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CONFERENCE REPORT
THE INTER-AMERICAN HUMAN RIGHTS SYSTEM:
INTO THE 1990s AND BEYOND

J. Lauchlan Wash
Dean B. Suagee
Phoebe Schlanger*

INTRODUCTION

Forgive us, Lord, for sending
this petition
but we have no place else to turn.
The Junta won't answer,
the newspaper makes jokes and is silent,
the Court of Appeals will not hear
the defense appeal,
the Supreme Court has ordered us to
cease and desist,
and no police station
dares
receive
this petition
from his family.¹

The number of violations of fundamental human rights in the Americas reached tragic proportions during the 1970s. The Inter-American human rights system, however, drew world attention to the situation. The violations against the integrity of the individual—tortures, disappearances, extra-judicial killings, and prolonged detentions without due process—decreased as the number of democracies in the region increased. In the political environment of the 1990s, the Inter-American human rights system will endeavor to ensure the positive rights guaranteed in the American Convention on Human Rights: the right to participate in government through freedom of speech, press, and assembly;

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1. "His Eye is on the Sparrow," in A. DORFMAN, *LAST WALTZ IN SANTIAGO* (1988).

and through voting in elections.

On November 5 and 6, 1987, the Inter-American Commission on Human Rights of the Organization of American States, the International Human Rights Law Group, and the International Legal Studies Program and International Law Society of the Washington College of Law at The American University co-sponsored a conference on the Inter-American human rights system. The participants included individuals affiliated with the governments of member states of the OAS. Representatives of the two principal OAS organs concerned with human rights in the western hemisphere also attended: the Inter-American Commission on Human Rights (the Commission) and the Inter-American Court of Human Rights (the Court). Participants also included individuals affiliated with nongovernmental organizations (NGOs) and with the academic community. Scholars, practitioners, and students of international law attended the conference.

The conference presented an opportunity for experts in the field to exchange candid opinions about the system as it exists and to make recommendations for improvements in the future. Judge Thomas Buergenthal of the Inter-American Court of Human Rights introduced the conference, saluting it as the first conference devoted entirely to the Inter-American human rights system. The conference consisted of five panels. The first panel featured an overview of the Inter-American human rights system, explaining the institutions that comprise the system, the Commission, and the Court, and the ways in which they carry out their missions. The second panel addressed the political context of the Inter-American system, outlining the interactions of the OAS, its member states, the Commission, and the Court. The third panel assessed the role of the Commission and the Court in addressing disappearances, summary executions, and torture. The fourth panel discussed the role of the Commission and the Court in addressing the general topic of political participation while focusing on certain critical issues. These issues include democratic elections, the right of indigenous peoples to exercise self-government, and the use of amnesty laws in transitions from military to civilian governments. The final panel offered suggestions on how to expand the use of the Commission and the Court and how to increase their visibility and impact.

I. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: HOW THE INSTITUTIONS WORK

The first panel discussed the jurisdiction and procedure of the Inter-American human rights system. David Padilla and Charles Moyer, rep-

representatives from the Commission² and the Court,³ presented an overview of the abilities and limitations of their institutions. Amy Young, the Executive Director of the International Human Rights Law Group,⁴ provided a critique of the system from the perspective of a practitioner.

A. THE COMMISSION

The OAS⁵ Ministers of Foreign Affairs created the Commission in 1959 to promote and protect human rights in the Americas.⁶ The Commission, an autonomous body composed of seven people elected individually for four year terms,⁷ meets two or three times a year. From its headquarters in Washington, D.C., it investigates alleged violations of

2. Mr. Padilla is the Assistant Executive Secretary of the Inter-American Commission on Human Rights.

3. Mr. Moyer is the Executive Secretary of the Inter-American Court of Human Rights.

4. Ms. Young is the Executive Director of the International Human Rights Law Group. The Law Group is a nonprofit, public interest organization that promotes human rights through the application of international human rights law.

5. Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2416, T.I.A.S. No. 2361, 119 U.N.T.S. 3, Protocol of Amend., Feb. 23, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 [hereinafter OAS Charter].

6. See Res. VIII, OASOR Ministers of Foreign Affairs (5th mtg.) at 10-11, OAS Doc. OEA/ser. C./II.5 (1959) (providing for the creation of the Inter-American Commission on Human Rights). Resolution VIII declares that "liberty, justice, and peace are based on recognition of the inherent dignity and the equal and inalienable rights of the individual." *Id.* The Meeting of Consultation considered a juridical system essential to protect these rights. *Id.* The Meeting pointed to the progress of the United Nations and the Council of Europe in codifying and studying human rights. *Id.* It resolved that the Inter-American Council of Jurists should draft a Convention on Human Rights. *Id.* Finally, it created a new Inter-American Commission on Human Rights. *Id.* The Council of the OAS approved the Commission statute in 1960. Statute of the Inter-American Commission on Human Rights of 1960, as amended, OEA/ser. L./V/II.26, doc. 10 (1971). Later amendments strengthened the powers of the Commission and it became a principal organ of the OAS. OAS Charter, *supra* note 5, art. 51(e). The Commission was reorganized in 1979 to include separate petition procedures for complaints against parties and non-parties to the American Convention on Human Rights. American Convention on Human Rights, Nov. 22, 1969, arts. 34-51, O.A.S.T.S. No. 36, at 1, OEA/ser. L./V/II.23, doc. 2 rev.6, O.A.S.O.R. OEA/ser. K./XVI/I.1, doc. 65 rev. 1 corr. 2 (1970), *reprinted in* 9 I.L.M. 673 (1970) [hereinafter American Convention]. The Commission now operates under its new statute, adopted in 1979. Statute of the Inter-American Commission on Human Rights [hereinafter New IACHR Statute], *reprinted in* OAS, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 117, OEA/ser. L./V/II. 65, doc. 6 (1985) [hereinafter HANDBOOK].

7. Regulations of the IACHR, arts. 1-2, [hereinafter IACHR Regs.], HANDBOOK, *supra* note 6, at 117. The Commission uses the amended regulations, adopted in 1985 for its day-to-day operations. The Commission has the power to adopt regulations consistent with its statute. New IACHR Statute, *supra* note 6, art. 22(2).

human rights by any state that is a member of the OAS.⁸ The definition of human rights violations restricts the Commission to the review of actions that individuals take under color of state law or authority.⁹ Although the Court and the Commission recognize that terrorist activities are politically motivated, both OAS organs still consider these activities common crimes, not violations of international obligations.¹⁰

The Commission receives petitions from OAS organs, member states, NGOs, and individuals.¹¹ The Commission was the first inter-governmental human rights entity to grant standing to individuals.¹² To gain standing, however, an individual must first exhaust all domestic remedies.¹³ The Commission may ignore this requirement in cases where the

8. See New IACHR Statute, *supra* note 6, arts. 18-20 (enumerating the powers of the Commission with respect to the member states of the OAS). Articles 19 and 20 establish separate petition procedures for complaints against OAS parties and non-parties to the Convention. *Id.* arts. 19-20.

9. See American Convention, *supra* note 6, art. 44 (requiring that petitions made to the Commission be complaints of violations by a state party).

10. See INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN ARGENTINA 21, OEA/ser. L./V/II.49, doc. 19 corr. 1 (1980) [hereinafter ARGENTINA REPORT], reprinted in 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM Booklet No. 22, at 83 (T. Buergenthal & R. Norris eds. 1983) [hereinafter HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM] (asserting that the Commission lacks jurisdiction to receive petitions alleging human rights violations by terrorist groups). The Commission stated that: (i) it lacked jurisdiction under its statute to investigate terrorism; (ii) its task is to investigate only those actions imputable to governments; (iii) as a practical matter jurisdiction over terrorism would place the terrorist on an equal footing with governments; and (iv) the Commission would not contribute to the publicity of terrorist acts by assuming jurisdiction. *Id.* at 87.

11. See American Convention, *supra* note 6, art. 45, para. 1 (requiring states parties to recognize the competence of the Commission to receive and act on complaints in which a state party alleges that another has violated the Convention); *Id.* art. 45, para. 2 (stating that only states parties that recognize the competence of the Commission under article 45, paragraph 1 may file complaints). Among the states parties, Argentina, Colombia, Costa Rica, Ecuador, Jamaica, Peru, Uruguay, and Venezuela recognize jurisdiction of the Commission to consider inter-state complaints in conformity with article 45; see also IACHR Regs., *supra* note 7, art. 23, para. 1 (requiring that one or more of the OAS states legally recognize the nongovernmental entity before it may submit a petition).

12. See generally GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (H. Hanum ed. 1986) [hereinafter HUMAN RIGHTS PRACTICE] (pertaining to individual complaint procedures of the United Nations and European systems). Today the United Nations processes individual complaints. U.N. E.S.C. Res. 1503 (1970). The European Commission on Human Rights likewise receives individual petitions and has the power to refer the cases to the European Court of Human Rights. HUMAN RIGHTS PRACTICE, *supra*, at 133-34; see also European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 25, 213 U.N.T.S. 221 (providing an optional procedure for individual petitions).

13. IACHR Regs., *supra* note 7, art. 34(1). As a general principle, international law requires a showing that domestic remedies are exhausted before a supranational court will accept jurisdiction. *Id.* See *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 29 (Judgment of Mar. 21) (finding that the United States had not exhausted its domes-

domestic remedies do not function adequately.¹⁴ Finally, if the Commission knows of an urgent situation, it may initiate its own investigation.¹⁵

Mr. Padilla explained that the Commission functions as a quasi-judicial body in the processing of petitions.¹⁶ It follows flexible procedures, recognizing the often impotent position of the human rights activist. When the Commission receives a petition, a staff attorney determines whether the case meets the *prima facie* requirements for admissibility.¹⁷ If necessary, the Commission solicits additional information from the petitioner. Furthermore, the Commission allows the petitioner's attorney liberal access to the staff of the Commission at all stages of the procedure to continue the flow of information to the Commission on developments in the case and to perfect the pleadings of the petition.¹⁸ Mr. Padilla emphasized that this informality increases the likelihood of admissibility for the petition.

tic remedies).

14. IACHR Regs., *supra* note 7, art. 34, para. 2. The requirement of prior exhaustion of remedies does not apply when:

- (a) the domestic legislation of the state concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
- (b) the party alleging violations of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them;
- (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Id. If the petitioner cannot prove exhaustion of domestic remedies, the burden then shifts to the government to demonstrate that the petitioner has not exhausted domestic remedies. *Id.* art. 34, para. 3. The regulations do not clearly address whether the requirement pertains to administrative remedies. In one case the Commission seemed to hint that an administrative process could constitute a legal remedy if it followed judicial norms. Case 1697, INTER-AM. C.H.R., OEA/ser. L./V/II.28 (1972); see Leblanc, *The Inter-American Commission on Human Rights*, 9 HUM. RTS. J. 645, 651-54 (1976) (discussing the case and the principle); see *infra* notes 130-37 and accompanying text (discussing three disappearance cases in Honduras).

15. See T. BUERGENTHAL, II HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 453 (T. Meron ed. 1984) [hereinafter LEGAL AND POLICY ISSUES] (stating that Commission Regulations article 41, paragraphs b, c, d, and g empower the Commission to act without any specific request or petition).

16. See IACHR Regs., *supra* note 7, arts. 28-47 (citing regulations pertaining to Petitions and Communications Regarding States Parties to the American Convention on Human Rights); *id.* arts. 48-50 (Non-parties) (explaining that the Commission makes various factual and legal determinations in considering petitions). Article 29 sets out the requirements for a petition. *Id.* art. 29.

17. IACHR Regs., *supra* note 7, art. 32 (Preliminary Questions), art. 38 (Declaration of Inadmissibility). If the petition passes the *prima facie* test, the current practice of the Commission is to proceed on the merits of a case without a formal decision on admissibility. HUMAN RIGHTS PRACTICE, *supra* note 12, at 117.

18. IACHR Regs., *supra* note 7, art. 30. The individual and the government may each have informal contact with the Commission. HUMAN RIGHTS PRACTICE, *supra* note 10, at 123-24.

Panel members, agreeing with human rights advocates in general, praised the informal procedures of the Commission as a great achievement for the system. Ms. Young noted, however, that informal procedures also have a disadvantage: since they are not recorded, not everyone can benefit from them. Because some aspects of the procedure depend on the petitioner's initiative, if the petitioner is unaware that certain procedures exist, they remain unused. Participants at the conference suggested that the Commission establish a working group to study the informal practices and to publish the results. Professor Dinah Shelton¹⁹ suggested that greater consistency would improve the reliability and predictability of the system.

Once a petition is processed by the staff attorney, the Commission communicates the "pertinent parts" to the government without disclosing the identity of the petitioner, unless he or she has expressly given permission to do so.²⁰ The Commission then requests the government to supply any relevant information pertaining to that petition.²¹ The Commission may ask the government specific questions to elicit details as needed, often through the use of questionnaires or interrogatories.²²

The government must reply within 120 days from the date of the request.²³ It may, however, request a thirty day extension.²⁴ The Commission may grant two such extensions, for a total of 180 days.²⁵ Ms. Young indicated that this practice gave governments too long a period in which to respond. Acknowledging that the Commission has no means even to enforce the 180 day maximum, Ms. Young reminded the participants that often a petitioner suffering human rights violations or simply seeking justice may wait as long as six months for a reply.²⁶ She suggested that the Commission raise the standard for granting government extensions and, in any case, reduce the time allotted for

19. Ms. Shelton is a Professor of Law at the University of Santa Clara School of Law.

20. See IACHR Regs., *supra* note 7, art. 31, para. 4 (requiring that the Commission keep the identity of the petitioner secret except when the petitioner expressly authorizes in writing the disclosure of his or her identity).

21. IACHR Regs., *supra* note 7, art. 31, para. 1(c).

22. American Convention, *supra* note 6, art. 48, para. e.

23. IACHR Regs., *supra* note 7, art. 31, para. 5.

24. *Id.* art. 31, para. 6.

25. *Id.* The Commission shall not grant extensions for more than 180 days after the date on which the Commission sent the first communication to the government of the state concerned. *Id.*

26. Ms. Young also stated that, clearly, the standard for justifiable extensions is too lax. For example, in one case the petitioner did not receive a timely response because the government's secretary in charge of photocopying was absent from the office. This example, although the exception rather than the rule, illustrates the problem associated with the standards of the Commission for granting extensions.

extensions.²⁷

The petitioner receives relevant portions of the response of the government. He or she has thirty days to offer further information or to rebut the reply.²⁸ This process of reply and rejoinder continues until the Commission determines that the parties have sufficiently developed the facts for an action on the merits.²⁹

If the Commission needs more information, it may depart from the usual process and initiate hearings or an on-site investigation.³⁰ Parties to the American Convention on Human Rights must facilitate a Commission visit.³¹ Other OAS member states have no specific obligation to consent to requests.³² As a practical matter, the Commission cannot make an on-site visit without the consent of the government involved.³³ In situations where the Commission learns of an imminent threat to a person's life or physical integrity, the Commission may employ interim measures.³⁴ These measures largely consist of sending letters and telegrams requesting a prompt reply from the government.³⁵ Frequently, interim measures compel the government to cease the violations.³⁶ At the very least, these messages put the government on notice that the Commission knows of the violations.³⁷ The panel called for stronger in-

27. See Norris, *The Individual Petition Procedure of the Inter-American System for the Protection of Human Rights*, in HUMAN RIGHTS PRACTICE, *supra* note 12, at 118 (noting that although the regulations do not mention a petitioner extension, the Commission would probably grant the petitioner the same extension allowed the government). The authors wonder whether the human rights practitioners would like the Commission to continue to grant petitioners extensions equal to the extensions the government enjoys after the Commission raises the standard for the government.

