's institutions and *modus operandi*. For example, greater emphasis can and should be given to the individual case system, now that gross and systematic violations no longer overwhelm the system while mocking its efficacy.

Yet both the trend toward democracy, and its consequences for the system, are easily overstated. To begin with, the hemispheric democratization of the last 15 years has been uneven and remains fragile. For example (without endorsing either the particular methodology or the specific conclusions), one author categorizes 22 Latin American states as of 1994 in eight separate levels, ranging from "liberal democracy" –a status which none attain– through "democracy," "partially illiberal democracy," "near democracy," "semidemocracy," "semicompetitive authoritarian," and "authoritarian," to a final category, of which Cuba is the lone inhabitant, termed "state hegemonic closed."<sup>58</sup>

For our purposes, and as the author agrees,<sup>59</sup> the point is not to debate the best scheme for classification or the placement of particular countries within it. What matters is to recognize that

elections, even free and fair, do not alone a democracy make –or keep.<sup>60</sup> Where rights are not protected by a culture and tradition of rule of law, by an independent judiciary and an active press and civil society, where civilian authorities have only

57. E.g., OAS General Secretariat, TOWARD A NEW VISION OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM, OAS doc. OEA/Ser.G/CP/doc.2828/96, 26 November 1996 (original: English) (hereinafter "New Vision"), at 1.

58. Larry Diamond, *Democracy in Latin America: Degrees, Illusions, and Directions for Consolidation*, in BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS (Tom Farer ed.) 1996, at 52, 55-58. This 1994 classification of 22 states is in any event out of date and incomplete for the 35 OAS member states.

59. *Id.* at 58.

60. *But see* Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFFAIRS 22 (1997). Zakaria distinguishes democracy –which he equates with "competitive, multiparty elections"– from "constitutional liberalism" –by which he means protection of individual liberty and the rule of law. *Id.* at 25-26. In our view, however, genuine democracy requires individual liberty and the rule of law. As

tenuous and incomplete control over military and security forces, where those forces operate with impunity, and where societies are sharply divided between the powerful and powerless, democracy is at best incipient. As of 1997, the member states of the OAS remain widely dispersed along a spectrum of real democracy.

Indeed, even today, the hemisphere's tragic human rights past persists in places. For example, Colombia continues to suffer extrajudicial executions and disappearances committed by various parties in the ongoing armed conflict,<sup>61</sup> political assassinations and reports of disappearances have lately increased in Mexico,<sup>62</sup> Brazil has seen massacres of street children and of peasants demonstrating for land,<sup>63</sup> torture is pervasive in some states,<sup>64</sup> and journalists are under attack, sometimes physical, in places from the Rio Grande to Punta del Este.<sup>65</sup>

The Commission's caseload reflects this reality. According to its then President, over 70% of the 800 cases pending before the Commission in 1996 alleged violations of the rights to life and physical integrity.<sup>66</sup> In just five months in 1996, the Commission recommended emergency measures in 26 cases of persons whose lives were in danger.<sup>67</sup>

Moreover, the Commission continues its life-and-death work in a hemispheric atmosphere of impunity for gross violations of human rights. In many countries, police, prosecutors and courts are generally unable or unwilling on their own to protect victims, to conduct serious investigations or prosecutions, or to provide redress. Often the Inter-American system is the only hope for victims and their families to obtain at least some measure of protection or redress.

Granted, enormous progress has been made in recent years; one cannot but celebrate the virtual disappearance of forced disappearances from some states where

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he acknowledges, "From the time of Herodotus democracy has meant, first and foremost, the rule of the people." *Id.* at 24. A people which has neither liberty nor the rule of law does not rule. It may elect a parliament, for example, but if legislators may be arbitrarily arrested, their supporters killed and their partisans in the press gagged, all without judicial redress, the electoral exercise does not amount to popular rule. The same is true where the parliament is elected but real power is held by the military, by a Soviet-style communist party or by a *de facto* strongman.

61. See, e.g., 1996 ANN.REP. COMM'N at 651-52.

62. See, e.g., Marisa Samuelson, *Rights Groups Decry Disappearances*, THE NEWS (Novedades Editores), Oct. 10, 1997, available in LEXIS News Library, Curnws file.

63. E.g., Human Rights Watch/Americas, FINAL JUSTICE: POLICE AND DEATH SQUAD HOMICIDES OF ADOLESCENTS IN BRAZIL (1994).

64. E.g., U.S. Dept. Of State, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996 (1997) 540, at 541 (Peru) ("security force torture and brutal treatment of detainees remains common").

65. E.g., Robert J. Caldwell, *War on the Press: Killed in the Line of Duty*, SAN DIEGO UNION-TRIBUNE, Nov. 16, 1997; *Press Group Warns of Attacks on Media*, HOUSTON CHRONICLE, Oct. 23, 1997; Michael McGuire, *Panel: Killing Journalists in Latin America Still Common*, CHICAGO TRIBUNE, Oct. 23, 1997; *Press Association Report Critical of LATAM Trends*, THE NEWS (Mexico City), Oct. 23, 1997; all available in LEXIS, News Library, Curnws File.

66. Seminario, note 32 *supra*, at 14.

67. *Id.*

they were once commonplace. Yet it remains premature to declare victory. As long as some states are unable to protect their people from gross violations of the most basic rights, the work begun in earnest by the Commission 20 years ago remains unfinished.

