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# Protecting the Protectors: Preventing the Decline of the Inter-American System for the Protection of Human Rights

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## NOTES

### PROTECTING THE PROTECTORS: PREVENTING THE DECLINE OF THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

*Michael F. Cosgrove\**

*“By its approach and action in this matter ... the (Inter-American) Commission is frustrating the general will of the people of Trinidad and Tobago, who have clearly given their government a mandate to deal with crimes generally, but specifically, with the escalating level of murders in the country.”*

*- George Dhanny, International Lawyer<sup>1</sup>*

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\* B.A., *summa cum laude*, The University of Dayton (1997); J.D. Candidate, Case Western Reserve University School of Law (2000). I would like to thank my wife for her patience as I spent long hours working on this Note; Professor Hiram Chodosh for his comments, which significantly aided me in strengthening the quality of this Note; and Dr. Mark Ensalaco of The University of Dayton for introducing me to the Inter-American system and nurturing my interest in human rights law.

<sup>1</sup> Wesley Gibbings, *Trinidad and Tobago: Controversy Reigns as Gallows are Readied*, Inter Press Service, June 25, 1998, available in 1998 WL 5987954.

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## INTRODUCTION

International human rights enforcement mechanisms depend upon the support of nation-states.<sup>2</sup> Any human rights system “is only as strong as its members. Its effectiveness will be significantly reduced if countries pull out whenever they perceive the [system] as posing an obstacle to domestic practice.”<sup>3</sup> The Inter-American system for human rights protection once occupied a strong position in regional human rights protection. However, the strength of the system has begun fading since it turned its attention from

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<sup>2</sup> See Natalia Schiffrin, Current Development, *Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights*, 92 AM. J. INT'L L. 563, 568 (1998).

<sup>3</sup> *Id.* at 568. Cf. Jo M. Pasqualucci, *Provisional Measures in the Inter-American Human Rights System: An Innovative Development in International Law*, 26 VAND. J. TRANSNAT'L L. 803, 846 (1993) (mentioning the importance of the political cost of non-compliance with decisions of human rights institutions).

country reports to individual petitions. Procedural delay in the individual petition process is weakening the system's support among countries whose application of the death penalty is undermined by this delay. The weakening of the support is manifesting itself in the withdrawal of some States from the system. The system must respond to concerns over delays in death penalty cases in order to maintain or increase its effectiveness in protecting human rights.

Part I of this Note describes the operation of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Part II analyzes the problem of backlog and delay in the system. Part III discusses the negative impact of delay on the application of the death penalty and illuminates the conflict between the Court and the Commission on one hand and States attempting to address the "death row phenomenon" on the other. Part IV evaluates the status quo and currently available options for reform. This Note argues in favor of an alternative "fast track" procedure for death penalty-related petitions. The fast track procedure will reduce delay and eliminate the conflict between the system's institutions and the States concerned. The resolution of this conflict will help to retain members and thus strengthen the human rights regime for the Americas.

## I. THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

The Inter-American system for human rights protection is a creation of the Organization of American States (OAS). In addition to Member States of the OAS, the system consists of the Inter-American Commission on Human Rights (the "Commission") and the Inter-American Court of Human Rights (the "Court"). Part A discusses the creation and procedures of the Commission. Part B discusses the development and operation of the Court.

### A. *The Inter-American Commission on Human Rights: Rising to the Challenge*

#### 1. The Development and Strengthening of the Commission

As a result of the evolution of the system, the Commission operates within two distinct spheres. Upon its creation in 1959, the Commission was given the responsibility of promoting respect for human rights.<sup>4</sup> The Commission initially promoted human rights by reporting on the human rights situation in the Member States of the OAS and making

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<sup>4</sup> See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, TEN YEARS OF ACTIVITIES: 1971-1981, at 5 (1982) [hereinafter TEN YEARS OF ACTIVITIES].

recommendations for promoting human rights to the Member States.<sup>5</sup> In 1965, the Commission was empowered to receive individual communications and to recommend remedies to Member States concerning those petitions.<sup>6</sup> Subsequently, the Commission became an organ of the OAS, thus securing its place within the regional system.<sup>7</sup> In 1978, the American Convention on Human Rights (the Convention or the American Convention) entered into force and the Commission became an organ of the Convention.<sup>8</sup> Thus, the Commission has a dual role in the Inter-American human rights system.<sup>9</sup> First, as an organ of the OAS, the Commission may conduct investigations of and receive petitions from citizens of any Member State of the OAS.<sup>10</sup> Second, the Commission has independent jurisdiction over the States Parties to the American Convention.<sup>11</sup> In contrast, the Court, discussed below, has jurisdiction only over States Parties to the Convention that have specifically acceded to the Court's contentious jurisdiction.<sup>12</sup> This Note focuses on the Convention-based system.<sup>13</sup>

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<sup>5</sup> See SCOTT DAVIDSON, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 14 (1992).

<sup>6</sup> See *id.* at 15.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 18-19.

<sup>9</sup> See Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 *HUM. RTS. Q.* 439, 440-48 (1990).

<sup>10</sup> See *TEN YEARS OF ACTIVITIES*, *supra* note 4, at 8-9. Within this sphere of competence, the Commission applies the American Declaration of Human Rights to produce nonbinding recommendations in a manner similar to that outlined under the Convention-based system discussed in this Note. See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See DAVIDSON, *supra* note 5, at 2.

<sup>13</sup> See Figure 1, *infra*, for the membership of the system.

Ratified and Acceded to the Court's Jurisdiction	Ratified Without Accession to the Court's Jurisdiction	Signed but not Ratified	OAS Member States not Signing
Argentina Bolivia Chile Colombia Costa Rica Ecuador El Salvador Guatemala Honduras Nicaragua Panama Paraguay Peru Suriname Trinidad and Tobago Uruguay Venezuela	Barbados Brazil Dominica The Dominican Republic Grenada Haiti Jamaica Mexico	The United States	Antigua and Barbuda The Bahamas Belize Canada Saint Lucia Saint Vincent and the Grenadines St. Kitts and Nevis

FIGURE 1: STATUS OF THE AMERICAN CONVENTION

Source: The Inter-American System of Human Rights 562-3 (David J. Harris & Stephen Livingstone eds., 1998).

The Commission is composed of seven members who are "persons of high moral character and recognized competence in the field of human rights."<sup>14</sup> The General Assembly elects Commission members in their personal capacity for a four-year term, and these members may only be reelected once.<sup>15</sup> The Commission meets for eight weeks each year and

<sup>14</sup> American Convention on Human Rights, art. 34, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, at 38 (1992)[hereinafter American Convention].

<sup>15</sup> *See id.* art. 37.

determines the number of regular sessions at its discretion during these eight weeks.<sup>16</sup> The Chairman of the Commission or an absolute majority of the Commission's members may convoke special sessions when necessary.<sup>17</sup> The General Secretary of the OAS appoints the Commission's secretariat.<sup>18</sup>

The Commission has at its disposal two primary tools. The first, the individual petition process, is discussed in detail below. The second tool is the country report. Country reports detail the status of human rights in a particular country and examine a government's conduct concerning human rights in general.<sup>19</sup> Utilization of this tool has decreased proportionately to the Commission's increasing reliance on individual petitions.<sup>20</sup>

Country reports carry with them many benefits. First, the Commission may initiate investigations at its own discretion.<sup>21</sup> Second, information may be gathered from any source.<sup>22</sup> Third, the procedure is short and flexible.<sup>23</sup> Fourth, the Commission issues recommendations promptly and sets a deadline for government compliance.<sup>24</sup> Fifth, the Commission may conduct an observation in loco with the consent of the government.<sup>25</sup> Sixth, the reports allow the Commission to make greater use of publicity.<sup>26</sup> These benefits make country reports an effective tool for pressuring national leaders to end human rights abuses.<sup>27</sup>

Despite these benefits, the "process of on-site investigations and issuing specific country reports on the mission's findings has now virtually disappeared" because of a lack of resources and the focus on individual

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<sup>16</sup> See Regulations of the Inter-American Commission on Human Rights, art. 15, reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, *supra* note 14, at 108 [hereinafter Regulations of the Commission].

<sup>17</sup> See *id.*

<sup>18</sup> See American Convention, *supra* note 14, art. 40.

<sup>19</sup> See CECILIA MEDINA QUIROGA, THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM 152 (1988).

<sup>20</sup> See Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUM. RTS. Q. 510, 544 (1997).

<sup>21</sup> See QUIROGA, *supra* note 19, at 320.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* at 321.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> For example, former Nicaraguan dictator Anastasio Somoza cited the 1978 report on the status of human rights in Nicaragua "as one of the decisive forces driving him to resign and flee the country even though the Guard was still holding the line in most of the country." Farer, *supra* note 20, at 538.

petitions.<sup>28</sup> A renewed use of country reports (or thematic reports, as suggested by a former Commission President), while lacking an immediate benefit to any particular petitioner, could improve overall respect for human rights in the Americas.<sup>29</sup>

## 2. The Lengthy Individual Petition Procedures of the Commission

The American Convention also allows individual victims direct access to the Commission. Under the Convention, any person, group of persons, or nongovernmental organization recognized in at least one Member State of the OAS may file a petition with the Commission.<sup>30</sup> As will become evident below, the petition process can be long and cumbersome.

Upon receiving a petition, the Commission must first determine its admissibility. The primary requirement for admissibility is the exhaustion of domestic remedies.<sup>31</sup> There are several exceptions to this requirement. The petitioner need not exhaust domestic remedies if domestic law does not afford due process, if he was prevented from exhausting domestic remedies, or if there is an unwarranted delay in rendering final judgment.<sup>32</sup> Additionally, a remedy that is not adequate in a particular case need not be exhausted.<sup>33</sup> A petitioner need not exhaust domestic remedies if he is unable to do so because of indigence or generalized fear in the legal community.<sup>34</sup>

In addition to exhausting domestic remedies, the petition must meet four other requirements of admissibility. First, the petition must be lodged within six months of the petitioner's notification of final judgment.<sup>35</sup> Second, the subject of the petition cannot be pending in another

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<sup>28</sup> José Miguel Vivanco, *International Human Rights Litigation in Latin America: The OAS Human Rights System*, in COLLECTIVE RESPONSES TO REGIONAL PROBLEMS: THE CASE OF LATIN AMERICA AND THE CARIBBEAN 73, 79 (Carl Kaysen et al. eds., 1994).

<sup>29</sup> See Farer, *supra* note 20, at 544-45.

