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# The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law

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# THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: ESTABLISHING PRECEDENTS AND PROCEDURE IN HUMAN RIGHTS LAW

JO M. PASQUALUCCI\*

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## I. INTRODUCTION

The underdeveloped nations of Latin America, Africa, Asia, and Eastern Europe suffer from similar human rights problems and abuses. Large segments of the populations of these Third World states live in widespread poverty,<sup>1</sup> which contributes to

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1. See INTERNATIONAL COMMISSION FOR CENTRAL AMERICA RECOVERY AND DE-

political instability. Population pressures are often high,<sup>2</sup> literacy rates are low,<sup>3</sup> access to education is limited,<sup>4</sup> and many people face daily misery, injustice and exploitation.<sup>5</sup> Social and economic oppression gives rise to political oppression, which may result in ruthless violations of human rights.<sup>6</sup> Moreover, much of the population has no means of redress for these violations.

Some Third World states are still governed by the rule of man rather than by the rule of law.<sup>7</sup> In states governed by dictatorships or controlled by the military, disappearances, summary executions, and torture may be employed by the government to intimidate the population and maintain control.<sup>8</sup> In many na-

VELOPMENT, POVERTY, CONFLICT AND HOPE: A TURNING POINT IN LATIN AMERICA (Report for the use of the Committee on Foreign Relations, United States Senate) (1989) [hereinafter POVERTY, CONFLICT AND HOPE].

2. As of 1990, Africa's population was 642,580,000 with an estimated average increase between the years 1990-2000 of 2.9% per annum; Asia had a population of 3,117,842,000 with an annual increase of 1.7%; Latin America and the Caribbean had a population of 441,066,000 with an annual increase of 1.7%. UNESCO, 39 STATISTICAL YEARBOOK, 1-5 (1994). See generally Enrique Carrasco, *Law, Hierarchy and Vulnerable Groups in Latin America: Toward a Communal Model of Development in a Neo-Liberal World*, STAN. J. INT'L L. 221, 315-24 (1994) (providing graphs on Latin American income, education, literacy, unemployment, etc.).

3. Of the 948 million illiterates over the age of fifteen estimated for 1990, ten countries account for 705 million, or 74.3% of the world's illiterate population — six are in Asia, three are in Africa, and one is in Latin America. India had an illiteracy rate of 51.8%, China 26.7%, Pakistan 65.2%, Bangladesh 64.7%, Indonesia 23.0%, Iran 46%, Nigeria 49.3%, Egypt 51.6%, Sudan 72.9%, and Brazil 18.9%. UNESCO 26:31 COMPENDIUM OF STATISTICS ON ILLITERACY 9 (1990).

4. In 1989, the richest 20% of the population in Latin America received nearly 50% of all educational subsidies, while the poorest 20% received only 5%. Moreover, per student expenditure at the primary level in Latin America fell from 28% to 1.1% of the gross national product during the 1980s. Due to the poor quality of education, 29% of Latin American students repeat every year of their primary education. UNESCO 26:31 COMPENDIUM OF STATISTICS ON ILLITERACY 1 (1990).

5. Hector Gros Espiell, *La Convención Americana y La Convención Europea de Derechos Humanos, Análisis Comparativo*, [The American Convention and the European Convention on Human Rights, A Comparative Analysis] 1991 ED. JURÍDICA DE CHILE 35; see generally POVERTY, CONFLICT AND HOPE, *supra* note 1.

6. Fernando Volio, *The Inter-American Commission on Human Rights*, 30 AM. U. L. REV. 65, 72-73 (1980); see Angela Cornell & Kenneth Roberts, *Democracy, Counterinsurgency, and Human Rights: The Case of Peru*, 12 HUM. RTS. Q. 529, 533-35 (1990).

7. See THOMAS G. PATERSON, *CONTESTING CASTRO: THE UNITED STATES AND THE TRIUMPH OF THE CUBAN REVOLUTION* (1994); Karen DeWitt, *Prominent Black Americans Take Aim at Nigeria*, N. Y. TIMES, Mar. 17, 1995, at A10. See generally Carlos Santiago Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. MIAMI L. REV. 129 (1989).

8. REPORT OF THE COMMISSION ON THE TRUTH FOR EL SALVADOR, FROM MADNESS TO HOPE: THE 12-YEAR WAR IN EL SALVADOR, U. N. Doc. s/25500 (1993) [here-

tions where dictators or military regimes have fallen or relinquished power, fledgling democracies have made major concessions to the former rulers in order to maintain a precarious hold on power.<sup>9</sup> These democratically elected governments often pass amnesty laws granting immunity from prosecution to those who committed gross and systematic human rights violations under previous regimes.<sup>10</sup> Consequently, the victims may have no remedy, and the perpetrators go unpunished.

The inter-American human rights system, the first such fully functioning system in an underdeveloped region, has established several innovative approaches to protect and ensure human rights. Thus, an analysis and evaluation of the system's

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inafter U.N. TRUTH COMMISSION REPORT FOR EL SALVADOR] (stating that one focus of the Commission's investigation was a series of individual cases that revealed a systematic pattern of violence meant to intimidate certain sectors of society); THE PRELIMINARY REPORT ON DISAPPEARANCES OF THE NATIONAL COMMISSIONER FOR THE PROTECTION OF HUMAN RIGHTS IN HONDURAS: THE FACTS SPEAK FOR THEMSELVES 216-17 (Human Rights Watch/Americas (formerly America's Watch) trans., 1994) (abridged English translation of *Los Hechos Hablan Por Si Mismo: Informe Preliminar Sobre Los Desaparecidos en Honduras 1980-1993* (1994)) [hereinafter, THE FACTS SPEAK FOR THEMSELVES]. See also Tim Weiner, *Guatemalan Agent of the C.I.A. Linked to Killing of American*, N.Y. TIMES, Mar. 23, 1995, at A1; Tim Weiner, *Long Road to Truth on Guatemala Killings*, N.Y. TIMES, Mar. 24, 1995, at A3.

9. See Jaime Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, in JUSTICE AND SOC'Y PROGRAM OF THE ASPEN INST., STATE CRIMES: PUNISHMENT OR PARDON, PAPERS AND REPORTS OF A CONFERENCE 23 (1989) [hereinafter STATE CRIMES: PUNISHMENT OR PARDON]; Jose Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, *Id.* at 23; Juan Mendez & Cynthia Brown, *Amnesty Laws in the Southern Cone: Argentina, Uruguay, Chile*, 4 HUM. RTS. WATCH NEWSL. 3-4 (Dec. 1989) cited in AMERICAS WATCH REPORT, ACCOUNTABILITY AND HUMAN RIGHTS: THE REPORT OF THE UNITED NATIONS COMMISSION ON THE TRUTH FOR EL SALVADOR 5 (1993); Carlos Nino, *The Duty to Punish Past Abuses of Human Rights Put in Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991); Jo Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 344-45 (1994).

10. President Raúl Alfonsín of Argentina, who was democratically elected to office following the military's "dirty war," passed two amnesty laws and issued a decree of pardon. AMNESTY INTERNATIONAL, ARGENTINA: THE MILITARY JUNTA AND HUMAN RIGHTS 94 (1987); El Salvador passed an amnesty law only five days after the official truth commission report naming several prominent leaders as human rights violators was released. See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 537-38 (1984). See generally Robert Norris, *Leyes de Impunidad y los Derechos Humanos en Las Americas: Una Respuesta Legal* [Laus of Impunity and Human Rights in the Americas: A Legal Response], 15 INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS REVISTA 47 (1992).

significant developments and limitations may provide important lessons for other regions. Significantly, the American Convention on Human Rights<sup>11</sup> provides greater access to the system for the poor and intimidated.<sup>12</sup> In urgent cases, the system may minimize delay and provide relief by allowing the Inter-American Court of Human Rights (Inter-American Court or Court) to immediately order provisional measures at the request of the Inter-American Commission of Human Rights, (Inter-American Commission or Commission) even before a case is before the Court.<sup>13</sup> Provisional measures may consist of ordering a state to protect those whose lives are in danger. In addition, the Court's balancing of victims' rights with procedural regularity and the liberalization of evidentiary rules in cases before the Court helps to prevent the intentional obstruction of justice.<sup>14</sup> The Inter-American Court is an example of the contributions a regional court can make to advance the protection of human rights. The Court has, however, recently ignored some of its positive precedents. Moreover, at times it appears to neglect unique opportunities to develop the jurisprudence of international human rights law and to establish clear criteria which will assist in the resolution of future related controversies.<sup>15</sup>

Generally, states comply with the Inter-American Court's judgments and orders of provisional measures. Perhaps as importantly, the referral of a case to the Court appears to have a chilling effect on human rights abuses. States do not, however, easily relinquish their sovereignty. Instead, they continue to place impediments in the road to human rights enforcement. These impediments must also be considered and explored in any

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11. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, OEA/ser.K/XVI/I.1, doc. 65 rev. 1 corr. 1 (1970) (entered into force July 18, 1978) [hereinafter American Convention], reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OAS/ser.LV/II.82, doc. 6. rev. 1, 25 (1992) [hereinafter BASIC DOCUMENTS].

12. See *infra* parts III.B.1 & 2.

13. American Convention, *supra* note 11, art. 63(2).

14. See *infra* part IV.B.2 & 3.

15. See, e.g., Genie Lacayo Case, May 18, 1995, Order of the Inter-American Court (Art. 54(3)), American Convention on Human Rights (to be reprinted in Annual Report of the Inter-American Court of Human Rights (1995)). In dissent, Judge Cancado Trindade complained that the Court failed to take advantage of a unique opportunity to clarify difficult issues concerning the scope of preliminary objections, their relationship to the merits, and the composition of the Court during the different phases of a case. *Id.* (Judge Cancado Trindade, dissenting).

developing system.

Part II of this article provides a brief history of the development of international human rights law. Part III outlines the structure of the inter-American human rights system. Part III also considers the system's human rights problems and analyzes innovative American Convention provisions addressing these problems. Part IV and V analyze jurisprudential, procedural, and evidentiary precedents set by the Inter-American Court of Human Rights and evaluate the effectiveness of the Court to date. Finally, part VI focuses on current state actions that limit the power of the enforcement organs in the inter-American human rights system. Although the system is not perfect, the effectiveness of certain of its innovative approaches in dealing with common human rights problems make it a worthy model for the developing systems of Africa and Asia, and even for the expanding European system.<sup>16</sup>

## II. BRIEF BACKGROUND ON THE DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW

No strong historical basis exists for the protection of an individual's human rights from violations by his or her own government. A state's treatment of its nationals was traditionally a matter of state sovereignty. This doctrine allows a state almost complete freedom to act within its domestic jurisdiction and forbids external interference into its domestic affairs.<sup>17</sup> The vague and often arbitrary doctrine of humanitarian intervention permits states to forcibly intervene in the territory of another state to protect the nationals of that state, but the doctrine is seldom utilized except for political reasons.<sup>18</sup> The traditional

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16. As a result of the political changes in Eastern Europe, many of the nations of the former Soviet Bloc have joined the Council of Europe and have ratified or are preparing to ratify the European Convention. These nations, which include Poland, Hungary, Bulgaria and the Czech Republic, do not have recent experience with democracy. Their inclusion in the European human rights system could result in unexpected problems for the European human rights institutions. Herbert Golsong, *On the Reform of the Supervisory System of the European Convention on Human Rights*, 13 HUM. RTS. L.J. 265, 265-66 (1992); Rolv Ryssdal, *The Future of the European Court of Human Rights*, Council of Europe, ECOUR 90296.AB, at 4 (1990). Lessons learned in the inter-American system may prove relevant in dealing with the human rights problems of these emerging democracies.

17. See generally PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 11 (1983); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287-97 (1990).

18. BROWNLIE, *supra* note 17, at 564-65. For a discussion of the doctrine of hu-

international belief in non-intervention began to change, however, immediately after World War II when the world community reacted with horror to the revelations of human rights atrocities perpetrated by the Nazis. As a result, nations became more willing to intercede in the affairs of other states, and a movement grew to establish a universal human rights standard.

Unfortunately, the initial attempts to develop human rights protections did not live up to some expectations. In 1945, the victors of World War II drafted the Charter of the United Nations with the intention of including provisions on human rights protection.<sup>19</sup> The resulting provisions, however, were not as protective as many believed necessary. Regrettably, the primary world powers had their own human rights problems to consider: the United States practiced *de jure* racial discrimination, France and Great Britain still had colonial empires, and the Soviet Union had its gulag.<sup>20</sup> Consequently, a need remained for more specific treaties to strengthen the protection of human rights. The United Nations responded to this need by drafting two such international treaties: the International Covenant on Civil and Political Rights<sup>21</sup> and the International Covenant on Economic, Social and Cultural Rights,<sup>22</sup> neither of which was opened for signature until 1966. Both treaties have since been widely ratified.<sup>23</sup> In the meantime, two regional organizations also drafted human rights treaties that focused on each region's particular

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manitarian intervention, see generally Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185 (Lori Fisler Damrosch & David J. Scheffer, eds. 1991).

19. See Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, arts. 1(3), 55 & 56, (entered into force Oct. 24, 1945) reprinted in BARRY CARTER & PHILLIP TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS AND NEW DEVELOPMENTS 3, 4, 16, 17 (1994) [hereinafter CARTER & TRIMBLE].

20. THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS 18 (1988).

21. International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967), 999 U.N.T.S. 171, 61 I.L.M. 368 (1967) (entered into force Jan. 3, 1976).

22. International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), 993 U.N.T.S. 3, 6 I.L.M. 360 (1967).

23. Through the ratification of international treaties, states place the subject matter of the treaty in the realm of international law, and limit their sovereignty to act freely in relation to it within their domestic jurisdictions. See generally SIEGHART, *supra* note 17, at 11; BROWNLIE, *supra* note 17, at 287-97. Thus, states agree to limit their sovereignty by relinquishing some power over their nationals and allowing international organs to ultimately oversee their protection.



problems.<sup>24</sup> The Council of Europe prepared the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>25</sup> which specifically applied to European States.<sup>26</sup> The nations of the Western Hemisphere, through the Organization of American States (OAS),<sup>27</sup> drafted the American Convention on Human Rights to promote and protect human rights in the Americas.<sup>28</sup>

### III. THE CONVENTIONAL STRUCTURE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The American Convention is modeled on the United Nations human rights instruments<sup>29</sup> and the European Convention. The

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24. The African equivalent, the Banjul Charter on Human and People's Rights, *infra* note 163, was not presented until 1982. The text of this treaty is reprinted at 21 I.L.M. 58 (1982).

25. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, Europ. T.S. No. 5, [hereinafter the European Convention] reprinted in IAN BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS 326 (1992). See generally J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS (1993); Rosalyn Higgins, *The European Convention on Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 495 (Theodore Meron ed., 1985).

26. As of December, 1994, thirty states had ratified this treaty, including: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, and United Kingdom. Council of Europe, Information Sheet No. 35, July-Dec. 1994, Human Rights, H/INF (95)2, Strasbourg (1995). Andorra, Estonia, and Lithuania have signed but have not yet ratified the European Convention. *Id.*

In general, the member states of the European human rights system are democratic, stable, and governed by the rule of law. See generally JOHN HENRY MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS (1978). Moreover, they are economically developed and socially advanced, with high literacy rates, broad access to the media, and a safety net of social programs. See Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585, 616 (1987).

27. The Organization of American States (OAS) is composed of all the nations in the Western Hemisphere. The Cuban government was suspended from participation in the OAS in 1962 for adopting a Marxist-Leninist form of government. CARTER & TRIMBLE, *supra* note 19, at 236.

28. American Convention, *supra* note 11. For a discussion of the evolution of the inter-American system, see THOMAS BUERGENTHAL ET AL., PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS (1990).

29. See generally Rodolfo Piza, *Coordination of the Mechanisms for the Protection of Human Rights in the American Convention with Those Established by the United Nations*, 30 AM. U. L. REV. 167 (1980).

drafters of the American Convention were not content, however, to merely replicate these treaties. They were aware of the human rights abuses and other realities of the developing region,<sup>30</sup> and made adaptations intended to enhance the protection of human rights within the unique circumstances of the Western Hemisphere.<sup>31</sup> One European observer to the drafting conferences noted that, in several instances, delegates suggested that the drafters more closely follow the wording of the United Nations covenants.<sup>32</sup> The majority of delegates, however, countered this suggestion, arguing that if the American states were to conclude their own convention after the United Nations Covenants were completed, "then it was appropriate to introduce any modifications that were desirable in the light of circumstances prevailing in the American Republics."<sup>33</sup>

#### A. Overview of the Inter-American System

The inter-American system of human rights is based on a regional treaty, the American Convention on Human Rights.<sup>34</sup> This treaty protects twenty-six substantive rights, including, *inter alia*, the rights to life,<sup>35</sup> humane treatment,<sup>36</sup> personal

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30. Habeas Corpus in Emergency Situations (arts. 27(2), 25(1), and 7(6)), American Convention on Human Rights, 8 Inter-Am. C.H.R., Advisory Opinion, Ser. A, ¶ 36 (1987).

31. Thomas Buergenthal & Robert Norris, 2 Hum. Rts., The Inter-American System, Part 2, The Legislative History of the American Convention on Human Rights, Chap. III, Reports on the Conference, at 88. While the American Convention was still in the stage of proposals and drafts, the U.N. General Assembly in December, 1966, approved the text of the U.N. Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights. At that time, the Member States of the OAS, after being polled by the Council of the OAS, determined that they wished to go ahead with a separate inter-American human rights treaty. *Id.*; see generally Weston et al., *supra* note 26.

32. Council of Europe, Report on The Inter-American Specialized Conference on Human Rights, *supra* note 31, at 71.

33. *Id.*

34. Twenty-five American nations have ratified the American Convention and have thereby obligated themselves to respect the human rights contained therein. The twenty-five nations include: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. The United States has signed but never ratified the American Convention. Annual Report of the Inter-American Court of Human Rights 115-16 (1994).