Nor can one assume that recent trends toward democracy and peace will continue unabated. The bloodbaths of the 1970's and 1980's resulted in part from deep economic inequalities in societies, which led to social protest, followed by repressive responses, all escalating in upward cycles of violence. The creation of democratic institutions does not assure social stability, especially when those in economic and political power are unprepared to cede a measure of power, a concession made all the more difficult by deep inequality. The OAS, in declaring eradication of extreme poverty to be among its essential purposes, now recognizes that "extreme poverty, . . . constitutes an obstacle to the full democratic development of the peoples of the hemisphere; . . ."<sup>68</sup>

In this light, the Inter-American Human Rights system must take note of the warning signs posted by reports that the hemisphere's rising macroeconomic tide does not seem to be lifting all boats.<sup>69</sup> Without suggesting that history will repeat itself in the forms of the past—let alone soon, while the peoples of many countries are still war weary—one cannot look to a future of continuing widespread poverty and sharpening inequality without concern for the human rights consequences.

Finally, even if the most optimistic economic, social and political outlook materializes, mature democracies are not exempt from the need for regional human rights oversight. The active dockets of the European Court and Commission of Human Rights are testaments to the need for effective regional institutions to protect human rights in democracies. The Inter-American Human Rights system, then, remains essential.

68. Charter of the OAS, April 30, 1948, 119 U.N.T.S. 3, art. 2 (g), added recently by the Protocol of Washington, which went into effect September 25, 1997.

69. *E.g.*, Inter-American Development Bank, *LATIN AMERICA AFTER A DECADE OF REFORMS: 1997 ECONOMIC AND SOCIAL PROGRESS REPORT*, Foreword ("... although levels of poverty and inequality have stabilized in the 1990s, they have not declined. . . . while structural reforms have greatly facilitated economic growth and benefited lower-income groups, these reforms have been operating against the countervailing effects of very slow and unequally distributed progress in education."); Calvin Sims, *Peru's Growth Leaving Poor Behind*, N.Y. TIMES, Dec. 29, 1996. *See also* United Nations Development Programme, *HUMAN DEVELOPMENT REPORT 1995 (1995)*, at 178-79, reporting that the ratio of the highest 20% of the population in income to the lowest 20% in Latin America during 1981-92 ranged from highs of 32 to 1 in Brazil, 30 to 1 in Guatemala and Panama, and 24 to 1 in Honduras, to lower ratios of 14 to 1 in Mexico, 13 to 1 in Costa Rica and 10 to 1 in Peru and Venezuela. The ratios were 9 to 1 in the United States of America and 7 to 1 in Canada. *Id.* at 203.

### III. THE FUTURE: RECOMMENDATIONS

To meet its goals to protect and promote human rights in the hemisphere, the Inter-American Human Rights system must be made accessible, effective, efficient, fair, governed by law and credible. By this we mean the following:

- **Accessibility.** OAS organs must be accessible to persons whose rights are violated and who have exhausted domestic remedies or are excused from doing so.<sup>70</sup> Victims, including ordinary people with limited education, must be able to file complaints without undue financial or procedural burden. Moreover, complaints should be resolved by the Commission or if necessary the Court within a reasonable time, rather than be left in limbo or endlessly delayed.
- **Effectiveness.** The system must be effective in preventing irreparable injuries and providing real redress for violations; else what good is it? While no legal system can expect 100% compliance, the system should strive toward that ideal.
- **Efficiency.** The system should work without wasted resources, needless duplication or avoidable delay.
- **Fairness.** The system should be fair to both victims and states. Fairness and the appearance of fairness are enhanced by transparency.
- **Governed by Law.** Procedures should be followed evenhandedly and with predictability but a degree of flexibility.<sup>71</sup> Decisions in individual cases should be based on reasoned and articulated application of defined legal principles to evidence of record, and not on any extraneous factors. The system should thereby achieve a reasonable measure of consistency and predictability.
- **Credibility.** The system's decisions and procedures must attain a degree of legal soundness worthy of respect by both victims and states, and the system must send a credible message that there are consequences to noncompliance.

With these criteria in mind, and without pretending to be exhaustive, we offer suggestions in three broad categories: institutional roles, the individual case system and substantive human rights priorities. We acknowledge our debt to other commentators and bodies which have previously made proposals to strengthen the system.<sup>72</sup>

70. Convention arts. 46.1(a) and 46.2; Commission Statute art. 20(c). See generally Velásquez Rodríguez, *supra* note 3, at 47-52 paras. 50-81.

71. "The Court must ensure a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism." Cayara Case, Preliminary Objections, Judgment of February 3, 1993, 1993 ANN.REP.CT. 25, 40 para. 63.

72. *E.g.*, New Vision, note 57 *supra*; Seminario, note 32 *supra*; REPORT OF THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS ON THE EVALUATION OF THE FUNCTIONING AND IMPROVEMENT OF THE INTER-AMERICAN SYSTEM FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, OAS Doc.

At the outset two premises should be made explicit. First, in our judgment, the time is not ripe to reform the system's basic instruments. The current system should be consolidated and perfected before the OAS embarks upon the necessarily lengthy process of transition to a new regime through eventual amendment of the Convention. Substantial reform is feasible within the framework of the current governing instruments.

Second, consistent with that view, neither is the time ripe for the OAS to follow the current European path of eliminating the Commission. The Commission continues to play an indispensable role, one which the Court is not remotely ready to replace.