<sup>30</sup> See American Convention, *supra* note 14, art. 44. In contrast to the European system, which requires specific recognition by States before the Commission can accept individual petitions but does not require such recognition for interstate communications, in the Inter-American system States must recognize the Commission's competence to receive interstate complaints, but a similar recognition is not required for the Commission to accept individual communications. See *id.* arts. 44-45.

<sup>31</sup> See *id.* art. 46(1)(a).

<sup>32</sup> See *id.* art. 46(2)(a)-(c).

<sup>33</sup> See Velásquez Rodríguez Case (Judgment of July 29, 1988), Inter-Am. Ct. H.R. (ser. C) No. 4, at para. 64 (1988).

<sup>34</sup> See I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (American Convention on Human Rights, Arts. 46(1), 46(2)(a) and 42(2)(b)), Advisory Opinion OC-11/90 of Aug. 10, 1990. Series A No. 11, at 21.

<sup>35</sup> See American Convention, *supra* note 14, art. 46(1)(b).



international proceeding.<sup>36</sup> Third, the petition must contain certain information identifying the petitioner or his legal representative.<sup>37</sup> Fourth, the petition must state facts that, if true, would tend to establish a violation of rights under the American Convention.<sup>38</sup> The Commission is not required to make a formal or express determination of admissibility unless the government contests admissibility.<sup>39</sup>

If the petition is admissible,<sup>40</sup> the investigation process begins. The Commission provides the State with information in the petition (although no information pertaining to the identity of the petitioner is released) and requests information from the State.<sup>41</sup> The government has ninety days to provide the information, but may request a thirty-day extension.<sup>42</sup> The government may not be given more than 180 days from the date of the Commission's communication, however.<sup>43</sup> If the government fails to respond within the 180-day period, the Commission may assume the truth of the facts submitted to the State.<sup>44</sup> After the government response (or lack thereof), the replies and accompanying documents are then made known to the petitioner, who is given thirty days to submit observations and contrary evidence.<sup>45</sup> The government then has another thirty days to make its final observations.<sup>46</sup> Thus, theoretically the initial processing of a petition should take a maximum of 240 calendar days.

The Commission examines the case at its next session either after the government fails to respond to the original communication, after the petitioner's response time or the government's final response time has elapsed without a response, or after the government's final response.<sup>47</sup> The Commission may hold a hearing and request oral and written statements and any other pertinent information from the parties.<sup>48</sup> If necessary, the

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<sup>36</sup> See *id.* art. 46(1)(c).

<sup>37</sup> See *id.* art. 46(1)(d).

<sup>38</sup> See *id.* art. 47(b).

<sup>39</sup> See Velásquez Rodríguez Case (Preliminary Objections) (Judgment of June 26, 1987), Inter-Am. Ct. H.R. (ser. C) No. 1, at para. 40 (1987); Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 340 (1994-95).

<sup>40</sup> Most petitions make it through "the Commission's deliberately porous jurisdictional screen" and then are "immediately stalled." Farer, *supra* note 20, at 528.

<sup>41</sup> See Regulations of the Commission, *supra* note 16, at art. 34(1)(c).

<sup>42</sup> See *id.* art. 34(5) and (6).

<sup>43</sup> See *id.* art. 34(6).

<sup>44</sup> See *id.* art. 42.

<sup>45</sup> See *id.* art. 34(7).

<sup>46</sup> See *id.* art. 34(8).

<sup>47</sup> See *id.* art. 36.

<sup>48</sup> See *id.* art. 43

Commission may conduct an on-site investigation within the respondent country's territory.<sup>49</sup> At any time during this process, the Commission may work with the parties to achieve a friendly settlement of the dispute, either at the request of the parties or on its own initiative. The Commission need not pursue friendly settlement at its own initiative if it determines it to be unsuitable or unnecessary.<sup>50</sup> Once the investigation is completed, the Commission has 180 days to prepare its decision.<sup>51</sup>

If there is no friendly settlement, the Commission prepares a report, along with its proposals and recommendations, and transmits the report to the government.<sup>52</sup> The government may choose to settle the matter or request reconsideration once within a ninety-day deadline if it invokes new facts or legal arguments.<sup>53</sup> Alternatively, the Commission or the government may transmit the case to the Court within three months of transmitting the report to the government.<sup>54</sup> If the case is not forwarded to the Court and the government does not settle the matter, the Commission prepares a second report. This report contains the Commission's opinion and conclusions, as reached by a vote of an absolute majority of the Commission's members.<sup>55</sup> In making recommendations, the Commission may prescribe a period in which the government must adopt the measures.<sup>56</sup> The Commission transmits the report to the parties, but it may not be published.<sup>57</sup>

After the period set by the Commission for the government to adopt the recommendations in the second report expires, the Commission determines whether the State has fulfilled its obligation and whether to publish the report.<sup>58</sup> Additionally, the report may be submitted to the

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<sup>49</sup> See *id.* art. 44.

<sup>50</sup> See American Convention, *supra* note 14, art. 48(1)(e); Regulations of the Commission, *supra* note 16, art. 45(7); Pasqualucci, *supra* note 39, at 340-41. See generally Charles Moyer, *Friendly Settlement in the Inter-American System: The Verbitsky Case – When Push Needn't Come to Shove*, in LA CORTE Y EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS 347 (Rafael Nieto Navia ed., 1994) (discussing a specific instance of the friendly-settlement procedure); David Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 AM. J. INT'L L. & POL'Y 95, 106-08 (1993) (discussing the increasing use of friendly settlement procedures).

<sup>51</sup> See Regulations of the Commission, *supra* note 16, art. 44(3).

<sup>52</sup> See *id.* art. 47.

<sup>53</sup> See *id.* art. 54.

<sup>54</sup> See *id.* art. 47(2).

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* art. 47(3).

<sup>57</sup> See *id.* art. 47(6).

<sup>58</sup> See *id.* art. 48(1).

General Assembly of the OAS as part of the Commission's Annual Report.<sup>59</sup> As stated above, if the Member State involved has acceded to the contentious jurisdiction of the Court, the Commission may refer the case to the Court after it transmits the initial report to the government.<sup>60</sup>

The foregoing process, although complex and time-consuming in itself, is further drawn out by the practical operation of the process. The Commission has often treated its individual petition procedure with flexibility. Before the American Convention entered into force, the Commission would send a letter incorporating the allegations to the Foreign Minister of the respondent State.<sup>61</sup> After time passed and the Commission prodded the government, the government would respond in a predictable manner, celebrating the country's commitment to human rights in the first paragraph, praising the Commission in the second paragraph, and denying the charges or stating that the charges were being inquired into in the final paragraph.<sup>62</sup> If the government was still investigating the charges, the Commission would prod more, resulting in a more or less identical letter, but with the third paragraph stating that the investigation had revealed the accusation to have no basis.<sup>63</sup> The petitioner might cut in to provide new information, and the Commission and the government would resume their dance.<sup>64</sup> Occasionally, the Commission would allow petitioners and the governments to argue their cases *ex parte*, without any rules of evidence or procedure being followed and no record being kept.<sup>65</sup> Eventually (long after the six months the government was provided with to come forth with information), the Commission would "accept the allegations as true and include the case in its annual report to the OAS General Assembly."<sup>66</sup>

This process is not prompt; however, the flexibility "gives the States the opportunity to rectify the anomalous situations that have occasioned the complaints."<sup>67</sup> Because the Commission's reports are not legally binding, the Commission must be able to negotiate flexibly with governments in order to secure compliance. The Commission was created as a quasi-diplomatic body and retains diplomatic qualities despite the growth of its

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<sup>59</sup> *See id.* art. 48(2).

<sup>60</sup> *See id.* art. 50(1).

<sup>61</sup> *See Farer, supra* note 20, at 528.

<sup>62</sup> *See id.* at 528-29.

<sup>63</sup> *See id.* at 529.

<sup>64</sup> *See id.*

<sup>65</sup> *See id.* at 543.

<sup>66</sup> *Id.* at 529.

<sup>67</sup> Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, 14 HUM. RTS. Q. 171, 180 (1992).

quasi-judicial functions.<sup>68</sup> Its diplomatic nature necessitates a flexible procedure that allows for fluid discussion between the parties.<sup>69</sup> The American Convention did not initially change the Commission's informal handling of cases. However, pressure from human rights lawyers and the Court has prompted a somewhat more case-oriented approach.<sup>70</sup>

## B. *The Inter-American Court on Human Rights: Strengthening the System's Effectiveness*

### 1. The Origin and Structure of the Court

The Court is a relative newcomer to the Inter-American system. The Court came into being in May 1979, one year after the American Convention entered into force.<sup>71</sup> The Court is composed of seven judges, who may be nationals of any OAS Member State. Judges are elected only by the States Parties to the American Convention for a six-year term.<sup>72</sup> The Court meets on a part-time basis, twice a year for several weeks per session.<sup>73</sup> However, judges must remain at the Court's disposal at all times.<sup>74</sup>

The Court has two forms of jurisdiction: Advisory jurisdiction and contentious (adjudicatory) jurisdiction. Under its advisory jurisdiction, the Member States and organs of the OAS may consult the Court on issues related to the interpretation of the American Convention and other treaties "concerning the protection of human rights in the American States," allowing the Court to render a non-binding decision concerning the issue.<sup>75</sup>

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<sup>68</sup> See Verónica Gómez, *The Interaction Between the Political Actors of the OAS, the Commission and the Court*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 173, 209 (David J. Harris & Stephen Livingstone eds., 1998).

<sup>69</sup> Cf. Frost, *supra* note 67, at 179 (quoting Judge Tovar of Venezuela discussing the fact that the Commission is more political than jurisdictional and is accustomed to acting alone); Juan E. Méndez & José Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 *HAMLIN L. REV.* 507, 523 (1990).

<sup>70</sup> See Farer, *supra* note 20, at 543-44.

<sup>71</sup> See Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 *AM. J. INT'L L.* 231, 231 (1982).

<sup>72</sup> See American Convention, *supra* note 14, arts. 52-54.

<sup>73</sup> See Frost, *supra* note 67, at 187.

<sup>74</sup> See Statute of the Inter-American Court on Human Rights, art. 16, *reprinted in* *BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM*, *supra* note 14, at 138 [hereinafter Statute of the Court]; Buergenthal, *supra* note 71, at 233.

<sup>75</sup> American Convention, *supra* note 14, art. 64. See generally DAVIDSON, *supra* note 5, at 99-128 (discussing the Court's advisory opinions); Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 *AM. J. INT'L L.* 1

Member States may also request an opinion concerning the compatibility of domestic laws with these treaties.<sup>76</sup>

Unlike its advisory jurisdiction, the Court's contentious jurisdiction does not apply to a Member State unless that Member State has ratified the American Convention and specifically acceded to the Court's contentious jurisdiction.<sup>77</sup> Under its contentious jurisdiction, the Court may render a binding judgment, award damages to an injured party, and order that a breach of the American Convention be remedied.<sup>78</sup> This Note addresses the Court's contentious jurisdiction.