28. IACHR Regs., *supra* note 7, art. 31, para. 7.

29. HUMAN RIGHTS PRACTICE, *supra* note 12, at 118.

30. IACHR Regs., *supra* note 7, art. 43 (Hearing), art. 44 (On-site Investigation).

31. American Convention, *supra* note 6, art. 48, para. 1(d).

32. *But see* IACHR Regs., *supra* note 7, art. 58 (stating that once a state has extended an invitation for an on-site observation, it shall furnish all necessary facilities and bind itself not to take any reprisals).

33. Mr. Padilla cited an example where the Commission approached Uruguay to obtain permission for a visit in order to conduct an "*in loco*" observation in 1976. INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN URUGUAY I, OEA/ser. L./V/II.43 (1978). The government refused to consent to the request of the Commission. *Id.* at 2, 6-7. The Commission issued its 1978 Special Country report on Uruguay without the benefit of a visit. *Id.* at 8. Uruguay eventually promised to give consent in the near future but, as of the date of the conference, still has not consented.

34. IACHR Regs., *supra* note 7, art. 29, paras. 1 and 2 (Precautionary Measures).

35. *Id.* art. 34, para. 2.

36. HUMAN RIGHTS PRACTICE, *supra* note 12, at 119.

37. Mr. Padilla suggested that as an alternative to an on-site visit by the Commission, the Commission could also ask the government to consent to a visit of a staff member. If the government grants the request, the Commission will be near the site of the violation. If the government fails to consent, the request to visit becomes more intimidating than the requests for prompt replies.

terim measures in the future in order to increase their effectiveness.

At any stage of the reply and rejoinder process either party may propose a friendly settlement.³⁸ The Commission must aid the parties in reaching a friendly settlement based upon the respect for human rights recognized in the Convention.³⁹ The OAS Secretary General is responsible for making friendly settlements public.⁴⁰ If the parties fail to reach a friendly settlement, the Commission, because it is a quasi-judicial body, lacks the authority to issue a binding decision. The Commission does have, however, a range of options available to protect and promote human rights.

When the Commission determines that sufficient elements for a judgment exist, it may adopt a report that contains facts, conclusions of law, and recommendations regarding an individual or collective case.⁴¹ In its report, the Commission may also make proposals and recommendations.⁴² Both parties receive a copy of the report with the hope that the state will implement the recommendations.⁴³ If the state does not implement the recommendations within the time the Commission sets, the Commission may publish the report as part of its Annual Report or in another suitable manner.⁴⁴ The OAS General Assembly addresses these reports and may include its own recommendations. At any time during this procedure, the Commission may send contentious cases to the Inter-American Court of Human Rights for a binding judgment.⁴⁵

In addition to processing cases, the Commission serves as the OAS authority on human rights.⁴⁶ Xenia Wilkinson⁴⁷ said the Commission has earned a reputation for making fair and authoritative assessments of human rights violations. In one instance, the Commission offered

38. IACHR Regs., *supra* note 7, art. 45, para. 1.

39. American Convention, *supra* note 6, art. 48, para. 1 (f); *see also infra* notes 131-33 and accompanying text (listing the claims of the Honduran government in cases submitted to the Inter-American Court of Human Rights regarding the Commission after failure to reach a friendly settlement).

40. IACHR Regs., *supra* note 7, art. 45, para. 6.

41. *Id.* art. 46. If the parties cannot reach a friendly settlement the Commission prepares a report. *Id.* art. 46, para. 2. The Commission then processes the report as a case. *Id.* arts. 47-48. Professor Shelton recognized that some ambiguity exists concerning whether Commission members must be present during a discussion to vote or whether they may vote by proxy. Professor Shelton called upon the Commission to clarify its voting procedure on reports and resolutions.

42. *Id.* art. 47, para. 1.

43. *Id.* art. 47, para. 3.

44. *Id.* art. 48, para. 2.

45. *Id.* art. 50, para. 1.

46. American Convention, *supra* note 6, art. 41; IACHR Regs., *supra* note 7, art. 1, para. 1; New IACHR Statute, *supra* note 6, art. 18.

47. Ms. Wilkinson is the Alternate Representative of the United States to the OAS.

proof of such extreme violations that the report, in effect, "delegitimated" the authority of a government.⁴⁸

Finally, the Commission engages in promotional efforts to increase awareness of human rights issues.⁴⁹ It sponsors conferences and publishes a wide variety of booklets and instructional texts. Panel members called upon the Commission to expand its efforts to include more self-promotion.⁵⁰ They recommended holding press conferences after its sessions and after taking interim measures to focus attention on the Commission.

Mr. Padilla observed that many improvements of the Inter-American system require an increased budget. The current budget allows for a staff of seven lawyers; an increase in budget and staff would accelerate the petition process. Although the Commission has maintained a prolonged presence in certain troubled areas,⁵¹ having a permanent representative in each state would greatly improve conditions. A permanent representative could receive petitions, protect individuals, and promote the policies of the Commission in that state. Accordingly, all of the participants called upon the OAS General Assembly to allocate more funds to the budget of the Commission.

B. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The panel next turned to the other half of the Inter-American human rights system: the Inter-American Court of Human Rights. The American Convention on Human Rights established the Court in 1979

48. See Res. II, OASOR Ministers of Foreign Affairs (17th mtg.) 1-2, OEA/ser. F./II.17, doc. 19/78 rev. 2 (1978); Res. II, OASOR Ministers of Foreign Affairs (17th mtg.) 1-2, OEA/ser. F./II.17, doc. 40/79 rev. 2 (1979), reprinted in 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 10, Booklet No. 6, at 181-83 (calling for the immediate and definitive replacement of the Somoza regime; installation of a democratic government with principal representative groups that opposed the Somoza regime; respect for human rights of all Nicaraguans; and the holding of free elections). The Commission drafted a detailed report that provided the OAS with the moral and legal justification for the unprecedented action of asking a national leader to step down. See INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF NICARAGUA 1, OEA/ser. L./V/II.45, doc. 16 rev. 1 (1978), excerpted in 4 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 10, Booklet No. 22, at 66-72 (reporting the findings of the Commission regarding human rights violations the Nicaraguan government committed).

49. See IACHR Regs., *supra* note 7, art. 45 (allowing the Commission to publish its reports in the annual report to the OAS or in any other way the Commission considers suitable).

50. Professor Shelton suggested that the Commission allow its staff members to serve as expert witnesses in domestic cases where human rights are at issue.

51. Mr. Padilla cited the prolonged presence of the Commission in the Dominican Republic after the 1965 invasion of the United States Marines, and on the El Salvador-Honduras border during the so-called "soccer wars."

to elevate human rights to the rule of law.⁵² The Court sits in San Jose, Costa Rica, under an agreement between the Court and the government of Costa Rica. The Court consists of seven members elected individually for seven-year terms.⁵³ It has jurisdiction over the nineteen OAS states that are parties to the Convention.⁵⁴ The Court in its adjudicatory capacity may issue legally binding judgments,⁵⁵ but only after a state consents to the binding jurisdiction of the Court.⁵⁶ Ratifying states may either accept the jurisdiction of the Court in all cases or reserve the right to accept jurisdiction on a case-by-case basis.⁵⁷ To date, nine states have accepted compulsory jurisdiction.⁵⁸ The panel urged the OAS General Assembly to encourage more states to accept compulsory jurisdiction.

Only the Commission and states that are parties to the Convention may file contentious cases with the Court.⁵⁹ Individuals may not file petitions. When the Commission files a case and the state involved has not accepted compulsory jurisdiction, the Commission must request the

52. American Convention, *supra* note 6, art. 81. The Convention established the Inter-American Court of Human Rights as an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. Statute of the Inter-American Court of Human Rights, art. 1, G.A. Res. 448, OAS (9th Sess.), OEA/ser. G./CP doc. 1113/80 (1980) [hereinafter *Court Statute*]. The Commission adopted rules of procedure in 1980. Rules of Procedure of the Inter-American Court of Human Rights, INTER-AM. COURT H.R., OEA/ser. L./V/III.3, doc. 13 corr. 1 (Apr. 15, 1981) [hereinafter *Court Rules*].

53. Court Statute, *supra* note 52, art. 4, para. 1. The Court Statute, article 4, paragraph 1 controls the composition of the Court. *Id.* No two judges may be nationals of the same state. *Id.* art. 4, para. 2. Judges may be from any OAS state but only states party to the American Convention on Human Rights may nominate them. American Convention, *supra* note 6, art. 53.

54. *The American Convention on Human Rights: Signatures, Ratifications, Texts of the Instruments of Ratification and Accession*, reprinted in HANDBOOK, *supra* note 5, at 70-101. Parties to the American Convention on Human Rights are: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela. *Id.* Non-ratifying OAS states are Antigua and Barbuda, Bahamas, Brazil, Chile, Cuba, Dominica, Paraguay, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, and the United States. *Id.*

55. American Convention, *supra* note 6, art. 67.

56. *Id.* art. 62, para. 1.

57. *Id.* art. 62, para. 2.

58. *See id.* art. 62 (defining the compulsory jurisdiction of the Court). Argentina, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Peru, Uruguay and Venezuela have accepted the compulsory jurisdiction of the Court. INTER-AM. C.H.R. 6 n.1, OEA/ser. L./V/II.71, doc. 9 rev. 1 (1987).

59. American Convention, *supra* note 6, art. 61, para. 1. Contentious cases must come before the Court after parties exhaust the procedures of the Commission under articles 48 and 50. *Id.* art. 61, para. 2.

consent of that state to jurisdiction.⁶⁰ If the Court decides against a government in a contentious case, it may require the state to (1) restore the victim's rights; (2) remedy the general situation; or (3) pay fair compensation.⁶¹ At any time in the proceedings or at the request of the Commission, the Court has the authority to take provisional measures if a person's life or physical integrity are in danger.⁶²

In addition to its adjudicatory capacity, the Court may issue advisory opinions.⁶³ Any member state or organ of the OAS may request the Court to issue an opinion on a hypothetical question of law with regard to the interpretation of instruments concerning the protection of human rights in the American states.⁶⁴ Consequently, advisory opinions typically involve interpreting the OAS Charter, the American Declaration of Rights and Duties of Man, or the American Convention on Human Rights.⁶⁵ The Court, however, is not limited to rendering interpretations of these instruments.⁶⁶ The Court held, in a 1982 advisory opinion, that its advisory powers extend to other international human rights instruments if they directly relate to the protection of human rights in an OAS member state.⁶⁷ Finally, states may also seek advisory opinions to test the compatibility of their domestic law with the OAS Charter, American Declaration, and American Convention.⁶⁸

60. IACHR Regs., *supra* note 7, art. 50, para. 3. *See infra* notes 130-37 and accompanying text (listing the first three contentious cases before the Court).

61. American Convention, *supra* note 6, art. 63, para. 1.

62. *Id.* art. 63, para. 2.

63. *Id.* art. 64.

64. *Id.* art. 64, para. 1.

65. *Id.* Article 64, paragraph 1 states: "The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." *Id.*

66. *See* LEGAL AND POLICY ISSUES, *supra* note 15, at 468-69 (discussing the ambiguity regarding the scope of and possible broader interpretations of article 64).

67. Inter-Am. Ct. H.R., "Other Treaties" Subject to the Consultative Jurisdiction of the Court (art. 64, American Convention on Human Rights) (Advisory Opinion OC-1/82 of Sept. 24, 1982), *reprinted in* 4 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 10, Booklet No. 25, at 69. The Court held that it had advisory jurisdiction with respect to treaties to which American states were parties. *Id.* para. 52. The scope of the advisory jurisdiction of the Court is not limited to treaties adopted within the Inter-American system. *Id.* para. 20. The Court cannot exercise advisory jurisdiction over non-member states, but it may interpret any treaty that affects human rights in a member state. *Id.* para. 21. Such an extension of jurisdiction is intended to assist the OAS states in fulfilling their international human rights obligations and to assist the organs of the Inter-American system in fulfilling their functions. *Id.* para. 25.

68. American Convention, *supra* note 6, art. 64(2). The rules of the Court state the procedure for requesting an interpretation relating to domestic laws. *Court Rules*, *supra* note 52, art. 51. *See* Inter-Am. Ct. H.R., Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (Advisory Opinion 4 OC-4/84 of Jan. 19, 1984), *reprinted in* 4 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 10, Booklet No. 25.1, at 38 (noting that Costa Rica employed this option to

Advisory opinions do not bind the requesting state. Governments and the Commission, however, find advisory opinions useful in a number of ways. The opinions serve as a guide for future government action,⁶⁹ defuse tension in situations of political impasse,⁷⁰ carry considerable moral force, and focus international attention on human rights violations.⁷¹ The panel strongly suggested increased study of advisory opinion jurisprudence and its impact on the administrative and legislative process.

II. THE POLITICAL CONTEXT OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: PRESENT DYNAMICS AND FUTURE OPTIONS

The second panel of the conference focused its discussion on the political realities within the inter-American human rights system. Edith Marquez⁷² and Xenia Wilkinson, OAS representatives from Venezuela and the United States joined Mark Schneider,⁷³ Sonia Picado⁷⁴, and Tom Farer⁷⁵, members of nongovernmental organizations and the aca-

test a proposed revision of its naturalization laws). In determining whether to exercise advisory jurisdiction, the Court will decide whether an advisory opinion would assist the requesting state to comply with its international human rights obligations. *Id.* para. 30.

69. See Inter-Am. Ct. H.R., Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, (Advisory Opinion 4 OC-4/84 of Jan. 19, 1984), para. 26, *reprinted in* 4 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 10, Booklet No. 25.1, at 38. (noting that advisory opinions advance the protection of basic human rights and freedoms). A state can prevent violations through seeking and heeding the advice of the Court before enacting formal legislation. *Id.*

70. See *id.* para. 30 (warning that the Court will exercise great care when granting requests for advisory opinions to ensure that it will not affect the outcome of the domestic legislative process).

71. Mr. Moyer cited the third opinion of the Court to demonstrate the moral force and consciousness-raising powers of advisory opinions. See Inter-Am. Ct. H.R., Restrictions to the Death Penalty (Arts. 4(2) and 4(4), American Convention on Human Rights) (Advisory Opinion OC-3/83 of Sept. 8, 1983), *reprinted in* 4 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 10, Booklet No. 25.1, at 3 (noting that Guatemala extended the death penalty to cover crimes that were not included at the time of its ratification). The Commission requested an advisory opinion on whether a state could legally adopt the Guatemalan measures. *Id.* para. 8. The Court held that under the American Convention such measures were clearly illegal. *Id.* para. 76(3)(a)(1). The Court, however, left open the possibility that it might reject an advisory opinion request instituted to disguise a contentious case. *Id.* para. 28. Mr. Moyer stated that, in response to international pressure, Guatemala quickly announced the suspension of the measures.