35. American Convention, *supra* note 11, art. 4.

36. *Id.* art. 5.

liberty,<sup>37</sup> a fair trial,<sup>38</sup> privacy,<sup>39</sup> and freedom of thought, expression,<sup>40</sup> and religion.<sup>41</sup> The American Convention establishes a two-tiered system to enforce human rights: the Inter-American Commission on Human Rights<sup>42</sup> and the Inter-American Court of Human Rights.<sup>43</sup> All complaints by individuals alleging human rights abuses must first be directed to the Inter-American Commission, which is composed of seven commissioners.<sup>44</sup> The Commission then determines whether the complaint meets the statutory requisites of admissibility.<sup>45</sup> If it does not, the Commission may ask the petitioner to complete the petition.<sup>46</sup> If the complaint is *prima facie* admissible, the Commission informs the government involved of the relevant portions of the complaint and requests that it provide pertinent information.<sup>47</sup> Portions of the government's information are then sent to the petitioner, along with a request for additional observations and evidence.<sup>48</sup> If the government does not respond, as is frequently the case, the Commission may treat the petition's allegations as presumptively true.<sup>49</sup> When appropriate, the Commission attempts to bring about a friendly settlement.<sup>50</sup> If,

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37. *Id.* art. 7.

38. *Id.* art. 8.

39. *Id.* art. 11.

40. *Id.* art. 13.

41. *Id.* art. 12.

42. *Id.* art. 37.

43. *Id.* art. 33. See Carlos Alberto Dunshee de Abranches, *The Inter-American Court of Human Rights*, 30 AM. U. L. REV. 79, 80-5 (1980) (providing a brief background on the Court within the framework of the American Convention and the Charter of the OAS).

44. American Convention, *supra* note 11, art. 36. The commissioners are chosen from the Member States of the OAS and must be of recognized competence in the field of human rights. No two Commission members may be nationals of the same state. *Id.* art. 37.

45. *Id.* art. 48(1)(a).

46. Regulations of the Inter-American Commission on Human rights, art. 30(2), modified June 29, 1987, reprinted in BASIC DOCUMENTS, *supra* note 11, at 115 [hereinafter Regulations of the Commission].

47. *Id.* Unless the petitioner expressly authorizes disclosure, the Commission withholds the identity of the petitioner from the government. Regulations of the Commission. *Id.* art. 34(4).

48. *Id.* art. 34(7).

49. *Id.* art. 42.

50. American Convention, *supra* note 11, art. 48(1)(f). See 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 INTER-AMERICANOS DE DERECHOS HUMANOS 347 (1994) (analyzing a case in which the Commission successfully used its good offices to bring about a friendly settlement).

however, no friendly settlement is reached, the Commission draws up a report and transmits it to the state concerned.<sup>51</sup>

Only after procedures before the Commission have been exhausted can the case be referred to the Court, and then only if the state involved has expressly recognized the Court's jurisdiction.<sup>52</sup> To date, seventeen state parties to the American Convention have expressly accepted the jurisdiction of the Court.<sup>53</sup>

### 1. Critique of the Effectiveness of a Two-Tiered System

It is questionable whether a two-tiered system, in which cases must be considered first by a commission and then by a court, is the most effective form of organization for the protection of human rights. The procedures before both bodies are often time-consuming, and thus may not adequately protect the victim's rights. For instance, in *Velásquez Rodríguez*,<sup>54</sup> a Honduran student was publicly detained by members of the Honduran security forces and subsequently disappeared. The period of time between his family's first official petition to the Commission and the Commission's referral to the Court was approximately four and a half years.<sup>55</sup> Four more years elapsed before

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51. American Convention, *supra* note 11, art. 50(1).

52. *Id.* art. 51(1), 62(1). This declaration of jurisdiction "may be made unconditionally, on the condition of reciprocity, for a specified time, or for specific cases." *Id.* art. 62(2). For a discussion of state acceptance of the Court's contentious jurisdiction, see Dunshee de Abranches, *supra* note 43, at 104-05. See generally Hector Gros Espiell, *El Procedimiento Contencioso Ante La Corte Interamericana de Derechos Humanos*, in ESTUDIOS SOBRE DERECHOS HUMANOS II 145 (1988).

53. The following states have accepted the jurisdiction of the Inter-American Court: Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. See Annual Report of the Inter-American Court (1994), *supra* note 34, at 115-16. El Salvador, the most recent state to accept the Court's jurisdiction did so formally in June, 1995 at the General Assembly of the OAS.

54. *Velásquez Rodríguez Case*, (Merits), Inter-Am. C.H.R., Ser. C, No. 4, ¶¶ 35-37 (1988).

55. *Id.* The facts of *Velásquez Rodríguez* provide an example of delays and continuations. Manfredo Velásquez was disappeared in downtown Tegucigalpa, Honduras by government agents on September 12, 1981, in front of eyewitnesses. On October 7, 1981, relatives filed a human rights petition with the Inter-American Commission on Human Rights. The Commission communicated the relevant parts of the petition to the Government for a response and then tried on several occasions to obtain information, but the Government did not reply. On October 4, 1983, (two years after the petition was originally filed) having received no response from Honduras, the Commission applied its regulations and presumed as true the allegations contained in the petition. Only at that point did Honduras reply, requesting recon-

the Court issued its ultimate judgment.<sup>56</sup>

Significant delay may result in a denial of justice to a victim whose rights have been abused.<sup>57</sup> Governments accused of human rights violations in the inter-American system are given ample time to respond to complaints filed against them.<sup>58</sup> Even when a government has repeatedly failed to acknowledge requests for information, the Commission must still allow the statutorily allotted time period for the government's response. Judge Piza Escalante, in an explanation of his dissenting vote in *In The Matter of Viviana Gallardo*, questioned the need for procedures before the Commission:

[I] have come to the conclusion that unfortunately the system of the Convention appears to make [the best protection of human rights] impossible because the American States in drafting it did not wish to accept the establishment of a swift

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sideration of the Commission's determination on various grounds. On May 30, 1984, the Commission agreed to reconsider its resolution and again requested information from Honduras. Honduras did not respond. On Jan. 29, 1985, the Commission informed Honduras that it would render a final decision in March, 1985. On March 1, Honduras again requested an extension on the grounds that it had set up an investigatory commission. The Commission granted an additional thirty day extension. On October 17, 1985, Honduras gave the Commission a report of its investigation, in which charges against all officials were dismissed except for the charge against a former general who was in exile and was out of favor with the Government. Finally, on April 18, 1986 (four and a half years after the petition was filed), the Commission referred the case to the Court. *Id.* ¶¶ 1-10.

56. On July 29, 1988, the Court pronounced judgment on the merits of the case. *Velásquez Rodríguez Case, (Merits)*. On July 21, 1989, the Court issued a judgment on compensatory damages. *Velásquez Rodríguez Case, (Compensatory Damages)*, Inter-Am. C.H.R., Ser. C, No. 7 (1988). The Court then issued an Interpretation of the Compensatory Damages Judgment on August 17, 1990. *Velásquez Rodríguez Case, (Interpretation)*, Inter-Am. C.H.R., Ser. C., No. 9 (1990).

57. See SCOTT DAVIDSON, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 203 (1992).

An advisory opinion by the Court on whether the repeated extensions granted by the Commission to the governments during the procedural stage violate the petitioner's right to prompt and effective justice could prove valuable to the functioning of the system. The Court can use its advisory jurisdiction, which is broader than that of any international tribunal, "to give judicial expression to certain principles that are basic to the development of the international law of human rights." Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 25 (1985).

58. The Commission allows a government ninety days to respond to a petition. Regulations of the Inter-American Commission on Human Rights, *supra* note 46, art. 34(5) reprinted in BASIC DOCUMENTS, *supra* note 11, at 103, 115. The government may then request extensions which may total no more than 180 days. *Id.* art. 34 (6).

and effective jurisdictional system but rather they hobbled it by interposing the impediment of the Commission, by establishing a veritable obstacle course that is almost insurmountable, on the long and arduous road that the basic rights of the individual are forced to travel.<sup>59</sup>

The Inter-American Court had the opportunity in *In The Matter of Viviana Gallardo* to curtail recourse to the Commission under certain circumstances. It chose, however, not to expedite access to the Court.<sup>60</sup> In this case, a Costa Rican prisoner was shot and killed in her prison cell by an off-duty member of the Costa Rican civil guard. The Costa Rican government sought to waive all procedures before the Commission and take the case directly to the Court.<sup>61</sup> The Court refused Costa Rica's request,<sup>62</sup> reasoning that direct access might damage the integrity of the system and would not allow the victim the opportunity to pursue a friendly settlement.<sup>63</sup> The Court could have allowed direct access by a state party with the consent of the victim.<sup>64</sup> In such a case, the victim's rights would have been protected. Furthermore, as both the victim and the state would have agreed to waive the Commission's procedures, the integrity of the system would also have been maintained.

The two-tiered inter-American system was modeled on the European human rights system, which is currently undergoing complete reform. Under the reform, the European Commission will be eliminated and its functions will be handled by a permanent court.<sup>65</sup> One reason for the change is the length of time required for decisions; in 1993 the average time was five years and eight months. On average, a case was before the European Commission for four years and three months, and in the European

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59. In *The Matter of Viviana Gallardo et al.*, Inter-Am. C.H.R., Advisory Opinion, Ser. A, No. G101/81, ¶ 11 (1981) (Judge Piza Escalante, dissenting).

60. *Id.* ¶ 28.

61. *Id.* ¶ 1.

62. *Id.* ¶ 28.

63. *Id.* ¶¶ 24, 25.

64. See DAVIDSON, *supra* note 57, at 200-01. A problem with this analysis, however, is that the victim is not a party to the case. Normally, only parties to a case can waive procedures.

65. See Andrew Drzemczewski & Jens Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11, Signed on 11 May 1994*, 15 HUM. RTS. L.J. 81, 84 (1994).

Court for one year and three months.<sup>66</sup> The reform followed a determination that delays put the system in danger of overload and consequent non-compliance with the fundamental guarantee that proceedings be conducted within a reasonable time.<sup>67</sup>

The inter-American system is not prepared for many of the reforms currently under way in the European system, mainly because American states are not yet fully participating in or supportive of the inter-American human rights system. Protocol 11 to the European Convention institutes the reform of the system. As of May 11, 1994, when Protocol 11 was opened for signature, all states parties had accepted the compulsory jurisdiction of the European Court.<sup>68</sup> Conversely, the states parties to the American Convention have not shown a comparable endorsement of the Inter-American Court; only seventeen of twenty-five have accepted the Court's compulsory jurisdiction.<sup>69</sup> Consequently, any attempt to increase the role of the Court at this time might have a negative impact on the inter-American system's stability.

Furthermore, the inter-American system does not face all of the same pressures as the European system. The contracting states to the European Convention have increased from twenty-three in 1990 to thirty as of December, 1994.<sup>70</sup> Moreover, many Central and Eastern European countries now participate in the system, and this has increased the number and complexity of cases being brought.<sup>71</sup> In the inter-American system, only twenty-five of the thirty-five OAS member states have ratified the American Convention, and the number of complaints to the

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66. *Id.* at 85.

67. Rolv Ryssdal, *The Reform of the Control Machinery of the European Convention on Human Rights*, in *LA CORTE Y EL SISTEMA INTERAMERICANOS DE DERECHOS HUMANOS* 481, 484 (1994).

68. See *Chart of Signatures and Ratifications of the European Convention on Human Rights and Additional Protocols*, 15 *HUM. RTS. L.J.* 114 (1994). Twenty-seven of the twenty-eight states parties to the European Convention at that time signed the Protocol. Only Italy did not sign. *Id.* at 81, n.1.

69. For those state parties that have accepted the compulsory jurisdiction of the Inter-American Court see *supra* note 53.

70. Council of Europe, Information Sheet No. 35, *supra* note 26.

71. Drzemczewski & Meyer-Ladewig, *supra* note 65, at 81, 84 (also stating that a lesser pressure has been "the movement of the European Community (Union) towards a single market and political union with increased awareness of the legal and political importance of human rights protection as a component part of the European Union's concerns.").

Commission would be manageable with additional staff lawyers and longer sessions.<sup>72</sup> Although the inter-American system may ultimately require similar reforms, the time has not come for such extensive changes.

Still, the inter-American system must minimize the time required to resolve a case. Lengthy preliminary procedures do not meet the needs of a victim who may be facing torture or death, or of the family that seeks a remedy for its loss.<sup>73</sup> As explained by a former member of the Inter-American Commission, "[l]ong before all of these procedures have been completed, however, the patience of the complainant, although not his injury, may have come to an end, and in many cases it may be the end of the endurance or the life of the person tortured."<sup>74</sup> Moreover, procedural delays are especially unacceptable when a government chooses to continue its course of conduct and thus is interested in delaying and manipulating the system.<sup>75</sup>

## 2. Provisional Measures at the Request of the Commission to Lessen Delay

A provision of the American Convention, unique to the inter-American System, allows the Commission in "cases of extreme gravity and urgency" to circumvent its time-consuming procedures and immediately request adoption of provisional measures by the Court.<sup>76</sup> In adopting such measures, as in granting an interim injunction, the Court may order the state to take or refrain from taking certain actions. For instance, the Court may order a state to refrain from executing a prisoner or

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72. For a list of states parties to the American Convention see *supra* note 34. The U.S. has not ratified the Convention.

73. See *infra* part III.A.2.

74. Volio, *supra* note 6, at 76-7 (requesting amendments to expedite procedures before the Inter-American Commission).

75. CECILIA MEDINA QUIROGA, *THE BATTLE OF HUMAN RIGHTS: GROSS SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM 2* (1988) [hereinafter *MEDINA QUIROGA*].

76. American Convention, *supra* note 11, art. 63(2). Article 63(2) provides that: In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.



to provide protection to certain individuals.

Most judicial systems permit a court to order provisional measures when the case is before the court. The inter-American system, however, is the only one to statutorily permit the Court to order such measures even before it is seized of the case. An example of the successful use of provisional measures occurred in *Chunima*.<sup>77</sup> In this case, several members of a local Indian group monitoring human rights abuses in the Guatemalan highlands<sup>78</sup> were killed.<sup>79</sup> Although local civil defense patrol leaders<sup>80</sup> had threatened the victims and then bragged about committing the murders, the army refused assistance and the police were unable to act. Two Guatemalan judges issued arrest warrants for the civil patrol leaders; they received death threats and were forced into hiding. The remaining group members and their families also went into hiding. These precautions were ineffective, however, and another member was murdered.<sup>81</sup>

Generally, the extensive procedures required under traditional human rights law do not allow for immediate assistance to those in imminent danger. However, the inter-American system responded quickly in *Chunima*. The Commission immediately requested the Court to order provisional measures. The Court then ordered the Guatemalan government to protect the threatened persons.<sup>82</sup> These measures were apparently successful as no additional members of the group were killed.

Provisional measures have a potentially significant role in the Americas and other developing regions due to the urgent character of many local human rights abuses.<sup>83</sup> The potential

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77. See *Chunima Case, (Provisional Measures)*, Aug. 1, 1991 Order of the Inter-Am. C.H.R., reprinted in 1991 INTER-AM. Y.B. HUM. RTS. 1118.

78. In 1988, hundreds of villagers from the Quiche province founded the Council of Ethnic Communities Renujel Juman (CERJ). CERJ was the first organization established to defend the rights of Guatemala's Maya population and to increase the community's awareness of the rights bestowed upon them by the Guatemalan Constitution. 1990 INTER-AM. Y.B. HUM. RTS. 246.

79. *Chunima Case, (Provisional Measures)*.

80. The Civil Patrols were established by the Guatemalan government in 1982, ostensibly to protect villages from guerrillas, and "are military structures established by the military." 1990 INTER-AM. Y.B. HUM. RTS. 242.

81. *Chunima Case, (Emergency Provisional Measures)*, July 15, 1991 Order of the Pres. Inter-Am. C.H.R., reprinted in 1991 INTER-AM. Y.B. HUM. RTS. 1104, 1106-1112, ¶ 4.

82. *Chunima Case, (Provisional Measures)*, at 1126, 1128 res. 1.

83. See Thomas Buergenthal, *Interim Measures in the Inter-American Court of*

for irreparable damage often requires an immediacy of response which can only be provided by provisional measures.<sup>84</sup> This preventive function — where the lives and physical security of persons are concerned — is far more valuable than the compensatory function of a final judgment.<sup>85</sup>

### B. Access to the System

An international human rights system can only be effective if individual victims have both *de jure* and *de facto* access to its remedies. Broadened individual access to international protection of human rights, especially for the poor, illiterate, and intimidated is essential.

#### 1. Direct Individual Access

Traditionally, only states have had automatic standing to file petitions or complaints against other states in international law.<sup>86</sup> Individuals have never had such standing. This is true

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*Human Rights, in* INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS 84-89 (R. Bernhardt ed., 1994); Jo Pasqualucci, *Provisional Measures in the Inter-American Human Rights System*, 26 VAND. J. TRANSNAT'L L. 803, 820-21 (1993) (also discussing provisional measures in the ICJ and European Systems). In Spanish, see Jo Pasqualucci, *Medidas Provisionales en la Corte Interamericana de Derechos Humanos: Una Comparación con La Corte Internacional de Justicia y la Corte Europea de Derechos Humanos*, 19 REV. I.I.D.H. 47 [INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS] (1994); José Miguel Vivanco & Juan E. Mendez, *Medidas de Protección para Testigos en Casos ante La Corte Interamericana de Derechos Humanos*, 19 REV. I.I.D.H. 157 (1994).

84. See Dunshee de Abranches, *supra* note 43, at 79, 109.

85. In addition to *Chunima*, provisional measures have been ordered by the Inter-American Court in the Bustios-Rojas Case (Peru), Decision of August 8, 1990, Annual Report of the Inter-American Court of Human Rights (1991) [hereinafter *Bustios-Rojas Case*]; Colotenengo Case, Annual Report of the Inter-American Court of Human Rights 73 (1994); Velásquez Rodríguez Case, (Merits), Inter-Am. C.H.R., Ser. C, No. 4, ¶¶ 43-5 (1988). In the combined Honduran Cases, including *Velásquez Rodríguez*, provisional measures were ordered while the cases were before the Court. Provisional measures were also ordered in the Caballero Delgado and Santana Case when the case was before the Court. Caballero Delgado and Santana Case, Annual Report of the Inter-American Court of Human Rights 83, 85 (1994). The Court denied the Commission's request for provisional measures in the Peruvian Prisons Case, Annual Report of the Inter-American Court of Human Rights 21-23 (1993), and the Chipoco Case, Annual Report of the Inter-American Court of Human Rights 17-19 (1993). The president of the Court ordered emergency provisional measures in the Reggiardo-Tolosa Case, Annual Report of the Inter-American Court 95-98 (1993).

