NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 16 | Issue 2 Article 4

Spring 2000

THE DEVELOPMENT OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: A HISTORICAL PERSPECTIVE AND A MODERN-DAY CRITIQUE

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The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*

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INTRODUCTION

The inter-American human rights system is composed of a series of international documents. The principal human rights tools include: the American Convention on Human Rights,[1] and its accompanying protocols; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights;[2] and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[3] In addition, three

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* The opinions expressed in this document are the sole responsibility of the authors and do not necessarily represent the opinions of the Inter-American Court of Human Rights or its Secretariat.

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[1] American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (entered into force July 18, 1978) [hereinafter American Convention]. To date, the following countries have ratified or acceded to the Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.

[2] The Protocol of San Salvador was signed at San Salvador, El Salvador, at the eighteenth regular session of the Organization of American States [OAS] General Assembly. As of today, it has not come into effect. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 14, 1988, 28 I.L.M. 156 (1989) (not in force) [hereinafter Protocol of San Salvador].

[3] The Protocol to Abolish the Death Penalty was approved in Asuncion, Paraguay at the twentieth regular session of the OAS General Assembly. Protocol to the

regional inter-American conventions seek to broaden the scope of protected human rights: the Inter-American Convention to Prevent and Punish Torture;[4] the Inter-American Convention on Forced Disappearance of Persons;[5] and the Inter-American Convention for the Prevention, Punishment, and Eradication of Violence Against Women.[6]

The American Declaration of the Rights and Duties of Man[7] also plays a significant role in the protection of human rights in the Americas. In fact, the impact of the American Declaration should not be understated as it binds countries who have ratified the American Convention and those who have not. The American Declaration operates as a source for common rights, and replaces serious juridical lacunae that exist in the case of economic, social and cultural rights. This year is the fiftieth anniversary of this important regional document, an honor for the Americas since it preceded the Universal Declaration of Human Rights by a few months.[8]

The goal of this Article is to review the development of human rights in the Americas so that it may be possible to analyze specific aspects of this protective system that need serious repair. It is especially pleasing to do this during a time where Brazil and Mexico,

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American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, 29 I.L.M. 1447 (entered into force Aug. 28, 1991) [hereinafter Protocol to Abolish the Death Penalty].

[4] Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, 25 I.L.M. 519 (entered into force Feb. 28, 1987) [hereinafter Torture Convention]. The Convention was adopted in Cartagena de Indias, Colombia at the fifteenth regular session of the OAS General Assembly.

[5] Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529 (entered into force Mar. 26, 1996) [hereinafter Belem Convention]. This Convention was adopted in Belem do Para, Brazil at the twenty-fourth regular session of the OAS General Assembly.

[6] Inter-American Convention for the Prevention, Punishment, and Eradication of Violence Against Women, "Convention of Belem do Para", June 9, 1994, 33 I.L.M. 1534 (entered into force Mar. 5, 1995) [hereinafter Convention for Eradication of Violence Against Women]. This Convention was Adopted in Belem do Para, Brazil at the twenty-fourth regular session of the OAS General Assembly.

[7] American Declaration of the Rights and Duties of Man, OEA/ser. L./V./II.23, doc. 21 rev. 6 (1948) [hereinafter American Declaration]. This Declaration was approved in 1948 at the 9th International American Conference in Bogota, Colombia.

[8] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

two of the largest countries in the Americas, with vast political and economic importance, have manifested their intent to accept the contentious jurisdiction of the Inter-American Court of Human Rights.[9] This step helps validate and strengthen the inter-American human rights system.

The Article's first section reviews the history of the inter-American human rights system. The authors illustrate the historical development of human rights in the Americas through various international conferences and meetings that led to the American Convention and the establishment of concrete human rights bodies. The next section discusses the Inter-American Commission prior to the ratification of the American Convention and how it has functioned thereafter. The following section discusses the mechanisms of the Inter-American Court of Human Rights. The authors provide a detailed analysis of the Court's procedural elements, contentious and advisory jurisdiction, and the use of provisional measures. Further, the role of the victim before the Court will also be examined. The next section will enumerate the recently implemented human rights instruments, and examine its impact on the Americas. Finally, the authors will evaluate the inter-American system of human rights, illuminating its structural, normative, and procedural problems. This critique will provide progressive remedies that will enable the system to function more efficiently and effectively in the twenty-first century.

I. BACKGROUND OF THE INTER-AMERICAN SYSTEM FOR HUMAN RIGHTS

The inter-American system for human rights has a rich history. Unfortunately, it is often overlooked as one of the vital precedents for the universal protection of human rights.[10] In fact, the history of human rights in the Americas is quite extensive, second

[9] At the date of publication of this Article, Brazil and Mexico accepted the contentious jurisdiction of the Court respectively on Dec. 10 and 16, 1998. Similarly, the Dominican Republic followed suit on Mar. 25, 1999.

[10] Reflecting on past times, it is illustrative to remember that America has its own history of human rights. It is worth noticing the efforts of Fray Bartolome de las Casas, who established the unity of the human gender, affirming that all men are born free and continue to remain free and equal in rights, a later corollary to the French Revolution.

only to the European system.[11] Examples of instruments which illustrate human rights principles date back to the Declaration of Independence in 1776.[12] A later example, the Central American Court of Justice,[13] was the first international tribunal where *locus standi* was recognized for the individual, a characteristic still foreign to the Inter-American Court of Human Rights, one of the weaknesses of the system that this Article will delineate.[14] The Congress of Panama in 1826 led to a series of Congresses and Inter-American Conferences, where the beginning of Pan-Americanism principles and Bolivarian ideals developed.[15] It is also important to recognize the significance of earlier historical events, such as the designing of the right to political asylum in America. This was an extremely peculiar institution in our inter-American system that later took shape at the Seventh International American Conference in Montevideo in 1933.

In the aftermath of World War II, a "progressive"[16] inter-American protective system for human rights began to develop. When the Inter-American Conference on Problems of War and Peace took place in Chapultepec, Mexico, in 1945, the American States, in one way or another, were suffering from the consequences of the war, and thus, began to examine the problems generated by war and to

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[11] RAFAEL NIETO NAVIA, INTRODUCCION AL SISTEMA INTERAMERICANO DE PROTECCION A LOS DERECHOS HUMANOS 9 (Instituto Interamericano de Derechos Humanos ed., 1993).

[12] The Declaration of Independence was actually the first instrument on human rights rather than the common misperception that it was the French Revolution's Declaration of the Rights of Man and of the Citizen.

[13] The Central American Court of Justice was created by the Treaty of Washington in 1907 and installed in San Jose, Costa Rica in 1908. It remained in effect until 1918.

[14] According to Article 61(1) of the American Convention, "[o]nly the States Parties and the Commission shall have the right to submit a case to the Court." American Convention, *supra* note 1.

[15] Rafael Nieto Navia presents a detailed analysis on the development of the inter-American system of human rights. *See* NAVIA, *supra* note 11, at 9.

[16] According to Pedro Nikken, one of the original judges of the Inter-American Court of Human Rights, since the approval of the Universal Declaration of 1948, there has been an important new evolution of juridical instruments created with the aim of protecting human rights. Also, a progressive tendency from the less vigorous mechanisms to offer greater human rights guarantees. *See* PEDRO NIKKEN, LA PROTECCION INTERNACIONAL DE LOS DERECHOS HUMANOS: SU DESARROLLO PROGRESIVO 39 (1987).

prepare for peace. It was a natural point to convert the Pan-American Union into a stronger, more political organization of American countries, leading to the development of the Organization of American States [OAS].[17] This movement helped to pioneer the regional protection of human rights. Also, it played an important role in the development of the United Nations, not only because of the vast number of countries in the Americas, but for the historical experiences acquired amongst its State Parties. The concept of State sovereignty has greatly affected the evolution of the inter-American human rights system, particularly in light of the foreign aggression that took place in the Americas, leading ultimately to part of the regions independence from Spain.