72. Ms. Marquez is an Ambassador, Mission of Venezuela to the OAS.

73. Mr. Schneider is a Board Member of the International Human Rights Law Group.

74. Ms. Picado is the Executive Director of the Inter-American Institute for Human Rights, Costa Rica.

75. Mr. Farer is a Professor of Law at the Washington College of Law, The Amer-

demic community in addressing current political issues in the hemisphere. Two conditions must exist for the complete development of civil and political rights.⁷⁶ First, strong democratic institutions must exist.⁷⁷ Second, economic, social, and cultural rights must be realized.⁷⁸ Mr. Schneider stated that the slow development of these rights is attributed to stagnant political thought. Consequently, political behavior must change before a solution becomes possible. He added that American democracies must, therefore, mobilize public opinion to foster fundamental changes in the political will.

A. POLITICAL ISSUES

In the first panel, Ms. Young noted the trend of progressively weaker OAS General Assembly resolutions and pointed to the current lack of political resolve of the Organization. The General Assembly, composed of representatives of member states, bears the ultimate responsibility for the preservation of peace and human rights.⁷⁹ Accordingly, its resolutions concerning human rights violations reflect its commitment to human rights.

Since 1980, the public has perceived that the General Assembly has not completely fulfilled its responsibilities in even the most egregious cases.⁸⁰ Ms. Young compared the resolutions of the seventies and those

ican University, and past President of the Inter-American Commission on Human Rights.

76. See American Declaration of the Rights and Duties of Man, adopted May 2, 1948, by the Ninth International Conference of American States, Bogota, Colombia, reprinted in HANDBOOK, *supra* note 7, at 19 [hereinafter Declaration] (noting the importance of civil and political rights). Chapter I of the American Declaration of the Rights and Duties of Man guarantees civil and political rights, while chapter II addresses the civil and political duties of citizens. *Id.* arts. I-XXXVIII.

77. See *infra* notes 87-88, 102-03, 105-10 and accompanying text (discussing the condition of the democratic institutions in Latin America). The OAS states adopted instruments guaranteeing civil and political rights. See *supra* note 76 (listing the instruments in the Inter-American system guaranteeing civil and political rights). The failure of these rights to take root in Latin America is blamed in part on the weak democratic institutions found in the region. See *infra* note 102-03 (noting the weakness of democratic institutions in many OAS states).

78. See Declaration, *supra* note 76, arts. 1-28 (enumerating specific economic, social, and cultural rights).

79. OAS Charter, *supra* note 5, art. 52. In most cases, resolutions require an absolute majority vote. *Id.* art. 57. Observers regard the General Assembly resolutions as an indicator of the level of human rights commitment among the OAS states. 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 10, Booklet No. 7, at iv.

80. Ms. Young recalled that General Assembly resolutions before 1975 were often weakly worded and limited to thanking the Commission for its work. Since the Commission made its first special report on the status of human rights in Chile in 1974, the resolutions have named specific states. See OAS GA Res. 192 (V-O/75) (noting that this was the first time the Commission reports were not merely noted and filed). Begin-

of the eighties to illustrate this trend. The resolutions of the later seventies condemned states by name for violating human rights.⁸¹ This strong political consensus culminated in the unprecedented 1979 resolution calling for the abdication of the Somoza regime in Nicaragua.⁸² The transition of the role of the General Assembly occurred one year later when the General Assembly adopted a resolution directly in response to the disappearances in Argentina. The resolution, however, failed to name any state as responsible.⁸³ The adoption of only a single resolution in 1986 further exemplifies the weakened role of the General Assembly.⁸⁴ This resolution simply called on nations named in the Annual Report to remain faithful to their human rights obligations.⁸⁵

This evidence of a trend toward weaker resolutions presented in the first discussion evoked varied responses from the second panel. Ms. Picado suggested that fear on the part of various states of being targeted in the next resolution often caused a "conspiracy of silence."⁸⁶ In fact,

ning in 1980, however, the General Assembly adopted omnibus resolutions and responded to all of the work of the Commission. 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 10, Booklet No. 7, at iv. As a result, omnibus resolutions became the preferred method of dealing with human rights issues. *Id.* Judge Buergenthal warned that the omnibus resolutions were a significant setback for OAS human rights efforts. LEGAL AND POLICY ISSUES, *supra* note 15, at 484 n.156. Judge Buergenthal further speculated that the development might signal a trend toward weaker support for human rights. *Id.*

81. Ms. Young read as an example a resolution of the OAS General Assembly referring to the REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON THE SITUATION OF HUMAN RIGHTS IN PARAGUAY, *reprinted in* 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 10, Booklet No. 7, at 62. In that report, the Commission concluded that "in Paraguay the great majority of the human rights recognized in the American Declaration of the Rights and Duties of Man and in other instruments are not respected in a manner in keeping with the international commitments assumed by that country." *Id.*

82. See *supra* note 48 and accompanying text (discussing the investigation of the Commission into the human rights violations of the Somoza regime).

83. See AG/Res. 510 (X-0/80), INTER-AM. C.H.R. 79, OEA/ser. P./AG doc. 1350/80 rev. 19 (1980), *reprinted in* 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 10, Booklet No. 7, at 84 (noting that the resolution merely mentions situations in Argentina, Chile, El Salvador, Haiti, Paraguay and Uruguay). The resolution directs much attention to the disappearances in Argentina. *Id.* at 85. The General Assembly resolved:

To urge the governments of the member states that have not yet done so to adopt and put into practice the necessary measures to preserve and safeguard the full exercise of human rights, especially in those cases

that concern the status of individuals detained without due process, the disappearance of persons, the return of exiles and the lifting of states of emergency.

Id.

84. AG/Res. 778 (XV-0/85), INTER-AM. C.H.R. 38-39, OEA/ser. P./AG doc. 2023/85 rev. 12 (1986), *reprinted in* 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 10, Booklet 7.1, at 24.

85. *Id.*

86. Judge Buergenthal has also spoken of a tacit agreement among the OAS states

this "conspiracy" did not seem to protect smaller nations, like Suriname, from being named in subsequent resolutions. Later in the conference, Dr. João Baena Soares, Secretary General of the OAS, gave the opinion that changes in wording had not affected the "essence" of the work of the Commission or the "substance" of its resolutions. Professor Farer suggested that the trend toward weakness resulted from the fact that while the power of so-called "middle states" has increased, the United States still remains central to the effective implementation of human rights. Thus the significance of the radical change between 1979 and 1981 clearly reflected the change in administrations in Washington, D.C.⁸⁷ The OAS General Assembly resolutions before 1980 reflect President Carter's emphasis on human rights in foreign policy, while the resolutions after 1980 reflected President Reagan's policy of "quiet" diplomacy.⁸⁸

The emergence of new democracies in the Western Hemisphere and their effect on the status of human rights signify a changing environment in the OAS.⁸⁹ The Commission earned its reputation for the pro-

with respect to the weak resolutions before the report on Chile in 1974. Buergethal, *The Inter-American System for the Protection of Human Rights*, in LEGAL AND POLICY ISSUES, *supra* note 15; at 483.

87. See generally Carleton & Stohl, *The Foreign Policy of Human Rights: Rhetoric and Reality from Jimmy Carter to Ronald Reagan*, 7 HUM. RTS. Q. 205, 205 (1985) [hereinafter Carleton & Stohl] (comparing the human rights policies of the Carter and Reagan administrations as regards the enunciated principles and rationales of their policies). Ronald Reagan criticized the foreign policy of the Carter administration for stressing human rights in situations where it caused embarrassment to allies of the United States and reduced United States influence on those allies. *Id.* at 225. Through his foreign policy, President Reagan criticized the human rights records of totalitarian regimes allied with the Soviet Union while exercising quiet diplomacy with pro-west authoritarian regimes. *Id.* at 209; see Kirkpatrick, *Dictatorships and Double Standards*, COMMENTARY, Nov. 1979, at 35-37 (distinguishing authoritarian from totalitarian regimes on the basis of the disruptive effect of totalitarian regimes on traditional society). Kirkpatrick, who had enormous influence on the foreign policy of the Reagan administration, prefers the repression of an authoritarian regime to the claim of a totalitarian regime to jurisdiction over the entire society that disrupts traditional social institutions. *But see* Carleton & Stohl, *supra*, at 220 (criticizing Kirkpatrick for emphasizing theoretical considerations over political realities). Carleton and Stohl assert that actions of authoritarian and totalitarian regimes are frequently indistinguishable. *Id.* Furthermore, many totalitarian states allow aspects of the traditional society, such as religion, black markets, and political dissent, to continue. In contrast to the Kirkpatrick thesis, authoritarian regimes frequently reach beyond political institutions to disturb social institutions. *Id.* at 219-22.

88. See Carleton & Stohl, *supra* note 87, at 222-23 (comparing the respective emphases of the Carter and Reagan foreign policies). Empirical studies show that the Carter foreign policy, despite its rhetoric, failed to withdraw United States assistance from friendly governments that violated human rights. *Id.* at 214-17. The one exception to the rule was Latin America, where geopolitical factors reduced the possible political costs of following through on the rhetoric. *Id.* at 224.

89. See BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, SPECIAL REPORT NO.

tection of human rights through its performance during the period of 1970-1981, the era of the "national security state."⁹⁰ A national security state governs through intimidation, including torture, numerous disappearances, and extra-judicial killings.⁹¹ It frequently declares a state of emergency as a device to suspend political rights.⁹² The Commission dealt effectively with these blatant violations of human rights by making public individual cases and by focusing the world's attention on the general situation.⁹³ The Commission also persuaded governments that

158, DEMOCRACY IN LATIN AMERICA AND THE CARIBBEAN: THE PROMISE AND THE CHALLENGE I (1987) [hereinafter DEMOCRACY IN LATIN AMERICA] (recognizing the new political situation in Latin America brought about by the decade-long trend of replacing military regimes with democratically elected governments); see *infra* notes 146-50 (discussing the issues that often arise in the context of the transition to a democratic government). Challenges may arise to the validity of an election on which a government bases its claim to legitimacy. Similarly, as part of the transition to democracy, a civilian government may enact laws granting amnesty to persons involved in human rights violations under the authority of the outgoing military regime.

90. See *Military Regimes in Latin America*, 17 INT'L COMM'N JURISTS REV. 13, 13-16 (1976) [hereinafter *Military Regimes in Latin America*] (noting the emergence of a new pattern of oppressive regimes in Latin America in the early seventies). By the mid-seventies many Latin American states ruled under states of emergency. *Id.* In every case the regime originated from a military coup. *Id.* Rulers declared states of emergency to give the executive branch extra-constitutional powers. *Id.* The executive branch used these powers to quash all forms of political expression which could be seen as an open door to communism. *Id.* The ideology of the "national security state" consisted of blind loyalty to the military and the preservation of a form of capitalism, reminiscent of the nineteenth century, found in the states. *Id.*

91. *Id.* at 20-22. National security forces typically aim repressive tactics first at members of armed movements, then at left-wing groups, and finally at all forms of political opposition. *Id.* In the first stages the military carries out the oppressive measures. Later, the police and special security forces under military control take over. *Id.* The breakdown of the rule of law in the national security state may even lead to unofficial oppression by paramilitary and parapolice groups that have apparent strong links with the official security authorities. *Id.*

92. *Id.* at 14. Most national security states adopt emergency measures to concentrate power in the executive. *Id.* Under the guise of constitutionally-implemented states of emergency, the executive places limitations on human rights. *Id.* at 14-15. The Executive then takes measures to suspend civil, political, economic, social, and cultural rights. *Id.* With the political system for protecting fundamental rights destroyed, the repressive measures of the state become increasingly violent. *Id.*; see Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 AM. U.J. INT'L L. & POL'Y 35, 37 (1986) (concluding that studies indicate that the greater the magnitude of human rights violations, the less likely those ruling under the state of emergency will restore human rights protections).

93. See American Convention, *supra* note 6, art. 27 (regulating the suspension of human rights guarantees during states of emergency). Article 27, paragraph 1 provides:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not

legitimate states of emergency can be enforced without violating fundamental human rights.⁹⁴

Fortunately, during the present decade, the number of OAS member states with democratically-elected governments has increased. Commensurate with this trend, egregious human rights violations have decreased.⁹⁵ Democratic governments typically recognize fundamental human rights in their constitutions and, at least in theory, represent the will of their citizens.⁹⁶ In the 1990s the Inter-American human rights system will confront the more subtle problems associated with political participation and the realization of economic, social, and cultural rights.⁹⁷ The panel emphasized the promotion and maintenance of dem-

involve discrimination on the ground of race, color, sex, language, religion, or social origin.

Id. The Commission has publicized state failures to meet the criteria contained in article 27 for declaring a state of emergency or suspending rights. Grossman, *supra* note 92, at 37 n.7.

94. See American Convention, *supra* note 6, art. 27, para. 2 (making certain rights absolute and nonderogable under the Convention). Article 27, paragraph 2 states:

The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex post facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Right of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

Id. A government may not suspend these rights even during a valid state of emergency.

Id. The Convention allows a government to suspend derogable rights in an effort to cope with a national emergency, provided that the government meets certain requirements: (1) necessity; (2) temporary status; (3) proportionality; (4) non-discrimination; (5) compatibility with other international obligations; and (6) adherence to domestic law. Grossman, *supra* note 92, at 50-53.

Most officials completely agree with the Commission's statement of law but each believes their case the exception. Farer, *Human Rights and Human Wrongs: Is the Liberal Model Sufficient?*, 7 HUM. RTS. Q. 189, 194 (1985) (relating the experiences of the author with Argentine officials).

95. INTER-AM. C.H.R. 20, OEA/ser. L./V/II.50, doc. 13 rev. 1 (1980) [hereinafter IACHR 1979-1980 ANNUAL REPORT]. *But see id.* (noting no appreciable improvement in human rights conditions since the previous Annual Report). The Commission established that neglect of economic and social rights and suppression of political participation leads to the violation of the right to physical safety. *Id.* at 151. In other words, neglect of economic and social rights, especially when the government suppresses political participation, produces the kind of social polarization that leads to acts of terrorism by and against the government. *Id.*

96. See Müller, *Fundamental Rights in Democracy*, 4 HUM. RTS. L.J. 131, 134 (1983) (discussing that although pure democracy represents absolute majority will, it does not necessarily guarantee a good human rights record). Constitutional democracies with certain rules of procedure that place fundamental individual rights beyond the majority will hold a promise for a good human rights record. *Id.* The panel deemed these rights essential for an environment conducive to a good human rights record.

97. See Park, *Human Rights and Modernization: A Dialectical Relationship?*, 2

ocratic institutions as a primary means to achieve an ideal political environment.⁹⁸

Professor Farer explained that when civilians win a national election and replace a military regime, the newly-elected government often faces serious problems. Having allowed the election, the military then inhibits the new leaders from implementing social and economic reforms essential for the success of the new government. In most cases the military remains untouched by the civilian authority. In Brazil, for example, the military effectively vetoed a constitutional proposal to divest it of jurisdiction over crimes committed by security services. In some states the military continued to administer rural areas without civilian oversight. In Guatemala and El Salvador, where the military shares power with the civilian government, a question arises of whether the states can call themselves "real democracies." Professor Farer stressed that the distinction between facade and real democracies must be preserved. All too frequently, states hide authoritarian practices behind the label of "democracy."