86. In the European system, a state party must make an express declaration to

even in international human rights law, which was created to protect individuals. An individual's only recourse when injured by the action of a state was to convince his or her own government to file a complaint;<sup>87</sup> if that government was the violator, there was almost no recourse under international law. Throughout history, when human rights abuses became endemic to a state only rarely did other states complain,<sup>88</sup> and such action was often politically motivated. Political reality seems to inspire a certain hesitancy among states. Even when concerned about human rights violations in another state, a state will often be reluctant to make accusations for fear of jeopardizing its economic interests or of having its own practices condemned.<sup>89</sup>

The American Convention is the first human rights treaty under which state parties automatically agree to the right of individual petition.<sup>90</sup> This provision affords individuals access to the mechanisms designed for their protection. In a reversal of customary procedure, upon ratifying the American Convention a state must make an express declaration which allows for inter-state complaints.<sup>91</sup> Such inter-state complaints are not as essential as individual access to the adequate functioning of any human rights system.

## 2. The Right of a Non-Governmental Organization to File on Behalf of the Victim

Even the direct authority to file complaints of human rights abuse will not always allow individuals to avail themselves of international human rights protection. Poverty, lack of education, and a scarcity of legal assistance all limit access to international assistance.<sup>92</sup> Many victims of human rights violations are

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recognize the competence of the Commission to receive petitions from individuals. European Convention, *supra* note 25, art. 25.

87. See BROWNIE, *supra* note 17, at 518-519.

88. The Greek Case, 1969 EUR. Y.B. 501 (Council of Europe).

89. See David Weissbrodt & Maria Luisa Bartolomei, *The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983*, 75 MINN. L. REV. 1009, 1030 (1991).

90. American Convention, *supra* note 11, art. 44.

91. *Id.* art. 45.

92. See Weston et al., *supra* note 26, at 617-18 (arguing that repressive socio-economic and political conditions, low levels of literacy, unavailability of the media, and arbitrary denial of the protection of law inhibit individual access to the human

rural peasants with a limited education who are simply too poor to hire a lawyer.<sup>93</sup> Additionally, in many states victims and their families are intimidated and fear retaliation if they complain of human rights violations. Complainants and their lawyers sometimes become the next victims.<sup>94</sup> Consequently, even those relatives of victims willing to take the risk can seldom find a lawyer willing to take their case.<sup>95</sup>

The American Convention is the only human rights treaty that attempts to counteract such problems of access or intimidation by allowing unrelated parties to complain of human rights violations on behalf of the victim.<sup>96</sup> Any state party to the Convention automatically agrees to the right of individual petition, not only by the victim or relative of the victim, but also by "any nongovernmental entity legally recognized in one or more member states" of the OAS.<sup>97</sup> Thus, the petitioner may be an international non-governmental organization (NGO), such as Amnesty International or America's Watch,<sup>98</sup> which has more exten-

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rights system).

93. See *Exceptions to the Exhaustion of Domestic Remedies in Cases of Indigence or Inability to Obtain Legal Representation Because of a Generalized Fear Within the Legal Community*, Inter-Am. C.H.R., Advisory Opinion of Aug. 10, 1990, Ser. A, OC-11/90, reprinted in 12 HUMAN RIGHTS L.J. 20 (1991) [hereinafter *Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion*].

94. *Id.* ¶ 3.

95. *Id.*

96. American Convention, *supra* note 11, art. 44. Even those international treaties which allow a state to make an express grant of standing to individuals limit that standing to the victim. The European Convention, *supra* note 25, article 25 requires that a state party must make an express declaration to recognize the competence of the Commission to receive petitions from individuals. The declaration allows a petition to be made by any person, non-governmental organization (NGO), or group of individuals claiming to be the victim. *Id.*; see *Optional Protocol to the International Covenant on Civil and Political Rights*, arts. 1-2, reprinted in HUMAN RIGHTS, A COMPILATION OF INTERNATIONAL INSTRUMENTS 38, 39, (U.N. 1988). See Gates Garrity-Rokous & Raymond H. Brescia, *Procedural Justice and International Human Rights: Towards a Procedural Jurisprudence for Human Rights Tribunals*, 18 YALE J. INT'L L. 559 (1993).

97. American Convention, *supra* note 11, art. 44. A member state is any state belonging to the OAS even though that state has not necessarily ratified the American Convention or accepted the jurisdiction of the Court. *Id.* Consequently, organizations such as Amnesty International, which are legally recognized in the U.S. and Canada, have standing to file complaints on behalf of victims in any state which has ratified the American Convention.

98. See generally David Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 AM. U. J. INT. L. POL'Y 95, 97-115 (1993) [hereinafter Padilla, *A Case Study*] (listing the several NGOs which represent victims or their families and providing examples of the functions

sive resources than individuals and fewer security problems related to investigating and filing complaints.<sup>99</sup> For example, when a Peruvian journalist was allegedly murdered by the military, and witnesses and some members of the victim's family were killed or threatened, this provision of the Convention allowed the World Council of Journalists to intercede and file a complaint with the Commission.<sup>100</sup> The Council of Journalists, a worldwide organization, was less responsive to intimidation, and the publicity the Council generated provided some protection to the domestic witnesses.

### 3. No Individual Standing Before the Court

The American Convention stopped short of giving individuals standing to bring a case before the Inter-American Court.<sup>101</sup> Only the states parties to the case and the Commission have such standing.<sup>102</sup> Therefore, an individual petitioner has no recourse if unsatisfied with the Commission's decision or if the government fails to comply with its recommendations.<sup>103</sup>

The right of an individual to bring a case before a human rights court is a logical step in the development of human rights law. "The situation whereby the individual is granted rights but not given the possibility to exploit fully the control machinery provided for enforcing them, could today be regarded as inconsistent with the spirit of the Convention, not to mention compatibility with domestic-law procedures in states parties."<sup>104</sup> An

performed by these NGOs before the Commission).

99. *Id.* at 100 (stating that "[f]or obvious reasons of timing, access, and resources," these parties can perform "key functions of investigating allegations of human rights violations").

100. Bustios-Rojas Case, (Provisional Measures), Order of the Inter-Am. C.H.R., ¶ 1, reprinted in Annual Report of the Inter-Am. C.H.R. (1990).

101. Individuals are not permitted to initiate proceedings before the International Court of Justice. The Statute of the Court provides that "[o]nly States may be parties in cases before the Court." Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, art. 34(1) reprinted in CARTER & TRIMBLE *supra* note 19, at 30, 36.

102. American Convention, *supra* note 11, art. 61. The state party must have recognized the jurisdiction of the Court either in general or by special agreement for a particular case. *Id.* art. 62.

103. See Manuel D. Vargas, *Individual Access to the Inter-American Court of Human Rights*, 16 N.Y.U.J. INT'L L. & POL. 601, 616 (1984) (discussing the means by which an individual might convince a relevant party to gain access to the Court).

104. PROTOCOL NO. 9 TO THE CONVENTION FOR THE PROTECTION OF HUMAN

institution like the Commission, in deciding whether to refer a case to the Court, may consider other interests such as the resources required and the possible impact of the case on the system.<sup>105</sup> From the perspective of the victim or the victim's family, however, these considerations should not interfere with the enforcement of rights. Consequently, the complainant should have the option to petition the Court directly for further consideration of the case.<sup>106</sup>

Another advantage of individual standing may be a depoliticization of the Commission's role. Currently, the Commission fulfills several roles, not all of them complementary. When processing an individual petition, the Commission serves as a factual investigator, a mediator in efforts at friendly settlements, and, if the case is not favorably resolved, as prosecutor.<sup>107</sup> The role of prosecutor in one case may jeopardize its role as mediator in another case involving the same state. If relieved of the prosecutorial role, the Commission's capacity for encouraging states to protect human rights and its function in facilitating friendly settlements might be enhanced.

Furthermore, due to its limited financial and personnel resources, the Commission must rely extensively on NGOs to fulfill both its investigative and prosecutorial functions.<sup>108</sup> These same NGOs have for many years publicly pressured states to improve their human rights records. As a result, they

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RIGHTS AND FUNDAMENTAL FREEDOMS, EXPLANATORY REPORT, *reprinted in* 12 HUM. RTS. L.J. 51, 52 (1991) [hereinafter Protocol 9].

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

If individual appeals were permitted, the Court might accept a case even when the Commission had not favored referral. This could necessitate elimination of the requirement that the Commission be a party to any case before the Court. The Commission could have an advisory role. American Convention, *supra* note 11, art. 57; Statute of the Inter-American Court of Human Rights, art. 28 (1979), *reprinted in* BASIC DOCUMENTS, *supra* note 11, at 133, 142.

106. Patrick Robinson, *The Inter-American Human Rights System*, 17 WEST INDIAN L. J. 8, 24 (1992).

107. In the Matter of Viviana Gallardo, Decision of November 13, 1981, Inter-Am. C.H.R., No. G 101/81, ¶ 22, *reprinted in* 20 I.L.M. 1424, 1428 (1981); *see also* Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT. L. 611, 615 (1994) (the Commission's role of *Ministerio Público*, referred to in In the Matter of Viviana Gallardo, is the same as that of the public prosecutor in North America).

108. *See* Padilla, *A Case Study*, *supra* note 98, at 101.

are often perceived by governments as enemies of the state. The close working relationship between the Commission and these NGOs has resulted in allegations by some states that the Commission does not maintain even a modicum of impartiality. If the Commission were to diminish its prosecutorial role, it could rely less on NGO assistance. The NGOs would remain actively involved, but states would view them as lending assistance to the victims rather than to the Commission. This would be more in keeping with the functioning of an impartial system.

Granting all individuals immediate standing would open the Court's flood gates. It would, therefore, be administratively impossible under the current inter-American system in which the Court sits only part-time. An intermediary step recently incorporated into the European system,<sup>109</sup> however, would allow those petitioners who have completed proceedings before the Commission to appeal to the Court. For example, these petitioners might appeal if they are dissatisfied with the Commission's result, or if the government fails to comply with its recommendations. The Court could then exercise discretion in determining whether to consider the case, in much the same way as the European Court of Human Rights<sup>110</sup> and the U.S. Supreme Court would do. If the case raises a serious question concerning the interpretation or application of the American Convention, a panel of judges could determine whether the case should be heard by the plenary Court.

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109. Protocol 9 to the European Convention for the Protection of Human Rights and Fundamental Freedoms permits the party which has lodged the complaint with the Commission to later refer the case to the Court. Article 3 of Protocol 9, which changes article 44 of the Convention, states:

Article 44 of the Convention shall read as follows:

Only the High Contracting Parties, the Commission, and persons, non-governmental organizations or groups of individuals having submitted a petition under Article 25 shall have the right to bring a case before the Court.

*Supra* note 104, at 51. Protocol 9 entered into force on October 1, 1994, and as of Dec. 31, 1994, it had been ratified by fifteen of the thirty contracting states to the European Convention. Council of Europe, Information Sheet No. 35, *supra* note 26, at 1.

110. Under Protocol 9 of the European system, when the case is referred to the Court by the victim rather than by the state party or the Commission, it must first be submitted to a panel of three judges. The panel determines whether the case raises "a serious question affecting the interpretation or application of the Convention" or whether for any other reason it warrants consideration by the Court. Protocol 9, *supra* note 104, art. 5.

A preliminary panel of judges, or even a plenary Court making this initial decision, could present a difficulty which is not present in the European system. In both the inter-American and European systems, the named state party has the right to nominate a judge to the panel deciding the case.<sup>111</sup> In the European system, where the number of judges is equal to the number of members of the Council of Europe,<sup>112</sup> each state has already nominated a judge on the European Court. That judge sits *ex officio* as a member of any panel making a decision regarding that state party, including future decisions as to whether the European Court will consider a case.<sup>113</sup> However, the Inter-American Court is composed of only seven judges.<sup>114</sup> Therefore, it is often necessary for the state party in a case submitted to the Court to name an *ad hoc* judge to sit.<sup>115</sup> It is likely that states would demand to have an *ad hoc* judge on any panel making the initial decision of whether the Court will consider a case against a state party referred to the Court by the victim or representative of the victim. If petitioners referred to the Court even a fraction of the matters decided by the Commission, the initial determination of whether a case should even be heard by the Court would prove expensive and time-consuming for an institution with already limited resources.<sup>116</sup>

Despite the many positive considerations, the inter-American system is not yet prepared for seizure of the Court by individual petitioners. Although granting individual standing before the Court is less drastic than eliminating the two-tiered system, even this level of change might have a negative effect on its overall stability and growth.<sup>117</sup> The European system did not

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111. American Convention, *supra* note 11, art. 55. European Convention, *supra* note 25, art. 43. All decisions of the Inter-American Court are decided in plenary session with five judges constituting a quorum. American Convention, *supra* note 11, art. 56. European Court decisions are made normally in Chambers rather than by the plenary court. European Convention, *supra* note 25, art. 43.

112. European Convention, *supra* note 25, art. 38.

113. Protocol 9, *supra* note 104, art. 5

114. American Convention, *supra* note 11, art. 52.

115. *Id.* art. 55.

116. *See infra* part VI.A.

117. Padilla, *A Case Study*, *supra* note 98, at 110. David Padilla, former Deputy Secretary of the Inter-American Commission, states:

I believe it would be imprudent if not downright risky to accelerate and expand the role of the private actor in the conduct of contentious cases before the Inter-American Court until and unless a substantial majority of the OAS member states are likely to acquiesce to such changes. Rejec-



attempt to incorporate this change until all members of the Council of Europe had ratified the European Convention and accepted the jurisdiction of the European Court. A change of such magnitude would require a Protocol to the American Convention, and such a Protocol is not likely to be accepted by the American states until there is greater consensus on the system.

#### 4. No Right of Victim to Direct Legal Representation Before the Court

Not only does the individual lack standing, but even when the Commission refers a case to the Court the individual victim or complainant lacks any statutory right to direct legal representation before the Court. Initially, the complainant has the right to name an attorney for procedures before the Commission.<sup>118</sup> This right, however, does not extend to participation before the Court. Under the terms of the American Convention, the Commission and the state are the only lawful parties, and it is the Commission's role to represent the victim before the Court.<sup>119</sup> On the other hand, the Court permits the Commission to name the victims' attorneys as assistants to the Commission delegates in Court proceedings.<sup>120</sup> The Court acknowledged these assistants for the first time in the Honduran cases.<sup>121</sup> The Court even allowed the victims' lawyers to present

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tion of these developments could jeopardize broader acceptance by reticent member states of the OAS whose participation in the system is essential for future progress.

118. Regulations of the Commission, *supra* note 46, art. 27, at 103, 112.

119. American Convention, *supra* note 11, art. 61. The role of the European Commission differs from the role of the Inter-American Commission. The European Commission's role before the Court is that of "defender of the public interest." In that role, the Commission must be objective and impartial. Although the Commission may express an opinion, it may not act as an advocate for the complainant. J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 45 (1993).

120. Rules of Procedure of the Inter-American Court of Human Rights, art. 22, adopted by the Court at its twenty-third session held January 9-18, 1991, *reprinted in* BASIC DOCUMENTS, *supra* note 11, at 145, 153. The Commission may name the attorneys of the original claimant or of the victim or the victim's next of kin. *Id.* art. 22(2).

121. Velásquez Rodríguez Case, (Merits), Inter-Am. C.H.R., Ser. C, No. 4 (1988); Godínez-Cruz Case, (Merits), Inter-Am. C.H.R., Ser. C, No. 5 (1989); Fairen Garbí and Solís Corrales Case, (Merits), Inter-Am. C.H.R., Ser. C, No. 6 (1989). The Honduran cases all dealt with evidence relating to a governmental policy of disappearances in Honduras during the same period. The Court heard evidence on this issue

their views on compensation directly to the Court when those views differed from those of the Commission.<sup>122</sup> The decision to name the victims' lawyers as assistants has become the Commission's policy, but it is within the Commission's discretion whether to maintain that policy.<sup>123</sup> Thus, if differences arise between the Commission and the victims' attorneys, the Commission could reject their participation. This should be the decision of the victims rather than that of the Commission.

The European human rights system originally limited the role of the petitioner's legal counsel to that of assistants to the Commission.<sup>124</sup> In 1982, however, the European Court amended its rules to permit direct victim representation.<sup>125</sup> The inter-American practice, which was modeled on the European system, may also be outmoded and should be reconsidered. A member of the Inter-American Commission, Claudio Grossman, argues that direct legal representation can be effectuated in either of two ways.<sup>126</sup> First, the current Rules of Procedure of the Inter-American Court could be interpreted to allow for direct victim representation,<sup>127</sup> or second, the Court could modify its Rules to allow for direct representation, as was done by the European Court.<sup>128</sup> Arguably, even such a limited step might jeopardize future state acceptance in the inter-American system.<sup>129</sup> The system, however, must continue to evolve if it is to adequately

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in all three cases simultaneously.

122. Grossman, *supra* note 105, at 371.

123. Rules of Procedure of the Inter-American Court of Human Rights, art. 22, *supra* note 120, at 145, 153.

124. See Juan Mendez, *La Participación de la Víctima Ante La Corte Interamericana de Derechos Humanos*, in *LA CORTE Y EL SISTEMA INTERAMERICANOS DE DERECHOS HUMANOS*, at 321, 323-24 (1994) (providing a brief history of the development of individual participation in the European system).

125. Revised Rules of the European Court of Human Rights, 1982 Y.B. EUR. CONV. ON H.R. 5, 14, Rule 30(1) (effective Jan. 1, 1983).