## 2. The Procedures Before the Court

The Court's procedures also add to the amount of time that it takes a petition to navigate the system. When the Court receives an application to hear a case, the respondent State and the Commission appoint their delegates within one month of notification of the application by the Secretary of the Court.<sup>79</sup> Preliminary objections, such as those based upon grounds for inadmissibility, must be filed within two months of notification of the application.<sup>80</sup> Presentation of preliminary objections does not suspend the proceedings on the merits.<sup>81</sup> The parties may submit written briefs on these objections within thirty days of notification of the objections.<sup>82</sup> The respondent has four months from the date of notification to file an answer.<sup>83</sup> Next, the parties may enter additional written pleadings with the permission of the President of the Court and within the time limits set by the President.<sup>84</sup>

Oral proceedings commence after the pleadings are filed. The President sets the date for oral proceedings.<sup>85</sup> The parties may only offer

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(1985); Buergenthal, *supra* note 71, at 242-45 (discussing the Court's advisory jurisdiction).

<sup>76</sup> See American Convention, *supra* note 14, art. 64.

<sup>77</sup> See *id.* art. 62(3). See generally DAVIDSON, *supra* note 5, at 61-98 (discussing the Court's use of its contentious jurisdiction); Buergenthal, *supra* note 71, at 235-41 (discussing the Court's contentious jurisdiction).

<sup>78</sup> See American Convention, *supra* note 14, art. 63(1).

<sup>79</sup> See Rules of Procedure of the Inter-American Court of Human Rights, art. 35(3), reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, *supra* note 14, at 145 [hereinafter Rules of the Court].

<sup>80</sup> See *id.* art. 36(1).

<sup>81</sup> See *id.* art. 36(4).

<sup>82</sup> See *id.* art. 36(5).

<sup>83</sup> See *id.* art. 37.

<sup>84</sup> See *id.* art. 38.

<sup>85</sup> See *id.* art. 39.

evidence if the application, reply, or preliminary objections give notification of the evidence, although exceptional circumstances allow for flexibility.<sup>86</sup> The Court may also obtain evidence on its own motion, invite the parties to provide useful evidence, or even commission one of its members to obtain evidence through an in situ investigation.<sup>87</sup> The State has the burden of producing evidence over which it has exclusive control,<sup>88</sup> although a recent decision has brought this rule into question.<sup>89</sup> The Court may discontinue the case at any time if a friendly settlement has been reached or if the party bringing the case does not intend to proceed with it.<sup>90</sup>

The power of the Court to order provisional measures under its contentious jurisdiction also bears noting. In “cases of extreme gravity and urgency,” the Court may order a government to take provisional measures to prevent “irreparable damage to persons.”<sup>91</sup> This power extends to cases before the Commission that have not yet been submitted to the Court.<sup>92</sup> Until recently, governments have recognized the importance of and attended the Court’s hearings concerning provisional measures, usually putting forth the appearance of compliance.<sup>93</sup>

The Court begins its decision-making process after the completion of oral proceedings. The Court conducts a general discussion of the case and comes to a basic agreement about the salient issues and the manner in which they should be handled.<sup>94</sup> The Court does not follow a particular decision-making methodology. In general a judge assigned by the President drafts an opinion, or in complex matters several judges are assigned to write proposals. The provisional opinion or proposals become the basis for the Court’s deliberations after the initial discussion of the case.<sup>95</sup> The provisional opinions or proposals are distributed before the Court meets, so that each member of the Court arrives for deliberations ready to make revisions.<sup>96</sup> The Court then renders its decision and establishes reparations

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<sup>86</sup> See *id.* art. 43.

<sup>87</sup> See *id.* art. 44.

<sup>88</sup> See Velásquez Rodríguez Case (Judgment of July 29, 1988), Inter-Am. Ct. H.R. (ser. C) No. 4, at para. 135 (1988).

<sup>89</sup> See Gangaram Panday Case, (Judgment of Jan. 21, 1994), Inter-Am. Ct. H.R. (ser. C) No. 16, at para. 68 (1994) (stating that the Court’s decision was based on inference); Pasqualucci, *supra* note 39, at 346.

<sup>90</sup> See Rules of the Court, *supra* note 79, arts. 52-53.

<sup>91</sup> American Convention, *supra* note 14, art. 63(2).

<sup>92</sup> See *id.*

<sup>93</sup> See Pasqualucci, *supra* note 3, at 844-45.

<sup>94</sup> See Frost, *supra* note 67, at 184.

<sup>95</sup> See *id.* at 183-85.

<sup>96</sup> See *id.* at 184 .

if necessary.<sup>97</sup> Either party may request an interpretation of the meaning or scope of the judgment within ninety days of the notification of the judgment.<sup>98</sup> The President may invite relevant written comments within an established time limit.<sup>99</sup> However, the request for interpretation will not suspend the effect of the judgment.<sup>100</sup>

### 3. The Ambiguous Role of the Commission Before the Court: Reinforcing Redundancy

The Commission's relationship with the Court initially appeared to be an uneasy one. During the first decade of the Court's existence, the Commission forwarded few cases to the Court, resulting in only three contentious cases being decided by 1990.<sup>101</sup> Some critics attribute this phenomenon to institutional distrust and jealousy on the part of the Commission, while others argue that the Commission simply was not accustomed to working with the Court.<sup>102</sup> The Commission may have been concerned with governmental attempts to use the Court to slow down the Commission.<sup>103</sup> Also, the Commission's focus on country reports prevented it from devoting its limited resources to individual petitions.<sup>104</sup> Whatever the reason for the lack of cooperation between the Court and the Commission, the Commission is now making more frequent use of the Court's contentious jurisdiction.<sup>105</sup>

Once a case has been forwarded to the Court, the Commission's role is ambiguous. The American Convention provides that the "Commission shall appear in all cases before the [C]ourt," but does not detail the role the Commission plays before the Court.<sup>106</sup> The Commission's intended role is that of *ministerio público*, a "representative of the general interest of the inter-American community."<sup>107</sup> However, the Court undermined this role by rejecting the Commission's assertion that its factual findings were

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<sup>97</sup> See Rules of the Court, *supra* note 79, arts. 56-57.

<sup>98</sup> See American Convention, *supra* note 14, art. 67.

<sup>99</sup> See Rules of the Court, *supra* note 79, art. 58(2).

<sup>100</sup> See *id.* art. 58(4).

<sup>101</sup> See Frost, *supra* note 67, at 179.

<sup>102</sup> See *id.* at 178.

<sup>103</sup> See Farer, *supra* note 20, at 544.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup> American Convention, *supra* note 14, at art. 57.

<sup>107</sup> QUIROGA, *supra* note 19, at 169.

binding upon the Court.<sup>108</sup> According to the Court, it “is not bound by what the Commission may have previously decided,” because “[i]ts power to examine and review all actions and decisions of the Commission derives from its character as sole judicial organ . . . concerning the [American] Convention.”<sup>109</sup> In effect, the Court treats the Commission as the representative of the victim-petitioner, and thus as an adversary before the Court rather than a *ministerio público*.<sup>110</sup>

## II. THE PROBLEM OF BACKLOG AND DELAY IN THE INTER-AMERICAN SYSTEM

The above procedures create the potential for backlog and delay, a common problem in both domestic and international tribunals. In both the domestic and international spheres the problem bears similar characteristics and attracts similar solutions. Part A of this section discusses backlog and delay in domestic courts. Part B applies the analysis from Part A to the Inter-American system.

### A. *The Problem of Delay and Backlog Generally*

Delay and backlog is a common problem in many domestic legal systems.<sup>111</sup> Understanding the causes of backlog and delay in the domestic context will assist in analyzing the Inter-American system. The causes of backlog and delay are both systemic and procedural. Systemic causes of backlog and delay can be traced to lack of resources.<sup>112</sup> Procedural causes of backlog and delay include free access to courts without mechanisms to deter frivolous suits, lack of court administration and case management mechanisms (which lead to repetition, fragmentation, and discontinuity), and lack of incentives for consensual settlements.<sup>113</sup>

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<sup>108</sup> See John F. Stack, Jr., *Human Rights in the Inter-American System: The Struggle for Emerging Legitimacy?*, in *LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS* 99, 111-12 (Mary L. Volcansek ed., 1997).

<sup>109</sup> *Gangaram Panday Case*, Judgment of Jan. 21, 1994, Inter-Am Ct. H.R. (ser. C) No. 16, at para 41 (1994).

<sup>110</sup> See Medina, *supra* note 9, at 460; QUIROGA, *supra* note 19, at 170.

<sup>111</sup> See Hiram E. Chodosh et al., *Egyptian Civil Justice Process Modernization: A Functional and Systemic Approach*, 17 *MICH. J. INT'L L.* 865, 871 (1996) (describing backlog and delay as among the most critical legal problems confronted by domestic legal systems around the world).

<sup>112</sup> See Hiram E. Chodosh & Stephen A. Mayo, *The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System*, 38 *HARV. INT'L L.J.* 375, 387 (1997).

<sup>113</sup> See *id.* at 386-87.



Practical solutions to limit backlog and delay are not easily implemented.<sup>114</sup> The obvious solution to systemic causes of delay is to devote more resources to the system, but finite resources make this solution impossible. Procedural solutions focus on "litigation prevention, procedural streamlining and case management measures, and alternative dispute resolution."<sup>115</sup> First, litigation prevention uses measures such as filing fees and sanctions to deter frivolous use of the system.<sup>116</sup> These measures may be undesirable, however, because they inhibit persons from exercising their rights.<sup>117</sup> Second, procedural streamlining and case management techniques include implementing a strict timetable for filing documents with the court, increasing the allocation of resources for court administration, and increasing judicial intervention.<sup>118</sup> These measures may enhance efficiency at the cost of judicial impartiality and increase the complexity of pre-trial procedure without adequate safeguards to control abuse.<sup>119</sup> Third, alternative dispute resolution mechanisms include those employed at the participants' consent to render binding decisions, as well as mechanisms required by court order without the requirement that the dispute be resolved.<sup>120</sup> Alternative dispute mechanisms reduce the effect of resource disparities by making a neutral judge or panel responsible for developing legal argumentation and gathering evidence, rather than allocating that responsibility to each party.<sup>121</sup>

### *B. The Problem of Delay and Backlog in the Inter-American System*

As in domestic legal systems, delay and backlog is a significant problem in the Inter-American system. Commentators have long criticized the slowness of the process from the petitioner's perspective.<sup>122</sup> As Sonia Picado, former Vice-President for the Court, states, "[i]t takes a lot of time and money to exhaust the domestic remedies, to then go to Washington to the Commission, and then, if the Commission so decides (and in many cases it does not), to take the case to the Court."<sup>123</sup> Governments often delay justice for victims of human rights abuses by exploiting the

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<sup>114</sup> See Chodosh et al., *supra* note 111, at 872.