The coup d'état, the military's ultimate "veto" of civilian government, effectively denies the popular exercise of political will. Professor Farer suggested consideration of a league of democratic Caribbean basin states obligated to support civilian governments against coups d'état by their militaries. Under the plan, a Caribbean league would come to the aid of a threatened civilian government at the request of the highest government official alive and free in the wake of a coup. Unless such a league could enlist the support of important Western democracies such as Canada, the United Kingdom, and Spain, in addition to the United States, however, it would tend to be, and to be seen as, a nineteenth century protectorate in twentieth-century drag.⁹⁹ A league

UNIVERSAL HUM. RTS. 85 (1980) (discussing an empirical study that showed a positive relationship between nations achieving economic, political, and civil rights for their citizens and a good human rights record).

98. See INTER-AM. C.H.R. 19, OEA/ser. P./AG doc. 2166/87 (1987) [hereinafter IACHR 1986-1987 ANNUAL REPORT] (stating that the Commission declares democracy the best guarantee for the observance of human rights). The Commission considered a democratic framework essential for the establishment of a political society where human values can be fully realized. *Id.* at 151.

99. Professor Farer said the United States would act pursuant to its obligations under the OAS Charter and the Rio Treaty and in accordance with customary international law. *But see* Farer, *Limiting Intraregional Violence: The Costs of Regional Peacekeeping*, in *THE FUTURE OF THE INTER-AMERICAN SYSTEM* 195, 198-201 (T. Farer ed. 1979) [hereinafter Farer] (discussing the neutrality of other major democracies). Professor Farer asserts that the major democracies in the region tend toward neutrality because their interests in Latin America are almost exclusively economic. *Id.* at 200. The United States may be the only major democracy able to play the role of regional peacekeeper. *Id.*

including a number of wealthy states could provide financial reinforcement for democratic regimes. Although Professor Farer expressed serious doubts about the feasibility of such a plan, precedent does exist for assistance to elected officials faced with military rebellions. Civilian governments in Africa have successfully called upon their former colonial rulers to intervene on their behalf.¹⁰⁰ Professor Farer added that such a league would tend to discipline United States tendencies to intervene in the Caribbean basin, which are likely to endure. How it might deal with attempts to displace non-elected governments is an even more difficult question.

B. AN INSTITUTIONAL RESPONSE

Through the various OAS instruments, states have pledged to promote political, economic, social, and cultural rights within a democratic context.¹⁰¹ Latin American constitutions, however, frequently make eloquent pronouncements of political rights that, in fact, fail to come to fruition.¹⁰² Given a climate of chronic economic crisis and military dominance, Latin America has generally failed to support democratic institutions.¹⁰³ In response to these concerns, the Inter-American Court of Human Rights and the government of Costa Rica established the autonomous Inter-American Institute of Human Rights (the Institute).¹⁰⁴ The Institute fosters human rights and democratic values in society through a variety of activities.¹⁰⁵

The achievement of human rights also depends on strengthening the

100. Professor Farer also gave the example that, in 1964, Kenya and Tanzania asked for British intervention to suppress their coups d'état. The new nations quickly received military assistance, after which the British withdrew.

101. OAS Charter, *supra* note 5, art. 31; American Convention, *supra* note 6, art. 26; Declaration, *supra* note 76, arts. XI-XIV, XVI.

102. See Burns, *The Continuity of the National Period*, in LATIN AMERICA, ITS PROBLEMS AND ITS PROMISE 61, 72-74 (J. Black ed. 1984) [hereinafter Black] (discussing the backlash against democratic reform).

103. Black, *Participation and Political Process: The Collapsing Pyramid*, in Black, *supra* note 102, at 165, 187-89. In Latin America, economic crises, caused by fluctuations in world commodity markets as well as uneven distribution of wealth, lead to the questioning of the existing political structure. *Id.* at 173. Such questioning threatens the interests of the elite, traditionally the landowners. *Id.* The elite then turn to the military to protect the status quo. *Id.*

104. See Ventura, *Costa Rica and the Inter-American Court of Human Rights*, 4 HUM. RTS. L.J. 273, 281 (1983) (discussing the Agreement between Costa Rica and the IACHR, signed July 30, 1980, which the Legislative Assembly of Costa Rica later ratified by Law No. 6482 of October 28, 1980).

105. *Id.* Sonia Picado stressed the problems associated with building a democratic tradition in Latin America. Ms. Picado noted that the Institute takes a multidisciplinary approach to its mission; this approach integrates human rights principles in all areas of study instead of presenting a single human rights class.

role of the judiciary. In many OAS states, the judiciary has little independent power.¹⁰⁶ Typically, a close relationship exists between the judiciary and the executive branches of government.¹⁰⁷ The executive can therefore manipulate the courts through threats and bribes.¹⁰⁸ In addition, the executive can institute permanent restrictions on the judiciary's defense of human rights by declaring a state of siege. The Institute lobbies for judicial reform in Latin America by calling for stronger courts to protect human rights and to promote respect for the rule of law. It also encourages stricter separation of constitutional and budgetary matters and promotes the prestige of the judiciary through such devices as holding annual meetings of the justices of OAS states.

The Institute also hopes to promote a democratic spirit among the people of Latin America, to instill democratic values in what traditionally have been authoritarian societies. In many states, from grade school to university, the textbooks have an authoritarian bias. In response, the Institute has produced textbooks incorporating a democratic bias; these books are now in use in Brazil. In Uruguay, the government has used the Institute's assistance in integrating democratic values into the entire school curriculum. While not an activist organization itself, the Institute has focused on the training of human rights activists in the use of the Inter-American system and of domestic processes. Many states have welcomed these trained people as an alternative to the leaders of leftist movements.

C. PERSPECTIVES OF TWO OAS STATES

The OAS representatives from Venezuela and the United States provided the panel with their perspectives on the Inter-American human rights system. Edith Marquez, the representative from Venezuela, explained why the international defense of human rights forms an essential part of her nation's foreign policy. First, in its almost 30 years of

106. See Garro, *The Role of the Argentine Judiciary in Controlling Governmental Action Under a State Of Siege*, 4 HUM. RTS. L.J. 311, 314 (1983) (discussing repeated purges of members of the Supreme Court and of the highest provincial courts of the previous government in Argentina). Although the Argentine Constitution of 1853 names the judicial branch as one of the co-equal branches of government, the lack of sustained constitutional governments in Argentina has made it impossible for the Supreme Court of Argentina to exercise independence. *Id.*

107. *Id.* For example, in Argentina, each new government typically purges the courts when it comes to power. *Id.* Military juntas likewise remove and appoint new members to the Supreme Court. *Id.* at 315.

108. See *id.* at 316 (listing the large numbers of judges that the Argentine government murdered, detained, or who disappeared through early 1978). Argentine judges who were too lenient on terrorism or too rigorous in investigating abuses of civil rights received murder threats. *Id.*

uninterrupted democracy, Venezuela has made the promotion of human rights a part of the process of consolidating its democracy. Venezuela has found respect for human rights inseparable from democracy. The country's experience under the dictatorship of General Marcos Perez Jimenez, in the late 1950s, caused all Venezuelan political parties, regardless of ideology, to respect human rights.¹⁰⁹ Second, Venezuela believes that in an increasingly interdependent world, the violation of human rights has become an issue of international peace.¹¹⁰ Third, Venezuela takes pride in its record of leadership in the hemisphere in the field of human rights. As one of the original OAS members, Venezuela participated in drafting the instruments, provided leadership in the Commission, and cooperated with the work of the Commission. Currently, Venezuela supports the additional protocol to the American Convention to abolish the death penalty and a special convention to prevent and punish disappearances.

Xenia Wilkinson, the representative from the United States, praised the Commission and the Court for their balanced and impartial assessment of human rights violations and pledged support for increased OAS allocations for the Inter-American human rights system. She explained the role of human rights in the United States foreign policy, reiterating that the Reagan administration accords human rights the highest priority. The United States, however, is not a party to the American Convention on Human Rights. Although President Carter signed the Convention in 1978, the Senate has not given its advice and consent to the ratification process.¹¹¹ The Carter administration endorsed most of the Convention, recommending ratification with certain reservations.¹¹²

109. Marty, *Venezuela, Colombia, and Ecuador*, in Black, *supra* note 102, at 381, 392. Parties of all ideological positions participate vigorously in the Venezuelan political scheme. *Id.*

110. See Tugwell, *Venezuela and the Inter-American System*, in Farer, *supra* note 99, at 256, 263 (noting that Venezuela subscribes to the Betancourt Doctrine. That doctrine obliges democratic governments to refuse recognition to military juntas that overthrow freely elected governments).

111. See U.S. CONST. art. II, § 2, cl. 2 (explaining the Presidential power to make treaties with the advice and consent of the Senate). *Id.*

112. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING FOUR TREATIES PERTAINING TO HUMAN RIGHTS, S. EXEC. DOC. F, 95th Cong., 2d Sess. 1 (1978). In transmitting the Convention to the Senate, President Carter proposed the adoption of the Convention with a specific declaration, namely that "the United States declares that the provisions of Articles 1 through 32 of this Convention are not self-executing." *Id.* The United States declaration reserves the right to choose which rights will be implemented domestically. *Id.*; see American Convention, *supra* note 6, arts. 3-32 (containing the human rights law of the Convention). These articles constitute the substantive human rights law of the Convention. Article 2 requires the states parties to

Two problems for the United States arise in article 4, which pertains to the right to life. Article 4(1) guarantees a right to life from the moment of conception.¹¹³ The Supreme Court, in *Roe v. Wade*, ruled that a woman's right to choose an abortion in the first trimester of pregnancy is a constitutionally protected right of privacy.¹¹⁴ Article 4(3) prohibits nations that have abolished the death penalty from reestablishing it.¹¹⁵ Under the federal system of the United States, the states retain exclusive control over the election of the death penalty.¹¹⁶ If the President ratified the American Convention on Human Rights without a reservation as to article 4, the Senate would thus violate the Constitution because treaties cannot authorize powers that the Constitution forbids.¹¹⁷ Treaties may, however, limit powers reserved to the states under the tenth amendment.¹¹⁸

Professor Farer suggested the use of reservations to a treaty only as a last resort. If the laws of a nation conflict with the international standards embodied in the treaty, the government ought to reconsider its domestic position. In order to sign the Convention without reservations, the United States would need to impose on the states a degree of uniformity politically impossible. Finally, Ms. Wilkinson expressed concern about the recent trend in applying standards of the Convention to non-parties. The United States will continue to reject this practice.

As a conclusion to the panel's discussion, Mr. Schneider summarized the task before the OAS states. The states must transform the standards of the various instruments to a hemispheric tradition of human rights and an effective enforcement system so that some day no violations will occur. The solution to this great task lies in the mobilization of the collective political will of the American democracies. When such a coalition holds human rights above parochial interests and does not

adopt legislation where needed to ensure the rights in articles 3 through 32. *Id.* art. 2; see also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 128 comment g (1965) (discussing the effect of reservations on international agreements negotiated under the general auspices of the OAS).

113. American Convention, *supra* note 6, art. 4, para. 1.

114. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

115. American Convention, *supra* note 6, art. 4, para. 3.

116. See *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding statute allowing for the discretionary imposition of the death penalty in state that used objective standards and rules to limit the discretion); *Jurek v. Texas*, 428 U.S. 262 (1976) (same); *Proffitt v. Florida*, 428 U.S. 242 (1976) (same).

117. See *Reid v. Covert*, 354 U.S. 1, 30 (1957) (holding that United States Military courts exercise exclusive jurisdiction over their forces but that civilian defendants enjoy the constitutionally-guaranteed right to a trial by jury).

118. See *Missouri v. Holland*, 252 U.S. 416, 432-33 (1920) (holding that matters such as the regulation of migratory birds are powers not delegated to the states and thus proper areas for Congress to preempt by international treaty).

hesitate to act in their defense, the Inter-American system will enter a new era.

III. AN ASSESSMENT OF THE COURT AND THE COMMISSION IN ADDRESSING DISAPPEARANCES, SUMMARY EXECUTION, AND THE TREATMENT OF PRISONERS

The third panel discussed the procedures and limitations of the Inter-American human rights system when confronted with "incommunicado violations" of human rights. The panel included Edmundo Vargas Carreño, Executive Secretary of the Inter-American Commission on Human Rights, and Professors Robert Dinerstein, Claudio Grossman, and Dinah Shelton, members of the academic community.¹¹⁹ Disappearances, summary executions, mistreatment of prisoners, and situations where the government has the victim in detention out of the public eye are classified as incommunicado violations. Of the petitions the Commission handled during the "national security" era, petitions for incommunicado violations occurred most frequently; in Central America, allegations of incommunicado violations still make up the majority of petitions.¹²⁰

Mr. Carreño explained the special problems of dealing with incommunicado detentions. The framers of the American Convention on Human Rights incorporated many procedures and norms from the European Convention on Human Rights and Fundamental Freedoms.¹²¹ Because the European model presupposes the existence of a strong democratic tradition, procedures adopted from the European model have not worked well in the Americas,¹²² especially in relation to human rights violations. For example, the American Convention on

119. Mr. Dinerstein is an Associate Professor and Deputy Director of Clinical Programs at The American University, Washington College of Law; Mr. Grossman is a Professor of Law and Director of the International Legal Studies Program at The American University, Washington College of Law.

120. See *Military Regimes in Latin America*, *supra* note 90, at 13-16 (noting the emergence in the early seventies of oppressive regimes in Latin America); IACHR 1979-80 ANNUAL REPORT, *supra* note 95, at 151 (noting the tremendous wave of murder, torture and arbitrary detention in the western hemisphere); INTER-AM. C.H.R. 111, OEA/ser. L./V/II.54, doc. 9 rev. 1 (1981) (characterizing summary executions, disappearances and torture as among the principal manifestations of human rights violations during the period covered by the report).

121. LEGAL AND POLICY ISSUES, *supra* note 15, at 441.

122. See Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U.L. REV. 155, 156 (1980) (noting that the existence of non-democratic regimes and large-scale poverty make the enforcement of human rights in the region more difficult than in Western Europe).

Human Rights obliges the Commission to pursue a friendly settlement as a first step in processing individual petitions.¹²³ In cases of disappearances, however, the government usually denies that the situation exists and the attempt at a friendly settlement becomes an empty gesture. Fulfilling the requirement to exhaust domestic remedies¹²⁴ may present a similar situation. Budget and staff constraints could pose additional procedural problems for the Commission.

Mr. Carreño went on to say that, despite difficulties, the Commission gives petitions concerning disappearances immediate attention because egregious violations of life and physical integrity usually occur within the first seventy-two hours of detention. Upon receiving and processing a disappearance petition,¹²⁵ the Commission immediately contacts the appropriate government authority. Sometimes this first action by the Commission leads to the release of the missing individual, but often without the government acknowledging the situation.¹²⁶ Unfortunately, for the majority of the petitions, the Commission must open an individual file and begin the slow process of handling a case. The Commission does not infer guilt but gives the government in question every chance to respond.¹²⁷

Only if the government fails to respond does the Commission presume the truth of the alleged violations.¹²⁸ The government, however, may have the last word by simply denying all knowledge of the situation. If after exhausting all procedures the Commission finds the government guilty, it may submit a report either to the OAS General As-

123. American Convention, *supra* note 6, art. 48, para. 1(f). The American Convention exemplifies this approach, stating that "the Commission *shall* place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention." *Id.* (emphasis added); see *supra* notes 38-40 and accompanying text (discussing the procedure for a friendly settlement outlined by the regulations of the Inter-American Commission on Human Rights); see also *infra* note 132 and accompanying text (discussing the discretion of the Commission over the friendly settlement procedure).