## a. Institutional Roles

States and the OAS should work together to upgrade the system, as follows:

### 1. States

States not yet party to the Convention should ratify at the earliest possible date, with the fewest feasible reservations.<sup>73</sup> States parties that have not yet accepted the Court's contentious jurisdiction should do so as soon as possible. To the degree these steps are taken, the three current regimes – the ten states subject only to the Declaration,<sup>74</sup> the eight states parties to the

OEA/Ser.G/CP/doc.2909/97, 16 May 1997 (Orig.: Spanish); *Special Issue on the Inter-American Human Rights System*, 4 J.LATIN AM.AFFAIRS N° 2 (1997); Inter-American Dialogue Study Group on Western Hemisphere Governance, MULTILATERALISM AND THE PROMOTION AND DEFENSE OF DEMOCRACY AND HUMAN RIGHTS, AN INTERIM REPORT 6-8 (1996); Antonio Cancado Trindade, *El Sistema Interamericano de Protección de los Derechos Humanos (1948-1995): Evolución Estado Actual y Perspectivas*, in Daniel Bardonnnet and Antonio Cancado Trindade, eds., DERECHO INTERNACIONAL Y DERECHOS HUMANOS 67 (1996); Claudio Grossman, *Reflexiones Sobre el Sistema Interamericano de Protección y Promoción de los Derechos Humanos*, in Rafael Nieto Navia, ed., LA CORTE Y EL SISTEMA INTERAMERICANOS DE DERECHOS HUMANOS 245 (1994); Claudio Grossman, *Proposals to Strengthen the Inter-American System of Protection of Human Rights*, 32 GERMAN YRBK. INT'L. LAW 264 (1989). Many of the proposals set forth below have been made previously by these and other commentators. Rather than reference each individually below, we here acknowledge our debt and our gratitude generally.

73. The OAS General Assembly has repeatedly called on all member states to ratify the Convention and to consider the possibility of accepting the Court's contentious jurisdiction. *E.g.*, AG/Res. 1404 (XXVI-0/96), June 7, 1996, reprinted in 1996 ANN.REP.COMM'N 19, at 21 paras 8 and 9. In addition, at the Vienna World Conference on Human Rights in 1993, the consensus declaration by all participating states, including the United States of America, Canada and other OAS member states that are not parties to the Convention, "urge[d] the universal ratification of human rights treaties" and declared that "all States are encouraged to avoid, as far as possible, the resort to reservations." *The Vienna Declaration and Programme of Action*, June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) (1993), reprinted in 32 I.L.M. 1661 (1993).

74. Those states are Antigua and Barbuda, Bahamas, Belize, Canada, Cuba, Guyana, St. Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, and the United States of America. UNESCO, HUMAN RIGHTS: MAJOR INTERNATIONAL INSTRUMENTS, STATUS AS AT 31 MAY 1997, at 32.

Convention but not to the Court,<sup>75</sup> and the 17 states parties to the Convention which also accept the Court's contentious jurisdiction<sup>76</sup>— will merge into a single, uniform system.

States should sponsor, individually and in cooperation with OAS and other regional institutions, training programs to educate their judges at all levels, beginning with Supreme Courts and Constitutional Courts, on the Convention, its interpretation in Inter-American jurisprudence and its implementation by national courts.

States should adopt implementing legislation to enable Commission resolutions and Inter-American Court judgments to be executed in their domestic courts. This may be done through general *amparo* legislation<sup>77</sup> or through specific legislation.<sup>78</sup>

Through their representatives in the General Assembly and Permanent Council, states should also support reforms in OAS procedures as outlined below.

## 2. OAS

In addition to universal participation in the Convention and Court, and in order to meet the criteria listed above, the OAS should pursue five priority objectives for reform. By themselves, the first three—adequate resources; merit-based selection of judges, commissioners and staff; and more efficient allocation of tasks among responsible organs— would go far to improve the system. They are addressed in this section. They should be complemented by procedural reform, and by mechanisms for monitoring and follow-up, addressed in the succeeding section on the individual case system.

• **Resources.** Even if procedures are streamlined, the system cannot resolve all cases fairly and expeditiously if the Commission and Court can meet only six weeks a year and lack sufficient staff and investigative resources.

75. Those states are Barbados, Brazil, Dominica, the Dominican Republic, Grenada, Haiti, Jamaica and Mexico. 1996 ANN.REP.COMM'N 771.

76. Those states are Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. 1996 ANN.REP.COMM'N 771.

77. For example, art. 40 of Law N° 23506 of Perú, of Dec. 7, 1982, entitled "Habeas Corpus y Amparo," provided as follows: "La resolución del organismo internacional a cuya jurisdicción obligatoria se halle sometido el Estado peruano, no requiere para su validez y eficacia de reconocimiento, revisión ni examen previo alguno. La Corte Suprema de Justicia de la República recepcionará las resoluciones emitidas por el organismo internacional, y dispondrá su ejecución y cumplimiento de conformidad con las normas y procedimientos internos vigentes sobre ejecución de sentencias."

78. E.g., Ley 288 de 1996, República de Colombia, Diario Oficial N° 42.826, Martes 9 de julio de 1996.

79. For a similar proposal, see Inter-American Dialogue Study Group, note 72 *supra*, at 9: "As a first

The resources required for an effective and efficient system, while far greater than current budgets, are small compared to the resources of OAS member states. They are also small as compared to the costs of the lack of an effective human rights system, in the form of social disruption, refugee and humanitarian relief, or even military intervention.