<sup>115</sup> *Id.* at 873.

<sup>116</sup> See *id.* at 874.

<sup>117</sup> See *id.*

<sup>118</sup> See *id.* at 874-75.

<sup>119</sup> See *id.* at 876.

<sup>120</sup> See *id.* at 877.

<sup>121</sup> See *id.* at 878.

<sup>122</sup> See Committee on International Human Rights, *Inter-American Commission on Human Rights: A Promise Unfulfilled*, 48 REC. OF THE ASS'N OF THE B. OF THE CITY OF N.Y. 589, 602-04 (1993); Farer, *supra* note 20, at 527-28.

<sup>123</sup> Frost, *supra* note 67, at 180.

Commission's procedures.<sup>124</sup> States may refuse to respond to requests for information until the last possible moment or exceed their allotted reply period by "promising" to reply if another extension is granted.<sup>125</sup> These tactics can result in significant delay before the Court even receives a case. For example, the petition for the Velásquez case, which was forwarded to the Court on April 24, 1986, had been received by the Commission on October 7, 1981.<sup>126</sup> Ironically, the exploitation of these procedures by death row petitioners is now a source of concern in the Caribbean countries.<sup>127</sup>

### 1. Systemic Causes of Backlog and Delay

As in domestic systems, a significant cause of backlog and delay within the Inter-American system is a lack of resources. The Commission and the Court meet only on a part-time basis; thus the amount of work each can accomplish is limited.<sup>128</sup> Lack of financial resources limits the possibility of full-time personnel, however desirable they might be. The Commission's overall budget remains insufficient to fund its work.<sup>129</sup> During the 1980s, the OAS Secretary-General "appropriated a slice of the Commission's space, let its staff diminish, and watched its budget shrink."<sup>130</sup> Resources are unlikely to be significantly increased because the OAS "is experiencing an almost continual fiscal crisis that shows no signs of abating."<sup>131</sup>

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<sup>124</sup> See Pasqualucci, *supra* note 39, at 311.

<sup>125</sup> See Christina Cerna, *The Inter-American Commission on Human Rights: Its Organization and Examination of Petitions and Communications*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 65, 96 (David J. Harris & Stephen Livingstone eds., 1998).

<sup>126</sup> See Velásquez Rodríguez Case (Judgment of July 29, 1988), Inter-Am. Ct. H.R. (ser. C) No. 4) at para. 3 (1988); Michael Jose Corbera, Note, *In the Wrong Place, at the Wrong Time: Problems with the Inter-American Court of Human Rights' Use of Contentious Jurisdiction*, 25 VAND. J. TRANSNAT'L L. 919, 933-39 (1993) (discussing the Velásquez case). See generally Méndez & Vivanco, *supra* note 69 (discussing the authors' experience as lawyers for the petitioners in the Honduran cases).

<sup>127</sup> See discussion *infra* Part III.B.

<sup>128</sup> See Frost, *supra* note 67, at 189 (mentioning the need for the Court to meet more frequently if its docket grows).

<sup>129</sup> See Vivanco, *supra* note 28, at 79 (discussing the Commission's financial constraints and dependency on the OAS); cf. Pasqualucci, *supra* note 3, at 862 (arguing that resources should be diverted from social and cultural programs of questionable impact in comparison to the importance of the work of the Court and the Commission).

<sup>130</sup> Farer, *supra* note 20, at 542.

<sup>131</sup> Pasqualucci, *supra* note 3, at 862.

## 2. Procedural Causes of Backlog and Delay

The system's procedures can foster delay in four ways. First, the requirement that domestic remedies be exhausted delays the initial filing of a petition. Second, the bifurcated nature of the system delays a binding judgment on petitions until both the Commission and the Court process the petition. Third, the Commission does not follow its procedures closely so that it can give greater leeway to governments. Fourth, the Court's interpretation of the Commission's role as advocate causes duplicative review processes.

### a. Facilitating the Exhaustion of Domestic Remedies

Because petitions are inadmissible if domestic remedies are not exhausted, delay may occur while the petitioner navigates the domestic legal system. However, the requirement that domestic remedies be exhausted is necessary to preserve state sovereignty.<sup>132</sup>

Although this necessary requirement does foster delay, exceptions to the rule facilitate the processing of petitions. Domestic remedies need not be exhausted if they are not realistic possibilities.<sup>133</sup> Indigent petitioners and petitioners unable to secure legal counsel because of generalized fear in the legal community need not exhaust domestic remedies.<sup>134</sup> Lastly, the requirement that the State asserting non-exhaustion demonstrate the existence of effective domestic remedies prevents government stonewalling.<sup>135</sup> These exceptions facilitate the lodging of a petition within the system, limiting the harshness of a necessary rule.

### b. The Inefficiency of a Bifurcated System

The bifurcated nature of the system is another source of delay.<sup>136</sup> As is apparent from the system's procedures, the Commission's need to maintain flexibility causes much time to pass before it takes definitive action. When the Commission does forward a case to the Court, a final disposition of the matter in question takes even longer, as can be seen from the Velásquez case mentioned above.

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<sup>132</sup> See Cerna, *supra* note 125, at 85.

<sup>133</sup> See American Convention, *supra* note 14, art. 46(2)(a)-(c).

<sup>134</sup> See Exceptions to the Exhaustion of Domestic Remedies, *supra* note 34.

<sup>135</sup> See Velásquez Rodríguez Case (Preliminary Objections) (Judgment of June 26, 1987), Inter-Am. Ct. H.R. (ser. C) No. 1, at para. 59 (1987).

<sup>136</sup> See Pasqualucci, *supra* note 39, at 307-09.

### c. Bending the Rules

The Commission has often been criticized for failing to adhere to its procedures.<sup>137</sup> When the first contentious cases were heard by the Court, the Commission had “never really learned to file proper reports the way the Convention requires,” forcing the Court to do a great deal of fact-finding on its own.<sup>138</sup> The need for flexibility stems from the dependence of the Commission on the political organs of the OAS.<sup>139</sup> The Commission is a prisoner “of the unending paradox of having been created and being nourished directly by the subjects” it is meant to regulate.<sup>140</sup> The Commission is required to obtain express authorization from the secretary-general of the OAS any time an expenditure exceeds \$50, which clearly shows the vulnerable position of the Commission.<sup>141</sup> The Commission also needs to be flexible because it cannot render decisions that are binding upon Member States, unlike the Court. Inflexibility limits the Commission’s ability to secure compliance and increases the odds of retaliation by the objects of its investigations.

### d. The Role of the Commission Before the Court

The Court’s treatment of the Commission also fosters delay. As mentioned above, the Commission is intended to be a *ministerio publico* before the Court.<sup>142</sup> However, the Court treats the Commission as the petitioner’s representative and has asserted the right to reject the Commission’s factual findings.<sup>143</sup> The Court’s position ignores the Commission’s broad role within the system for which the appearance of impartiality is essential.<sup>144</sup> The Court’s stance denies it the opportunity to take advantage of the Commission as a fact-finder. This increases the probability of unnecessarily duplicative processes by requiring independent review of the facts by both the Commission and the Court in some cases.

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<sup>137</sup> See Committee on International Human Rights, *supra* note 122, at 592-97, 601-04, 607-09, 618.

<sup>138</sup> Frost, *supra* note 67, at 180.

<sup>139</sup> See Vivanco, *supra* note 28, at 79.

<sup>140</sup> Gómez, *supra* note 68, at 173.

<sup>141</sup> See Vivanco, *supra* note 28, at 79.

<sup>142</sup> See QUIROGA, *supra* note 19, at 169.

<sup>143</sup> See Gangaram Panday Case, Judgment of Jan. 21, 1994, Inter-Am. Ct. H.R. (ser. C) No. 16, at para. 41 (1994).

<sup>144</sup> See MEDINA QUIROGA, *supra* note 19, at 169-70.

### III. THE PROBLEM OF DELAY AND THE UNDERMINING OF THE DEATH PENALTY

As is apparent from the above discussion, systemic and procedural factors cause delay and backlog in the Inter-American system. The delay and backlog causes a particular problem in the processing of death row petitions. Section A discusses how delay undermines rationales for applying the death penalty. Section A also discusses the possibility that extended stays on death row are cruel and unusual punishment. Section B discusses the confrontation between the Inter-American system and its Caribbean members concerning the relationship between delay and the death penalty.

#### A. *Death and Delay Generally*

Procedural delay tends to undermine arguments in favor of the death penalty. Death penalty supporters often bolster their position by arguments based on deterrent and retributive effects of the death penalty.<sup>145</sup> Lengthy stays on death row undermine both rationales for the application of the death penalty. Additionally, such delay may be cruel, unusual, inhuman, or degrading punishment.

First, increasing the amount of time between conviction and execution undermines deterrence by attenuating the connection between execution and conviction.<sup>146</sup> The "deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks."<sup>147</sup> The imminence of death, rather than the abstract concept of death, is the primary reason the death penalty can be an effective deterrent.<sup>148</sup> Removing the imminence factor robs the death penalty of its deterrent value.<sup>149</sup>

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<sup>145</sup> See Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 966 (1985).

<sup>146</sup> See *Lackey v. Texas*, 514 U.S. 1045, 1046 (1995)(mem.)(noting that the deterrent effect of execution after 17 years on death row is minimal).

<sup>147</sup> Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035, 1041-42 (1989) (quoting *Kuhlman v. Wilson*, 477 U.S. 436, 452-53 (1986) (plurality opinion of Powell, J.)).

<sup>148</sup> See ROGER E. SCHWED, *ABOLITION AND CAPITAL PUNISHMENT* 40 (1983). Arguably, the psychological harm of awaiting death could also be a deterrent. However, if the death penalty itself does not operate as a deterrent, it is unlikely that awaiting death could be a deterrent either.

<sup>149</sup> This demonstrates the fundamental flaw with the deterrence rationale. The desire to protect the rights of the accused, even minimally, will likely result in a delay that undermines that rationale. However, this Note proceeds on the assumption that any reduction in delay results in a corresponding increase in deterrent value.