The inter-American system does not provide the complainants with free legal aid if they are indigent, and for that same reason they cannot pursue their cases. Under the European system, this assistance pays the fees for legal counsel as well as travel, hotel, and other necessary expenses for the applicant and attorney for appearances before the Commission and the Court. See P. VAN DIJK & G.J.M. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 55-56 (1984) (*citing* Addendum to the Rules, Council of Europe, *Collected Texts*, 315-316 (1979)).

126. Grossman, *supra* note 105, at 384-388.

127. *Id.* at 384-88.

128. *Id.* at 388.

129. See Padilla, *A Case Study*, *supra* note 98.

protect human rights. The transitional step from the victims' lawyers appearing as the Commissioner's assistants to their direct appearance on behalf of the victims may be the next step which should be taken in the strengthening of victims' rights.

#### IV. HUMAN RIGHTS PRECEDENTS ESTABLISHED BY THE INTER-AMERICAN COURT

The Convention-based developments in human rights law are supplemented by the substantive and procedural precedents set by the Inter-American Court. The Court's determinations have advanced the international law of human rights, at times by validating innovative approaches established by the Inter-American Commission.

Many of the Court's precedents relate to gross and systematic abuses of human rights, a problem which has plagued some Latin American states. During times of social unrest, governments may intentionally and systematically perpetrate gross human rights abuses, mainly against particular segments of society, in order to bully the population into fear and submission.<sup>130</sup> To combat perceived subversion,<sup>131</sup> many regimes simply avoid state judicial systems and resort to kidnapping, torture, extra-judicial executions and disappearances.<sup>132</sup> Where

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130. Gross and systematic violations of human rights are perpetrated pursuant to government policy in such numbers and in such a manner that the rights to life, personal integrity, and personal liberty of certain sectors of the population are threatened. MEDINA QUIROGA, *supra* note 75, at 16, *quoted in* Cecilia Medina Quiroga, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights*, 12 HUM. RTS. Q. 439, 440 n. 5 (1990).

131. Argentine Decree No. 158/83, which ordered that the members of the former Military Junta be brought to justice, affirmed that: "Thousands of persons were illegally deprived of their liberty, were tortured and murdered as a result of the application of . . . the totalitarian Doctrine of National Security." *quoted in* COMMISSION NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS, NUNCA MAS [National Commission on the Disappearance of Persons, Never Again] 473 (1984) [hereinafter NUNCA MAS]. For discussion of the national security doctrine in Latin America, see LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE, SETTLING ACCOUNTS WITH TORTURERS* 119-20 (1990).

132. See J. Lauchlan Wash et al., *Conference Report, The Inter-American Human Rights System: Into the 1990's and Beyond*, 3 AM. U. J. INT'L L. & POL'Y 517, 532 (1988) (*citing Military Regimes in Latin America*, 17 INT'L COMM'N JURISTS REV. 13, 13-16 (1976)); see also AMNESTY INTERNATIONAL, ARGENTINA: THE MILITARY JUNTA AND HUMAN RIGHTS, *supra* note 10; U.N. TRUTH COMMISSION REPORT FOR EL SALVADOR, *supra* note 8, and Chile, *infra* note 142.

such a governmental policy becomes prevalent, the rule of law dissolves, and national mechanisms for the protection of human rights are ineffective.<sup>133</sup>

A governmental policy of gross and systematic human rights abuses often includes forced disappearances. A forced disappearance takes place when government agents or those working for the government kidnap and hold a person *incommunicado* in a clandestine prison. The kidnappers then subject the prisoner to torture and other cruel and inhuman punishment, secretly execute him or her without trial, and then destroy or conceal the body<sup>134</sup> "to eliminate any material evidence of the crime and to ensure the impunity of those responsible."<sup>135</sup> The government refuses to acknowledge that the person has been in custody, and the victims' loved ones live in continual uncertainty, shifting between hope and despair.<sup>136</sup> The Inter-American Court is the first international court to confront this specific human rights problem. In 1986, the Commission referred to the Court three cases filed against Honduras: *Velásquez Rodríguez*, *Godínez Cruz*, and *Fairen Garbi and Solís Corrales*. Each contained simi-

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133. MEDINA QUIROGA, *supra* note 75, at 440.

The judiciary is often threatened and then becomes powerless to act in such situations. In *Chunima*, indigenous human rights monitors were being murdered in the highlands of Guatemala and the two judges who investigated the complaints and issued arrest warrants received death threats and were forced into hiding. *Chunima Case*, (Emergency Provisional Measures), July 15, 1991 Order of the Pres. Inter-Am. C.H.R., reprinted in 1991 INTER-AM. Y.B. HUM. RTS. 1104, 1106-1112, ¶ 4.

134. In Argentina during the "dirty war," the armed forces reportedly eliminated bodies by drugging victims and then dropping them alive from airplanes into the ocean. NUNCA MAS, *supra* note 131, at 235-36; Calvin Sims, *Argentine Tells of Dumping "Dirty War" Captives Into Sea*, N.Y. TIMES, Mar. 13, 1995, at A1; Calvin Sims, *Argentina to Name More Missing in "Dirty War"*, N.Y. TIMES, Mar. 23, 1995, at 1.

135. *Velásquez Rodríguez Case*, (Merits), Inter-Am. C.H.R., Ser. C, No. 4, ¶¶ 147-48 (1988).

136. The United Nations Human Rights Committee has stated that a mother who lives in continuing uncertainty as to the fate of her disappeared daughter is also a victim of the violation of the Covenant on Civil and Political Rights, particularly article 7. Case No 107/1981 quoted in *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, final report submitted by Mr. Theo Van Boven, Special rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Hum. Rts. Comm., 45th Sess., Provisional Agenda Item 4, at 27, U.N. Doc. E/CN.4/Sub.2/1993 [hereinafter Van Boven Report]. Also, the Honduran Human Rights Commissioner stated that the victims of disappearances were not only those who were disappeared, but also the parents, spouses, children and other relatives. THE FACTS SPEAK FOR THEMSELVES, *supra* note 8, at 19.

lar allegations and were heard simultaneously by the Court.<sup>137</sup> All involved a victim or victims allegedly disappeared at the hands of persons acting for the Honduran government. The Court's rulings in these cases and in its advisory opinions on related issues have resulted in significant advances in international human rights law.

### A. *Substantive Precedents*

The Inter-American Court has established important substantive precedents in the areas of gross and systematic human rights violations, as well as in indigenous rights and victim reparation.

#### 1. Habeas Corpus as a Non-Derogable Right

The Court has ruled that the right to habeas corpus may not be suspended even during a declared state of emergency.<sup>138</sup> The American Convention is the first international human rights instrument to prohibit the suspension of certain "judicial guarantees" even during a state of emergency.<sup>139</sup> In serious emergencies, most human rights treaties allow a state to temporarily derogate from certain human rights.<sup>140</sup> Other rights, however, such as the right to life and the right to humane treatment may never be suspended.<sup>141</sup> Nevertheless, despite

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137. See *supra* note 121.

138. Habeas Corpus in Emergency Situations, *supra* note 30, ¶ 36; see generally Elizabeth Faulkner, *The Right to Habeas Corpus: Only in the Americas*, 9 AM. U. J. INT. L. & POL'Y 653 (1994) (describing the differences between state rights to derogate in the American Convention and the European Convention).

139. American Convention, *supra* note 11, art. 27.

140. *Id.* ¶ 12. The American Convention provides: "[I]n times of war, public danger, or other emergency that threatens the independence or security of a State Party," the state may take measures derogating from certain of the rights protected by the Convention. *Supra* note 11, art. 27(1). The derogation may be only "to the extent and for the period of time strictly required by the exigencies of the situation . . . ." *Id.* For a more comprehensive discussion in Spanish of states of emergency and human rights in Latin America, see DANIEL ZOVATTO, *LOS ESTADOS DE EXCEPCIÓN Y LOS DERECHOS HUMANOS EN AMERICA LATINA* (1990).

141. American Convention, *supra* note 11, art. 27(2). Other rights that may never be derogated from under the American Convention include: the right to juridical personality (art.3), freedom from slavery (art. 6), freedom from ex post facto laws (art. 9), freedom of conscience and religion (art. 12), rights of the family (art. 17), right to a name (art. 18), rights of the child (art. 20), and the right to partici-

this prohibition:

the realities that have been the experience of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments . . . has demonstrated over and over again that the rights to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended.<sup>142</sup>

Judicial guarantees are indispensable to the maintenance of the rule of law, and the writ of habeas corpus is perhaps the most essential of all judicial guarantees.<sup>143</sup> The purpose of the writ is to bring a detained person before a judge, who can then verify that the prisoner is alive and that he or she has not been tortured. "Habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or cruel, inhumane, or degrading punishment or treatment."<sup>144</sup> Thus, the American Convention's mandate that the judicial guarantees necessary to protect non-derogable rights cannot be suspended even during a state of emergency, and the Court's holding that habeas corpus constitutes one of these non-derogable guarantees, are of primary importance in regions which suffer gross and systematic violations of human rights.

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pate in government (art. 23). *Id.*

142. Habeas Corpus in Emergency Situations, *supra* note 30, ¶ 36; see generally NUNCA MAS, *supra* note 131; INFORME DE LA COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, CHILE, [NATIONAL COMMISSION ON TRUTH AND RECONCILIATION REPORT, CHILE], March, 1991; U.N. TRUTH COMMISSION REPORT FOR EL SALVADOR, *supra* note 8; THE FACTS SPEAK FOR THEMSELVES, *supra* note 8.

Some States have even promulgated special laws or have instituted a practice enabling them to hold a detainee incommunicado for a prolonged period of time, in some cases for as long as fifteen days. During that time, the detainee may be refused all contact with the outside world, thus preventing resort to the writ of habeas corpus."

Habeas Corpus in Emergency Situations, *supra* note 30 (quoting the request of the Inter-American Commission, January 30, 1987).

143. Habeas Corpus in Emergency Situations, *supra* note 30; Judicial Guarantees in States of Emergency (Arts. 27(2), 25, 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987.

144. Judicial Guarantees in States of Emergency, *supra* note 143, ¶ 35.

## 2. The Duty to Investigate and Punish Human Rights Abuses: Truth Commissions and the Problem of Impunity

Internationally, and especially in those countries where democratically elected governments have succeeded governments that committed gross and systematic human rights abuses, there is much debate over whether the state has an obligation to investigate and punish past human rights abuses.<sup>145</sup> Some states have established governmental commissions called "truth commissions" to investigate egregious human rights abuses committed under prior governments and to provide official acknowledgment of that truth.<sup>146</sup> Other states, however, refuse to empower official investigatory bodies.<sup>147</sup>

Still, even those states that have officially investigated the truth have passed amnesty laws barring the prosecution of the perpetrators. In many cases government agents engaged in atrocious acts of torture, murder and disappearance. The agents were granted *de facto* impunity when they committed the violations<sup>148</sup> and subsequent *de jure* immunity from prosecution by national amnesty laws.<sup>149</sup> Moreover, even when current human rights violations occur, the military personnel involved are tried before military courts which do not usually hand down convictions. This results in continued impunity.<sup>150</sup>

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145. See *supra* notes 9, 10 and accompanying text.

146. *Id.* The states' duty to ensure human rights by investigating human rights offenses can be fulfilled by an officially established "truth commission." The Truth Commissions, established in Argentina, Chile, and El Salvador, and the Human Rights Commissioner in Honduras, have officially revealed and acknowledged the gross and systematic violations of human rights which occurred in those states. See also *supra* note 30.

147. See Pasqualucci, *supra* note 9, at 321.

148. One leading commentator has stated:

In pursuance of orders, army officers enjoyed support from their comrades and were granted *de facto* immunity. When torture was performed, the officers who carried it out counted on all the help available, including the whole state apparatus, with the assurance that no officer would attempt to stop the torment or report it.

Jaime Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, in STATE CRIMES: PUNISHMENT OR PARDON, *supra* note 9, at 71, 72. (The author was a senior advisor to President Alfonsín, who democratically took control of Argentina after the military dictatorship).

149. Norris, *supra* note 10.

150. In Latin America, military courts have not generally shown themselves to be willing or able to provide competent, independent, and impartial justice. Rather they have stalled and then released the alleged perpetrators. See AMERICA'S WATCH,

The Inter-American Court made perhaps the most extensive ruling on the states' affirmative duties under international human rights law in *Velásquez Rodríguez*.<sup>151</sup> The Court declared that under the American Convention, the state has a duty to both investigate and punish human rights violations.<sup>152</sup> The American Convention requires that the states parties "ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" provided for in the Convention.<sup>153</sup> The Court held that under the duty to "ensure" human rights, the state must "use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction," and must "identify those responsible."<sup>154</sup> The Court declared in this regard that, "[t]he State is obligated to investigate every situation involving a violation of the rights protected by the Convention."<sup>155</sup>

The state's duty to investigate is independent of any possible duty to punish the violators. The Court clarified that:

[E]ven in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the state is obligated to use the means at its disposal to inform the relatives of the fate of the

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TRUTH AND PARTIAL JUSTICE IN ARGENTINA, AN UPDATE (1991). The judges making up the military tribunals often have a strong spirit of solidarity with the military personnel whom they judge. Provisional Report on the Question of Impunity for the Authors of Human Rights Violations, prepared by Sr. Guisse and Sr. Joinet, in compliance with Resolution 1992/23 of the Subcommission on Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/1993/6, 13, (citing E/CN.4/1991/20). Thus, they tend to justify violations, and even legitimize them in the superior interest of fulfilling the mission of the armed forces. In most cases, military tribunals do not appear capable of fulfilling the international requirement of an independent tribunal. Military courts, of course, are not the only tribunals in Latin America which may lack independence. The U.N. Truth Commission for El Salvador stated that nation's courts were not, at the time of the report, capable of administering justice. U.N. TRUTH COMMISSION REPORT FOR EL SALVADOR, *supra* note 8.

151. *Velásquez Rodríguez Case*, (Merits), Inter-Am. C.H.R., Ser. C, No. 4, ¶¶ 174, 176 (1988).

152. *Id.* The Court further stated that, "[t]he second obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the states parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights." *Id.* ¶ 166.

153. *Supra* note 11, art. 1(1).

154. *Velásquez Rodríguez Case*, (Merits), ¶ 174.

155. *Id.* ¶ 176.



victims and, if they have been killed, the location of their remains.<sup>156</sup>

In an advisory opinion requested by the Commission, the Court affirmed that a state may be held internationally responsible when state agents comply with a domestic law which is manifestly in violation of the American Convention.<sup>157</sup> The Court also reiterated the Nuremberg principle that state agents are individually responsible under international law, when their acts per se constitute an international crime.<sup>158</sup> It follows that domestic amnesty laws could not prevent the prosecution of state agents in an international criminal court, should such a court be established.<sup>159</sup>

Moreover, the state may be in violation of the Convention's duty to ensure human rights because of its failure to protect them. In this regard the Court reasoned that:

[a]n illegal act which violated human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>160</sup>

Consequently, the duty to ensure human rights requires the state to use all means at its disposal, not only to identify those responsible for human rights violations, but also to impose on them "appropriate punishment."<sup>161</sup> This reasoning may serve as persuasive authority in areas where amnesty is an issue.

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156. *Id.* ¶ 182. This duty continues until the person's fate is known. *Id.*

157. International Responsibility for the Passage and Application of Laws which Violate the Convention on Human Rights, Advisory Opinion OC-14/94, December 9, 1994, ¶ 58(2).

158. *Id.*

159. See Pasqualucci, *supra* note 9.

160. *Id.* ¶ 172. An act may not initially be imputable to the state because it was the act of a private person or because the perpetrator of the violation has not been identified. *Id.*

161. *Id.* ¶ 174. The Court did not, however, define "appropriate punishment." *Id.*

### 3. Respect for Indigenous Cultures and Victim Reparation

The Inter-American Court has also demonstrated sensitivity to the cultural values of indigenous peoples. Third World states often have large indigenous populations with their own cultural values.<sup>162</sup> It is important for a human rights system to respect these values to the extent that they do not conflict with individual human rights. Although the American Convention, unlike its African counterpart,<sup>163</sup> generally protects only the rights of individuals and does not concern itself directly with the corresponding rights of peoples,<sup>164</sup> the Inter-American Court has been respectful of cultural values.<sup>165</sup> The *Aloeboetoe* case pro-

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162. See generally Diego A. Iturralde, *Los Pueblos Indígenas Y Sus Derechos en America Latina [Indigenous Peoples and Their Rights in Latin America]*, 15 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 11 (1992).

163. The African Banjul Charter on Human and People's Rights, reprinted in 21 I.L.M. 58 (1982). The Banjul Charter specifically refers to both the rights of individuals and the rights of peoples. Articles 2-17 protect individual rights. Articles 19-24 protect peoples rights. For example, Article 19 provides that, "[a]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another." *Id.* See generally Thomas Buerghenthal & Pedro Nikken, *El Sistema Africano de los Derechos Humanos y de Los Pueblos*, [The African System of Human Rights and Its Nations], 79 REVISTA DE LA FACULTAD DE CIENCIAS JURÍDICAS Y POLÍTICAS, UNIVERSIDAD CENTRAL DE VENEZUELA 267, 274, 275 (1991) (stating that the majority of the peoples' rights contained in the Banjul Charter can be characterized as "third generation" rights, such as the right to self-determination (art. 20), the right to a "satisfactory environment favorable to their development" (art. 24), and the right to "national and international peace and security" (art. 23)).

Conversely, the American and European Conventions focus primarily on the rights of the individual.

164. The rights protected by the American Convention are generally civil and political rights, such as the rights to life, personal liberty, due process, and humane treatment. However, the Convention contains a provision steering states toward full realization of economic, social, and cultural rights. American Convention, *supra* note 11, art. 26. These rights usually include, *inter alia*, the rights to work, an adequate standard of living, enough to eat, an education, and the rights of peoples to self-determination and to freely pursue economic, social, and cultural development. Furthermore, an additional Protocol to the American Convention — the Protocol of San Salvador — protects these rights. Protocol of San Salvador, American Convention, reprinted in BASIC DOCUMENTS, *supra* note 11, at 67. The San Salvador Protocol has not entered into force as of this date. See THE RIGHTS OF PEOPLES (James Crawford ed., 1988) for a comprehensive discussion of people's rights. See also Guillermo Fernández de Soto, *La Protección de Los Derechos Colectivos en el Sistema Interamericano*, in LA CORTE Y EL SISTEMA INTERAMERICANOS DE DERECHOS HUMANOS, at 133.