124. See *supra* notes 13-14 and accompanying text (discussing exhaustion of domestic remedies).

125. See *supra* notes 16-18 and accompanying text (discussing the procedures the Commission follows once it receives a perfected petition).

126. See *supra* notes 20-25 and accompanying text (explaining the relationship between the Commission and governments).

127. See HUMAN RIGHTS PRACTICE, *supra* note 12, at 115 (emphasizing the importance of establishing a nexus between the acts complained of and the involvement of the government).

128. IACHR Regs., *supra* note 7, art. 39. The Commission presumes that the complaint transmitted to the government is true if the government fails to provide pertinent information in a timely manner and if other evidence does not lead to a different conclusion. *Id.*; see HUMAN RIGHTS PRACTICE, *supra* note 12, at 115-16 (same).

sembly or to the Court, whichever it considers suitable.¹²⁹

The first contentious cases before the Court concerned the disappearance of four persons in Honduras. Professor Claudio Grossman, who was appointed advisor of the Inter-American Commission on Human Rights for the cases, discussed the preliminary rulings of the Court in these cases. Honduras objected to the court proceedings on several grounds in a series of preliminary exceptions.¹³⁰ Honduras first asserted that because the Commission had failed to reach a friendly settlement, the Court could not claim jurisdiction.¹³¹ The Court ruled that the Commission has discretion regarding the use of friendly settlements.¹³² It further ruled that the failure of the government to make any effort toward a friendly settlement properly placed the cases before the Court.¹³³ In a second objection, Honduras asserted that the procedures of the Court require on-site visits and preliminary hearings by the Commission before the Court can hear a case.¹³⁴ The Court ruled that the Commission also has discretion regarding the use of on-site visits.¹³⁵ Honduras further alleged that a failure of the claimants to exhaust domestic remedies barred the Court from having jurisdiction.¹³⁶ The

129. The Commission examines evidence such as witnesses and documents that the government and petitioner provide. IACHR Regs., *supra* note 7, art. 43.

130. See Inter-Am. Ct. H.R., *In re Fairen Garbi and Solis Corrales*, No. 7951, para. 16 (Decision of June 26, 1987) (describing how Honduran authorities denied that two Costa Ricans had crossed into its country); Inter-Am. Ct. H.R., *In re Godinez Cruz*, No. 7920, paras. 15, 21 (Decision of June 26, 1987) (describing how the Honduras government claimed that a detained man was not in their custody); Inter-Am. Ct. H.R., *In re Velasquez Rodriguez*, No. 8097, para. 15 (Decision of June 26, 1987) (describing how security police denied the detention and torture of a student).

131. Inter-Am. Ct. H.R., *In re Fairen Garbi and Solis Corrales*, No. 7951, para. 37 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Godinez Cruz*, No. 7920, para. 45 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Velasquez Rodriguez*, No. 8097, paras. 42-44 (Decision of June 26, 1987).

132. Inter-Am. Ct. H.R., *In re Fairen Garbi and Solis Corrales*, No. 7951, paras. 49-50 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Godinez Cruz*, No. 7920, para. 48 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Velasquez Rodriguez*, No. 8097, para. 45 (Decision of June 26, 1987).

133. Inter-Am. Ct. H.R., *In re Fairen Garbi and Solis Corrales*, No. 7951, para. 51 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Godinez Cruz*, No. 7920, para. 49 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Velasquez Rodriguez*, No. 8097, paras. 45-46 (Decision of June 26, 1987).

134. Inter-Am. Ct. H.R., *In re Fairen Garbi and Solis Corrales*, No. 7951, paras. 52-54 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Godinez Cruz*, No. 7920, paras. 50, 58 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Velasquez Rodriguez*, No. 8097, paras. 47, 50 (Decision of June 26, 1987).

135. Inter-Am. Ct. H.R., *In re Fairen Garbi and Solis Corrales*, No. 7951, paras. 52-54 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Godinez Cruz*, No. 7920, paras. 52, 64 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Velasquez Rodriguez*, No. 8097, paras. 48, 52 (Decision of June 26, 1987).

136. Inter-Am. Ct. H.R., *In re Fairen Garbi and Solis Corrales*, No. 7951, paras. 79-83 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Godinez Cruz*, No. 7920,

Court ruled the objection invalid because the Honduran government made little effort to establish effective recourse for the protection of the rights of those under government persecution.¹³⁷ Finally, the Court rejected the objection that each of the proceedings before the Commission violated the procedure established in the American Convention. The Court weighed the nature of the alleged violation against the need for adopting flexible procedures suited for the American system.

Professor Grossman suggested special measures that the Court should pursue to benefit the victims appearing before it. For example, the Inter-American system would benefit from following the European model of allowing independent representation before the Court.¹³⁸ Such a measure would help prevent the concerns of the victim becoming lost in Court politics. The creation of a fund to assist petitioners with the costs of using the system would increase accessibility to the Commission and the Court.

The existence of disappearances in a state should prompt the Commission to take immediate urgent steps, such as requesting an on-site visit, to notify the OAS General Assembly and the Permanent Council that a serious situation exists.¹³⁹ The Commission and the OAS General Assembly may adopt a resolution that calls on the concerned government to abide by its international obligations, and to accept the conduct of investigations.¹⁴⁰

The various American human rights instruments fail to use specific language that addresses forced disappearances.¹⁴¹ The OAS General Assembly attempted to remedy this omission in 1983, when it declared

para. 80 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Velasquez Rodriguez*, No. 8097, paras. 78-80 (Decision of June 26, 1987).

137. Inter-Am. Ct. H.R., *In re Fairen Garbi and Solis Corrales*, No. 7951, paras. 92-94 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Godinez Cruz*, No. 7920, paras. 94-96 (Decision of June 26, 1987); Inter-Am. Ct. H.R., *In re Velasquez Rodriguez*, No. 8097, paras. 92-93 (Decision of June 26, 1987).

138. See HUMAN RIGHTS PRACTICE, *supra* note 12, at 143-44 (explaining the policy of the European Commission on Human Rights toward legal representation and legal aid).

139. See IACHR Regs., *supra* note 7, arts. 58-59 (discussing the need for reports on human rights); see also INTER-AM. C.H.R., REPORT ON THE STATUS OF HUMAN RIGHTS IN CHILE: FINDINGS OF "ON-THE-SPOT" OBSERVATIONS IN THE REPUBLIC OF CHILE 1, OEA/ser. L./II.34, doc. 21 corr. 1 (1974) (concluding that under the regime instituted in Chile beginning September 11, 1973, extremely serious violations of human rights occurred).

140. IACHR Regs., *supra* note 7, art. 50, para. 1.

141. See American Convention, *supra* note 6, art. 5 (Right to Humane Treatment), art. 7 (Right to Personal Liberty) (expressly forbidding torture and arbitrary arrests or imprisonment, and affirming the right to personal liberty, but failing to mention enforced or involuntary disappearances).

that forced disappearances constitute a crime against humanity.¹⁴² The General Assembly has played an equally useful role in other areas, such as the problem of incommunicado detentions. To date, eighteen states have signed the Inter-American Convention to Prevent and Punish Torture, with three states ratifying.¹⁴³ The seventh full session of the OAS General Assembly will consider the adoption of an Inter-American convention aimed at preventing and punishing forced disappearances.¹⁴⁴ Many members of the Assembly hope for a similar convention in the future to deal with summary executions.

In disappearance cases, the Commission has conducted many successful on-site investigations.¹⁴⁵ It won a reputation for writing credible reports and, most importantly, for actually securing the release of disappeared persons. The participants called upon the Commission to pressure governments to allow on-site visits at the threat of a crisis. If the Commission appears on the scene early, it can issue advisory opinions and extend its services to abort the crisis.

With the Honduran cases in mind, the panel next discussed the future role of the Court in securing human rights and offered suggestions to strengthen its impact on OAS states. Professor Grossman explained that the judicial process is essential to the protection of human rights because the Court applies standards separate from a political context. The Court also interprets the human rights instruments and thus develops the law in a neutral context. While those on the extreme right and extreme left of the political spectrum tend to judge situations on the basis of political expediency, the participants asserted that the American states were politically mature enough to live by the rule of law. Many OAS states, however, merely pay lip service to the Court and public awareness of the Court remains low.

The panel proposed several solutions to these problems. First, the Commission could present an annual questionnaire to governments. The questionnaire would ask each government to state what resources it has allotted to the Court; how the government responded to Commission and OAS resolutions; what the government is doing about the rati-

142. AG/Res. 666 (XIII-0/83), INTER-AM. C.H.R., OEA/ser. P./AG doc. 1731/83 rev. 1 (1983). Currently the OAS is receiving comments on a draft convention that defines torture as an international crime. AG/Res. 624 (XII-0/82), OAS Gen. Assem., *Proceedings*, Certified Texts of the Resolutions at 70 (Washington, D.C.: General Secretariat, 1982).

143. Inter-American Convention to Prevent and Punish Torture, AG/Res. 783 (XV-O/85) 46-54, OEA/ser. P./AG doc. 2023/85 rev. 1 (1986).

144. IACHR 1986-87 ANNUAL REPORT, *supra* note 98, at 277.

145. See ARGENTINA REPORT, *supra* note 10, at 53-138 (analyzing the issue of forced disappearances in Argentina).

fication of various instruments; what the status is of accepting the compulsory jurisdiction of the Court; and what the government is doing for the Inter-American system in general. The Commission could evaluate the questionnaires and generate Inter-American competition in defending human rights.

Second, Professor Shelton suggested that holding a press conference after each Commission and Court meeting, and combining an aggressive press campaign with studies of the Inter-American system, could increase public awareness. Public awareness is particularly important in the Inter-American system because the OAS is not a supernational enforcer. The Court and the Commission depend on public opinion to a large degree to assure that governments implement various recommendations.

The panel concluded, calling upon the Court to continue its policy of refraining from creating rights. Where the human rights instruments clearly delineate rights the Court must respect the political outcome. Even in the most compelling cases, the Court risks its credibility when it creates new rights. The proper course is to strive for additional protocols.

IV. ASSESSMENT OF THE ROLE OF THE COURT AND THE COMMISSION IN CRITICAL ISSUES: POLITICAL PARTICIPATION, RIGHTS OF INDIGENOUS POPULATIONS AND STRENGTHENING DEMOCRACIES

The fourth panel discussed the performance of the Commission and the Court in terms of addressing critical and controversial issues, and how this could improve in the future. The panel addressed three critical issues: (1) free and democratic elections; (2) the rights of indigenous peoples; and (3) the use of amnesty laws to protect officials who have committed human rights abuses.

A. FREE AND DEMOCRATIC ELECTIONS

Member states of the OAS have indicated that free and democratic elections are essential for ensuring human rights.¹⁴⁶ Article XX of the American Declaration on the Rights and Duties of Man guarantees in

146. See Universal Declaration of Human Rights art. 21, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948) (stating that widespread political participation shall be the basis of the authority of government and that participation shall take the form of periodic and genuine elections); OAS Charter, *supra* note 5, art. 3 (stating that the solidarity of the American states and the goals those states hope to accomplish must be achieved on the basis of representative democracy).

general terms the right of every person having legal capacity to participate in periodic, honest, and free elections.¹⁴⁷ Article 23 of the American Convention on Human Rights reaffirms that right.¹⁴⁸ Article 23 indicates the kinds of legal limitations that a state may place on the participation of people in their government. Under article 23, a state may restrict participation in elections only on the basis of "age, nationality, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."¹⁴⁹ Furthermore, article 27 of the American Convention specifically excludes participation in government as a right that a state may suspend during a time of national emergency.¹⁵⁰ Failure of a government to protect the right of political participation often has resulted in a domestic challenge to its legitimacy, with the challenge sometimes taking the form of civil war.

Larry Garber¹⁵¹ commented on the debate between the OAS Secretariat and the Commission regarding the sending of their representatives as election observers. Since 1962, the OAS has sent observers to elections in 25 states.¹⁵² In 1979, the OAS established a committee to draft guidelines for OAS election observing, but later tabled the project because of controversy over the role of such observers.¹⁵³ The OAS continues to send observers, but their practice of adopting a relatively low profile raises questions about their efficacy.

The Commission is reluctant to designate election observers in response to specific requests from countries because of fear that the very act of sending observers would serve to legitimate an election.¹⁵⁴ Ob-

147. See Declaration, *supra* note 76, art. 20 (granting persons with "legal capacity" the right to participate in governing their country).

148. See American Convention, *supra* note 6, art. 23 (stating that all citizens shall enjoy the right to participate in government).

149. See *id.* art. 23(e) (listing the bases upon which governments may regulate participation in government).

150. See *id.* art. 27 (enjoining states from denying the right to political participation in national emergencies).

151. Mr. Garber is Legal Director and Director of the Election Observer Project of the International Human Rights Law Group.

152. Mr. Garber explained that, as of 1984, the OAS had authorized observers for elections in Costa Rica, the Dominican Republic, Ecuador, Guatemala, Panama, El Salvador, and Honduras. U.S. Dep't of State, Research Mem. No. 1304, International Observation of Elections in Latin America: A Listing 1962-1982, *cited in* GUIDELINES FOR INTERNATIONAL ELECTION OBSERVING 8 n.10 (L. Garber ed. 1984) [hereinafter Garber].

153. See OEA/ser. G./CP./CAJP-417/80 (1980) (noting that the Permanent Council of the OAS rejected the adoption of the guidelines); see also OEA/ser. G./CP./CG-1086/80 (1980) (recommending that the OAS Secretary General be authorized to select non-OAS observers at the request of a government).

154. Garber, *supra* note 152, at 78. "Where the incumbent government seeks observers, and the opposition is not participating, observers function to legitimate a prede-

servers can reduce this risk of misinterpretation through engaging in serious and credible fact-finding. Mr. Garber suggested that an OAS decision not to send observers, for example, on the grounds that the election in question will not result in a significant transfer of power from military to civilian authorities, pre-judges an issue that observers should investigate.

The Commission also addressed the issue of political participation in its annual and country reports and in its response to some of the cases and petitions that have been presented to it. For example, in its 1985 country report on Chile, the Commission expounded on the right to political participation.¹⁵⁵ After determining that Chile's 1980 plebiscite lacked credibility,¹⁵⁶ the Commission outlined its view on the requirements for genuine elections and representative democracy.¹⁵⁷ In its 1986-1987 annual report,¹⁵⁸ the Commission set forth four basic conditions that must exist for an election or plebiscite to have moral authority: (1) a sufficient number of people must be eligible to vote; (2) voters must have equitable access to television and radio; (3) the government must not pressure or intimidate the voters; and (4) the ballots must be cast and counted so as to assure the accuracy of election results.¹⁵⁹

The most recent annual report of the Commission also addressed specific language in the constitutions of Chile¹⁶⁰ and of Nicaragua.¹⁶¹ This language proscribes certain categories of individuals from political participation based on their ideological views. Citing the 1959 Santiago

terminated result." *Id.*

155. See INTER-AM. C.H.R., *Report on the Situation of Human Rights in Chile*, OEA/ser. L./V/II.66, doc. 7 (1985) (declaring the right of citizens to political participation).