Second, delays in the application of the death penalty also undermine the retribution rationale. “[T]o the extent that the desire to kill someone for revenge diminishes with the time elapsed after his offense, the long delay between the apprehension of a suspect and his execution may entirely subvert the goal of retribution.”<sup>150</sup> Also, the psychological harm of awaiting death, combined with actual execution, often exceeds the limits of retribution.<sup>151</sup>

Third, the psychological harm associated with awaiting death may constitute cruel and unusual punishment. Awaiting execution on death row can cause an individual severe mental suffering.<sup>152</sup> “Such an individual is . . . deprived of all the creature comforts of life, forced to contemplate a sudden and violent death by a means already ordained and known to him or her. It is a period during which the soul and spirit of any mortal is severely tested.”<sup>153</sup> One prisoner spoke of a recurrent nightmare in which he dreamt of himself “walking down the tier, sitting down in it, then hooking it up and turning it on.”<sup>154</sup> Waking up sweating, the prisoner felt as if he were having a heart attack.<sup>155</sup> The adverse psychological effects of awaiting death over a long period of time are clear.

Some national and international courts have recognized such psychological effects as the “death row phenomenon” and found the phenomenon to be cruel, unusual, inhuman or degrading punishment. The European Court of Human Rights, for example, refused to allow extradition of a German national to the United States on a murder charge because of the death row phenomenon, holding that the physical and mental conditions

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<sup>150</sup> SCHWED, *supra* note 148, at 45.

<sup>151</sup> See *Lackey v. Texas*, 514 U.S. at 1045 (stating that the State’s retributive interest may already be satisfied by the punishment inflicted by the prolonged stay on death row).

<sup>152</sup> See DAVID PANNICK, *JUDICIAL REVIEW OF THE DEATH PENALTY* 72, 84, 86-87 (1982).

<sup>153</sup> Watt Espy, *Facing the Death Penalty*, in *FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* 27, 27 (Michael L. Radelet ed., 1989).

<sup>154</sup> ROBERT JOHNSON, *CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH* 88 (1981). See generally BURTON H. WOLFE, *PILEUP ON DEATH ROW* (1973) (discussing the impact of conditions on death row on condemned prisoners); Espy, *supra* note 153 (discussing the thoughts and emotions of prisoners on death row); William A. Schabas, *Developments in Criminal Law and Criminal Justice: Execution Delayed, Execution Denied*, 5 CRIM. L.F. 180 (1994) (discussing the growing judicial sentiment that delayed execution constitutes inhuman treatment); Richard E. Shugrue, “A Fate Worse Than Death” – *An Essay on Whether Long Times on Death Row are Cruel Times*, 29 CREIGHTON L. REV. 1 (1995).

<sup>155</sup> See JOHNSON, *supra* note 154.

of prisoners on death row in Virginia constitute cruel and unusual punishment.<sup>156</sup>

Although the U.S. Supreme Court has not decided the issue, one Justice has recognized its significance in *Lackey v. Texas*.<sup>157</sup> Charles Allen Lackey, the defendant, argued that his execution after seventeen years on death row would violate the Eighth Amendment's prohibition of cruel and unusual punishment.<sup>158</sup> Although the Court denied certiorari, Justice Stevens noted that the claim was "not without foundation."<sup>159</sup> Because the benefits of the death penalty seemed minimal, a "penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment."<sup>160</sup> Nevertheless, the Court postponed consideration of the issue.<sup>161</sup>

### B. *Death and Delay in the Caribbean: The Inter-American System's New Challenge*

The most significant court decision concerning the death row phenomenon took place in the Caribbean. The importance of the decision can only be understood in the context of the political climate in the region. Executions have increased due to the rise in violent crime.<sup>162</sup> Jamaica saw a new record in the number of murders in 1997, at 1,038.<sup>163</sup> The rise in violent crime has created corresponding domestic support for moving away from the de facto abolition of the death penalty in the Caribbean.<sup>164</sup> For example, in the Bahamas "[d]ozens of Bahamians cheered when death notices from the gallows were solemnly posted after two executions."<sup>165</sup>

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<sup>156</sup> See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 5-6 (1989); see also Renee E. Boxman, Comment, *The Road to Soering and Beyond: Will the United States Recognize the "Death Row Phenomenon?"*, 14 HOUS. J. INT'L L. 151, 151, 162 (1991).

<sup>157</sup> See *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (mem.) (postponing consideration of the "death row phenomenon"); see also Shugrue, *supra* note 154, at 3.

<sup>158</sup> See *Lackey v. Texas*, 514 U.S. at 1045.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1046.

<sup>161</sup> See *id.* at 1045; see also *McKenzie v. Day*, 57 F.3d 1461, 1484-89 (9th Cir. 1995) (Norris, J., dissenting) (supporting an Eighth Amendment claim based on delay in execution).

<sup>162</sup> See ROGER HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* ¶ 45 (2d ed. 1996).

<sup>163</sup> See Shelley Emling, *Crime Epidemic Revives Hangings in Caribbean*, ATLANTA J.-CONST., Sept. 20, 1998, at A14.

<sup>164</sup> See *id.*

<sup>165</sup> *Bahamians Applaud News of Executions*, BOSTON GLOBE, Oct. 16, 1998, at A21.

However, a recent decision of the Judicial Committee of the Privy Council complicated the application of the death penalty in the Caribbean.<sup>166</sup>

In *Pratt v. Jamaica*, the Privy Council recognized the death row phenomenon and held that a delay of more than five years creates a presumption of "inhuman or degrading punishment or other treatment."<sup>167</sup> Such a delay requires commutation of the prisoner's sentence to life imprisonment.<sup>168</sup> The presumption of inhuman or degrading punishment exists not only when the State is at fault for creating the delay by its action or inaction, but also when the prisoner is legitimately utilizing all avenues of appeal made available by the State.<sup>169</sup> If the delay is due to the escape from custody of the accused or his frivolous use of the appellate process in order to waste time, however, this rule does not apply.<sup>170</sup>

In response to the *Pratt* decision, the Caribbean countries are attempting to streamline the appellate process for death row prisoners.<sup>171</sup> These efforts necessarily address the procedures of the Inter-American system and possibly undermine the system's legitimacy. Even if a Member State can reduce delay in domestic courts, the Caribbean efforts would be to no avail if delay is not addressed in the Inter-American system. Delay at this level contributes years to the appellate process, as is evident from the above discussion of the system's procedures. For example, Trevor Fisher and Richard Woods, the two Bahamians who were executed, had been convicted in 1994 and 1995, respectively, and appealed the sentences to the Inter-American Commission on Human Rights in 1996.<sup>172</sup> By October of 1998, the Commission had taken no action other than to encourage the Bahamas to stay the execution.<sup>173</sup>

Jamaica and Trinidad and Tobago have responded to delay by attempting to impose time limits on the Commission's processing of individual petitions.<sup>174</sup> The Court has heard oral argument concerning these

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<sup>166</sup> The Privy Council is the highest court of appeal in some cases in the British Commonwealth. See Roget V. Bryan, *Toward the Development of a Caribbean Jurisprudence: The Case for Establishing a Caribbean Court of Appeal*, 7 J. TRANSNAT'L L. & POL'Y 181, 183-87 (1998) (discussing the history and jurisdiction of the Judicial Committee of the Privy Council).

<sup>167</sup> See *Pratt v. Attorney Gen. for Jamaica*, 4 All E.R. 769, 788-89 (P.C. 1993).

<sup>168</sup> See *id.*

<sup>169</sup> See *id.* at 786-87.

<sup>170</sup> See *id.* at 783.

<sup>171</sup> See Emling, *supra* note 163.

<sup>172</sup> See *Bahamians Applaud News of Executions*, *supra* note 165.

<sup>173</sup> See *id.*

<sup>174</sup> See Estrella Gutierrez, *Rights-Americas: Trinidad and Tobago Stands up to OAS*, Inter Press Service, June 4, 1998, available in 1998 WL 5987579.



external time limits, but has yet to render a decision.<sup>175</sup> Despite an urgent appeal by the President of the Court, Trinidad and Tobago refused to attend the hearing and notified the Court that it would not accept responsibility for the Commission's procedural failures.<sup>176</sup> Meanwhile, Trinidad and Tobago defied the Court by setting the date for the execution only days after the Court ordered provisional measures to protect the lives of the petitioners.<sup>177</sup> The Court reported Trinidad and Tobago's intransigence to the OAS General Assembly, which failed to act, resulting in the execution of nine individuals within days of the General Assembly's meeting.<sup>178</sup> Thus, the Caribbean countries have announced their intention to flout the measures rather than risk having to commute sentences to life imprisonment.<sup>179</sup>

Under the status quo, appeals through local courts and up to the Inter-American system are likely to exceed the five-year limit imposed by the Privy Council.<sup>180</sup> The Privy Council estimated that appeal to international organizations such as the Commission should take approximately eighteen months.<sup>181</sup> The process before the Commission is longer than the Privy Council estimated, fueling the suspicions of the Caribbean countries.<sup>182</sup> The Caribbean countries believe that the Inter-American system and the Privy Council are conspiring to undermine application of the death penalty.<sup>183</sup>

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<sup>175</sup> See Schiffrin, *supra* note 2, at 567. Jamaica imposed a seven-month restriction on proceedings before the Commission, and Trinidad and Tobago has imposed a similar limit. *See id.* at 567 & n.31. The Privy Council held that such action was not legitimate. *See* Wesley Gibbings, *Rights: Trinidad and Tobago Temporarily Thwarted on Death Penalty*, Inter Press Service, Jan. 28, 1999, available in 1999 WL 5946798 (1999). The Privy Council allotted eighteen months for review by the Commission or the U.N. Human Rights Committee. *See* Pratt, 4 All E.R. at 788; Schiffrin, *supra* note 2, at 567.

<sup>176</sup> *See* Corte Interamericana de Derechos Humanos, *Comunicado de Prensa* (visited Sept. 10, 1999) <<http://corteidh-oea.nu.or.cr/ci/Prensa/Doc9.htm>>.

<sup>177</sup> *See* *Trinidad Plans to Hang 5 Killers*, SUN-SENTINEL (Ft. Lauderdale, Fla.), June 25, 1998, at 22A.

<sup>178</sup> *See* Douglas W. Cassell Jr., *Court's Promise Now in Peril*, CHI. DAILY L. BULL., July 13, 1999, at 6.

<sup>179</sup> *See* *Bahamas Will Hang Two Killers Despite Opposition*, GRAND RAPIDS PRESS, Oct. 15, 1998, at D11, available in 1998 WL 19040981. Lest this action be taken as mere posturing, it is important to note that Trinidad and Tobago has shown itself willing to execute prisoners even while appeals were pending, as happened when Glen Ashby was executed on July 14, 1994. *See* HOOD, *supra* note 162, at 127.