The approximate budgetary amount needed is a matter of informed judgment. To ascertain a realistic budget, the OAS should commission a management audit of the Commission and Court by a team of auditors with expertise in both management and human rights.<sup>79</sup> For example, a partnership between an internationally recognized management consulting firm and a human rights institution such as the Inter-American Institute of Human Rights, could possess the necessary expertise. To hold down costs, the auditors should be asked to work at discounted or *pro bono* rates, and funding should be sought from private foundations and other sources outside the Inter-American Human Rights system, such as the Inter-American Development Bank. The OAS Secretary General should ask the Presidents of the Commission and Court to cooperate in providing information on costs, staffing and procedures in a manner consistent with institutional independence and the security of confidential information. Once an appropriate budgetary level is determined, the Commission and Court should be accorded full control over how their budgets are spent.

• **Judges, Commissioners and Staff.** The formal criteria for selection of commissioners and Judges are appropriate but are not consistently followed in practice. The present selection procedure has demonstrated that it is not reliable; the OAS needs to develop a mechanism to ensure that persons nominated for human rights positions meet its criteria.

One approach is to make OAS selection procedures more transparent.<sup>80</sup> Resumes of nominees should be publicized by the OAS in a timely manner, and individual member states should on their own initiative invite public comment on nominees to OAS human rights positions.

In addition, the Commission should be given exclusive authority to select its own staff, as has been agreed to recently for the Court.<sup>81</sup> Staff should be

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step in clarifying and reordering internal lines of responsibility and authority and assessing effectiveness, we recommend that the OAS authorize an external performance and efficiency audit of the [Unit for Promotion of Democracy and the Commission] –of what they do, why and how effectively they do it.” The Study Group made clear that it envisioned more than the “conventional external financial audits” underway at the time of its report. *Id.* at n. 1.

80. The potential value of transparency was illustrated at the 1997 OAS General Assembly. One candidate for the Commission and one for the Court, whose nominations had become publicly known in advance, and whose qualifications had been challenged by NGO’s and others, were defeated.

81. “El Secretario de la Corte seleccionará y procederá a la contratación del personal profesional . . . de la Corte, de acuerdo con las normas y regulaciones que al efecto la misma apruebe, las cuales

selected through an open, merit-based competition. The Commission should also have authority to hire, transfer, discipline or release staff members, as well as outside consultants.

• **Allocation of Tasks.** The Commission is overwhelmed with too many tasks, not all of which should be concentrated in a single body. Because only the Commission can administer the individual case system, that should be its priority. Other functions should be reformed or delegated as follows.

The *promotion* of human rights is too important, especially now that states are more receptive to promotional activities, to be left to an overburdened Commission often at odds with states as a result of its other functions. Primary responsibility for promotion should be delegated to entities such as the Inter-American Institute for Human Rights, which could act both on their own and under contract with the Commission. The Commission's role would then become principally one of oversight and coordination. Arrangements to this effect could be provided as part of the Inter-American program for the international promotion of human rights, to be submitted to the 1998 OAS General Assembly.<sup>82</sup>

Two other responsibilities which should be delegated in large part are the related functions of *on-site visits* and *country reports*. In the United Nations system, these functions are often carried out by special experts or rapporteurs designated for such purposes by the Human Rights Commission or Subcommission.<sup>83</sup> Rather than divert the limited time of members of the Inter-American Commission routinely to these functions, the Commission should in general designate individuals of appropriate expertise and prestige to conduct visits and prepare reports for submission to the Commission and publication in its annual report. Much of the cost could be covered from the Commission's existing line items for on-site visits and country reports. The Commission should still reserve the right to conduct visits and to author reports, but only in exceptional situations.

In addition, the Commission's *diplomatic responsibilities*, such as assistance to the OAS in responding to military coups and other crisis situations, should

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deberán estar de acuerdo con las normas administrativas de la [Secretaría General de la OEA], en todo lo que no sea incompatible con la independencia de la Corte. El Secretario General de la OEA los nombrará como personal de la Corte." *Acuerdo entre la Secretaría General de la OEA y la Corte Interamericana de Derechos Humanos. sobre el Funcionamiento Administrativo de la Secretaría de la Corte*, Nov. 12, 1997, p. 2, art. III.1.

82. See "International Promotion of Human Rights in the Inter-American System," resolution adopted by the OAS General Assembly June 5, 1997, OAS doc. OEA/Ser.P/AG/doc.3583/97/5 June 1997 (orig.: Spanish). Paragraph 2 thereof requested the Commission "to prepare, without reducing its protection activities and in collaboration and/or consultation with other pertinent organs and entities, a draft inter-American program for the international promotion of human rights," to be submitted for consideration at the 1998 General Assembly.



be alleviated by the creation of a new post of OAS High Commissioner for Human Rights. The duties of such a post, like those of the United Nations High Commissioner for Human Rights<sup>84</sup> and the OSCE High Commissioner for National Minorities,<sup>85</sup> should involve crisis intervention, preventive diplomacy, and ongoing efforts to persuade states to ratify OAS human rights treaties and otherwise to promote and protect human rights, using both public and private diplomacy as warranted. The High Commissioner could also take over responsibility for the special experts or rapporteurs suggested above. The post should not require a large staff or budget. Utmost care must be taken to select a person with the requisite human rights commitment and diplomatic prestige, as exemplified by U.N. High Commissioner Mary Robinson, former President of Ireland, and OSCE High Commissioner Max van der Stoep, former Dutch Foreign Minister.

Finally, as discussed in the next section, the Commission's burdens of *litigation before the Court* should be reduced by shifting primary responsibility for case presentation to the victim's attorney, and by generally narrowing the scope of court proceedings to those of an appellate body.