156. See *id.* at 270-82 (analyzing events since the 1980 plebiscite and concluding the plebiscite lacked popular support).

157. See *id.* at 283 (discussing the need for a democratic government "arising from free, secret, and informed elections, with all the participants having equal access to the media and whose results genuinely express the will of the people"). *Id.*

158. See IACHR 1986-87 ANNUAL REPORT, *supra* note 98, at 19 (setting forth the necessary conditions for an acceptable election or plebiscite).

159. See *id.* at 220-21 (drawing on the Episcopal Conference of Chile issuing a declarative entitled "In the Service of Peace," on August 13, 1987, in establishing the conditions for acceptable elections).

160. *Id.* at 218. The Law of Political Parties, article 18 of the Chilean Constitution states: "no member of the armed forces, or of the public security, or law enforcement agencies, officials, and employees of the various levels of the judiciary, the Election Board (Tribunal Calificado de Elecciones), the Electoral Service, or labor or guild leaders may be members of any 'political party.'" *Id.*

161. *Id.* at 250. Title I of the Nicaraguan Constitution, article 5 states: "political pluralism ensures the existence and participation of all political organizations in the economic, political and social affairs of the country, without ideological restrictions, except for those who seek a return to the past or advocate the establishment of a similar political system." *Id.*

Declaration,¹⁶² the Commission suggested that the use of political proscription conflicts with the American democratic system.¹⁶³

Some petitions to the Commission also concern the right to political participation. In three cases now pending, petitioners presented substantial evidence of election fraud that affected both the process and the results. Mr. Garber cited a number of situations that the Commission could pursue if it were petitioned to do so. Despite strong jurisprudential reasons for the Commission to resolve the issues presented in political participation cases, they pose difficult practical and political problems relating to the Commission's willingness to investigate and issue a resolution concerning an issue relating to the legitimacy of an OAS member government.¹⁶⁴ They point to a need for the Commission to consider alternative mechanisms.

Mr. Garber suggested two options for resolving such inherently difficult cases. First, the Inter-American Court of Human Rights could address certain issues relating to the right to political participation. The Court could, for instance, review the permissible types of political proscription and the permissible periods of delay a government may impose before holding an election.¹⁶⁵ Second, the OAS could establish a new organ, parallel to the Commission, that would only handle elections; i.e., an Inter-American Commission on Elections. As more states in the hemisphere move toward a democratic form of government, the Commission must confront questions of what constitutes democratic government and what constitutes free and genuine elections.

162. Fifth Meeting of Consultation of Ministers of Foreign Affairs, *Final Act* (Washington, D.C.: Pan American Union, 1960) OEA/ser. C./II.5, *The Declaration of Santiago, Chile*, at 4-5 (noting that "[t]he systematic use of political proscription is contrary to American democratic order"). *Id.*

163. IACHR 1986-87 ANNUAL REPORT, *supra* note 98, at 216-17, 252 (suggesting that the exclusion of certain classes of persons is incompatible with the democratic system).

164. See Farer, *supra* note 99, at 119-23 (summarizing the Commission as an institutional anomaly). The Organization of American States created the Commission to monitor the compliance of the states with the idealistic nonobligating statements of intent found in the OAS Charter and instruments. *Id.* Governments deviating from the ideals view the Commission as a source of harassment and interference. *Id.*

165. See American Convention, *supra* note 6, art. 23, para. 1(b) (requiring that elections be held on a periodic basis); Declaration, *supra* note 76, art. XX (same). According to article 23 of the Convention, all citizens have the right to participate in governmental and civic activities. American Convention, *supra* note 6, art. 23, para. 1. The government may regulate these rights only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings. *Id.* art. 23, para. 2.

B. THE RIGHTS OF INDIGENOUS PEOPLES

Steven Tullberg¹⁶⁶ explained the role of indigenous peoples in the Inter-American system. Many of the indigenous peoples¹⁶⁷ of the hemisphere do not regard the right to participate in national elections as one of their fundamental human rights. Rather, they hold as fundamental the right to receive recognition from the states of the world, to govern themselves according to their own laws, and to control the land and resources upon which their ways of life depend.¹⁶⁸ They see the state as an entity that has forced itself upon them against their will and without regard to their right to self-determination, a right guaranteed under both the International Covenant on Economic, Social and Cultural Rights¹⁶⁹ and the International Covenant on Civil and Political Rights.¹⁷⁰

Although the Commission has had some involvement in the rights of indigenous peoples,¹⁷¹ the United Nations took the lead in addressing the general issue by establishing the Working Group on Indigenous

166. Mr. Tullberg is a Staff Attorney with the Indian Law Resource Center.

167. See *infra* notes 193-97 and accompanying text (discussing the significance of the term "peoples"). This article uses the term in much the same way that the United Nations Working Group on Indigenous Populations and the International Labour Organization does.

168. Mr. Tullberg, speaking as a panelist at the conference, noted that a strong consensus exists among Indian peoples; that the relationships between them and the dominant states in the hemisphere should be based on a principle of agreement; that power alone is not sufficient to justify the nonconsensual assertion of governmental authority over indigenous peoples. See *infra* notes 181-84 and accompanying text (discussing the consensus of indigenous peoples expressed in the proposed declaration of principles). See generally Barsch, "Indigenous Peoples: An Emerging Object of International Law," 80 AM. J. INT'L L. 369 (1986); INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES, INDIGENOUS PEOPLES: A GLOBAL QUEST FOR JUSTICE (1987); Roy & Alfredson, *Indigenous Rights: The Literature Explosion*, 13 TRANSNAT'L PERSP. 19-24 (1987).

169. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 [hereinafter ICESCR], *reprinted in* 6 I.L.M. 360 (1967).

170. International Covenant on Civil and Political Rights, *opened for signature*, Dec. 19, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967) [hereinafter ICCPR], *reprinted in* 6 I.L.M. 368 (1967). The right of self-determination gives all peoples the right to determine freely their political status as well as to pursue their economic, social and cultural development. *Id.* Although the United Nations Charter, articles 1 and 55, mentions self-determination as a political principle, the two Covenants are the only international human rights instruments that proclaim self-determination as a right. Humphrey, *Political and Related Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW 171, 171 (T. Meron ed. 1984).

171. See *infra* notes 186-88 and accompanying text (discussing the work of the Commission on human rights problems of Indians in Nicaragua).

Populations in 1982.¹⁷² Within the United Nations human rights hierarchy, the Working Group ranks below the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which in turn ranks below the Commission on Human Rights and the Economic and Social Council. Like the Sub-Commission, the Working Group consists of experts who serve in their individual capacities.¹⁷³ The Working Group meets annually in Geneva, Switzerland for five working days prior to the annual sessions of the Sub-Commission.¹⁷⁴ The Working Group operates with a substantial degree of openness, a unique characteristic among United Nations organs. Nongovernmental and indigenous representatives, regardless of whether a representative has an affiliation with an NGO with consultative status, have authority to present both oral and written statements. This openness, in conjunction with the intense interest of indigenous peoples and their representatives, contributes to the high levels of attendance that have characterized the Working Group sessions.¹⁷⁵

The Working Group has a two-part mandate: (1) to review developments pertaining to the human rights of indigenous populations; and

172. U.N. Doc. E/CN.4/Sub.2/1983/21 Add.8. The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities proposed the creation of the Working Group in its Resolution 2 (XXXIV) of September 8, 1981. *Id.* The Sub-Commission based the proposal largely on the recommendations of Special Rapporteur José Martínez Cobo, in *Study on the Problem of Discrimination Against Indigenous Populations*. The Commission on Human Rights endorsed the proposal in resolution 1982/19 of March 10, 1982. The Economic and Social Council (ECOSOC) then adopted resolution 1982/34 of May 7, 1982 that authorized the Sub-Commission to establish the Working Group. *Id.*

173. See Van Boven, *Protection of Human Rights through the United Nations System*, in HUMAN RIGHTS PRACTICE, *supra* note 12 (discussing the hierarchy of the United Nations); Sohn, *Human Rights: Their Implementation and Supervision by the United Nations*, 2 HUMAN RIGHTS IN INTERNATIONAL LAW 369 (T. Meron ed. 1984) (same). The Working Group has five members, one from each of the five regions of the world as defined by the United Nations.

174. United Nations Commission on Human Rights, *Problem of Discrimination Against Indigenous Populations*, U.N.E.S.C. (Agenda Item 10) at 3, U.N. Doc. E/CN.4/Sub.2/1987/22 (1987) [hereinafter Working Group Report]. As of the date of the Conference, the Working Group had conducted five sessions on an annual basis, except that no session took place in 1986, because of United Nations funding problems. *Id.* at 6. In 1986, however, the NGOs sponsored a meeting on indigenous peoples in Geneva that year. *Id.* The sixth session was conducted in August, 1988. See *infra* notes 182, 184 and 196 (discussing the work of the sixth session).

175. *Id.* at 3-5. Approximately 370 individuals participated in the fifth session, held in August 1987. *Id.* at 5. The Working Group Report lists the states and organizations with which these individuals were affiliated. These included 33 NGOs with consultative status (including 10 NGOs specifically identified with indigenous peoples); 79 NGOs without consultative status (including 51 specifically identified with indigenous peoples); 27 member states of the United Nations; two national liberation movements; and the Holy See. *Id.*

(2) to develop new standards for the protection of these rights.¹⁷⁶

To fulfill the first part of its mandate, the Working Group accepts and discusses information that indigenous peoples submit regarding alleged violations of their human rights under existing instruments. The Working Group does not have the capacity to treat the complaints formally, nor the competence to resolve them. The Working Group uses the complaints to determine the adequacy of existing instruments, standards, and enforcement mechanisms.¹⁷⁷ Generally, members of the Working Group find the existing instruments, standards, and mechanisms inadequate,¹⁷⁸ although some exceptional cases exist.¹⁷⁹ The Working Group devotes a substantial amount of attention to the current project of the International Labour Organization (ILO): revising the ILO Convention 107.¹⁸⁰ The ILO Convention is the only international instrument specifically concerned with the rights of indigenous peoples.

To fulfill the second part of its mandate, the Working Group, in its fifth session, approved preliminary wording of fourteen draft princi-

176. *Id.* at 3. The mandate of the Working Group instructs the Group to review developments that pertain to the promotion and protection of human rights and fundamental freedoms of indigenous populations. *Id.* Following the mandate, the Working Group analyzes information that the Secretary General requests annually from governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status, particularly those of indigenous peoples. After analysis of these materials, the Working Group submits its conclusions to the Sub-Commission, bearing in mind the report of the Special Rapporteur of the Sub-Commission. *Id.*

The mandate also provides that the Working Group incorporate the evolution of standards concerning the rights of indigenous populations, including the similarities and the differences in the situations and aspirations of indigenous populations throughout the world. *Id.*

177. *Id.* at 8. The complaints represent situations of deep concern to indigenous peoples. *Id.*

178. *Id.* at 12. Members of the Working Group expressed the need for additional international standards for the protection of indigenous peoples. *Id.*

179. See United Nations Human Rights Committee, Communication No. 24/1977 (July 30, 1981), in *SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL*, at 83, U.N. Doc. CCPR/C/OP/1 (1981) (discussing the case of one indigenous person against the government of Canada, pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights); see also United Nations Human Rights Committee, Communication No. 167/1984, U.N. Doc. CCPR/C/30/D/167/1984 (July 27, 1987) (discussing another communication that the chief of the Lubicon Lake Band of Cree Indians brought against Canada under the Optional Protocol). The Human Rights Committee decided that it will admit this communication, at least with respect to some of the allegations. *Id.*

180. International Labour Office, Report VI (1), Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) (1987) [hereinafter ILO Report]. Indigenous peoples and others have widely criticized Convention 107 for its integrationist approach. *Id.* at 9. The ILO based its decision to revise the convention on the recognition that this criticism is well-founded. *Id.*

ples.¹⁸¹ It also authorized the Chairman/Rapporteur to prepare a full draft text of principles and preambulatory paragraphs for the Working Group to insert into a future declaration on indigenous rights, prior to the sixth session in 1988.¹⁸² The report of the fifth session includes not only the draft principles that the Working Group has approved, but also the draft principles that the representatives of indigenous peoples proposed to the Working Group.¹⁸³ Although the Working Group and the representatives agree in some significant areas, they have not yet reached agreement in other fundamental areas including self-determination and/or autonomy and the control of land and resources.¹⁸⁴

Mr. Tullberg stated that the Inter-American system has had no similar focus on indigenous rights.¹⁸⁵ The Commission has, however, addressed issues concerning indigenous peoples in the context of a number of cases that have come before it. One such case involves the Miskito,

181. Working Group Report, *supra* note 174, at 12, 17-18. The Working Group believed that additional draft principles would facilitate the work of the Group. *Id.* at 17. The draft principles that the Working Group tentatively approved appear in the Working Group Report as Annex II. *Id.* at 23-24.

182. *Id.* at 22. The Working Group charged the Chairman/Rapporteur with the task of preparing draft principles for insertion into future declarations that would provide a basis for discussion on new standards. *Id.*; see also United Nations Commission on Human Rights, *Draft Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Thirty-ninth Session*, U.N.E.S.C. (Agenda Item 16) at 3-4, U.N. Doc. E/CN.4/Sub.2/L. 11/Add.3 (1987) [hereinafter Sub-Commission Draft Report (Fifth Session)] (discussing how the Sub-Commission, through Resolution 1987/16, approved this recommendation of the Working Group). At its sixth session, in August 1988, the Working Group considered a revised draft declaration, comprised of 28 principles. No formal action was taken on this draft. United Nations Commission on Human Rights, *Draft Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Fortieth Session*, U.N.E.S.C. (Agenda Item 12), U.N. Doc. E/CN.4/Sub.2/ 1988/25 (1988) [hereinafter Sub-Commission Draft Report (Sixth Session)].

183. Working Group Report, *supra* note 174, at 30-32. The Working Group has recommended that the United Nations General Assembly declare the year 1992 to be the "International Year of Indigenous Rights." *Id.* at 22. The Sub-Commission on Prevention of Discrimination and Protection of Minorities has approved this recommendation, changing the wording to "International Year of the World's Indigenous Populations." Res. No. 1987/15, Sub-Commission Draft Report (Fifth Session), *supra* note 182, at 2.

184. Working Group Report, *supra* note 174, at 14-16. See also ILO Report, *supra* note 180, at 44-75 (discussing the importance of land in the preservation of the cultures of indigenous peoples). The draft set of principles as prepared during the sixth session contains several provisions that would establish rights of indigenous peoples to autonomy over their land and natural resources. Sub-Commission Draft Report (Sixth Session), *supra* note 182, at 3-5.

185. Mr. Tullberg also acknowledged a study that another participant mentioned that was conducted under contract with the Commission. See S. DAVIS, *LAND RIGHTS AND INDIGENOUS PEOPLES: THE ROLE OF THE OAS INTER-AMERICAN COMMISSION ON HUMAN RIGHTS* (1988) [forthcoming] (summarizing the reports and decisions of the Commission that address issues of concern to indigenous peoples).