<sup>180</sup> *See* Schiffrin, *supra* note 2, at 567.

<sup>181</sup> *See* Pratt, 4 All E.R. at 788 (P.C. 1993).

<sup>182</sup> *See* Eric Nurse, *Jamaica Premier: Keep Death Penalty*, Associated Press, Nov. 2, 1998, available in 1998 WL 21782233 (discussing Jamaica's accusations that international organizations and the Privy Council are conspiring to abolish the death penalty in the Caribbean).

<sup>183</sup> *See* *Bahamas Will Hang Two Killers Despite Opposition*, *supra* note 179.

Jamaica and Trinidad and Tobago are withdrawing from the system in response to this problem, and Barbados intends to do likewise.<sup>184</sup> Expediting the procedures before the Commission and Court are necessary to address these concerns.<sup>185</sup> The measures already taken by Jamaica and Trinidad and Tobago indicate that these countries will take whatever measures are necessary to continue executions rather than risk de facto abolition of the death penalty.<sup>186</sup> Maintaining the present course will cause the Caribbean countries to leave the system. If keeping the Caribbean countries within the system is necessary to most effectively promote human rights, change is necessary.

#### IV. MAINTAIN OR REFORM? THE FUTURE OF THE SYSTEM

The Inter-American system may be weakening due to the defection of the Caribbean countries.<sup>187</sup> The future effectiveness of the system depends on its response to the concerns of these countries. Part A of this section introduces the analytical framework applied by this Note to assess the status quo and proposed reforms. Part B evaluates the status quo and concludes that adhering to current practice is detrimental to the system. Part C examines several possible reforms, and recommends an optional fast track process for death row petitioners as the most effective reform.

##### A. *Evaluation Criteria*

An ideal situation would maintain or enhance the system's protection of human rights in four primary areas.<sup>188</sup> First, the system must be capable of preventing the use of death penalty in situations prohibited by the

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<sup>184</sup> See Gutierrez, *supra* note 174. The same concerns have already prompted Jamaica to denounce the optional protocol to the International Covenant on Civil and Political Rights (which allows individual petitions under the Covenant). See Schiffrin, *supra* note 2, at 563. Trinidad and Tobago has done likewise. See *id.* at 567 n.31. The Caribbean countries are also moving to withdraw from the jurisdiction of the Judicial Committee of the Privy Council. See Michelle Faul, *Caribbean May Use Death Penalty*, Associated Press, June 4, 1999, available in 1999 WL 17810547. Ironically, in its decision the Privy Council stated that they "wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefiting from the wisdom of their deliberations." Pratt, 4 All E.R. at 788.

<sup>185</sup> Cf. José Miguel Vivanco, *HRW and CEJIL Call on Trinidad and Tobago to Reconsider Withdrawal from the American Convention on Human Rights* (visited Sept. 1, 1998) <<http://www.hrw.org/hrw/press98/june/t&t0604.htm>> (urging Trinidad and Tobago to support reform by expediting the system rather than by withdrawing from the system).

<sup>186</sup> See HOOD, *supra* note 162, at 44-46.

<sup>187</sup> See Cassell, *supra* note 178.

<sup>188</sup> These may not be the only possible areas of concern for the system, but they seem most pertinent here.

American Convention. Under Article 4, the death penalty may not be extended to crimes to which it does not apply at the time of ratification or be reestablished in States where it has been abolished.<sup>189</sup> Capital punishment is prohibited for political offenses or related common crimes.<sup>190</sup> States Parties may not execute persons below the age of eighteen, persons above the age of seventy, and pregnant women.<sup>191</sup> An ideal solution would allow the system to monitor compliance with these prohibitions.

Second, the system must be capable of preventing unjust application of the death penalty. This requires that the system have the ability to ensure conformity with the requirements of procedural due process as protected in the American Convention.<sup>192</sup>

Third, the system must prevent protracted stays on death row because of the human rights concerns arising as a result of such delays. Although the Convention does not explicitly recognize the death row phenomenon as a human rights concern, its growing recognition as "cruel, inhuman, or degrading punishment or treatment" could incorporate it under Article 5 of the Convention.<sup>193</sup>

Fourth, and most importantly, protecting human rights in non-death penalty cases must not be prejudiced.<sup>194</sup> Because death penalty cases are only a portion of all cases proceeding through the system, victims of non-death penalty related human rights abuses must be protected while efforts are made to reform the system as applied to death penalty petitions. While efforts to make the system more efficient could also benefit these victims by streamlining the petition process generally, some of these victims could lose access to the system as a result of reforms. This Note assumes that a greater number of persons protected takes precedence over efficiency concerns.

The system's performance in these areas is affected by the perceived impact upon domestic criminal justice systems. If a Member State feels its criminal justice goals are subverted because of the system, it is less likely to support the system and more likely to withdraw from its obligations, thus weakening the system. One way this may occur is if the system's long delays undermine the deterrent and retributive goals of applying the death penalty. A second way this may occur is when a reform significantly strengthens the system and threatens to significantly interfere with domestic criminal justice systems. The negative criminal justice effects could induce

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<sup>189</sup> See American Convention, *supra* note 14, art. 4(2)-(3).

<sup>190</sup> See *id.* art. 4(4).

<sup>191</sup> See *id.* art. 4(5).

<sup>192</sup> See *id.* art. 8

<sup>193</sup> *Id.* art. 5.

<sup>194</sup> Other possible areas of human rights protection exist, but for purposes of this evaluation these areas seem to be the most salient.

State parties to the American Convention to withdraw from the system or prevent non-parties from ratifying the Convention. Because only twenty-five of the thirty-five Member States of the OAS have ratified the American Convention, of which seventeen have accepted the compulsory jurisdiction of the Court,<sup>195</sup> it is essential that no course of action cause this result in the absence of countervailing benefits to the system in the above areas.

The effects upon the criminal justice system in the United States and the impact upon the possibility of ratification of the American Convention by the United States are of particular concern. The United States' ratification of the American Convention and accession to the Court's jurisdiction may influence other States to do likewise, bolstering the strength of the system.<sup>196</sup> Although the primary reason for United States' failure to ratify the American Convention is protection of its sovereignty,<sup>197</sup> the evident concern for delay caused by domestic legal processes<sup>198</sup> tends to show that further delay caused by international institutions will meet considerable resistance in the United States.<sup>199</sup> Even if the U.S. Supreme Court does not recognize the death row phenomenon, the long delays in the death penalty process do undermine the deterrence rationale, one

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<sup>195</sup> See Christina M. Cerna, *International Law and the Protection of Human Rights in the Inter-American System*, 19 HOUS. J. INT'L L. 731, 737 (1997).

<sup>196</sup> See James C. Kitch, Note, *The American Convention on Human Rights: The Propriety and Implications of United States Ratification*, 10 RUT.-CAM. L.J. 359, 394 (1979). This seems especially true in light of the effect of the Carter administration's support for the Inter-American Convention on Human Rights, which persuaded enough countries to ratify the Convention to bring it into force. See Farer, *supra* note 20, at 520-21. Of course, this logic relies on the assumption that the United States would adhere to the Court's decisions, a dubious proposition. See Corbera, *supra* note 126, at 945-49.

<sup>197</sup> See Cerna, *supra* note 195, at 732-39.

<sup>198</sup> See Donald L. Beschle, *What's Guilt (or Deterrence) Got to Do With It?: The Death Penalty, Ritual, and Mimetic Violence*, 38 WM. & MARY L. REV. 487, 499-500 (1997) (referring to the U.S. Supreme Court's "growing impatience with the length of postconviction proceedings"); Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1673-75 (1986) (noting that expedited procedures are responsible for the current level of executions); Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 4-5 (1986) (discussing the "Rush to Judgment," the "willingness of courts and the state governments to expedite proceedings in order to bring about speedy executions").

<sup>199</sup> U.S. resistance to the World Court's order that it stay the execution of Paraguayan national Angel Breard supports the argument that the United States will fight measures of international courts that result in prolonging the immediacy of executions. Cf. Douglass Cassel, *The World Court, Washington and the Rule of Law*, CHI. TRIB., Apr. 13, 1998, at 11; Philippe Sands, *An Execution Heard Round the World*, L.A. TIMES, Apr. 16, 1998, at B9.

justification for the death penalty in the United States.<sup>200</sup> Failure to address long delays will give the United States another reason not to subject itself to the system's procedures.<sup>201</sup> If the United States shows tangible support for the system, i.e. by ratifying the Convention and acceding to the contentious jurisdiction of the Court, the system could attain the level of strength it held in the early 1980s. The importance of the United States' actions in securing support for the system is essential.<sup>202</sup>

### B. *The Failure of the Status Quo to Protect Human Rights*

Although domestic politics within the Caribbean may yet cause Jamaica and Trinidad and Tobago to back down from threats to withdraw from the system, these countries will most likely adhere to their present course because of the negative effects upon their domestic criminal justice systems. Since this will reduce the system's ability to protect human rights overall, the status quo must be abandoned.

#### 1. The Failure of the Status Quo to Prevent the Death Penalty

Under the status quo, the system will not be able to prevent the use of the death penalty in a manner inconsistent with the American Convention. The long procedural delays harm Jamaica's and Trinidad and Tobago's criminal justice systems. Frustrated by this, they intend to withdraw from the system to ensure their ability to execute prisoners. This result is not outweighed by any apparent countervailing effect upon the goal of preventing the death penalty. Although keeping these Member States within the system will not prevent the use of the death penalty in these countries, the American Convention would limit the class of permissible uses.<sup>203</sup> By inducing these Member States to leave the system, the status quo will prevent the system from monitoring compliance with death penalty prohibitions found in Article 4.

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<sup>200</sup> See *Lackey v. Texas*, 514 U.S. 1045, 1046 (1995) (mem.) (noting that the deterrent effect of execution after seventeen years on death row is minimal).

<sup>201</sup> From the American Convention's inception, the United States has had many objections to the Convention. See *Kitch*, *supra* note 196, at 376-87 (discussing the State Department's reservations to the Convention's provisions).

<sup>202</sup> The importance of U.S. support was also evident in relation to on-site investigations conducted by the Commission. In 1977, the United States revived the then dormant on-site investigation by supporting an increase in the Commission's budget and allowing the Commission to conduct an investigation on U.S. territory. See Robert E. Norris, *Observations In Loco: Practice and Procedure of the Inter-American Commission on Human Rights*, 15 TEX. INT'L L.J. 46, 47 (1980). Within the next year, two investigations had been conducted, two others were being planned, and the General Assembly of the OAS recommended that Member States consent to on-site investigations. See *id.* at 47-48.