## b. Individual Case Procedures.

Individual case procedures should be accessible, simple, prompt and affordable for victims; fair, credible and transparent to governments, victims and the public alike; and efficient, effective and governed by law.

In order to achieve these goals, the reforms suggested below propose, in general, regularizing procedures and adhering to time limits, strengthening capacities to deal with emergency cases, requiring early rulings on admissibility in all cases, delegating Commission and Court functions to individual members or panels, encouraging friendly settlements, expanding the Commission's role and restricting the Court's role in factfinding, referring all appropriate cases to the Court, modifying the roles of the Commission and victims before the Court, making the entire process more transparent, and developing mechanisms to monitor and follow-up on compliance.

• **Commission Procedures and Time Periods.** Commission procedural requirements, especially time periods for responses, are often disregarded. In the past, when the Commission lacked resources to cope with its caseload, it often acquiesced in such laxity. It should now establish systems to ensure a single prompt

83. See, e.g., United Nations, UNITED NATIONS AND HUMAN RIGHTS 1945-1995 (1995)(hereafter "UNITED NATIONS"), at 66-68.

84. See UNITED NATIONS, note 83 *supra*, at 109-11, 471-73.

85. See Conference on Security and Cooperation in Europe, Helsinki Document 1992/ The Challenges of Change, 10 July 1992, reprinted in 13 H.Rts.L.J. 284, 289-91 (1992).

reminder to parties failing to meet required time periods, and, if a response is again not forthcoming, take appropriate action.<sup>86</sup>

The Commission should also no longer tolerate its own failure to act for years on end. It should establish reasonable time periods, consistent with its resources, for rulings on the admissibility and merits of all cases. If priority is to be given to more urgent and important cases, such priority should be formally established, rather than left to *ad hoc* decisions, the basis of which is often unclear to the parties. The Commission should also establish a procedure for summary disposition in cases where the initial communication and response do not raise serious issues.

- **Emergency Cases.** The Commission's recent pattern of prompt responses to requests for urgent measures is welcome, but should be complemented by a rapid response investigative capability, so that the Commission can immediately pursue cases of disappearance, forced detention, alleged ongoing torture and other emergencies.

- **Admissibility.** All communications meeting the formal requirements should be immediately registered and transmitted in pertinent part to the state. Incomplete communications should be promptly referred back to the petitioner for completion. To avoid confusion and controversy, a separate nomenclature should be used to distinguish initial complaints from those found admissible. For example, initial complaints might be called "communications," reserving the term "case" for complaints which have been found admissible.

Once a communication has been registered and a response received or the time for response has elapsed, and without delaying the merits, the Commission should make an express ruling on admissibility as early as possible. This would minimize the burden and uncertainty for all parties of inadmissible communications, while clarifying the issues and promoting friendly settlements in admissible cases.

While the issue of admissibility may in exceptional cases depend upon and therefore be joined to the merits,<sup>87</sup> the Commission should in general have a presumption against joining the admissibility to the merits. Otherwise cases which may ultimately be found inadmissible can go on at length, diverting resources and attention from meritorious cases.

- **Delegation.** To expedite and manage more cases, the Commission should use three member panels to recommend rulings on admissibility, preliminary and

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86. If a state fails to respond to a complaint within 90 days, Commission Regulation article 42 provides that the facts alleged by petitioner "shall be presumed true . . . as long as other evidence does not lead to a different conclusion."

87. *E.g.*, Velásquez Rodríguez (Preliminary Objections), 1987 ANN.REP.CT. 35, 55 paras. 94-96.

final reports. Under the Statute and current Regulations, at least four members are needed for a quorum, to adopt final reports in Convention cases, and for decisions in Declaration cases “except in matters of procedure”.<sup>88</sup> However, three-member “working groups” may prepare draft resolutions for the full Commission.<sup>89</sup> By adding the Chairman’s vote, the four-member requirement can be met. While the full Commission should retain power to overrule a decision thus made, if panels are to prove efficient, the full Commission should not conduct a review unless a majority of the Commission decides that one is warranted.

In extended evidentiary hearings, which may become necessary in some cases if the Court (as recommended below) no longer conducts trials *de novo*, a single commissioner should preside and prepare a first draft for the working group.<sup>90</sup>

The Court, too, should make regular use of its existing powers to designate single judges to preside over presentation of evidence, and panels of judges for preliminary decisions, while reserving the possibility of review by the full Court where deemed appropriate.<sup>91</sup>

88. Current provisions are as follows:

*Final Reports:* The Convention requires an absolute majority of Commission members (four of the seven) to adopt and publish final reports. Convention art. 51.1, 51.3; Regulations art. 47.2, 48.1.

*Quorum:* The Statute art. 17.1 and Regulations art. 18 require an absolute majority for a quorum.

*Voting generally:* For states parties, the Statute art. 17.2 authorizes decisions by a majority of “members present” –which could be as few as three members of a four-member quorum– except where the Convention or Statute otherwise requires a majority of the Commission. For non-state parties, the Statute art. 17.3 requires an absolute majority for all decisions “except in matters of procedure.” For all states, the Regulations art. 20.1 requires an absolute majority vote to elect officers, to adopt country reports, to amend or interpret the Regulations, and whenever required by the Convention, Statute or Regulations. For decisions on other matters, art. 20.2 allows a majority vote of members present.