One resolution, which emanated from the Inter-American Conference on Problems of War and Peace, had a significant impart on the development of the inter-American system for the promotion and protection of human rights. Resolution XL, on the "International Protection of the Essential Rights of Man," was the forerunner to the American Declaration, as it established principles to safeguard the essential rights of man through international law.[18] The Conference also delegated to the Inter-American Juridical Committee[19] the responsibility of drafting a declaration that could be adopted as a convention by American States.[20] This project was not followed through because the Juridical Committee considered that the constitutional systems of the countries in the Americas represented an obstacle that would initially require a profound transformation of States' domestic legal systems.[21]

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[17] Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2416, as amended by Protocol of Amendment to the Charter of the Organization of American States, Feb. 27, 1967, 21 U.S.T. 658 [hereinafter OAS Charter].

[18] *See* INTERNATIONAL CONFERENCES OF AMERICAN STATES, SECOND SUPPLEMENT, 1942-1954, 93-94 (Washington, D.C., Pan American Union, 1958) [hereinafter INTERNATIONAL CONFERENCES].

[19] The Inter-American Juridical Committee, [hereinafter Juridical Committee], serves the Organization as an advisory body on juridical matters and promotes the progressive development and the codification of international law.

[20] *See* INTERNATIONAL CONFERENCES, *supra* note 18, at 102.

[21] Edith Marquez Rodriguez, *Las Relaciones Entre la Comision y la Corte Interamericana de Derechos Humanos*, *in* LA CORTE Y EL SISTEMA INTERAMERICANOS DE DERECHOS HUMANOS 298 (1994). This article discusses the relationship between the

The culminating moment of this process was in 1948 at the Ninth International Conference of American States in Bogotá, Colombia. Aside from drafting a series of vital agreements, the Conference created the OAS Charter and the American Declaration on the Rights and Duties of Man. The Conference also adopted a number of decisions in the field of human rights, such as separate conventions on the granting of civil and political rights to women,[22] the resolution on the "Economic Status of Women,"[23] and the "Inter-American Charter of Social Guarantees,"[24] in which the governments of the Americas proclaimed "the fundamental principles that must protect workers of all kinds." For such a vast conglomeration of countries, the promulgation of so many international documents in one conference was a true accomplishment.

It was in 1959, at the Fifth Meeting of the Consultation of Ministers of Foreign Affairs in Chile that the Inter-American Council of Jurists was instructed to develop a human rights convention, a court of human rights, and other vital protective systems.[25] The process continued with the creation of the Inter-American Commission on Human Rights, which promoted and protected human rights, but without the capability to process individual complaints. The Council approved the Statute of the Commission on May 25, 1960 and elected its first members on June 29 of the same year. In 1965, by means of the Protocol of Rio de Janeiro, the Commission's functions expanded so that they could receive individual petitions. In 1967, through the Protocol of Buenos Aires, the Commission became a principal organ of the OAS.

The amended OAS Charter, which entered into force in 1970, refers to the Commission's expanded powers and duties in Articles

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Commission and the Inter-American Court of Human Rights. The book, which contains this Article, is a Commemorative edition of fifteen years of the Inter-American Court of Human Rights, twenty-five years since the signing of the Pact of San Jose of Costa Rica, and thirty-five years since the creation of the Inter-American Commission on Human Rights.

[22] *See* INTERNATIONAL CONFERENCES, *supra* note 18, at 229.

[23] *See id.* at 251.

[24] *See id.* at 262.

[25] Declaration at the Fifth Meeting of Consultation, Santiago, Chile, Aug. 12-18, 1959, Final Act, OAS Official Records, OEA/ser. C./II.5, 4-6 [hereinafter Declaration at the Fifth Meeting].

112 and 150. Article 112 denotes that the Commission's principal function shall be "to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters" and states that "an inter-American convention on human rights shall determine the structure, competence, and procedures of this Commission, as well as those of other organs responsible for these matters."[26]

The increased responsibility of the Inter-American Commission led to the drafting of the American Convention on Human Rights in San José, Costa Rica, on November 22, 1969, causing a fundamental change within the inter-American human rights system. This system, which had been previously based on instruments of a declarative nature, established concrete means of protection: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The Convention, which entered into force on July 18, 1978, not only strengthened the inter-American mechanisms to support and protect human rights, but marked the culmination of the evolution of human rights in the Americas.

As the American Convention took effect, the inter-American system for the protection of human rights became a dual system. The two parts included not only the substantive aspects toward the protection of human rights, but the bodies and procedures that enabled these protective mechanisms to function. The first system was utilized for OAS countries that had not ratified the American Convention, and the other was exclusive to those State Parties that had.

The inter-American system may be characterized as a "progression"[27] towards the protection of human rights in the Americas and can be summarized in the following manner:

1) The American Declaration on the Rights and Duties of Man was adopted by means of the OAS political system.[28] Although it appeared like a declaration of principles, the member countries granted it a juridical value beyond that of a mere recommendation.

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[26] OAS Charter, *supra* note 17, at arts. 112 & 150.

[27] NIKKEN, *supra* note 16, at 39.

[28] It was adopted in 1948 by the Ninth International American Conference which was held in Bogota, Colombia.

The juridical value of the American Declaration was noted by the Inter-American Court in its advisory opinion OC-10/89.[29]

2) In 1959, during the Fifth Meeting for Consultation of Secretaries of Foreign Affairs, a plan was designed to create an inter-American convention. As a result, the Inter-American Commission for Human Rights was created, which began working in 1960, upon approval of its Statute.

3) During the Second Special Inter-American Conference in Rio de Janeiro in 1965, the responsibilities of the Inter-American Commission on Human Rights were expanded so that they could receive both communications and/or individual petitions.

4) In the Third Special Inter-American Conference at Buenos Aires in 1967, a Protocol of reform was approved through the amended OAS Charter. As a result of the amendment, the Inter-American Commission became a principal organ of the OAS.

5) In 1969, the American Convention on Human Rights was adopted. The Convention provided conventional characteristics for the protection of human rights in the Americas and created systems and mechanisms of protection with greater aptitude and precision to guarantee a major juridical effect. With the enactment of the document in 1978, the dual structures of the inter-American system took place: a. One system encompassed the countries that had not yet ratified the American Convention but recognized the American Declaration. b. A second system involved the countries that had ratified the American Convention and was governed by two protective mechanisms: the Inter-American Commission on Human Rights (which already existed, but whose functions were redefined in the Pact of San Jose) and the Inter-American Court of Human Rights. In the latter system, for a matter to be considered by the Court, it required that the country ratify both the American Convention and accept the contentious jurisdiction of the Court.

6) Adoption of the amendments for the Protocols to the American Convention: the Protocol of San Salvador and the Protocol

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[29] Advisory Opinion No. 10, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10, at paras. 41, 42 [hereinafter Advisory Opinion No. 10].

to Abolish the Death Penalty.

7) Adoption of other inter-American conventions for the protection of human rights.

II. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

A. The Commission Before the American Convention

1. A Brief History

The Inter-American Commission on Human Rights was created in 1959 during the Fifth Meeting of the Consultation of Secretaries of Foreign Affairs in Santiago, Chile. On May 25, 1960, the Council of the OAS approved the Commission's Statute. A month later, the Commission was fully operative. Pursuant to Article 18 of the Statute, the Inter-American Commission included the following tasks: stimulating an awareness of human rights among Pan-American cities; formulating recommendations to governments so that they may adopt progressive measures; preparing studies or reports that they consider useful; requesting reports from governments on human rights measures that they adopt; serving as an advisory body for the OAS on human rights.[30]

Other functions of the Commission include preparing individualized country reports documenting the general state of human rights. All OAS member countries are required to participate. At present, more than forty country reports have been completed. Although no single procedural norm exists to investigate a State Parties conduct, the practice has been consistent since its origin. For example, the Commission's existence can be marked by a considerable number of individual communications (First Questionnaire on Chile); or through a general petition to a body of the OAS (Questionnaire on Bolivia requested by the Permanent Council); or via a petition by the same participating country (Questionnaire on

[30] Statute of the Inter-American Comm. on Hum. Rts. G.A. Res. 447, OAS, 9th Sess., art. 18 (1979), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser. L./V./II.92, doc. 31 rev. 3 (updated 1996).

Panama); or from a follow up by the Commission from a prior questionnaire (Questionnaire on Suriname and the seven on Cuba).

The structure of the Commission goes hand in hand with that of the OAS, in that each body was concerned with not intruding on the domestic affairs of member countries. It was initially designed to operate as a promotional and educational body for human rights through the enactment of studies, symposiums, and general meetings, but without interfering in a particular country's policies toward human rights.

Nevertheless, the Commission interpreted that it had been granted the authority to overlook, protect, defend, and promote the observance of human rights throughout the Americas. It was obvious to the Commission that the inadequate faculties conferred upon it made it difficult to fulfill its mission. Therefore, the Commission began to carry out activities not explicitly provided for in its Statute, but which it considered necessary for the best execution of its tasks. In fact, it was the submission of numerous petitions against various governments that stimulated the Commission to carry out an extensive revision of its Statute. The OAS did not question these undertakings, which implied a tacit acceptance of their validity.

Through this plan, the main function of the Commission was to deal with the problem of the massive and systematic violations of human rights, rather than to investigate isolated violations. This structure paralleled the European human rights system. The purpose was to document the existence of human rights violations in a country and to place pressure on that government to improve its general human rights record. The procedure was characterized by its flexibility to be able to become cognizant of human rights abuses in the Americas, to request information from governments, and to formulate final recommendations. More specifically, and in descending order of importance, the characteristics of that process were as follows: to put forth a procedural decree that that did not examine the requirements of the admissibility of the accusation; to exercise a very active role in the request of information and to investigate by using all its available resources (witnesses, newspapers, non-governmental organizations, on-site visits, etc.); to publicize the facts to pressure governments; to send the results of investigation to the political bodies within the OAS for their review and approval; and

to prevent from draining the domestic resources of the jurisdiction.[31]

In 1965, Resolution XXII of the Second Special Inter-American Conference authorized the Commission to examine and investigate individual communications and to formulate recommendations to individual countries.[32] Contrary to previous practice, in this new phase the Commission was required to verify the exhaustion of internal remedies.[33] This requirement proved detrimental to the flexible practice that the Commission had been developing and represented an obstacle to the main function of the Commission: its ability to provide a quick answer from complainants in situations of serious and systematic human rights violations. Similarly, the quasi-judicial character of the Commission was accentuated, which removed some of its investigatory flexibility.[34]

The solution for this procedural quagmire was to add Article 9 to the Statute of the Commission[35] which conserved the Commission's flexible procedure and initiated a quasi-judicial element, to review violations of certain established "fundamental" human rights set forth in Resolution XXII (articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration). However, this turned out to be more procedurally demanding because, aside from exhausting internal remedies, the petition had to be presented inside established terms. The Commission would then release an opinion denouncing specific human rights violations at the same time it gave recommendations to the country.

In 1967, the Protocol of Buenos Aires was approved during the Third Special Inter-American Conference. With it, the necessary

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[31] Final Act of the Second Special Inter-American Conference, OAS Official Records, OEA/ser. C./I.13, 32-34 (1965).

[32] *Id.*

[33] *Id.*

[34] This is despite Article 26.2 of the Regulations of the Inter-American Commission on Human Rights which provides: "[t]he Commission may also, *motu proprio*, take into consideration any available information that it considers pertinent and which might include the necessary factors to begin processing a case which in its opinion fulfills the requirements for the purpose." Regulations of the Inter-American Comm. on Hum. Rts., OAS, 49th Sess., art. 26.2 (1980). Nevertheless, this norm, which is completely viable, would not appear to have the support of the American Convention.

[35] Statute of the Inter-American Court of Human Rights, Oct. 31, 1979, 19 I.L.M. 634, 637 (entered into force Jan. 1, 1980).

steps were taken to strengthen the institutional structure of the Commission. Article 51 of the Charter was modified and included the Commission as a body of the OAS. Nevertheless, the nature and function of the Commission was to remain the same.

2. Rights to Protect

Article 1(2) of the Commission's Statute established that "human rights are understood to be the rights set forth in the American Declaration on Human Rights . . . [and] in the American Declaration on the Rights and Duties of the Man."[36] Some have attempted to undermine the irrefutable character of the rights contemplated in the American Declaration through contrasts with the American Convention,[37] the latter being an international treaty, the former only an international declaration of human rights principles.[38] However, the fact that the Declaration has been adopted unanimously by the participating members of the OAS contributes to its character as customary law, at least within the context of the inter-American system.[39] Further, aside from being a source of international rights,

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[36] Statute of the Inter-American on Comm. Hum. Rts., *supra* note 30, at art. 1(2).

[37] *See id.* at art. 1(2). The position of the United States of America is illustrative in its observation of the advisory process OC-10/89, when it stated "The American Declaration of the Rights and Duties of Man represents a noble statement of the human rights aspirations of the American States. Unlike the American Convention, however, it was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions. Its normative value lies as a declaration of basic moral principles and broad political commitments and as a basis to review the general human rights performance of member states, not as a binding set of obligations." Advisory Opinion. No. 10, *supra* note 29, at para. 17. On its part, the State of Costa Rica, in one inaccurate and contradictory opinion, very different from its characterization as a progressive American State (the first State to ratify the American Convention and to accept the contentious competence of the Court), expressed that "notwithstanding its great success and nobility, the American Declaration of the Rights and Duties of Man is not a treaty as defined by international law, so Article 64 of the American Convention *does not authorize the Inter-American Court to interpret the Declaration. Nevertheless, that could not in any way limit the Court's possible use of the Declaration and its precepts to interpret other, related juridical instruments or a finding that many of the rights recognized therein have become international customary law.*" Advisory Opinion No. 10, *supra* note 29, at paras. 11 & 12 (emphasis added).

[38] *See* Advisory Opinion No. 10, *supra* note 29, at para. 33.

[39] In Advisory Opinion OC-10/89, the Inter-American Court found that

regularly invoked by the participating OAS countries, it is also often used by State Parties to create national legislation.

In addition, the Inter-American Commission (similar to that of the Inter-American Court) has a great ability to interpret "other treaties concerning the protection of the human rights in the countries in the Americas."[40] In their advisory opinion OC-1/82, the Inter-American Court interpreted the phrase "other treaties" mentioned, in the following way:

> "the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in *any international treaty in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.*"[41] (emphasis added).

3. Procedures for Country Reports

Country reports serve as an important function of the Commission in analyzing human rights situations of particular countries. The procedures utilized in conducting such an investigative report include the following: to seek reports from the State or other governmental institutions; to conduct hearings of witnesses and experts; to carry on individual communications; to undertake *in loco*

"[t]hese norms authorize the Inter-American Commission to protect human rights. These rights are none other than those enunciated and defined in the American Declaration . . .. The General Assembly of the Organization has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS." Advisory Opinion No. 10, *supra* note 29, at paras. 41 & 42.