<sup>203</sup> See American Convention, *supra* note 14, art. 4.

## 2. The Failure of the Status Quo to Prevent Unjust Application of the Death Penalty

The loss of Member States due to the perceived negative effect of delay upon their criminal justice processes will also reduce the system's ability to prevent unjust application of the death penalty. Arguably, the Commission and the Court can more closely scrutinize those countries remaining within the system to ensure the observance of procedural due process. Having more time to investigate allows the Commission to be more accurate in preventing the unjust application of the death penalty. This benefit will be minute, however, if most petitions are not death penalty-related. Thus, the defection of the Caribbean countries will not be offset by greater protection for those cases processed within the system.

## 3. The Failure of the Status Quo to Prevent Protracted Stays on Death Row

The system's delays will add to protracted stays on death row. The reduction in the number of countries monitored by the Commission and the Court will reduce the system's ability to prevent protracted stays on death row. The system's failure to address delays in death penalty cases will result in a possible violation of Article 5 in countries that remain within the system, if the death row phenomenon is recognized as a human rights violation in the system. Only States outside of the system will be able to reduce delay. Thus, any positive effect the status quo has in this area is due to the efforts of those countries that leave or remain outside of the system, rather than by any activities of the system itself.

## 4. The Failure of the Status Quo to Protect Human Rights in Non-Death Penalty Cases

The system's ability to protect human rights in cases involving non-death penalty related human rights violations will be significantly damaged under the status quo. A State's withdrawal from the American Convention will remove all protections for citizens of that State, in both death penalty and non-death penalty cases.<sup>204</sup> Such an extreme result is unjustifiable in the absence of strong reasons for not addressing the cause of the delay. This Note argues that delay can be addressed without engendering strong reasons against change.

The Caribbean defection must be halted to prevent these negative effects from coming to pass. If reform is possible with less detrimental effects than those that exist under the status quo, such reform must be attempted.

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<sup>204</sup> See Vivanco, *supra* note 185.

### C. *Reforming the System*

Reform without decay is possible. This section anticipates the effects of several possible reforms, most of which are procedural.<sup>205</sup> This Note emphasizes the need to protect human rights as widely as possible. For this reason, litigation prevention measures that may be helpful in domestic legal systems are inappropriate.<sup>206</sup> Also, the Commission itself is partly an alternative dispute resolution mechanism through its friendly settlement procedure, so such measures are improper as well. This Note focuses on procedural streamlining and case management techniques, although mention is made of institutional reforms as well.

This section evaluates five options for reform. First, the Commission and the Court could be made full-time institutions. Second, changing the Commission's role before the Court could make the process less duplicative. Third, stricter adherence to the Commission's procedures could be required. Fourth, the Commission and the Court could be merged along the lines of the proposed merger of their European counterparts. Lastly, this Note evaluates a fast track process for death penalty petitions. This Note concludes that of all the foregoing proposals, the fast track best protects human rights by respecting domestic criminal justice systems with minimal detriment to the system's goals.

#### 1. Full-time Institutions

Increasing the system's resources so that the institutions may meet on a full-time basis could reduce delay. Such a solution, although an ideal one, is unlikely to be feasible because of the lack of available financial resources. Even were such action feasible, Member States will resist taking a step that will strengthen the system's position and enable it to significantly interfere with domestic criminal justice processes. Because this reform is infeasible, it is not further addressed here.

#### 2. Changing the Commission's Role Before the Court

Another option for reducing delay is to give the Commission a factfinding role on behalf of the Court and to require the Court to accept the findings of the Commission. This will reduce duplicative factfinding processes. The change in processing time may be insufficient, however, because most delay and backlog takes place while the Commission is

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<sup>205</sup> The contemplated effects are necessarily speculative in nature, but are based upon the history of the system.

<sup>206</sup> Shortening petition processing time may or may not prevent litigation by dissuading petitioners from filing within the system. Any delay may prompt death row petitioners to file hoping their sentences will be commuted after five years of delay.

processing the petition.<sup>207</sup> Also, the Commission could no longer act as the link between the individual and the Court because it must appear to be neutral. Thus, the individual must be accorded direct standing before the Court, a result that may be unpalatable for many States.<sup>208</sup> Unlike the Commission, individuals are not subject to political pressures, allowing them to zealously protect their interests. Thus, while some States might remain with the system because the delay problem is addressed, others will leave because they object to the enhanced status of the individual.

#### a. Effect Upon Prevention of the Death Penalty

If this reform reduces delay, the Caribbean States will remain within the system. This will allow the system to continue monitoring the use of the death penalty so it is not applied in situations prohibited by the Convention. Enhancing the individual's status within the system will interfere significantly with domestic affairs, however. This interference could induce other States to defect. Thus, the effects of this reform would be identical to the status quo.

#### b. Effect Upon Prevention of Unjust Application of the Death Penalty

This reform will cripple the system's ability to monitor procedural due process guarantees. As discussed above, the States remaining within the system will be offset by the new defectors. Even if these cancel each other out, requiring the Court to accept the Commission's factual conclusions might result in less accuracy because only a single body will review the facts. This will reduce the thoroughness of the system's oversight of domestic judicial systems.

#### c. Effect Upon Prevention of Protracted Stays on Death Row

This reform will help prevent protracted stays on death row by reducing delay. Even if the retention of the Caribbean countries is offset by the defection of States that oppose individual standing, the overall effect will be to reduce the processing time of petitions. Petitions will be processed more efficiently than they are currently for petitioners on death row in any State within the system.

#### d. Effect Upon Non-Death Penalty Cases

This reform will not successfully protect the greatest number of people from abuse of their human rights. The overall number of human rights

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<sup>207</sup> Cf. Cerna, *supra* note 125, at 96 (stating that the Secretariat's workload is responsible at least in part for extensions and delays).

<sup>208</sup> See Padilla, *supra* note 50, at 109-11 (noting that the Convention has only been ratified by two-thirds of the thirty-five member states of the OAS).



violations the system can monitor will remain unchanged because of the setoff between States that remain within the system and those that defect. Also, justice will be speedier in those States that remain within the system, but at the cost of reduced accuracy. Even if efficient and accurate justice were possible, the desire to ensure a more global protection of human rights should take precedence over the desire to make the system more efficient.

Thus, even if this reform were to limit the delays sufficiently, it is not the most effective choice. The potential to retain the Caribbean countries within the system may be offset by other defections and by the unwillingness of non-Parties to ratify the American Convention and accept the contentious jurisdiction of the Court. The net effect would be identical to that observed under the status quo, except for the positive effect on the system's ability to prevent protracted stays on death row.

### 3. Requiring Adherence to the Commission's Rules

The Commission often bends its rules to deal flexibly with Member States of the OAS.<sup>209</sup> Requiring the Commission to closely adhere to its own procedures and time limits has often been recommended as an important reform to the system.<sup>210</sup> This reform may ultimately prove to be infeasible due to the volume of cases the Commission processes and the inadequate resources available to allow the Commission to process petitions efficiently.<sup>211</sup> If the reform is practicable, it will increase predictability and efficiency in the processing of individual petitions. There will be a corresponding decline in the system's flexibility, however.

The lack of flexibility could result in three possible outcomes. First, the Commission will often have to act without information that it cannot obtain from Member States. Second, the Commission will not be able to coax Member States to comply with its recommendations, resulting in noncompliance and undermining the system's legitimacy. Third, Member States might choose not to participate in the system because they can no longer manipulate its procedures.

#### a. Effect Upon Prevention of the Death Penalty

The system's ability to prevent use of the death penalty inconsistent with the American Convention will not change from the status quo. The Caribbean members will be retained at the cost of losing other States and discouraging compliance. The system's institutions will have to act on incomplete information, harming its ability to monitor the use of the death penalty.

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<sup>209</sup> See *supra* Part II.B.2.c.

<sup>210</sup> See Committee on International Human Rights, *supra* note 122.

<sup>211</sup> See Cerna, *supra* note 125, at 96.

#### b. Effect Upon Prevention of Unjust Application of the Death Penalty

This reform will also diminish the system's ability to prevent the unjust application of the death penalty. Because monitoring procedural guarantees of fair trial and the like may be fact-intensive, forcing the Commission to act with incomplete information will detract from its ability to protect these rights.

#### c. Effect Upon Prevention of Protracted Stays on Death Row

The Commission's increased adherence to its rules will have a positive effect upon its ability to prevent protracted stays on death row. Protracted stays on death row will be prevented not only within the Caribbean countries, but in every State that is subject to the jurisdiction of the system.

#### d. Effect Upon Non-Death Penalty Cases

The negative effect of strict application of the Commission's procedures will be most evident in the system's ability to protect human rights generally. The Commission will no longer have the ability to bargain with governments to gain information or concessions, forcing the Commission to adopt reports with insufficient information. Also, decreasing negotiation between the institutions and the Member States will discourage state compliance with the Commission's recommendations and the Court's decisions.

Requiring stricter adherence to the Commission's rules will thus diminish the system's ability in every area except for preventing protracted stays on death row. This reform must therefore be rejected.

### 4. Merging the Commission and the Court

To avoid the expense of having two full-time institutions, the Commission and the Court could be merged to create a single Court.<sup>212</sup> This reform addresses concerns about lengthy procedures and duplicative work by the two primary institutions of each system.<sup>213</sup> If this reform creates a full-time institution, however, it will run into the same financial and political difficulties discussed above.

If this proposal is economically feasible, merging the Commission and the Court into a single Court might eliminate entirely the non-judicial functions of the Commission. These functions include conducting

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<sup>212</sup> This would create a structure similar to that contemplated by the proposed Protocol No. 11 to the European Convention on Human Rights. See DONNA GOMIEN ET AL., *LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER* 91-92 (1996).

<sup>213</sup> See Rudolf Bernhardt, *Reform of the Control Machinery Under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT'L L. 145, 146-47 (1995).

observations in loco and the production of country reports, as well as friendly settlement procedures. This would reduce the system's flexibility. Any petition being lodged could only be lodged within a body that ultimately could render a binding judgment. Currently, Member States of the OAS are reluctant to commit to the Convention and to subject themselves to the compulsory jurisdiction of the Court.<sup>214</sup> A consolidated institution capable of rendering binding judgments is premature in light of this reluctance. Also, as with making the Commission a neutral factfinder on behalf of the Court, this reform will require giving the individual standing. Creating a single tribunal with authority to render binding judgments could induce Member States of the OAS to withdraw from the system altogether.