*Preliminary reports:* For State Parties, the Regulations art. 46(6) provides that preliminary reports “shall be signed by all members that have participated in the deliberation . . . a report signed by a majority of the members shall be valid.”

89. Regulations art. 17.1 allows three-member working groups to prepare draft decisions on cases, and art. 17.2 allows working groups “of no more than three members” for other specific subjects.

90. Regulations art. 17.2 allows working groups “of no more than three members.” For purposes of presiding over extended evidentiary hearings, a single commissioner could be deemed to constitute such a working group. Alternatively, the Commission could amend its Regulations to so provide.

91. Convention art. 56 requires five judges for a quorum “for the transaction of business by the Court.” The Statute art. 23.1 and the Rules of Procedure art. 13 specify a five-judge quorum for Court “deliberations.” However, as the Court recently noted, its Statute art. 25 permits the Rules to delegate to the President or to Committees “authority to carry out certain parts of the legal proceedings, with the exception of issuing final rulings or advisory opinions.” Any decisions thereby made “that are not purely procedural may be appealed before the full Court.” The Court further noted that its Rules art. 6(2) authorize it to “appoint . . . commissions for specific matters,” while art. 34(4)[now 44(4)] authorizes it, “at any stage of the proceedings . . . [to] designate one or more of its members to conduct an inquiry, carry out an investigation on the spot or take evidence in some other manner.” It accordingly decided “[t]hat the receipt of testimonial and expert evidence in the proceedings

• **Settlements.** The Commission should make every reasonable effort to exercise its powers to encourage friendly settlements of cases.<sup>92</sup> As soon as a case is ruled admissible, the Commission should request both parties to make good faith efforts to settle and offer its assistance for that purpose. It is important, however, that the Commission not permit settlement negotiations to be prolonged unreasonably or to delay unduly its resolution of the case.

• **Factfinding.** The system cannot afford duplicative factfinding by two successive bodies in every case. The Court should adopt a rebuttable presumption in favor of Commission findings of fact, provided that both parties have had a fair opportunity to present their evidence and arguments before the Commission, and its findings are explained in a reasoned opinion. The presumption, while not absolute, should avoid *de novo* evidentiary proceedings before the Court, except when there is good reason to doubt the reliability of the Commission's findings in a particular case. Even then, to the extent practicable, evidentiary proceedings before the Court should be limited to those points as to which there is some question.

• **Referral of Cases to the Court.** In principle, the Commission should refer to the Court all cases involving states which have accepted the Court's contentious jurisdiction, and which raise legal issues not yet authoritatively determined by the Court. In addition, the Commission should refer all cases which have not been resolved either by friendly settlement or by state compliance with the Commission's resolution. Otherwise the Convention right in issue may become a dead letter for the victim in the case. In the interim, until the Court and Commission have sufficient resources to allow for full implementation of this principle, the Commission should utilize publicly articulated, objective selection criteria designed to ensure that all important cases not resolved by the Commission go before the Court, and that participants and the public are not left to wonder why some cases but not others, against some states but not others, may have been referred to the Court.<sup>93</sup>

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before it may be verified by the presence of one or more of its members at a public hearing at the seat of the Court or *in situ*." Decision CDH-R3/96, 1996 ANN.REP. 155.

92. Convention art. 48(1)(f); Statute art. 20(b).

93. "Although the Convention does not specify under what circumstances a case should be referred to the Court by the Commission, it is implicit in the functions that the Convention assigns to the Commission and to the Court that certain cases should be referred . . ." Advisory Opinion OC-5/85, note 2 *supra*, 1985 ANN.REP. at 26 para. 25. The Court went on to mention the following factors as to why a case should have been referred to the Court: "The controversial legal issues it raised had not been previously considered by the Court; the domestic proceedings . . . produced conflicting judicial decisions; the Commission itself was not able to arrive at a unanimous decision on the relevant legal issues; and its subject is a matter of special importance to the hemisphere because several states have adopted laws similar to that [in issue]." *Id.*; see also Juan E. Méndez, *Criterios para enviar casos a la Corte . . .*, at 15-23 (1996)(monograph presented at 2-4 December 1996 Seminar on the Inter-American Human Rights system, sponsored by the Commission: on file with authors).

• **Parties Before the Court.** The Commission should appear before the Court, as the European Commission appears before the European Court,<sup>94</sup> not as the representative of the complainant but as “defender of the public interest” and of the integrity of the system. As such, the Commission’s position before the Court may differ from that of both the state and the complainant. Such a role should enhance both the appearance and the reality of an independent and impartial Commission. Once a case is referred to the Court by the Commission or by a state, then, the complainant would be represented before the Court by his or her own counsel.<sup>95</sup>

If measures are taken as suggested above to minimize evidentiary hearings before the Court, its proceedings will involve mainly written and oral arguments of counsel. This should greatly reduce the financial burden on complainants and states to present their cases to the Court. Where a complainant cannot meet the costs of representation and travel by counsel, the Court should take measures to ensure that the complainant can be heard. For example, the Court might consider creating a panel of distinguished counsel drawn from throughout the hemisphere who offer to volunteer their services *pro bono publico* in cases before the Court.