[40] Article 111 of the OAS Charter states that "[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to *serve as a consultative organ* of the Organization in these matters . . .." OAS Charter, *supra* note 17, at art. 111 (emphasis added). *See also* American Convention, *supra* note 1, at art. 64(1).

[41] Advisory Opinion No. 1, "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), 1982 Inter-Am. Ct. H.R. (ser. A) No. 1, at para. 52 [hereinafter Advisory Opinion No. 1].

observations, where the Commission requests permission from the State or suggests to the State to invite the Commission; to conduct public or private interviews of people, groups or institutions; to make visits to jails and interview persons privately detained; to mediate for the resolution of specific cases.

4. Report Process

The report process of the Inter-American Commission can be described in the following manner:

1) A preliminary report is carried out in a uniform pattern: the political and legal system of the particular country is described and analyzed and each one of the rights that the Commission wishes to investigate is studied;

2) Comparative analysis of the domestic legal norms are contrasted to the regional international documents for human rights;

3) The general situation is illustrated with individual cases that the Commission examines;

4) Rigorous technical analysis is not conducted;

5) Neither victims' nor witnesses' names are revealed;

6) The report is finalized with specific and political conclusions, and in some cases, with recommendations;

7) The report is transferred to the State so that it may make its own observations. Later, the Commission may maintain or modify the report due to the information that the government transmits;

8) The Commission creates a final report: if the Commission wishes to publicize it, it is mailed to the OAS or occasionally to the Meeting of Consultation of Ministers of Foreign Affairs.

Until 1976, no political organ of the OAS had discussed the reports regarding massive and systemic human rights violations. Between 1976 and 1980, the OAS discussed them thoroughly and it condemned State Parties without taking measures against them. After 1980, it decided not to condemn any specific country and instead referred to violations in a more general manner, by the initiative of Argentina, Chile and Uruguay.

However, in some cases, extensive debate occurred within the organs of the OAS. For example, in 1962, Resolution VI of the

Eighth Meeting of Consultation of Ministers of Foreign Affairs,[42] declared Fidel Castro's Government in Cuba incompatible with the principles and purposes of the inter-American system and excluded its participation, even though Cuba was required to uphold its international obligations. Another example was Resolution II which emanated from the Seventeenth Meeting for Consultation of Ministers in 1979, which requested the substitution of the Somoza government in Nicaragua. In both cases the Commission adopted diplomatic measures.

5. The Commission After the American Convention

Even with the vigorous adoption of the American Convention and the modification of the political structure within the Americas, it is clearly noticeable how the system prior to the Convention was designed in part for countries that were not democratic. The initiation of the new system modified the procedural mechanisms to protect human rights. Further, its essential purpose was to report and investigate isolated violations of human rights when a State's domestic system failed, representing a more juridical focus on human rights. This does not mean that the inter-American human rights system was only conceived for non-democratic countries, a position that has been maintained in some international forums, but nevertheless constitutes a misconception of the systems' origin.[43]

The American Convention's modern foundation is rooted in the right to present individual petitions before the Commission as a result of a human rights violation. This procedure consists,

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[42] The Organization of American States accomplishes its purposes through a number of organs. The Meeting of Consultation of Ministers of Foreign Affairs, meets at the request of any State Party "to consider problems of an urgent nature and of common interest." Resolution VI of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser.L./V./II.92, doc. 31 rev.3, at 2 (updated to 1996) [hereinafter Consultation of Ministers]. Furthermore, it serves as the "[o]rgan of Consultation to consider any threat to the peace and security of the hemisphere, in accordance with the provisions of the Inter-American Treaty of Reciprocal Assistance, signed in Rio de Janeiro in 1947." *Id.*

[43] FELIPE GONZALEZ & ROMINA PICOLOTTI, DERECHOS HUMANOS Y LA ORGANIZACION DE ESTADOS AMERICANOS 8 (International Human Rights Law Group ed., 1998).

fundamentally, of five stages, set forth between Articles 48 and 51 of the American Convention:[44] admissibility; factual investigation, including information from the parties involved; offer of a friendly solution if the case proceeds; submission of a provisional report pursuant to Article 50; and, the transmission of the case before the Court. If the Commission decides not to send the case before the Court, the final stage, pursuant to Article 51, would be the submission and possible publication of the final report.[45]

III. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The concept of creating a court to protect human rights in the Americas has a detailed history.[46] In 1948, the Ninth International Conference of American States in Bogotá, Colombia, through Resolution XXXI entitled "The Inter-American Court for the Protection of Human Rights," considered that the protection of human rights "should be guaranteed by a juridical organ, in as much as no right is genuinely assured unless it is safeguarded by a competent tribunal," and that "where internationally recognized rights are concerned, juridical protection, to be effective, should emanate from an international organ."[47] Consequently, it delegated the Inter-American Juridical Committee[48] the task of designing a Statute to create an inter-American court dedicated to the guarantee of human rights. However, on September 26, 1949, in its report to the Inter-

[44] American Convention, *supra* note 1, at arts. 44-51.

[45] Regarding the nature of the Reports of the Commission on Articles 50 and 51 of the American Convention, one could consult the following advisory opinions of the Inter-American Court: Advisory Opinion No. 13, Certain Attributes of the Inter-American Commission on Human Rights, 1993 Inter-Am. Ct. H.R. (ser. A) No. 13; Advisory Opinion No. 15, Reports by the Inter-American Commission on Human Right, 1997 Inter-Am. Ct. H.R. (ser. A) No. 15.

[46] Perhaps one of the most thorough works on the background of the Inter-American Court of Human Rights is found in an article by Daniel Zovatto, which is referred to in its entirety. *See* DANIEL ZOVATTO, *Antecedentes de la Creación de la Corte Interamericana de Derechos Humanos, in* LA CORTE INTERAMERICANA DE DERECHOS HUMANOS, ESTUDIOS Y DOCUMENTOS (Instituto Interamericano de Derechos Humanos, ed., 1985).

[47] INTERNATIONAL CONFERENCES, *supra* note 18, at 270.

[48] *See supra* note 19 and accompanying text.

American Council of Jurists, the Juridical Committee considered that the lack of positive law created a great obstacle in the design of the Statute for the Court.[49] The Juridical Committee therefore found it advisable to first arrange a Convention that contained the rules of this nature and thereafter proceed with drafting the Court's Statute.[50] The Committee concluded that that the Council of Jurists should propose such a solution at the Tenth Inter-American Conference.[51]

In 1954, the Tenth Inter-American Conference in Caracas, Venezuela, through Resolution XXIX entitled "Inter-American Court for the Protection of Human Rights," postponed an opinion on this matter to the Eleventh Conference so that a decision could be made based on the studies compiled by the OAS Council. It instructed the OAS Council to base its efforts on existing proposals and in light of its own experience.[52] The Eleventh Conference, however, never took place.

In 1959, at the Fifth Meeting of Consultation, the Inter-American Council of Jurists was instructed to prepare two conventions: one on "human rights" and the other on the creation of an "Inter-American Court of Human Rights," and other organs appropriate for the protection and observance of those rights.[53]

The Council of Jurists completed its project during the Fourth Meeting in Santiago, Chile, in 1959. The Council prepared a draft convention, which included substantive provisions on human rights. Moreover, they developed institutional and procedural regulations with regard to those rights, which entailed the creation and operation of the Inter-American Court and the Inter-American Commission on Human Rights.[54]

The Convention project was then considered at the Second

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[49] COMITE JURIDICO INTERAMERICANO: RECOMENDACIONES E INFORMES - DOCUMENTOS OFICIALES (1949-1953) 105-110 [hereinafter COMITE JURIDICO INTERAMERICANO].