165. Latin America has several populations of indigenous peoples, ranging upward to more than 50% of the total national population in certain countries such as Guatemala.

vides a good example.<sup>166</sup> *Aloeboetoe* involved the kidnapping by the Surinamese military of seven young men of the Saramaca tribe, a tribe inhabiting the bush country of Suriname and made up of descendants of African slaves. The military forced the men to dig their own graves and then murdered them.<sup>167</sup> Suriname accepted liability for the deaths, leaving reparations as the only issue to be decided by the Court.<sup>168</sup>

The Court considered tribal law in apportioning compensation to the victims' next of kin.<sup>169</sup> Rules of succession, which identify the decedent's beneficiaries, are generally determined under local law. Surinamese national law provides that a victim's next of kin includes the legally recognized spouse, the children, and perhaps dependent parents of the victims. Suriname does not recognize polygamy.<sup>170</sup> Under Saramaca tribal customs, however, polygamy is common, and marriages are not registered with the government.<sup>171</sup> The tribe generally follows its own rules and is not aware of national laws. Moreover, even had the tribe wished to comply with governmental requirements, the Surinamese government did not provide accessible facilities to officially register births, deaths, and marriages.<sup>172</sup>

The Court determined that official Surinamese family law was not effective in the region and was, therefore, not the local law for the purposes of the case. Consequently, the Court considered Saramaca customs in order to determine the next of kin.<sup>173</sup> In accordance with the local tribal law of succession, the Court ordered that reparations be paid to all the wives, children, and in some cases, the parents of the victims.<sup>174</sup> The Court did not go so far as to accept the Commission's argument that under tribal customs, "a person is a member not only of his or her own family group, but also of his or her own village, community and tribal group" and, therefore, that damages should be paid not

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166. *Aloeboetoe Case, (Reparations), Inter-Am. C.H.R., Ser. C, No. 15 (1993).*

167. *Id.*

168. *Id.*

169. *Id.* A victim who survived for five days after the attack described the events. *Id.* ¶ 6.

170. Marriages must be officially registered to be recognized by the state. *Id.* ¶ 17.

171. *Id.*

172. *Id.* ¶ 58.

173. *Id.* ¶ 62.

174. *Id.* ¶ 66.

only to the victim's immediate family but to the entire tribe.<sup>175</sup> Nor would the Court give effect to those customs which would contravene the provision against gender discrimination in the American Convention.<sup>176</sup>

Even beyond considering tribal customs, the Court has taken into account the cultural values reflected in the social and economic setting of much of rural Latin America. In these regions, many couples do not legally marry, fathers "recognize" and support children out of wedlock, and parents in their old age are often dependent on adult children. The Court appeared willing to take some social customs into account when determining reparations in the Honduran disappearances. In the damages phase of that case, it asked that the government provide the names of the victims' wives as well as those "of any concubines recognized in any official document."<sup>177</sup> The Court also noted that if one of the victims had a child other than those conceived in matrimony, as had been mentioned at the public hearing, that child should share in the indemnification.<sup>178</sup>

Furthermore, in *Aloeboetoe* the Court considered the poverty in the Saramaca's locale in setting reparations. The Court required that the Government reopen and staff the school and health dispensary in the area where the victims' families lived.<sup>179</sup>

The Court, however, has not advanced the international law of reparations by creating a fund to pay the victims of gross and systematic human rights abuses.<sup>180</sup> In a state where gross and systematic violations are common, there are often several victims of the same offense. All of their cases, however, cannot be referred to an international court that can order reparations to

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175. *Id.* ¶ 83.

176. *Id.* ¶ 62. There has been much scholarly debate and some case law on whether a people which has traditionally discriminated on the basis of gender should be permitted to do so under international law. See FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS* 61-100 (1988).

177. Velásquez Rodríguez Case, (Compensatory Damages), Inter-Am. C.H.R., Ser. C, No. 7, ¶ 63(1) (1988); American Convention, *supra* note 11, ¶ 13.

178. *Id.* ¶ 55.

179. *Aloeboetoe* Case, (Reparations), Inter-Am. C.H.R., Ser. C, No. 15, res. 5 (1993).

180. Velásquez Rodríguez Case, (Compensatory Damages), ¶ 7 (in which the wife of Manfredo Velásquez Rodríguez requested that a fund be established to pay for the education of the children of the disappeared in Honduras).

the families. For instance, the Inter-American Court sits only part-time and cannot consider all the human rights complaints initially filed with the Commission. Thus, the Commission is more likely to send sample cases to the Court. This is especially problematic in regard to reparations, where only one or two families out of many who suffered similar abuses will receive compensation. Normally in such cases, domestic courts should order the state to pay reparations. However, this usually does not occur.<sup>181</sup> Honduran Human Rights Commissioner Leo Valladares, in his official report on the disappearances in Honduras, stated that it was patently unfair "that only those whose cases were before the Inter-American Court received reparations, and that all of the proven cases of disappearances should receive economic reparations."<sup>182</sup> Theo Van Boven, who studied victim reparations for the U.N., also suggested that it is "necessary that, in addition to individual means of reparation, adequate provision be made to entitle groups of victims or victimized communities to present collective claims for damages and to receive collective reparation accordingly."<sup>183</sup> In the inter-American system, where gross violations of human rights have often occurred, the Court could advance international human rights by instituting a means to compensate such victims.

The American Convention requires that a government do more than pay financial compensation to the injured party.<sup>184</sup> The Convention also requires that the government ensure the injured party the enjoyment of the right violated and, if appropriate, that it remedy the situation that caused the violation.<sup>185</sup> In *Velásquez Rodríguez*, the Court interpreted the Convention

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181. Argentina established laws to provide reparation to the victims of human rights abuses and their families. Argentine Law 23,466 granted pensions to the families of the disappeared; Argentine Law 24,043 provides compensatory damages for persons arrested under orders from the National Executive Power or civilians arrested by warrants issued by a military tribunal. *Inter-Am. Comm. H. R., Argentine Report No. 28/92* (October 2, 1992) reprinted in 13 HUM. RTS. L. J., 336, (1992).

182. THE FACTS SPEAK FOR THEMSELVES, *supra* note 8, at 234. Valladares suggested that the government of Honduras should provide reparation to all the families of the victims.

183. Van Boven Report, *supra* note 136, § VII (The Issue of Impunity in Relation to the Right to Reparation For Victims of Gross Violations of Human Rights, Review of Further Developments in Fields With Which the Sub-Commission Has Been Concerned, Commission on Human Rights).

184. American Convention, *supra* note 11, art. 63(1).

185. *Id.*

provision on victim reparation to comply with the general principle of international law that every violation causing harm creates a duty to make adequate reparation.<sup>186</sup> The Court made clear that adequate reparation in the case of a human rights violation requires the state to make full restitution.<sup>187</sup> Full restitution includes "the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."<sup>188</sup> Within this duty, the Court included the state's duties to investigate human rights violations and to punish those directly responsible.<sup>189</sup> The Court did not, however, expressly incorporate these duties in the resolutions of the judgment on the merits or even in the resolutions on compensatory damages.<sup>190</sup>

More recently, the Court seems to be limiting its decisions on reparations to orders that the state make financial payments and other forms of economic compensation to the victims. This limitation is contrary to both the wording of the Convention<sup>191</sup> and the Court's statements in *Velásquez Rodríguez*. In *Aloeboetoe*,<sup>192</sup> the Court appears to distance itself from its *Velásquez* position by stating that "the rule of *in integrum restitutio*" [full restitution] is "one way in which the effect of an international unlawful act *may* be redressed, but it is not the only way in which it *must* be redressed, for in certain cases such reparation may not be possible, sufficient or appropriate."<sup>193</sup>

Subsequent to the Honduran cases, the Court has never referred

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186. *Velásquez Rodríguez Case*, (Compensatory Damages), Inter-Am. C.H.R., Ser. C, No. 7, ¶ 25 (1988).

187. *Id.* ¶ 26. Full restitution is also called *restitutio in integrum*. *Id.*

188. *Id.* ¶ 26.

189. *Id.* ¶ 34.

190. *Id.* ¶ 35. The Court simply stated that "the bases of a judicial decision are a part of the same. Consequently, the Court declares that those obligations [to investigate and punish] on the part of Honduras continue until they are fully carried out". *Id.*

191. American Convention, *supra* note 11, art. 63(1) requires not only the payment of "fair compensation," but also "if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied." Article 63(1) also provides that the victim be assured the enjoyment of the right violated. *Id.* This, of course, is not possible in the case of a violation of the right to life.

192. *Aloeboetoe Case*, (Reparations), Inter-Am. C.H.R., Ser. C, No. 15.

193. *Id.* ¶ 49 (emphasis in original).

to the state's duties to investigate violations and to punish those responsible.<sup>194</sup> In the *El Amparo Case*, in which the government of Venezuela took responsibility for the violation of the right to life of seventeen fisherman, the Court did not reach the issue of whether sections of the Venezuelan Code of Military Justice were compatible with the American Convention.<sup>195</sup> The Court simply ordered that Venezuela and the Commission decide on reparations and compensation.<sup>196</sup> The Court's message could be interpreted to allow a state to violate human rights with impunity provided that it is willing to make reparations with taxpayers' money.

The Court has also refused to order state payment of victims' attorneys fees. In *Aloeboetoe*, the Court made a stinging and seemingly unjustified rebuke to the Commission in response to its request for state payment of fees to the victims' counsel.<sup>197</sup> The Court stated that if the Commission fulfilled its function by "contracting outside professionals instead of using its own staff," it could not demand attorney's fees.<sup>198</sup> In fact, the Commission had not contracted the services of Dr. Grossman, the outside attorney. Although he was designated as "legal advisor" to the Commission, he represented two NGOs.<sup>199</sup> The Commission has now established the Inter-American Human Rights Foundation, which will identify a pool of lawyers in the Western Hemisphere who are willing to work *pro bono* on cases

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194. In *Aloeboetoe*, however, the victims' bodies had not been returned to their families for proper burial, and the Court did quote the following from *Velásquez*: "the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and . . . the location of their remains." *Id.* ¶ 9. (quoting *Velásquez Rodríguez Case*, (Merits), Inter-Am. C.H.R., Ser. C, No. 7, ¶ 181 (1988)).

195. See *El Amparo Case* (Venezuela), Inter-Am. C.H.R., Ser. C, ¶ 4 (1995) (on file with author), to be reprinted in the Annual Report of the Inter-American Court of Human Rights (1995). Judge Cancado Trindade, a well-known international law scholar, filed a concurring opinion, stating that the Court should have reserved the right to decide on the compatibility of certain sections of the Venezuelan Military Code with the American Convention.

196. *Id.* res. 2. The Venezuelan military has since promoted one of the officers who was in charge of the battalion that committed the murders. Thomas Buergenthal, Lecture on Human Rights at George Washington University School of Law (Sept. 29, 1995) (notes on file with the author).

197. *Aloeboetoe Case*, (Reparations), Inter-Am. C.H.R., Ser. C, No. 15 (1993).

198. *Id.* ¶ 114.

199. See David Padilla, *Reparations in Aloeboetoe v. Suriname*, 17 HUM. RTS. Q. 541, 548-9 (1995) (stating that "the Court made a serious mistake of fact, confusing the role of the Commission's legal advisor . . .").

before the Commission and the Court.

### *B. Procedural and Evidentiary Precedents*

Several of the Court's most important precedents deal with procedural issues. As the Convention provides a detailed list of the substantive rights of individuals, the Court's clarification of the procedures which must be followed for the effective enforcement of those rights has proven significant.

#### 1. Exceptions to the Exhaustion of Domestic Remedies

The Court has clarified issues of the burden of proof and the scope of exceptions to the international principle of exhaustion of domestic remedies. This principle requires an individual to exhaust all available state remedies before turning to international law.<sup>200</sup> Under the American Convention "the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law."<sup>201</sup> Thus, a victim of human rights abuse must normally be denied redress in the local legal system before filing a complaint with an international body. This generally recognized rule allows a state to attempt resolution of the case under its internal law before being confronted with an international proceeding.<sup>202</sup> The requirement that the victim exhaust domestic remedies is based, however, on the presumption that effective domestic remedies are in fact available.

Victims and their family members frequently encounter difficulties in pursuing domestic remedies. These difficulties are especially severe when the victims have been forcibly disappeared. In *Velásquez Rodríguez*, the victim's family unsuccessfully filed three writs of habeas corpus<sup>203</sup> and two criminal com-

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200. See American Convention, *supra* note 11, art. 46(1)(a); European Convention, *supra* note 25, art. 26; African Banjul Charter on Human and People's Rights, arts. 50 and 56(5) reprinted in 21 I.L.M. 58 (1982); and First Protocol to the United Nations International Covenant on Civil and Political Rights, arts. 2 and 5(2)(b) reprinted in 999 U.N.T.S. 171, 6 I.L.M. 383 (1967).

201. American Convention, *supra* note 11, art. 46(1)(a).

202. *Velásquez Rodríguez Case*, (Merits), Inter-Am. C.H.R., Ser. C, No. 4, ¶¶ 35, 36-37 (1988).

203. Habeas Corpus is the normal legal "means of finding a person presumably



plaints before turning to the inter-American system.<sup>204</sup> The government of Honduras, however, claimed that domestic remedies had not been exhausted because the writs of habeas corpus required the petitioner to identify both the place of detention and the detaining authority.<sup>205</sup> The petitioners were unable to do so because of the clandestine nature of the detention.<sup>206</sup>

When a state alleges non-exhaustion of domestic remedies, the Inter-American Court places the burden of proof on the state to show that effective remedies remain to the complainant.<sup>207</sup> This is a reasonable allocation of the burden. The state is in the best position to access information on the availability and effectiveness of any untested internal remedies. If the government specifies which remedies the petitioner did not exhaust, then the burden shifts to the petitioner to show that the remedies were indeed exhausted or that they could not be exhausted due to one of the exceptions listed in the Convention.<sup>208</sup> Consequently, the Court continues to observe tenets of state sovereignty, but does not permit the government to place the burden on the petitioner merely by alleging failure to exhaust domestic remedies. Moreover, the Court has held that if a state alleges such failure, it is subsequently estopped from claiming that the petition is inadmissible due to the requirement that it be lodged with the Commission within six months of the exhaustion of domestic remedies.<sup>209</sup>

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detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty." *Id.* ¶ 65.

204. *Id.* ¶ 55.

205. *Id.* ¶ 52.

206. In the case of disappearances, the government usually holds the victim in clandestine detention centers. Thus it is impossible for the petitioner to identify the place of detention. See NUNCA MAS, *supra* note 131, at 479 (the Commission verified that hundreds of clandestine detention centers were used by the government during what has become known as the "dirty war").

207. Velásquez Rodríguez Case, (Preliminary Objections), Inter-Am. C.H.R., Ser. C, No. 1, ¶ 88 (1987) cited with approval in Velásquez Rodríguez Case, (Merits), Inter-Am. C.H.R., Ser. C, No. 4, ¶ 59 (1988).

There is a division of authority between international human rights bodies as to which party shall bear the burden of proof when the parties disagree as to the exhaustion of domestic remedies. For discussion of the burden of proof in claims of exhaustion of domestic remedies in the European system and before the U.N. Human Rights Committee, see DAVIDSON, *supra* note 57, at 71-73. The European Human Rights Commission generally places the burden on the petitioner, while the United Nations Human Rights Committee requires that the state demonstrate the specific domestic remedies still available to the complainant. *Id.*

208. Velásquez Rodríguez Case, (Merits), ¶ 60.

209. Neira Alegria et al. v. Peru, (Preliminary Objections), I-A. C.H.R., ¶ 29

The Court has specified that only those domestic remedies which are "adequate" in a specific case need be exhausted.<sup>210</sup> A domestic remedy is adequate only if it is suitable to address the infringement of the specific legal right allegedly violated.<sup>211</sup> The Court reasoned that a norm should not be interpreted "to lead to a result that is manifestly absurd or unreasonable."<sup>212</sup> In the case of disappearances, although habeas corpus is the normal remedy used to locate a person detained by the authorities, if the writ requires the identification of the detention area, "it would not be adequate for finding a person clandestinely held by State officials, since in such cases there is only hearsay evidence of the detention, and the whereabouts of the victim is unknown."<sup>213</sup>

Furthermore, the remedy must also be effective, meaning that it is capable of producing the anticipated result.<sup>214</sup> According to the Court, habeas corpus cannot be considered an effective remedy if it is not applied impartially by the government, or if the party invoking it is thereby placed in danger.<sup>215</sup> Resorting to domestic remedies becomes a "senseless formality" if they "are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government."<sup>216</sup> Specifically in the case of disappearances, the Court found that the remedies offered in Honduras were ineffective because "the imprisonment was clandestine; formal requirements made them inapplicable in practice; the authorities against whom they were brought simply ignored them, or because attorneys and judges were threatened and intimidated by those authorities."<sup>217</sup> In such a case, exceptions would be applicable, and the petitioner would not be re-

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(1991) reprinted in 13 HUM. RTS. L. J. 146, 148 (1992). The American Convention, *supra* note 11, provides that a petition must be lodged with the Commission within a "period of six months from the date on which the party alleging violation of his rights was notified of the final judgment," or the petition is inadmissible. *Id.* art. (46)(1)(b).

210. Velásquez Rodríguez Case, (Merits), ¶ 64.

211. *Id.*

212. *Id.*

213. *Id.* ¶ 65.

214. *Id.* ¶ 66.

215. *Id.*

216. *Id.* ¶ 68.