#### a. Effect Upon Prevention of the Death Penalty

This reform's effect upon the ability of the system to prevent the use of the death penalty will not differ from the status quo. The possible retention of the Caribbean countries will be mirrored by a defection of countries that object to the lack of nonbinding procedures, especially for States that have not accepted the jurisdiction of the Court.

#### b. Effect Upon Prevention of Unjust Application of the Death Penalty

This reform will limit the system's ability to prevent the unjust application of the death penalty. Any success in keeping the Caribbean States within the system will be undermined by the loss of States that object to submission to the jurisdiction of a tribunal competent to render binding decisions. The effect will be worse than that under the status quo, however, because cases processed by the system will only be scrutinized by a single body, thus increasing the chance of error.

#### c. Effect Upon Prevention of Protracted Stays on Death Row

The effect upon prevention of protracted stays on death row is uncertain. Assuming the number of countries ultimately subjecting themselves to the jurisdiction of the system is no different from the status quo, the greater efficiency provided by a single institution rather than a bifurcated system will facilitate the individual petition process. More States might be deterred from participation than would be true under the status quo, however. Those that are deterred will not seek to reduce delay in their own domestic legal processes. Thus, the system will be unable to monitor

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<sup>214</sup> See Pasqualucci, *supra* note 39, at 310. Although the compulsory jurisdiction of the European Court has been accepted by all of the State parties to the European Convention, only seventeen of twenty-five parties to the American Convention have accepted the Inter-American Court's compulsory jurisdiction. *See id.*

the duration of stays on death row, and States outside the system may not be compelled to do so.

#### d. Effect Upon Non-Death Penalty Cases

The system's success in this area of protection depends upon the overall effect on the number of States within the system compared to the status quo. Judging by the number of States that have not acceded to the Court's jurisdiction, however, it can be assumed that this reform will result in more countries defecting from the system than would occur under the status quo. There would thus be a negative effect upon the system's ability to monitor human rights abuses in general. Also, the removal of a layer of review of the facts will diminish the system's success in this area. Whether this negative impact is an acceptable price to pay for speedy justice is a matter of dispute. However, this Note takes the position that the scope of protection should not be sacrificed for more efficient protection.

The merger solution, if feasible, is not desirable. It will limit nonbinding procedures before the Commission and deter the participation of those States that have not acceded to the Court's contentious jurisdiction.

### 5. The Fast Track Equilibrium

The most effective reform is to implement an optional "fast track" process only for petitions by death row prisoners who are challenging an abuse of their rights that may have led to the death sentence (such as the lack of a fair trial). This process would not apply to petitions in non-death penalty cases or to petitions by death row prisoners that are unrelated to the imposition of the death sentence.

Under the fast track process, the Commission would prioritize petitions by death row prisoners over all other petitions in the admissibility review process. In addition to applying existing admissibility grounds, the Commission determines whether the alleged abuse bears a significant impact upon the imposition of the death sentence. Upon deciding that the petition meets these requirements, the Commission forwards the case to the Court.

The Commission then gathers facts on behalf of the Court, and the Court accepts the Commission's factual conclusions unless controverted by sufficient evidence produced by the State or by the petitioner. This process would eliminate the possibility of duplicative work created by the Court's decision in *Gangaram Panday*,<sup>215</sup> but only in death penalty cases. If the Court is not involved in appellate review, as it asserted in *Gangaram*

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<sup>215</sup> See *Gangaram Panday Case*, (Judgment of Jan. 21, 1994), Inter-Am. Ct. H.R. (ser. C) No. 16, at para. 41 (1994) (explaining that the Court is not bound by the Commission's findings).

*Panday*,<sup>216</sup> there should be no difficulty in eliminating the Commission's nonbinding decision and the factual determinations because the Court claims it conducts a *de novo* investigation.

Under the fast track process individuals could have standing to contest the factual conclusions of the Commission and to argue based on those facts before the Court, but only in this particular class of cases. Direct access to the Court allows the individual to effectively exercise his rights and permits the more cooperative relationship between the Commission and the Court contemplated above.<sup>217</sup>

The increased use of the Court's contentious jurisdiction could be considered a threat,<sup>218</sup> as could giving the individual standing before the Court.<sup>219</sup> This threat can be alleviated, however, by implementing the fast track as an optional protocol to the Convention. This assures that States voluntarily submit to the process. Limiting the process to death penalty petitions only also diminishes this threat.

The likely result of implementing the fast track process as an optional protocol relating to a select class of petitions is that only States concerned with delay in the application of the death penalty will adopt the fast track. Those that fear the proposal will strengthen the system need not ratify the optional protocol. The fast track option thus allows the system to maximize the number of countries in which it can monitor the use of the death penalty so that it is only used as specified in the Convention. Also, limiting the fast track process to death penalty petitions will prevent detrimental effects on other areas of concern.

Facilitating death penalty petitions through the system quickly may decrease the caseload of both institutions. If the current delays encourage death row prisoners to use the system to prevent their execution, the knowledge that there will be no significant delays will discourage frivolous petitions filed for the sole purpose of producing delay. Thus, the overall effect could be a reduction in cases. There may be salutary effects of a proposal that eliminates some cases from the Commission's docket. Perhaps the most significant effect is that the Commission could direct some of its resources toward the publication of country reports or thematic reports.

While the Commission may see a reduction in its workload, the Court's docket will probably grow, necessitating more frequent sessions. In accordance with Article 16 of the Court's statute, judges must remain at the Court's disposal and "travel to the seat of the Court . . . as often and for as

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<sup>216</sup> *See id.*

<sup>217</sup> *See Vivanco, supra* note 28, at 86-87.

<sup>218</sup> *See Corbera, supra* note 126, at 940-43.

<sup>219</sup> *See Padilla, supra* note 50, at 108-11.

long a time as may be necessary.”<sup>220</sup> The necessity of more frequent meetings could cause financial difficulties because the compensation for the Court’s judges is based on the obligations and incompatibilities Articles 16 and 18 impose on them.<sup>221</sup> The feasibility of the fast track option may be limited by the resources of the Court and the infrequency of its meetings. The judges on the Court have acknowledged that an increased volume of cases, which might be caused by the fast track option, will require the Court to modify its methodology.<sup>222</sup> Granting the petitioner greater control over the fact-finding process may alleviate this concern over the volume of cases. Judges could also increasingly make use of information technology in their deliberations.<sup>223</sup>

#### a. Effect Upon Prevention of the Death Penalty

The fast track will enhance the system’s ability to prevent the use of the death penalty in situations that violate the American Convention. The reform will maintain the greatest number of States within the system, allowing the widest scope of monitoring. Also, the fast track will require the Commission to flag death penalty cases and draw attention to such cases sooner than they would otherwise be addressed. Thus, violations with respect to the use of the death penalty will be prevented before a sentence can be carried out in defiance of provisional measures ordered by the Court.

#### b. Effect Upon Prevention of Unjust Application of the Death Penalty

The effect of the fast track process on the prevention of the unjust application of the death penalty will probably be positive. If those States that would otherwise leave the system over concerns with the death row phenomenon approve the optional protocol, more death penalty petitions will be monitored than under the status quo. At the same time, however, the reduced time available to scrutinize petitions will diminish the certainty of the system’s decisions. This tradeoff will be isolated by implementing the fast track as an optional protocol, so that only those States that would have removed themselves from scrutiny altogether will be affected. This will allow greater scrutiny of States that do not adopt the protocol. If States that would not have defected under the status quo adopt the protocol, the reduced scrutiny could have a neutral or negative effect.

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<sup>220</sup> Statute of the Court, *supra* note 74, at art. 16.

<sup>221</sup> *See id.* at art. 17.

<sup>222</sup> *See Frost, supra* note 67, at 187-89.

<sup>223</sup> *Cf. id.* at 189 (stating that telephones and fax machines have allowed judges to maintain continuity of communications during deliberations).

### c. Effect Upon Prevention of Protracted Stays on Death Row

The fast track will reduce the incidence of the death row phenomenon. The Caribbean States will remain within the system without fear of delay undermining their criminal justice processes. Other States may be attracted by the optional protocol as well. The fast track proposal will reduce delay in death penalty cases for those countries that ratify the optional protocol, and at worst, will have no effect upon countries that choose not to ratify the protocol. Additionally, if the system eventually recognizes the death row phenomenon as a human rights violation, a mechanism will already be in place to reduce delay within the system. States attempting to reduce domestic delay can do so with the assurance that the system will not significantly add to delays.

### d. Effect Upon Non-Death Penalty Cases

The fast track process will improve the system's protection of human rights in non-death penalty cases by ensuring that the system has the broadest jurisdictional scope. The fast track will retain the Caribbean States within the system so that the system can monitor all abuses in these countries. The effect upon non-death penalty cases in other countries is not so certain, however. The priority given to death penalty petitioners by the system could result in a diminishing emphasis on non-death penalty cases. As already mentioned, however, this Note assumes that a wider scope of application takes precedence over efficiency concerns.

The fast track proposal will result in an overall positive effect upon the four goals not currently advanced under the status quo. The system will be able to widely monitor the application of the death penalty and the procedural safeguards of death penalty petitioners. Also, the proposal prevents protracted stays on death row by limiting delay within the system. Lastly, the fast track does not undermine human rights protection in non-death penalty cases. The system will continue its present procedures in these cases. This will give the Commission leeway to negotiate with States and prevent threats to domestic criminal justice processes that arise under other options for strengthening the system. Lastly, the potential for the use of thematic reports in all of these areas due to the transfer of some duties from the Commission to the Court will best protect human rights overall.

## V. CONCLUSION

The Inter-American system for the protection of human rights is facing a crisis. States are withdrawing from the system to secure effective application of the death penalty. The defection of these countries from the system undercuts the legitimacy of the system, which ultimately must rely on the support of Member States as the source of the system's strength. The scope of the system's purview is also diminished, preventing it from maximizing its goals. The system does not have a legitimate countervailing

interest in holding its ground. A fast track for death penalty-related petitions would respond to the concerns of these countries without sacrificing the system's goals. The fast track would accomplish this result while maintaining, or even enhancing, the performance of the system in four areas. First, the fast track will allow the system to prevent the application of the death penalty in circumstances inconsistent with the American Convention. Second, the system will be able to monitor the greatest number of States to ensure observance of procedural rights that prevent the unjust application of the death penalty. Third, the fast track process will prevent long delays in the application of the death penalty. Fourth, implementing the fast track process as an optional protocol ensures the widest scope of countries within the system's jurisdiction and allows greater monitoring of human rights violations in non-death penalty settings. The fast track process advances these goals more effectively than the status quo or other reforms.