Sumo, and Rama Indians and the government of Nicaragua.¹⁸⁶ The Commission received praise for its efforts to mediate this dispute and to reach a friendly settlement. Following the failure to reach a friendly settlement, it released its report documenting the human rights of the Indian people in Nicaragua.¹⁸⁷ As a result, the government released several hundred people from imprisonment and commenced negotiations with the Indians.¹⁸⁸

Mr. Tullberg criticized the Commission's report on the following grounds: (1) its findings on the issue of forced relocation of populations; (2) its discussion of the issue of self-determination; and (3) its delay in releasing a report after the friendly settlement proceedings broke down. The Americas Watch criticized the Commission for releasing the report too soon. The contradictory criticism on the timing of the report illustrates a problem concerning human rights publicity. Despite the need for publicity about human rights problems, too much publicity, or publicity at an inappropriate time, can have a counterproductive effect. The individuals and groups involved in such publicity must therefore exercise judgment and coordinate efforts.

Mr. Tullberg challenged not only the Commission, but also the wider community of human rights advocates. He commended the Commission for not supporting the position of the Nicaraguan government in its claims of military necessity for the forced relocation of the Miskito and other Indians. He did criticize the Commission, however, for not challenging these claims strongly enough. He then exhorted human rights advocates to scrutinize such cases closely, to discover the "real" reasons for the states' actions. He called upon advocates to challenge politically motivated relocations, e.g., those intended to eliminate perceived threats to the maintenance of power or to distribute the benefits of resource exploitation to political supporters. Mr. Tullberg noted that

186. See INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS OF A SEGMENT OF THE NICARAGUAN POPULATION OF MISKITO ORIGIN I, OEA/ser. L./V/II.62, doc. 26 (1984) [hereinafter MISKITO REPORT] (discussing the project of the Commission in Nicaragua). The human rights problems of the indigenous population of Nicaragua's Atlantic coast represented one of the major topics of the sessions of the Commission from 1981 to 1983. *Id.*

187. INTER-AM. C.H.R., SPECIAL REPORT ON THE SITUATION OF HUMAN RIGHTS OF THE MISKITO INDIANS IN NICARAGUA I, OEA/ser. L./V/II.56, doc. 11 (1982). The report analyzes human rights of the Nicaraguan Miskito Indians on the Atlantic coast. *Id.*

188. Mr. Tullberg continued by saying the most recent development is the negotiations of preliminary accords between the government and the Indians. These accords were signed a short time after the Conference. Basic Preliminary Accords Between the government of Nicaragua and the Organization YATAMA Resulting from Dialogue from January 25-February 2, 1988 (signed Feb. 2, 1988) (on file with The American University Journal of International Law & Policy).

when a government proposes to use force in relocating an indigenous people, it will invariably violate a number of human rights, including the deprivation of freedom of religion,¹⁸⁹ of culture,¹⁹⁰ and of the means of subsistence.¹⁹¹

189. See Working Group Report, *supra* note 174, at 9 (discussing deprivation of freedom of religion). Three of the draft principles that indigenous peoples proposed to the Working Group specifically call for protection of sacred sites. *Id.* at 30-31; see generally Federal Agencies Task Force, American Indian Religious Freedom Act Report, Pub. L. No. 95-341 (1979) [hereinafter AIRFA report] (discussing the distinctive nature of traditional tribal religions in a report mandated under section 2 of the American Indian Religious Freedom Act of 1978 (AIRFA), Pub. L. No. 95-341, 92 Stat. 469 (codified in part at 42 U.S.C. § 1996 (1982))). One of the fundamental distinctions between traditional tribal religions of North American Indians and the dominant religions of the world is that tribal religions are integrally based on the natural environment in which Indian peoples live; sacred properties exist throughout a tribe's territory and the tribe can perform certain kinds of ceremonies only at specific sacred sites. AIRFA Report at 10-11. Article 12, paragraph 1 of the American Convention on Human Rights declares, "Everyone has the right to freedom . . . of religion." American Convention, *supra* note 6, art. 12, para. 1. A state may limit this right by law only when necessary to protect public safety, order, health, or morals, or the rights or freedoms of others. *Id.* para. 3. Thus, the forced relocation of Indian peoples from their sacred sites violates article 12 unless justified in accordance with paragraph 3. See Barsch, *The Illusion of Religious Freedom for Native Americans*, 65 OR. L. REV. 363, 387-91 (1986) (discussing the failure of the United States Supreme Court to treat Native American sacred sites as religious); Stambor, *Manifest Destiny and Indian Religious Freedom, Sequoyah, Badoni and the Drowned Gods*, 10 AM. INDIAN L. REV. 59, 59 (1982) (same); Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1, 1 (1982) (discussing the rights of Indian peoples in the United States); Note, *Native Americans' Access to Religious Sites: Underprotected Under the Free Exercise Clause?*, 26 B.C.L. REV. 463, 483-90 (1985) (same); Note, *Native American Free Exercise Rights to the Use of Public Lands*, 63 B.U.L. REV. 141, 151 (1983) (same); Note, *The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion*, 71 IOWA L. REV. 869, 877 (1986) (discussing the possible positive impact of AIRFA on respect for Native American religions); Note, *American Indian Religious Sites and Governmental Development: A Conventional Analysis in an Unconventional Setting*, 85 MICH. L. REV. 771, 791-95 (1987) (discussing the failure of courts to give value to Native American religious sites); Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1453-57 (1985) [hereinafter *Religious Freedom and Governmental Development*] (same).

190. Working Group Report, *supra* note 174, at 9. Indian cultures have developed a very close, spiritual relationship with the natural environment. AIRFA Report, *supra* note 189, at 11. The forced relocation of Indian peoples from the land of their cultures and economic systems has resulted, in many instances, in severe cultural disintegration. *Religious Freedom and Governmental Development*, *supra* note 189, at 1448. Although no provision in the American Convention specifically protects the right of indigenous peoples to preserve their culture, such a right could be derived from article 12. See American Convention, *supra* note 6, art. 12 (guaranteeing freedom of religion). Indian people believe their culture and religion are synonymous. AIRFA Report, *supra* note 189, at 8-12. "Cultural development" is specifically included in article I of both International Covenants. ICCPR, *supra* note 170, at 52; ICESCR, *supra* note 169, at 49.

191. Both International Covenants state, in part, "[i]n no case may a people be

The Commission received criticism for making overly broad and conclusory remarks regarding the issue of self-determination. The Miskito Indians argued that article 1 of the International Covenant on Civil and Political Rights guarantees them the right to self-determination.¹⁹² The Commission rejected this argument, without critical analysis, concluding that the Miskito Indians do not fall within the definition of "peoples" under article I of the Covenant, and thus are not entitled to the right of self-determination.¹⁹³ The Commission based its decision on the grounds that the majority of states that took part in the United Nations General Assembly debate did not intend for the term "peoples" to include indigenous peoples.¹⁹⁴ The concern of the Commission was that if a state recognizes that an indigenous people has a right to self-determination, the people may choose full independence.¹⁹⁵ More-

deprived of its means of subsistence." ICCPR, *supra* note 170, art. 1, para. 2; ICESCR, *supra* note 169, art. 1, para. 2. Indian peoples derive their means of subsistence from their land, and forced relocation may deprive them of such means of subsistence. ILO Report, *supra* note 180, at 44-45. No provision in the American Convention parallels this language from the Covenants.

192. See Working Group Report, *supra* note 174, at 30 (citing the right of self-determination, as stated in article I of both Covenants).

193. MISKITO REPORT, *supra* note 186, at 78-81.

194. *Id.* In its report, the Commission recognizes that the majority of states has long held the position that the right of self-determination arises only in the context of decolonization. *Id.* at 78-81 (citing UN General Assembly debates of 1952 and the adoption in 1960 of Resolution 1514 (XV) on the Declaration on the Granting of Independence to Colonial Countries and Peoples). The Commission also relied on Resolution 2625 (XXV), entitled Declaration on the Principles of International Law Concerning Friendly Relations Among States. This resolution states, in part "that the establishment of a sovereign and independent state, free association or integration with an independent state or acquisition of any other freely chosen political status by a people constitutes that people's means of exercising the right of self-determination." MISKITO REPORT, *supra* note 186, at 80; United Nations Declaration of Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) (1970) at 121. The Commission stated that the establishment of the state of Nicaragua constituted an act of self-determination for all of the people within the territory of Nicaragua, including Indians. The Commission further stated that, in light of the Resolution, the absence of Indians' right of autonomy did not give the government of Nicaragua a right to force complete assimilation of these Indians. *Id.*

Thus, the fundamental concern of states seems to be the integrity of their claims over territory. *Id.*; see Humphrey, *supra* note 170, at 171, 196 (stating that the decision to include self-determination in the Covenants was aimed at the colonial powers even though the drafters were convinced that this could prevent those powers from ever ratifying the Covenants). *Id.* at 196. Humphrey asserts that the members of the United Nations were not only concerned with colonial peoples; rather, he argues that, while the Political and Economic Covenants contain no definition of the word "peoples," the General Assembly clearly did not mean to include only colonial peoples in that term. *Id.*

195. ILO Report, *supra* note 180, at 15-16. Many indigenous peoples would accept a reasonable measure of autonomy within an existing state. *Id.*

over, the movement for indigenous self-determination challenges the legitimacy of state claims to sovereignty over the indigenous peoples and, in some cases, ownership of their traditional territories.¹⁹⁶ The Indian peoples, however, do not accept the legal doctrines that they perceive as racist and that rationalize the raw assertion of power. Rather, they view self-determination as a relationship to the states that must be based on consent. The Working Group and the ILO both acknowledge the absurdity of refraining from describing indigenous populations as "peoples" in order to avoid the human rights implications of the term.¹⁹⁷ The Working Group and the ILO have focused instead on the issue of defining "self-determination" in the context of indigenous peoples.

Mr. Tullberg offered three recommendations to the Commission and the human rights community at large. First, he maintained that the Commission and others should become involved with the UN Working Group in setting standards and in revising ILO Convention 107. Second, when confronted with Indian human rights issues, the Commission should expand its investigations and analyses, and should conduct outreach activities in the rural communities where Indian peoples live. Similarly, human rights advocates need to overcome their "urban bias."¹⁹⁸ Third, the Commission and all human rights organizations

196. Working Group Report, *supra* note 174, at 9, 14-16. The indigenous peoples proposed principle number 6 which states that "[d]iscovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples." *Id.* at 30. The draft set of principles prepared during the sixth session of the Working Group incorporates this language in large part. Sub-Committee Draft Report (Sixth Session) *supra* note 182, at 4. See *Western Sahara*, 1975 I.C.J. 4, 31 (Advisory Opinion of Oct. 16) (rejecting a Spanish claim of sovereignty based on *terra nullius* because at the time of the Spanish conquest the land had people and a thriving organization). See E. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47-70, 471-500 (1982) (discussing the doctrine of discovery and other theories for the assertion of sovereignty and/or ownership over the lands of American Indians and the legal principles regarding tribal land ownership under the law of the United States); see also Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 428-39 (1984) (arguing that the Trust Doctrine requires Native Americans to substantially govern themselves); Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFFALO L. REV. 637, 638 (1978) (discussing the treatment of American Indians during the Marshall court); Comment, *Land and the Forest-Dwelling South American Indian: The Role of National Law*, 27 BUFFALO L. REV. 759, 766-72 (1978) (discussing how national laws dispossessed South American Indians of their native lands).

197. Working Group Report, *supra* note 174, at 3, 9, 30-31 (using the terms "populations" and "peoples" interchangeably); ILO Report, *supra* note 180, at 31 (explaining the desire of various indigenous representatives to use the term "peoples").

198. In the question and answer portion of this panel discussion, Professor Robert Goldman reiterated this point, noting that at least two NGOs, Americas Watch and the Washington Office on Latin America, have shown a recent shift in emphasis toward the concerns of indigenous peoples in rural areas. See T. BERGER, VILLAGE JOURNEY:

should develop affirmative action programs and should institutionalize their relationships with Indian organizations. The Commission as an inter-governmental organization cannot lead the movement for the rights of indigenous peoples. The human rights community must therefore take the leadership role, in cooperation with indigenous peoples' organizations.¹⁹⁹

C. AMNESTY LAWS FOR HUMAN RIGHTS VIOLATORS

The panel addressed the use of amnesty laws for the protection of human rights violators from prosecution. Professor Robert K. Goldman²⁰⁰ spoke as an expert on amnesty laws. He explained that amnesty laws sometimes form part of the agreement through which a military government agrees to transfer power to civilian authorities. For instance, when a military government loses popular support, it will often enact amnesty laws to maintain power. The use of amnesty or self-amnesty laws, however, undermines the system for the protection of human rights.

Brazil, Argentina, Chile, Guatemala, and Uruguay have enacted various forms of amnesty laws that, as a practical matter, are either *prima facie* violations of articles 2 and 25 of the American Convention, or else violate these articles as applied.²⁰¹ Under most amnesty laws the state waives the criminal jurisdiction of human rights violators. This

THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 173, 183 (1985) (comparing the rural and urban concerns of indigenous peoples). Judge Berger observed that the search of Europeans and their descendants for wealth from the New World continues to this day, in the search for oil and minerals in Alaska. *Id.* at 174. The success of industrialized nations established a model for economic development which the United States sees as a model the Third World should emulate. *Id.* at 175. Most native peoples, however, do not wish to assimilate for fear of losing autonomy. *Id.* at 176. Native peoples insist that their culture and, therefore, their values, economy, and way of life, are still the vital force in their lives. *Id.*

199. Mr. Tullberg listed some of the major indigenous peoples' organizations of the hemisphere: Organización Nacional Indígena de Colombia [ONIC], Confederación Indígena Nacional de Amazonia Ecuatoriana [CONFENIAE], Asociación Internica de Desarrollo de la Selva Peruana [AIDSESEP], União das Nações Indígenas [UNI], and the Inuit Circumpolar Conference.

200. Mr. Goldman is a Professor of Law and Louis C. James Scholar at the Washington College of Law, The American University.

201. See American Convention, *supra* note 6, art. 2 (providing that states must undertake to adopt legislation to ensure the rights and freedoms of the Convention in a non-discriminatory way). Article 25 (Right to Judicial Protection) guarantees the right to a simple and prompt recourse before a competent court for protection against acts that violate one's fundamental rights under laws of the state concerned or the Convention. *Id.* art. 25, para. 1. Article 25 requires states to ensure that competent legal authorities determine the individual's rights. *Id.* art. 25, para. 2(a). It further requires states to develop the possibilities of judicial remedy, and to ensure that the competent authorities enforce the remedies. *Id.* art. 25, para. 2(b)-(c).

waiver, in combination with the nature of civil-law systems, allows a state to preclude victims, their representatives, or their families from seeking or obtaining any domestic legal redress for violations of rights protected by the American Convention. Similarly, the victims cannot recover for violations of comparable rights in the Covenants or other treaties. Advisory opinions of the Inter-American Court indicate that obligations of states party to the OAS Charter, as well as to the American Convention, extend to compliance with mandatory provisions of common article 3 or Protocol II to the Geneva Conventions. Professor Goldman asserted that these amnesty laws violate the most basic norms of international *jus cogens*. Under no circumstances during times of peace, low-level or high-level internal conflict, or international armed conflict, may the government of a state murder, torture, rape, or force the disappearance of people.