217. *Id.* ¶ 80.

quired to prove exhaustion.<sup>218</sup>

Generally recognized legal principles and the American Convention establish exceptions to the exhaustion of domestic remedies when appropriate.<sup>219</sup> For instance, in locales where due process of law does not exist for protection of the right violated, it is not necessary for the applicant to prove exhaustion.<sup>220</sup> Exceptions also apply when local authorities deny access to or prevent a party from exhausting such remedies, or when there is unwarranted delay in the rendering of a final domestic judgment.<sup>221</sup>

The Court provided additional clarification regarding when exceptions are applicable within the particular situation of developing states. In an advisory opinion request, the Commission asked the Court to determine whether domestic remedies must be exhausted when the petitioner is indigent or unable to obtain legal representation because of a generalized fear in the legal community.<sup>222</sup> With respect to indigence, the Court stated that the American Convention guarantees the exercise of rights protected by the Convention, without discrimination based on "economic status."<sup>223</sup> The Court held that if a person must have legal representation or pay filing fees in order to exhaust domestic remedies, and she does not have the financial ability, the state must "organize the governmental apparatus"<sup>224</sup> so as to permit her to do so.<sup>225</sup> Otherwise, the victim's indigence may trigger an exception to the duty of exhaustion.<sup>226</sup>

Moreover, when a claimant is unable to secure legal repre-

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218. *Id.* ¶ 68.

219. American Convention, *supra* note 11, art. 46(2).

220. *Id.* at 46(2)(a).

221. *Id.* at 46(2)(b).

222. See Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion, *supra* note 93.

223. American Convention, *supra* note 11, art. 1(1).

224. The Court in *Velásquez Rodríguez* found that states parties to the Convention have a duty "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights." *Velásquez Rodríguez Case*, (Merits), Inter-Am. Ct. H.R., Ser. C, No. 4, ¶ 175 (1988) *cited with approval* in Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion *supra* note 93, ¶ 23.

225. Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion, *supra* note 93, ¶ 30.

226. *Id.*

sentation because of a generalized atmosphere of fear, in which "lawyers do not accept cases which they believe could place their own lives and those of their families in jeopardy," the state may be in violation not only of its affirmative duty to protect human rights, but also to "ensure" them.<sup>227</sup> In such a case, the Court stated that the claimant would also be absolved of the duty to exhaust domestic remedies.<sup>228</sup>

## 2. The Court's Balancing of Victim's Rights and Procedural Regularity

The Inter-American Court has specified that the object and purpose of the American Convention is the protection of the individual's human rights. In an oft-quoted explanation of the singular nature of human rights treaties, the Court held that:

[M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction . . . .<sup>229</sup>

The Court and Commission, in enforcing the individual's basic rights, must do so within the "legal order" established by the American Convention. A state has a legitimate expectation that the procedures stipulated in the Convention will be followed. State parties before the Court often request that the case be dismissed because of the Commission's failure to follow cer-

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227. *Id.* ¶ 34. American Convention, *supra* note 11, art. 1(1), provides that "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . . ."

228. *Id.* ¶ 35.

229. The Effect of Reservations on the Entry into Force of the American Convention, (arts. 74, 75, American Convention of Human Rights), Inter-Am. C.H.R., Advisory Opinion OC-2/82, Ser. A, No. 2, ¶ 29 (1982).

tain procedures mandated by the Convention.<sup>230</sup> These procedures are interposed to protect both the victim and state sovereignty, and as such, any deviation from the requirements must be considered carefully. The Court has held, however, that the Convention must be interpreted in favor of the individual,<sup>231</sup> and thus it has refused to take a strictly formalistic view of procedural requirements. The Court made clear that "the procedural system is a means of attaining justice and that the latter cannot be sacrificed for the sake of mere formalities."<sup>232</sup> Furthermore, the Court stated that "failure to observe certain formalities is not necessarily relevant when dealing on the international plane."<sup>233</sup> What is essential is that "the conditions necessary for the preservation of the procedural rights of the parties not be diminished or unbalanced and that the objectives of the different procedures be met."<sup>234</sup>

In this regard, the Court has made several procedural rulings. The Court held that the Commission need not make an express and formal determination of the admissibility of a petition unless the government made an issue of admissibility at the time.<sup>235</sup> Additionally, the Court held that the Commission is not required to attempt a friendly settlement unless, at the Commission's sole discretion, it determines it is suitable or nec-

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230. See *Velásquez Rodríguez Case*, (Preliminary Objections), Inter-Am. C.H.R., Ser. C, No. 1 (1987); see also *American Convention*, *supra* note 11, arts. 46-51 for procedures before the Commission.

231. The Court applies the rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties (1990), reprinted in CARTER & TRIMBLE, *supra* note 19, at 53 (1994). See also *Restrictions to the Death Penalty* (arts. 4(2) & 4(4)), American Convention on Human Rights, Inter-Am. C.H.R., Advisory Opinion OC-3/83, Ser. A, No. 3. ¶ 18 (1983).

The Inter-American Court has stated that, "[t]he Convention has a purpose — the international protection of the basic rights of human beings", which "requires that the Convention be interpreted in favor of the individual, who is the object of international protection, as long as such an interpretation does not result in a modification of the system." *Government of Costa Rica* (In the Matter of Viviana Gallardo, et al.), Inter-Am. C.H.R., No. G 101/81, ¶ 16 (1981).

232. *Cayara Case*, (Preliminary Objections), Inter-Am. C.H.R., Ser. C, No. 14, ¶ 42, reprinted in 14 HUM. RTS. L. J. 159 (1993) cited with approval in *Certain Attributes of the Inter-American Commission on Human Rights* (arts. 41, 42, 46, 47, 50, and 51 of the American Convention on Human Rights), Advisory Opinion OC-13, ¶ 43, July 16, 1993.

233. *Id.* ¶ 33.

234. *Id.*

235. *Velásquez Rodríguez Case*, (Preliminary Objections), Inter-Am. C.H.R., Ser. C, No. 1, ¶ 40 (1987); see *American Convention*, *supra* note 11, art. 48(1).

essary under the circumstances.<sup>236</sup> The Court reasoned that in the case of a disappearance in which the state denies involvement or knowledge of the person, "it is very difficult to reach a friendly settlement that will reflect respect for the rights to life, to humane treatment, and to personal liberty."<sup>237</sup> In a subsequent case, the Court seemed to backtrack in holding that the Commission could only exercise its discretion not to initiate a friendly settlement in "exceptional cases" and for good reason.<sup>238</sup> However, the Court refused to dismiss the case on the basis of the Commission's failure to initiate a friendly settlement, because under the Regulations of the Commission, the government also had the authority to request a friendly settlement.<sup>239</sup> The Court aptly stated that, "[o]ne cannot demand of another an action that one could have taken under the very same conditions but chose not to."<sup>240</sup> The Court also held that on-site investigations are not mandatory under the Convention.<sup>241</sup> Thus, the Commission has discretion to conduct such a factual investigation.<sup>242</sup>

Nevertheless, the Court insists on certain formalities to protect the system's integrity. This has resulted in the removal of some cases alleging egregious violations. In the *Cayara* case against Peru, the Commission alleged that in retaliation for a guerilla ambush by the Shining Path the Peruvian military entered a village in the highlands and murdered the first man they saw.<sup>243</sup> According to the application, the military then shot five men in the village church. Later, when other men returned from the fields the soldiers murdered them with bayonets

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236. Velásquez Rodríguez Case, (Preliminary Objections), ¶ 45. The Court stated, however, that the Commission's power could not be exercised arbitrarily. *Id.* See American Convention, *supra* note 11, art. 48(1)(f) (for provision on friendly settlements).

237. *Id.* ¶ 46.

238. Caballero Delgado Case, (Preliminary Objections), Inter-Am. C.H.R., Ser. C, No. 17, ¶ 27 (1994).

239. *Id.* ¶¶ 29-30. See Regulations of the Commission, *supra* note 118, art. 45(1), at 119.

240. *Id.* ¶ 30.

241. Velásquez Rodríguez, (Preliminary Objections), Inter-Am. C.H.R., Ser. C, No. 1, ¶ 49 (1987).

242. *Id.* Furthermore, the Court ruled that it was not necessary for the Commission to hold a preliminary hearing before the issuance of a report unless requested by the parties. *Id.* ¶ 53.

243. Cayara Case, (Preliminary Objections), Inter-Am. C.H.R., Ser. C, No. 14 (1993).

and farm tools.<sup>244</sup> In all, between twenty-eight and thirty-one persons were killed in one day.<sup>245</sup> Subsequently, witnesses were arrested and disappeared or murdered.<sup>246</sup> As a preliminary objection, the government demanded that the case be dismissed because the Commission had not complied with the time-limit for case submissions. The Commission had submitted the case and then withdrawn it, submitting it again at a later date.<sup>247</sup>

Although the Court reasoned that some delays and omissions in complying with Convention procedures might be excused, it determined that to "preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism," the case had to be dismissed.<sup>248</sup> The Court explained that "[w]ithout falling into a rigid formalism which distorts the purpose and object of the Convention, the states and the organs of the Convention must comply with the provisions which regulate the procedure, for the juridical security of the parties depend upon it."<sup>249</sup>

Despite the extreme nature of the dismissal, particularly with such serious allegations at stake, some experts on the inter-American system support the Court's decision and its concern for improved procedural regularity by the Commission.<sup>250</sup>

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244. *Id.*

245. *Id.* ¶ 15.

246. *Id.* ¶¶ 16-18.

247. *Id.*

248. *Id.* ¶ 63. American Convention, *supra* note 11, art. 51(1) provides:

If, within a period of three months from the date of the transmittal of the report of the Commission to the States concerned, the matter has not either been settled or submitted by the Commission or by the State concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

249. Certain Attributes of the Inter-American Commission on Human Rights, Advisory Opinion, OC-13, ¶ 41 (1993) (citing to Cayara Case, (Preliminary Objections), Inter-Am. C.H.R., Ser. C, No. 14, ¶¶ 42, 63 (1993)).

If, however, the state requests an extension which results in the expiration of a Convention mandated deadline, the Court held that principles of good faith which govern international relations prohibit the state from invoking the expiration of the deadline as a preliminary exception to the consideration of the case on the merits. Neira Alegria Case, (Preliminary Objections), Inter-Am. C.H.R., Ser. C, No. 13, ¶ 34 (1991), reprinted in 13 HUM. RTS. L.J., 146, 148 (1992).

250. Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human*

One study found that the Commission's "manipulation and disregard of regulations has led to slipshod handling of cases, with results that encourage disrespect and create legal difficulties for the Commission."<sup>251</sup> These stricter procedural demands may result in a more efficient system which will better protect human rights; provided of course that the Court does not go too far in considering form over substance.

### 3. The Court's Consideration of Evidence

Perpetrators of disappearances attempt to avoid accountability by eliminating all evidence of the kidnapping or of the victim's fate.<sup>252</sup> Consequently, the complainant can seldom provide direct evidence. Evidentiary issues of the initial burden and standard of proof become crucial in establishing government responsibility. In the Honduran cases, the Inter-American Court complied with basic principles of law which assign the burden of proof to the party making the allegations.<sup>253</sup> The Court created a two-prong test to satisfy this burden. Under the first prong, the Inter-American Commission, which is usually the complainant alleging the disappearance of a particular individual, must show that the state engaged in an official practice of disappearances or at least tolerated such a practice.<sup>254</sup> Under the second prong, the Commission must establish a link between the individual's disappearance and the state practice.<sup>255</sup>

In the Honduran cases, the Commission established that a state practice of disappearances existed. It proved to the Court that between one-hundred and one-hundred-fifty persons were disappeared in Honduras from 1981 to 1984.<sup>256</sup> It further proved that "[i]t was public and notorious knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders."<sup>257</sup> The vic-

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*Rights*, 10 AM. U. J. INT'L L. & POL'Y 333, 343 (1994).

251. *Committee on International Human Rights: The Inter-American Commission on Human Rights: A Promise Unfulfilled*, 48 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF N.Y. 607, 608.

252. *Velásquez Rodríguez Case*, (Merits), Inter-Am. C.H.R., Ser. C, No. 4, ¶ 130 (1988).

253. *Id.* ¶ 124.

254. *Id.* ¶ 125.

255. *Id.*

256. *Id.* ¶ 147(a).

257. *Id.* ¶ 147(b) & (c). In *THE FACTS SPEAK FOR THEMSELVES*, *supra* note 8,



tims, many of whom had been under surveillance before their disappearances, were often labor leaders, student leaders, or persons that the government deemed a threat to state security.<sup>258</sup> The kidnappers drove vehicles with tinted glass, which required official authorization, and carried arms reserved for use by the police and military.<sup>259</sup> At times, state security agents cleared the areas just prior to the kidnappings.<sup>260</sup>

The Commission then established a link between the governmental policy and the disappearance of the particular victims. In *Velásquez Rodríguez*, the Commission demonstrated the requisite link by showing that the victim was a student leader who had been under governmental surveillance and was kidnapped in broad daylight under circumstances similar to those shown under the first prong of the test to be common in Honduras at that time.<sup>261</sup>

When the Commission has met its burden of proof, a rebuttable presumption is raised that the government was responsible for the disappearance.<sup>262</sup> The burden then shifts to the government to refute the presumption.<sup>263</sup> The government may do so by showing that the alleged victim was not the type of person who was traditionally disappeared or that there are other likely reasons for the disappearance. Honduras, however, did not present evidence to rebut the presumption in *Velásquez Rodríguez*.

The nature of the evidence the Court accepts to establish governmental responsibility for a disappearance is not limited to direct testimonial or documentary evidence.<sup>264</sup> In cases where

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Leo Valladares, the Honduran National Commissioner for the Protection of Human Rights, compliments the Honduras press for its thorough reporting of human rights violations and disappearances.

258. *Velásquez Rodríguez Case*, (Merits), Inter-Am. C.H.R., Ser. C, No. 4, ¶ 147(i) (1988). The usual targets of the state-sponsored violence included opposition political groups, union leaders, student leaders, religious persons who assisted the poor, and virtually anyone who threatened the status quo. *THE FACTS SPEAK FOR THEMSELVES*, *supra* note 8, at 217.

259. *Velásquez Rodríguez Case*, (Merits), ¶ 147(ii).

260. *Id.*

261. *Id.* ¶ 147.

262. Thomas Buergenthal, *Judicial Fact-Finding: Inter-American Human Rights Court*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 261, 269 (Richard Lillich ed., 1991) (Buergenthal was President of the Inter-American Court during consideration of the Honduran cases).

263. *Id.*

264. *Velásquez Rodríguez Case*, (Merits), Inter-Am. C.H.R., Ser. C, No. 4, ¶ 130

the perpetrators have made every effort to eliminate evidence,<sup>265</sup> the Court has emphasized the value of circumstantial evidence, indicia, and presumptions.<sup>266</sup> As international legal proceedings are generally less formal than their domestic counterparts,<sup>267</sup> the Court will consider any evidence that leads to conclusions consistent with the facts.<sup>268</sup> The Court has been liberal in considering most of the evidence proffered by the parties, despite objections that such evidence would not be accepted in a state's domestic court.<sup>269</sup> In *Velásquez Rodríguez*, the Court considered newspaper clippings as corroborative evidence.<sup>270</sup> It also considered testimony proffered by relatives of the victims, witnesses with criminal records, and witnesses whom the government claimed were disloyal simply by virtue of their willingness to testify.<sup>271</sup> Some of the testimony referred to other related kidnappings and torture practices. One death squad member, in a classic offering of hearsay, stated that he had been told of the capture of Manfredo Velásquez Rodríguez, although he did not directly participate in the disappearance.<sup>272</sup> The Court reserved the right to consider all evidence and to weigh its probative value.<sup>273</sup> The Court expressed especially strong disagreement with the government's position that an individual's testimony before the Court was evidence of disloyalty to the nation.<sup>274</sup>

The Court has the authority to establish its own evidentiary standard of proof.<sup>275</sup> The standard established in the Honduran cases was proof "capable of establishing the truth of the allega-

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(1988).

265. *Id.* ¶ 131.

266. *Id.* ¶ 130.

267. *Id.* ¶ 128. In proceedings before the Court, the Court has repeatedly stated that international law, rather than the domestic law of the state charged, is applicable. *Id.* ¶ 132.

268. *Id.* ¶ 130.

269. *Id.* ¶¶ 141-42. The Court emphasized that it is an international tribunal and that, therefore, "[a]ll the elements of domestic legal procedures are . . . not automatically applicable." *Id.* ¶ 132.

270. *Id.* ¶ 146.

271. *Id.* ¶¶ 141-44.

272. *Id.* ¶¶ 113, 119.

273. *Id.* ¶ 138.

274. *Id.* ¶ 144.

275. Neither the American Convention, the Statute of the Court, nor the Rules of Procedure of the Court address standards of proof.

tion in a convincing manner."<sup>276</sup> The Court determined that this standard, stricter than the "preponderance of the evidence" test but weaker than "beyond a reasonable doubt,"<sup>277</sup> reflected the seriousness of the finding that the government had engaged in or tolerated a policy of disappearances.<sup>278</sup> The Court left open the issue of whether it would establish different standards in less serious cases.<sup>279</sup>

The Court initially placed the burden on the state to produce evidence over which the state has exclusive control. It held that "[i]n contrast to domestic criminal law, in proceedings to determine human rights violations the state cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation."<sup>280</sup> Recently, however, the Court apparently departed from this sound evidentiary ruling. In *Gangaram Panday*, the Court put the burden on the Commission to prove what occurred when the victim was illegally detained by governmental authorities and held *incommunicado*.<sup>281</sup> In this case, a Surinamese citizen was detained by authorities at the airport on his return to the country. He was later found hanged by the neck in his cell.<sup>282</sup> The Commission alleged that the victim was tortured and that the Government was liable for his death.<sup>283</sup> The Government, on the other hand, alleged that the victim had committed suicide.<sup>284</sup> The Court unanimously found that, based on inference, the detention was illegal.<sup>285</sup> In its split 4-3 decision, however, the Court held that the Government was not responsible for a violation of the victim's right to life.<sup>286</sup> The expert evidence was

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276. *Id.* ¶ 129.