[50] *See id.*, at 108, 197.

[51] Rodriguez, *supra* note 21, at 297-300.

[52] INTERNATIONAL CONFERENCES, *supra* note 18, at 379.

[53] Declaration at the Fifth Meeting, *supra* note 25, at 4-6.

[54] Final Act of the Fourth Meeting of the Inter-American Council of Jurists, Santiago, Chile, 1959, OAS Official Records, OEA/Ser.I/CJI-43, at 52-81.

Special Inter-American Conference, in Rio de Janeiro, in 1965.[55] The Conference agreed to send the project to the Council of the Organization with the duties to implement and complete the Committee's proposals that it deemed appropriate, and later, convene at the Inter-American Specialized Conference.[56] It is important to highlight that it was at the Conference in Rio de Janeiro, that both Chile[57] and Uruguay[58] presented proposals to create an American Convention.

On April 10, 1967, the Inter-American Commission on Human Rights presented its opinion to the Council. On November 22, 1969, the American Convention on Human Rights was adopted in San Jose, Costa Rica hereby creating the Inter-American Court of Human Rights.[59]

In 1979, in La Paz, Bolivia, the OAS General Assembly approved the Statute of the Court through Resolution 448. Article 1 of the Statute defines the Court as "an autonomous judicial institution[60] whose purpose is the application and interpretation of the American Convention on Human Rights."[61]

In May 1979, during the seventh special session period of the OAS General Assembly, the participating State Parties of the Convention elected the first seven judges of the Court. On September 3, 1979, the inaugural judges were officially elevated to their positions

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[55] Inter-American Conference, OAS Official Documents, OEA/ser.C./I.13, 49-50 (1965).

[56] *Id.*

[57] *Project on the Convention of Human Rights, Prepared by the Government of Chile*, 1968 INTER-AM. Y.B. OF H.R. 275-79.

[58] *Project on the Convention of Human Rights, Prepared by the Government of Uruguay*, 1968 INTER-AM. Y.B. OF H.R. 298-317.

[59] Chapter VII of Part II of the American Convention discusses the implementation, organization, jurisdiction, and procedural functions of the Inter-American Court of Human Rights. *See* American Convention on Human Rights, July 18, 1978, pt. II, ch. VII, 1144 U.N.T.S. 123, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser. L./V./II.82, doc. 6 rev. 1 (1992).

[60] On the former definition, see the following critique: Hector Gross Espiell, *El Procedimiento Contencioso ante la Corte Interamericana de Derechos Humanos*, *in* LA CORTE INTERAMERICANA DE DERECHOS HUMANOS, ESTUDIOS Y DOCUMENTOS 68, 69 (Instituto Interamericano de Derechos Humanos ed., 1985).

[61] Statute of the Inter-American Court of Human Rights, *supra* note 35, at art. 1.

at the Court's seat in San Jose, Costa Rica.

In its Third Regular Session between July 30, and August 9, 1980, the Court adopted its Rules of Procedure[62] and it completed the works on a Headquarters Agreement with Costa Rica. The accord, ratified by the Government of Costa Rica,[63] specified the privileges and immunities of the Court, its judges and staff, and the persons who appear before it.

A. Procedural Role of the Court

In conformity with the American Convention, the Court exercises contentious[64] and advisory[65] jurisdiction. These functions are highlighted in the rules that govern these respective processes. When exercising their contentious role, the Court analyzes a specific demand, establishes the truthfulness of the asserted facts, and decides if they constitute a violation of the American Convention. The advisory role, when enacted, is different in its content and aptitude. When analyzing a petition of an advisory nature, the Court interprets the international right, not the specific facts. Consequently, there are no facts to prove.[66]

Also, while the contentious function materializes into a judicial process of contradicting positions, the essential elements of the advisory function are less adversarial. Further, the contentious

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[62] *See generally* Rules of Procedure of the Inter-American Ct. of Hum. Rts., OEA/ser. L./V./III.25, doc. 7, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser. L./V./II.82, doc. 6 rev. 1 (1992) [hereinafter Rules of Procedure]. The Court's Rules of Procedure were reformed substantially in 1991, and then in 1997. The later reformation through a Resolution of the Inter-American Court of Human Rights dated Sept. 16, 1996.

[63] An agreement between the Government of the Republic of Costa Rica and the Inter-American Court of Human Rights was signed in San Jose, Costa Rica on September 10, 1981.

[64] *See* Rodolfo E. Piza Escalante, *El Procedimiento Contencioso ante la Corte Interamericana de Derechos Humanos*, *in* LA CORTE INTERAMERICANA DE DERECHOS HUMANOS, ESTUDIOS Y DOCUMENTOS 155 (Instituto Interamericano de Derechos Humanos ed., 1985) (discussing the terminology used in the Convention and the distinctions made with the term "jurisdiction").

[65] *See generally* American Convention, *supra* note 1, at arts. 62-64.

[66] The distinction between contentious and advisory jurisdiction was addressed by the Court in its first advisory opinion. *See* Advisory Opinion No. 1, *supra* note 41, at paras. 23-25, 51.

jurisdiction of the Court is dependent on its previous acceptance by State Parties, which then must respect the Court's judgment.[67] In contrast, the advisory function of the Court does not depend on the consent of the interested States.[68]

Lastly, a difference exists in the Court's juridical role. In contentious cases, the Court issues judgments and orders concluding whether or not there was a violation of an international right, and whether the Court is capable of judicially resolving the conflict that has emerged between the petitioner and the State Party.[69] On the other hand, in the case of the advisory role, the Court submits an opinion, which does not have the characteristics of an executable sentence.[70]

Hence, it can be said that the Court's contentious jurisdiction represents a medium to resolve conflicts. The Court's advisory jurisdiction, in contrast, serves to prevent disputes between the members and organs of the inter-American system and is a means to *perfect* existing human rights instruments in a manner in which the agreements are respected and followed.

B. Phases of a Contentious Case

The Convention, the Statute of the Court, and its Rules of Procedure codify the existence of several procedural phases before the Court. However, it is necessary to clarify the practical stages undertaken when cases are submitted to the Court. It should be noted that not every phase will apply in cases of a friendly settlement, discontinuance or an acceptance of a claim.[71] The following phases

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[67] *See* American Convention, *supra* note 1, at arts. 62 & 68.

[68] *See id.* at art. 64.

[69] *See* Advisory Opinion No. 3, Restrictions to the Death Penalty, 1983 Inter-Am. Ct. H.R. (ser. A) No.3, at para. 32 [hereinafter Advisory Opinion No. 3].

[70] Notwithstanding this, it does not mean that advisory opinions have no juridical value. On the contrary, the Court's advisory jurisdiction plays a fundamental part in the process of interpretation of the Convention. *See* Victor Rodriguez Rescia, *La Ejecución de Sentencias de la Corte Interamericana de Derechos Humanos*, *in* EL FUTURO DEL SISTEMA INTERAMERICANO DE PROTECCION DE LOS DERECHOS HUMANOS 482 (Interamerican Institute of Human Rights ed., 1998).

[71] *See* Rules of Procedure of the Inter-American Ct. of Hum. Rts., OEA/ser.L./V./II.71, doc. 6 rev. 1, at arts. 52-53 (as amended 1996).

are briefly outlined below.

1. Preliminary Exceptions Phase[72]

This is the initial phase for contentious cases brought before the Court. The use of preliminary exceptions is a defense that may be utilized by a responding State party. A common preliminary exception enumerated by State Party respondents is the failure of the petitioner to exhaust domestic remedies. In the majority of cases before the Court, the responding State party interposes such preliminary exceptions. The preliminary exceptions phase, however, does not estop the substantive phase of the case from proceeding.[73] Nevertheless, practically speaking, a State Parties' declaration of preliminary exceptions delays the resolution of the underlying matter, as the Court must listen to the allegations of both parties before dictating a verdict.