The majority of the human rights community has not addressed amnesty laws, in much the same way that courts have declined to address acts of state or political questions. When civilian leaders agree to an amnesty law as a condition or price for democratic elections, many in the human rights community do not challenge the bargain. This "political question" approach undercuts the essence of the Inter-American system for the protection of human rights. For the system to work, states must respect and ensure the human rights guarantees set forth in the American Convention and the American Declaration. States parties to the Convention have an obligation to enact and enforce effective domestic protection and judicial remedies. By negotiating amnesty with its military, a government engages in an "auto coup," i.e., it surrenders to the armed forces part of its authority and part of its function of executing laws. If a government allows members of the armed forces to retire unpunished, little incentive remains for the military to refrain from acts against human rights should the military gain power in the future.

Professor Goldman suggested that because of political constraints on the Commission, the Court can play the more important role in dealing with problems of amnesty. In addition, NGOs should try to bring more cases before the Commission and also before the United Nations Human Rights Committee. Because amnesty laws preclude legal remedies, the issue of exhaustion of domestic remedies does not arise. Professor Goldman mentioned an example of such a potential case, suggesting that civilian authorities in Uruguay request from the Court an advisory opinion on the compatibility of amnesty laws and the obligations of states parties under international law. Professor Goldman suggested that, if the civilian authorities fail to make such a request, the

Commission could pose the question to the Court and thus seek to establish the permissible scope of amnesty laws. The establishment of such parameters would strengthen democratic leaders during periods of transition of power. A leader could invoke international law to reject the demands of the military regime for amnesty, and the Court would thus become "the single best vehicle" for establishing parameters.

Professor Goldman concluded that granting amnesty to the perpetrators of violations of human rights is contrary to international law and frustrates the entire international human rights system. Professor Goldman concluded by saying:

We really fail ourselves, as agents of the international legal system, and essentially as advocates for human rights, if we continue to ignore the problem because of perceived political difficulties or discomfort that may be caused for certain leaders who are helping to re-establish or build democracy. I do not believe that you build democracy by compromising on issues like this.

V. WHO USES THE COURT AND THE COMMISSION? HOW TO EXPAND AND FACILITATE THEIR USE? HOW TO INCREASE THEIR VISIBILITY AND IMPACT?

Throughout the conference, panelists and participants voiced concern about the need for more publicity on human rights matters and the need for the human rights community to assume the burden of rectifying the situation. The final panel focused on this topic. In their remarks, panelists continued to question the overall effectiveness of human rights organizations.

The first speaker, Mario del Carril,²⁰² stated that although human rights violations receive fairly significant news coverage, the media devotes less attention to the institutional responses to the violations. The reporting of human rights abuses remains vitally important as a force for constructive change, but the public must also hear how institutions respond to the abuses. This information would increase awareness of the problem and help people develop a sense of justice and a sense that the rule of law is important.

Mr. del Carril looked at examples of news coverage of governmental wrongdoing, including coverage of the trial of members of three juntas in Argentina that involved a confrontation between military and civilian institutions.²⁰³ In other news coverage, the Argentine national press reported a visit of the Inter-American Commission on Human Rights

202. Mr. del Carril is the Press Attaché to the Embassy of Argentina.

203. To illustrate this point, Mr. del Carril read random passages from several articles from the Argentine press.

as an affront to Argentine sovereignty. Mr. del Carril characterized this coverage as a "nationalistic reaction." He concluded that an emphasis on the confrontational element in human rights matters undermines any educational function the news media may perform regarding the promotion of the institutions of the Inter-American human rights system. Rather than helping to develop an understanding of the rule of law, this type of news coverage reinforces skepticism about the possibility of adequate redress of human rights abuses. A skeptical public tends to pay less attention to the institutions and their procedures.²⁰⁴ In light of this, the Commission must ensure distribution of its reports in the countries that are the subjects of the reports.

The second speaker, John Goshko,²⁰⁵ asserted that although the Court and the Commission are worthy institutions, they remain ineffective because they lack the support and cooperation of OAS member states. Mr. Goshko suggested that NGOs concerned with results, in terms both of achieving redress for victims of human rights abuse and of improving the effectiveness of the Court and the Commission, should emphasize political strategies rather than legal strategies.

The third speaker, Alexander Wilde,²⁰⁶ reported on the experiences of a Washington-based human rights NGO with the Commission and the Court. The cases involved the governments of both Colombia and Peru, examples of "democraduras." These are governments that are formally democratic with a measure of political openness and competition, which are nevertheless subject to serious human rights violations traceable to the military, the police, and the militia. Mr. Wilde, to illustrate practical problems in gathering information for petitions, posed the following problem. In 1983, an NGO used a standard form to collaborate with a local NGO to investigate conditions in Colombia. The NGO succeeded in identifying a large number of violations and submitted the information to the Commission. The Commission was unable to use the information, however, because the Washington-based NGO could not provide verification.

In light of this experience, the NGO used a different approach in Peru. In 1984, it assigned a staff member to travel through the country taking testimony from a great many witnesses. After consulting an-

204. Mr. del Carril suggested that an approach to overcoming this paradox would be to attempt to minimize the confrontational element in news coverage. Without offering a way to achieve such minimization, he suggested that a solution might be found through a detailed study of the actual press coverage of institutional responses to governmental abuse.

205. Mr. Goshko is a reporter for The Washington Post.

206. Mr. Wilde is the Director of the Washington Office on Latin America.

other human rights NGO,²⁰⁷ the original NGO selected and developed four cases and brought them before the Commission. The Commission transmitted the petitions to the Peruvian government,²⁰⁸ and the government responded to the Commission. The following year, the NGO staff member returned to Peru, re-interviewed many people, and then submitted additional information to the Commission. Despite this effort, the mission eventually failed, in Mr. Wilde's opinion, because of the difficulty of maintaining a working relationship between the Washington-based NGO and the human rights organizations in Peru. While stressing the importance of cooperation between international NGOs and local human rights organizations, Mr. Wilde noted the need for the international NGOs to take account of the constraints faced by local organizations. He concluded by calling on human rights organizations worldwide to strengthen their contacts with the academic community in an effort to generate systemic analyses of the effectiveness of human rights advocacy in general and of the work of the Commission and the Court in particular.

The final speaker, Ken Anderson,²⁰⁹ reiterated two points: (1) the need for effective local organizations to monitor and investigate violations of human rights and to advocate legal and political resolutions; and (2) the need for local groups and international groups to coordinate their efforts. Mr. Anderson considered the "legal professionalization" of the Inter-American human rights system of central importance, but he raised two points of caution. First, as the legal profession increases its influence on the process, human rights groups may tend to make decisions about what cases to pursue on the basis of the quantity and quality of the evidence that is available. Yet in many cases of egregious abuses, especially disappearances, even competent investigation can turn up little or no legally admissible evidence. If evidence becomes the primary criterion for determining which cases to pursue, NGOs may decide that the Commission is not an appropriate forum to consider disappearances.

Second, as petitions to the Commission become longer, more detailed, and couched in legal terms, the Commission may expect legalistic documents and respond more favorably to them. This will be troublesome for local human rights organizations which generally lack both legal expertise and the resources to prepare detailed petitions. Mr. An-

207. International Human Rights Law Group.

208. IACHR Regs., *supra* note 7, art. 34, para. 1(c).

209. Mr. Anderson, formerly of the International Human Rights Law Group, is currently with the law firm of Sullivan & Cromwell.

derson suggested that, to alleviate this concern, the Commission should take an active role in responding to cases submitted by local human rights organizations. Professor David Weissbrodt,²¹⁰ the moderator of the panel, suggested that with the development of a "two-track" system the Commission could make effective use of experienced attorneys involved in cases and provide an extra measure of assistance to petitioners not represented by counsel.

VI. SUMMARY OF RECOMMENDATIONS

A final conference report summarized the proceedings of the two days and the recommendations of the panelists and other participants.²¹¹ Some recommendations evoked the support of several speakers with no apparent dissent, or very limited dissent, and, thus, appeared to represent a consensus of the conference. Other recommendations put forth by individual speakers did not have unanimous backing, although the conference participants generally agreed on the gravity of each question and the need for some sort of action. The participants decided that all the recommendations should be considered as agenda items for future conferences. The summary below categorizes the conference recommendations according to the entities involved: the General Assembly of the Organization of American States, the member states of the OAS, the Commission, the Court, the human rights NGOs, and the academic community. Many issues, such as the need for funding and for publicity, involved a number of entities; thus, the recommendations dealing with them are interrelated.

A. THE OAS GENERAL ASSEMBLY

Participants generally agreed about the importance of the General Assembly in promoting human rights and about its limitations caused by the constraints under which it operates. Many participants called on the General Assembly to provide more funds and staff for the Commission and for the Court to permit them to expand their activities. Some participants called on the General Assembly to direct its attention to new human rights protocols and conventions, particularly in the areas of economic, cultural, and social rights. Most people agreed that the

210. Mr. Weissbrodt is a Professor of Law at the University of Minnesota School of Law.

211. Laurence Eisenstein of the law firm of Covington & Burling was the Conference Rapporteur. The recommendations are taken from his report, submitted to the Seventeenth Regular Session of the General Assembly (Nov. 9, 1987, Washington, D.C.).

vague wording in the 1980s of recent General Assembly resolutions on human rights has compromised their effectiveness.

B. THE ROLE OF OAS MEMBER STATES

Several participants called upon those states that have failed to ratify the American Convention on Human Rights or to accept the jurisdiction of the Court to remedy their inaction. The assemblage expressed support for the development of new human rights protocols and conventions in the areas of economic, cultural, and social rights, and the prevention of torture. Moving beyond formalities, several participants called upon states to assume responsibility for enforcing decisions of the Commission and the Court on matters within the scope of their sovereignty and, in matters beyond their sovereignty, to promote human rights through bilateral relations. One participant suggested the use of questionnaires as a way of monitoring what individual states have done to promote human rights in response to communications, reports, and opinions of the Commission and the Court.

C. IMPROVING THE EFFECTIVENESS OF THE COMMISSION

A broad consensus evolved for the notion that the Commission should expand its outreach and publicity activities to the greatest extent its limited resources permit. Such actions would increase the moral pressure on states to honor the decisions of the Commission, enhance the prestige and moral authority of the Commission, and contribute to the public's understanding of human rights. Specific recommendations covered the issuance of press releases on the actions of the Commission, the distribution of country reports within the subject countries, and the enhancement of relationships with the academic community and educational institutions.

A wide-ranging discussion illustrated the tension that arises from the need of the Commission to balance the benefit of its procedural informality against the need for procedural predictability. Although most people agreed that flexibility and informality in responding to human rights abuses, especially in cases of disappearances, contribute to the effectiveness of the Commission, several participants suggested that the Commission should revise its regulations to reflect actual rather than theoretical practice. One panelist argued that the informality of Commission procedures has worked primarily to the benefit of parties who are represented by experienced counsel. This panelist suggested that the Commission should focus its attention on providing assistance to parties who are unrepresented through the establishment of a two-track

system for petitioning the Commission.

Several panelists commended the Commission for its sensitivity to the danger of political influence on its decisionmaking, and urged the Commission to continue to emphasize legal standards rather than political concerns. One panelist recommended that the Commission directly involve itself in the development of new legal standards for the rights of indigenous peoples through participation in the sessions of the United Nations Working Group on Indigenous Populations.

D. IMPROVING THE EFFECTIVENESS OF THE COURT

A consensus existed on the need for more publicity and outreach regarding the rulings of the Court. Participants deemed this important because governmental compliance remains largely a function of public awareness and support. Several participants recommended steps to increase access to the Court, such as broadening the opportunities for initiating requests for advisory opinions, allowing parties before the Court to be represented by counsel independent of the Commission, and establishing a fund to defray the costs of pursuing a claim before the Court. The American Convention, however, limits the steps that the Court itself can take in these directions. For example, to allow individual parties to appear before the Court in their own capacities would require an amendment to the Convention. The Commission, however, might be able to develop a practice that would approximate individual representation by using its right to appoint private attorneys to represent the Commission before the Court.

E. PROMOTION OF HUMAN RIGHTS BY NONGOVERNMENTAL ORGANIZATIONS

While recognizing that NGOs have limited resources, conference participants agreed that NGOs should do more to help promote human rights through the Inter-American system. One recommendation was that NGOs offer indirect support to the Court and to the Commission in matters relating to funding and public awareness. NGOs can represent petitioners before the Commission. They can undertake analyses of the Commission and Court, including the development of issues that member states and the Commission can present to the Court for advisory opinions. They can also seek and receive funding from private sources to promote human rights.

F. MATTERS REQUIRING FURTHER STUDY

On a number of issues, the participants agreed that the questions deserve further attention from individuals and institutions in the human rights community.

1. *Procedural issues*

Throughout the conference, the matter of the distribution of cases in the Inter-American system drew wide attention. The discussion centered on the determination of the kinds of cases that the informal procedure of the Commission should address, the kinds of cases within the jurisdiction of the Commission that require more formal procedures, and the cases in which the Court has the more appropriate jurisdiction. The speakers recognized that generally the Commission is best suited for fact-finding and the Court for legal analysis. They noted, however, that in many cases this distinction does not provide a sufficient basis for a division of responsibilities. The division of responsibility is further complicated by the emergence of "new" issues related to economic, social, and cultural rights, to elections, and to the rights of indigenous peoples.

2. *The Effect of Actions by the Commission and the Court*

The participants did not reach a consensus on how to make OAS member states accountable for giving legal and practical effect to decisions of the Commission and the Court. While many believe that states can be encouraged to raise public consciousness about human rights, most feel that the matter of enforcing state compliance with international human rights norms is problematic and is likely to remain so.

3. *Substantive Issues*

The participants recommended further attention to the development of provisional measures to protect the victims of disappearances and other such egregious human rights abuses. They also discussed the topic of state laws that grant amnesty to persons who have committed human rights abuses. Although one panelist forcefully argued that such amnesty laws conflict with international *jus cogens*, no consensus emerged as to what can be or should be done to prevent the enactment of such laws and what the role of the Commission and the Court should be. While many agreed that the right of indigenous peoples is an important subject that needs to be addressed, they achieved no consensus

on recommendations for action.

CONCLUSION

The participants unanimously concluded that the conference was worthwhile. Individuals affiliated with OAS states, the Commission, and the Court, members of the academic community, and representatives of nongovernmental organizations all expressed appreciation for the opportunity to exchange points of view and engage in constructive dialogue. All those in attendance agreed that the advancement of the cause of human rights depends primarily upon public consciousness — a growth in people's awareness of the rights to which everyone is entitled by virtue of belonging to the human community and the development of an attitude that civilized nations can no longer tolerate violations of human rights. Conference participants expressed the view that this particular conference will contribute greatly to the development of public consciousness and that, through participation in the conference, they were better prepared to expand their efforts to promote human rights in the Inter-American community.

POSTSCRIPT

On July 29, 1988, the Inter-American Court of Human Rights found the Honduran government guilty in the disappearance of Angel Manfredó and Velásquez Rodríguez. The Court will oversee a settlement between the government and the family of Velásquez. A spokesman for Honduras President José Azcona Hoyo said, "The Government of Honduras has no option but to respect the judgment fully."²¹²

212. N.Y. Times, Jul. 30, 1988, at 1.