277. Buergenthal, *supra* note 262, at 271-72.

278. Velásquez Rodríguez Case, (Merits), Inter-Am. C.H.R., Ser. C, No. 4, ¶ 129 (1988).

279. See Buergenthal, *supra* note 262, at 272.

280. Velásquez Rodríguez Case, (Merits), ¶ 135.

281. *Gangaram Panday* Case against Suriname, Judgment of January 21, 1994, Inter-Am. C.H.R., ¶ 68, reprinted in 15 HUM. RTS. L.J. 168 (1994).

282. *Id.* ¶ 3.

283. *Id.* ¶¶ 52, 58.

284. *Id.* ¶ 3.

285. *Id.* ¶ 68; ¶ 1 of the holdings of the Court.

286. *Id.* ¶ 3 of the holdings of the Court. Three of the seven participating judges dissented, stating that:

It is our opinion that from the very moment that the Court established the responsibility of the respondent State for the illegal detention of Mr. Gangaram Panday, albeit by inference, it became necessary for it to ac-

contradictory, and, therefore, the Commission had not proved its case.<sup>287</sup> In this case, due to the illegal detention coupled with the Government's intentional *incommunicado* holding of the victim, the evidence as to what actually happened to the victim was solely in the hands of the Government. Consequently, in accordance with the Court's *Velásquez Rodríguez* holding Suriname should not have been permitted to rely on the Commission's failure to present evidence as to the cause of death. Rather, the Court should have established a rebuttable presumption that, at least in cases of illegal *incommunicado* detention, the state must bear the burden of showing that the subsequent death was not at the hands of the government. If the government shows this, then the burden would shift to the complainant to show that the government had violated the victim's right to life. In the case of inconclusive evidence, the state would not likely satisfy its burden, and it would be held liable.<sup>288</sup>

Furthermore, the Court may have unwittingly discouraged governments from supplying requested information if such information is detrimental to its case. The Court had previously ruled in *Velásquez Rodríguez* that in international human rights law, if the state, which has the duty to protect the rights of the victims, remains silent or provides elusive or ambiguous answers, it "may imply acknowledgement of the truth of the allegations."<sup>289</sup> In *Gangaram Panday*, the Court requested that the government of Suriname provide it with a copy of the Suriname Constitution and the substantive laws and criminal procedure in force in Suriname at the time of the detention.<sup>290</sup> When the Government did not produce the information, the Court had no direct evidence to determine if the detention was illegal under the Constitution of Suriname.<sup>291</sup> Consequently, the illegal de-

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cept the consequences of such a finding insofar as the protection of the victim's right to life is concerned.

*Id.* (Judges Picado-Sotela, Aguiar-Aranguren, and Cancado Trindade, dissenting).

287. *Id.* ¶¶ 59-61.

288. For arguments that this decision not only retreats from the Court's earlier evidentiary framework but also conflicts with customary norms of state responsibility for the treatment of aliens, see Shelton, *supra* note 250, at 352.

289. *Gangaram Panday* Case against Suriname, Judgment of January 21, 1994, Inter-Am. C.H.R., ¶ 138, reprinted in 15 HUM. RTS. L.J. 168 (1994) ("so long as the contrary is not indicated by the record or is not compelled as a matter of law"). *Id.*

290. *Id.* ¶ 33. The Surinamese Constitution is written in Dutch, which is not an official language of the OAS.

291. *Id.* ¶¶ 48, 50. Although local law is not usually the determining factor

tention was not proved, and the Court "inferred" such to be the case.<sup>292</sup> Although this aspect of the Court's determination was positive for the development of international human rights law, the Court then went on to award only nominal indemnification due to the inference.<sup>293</sup> This could lead to an unfortunate result. When the Court requests that a state produce incriminating evidence, the state might choose to withhold it in order to limit reparations to only nominal amounts.<sup>294</sup> This would be counterproductive to the system. Court rulings should encourage state compliance.

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before an international court, in the case of detention the American Convention provides that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." American Convention, *supra* note 11, art. 7(2). Thus it was necessary for the Court to determine the law of Suriname to determine if the detention was illegal.

292. Gangaram Panday Case against Suriname, Judgment of January 21, 1994, Inter-Am. C.H.R., ¶ 51, *reprinted in* 15 HUM. RTS. L.J. 168 (1994).

293. *Id.* ¶ 70. The amount of indemnification to be paid by the Government of Suriname was set at the equivalent of \$10,000.

294. Conversely, it appears that any admission by the government, no matter how general, may serve as adequate evidence of the truth of the allegations, which may also discourage governments from offering information to the Court. In *Chunima*, the plenary Court, meeting after its President had already ordered Guatemala to take emergency measures, found that the Commission did not have a reasonable basis for assuming that the facts of the petition for provisional measures were true. See *Chunima Case*, (Provisional Measures), Aug. 1, 1991 Order the Inter-Am. C.H.R., *reprinted in* 1991 INTER-AM. Y.B. HUM. RTS. 1118, 1124, ¶ 6. Despite the Commission's apparent lack of a basis for requesting provisional measures, the Court found that the President's order was properly adopted. *Id.* The Court based this determination on the "blanket acknowledgement" by the government that for the last thirty years there had been an "internal armed conflict" which resulted in the occurrence of violent acts in the *Chunima* area. The Court found that this statement led to the "presumption that a situation exists which could bring about irreparable damage to persons." *Id.* at 1126, ¶ 8. Of course, violence in an area can result in irreparable damages to persons in general. However, this should not constitute adequate proof that there exists the necessary gravity and urgency of irreparable damage to particular persons which is required for a Court order of provisional measures. American Convention, *supra* note 11, art. 63(2). If this general acknowledgement by the government is truly sufficient evidence to give rise to an order for provisional measures, then in the future the facts of any request for provisional measures arising in the highlands of Guatemala and in any other conflicted area in Latin America should be presumed to be true, thus weakening, rather than strengthening the standard. Even more damaging, it encourages governments to refrain from submitting any information to the Court for fear that such information will be used against it. In *Chunima*, Guatemala not only commented on its internal situation but expressed a willingness to comply with the President's order of urgent measures, and had taken effective steps to put the order into effect. See *Chunima Case*. Such compliance by state parties should be encouraged.

## V. EFFECTIVENESS OF AN INTERNATIONAL HUMAN RIGHTS COURT

An international human rights court may have both formal and informal positive effects on its regional human rights situation. Formally, the contentious judgments, advisory opinions, and provisional measures ordered by a court protect human rights and develop legal principles that advance international human rights law. Informally, a mere summons to appear before an international court has been shown to have a chilling effect on human rights abuses within the summoned state. To date, human rights courts have not succeeded uniformly in minimizing human rights abuses. Nonetheless, as explained by Judge Buergenthal, "[e]ven some success in the international human rights field, however small, will make this world a little better place to live in. And that, after all, is what law is all about."<sup>295</sup>

### A. Formal Effectiveness of the Inter-American Court to Date

The effectiveness of the Inter-American Court provides an example of the potential value of regional human rights courts. Although the Court has decided few contentious cases to date, there is evidence of its moderate successes. Governments called before the Court have uniformly attended the public hearings and presented their arguments.<sup>296</sup> Recently, two governments officially accepted responsibility for violations of the Convention. In *Aloeboetoe* Suriname admitted its liability,<sup>297</sup> and in *El Amparo* Venezuela accepted international responsibility for its acts.<sup>298</sup>

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295. Buergenthal et al., *supra* note 28, at 383 (quoting Remarks by Thomas Buergenthal, American Society of International Law, Annual Meeting, April 24, 1981, Proceedings).

296. This is in contrast to the ICJ, where in at least the majority of requests for provisional measures, the respondent has failed to appear and the Court has made a decision *ex parte*. See generally, JEROME B. ELKIND, NONAPPEARANCE AND DISAPPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: FUNCTIONAL AND COMPARATIVE ANALYSIS (1984).

Although governments in the inter-American system have at times requested postponements of the hearings, when their requests have been denied they have complied with their obligations to appear and present their positions. See, e.g., *Chunima Case*, (Provisional Measures), 1991 Order of the Inter-Am. C.H.R., reprinted in 1991 INTER-AM. Y.B. HUM. RTS. 1118, 1122, ¶ 4.

297. *Aloeboetoe Case*, (Reparations), Inter-Am. C.H.R., Ser. C, No. 15 (1993).

298. *El Amparo Case* (Venezuela), Inter-Am. C.H.R., Ser. C, ¶ 4 (1995) (on file

In the Honduran cases, where the Court determined that Honduras was responsible for the disappearance of at least two of the victims, the Government has finally committed to pay the full amount of the court-ordered reparations.<sup>299</sup> Also, in *Aloeboetoe*, the government of Suriname has reportedly paid the first installment of reparations.<sup>300</sup>

The Court has been most successful with provisional measures. Governments have made an effort to comply with the initial orders of urgent measures made by the President of the Court, and with the orders for provisional measures taken by the full Court. In both *Chunima* and *Bustios-Rojas*, the persons designated for protection by the Court were not harmed.<sup>301</sup> In addition, the government of Argentina complied so completely with the President of the Court's order of urgent measures in *Reggiardo-Tolosa* that the plenary Court did not need to order provisional measures. In *Reggiardo-Tolosa*, the Grandmothers of the Plaza de Mayo filed a complaint with the Inter-American Commission requesting the return of male twins to their biological family.<sup>302</sup> The twins were born in 1977 during the illegal and clandestine imprisonment of their mother, in the midst of Argentina's "dirty war."<sup>303</sup> Immediately after their birth, the

with author).

299. On February 10, 1995, at a ceremony at the seat of the Inter-American Commission on Human Rights, the government of Honduras presented Judge Thomas Buergenthal, as representative of the Court, with a letter of commitment to pay the remaining amount owing to the families of the victims.

Honduras had made the initial payment to the survivors. It had, however, delayed that payment beyond the date set by the Court. Before payment was made, a devaluation of Honduran currency reduced the purchasing power of the sum.

Velásquez Rodríguez Case, (Interpretation), Ser. C., No. 9 (1990). At the request of the Commission, the Court issued an interpretation of the reparations judgment, in which it held, *inter alia*, that Honduras had to compensate the families of the victims for the losses caused by the delays in payment. *Id.* at res. 4. Honduras delayed payment of the additional sum for over four years. See also Velásquez Rodríguez Case, (Compensatory Damages), Inter-Am. C.H.R., Ser. C, No. 7 (1988); Godínez-Cruz, (Compensatory Damages), Ser. C., No. 8 (1989).

300. Victor Rodríguez, *Eficacia Jurídica de la Jurisprudencia de la Corte Inter-Americana de Derechos Humanos*, in LA CORTE Y EL SISTEMA INTERAMERICANA DE DERECHOS HUMANOS 459, 469 (1994).

301. See, e.g., *Chunima* Case, (Provisional Measures), Aug. 1, 1991 Order of the Inter-Am. C.H.R., reprinted in 1991 INTER-AM. Y.B. HUM. RTS. 1118; *Bustios-Rojas* Case, (Provisional Measures), Order of the Inter-Am. C.H.R., Annual Report of the Inter-Am. C.H.R. (1990).

302. Request for Provisional Measures involving Argentina, (*Reggiardo-Tolosa* Case), Case 10.959, Inter-Am. Comm. H.R. (1993), reprinted in Annual Report of the Inter-American Court of Human Rights 92 (1993).

303. Theo Van Boven, *Report to the U.N. on the Prevention of the Disappearanc-*

boys were appropriated by a police officer and registered as his natural children. This officer was formally accused of torture, rape, and murder by former victims.<sup>304</sup> Although the natural parents of the boys remain disappeared, the biological relatives fought for the boys' return through the Argentine courts for many years. In response to the request for provisional measures, the acting President of the Court ordered the government of Argentina to take all measures necessary to protect the well-being of the boys and to provide a full report to the Court.<sup>305</sup> Argentina responded that the domestic courts had ordered the children into substitute custody and that they were then living with their biological uncle.<sup>306</sup> Thus, there was no further need for the Court's consideration.

In another example, governmental compliance with a request for provisional measures was far too literal. In the Honduran cases, two witnesses before the Court received death threats upon their return to Honduras. When the President of the Court requested that Honduras protect these particular witnesses, the government agreed to guarantee their safety.<sup>307</sup> Those two witnesses were not harmed. However, three other witnesses who had appeared before the Court or were scheduled to give evidence were subsequently murdered.<sup>308</sup> These victims had not been named in the president's communication with the government.<sup>309</sup>

By means of its advisory opinions, the Inter-American Court has given effective "judicial expression to certain principles that are basic to the development of the international law of human rights."<sup>310</sup> The highest courts of the states parties to the Con-

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*es of Children in Argentina*, U.N. Hum. Rts. Comm., 40th Sess., 8, E/CN.4/Sub2/1988/19 (1988).

304. Carlos Ernesto Rodriguez, *Los Crimenes Impunes del Comisario Miara*, MADRES DE LA PLAZA DE MAYO, May 1989, at 20.

305. Resolution of the President of the Inter-American Court of Human Rights, (Reggiardo-Tolosa Case), Provisional Measures Requested by the Inter-American Commission on Human Rights in the matter of The Republic of Argentina, Nov. 19, 1993, reprinted in the Annual Report of the Inter-American Court of Human Rights 95-8 (1993).

306. Note of the Government of Argentina, (Reggiardo-Tolosa Case), Dec. 20, 1993, reprinted in Annual Report of the Inter-American Court 99-100 (1993).

307. Velásquez Rodríguez Case, (Preliminary Objections), Inter-Am. C.H.R., Ser. C, No. 13, ¶ 39 (1987).

308. *Id.* ¶¶ 40-1.

309. *Id.*

310. Buergethal, *The Advisory Practice of the Inter-American Human Rights*



vention have, in some recent cases, relied on the Court's advisory opinions in upholding rights guaranteed by the Convention. The Costa Rican Supreme Court Constitutional Chamber recently nullified a domestic law that the Inter-American Court had found incompatible with the American Convention.<sup>311</sup> The law required the compulsory membership of journalists and reporters in an association and limited membership in the association to university graduates specializing in certain fields.<sup>312</sup> The Inter-American Court unanimously held that the law was incompatible with freedom of expression under article 13 of the Convention, as it denied "any person access to the full use of the news media as a means of expressing opinions or imparting information."<sup>313</sup> The Constitutional Court reiterated the reasoning of the Inter-American Court and nullified the law.<sup>314</sup> The Costa Rican Constitutional Chamber also declared, in accordance with an Inter-American Court advisory opinion,<sup>315</sup> that a state law on nationalization of spouses could not be read to discriminate on the basis of gender.<sup>316</sup>

In 1992 the Argentine Supreme Court held that the American Convention on Human Rights created a directly enforceable right of reply in Argentina.<sup>317</sup> In doing so, it relied on an advi-

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*Court, supra* note 57, at 25.

311. *Acción de Inconst.*, No. 421-S-80, Roger Ajun Blanco, Art. 22 Ley Org. Col. de Periodistas, Sala Constitucional de la Corte Suprema de Justicia (May 9, 1995) (Costa Rica). Other states have not necessarily revised their internal laws to correspond with the Court's advisory opinions. Latin American states, for instance, continue to have laws which authorize the derogation of the right of habeas corpus during a state of emergency. This practice ignores two advisory opinions interpreting the American Convention as prohibiting the suspension of habeas corpus. See Advisory Opinion, *Judicial Guarantees in States of Emergency*, Inter-Am. C.H.R., *supra* note 143; *Habeas Corpus in Emergency Situations*, *supra* note 30.

312. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13, 29 of American Convention on Human Rights), Advisory Opinion OC-5/85, Nov. 13, 1985, Ser. A., No. 5, ¶ 81 (citing Costa Rican Law No. 4420).

313. *Id.* ¶ 85.

314. *Id.*

315. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Jan. 19, 1984.

316. Expediente 2965-S-91, Voto: 3435-92, Ricardo Fliman Wargraft v. Director y Jefe de la Sección de Opciones y Naturalizaciones, Sala Constitucional de la Corte Suprema de Justicia (Nov. 11, 1992) (Costa Rica) (on file with the author).

317. Thomas Buergenthal, *International Tribunals and National Courts: The Internationalization of Domestic Adjudication*, in *RECHT ZWISCHEN UMBRUCK UND BEWAHRUNG FESTSCHRIFT FÜR RUDOLF BERNHARDT* 687, 695 (1995) (citing *Ekmekdjian v. Sofovich*, Case No. E. 64. XXIII, (Arg., CSJN, 1992)).

sory opinion of the Inter-American Court which held that the right to reply was self-executing in state parties under the American Convention.<sup>318</sup>

### *B. Informal Effectiveness of the Inter-American Court*

A lesser known effect of the Court's consideration of a matter is the positive prejudgment effects it may have on a particular case, or on the overall human rights situation in the state involved. In repeated instances, referral of a case to the Court, or the Court's scheduling of a public hearing has brought about positive action within the state involved.

The referral of a case to an international court focuses international attention on the situation, and the publicity often curtails some abuses even before the Court reaches a judgment.<sup>319</sup> Most states are surprisingly sensitive about their international reputations and world image. According to a former United States representative to the U.N. Commission of Human rights, "[d]espite the harsh realities of power politics, world opinion is a force to be reckoned with. Governments devote much time and energy, both in and out of the U.N., to defending and embellishing their own human rights image and demeaning that of others."<sup>320</sup> For example, agents of the Argentine government reportedly disappeared some nine thousand people during the "dirty war."<sup>321</sup> Concerned by negative publicity, the Argentine government hired a high-powered New York public relations firm to improve its international image.<sup>322</sup> The threat of nega-

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Article 14(1) of the American Convention provides:

Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make correction using the same communications outlet, under such conditions as the law may establish.

American Convention, *supra* note 11.

318. Enforceability of the Right to Reply or Correction, Inter-Am. C.H.R., Advisory Opinion OC-7/86, Ser. A, No. 7 (1986).