2. Merits Phase

The Merits Phase begins with the presentation of the case before the Court by the Commission or through a participating country. If the suit fulfills all the elements contained within Article 34 of the Court's Rules of Procedure,[74] the President authorizes a formal notification to the responding State. The State, in turn, is granted four months to answer. This period often increases up to three or four months as countries usually request extensions of time to gather evidence, hire an agent, etc.

Once the responding country replies to the petition or if the term lapses without an answer, the parties could request the Court's President to require further written presentations. If necessary, the President could request the parties to present other pertinent writings.[75]

During the public hearing, the Court listens to witnesses and experts regarding the matter at issue. In the final oral argument phase,

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[72] *See id.* at art. 31.

[73] *See id.* at art. 31(4).

[74] *See id.* at art. 31.

[75] *See id.* at art. 34(2).

known as the "final conclusions,"[76] the parties in the case can propose what they want the court to consider. Also, in several cases, the Court has conducted public hearings with the sole purpose of listening to allegations regarding specific claims, such as objections to witnesses.

After the conclusion of the oral process, the Court deliberates in private on the underlying issue and presents a definitive opinion that cannot be appealed.[77] The Court may only proceed to reevaluate its judgments by a request from the parties involved. For legal purposes, the Court has left open the possibility of case revisions, but only in very rare circumstances, such as the findings of new evidence that could modify the final result of the sentence.[78]

3. Reparations Phase

The Court has the ability to dictate reparations that it considers necessary if they have found a violation of the American Convention.[79] These reparations can be ordered at the time of the verdict, but this matter is generally reserved for a later stage. The existence of this separate stage provides for the ordering of compensatory damages and/or other reparations.

4. Supervision and Execution of Judgments

The Court generally reserves the ability to supervise the execution of its judgments during the reparations stage. The supervision of judgments is a delicate job that requires careful review and cautious consideration. During this stage the work of the Court reaches those people materially and emotionally affected by a State's human rights abuse, a victim and his or her family.

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[76] The presentation of the final arguments is not based on norms, but, instead, in the practice followed by the Court, where the parties are allowed to present their conclusions at the end of oral deliberations on the merits. Then, they may present their conclusions in written form within the terms set by the Court. The Court sets the term from the moment it sends the parties the official transcripts of the hearing.

[77] Article 67 of the American Convention states "The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment." American Convention, *supra* note 1, at art. 67.

[78] Genie Lacayo Case, 30 Inter-Am. Ct. H.R. (ser. C) (1997).

[79] American Convention, *supra* note 1, at art. 63.

If the State party does not comply with the Court's judgment, the victims or their relatives could execute the judgment in the country concerned in accordance with domestic procedure governing the execution of judgments against the State.[80] Further, victims or their relatives may inform the Court, who in turn, will inform the General Assembly. The General Assembly shall specify the cases in which a State has not complied with its judgments, making any pertinent recommendations.[81]

It is important to indicate that the mechanism to execute judgments by the Court via Article 68 is unparalleled, as the European system contains no such provisions.[82] Therefore, at least in theory, the Court's judgments are effective juridical instruments. However, a problem could arise regarding non-monetary damages such as the restoration of a victim's rights, the further investigation of a particular matter, and the sanction of those responsible. Thus far, the only verdict decided by the Inter-American Court which dealt with non-monetary damages to a non-deceased victim involved the release of an arbitrarily detained person. The State of Peru, in the *Loayza Tamayo* case, violated the principle of *non bis in idem,* but respected the Court's admonition to immediately release the victim.[83]

C. The Victim Before the Inter-American Court

A topic that deserves a more in-depth review, particularly in the inter-American system, is the role of the victim. Unlike the human rights system in the Americas, the European Court of Human Rights provides the victim with direct access. Article 61 of the American Convention limits the jurisdiction of the Court to "[o]nly the State Parties and the Commission."[84] Hence, until recently, neither the victim nor its representatives were part of the process before the Inter-American Court.[85]

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[80] *See id.* at art. 68(2).

[81] *See id.* at art. 65.

[82] *See id.* at art. 68.

[83] Loayaza Tamayo Case, 31 Inter-Am. Ct. H.R. (ser. C.) (1997).

[84] American Convention, *supra* note 1, at art. 61.

[85] Regarding this issue, there has been a retreat in comparison to the Central American Court of Justice, which allowed direct access for victims.

A fundamental change was introduced in the new Rules of Procedure of the Court, which became effective on January 1, 1997. The change refers to the participation of victims or their representatives in the process before the Court. The Court now recognizes the importance of the victim's role in the reparations phase. During this phase, representatives of the victims or its relatives are able to present their own arguments in developing a theory for appropriate damages.

D. Advisory Opinions[86]

According to Article 64 of the American Convention, the Inter-American Court is qualified to be consulted with in regards to the interpretation of the Convention or of other related treaties concerning the protection of human rights in the Americas.[87] Hence, this Article has been interpreted to guide the Court's advisory opinions. According to these pronouncements, the advisory function of the Court extends to the interpretation of a treaty whenever it is directly implicated in the protection of human rights in a participating country of the inter-American system.[88] This wide interpretation covers treaties and other human rights instruments that have been subscribed outside the regional inter-American system, including the Universal Declaration of Human Rights. It also authorizes the Court to interpret the American Declaration on the Rights and Duties of Man, as several references are made to it in the American Convention and in the Charter of the Organization of American States.

Similarly, the Court, by request of a participating State in the OAS, will be able to provide opinions based on the compatibility between a State Parties' internal law and the aforementioned international documents. This possibility is particularly interesting when a participating country requests an advisory opinion with regard to law not yet implemented. In such matters, the Court assumes a more "conventional" judicial role. This situation was presented in

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[86] For an indispensable guide regarding the advisory opinions of the Court, *see* Manuel Ventura & Daniel Zovatto, LA FUNCION CONSULTATIVA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS, NATURALEZA Y PRINCIPIOS 1982-1987 (1990).

[87] *See* American Convention, *supra* note 1, at art. 64.

[88] *See* Advisory Opinion No. 1, *supra* note 41, at paras. 23-25, 51.

OC-4/84, when the Government of Costa Rica requested an advisory opinion from the Court regarding the compatibility of various legislative modifications that eventually were implemented in their Constitution.[89]

Article 64 of the Convention provides extensive latitude for the Inter-American Court's advisory function. In its advisory opinion, OC-1/82, the Court found that: "[a]rticle 64 of the Convention confers on this Court an advisory jurisdiction that is more extensive than that enjoyed by any international tribunal in existence today."[90] In fact, participating members of the OAS can request advisory opinions, without having ratified the American Convention. Further, in regards to the advisory process, the Court generally invites all participating countries and legitimate bodies to present their written observations on the issue to be resolved.

Advisory opinion OC-1/82 established wide-parameters for the Court's advisory jurisdiction. It does not, however, imply the absence of limitations to execute its functions. Fear has been expressed that the exercise of the Court's advisory jurisdiction might weaken its contentious jurisdiction, or worse still, that it might undermine the purpose of the latter, thus changing the system of protection provided for in the Convention to the detriment of the victim. The Court has been extremely cautious in analyzing whether or not it should accept a request for an advisory opinion because of the impact its action will have on the general framework of the inter-American system, particularly on individual petitioners. Thus, the Court has established that it will not exercise advisory jurisdiction, which would weaken or duplicate its contentious function or interfere with the functioning of the Convention and adversely affect the interests of the victim.[91]

E. Use of Provisional Measures

Provisional measures refer to the authority of the Court to act

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[89] *See generally* Advisory Opinion No. 4, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, 1984 Inter-Am. Ct. H.R. (ser. A) No. 4.