The Court has already taken a step in this direction by allowing independent representation of victims at the reparations stage.<sup>96</sup> This proposal would extend that independent representation to the entire proceeding before the Court, and would parallel the similar procedural progression of the European system.<sup>97</sup>

• **Transparency.** To ensure the confidence of all concerned, the Commission should decide cases on the record and not on the basis of extraneous factors. Accordingly, it should prohibit *ex parte* communications by or with anyone concerning cases pending before it, except to the extent narrowly defined exceptions may be set forth in its regulations. Consistent with this approach, the Commission and Court should reconsider the current practice of *ex parte* pro-

94. The European Court of Human Rights permits the European Commission, “as defender of the public interest, to express its view at every stage of the proceedings. The [Commission] Delegate’s role of *amicus curiae* has been likened to that of an Advocate General before the Court of Justice of the European Communities although the latter has considerably more influence than a Delegate.” D.J. Harris, M. O’Boyle and C. Warbrick, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 665 (1995). As the Commission’s representative told the Court in the first case before it, “The Commission. . . . does not understand its function before the Court to be to defend the interests of the individual as such. The Commission’s function is . . . to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention; . . . . The function of the Commission before the Court. . . . is not litigious: it is ministerial.” *Id.* at 665-66 (quoting Sir Humphrey Waldock in *Lawless v. Ireland B 1*, pp. 261-62).

95. See generally Claudio Grossman, *Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation*, 15 *HASTINGS INT’L & COMP.L.REV.* 363 (1992).

96. Rules of Procedure effective Jan. 1, 1997, art. 23.

97. See generally Harris, O’Boyle and Warbrick, note 94 *supra*, at 659-65.

ceedings between the Commission and the state concerning the state's response to the Commission's preliminary report.<sup>98</sup>

The Commission should also move toward greater transparency throughout its proceedings. Although the confidentiality provisions of the Convention and Statute are quite limited,<sup>99</sup> the Commission treats cases with excessive secrecy, both in its Regulations<sup>100</sup> and even more so in practice.<sup>101</sup> No less than judicial proceedings against state officials before national tribunals,<sup>102</sup> Commission proceedings should be public, except for deliberations and matters involving personal privacy, national security or other particular and justifiable grounds for confidentiality. If the theory underlying confidentiality of Commission proceedings is to preserve publicity as a form of sanction, that theory has not worked in practice.

As an initial step toward opening up its proceedings, the Commission should follow the example of the United Nations Human Rights Committee, which recently made explicit the right of the parties, in general, to make public their submis-

98. See note 45 *supra*.

99. The only Convention provisions on confidentiality concern the Commission's reports: Art. 50.2 directs the Commission to transmit its preliminary report to the states concerned, "which shall not be at liberty to publish it," while art. 51.3 provides that once the prescribed period for compliance with a final report has expired, the Commission shall determine "whether the state has taken adequate measures and whether to publish its report." The Statute requires no more than that Commission members "maintain absolute secrecy about all matters which the Commission deems confidential." Art. 9.3.

100. The Regulations, which may be amended by the Commission (Statute art. 22.2), add the following requirements. Meetings "shall be closed unless the Commission decides otherwise." Art. 16.3. When the Commission sends pertinent parts of a communication to the state, "the identity of the petitioner shall be withheld, as shall any other information that could identify him, except when the petitioner expressly authorizes in writing the disclosure of his identity." Art. 34.4. Commission deliberations, of course, shall be "in private, and all aspects of the discussions shall remain confidential." Art. 46.3. Hearings shall be private, unless the Commission decides otherwise; hearings on petitions "shall be held in private, in the presence of the parties or their representatives, unless they agree that the hearing should be public." Art. 70.1 and 2.

101. For example, the Commission or its staff often sometimes refuses public requests for its reports, even after the Commission has decided to publish them, until publication of the Annual Report.

102. *Cf.* Convention art. 8.5: "Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice." This provision, as well as the art. 8.1 right to a hearing "with due guarantees" in non-criminal matters, may not be interpreted to restrict rights guaranteed by other treaties to which states parties are bound. Convention art. 29.b. All states party to the Convention are also parties to the International Covenant on Civil and Political Rights. UNESCO, note 74 *supra*, at 14-20. Art. 14.1 of the Covenant guarantees a "public hearing" in both criminal and civil cases, except as follows: "The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; . . ." See also *The Sunday Times Case*, Judgment of 26 April 1979 (N° 30), 2 E.H.H.R. 245 (Eur.Ct.H.Rts.).

sions and other information bearing on cases.<sup>103</sup> The Commission is also to be commended for its present decision to begin regularly releasing its decisions publicly when they are made, without waiting for its annual report.<sup>104</sup> This should avoid needless delay and make it easier for press and public to focus on particular cases. And the current presumption of closed meetings and hearings on cases should be reversed; Commission meetings (except for deliberations) should be presumptively open, and hearings on cases should be public unless the Commission orders them closed for good cause.

• **Follow-up.** The Commission should develop procedures to monitor and follow-up compliance with its final resolutions, similar to those used by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.<sup>105</sup> In addition, the Commission's annual report to the General Assembly should contain a section on compliance with resolutions issued in previous years.

The Court is obliged by the Convention to report non-compliance with its judgments to the General Assembly;<sup>106</sup> this implies a duty on the part of the General Assembly to act to encourage compliance.<sup>107</sup> The Court has recently amended its Rules to provide for reporting as well of noncompliance with provisional measures.<sup>108</sup> For clarity and consistency, the Court's annual report should include separate sections on compliance with all outstanding judgments and orders for provisional measures.

In addition, the OAS Permanent Council should adopt procedures, similar to those used by the Council of Ministers of the Council of Europe, to monitor and

103. Human Rights Committee Rule 96(3), as amended in 1997, recognizes "the right of the author of a communication or a State Party to make public any submission or information bearing on the proceedings." In exceptional cases, such as to protect the privacy of third parties, the Committee or a Working Group may require confidentiality. U.N.Doc. CCPC/C/3/Rev.5, 11 August 1997.