319. Adverse international publicity has often proven to be an effective tool in curtailing human rights violations. Tom J. Farer, *The OAS at the Crossroads: Human Rights*, 72 IOWA L. REV. 401, 403 (1987). ("Exposure, or the threat thereof, has accomplished a mitigation of barbarity in many identifiable instances throughout the Western Hemisphere"). *Id.*

320. Dr. Morris Abram, *The U.N. and Human Rights*, 47 FOREIGN AFF. 363, 371 (1969).

321. NUNCA MAS, *supra* note 131, at 479.

322. Weissbrodt & Bartolomei, *supra* note 89, at 1030 (citing Omang, *Argentina*

tive publicity is a persuasive force, and can compel governments to comply with international human rights norms.<sup>323</sup>

An example of such governmental compliance took place at a public hearing on an advisory opinion request to the Court concerning the legality of extensions to the death penalty, a situation involving Guatemala.<sup>324</sup> In 1982, following a military coup by General Efraim Rios Montt, Guatemala established special courts to combat subversion.<sup>325</sup> These Courts of Special Jurisdiction met in secret and did not provide even minimum due process guarantees to defendants.<sup>326</sup> The government also extended the death penalty to crimes which were not punishable by death at the time Guatemala ratified the American Convention.<sup>327</sup> Guatemala executed those defendants found guilty.<sup>328</sup> Despite pleas from the Inter-American Commission and from Pope John Paul II, who was about to visit, Guatemala went forward with the executions.<sup>329</sup> Guatemala had not accepted the Court's jurisdiction, and thus could not be brought before it in a contentious case. Nevertheless, the Commission sought an advisory opinion from the Court.<sup>330</sup> Guatemala objected to the admissibility of the advisory opinion petition,<sup>331</sup> but attended the public hearing on the matter. Surprisingly, at the hearing Guatemala announced the suspension of the executions,<sup>332</sup> which were never resumed. Apparently the public exposure

*Hires U.S. Company to Improve Image*, WASH. POST, Dec. 28, 1976, at A9.

323. See Nanette Dumas, Note, *Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals*, 13 HASTINGS INT'L & COMP. L. REV. 585, 607 (1990). "Embarrassment and the threat of embarrassment" are perhaps the principal tools currently in use to prevent human rights abuses. David Weissbrodt & Teresa O'Toole, *The Development of International Human Rights Law*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948-1988: HUMAN RIGHTS, THE UNITED NATIONS AND AMNESTY INTERNATIONAL 17, 25 (Am. Int. ed., 1988).

324. Restrictions to the Death Penalty, *supra* note 231.

325. Charles Moyer & David Padilla, *Executions in Guatemala as Decreed by the Courts of Special Jurisdiction in 1982-83: A Case Study*, 6 HUM. RTS. Q. 507, 508 (1984).

326. *Id.*

327. *Id.* Article 4(2) of the American Convention, *supra* note 11, deals with the right to life and provides in part: "[t]he application of such punishment [the death penalty] shall not be extended to crimes to which it does not presently apply." *Id.*

328. Moyer & Padilla, *supra* note 325, at 509.

329. *Id.* at 511.

330. Restrictions to the Death Penalty, *supra* note 231. Advisory opinions are not binding.

331. *Id.* ¶ 11.

332. Moyer & Padilla, *supra* note 325, at 516, 520.

caused by the Court's consideration of the issue resulted in this change of policy.

Another impressive instance of government compliance was announced at the public hearing on provisional measures in *Chunima*. There, Guatemala made the surprise announcement that it had already arrested and imprisoned the civil patrol leaders charged with murdering the human rights monitors.<sup>333</sup> Furthermore, in Argentina the government recently released a prisoner after the Commission referred his case to the Court.<sup>334</sup> In Honduras, the activity of the death squads dropped precipitously when the Commission referred the disappearance cases to the Court.<sup>335</sup>

## VI. STATE MEANS OF LIMITING THE POWER OF THE SYSTEM

Human rights treaties are based on the principle that governments respect the rule of law and act in good faith.<sup>336</sup> Many states, however, ratify human rights treaties because it makes good propaganda.<sup>337</sup> In reality, many of these states are reluctant to limit their sovereignty by granting any international body the power to effectively supervise their domestic behavior.<sup>338</sup> Consequently, while appearing to support an international system, states may use more covert means to undermine the system's force.

### A. *Financial Strangulation of the Commission and the Court*

A regional human rights system must provide adequate financing of its enforcement organs if they are to be effective. In the inter-American system, states have successfully restricted

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333. *Chunima Case*, (Provisional Measures), Aug. 1, 1991 Order of the Inter-Am. C.H.R., reprinted in 1991 INTER-AM. Y.B. HUM. RTS. 1118, 1122, ¶ X.

334. *Caso Maqueda*, Resolution of the Inter-American Court, Jan. 17, 1995 (on file with the author).

335. James LeMoyné, *Testifying to Torture*, N.Y. TIMES, June 5, 1988, (Magazine), at 45.

336. MEDINA QUIROGA, *supra* note 75, at 316.

337. Thomas Buergenthal, *The Human Rights Revolution*, 23 ST. MARY'S L.J. 3, 8 (1991).

338. *Id.* at 8.

such financing, and have, thereby, limited enforcement of human rights. The OAS sets the budgets of the Commission and the Court, and both budgets are so constricted that institutional functioning is inhibited.<sup>339</sup> One result of the Court's limited budget is that it cannot always afford to convene public hearings on a timely basis. As more contentious cases and requests for provisional measures and advisory opinions are being referred, the Court's inability to hold more sessions is developing into a serious problem. Since its creation, the Court has functioned on a part-time basis. On average it has held two, and sometimes three, two-week sessions per year.<sup>340</sup> The judges, who generally live and work in their countries of residence, must travel to the seat of the Court in San José, Costa Rica for sessions.<sup>341</sup> In the years immediately following its inception, the periodic meetings of the Court were sufficient to handle its light caseload. In its first ten years, the Court issued only twelve advisory opinions and decided three joined contentious cases.<sup>342</sup> The recent increase in the number of cases, however, is making such periodic meetings inadequate. For instance, in 1993 the Court considered five contentious cases, three requests for provisional measures,

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339. For example, the proposed 1994-95 budget for the Court was less than that proposed for *Americas Magazine*. Organization of American States, Proceedings, Vol. 1, 23rd Sess., Managua, Nicaragua, June 7-11, 1993, OEA/Ser. P/XXIII.O.2, Sept. 30, 1993, Court Budget 84-85.

340. Regulations of the Court, art. 11 (1991). In addition, the Court may meet for special sessions.

341. Statute of the Inter-American Court of Human Rights, art. 16, reprinted in BASIC DOCUMENTS, *supra* note 11, at 133, 138. Most of the judges, who are paid emoluments, per diem, and travel allowances when the Court is in session, have full time positions in their countries of residence.

As explained by Dunshee de Abranches, a renowned legal scholar of international law and the inter-American system:

Even though they are not required to live in the place where the Court has its permanent seat, the judges must be at the disposal of the only jurisdictional organ of the OAS, particularly for the urgent and serious cases requiring provisional measures that the Commission can request from the Court in crisis situations, which arise so frequently in the lives of the American peoples.

Dunshee de Abranches, *supra* note 43, at 96.

342. See General Information of the Court, issued by the Inter-American Court of Human Rights (on file with the author). Only the Commission or a state may refer a case to the Court. In the first years of the Court's operation the Commission chose not to refer cases to the Court. This bottleneck has now been broken, and the inter-American system is functioning as was expected under the American Convention. Thomas Buerghenthal, *Human Rights in the Americas: View from the Inter-American Court*, 2 CONN. J. INT'L L. 303, 309-10 (1986).

and two requests for advisory opinions.<sup>343</sup> If the inter-American system is to have a more influential effect on human rights in the Americas, many more cases should come before the Court. Should the caseload continue to increase as circumstances indicate, the Court will need to convene more often, perhaps eventually on a full-time basis.<sup>344</sup> Neither of these alternatives, however, is a possibility under the current budget.<sup>345</sup>

The Court has adjusted its operations to partially compensate for its limited funding. The Court's Rules of Procedure previously required that it be called into special session whenever the Commission made a request for provisional measures. This was financially impossible if there were many requests.<sup>346</sup> The rules now provide that the plenary Court will consider the request at its next regular session.<sup>347</sup> In the meantime, the president, in consultation with the Permanent Commission, can call upon the involved government "to adopt the necessary urgent measures and to act in such a way as to permit any provisional measures subsequently ordered by the Court . . . to have the requisite effect."<sup>348</sup>

Another problem is that the enforcement organs lack the funding to hire enough lawyers to process the cases and assist the Commissioners and Judges with basic legal analysis.<sup>349</sup> Neither the Court nor the Commission has sufficient legal staff to research all the important issues raised by a case. Consequently, the Court relies on amicus briefs, submitted by voluntary organizations or by other states, to supplement the legal research of its few lawyers.<sup>350</sup> The Court has also allowed the

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343. See General Information of the Court, *supra* note 342.

344. Under Protocol 11 to The European Convention, the European Court of Human Rights will become a permanent court. Protocol 11, art. 19., *reprinted in* 15 HUM. RTS. L.J. 81, 87 (1994).

345. The Court's draft statute originally envisioned a permanent court with full-time judges. The General Assembly of the OAS found this proposal unjustified until such time as the Court would have a substantial caseload. Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231, 232-33 (1982) (citing draft statute OEA/Ser.P, AG/doc.1112/79, Oct. 10, 1979, arts. 20, 22).

346. Article 24(3) of the Rules of Procedure was modified at the Court's Twenty-Seventh Regular Session in January, 1993.

347. *Id.* art. 24(4).

348. *Id.*

349. Judge Sonia Picado, *The Role of a Court of Human Rights: Perspectives for the Future*, Address Before the Annual Meeting of the International Institute of Human Rights, Strasbourg, France (June, 1992) (transcript on file with the author).

350. Although the Convention says nothing about whether the Court can accept

Commission to name legal advisors for the victims or their families, who assist the Commission in preparing a case. Furthermore, as stated earlier, the Commission has established the Inter-American Human Rights Foundation to encourage the participation of *pro bono* attorneys.

Increasing the sessions of the Court and the Commission and augmenting their legal staff will require a corresponding increase in financing. Unfortunately, the OAS is in a continual fiscal crisis which shows no signs of diminishing.<sup>351</sup> If the OAS cannot increase its resources, it should reevaluate its spending and eliminate all but the most essential avenues.<sup>352</sup> The inter-American system must have the fiscal ability to promote and protect human rights.<sup>353</sup> The continual violation of human rights is one of the most severe problems faced in the Americas, yet this is in no way reflected in the budget of the OAS. Consequently, the budget should be revised.<sup>354</sup> Currently, the OAS allocates funding to various social and cultural programs and studies.<sup>355</sup> While these programs are certainly valuable, their impact must be compared to that of the work of the Inter-American Court and Commission's monitoring of human rights in the Americas. Most, if not all, social and cultural activities of the

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amicus briefs, it is doing so. See Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, *supra* note 57, at 15-16; the Court's admission of the amicus briefs is based on Article 34(1) of the its Rules of Procedure, which states "[t]he Court may, at the request of a party or the delegates of the Commission, or *proprio motu*, decide to hear a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function"; see also Shelton, *supra* note 107, at 638-40.

351. See Thomas Buergenthal, *The Inter-American Court and the OAS*, 7 HUM. RTS. L.J. 157, 157-63 (1986).

352. The OAS allocates money to the Inter-American Music Council (U.S. \$260,500 per annum), the Columbus Memorial Library (U.S. \$857,100 per annum), the Museum of Art of Americas (U.S. \$400,100 per annum). Organization of American States, Proceedings, vol. 1, *supra* note 339. These allocations should perhaps be eliminated until the Court and Commission are adequately funded to meet their needs.

353. See Farer, *supra* note 319, at 401 (commenting that critics have cited the Inter-American Commission as the main justification for the existence of the OAS.)

354. 48 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF N.Y. 589, 617, *supra* note 251 (stating that, "[t]he budget of the Commission should be increased . . . as much as necessary to assure that it operates effectively. If special contributions are necessary then they should be made.")

355. Organization of American States, Proceedings, vol. I, 22nd Regular Session, Nassau, The Bahamas, May 18-23, 1992, OEA/Ser.P/XXII.O.2, June 21, 1992, Court Budget, 77-88.

OAS should be dropped or should depend on voluntary contributions. If the OAS hopes to protect human rights in the Americas, it should focus additional financing and support on the Inter-American Court and Commission.

*B. Selection of Judges and Commissioners*

The effectiveness and prestige of an international human rights system depends in large part on the caliber of its judges and commissioners. Any human rights convention providing for enforcement by a court should provide, as does the American Convention, that the judges be "jurists of the highest moral authority and of recognized competence in the field of human rights."<sup>356</sup> Moreover, judges in the inter-American system must possess the "qualifications required for the exercise of the highest judicial functions in conformity with the law of the State of which they are nationals or of the State that proposes them as candidates."<sup>357</sup>

The Inter-American Court has been graced with the presence of excellent human rights jurists and scholars whose opinions reflect a depth of understanding of public international law in general, and international human rights law in particular. These judges have advanced the jurisprudence in this important area. Recently, however, some nominations to the bench have not been of such uniformly commanding quality. Despite the conventional requirements, there are signs that governments may, either intentionally or unknowingly, weaken the Court by nominating judges who lack expertise.<sup>358</sup> In recent years, some

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356. American Convention, *supra* note 11, art. 52. The American Convention also provides that Commissioners must be "of high moral character and recognized competence in the field of human rights." *Id.* art. 34.

357. *Id.* art. 52(1). The judges serve in an individual capacity rather than as representatives of their country. *Id.* art. 52. The Inter-American Court judges are elected by secret ballot in the General Assembly of the OAS. *Id.* art. 53(1). Only parties which have ratified the American Convention can nominate and vote on candidates for the Court. *Id.* Candidates for judgeships need not be from states which have ratified the Convention. A state party can propose up to three candidates, one of which must be from another member state. *Id.* art. 53(2). In this way, Prof. Thomas Buergenthal of the U.S. served as a judge on the Inter-American Court, even though the U.S. has neither ratified the American Convention nor accepted the jurisdiction of the Court.

358. See Douglas Cassel Jr., *Somoza's Revenge: A New Judge for the Inter-American Court of Human Rights*, 13 HUM. RTS. L.J. 137 (1992) (condemning the election



nominations seemed based on cronyism rather than qualifications.<sup>359</sup> Politics may also play a role in the elections, as certain nations have reportedly voted in block to elect a candidate despite a lack of qualifications.<sup>360</sup> The Inter-American Court has only seven judges,<sup>361</sup> as compared to the thirty-two judges currently on the European Human Rights Court.<sup>362</sup> With such a limited number of judges in the inter-American system, two or three with no expertise in international human rights law could have a significant negative impact on the jurisprudence and prestige of the Court. This is also true of the Commission.

Governments must make responsible choices for judges and Commissioners if these organs are to be considered seriously in their efforts to protect and enforce human rights.<sup>363</sup> A human rights treaty, in addition to detailing the necessary qualifications of judges, might also provide for an inter-state committee to review the qualifications of candidates for the Court and the Commission. Such a committee could inhibit any governmental attempts to undermine human rights efforts by electing unquali-

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to the Court of Dr. Alejandro Montiel Arguello, a Nicaraguan lawyer and professor of international law, who had served as Somoza's Foreign Minister and United Nations Delegate). At the time that Somoza's National Guard was bombing civilian populations and was involved in widespread summary executions and torture, Dr. Montiel went before the U.N. General Assembly and claimed that the allegations of human rights violations by Somoza's government were "totally false," and that Nicaraguans were "fully exercising their human rights." *Id.* at 137, (citing the Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Nicaragua, OAS Document, OAS/Ser. L/V/II.45, doc. 16 rev. 1, Nov. 17, 1978; U.N. General Assembly, Official Rec., Sess. 33, 84th Plenary Meeting, Dec. 14, 1978, 1487-88, ¶¶ 256, 258, 259 and 261).

359. After much negative publicity and pressure, Argentina retired its nomination of Carlos Corach, an advisor to Argentine President Menem, who had "no discernable expertise or record of rights advocacy". Martin Anderson, *Human Rights Nominee has Clouded Past*, MIAMI HERALD, Apr. 7, 1994, at A11. Corach had allegedly been involved in politicizing the Supreme Court of Argentina and in removing independent judges from the Courts. *Id.* Also, the Costa Rican candidate to the elections in June, 1994, Juan Luis Arias, had no expertise or experience in the area of human rights. He was defeated.

360. See Cassell, *supra* note 359, at 139.

361. American Convention, *supra* note 11, art. 52(1).

362. The European Court has one judge for each member state of the Council of Europe.

363. Governments must also make responsible choices in nominating members of the Human Rights Commission. See 48 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF N.Y. 589, 595, *supra* note 251, stating that "persons of stature, with a commitment to human rights, have not always been selected as Commissioners or appointed to staff positions, including that of Executive Secretary."

fied and undedicated judges or commissioners.

## VII. CONCLUSION

Developing regions, and even the European human rights system, can learn valuable lessons from the advances in human rights law made in the inter-American system. The social, economic, and cultural circumstances of Latin America, including widespread poverty, illiteracy, inadequate domestic administration of justice systems, and indigenous populations with diverse languages and customs, has required the development of an enlightened approach to human rights protection. This approach has relevance in many parts of the world. The American Convention allows for such innovations as the individual right to petition, the right of non-governmental organizations to petition on behalf of the victims, and judicial guarantees as non-derogable rights in times of emergency.

Some Latin American governments, in efforts to consolidate power, have committed gross and systematic violations of human rights. Such violations include large-scale disappearances and the elimination of evidence in order to avoid liability. The Court has consequently developed a jurisprudence which balances the issues of state sovereignty with the effective protection of an individual's human rights. Although the Court has ingeniously walked this tightrope in many instances, it has, at times, not gone as far as could be desired, and recently appears to be backtracking. Still, the inter-American system effectively promotes and protects human rights. At present, however, states appear to be reining in the system with financial strangulation and the nomination of unqualified judges and commissioners. These limitations on the future effectiveness of the inter-American system must be halted.

The problems of the inter-American system, although not universally shared by the majority of Western European states, have their counterparts in Africa, some parts of Asia, and in Eastern Europe. The lessons learned and the jurisprudence developed in the inter-American system have already had a positive effect on Latin America. If adapted, they may prove very beneficial in other areas of the world.