[90] *See generally* Advisory Opinion No. 1, *supra* note 41, at para. 14.

[91] *See* Advisory Opinion No. 1, *supra* note 41, at para. 24.

at the request of the Commission or on its own, to adopt urgent or provisional measures as necessary. Specifically, Article 63(2) of the Convention, establishes that:

> In cases of extreme gravity and urgency, and when necessary to avoid irreparable damages to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.[92]

The measures adopted by the Court have proven to be an instrument of exceptional importance in the protection of future probatory evidentiary material, and of the life and personal integrity of the witnesses in the matters presented before the Court.

Provisional measures have been both an important and continual aspect of the Court's processes. Such practice has permitted the Court to handle certain problems in connection with the application of these mechanisms. Specifically, this refers to provisional measures, which relate to matters that are not before the Court. In such scenarios, that Court has issued provisional measures granting the protection of witnesses prior to the conclusion of the procedure before the Inter-American Commission. However, it should be noted, that the Court relies greatly upon the request by the Commission for the issuance of provisional measures, as the Court lacks extensive knowledge as to the extreme graveness and urgency of the matters at issue.

Consequently, the Court has issued provisional measures with the aspiration that they may not face prolonged delay in their implementation as that would lose the virtue of their nature. In situations of extreme graveness and urgency, the Commission should take the necessary measures with the purpose of presenting the case immediately before the Court.[93] The basic concern with regard to this excessive delay is that this would decrease the effectiveness of a mechanism conceived as a tool of exception. In effect, the provisional

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[92] American Convention, *supra* note 1, at art. 63(2).

[93] Letter from the President of the Inter-American Court of Human Rights to the Inter-American Commission on Human Rights in regards to the provisional measures in the case of Chunima.

measures, as the name indicates, are temporary.

IV. RECENTLY IMPLEMENTED HUMAN RIGHTS INSTRUMENTS

In 1985, the General Assembly approved the Protocol of Cartagena of Indias, which amended the OAS Charter. Here, the member States opened up the Inter-American Convention to Prevent and Punish Torture for signature.[94]

This instrument provides a detailed definition of torture and indicates who would be responsible for the crime. The State Parties not only promise to severely punish the perpetrators of torture but also to take effective measures to prevent and punish other cruel, inhuman, or degrading treatment in their jurisdictions. Most importantly, under the terms of the Torture Convention, a person accused of torture cannot avoid punishment by fleeing to another member country.[95]

This Convention entered into force on February 28, 1987, thirty days after the deposit of the second instrument of ratification. In the 1998 case, *Paniagua Morales, et. al.*,[96] the Inter-American Court, for the first time, determined that a country, in addition to having violated Article 5 of the American Convention with respect to torture,[97] also violated Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.[98]

In 1990, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty was approved at the twentieth regular session of the OAS General Assembly in Asunción, Paraguay.[99] When the American Convention on Human Rights was drafted in 1969, a concentrated effort to include a provision that would have absolutely prohibited capital punishment failed. This

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[94] Torture Convention, *supra* note 4.

[95] *See id.*

[96] Paniagua Morales, et.al. Case, Judgment on the Preliminary Objections of Jan. 25, 1996, Inter-Amer. Ct. H.R. (ser. C.) para. 3.

[97] Article 5 of the American Convention states that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." American Convention, *supra* note 1, at art. 5(2).

[98] Torture Convention, *supra* note 4.

[99] Protocol to Abolish the Death Penalty, *supra* note 3.

recently approved Protocol would abolish the death penalty throughout the Americas by means of State-by-State ratification of the Protocol.

During the twenty-fourth regular session of the OAS General Assembly, in Belém do Pará, Brazil, the Assembly approved the Inter-American Convention on Forced Disappearance of Persons, which went into effect in March of 1996, 28 thirty days after the enactment of the second ratification document.[100]

This document establishes a detailed definition of kidnappings and it indicates who is responsible for this crime. The member countries commit to refrain from both the practice of kidnapping and passively accepting or tolerating kidnappings to take place. Also, they agree to sanction kidnappers, accomplices, and conspirators of this crime inside their own jurisdictions. Further, member countries commit to adopt domestic legislative measures to identify kidnapping as a crime. In addition, signatories must cooperate with other member countries to contribute to the prevention of kidnapping through appropriate sanctions, including all necessary measures to fulfill the commitments of the Convention. Finally, member countries must identify kidnapping as a type of crime that justifies extradition, so that a person accused of such a crime cannot avoid punishment by fleeing to a territory of a participating member country.

During the twenty-fourth regular session of the OAS General Assembly in Belém do Pará, Brazil, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, "Convention of Belém do Pará," was approved.[101] The aforementioned instrument went into effect in March of 1995, thirty days after the submission of the second ratification document.

This Convention establishes a detailed definition of what constitutes violence against women, including physical, sexual and psychological violence. It validates the fact that all women are entitled to a life free of violence, in addition to all the human rights consecrated by other regional and international documents. The participating member countries condemn all forms of violence against women and agree to convene to adopt the necessary policies to

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[100] Belem Convention, *supra* note 5.

[101] Convention for Eradication of Violence Against Women, *supra* note 6.

prevent, sanction and eradicate this type of violence.

V. EVALUATION OF THE INTER-AMERICAN SYSTEM FOR HUMAN RIGHTS

As discussed throughout this Article, the operation of the inter-American system for the protection of human rights functions through two protective bodies; the Inter-American Court of Human Rights and the Inter-American Commission for Human Rights. The role of these bodies has greatly enhanced the development of international human rights law. Nevertheless, these bodies have been presented with structural, normative, and procedural challenges that have affected their operation.

A. Structural Problems

1. Number of Ratified Countries

One of the most pressing issues facing the inter-American human rights system is the number of member countries of the OAS that have neither ratified the American Convention nor accepted the contentious jurisdiction of the Inter-American Court. In reality, the Americas have a Latin American system of human rights not an inter-American system. The United States and Canada have not yet ratified the American Convention, and other countries, especially in the Caribbean, have not accepted the Court's contentious jurisdiction. It is critical that State Parties that have ratified the American Convention also accept the contentious jurisdiction of the Inter-American Court. Thus, the recent commitment of Brazil and Mexico to accept the Court's contentious jurisdiction is encouraging.

The inter-American system requires great persistence and a continual effort on behalf of the political bodies of the OAS to get member countries to ratify the American Convention and accept the contentious jurisdiction of the Inter-American Court. The resolution of the General Assembly that approves the Annual Report of the Court found that the system needs greater participation from member countries to become truly an inter-American system.

2. Improved Coordination Among the Protective Bodies

The two aforementioned human rights bodies have different origins, characters, and goals. Nevertheless, they have a common objective, which is the protection of human rights in the Americas. Unfortunately, the Court and Commission have only met on eight different occasions to deal with matters of common interest. To the detriment of the inter-American human rights system, there lacks a systematic coordination of activities between the bodies that have related functions. At times, the Court and Commission have proceeded in a unilateral form to reform internal regulations without consulting the other. Such independent action has caused adverse procedural effects on the activities of the other body, consequently, producing situations of miscommunication and a lack of coordination in dealing with human rights issues. Therefore, the improvement of communication channels between these two bodies is critical.

3. Headquarters of the Protective Bodies

The different locations of the headquarters of each representative body deepens the problems of miscommunication and lack of coordination. Further, the long geographical distance between the two bodies increases the costs related to all the resulting activity between them. The only valid reason for the Commission to remain in Washington D.C. lies in its historical roots.