104. Convention art. 51.3 does not specify the manner in which final Commission reports shall be published. The Commission Regulations permit publication by inclusion in the annual report "or in any other way the Commission may consider suitable," in both Convention cases (Reg. Art. 48.2) and Declaration cases (Reg. Art. 53.4). In October 1997 the Commission decided to begin making its final reports on the date of their approval for publication, and also to issue press release on its requests for precautionary measures. Commission Press Release N° 13197, Oct. 17, 1997, at 6.

105. See, e.g., UNITED NATIONS, note 83 *supra*, at 62; Manfred Nowak, *The Activities of the U.N. Human Rights Committee: Developments from 1 August 1992 through 31 July 1995*, 16 H.R.TS.L.J. 377, 383 (1995). In 1997 the Commission began to take follow up measures including on site visits and hearings. Commission Press Release N° 13197, Oct. 17, 1997, at 2.

106. Convention art. 65.

107. See generally Douglass Cassel et al., *The Inter-American Human Rights System Put to the Test: The Interpretation Judgments in the Honduran Disappearance Cases*, 13 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 315 (1991).

108. Rules of Procedure art. 25.5.

encourage compliance with the resolutions of the Commission and judgments of the Court. The procedure used in Europe is non-coercive.<sup>109</sup> All Commission final resolutions (if not referred to the Court) and Court judgments would be reported to the Permanent Council. The Council would then request information from the state, and from the Commission or Court, on the status of implementation. The matter would remain on the Council agenda for review and status reports every six months until resolved.

## CONCLUSION

In the past the Inter-American Human Rights system had no alternative but to focus in large measure on massive violations of human rights committed by oppressive regimes in power in many nations of Central and South America. With the demise of those regimes, the human rights situation in the hemisphere has significantly improved. Large-scale violations are today the exception rather than the rule. The time has come, then, for the Inter-American system to focus on protection of individual rights, and through individual cases to strengthen domestic institutions capable of protecting fundamental rights.

The Court and Commission need, therefore, to develop a jurisprudence that can guide domestic courts, legislatures and policymakers in their efforts to build democratic societies which respect individual rights and the rule of law.<sup>110</sup> They can do so in part by addressing in a serious and juridically sound manner the widespread violations of basic rights that continue to afflict the region. Examples include, among others, police brutality, inhumane prison conditions,<sup>111</sup> corrupt or inefficient judicial conduct, denial of due process for persons accused of crimes,<sup>112</sup> domestic violence and sexual abuse of women,<sup>113</sup> discrimination against minorities and indigenous groups,<sup>114</sup> mistreatment of immigrants,<sup>115</sup> and interference with freedom of the press.<sup>116</sup> Many of these problems intersect with the forgotten stepchild of interna-

109. See generally *New Vision*, note 57 *supra*, at 15-17 and Appendix I.

110. On the issue of the rule of law and amnesties for serious violations of human rights, see generally *Hermosilla v. Chile*, 1996 ANN.REP. 156.

111. See, e.g., *Progress Report on Conditions of Detention in the Americas*, 1996 ANN.REP.COMM'N 749.

112. See, e.g., *Country Report on Colombia*, 1996 ANN.REP.COMM'N 651, 658 para. 32.

113. See, e.g., *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women*, June 9, 1994, in *BASIC DOCUMENTS*, note 1 *supra*, at 109; *Mejía v. Perú*, Case N° 9213, 1995 ANN.REP.COMM'N 157; *Progress Report on the Project to Promote and Protect the Right of Women in the Hemisphere to be Free from Discrimination*, 1996 ANN.REP.COMM'N 751.

114. See, e.g., the Commission's progress report and the text of the proposed American Declaration on the Rights of Indigenous Peoples, 1996 ANN.REP. 625.

115. See, e.g., *Progress Report on the Situation of Migrant Workers and their Families in the Hemisphere*, 1996 ANN.REP.COMM'N 754.

116. For recent Commission reports concerning free press, see, e.g., *Martorell v. Chile*, 1996 ANN.REP. 234 (recommending lifting of a book ban); *Clark v. Grenada*, 1995 ANN.REP. 113 (finding violations in seizures of books and denials of visas to attend a conference); *Verbitsky v. Argentina*, 1994



tional human rights law: economic, social and cultural rights.<sup>117</sup> Poverty, inequality and ignorance threaten whatever progress might otherwise be achieved toward democracy and respect for civil and political rights. While this problem falls mainly within the domain of economic and social policy, law must not neglect its proper role.

In short, the Court and Commission, as well as the OAS and its member states, need to recognize that contemporary human rights conditions call for refocusing on adjudication of individual cases, as the building blocks of a political and social environment respectful of human rights and the rule of law.

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ANN.REP. 40 (friendly settlement of a case of a journalist convicted for calling a Supreme Court Minister "asqueroso;" state agreed to repeal law and apply repeal retroactively to the case); Report on "Desacato" Laws, 1994 ANN.REP. 197 (laws that punish insulting of public officials violate free expression).

117. See, e.g., Convention arts. 26 and 42; Commission Regulations art. 64 (2)-(7); The Realization of Economic, Social and Cultural Rights in the Region, 1993 ANN.REP.COMM'N 519; and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), Nov. 17, 1988, in BASIC DOCUMENTS, note 1 *supra*, at 69.