The Commission and the Inter-American Court concur that ideally both headquarters should be in the same place. The most appropriate headquarters for both the Commission and the Court would be San José, Costa Rica, since it is halfway between the continents of the Americas. However, until the implementation of such a geographical change for one of these human rights bodies, it is essential that the Commission establish an office or branch in San José. This step would immediately improve communication and coordination efforts, a necessary requisite to satisfy the protective purpose of the inter-American human rights system.

4. Time Delay for Cases to Proceed Through the Inter-American System

Only upon the exhaustion of domestic remedies may a case be

presented before the Inter-American Court. In fact, prior to the commencement of this process, a case must proceed before the Inter-American Commission, which takes an average of three to four years. If the Commission decides to present the case before the Inter-American Court,[102] the process often takes another four years to be completely resolved. Hence, in real terms, the victim of a violation of human rights becomes a victim of the inter-American system. The delay to resolve the demands of human rights abuses, the duplicity of processes, the loss of evidence, and the anguish of having to relive often horrific events after eight or ten years contradicts the purpose of a system which seeks to emotionally and economically compensate victims.

There are several alternatives to reduce the lapse of time. These include solving the budgetary problems of the Commission and the Court so that they may meet more regularly; and allowing both bodies to create mechanisms to eliminate the duplicity of the processes and potential loss of evidence.

5. The Inter-American Court and Commission Must Function Permanently

Considering the extraordinary length of time for a case to proceed through the inter-American system it is difficult to hold a state responsible for unjustified delay in its own domestic processes. In order to truly reform the inter-American system, the Court and the Commission must be provided with the necessary resources to function as permanent bodies.

Given the increased caseload before the Court and the Commission, the fact that these bodies continue to meet only three or four times a year, each time for a period of two or three weeks, adversely hinders the quality of reports and judgments. A firmer commitment is also needed from the judges and the commissioners toward their international tasks. However, practically speaking, this is unlikely to be achieved within the present framework of the inter-American system. The compensation for judges and commissioners is

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[102] This is not very likely because, statistically speaking, a very low percentage of cases are submitted to the Court due to the use of Article 51 of the Convention.

accrued only during the period each body is in session. In fact, judges and commissioners often spend a great deal of uncompensated time on preparing judgments and/or reports, emphasizing the necessity of creating permanent bodies.

While the Court remains a temporary institution, an intermediate solution would be to require the President to reside at the Court's headquarters, essentially allowing him/her, with the aid of the Secretariat, to resolve the most pressing matters, particularly, all urgent provisional measures in cases of extreme graveness. The Commission has already put in place a similar system, as the President resides permanently in the country of the headquarters.

6. Lack of Administrative Independence of the Protective Bodies

As essential as the need to create two permanent human rights bodies, it is equally necessary for each body to achieve independence in connection with the administrative norms and operations that govern the OAS's General Secretary. At this point, the Court enjoys more autonomy than the Commission because of Article 59 of the American Convention.[103] Article 59 requires the Court to function under the administrative standards of the OAS's General Secretary "in all respects not incompatible with the independence of the Court."[104] Additionally, the General Secretary of the OAS and the Inter-American Court signed an agreement to achieve such administrative independence, which commenced in January of 1998. The Inter-American Commission must follow suit even though its administrative independence is not codified in an international convention or statute.

7. The Role of the Commission in the Process of Individual Petitions

As stated earlier, when a case is presented before the Commission, certain procedural requirements must be exhausted.

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[103] American Convention, *supra* note 1, at art. 59.

[104] Article 59 states in entirety that "[t]he Court shall establish its Secretariat, which shall function under the direction of the Secretary of the Court, in accordance with the administrative standards of the General Secretariat of the Organization in all respects not incompatible with the independence of the Court. The staff of the Court's Secretariat shall be appointed by the Secretary General of the Organization, in consultation with the Secretary of the Court." *See* American Convention, *supra* note 1.

Since the Commission is not an international tribunal, the process, the review of evidence and its final reports, do not have judicial characteristics. Thus, when a matter is brought before the Court, it results in procedural duplicity, as the Court, a judicial body, must reach a legal judgment without considering the decision of the Commission.

One solution is for the Court to accept some of the Commission's proven facts as undisputed. A more radical approach is for the Commission to be the sole finder of fact. These may be viable alternatives in terms of procedural economy, but it would be inadequate because the function of a human rights tribunal requires extensive knowledge of a case to make factual determinations that are intimately connected to an individual's rights.

Further, suggesting that the facts determined by the Commission remain undisputed would likely reduce the credibility of the inter-American human rights system. Since the Commission is not a tribunal,[105] it would be difficult for the parties to understand why a judicial body would be bound by the Commission, a non-legal entity. In fact, it is not necessary for the Commission to have any judicial characteristics. Moreover, the Commission, which would have previously functioned as the sole fact-finding body, would then serve as the accuser in the same matter before the Court, a clear conflict of interest to one or more of the parties.

However, if the Commission, upon reaching a decision, respects due process, the right to a defense, and all the rights of the parties, and the State Party does not object to its decision, the Commission's decision would achieve a presumption of validity.

Although presently the system continues to function in a relatively fluid manner, it is still advisable to "rethink" the role of the Commission in regard to the individual petitions process and to eliminate many of the dual functions of the system. Quite simply, there is no reason why a human rights victim has to be subjected to two different international processes, as the system was designed to protect the victim not to serve as a tool for further victimization.

Therefore, the process of presenting individual petitions

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[105] It should be noted that the Commissioners of the Inter-American Commission do not have to be lawyers.

before the Commission should be eliminated where State Parties have ratified and accepted the American Convention and the contentious jurisdiction of the Court. In a sense, it is a basic step toward granting the victim direct access to the Court. The Commission would continue its role in the process as a third party agent and would maintain the important responsibilities that the OAS Charter and its Statute assign to it. This would allow the Commission to strengthen its ability to develop an awareness of human rights among the peoples of America,[106] a delicate and critical task. The Commission would also retain its primary functions carried out through on-site visits, country reports and the protection of citizens from State Parties within the OAS, including from those States who have not accepted the Court's contentious jurisdiction.

It has been argued that the Court would not be capable of handling a caseload of direct individual petitions; however, the Commission, has been performing similar quasi-judicial functions since its inception. Given that the Commission capably renders decisions on both issues of admissibility and fact, there is no reason why the Court could not follow suit.[107] In essence, a victim's rights would be further protected if the petitions were presented directly before the Court.

8. Budgetary Problems

The Commission and the Court have extremely small budgets, making it impossible for each body to adequately fulfill the responsibilities assigned to them by the American Convention. One essential reform is to endow these protective bodies with the necessary resources so that they can be "permanent," allowing them to carry out their functions efficiently. As long as member countries do not pay their corresponding dues nor manifest the political will, the reform of the inter-American system cannot take place.

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[106] *See* American Convention, *supra* note 1, at art. 41(a).

[107] However, the Commission has only recently adopted the practice of issuing reports regarding admissibility.

B. Normative Problems

The American Convention is modeled after the European Convention for Human Rights. Consequently, the Convention only protects civil and political rights rather than economic, social and cultural rights. Only a brief reference, in Article 26 of the American Convention, mentions the protection of economic, social and cultural rights.[108] The promulgation of the Protocol of San Salvador[109] has attempted to protect these rights, however, it has not yet entered into force.

With regard to more general economic, social and cultural rights, Article 42 of the American Convention allows the Inter-American Commission to watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the OAS Charter.[110] State parties must submit reports annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture. It should be noted that the Convention requires the promotion, not the protection, of these rights. The 1991 Annual Report of the Commission began to include a chapter to inform the General Assembly on such matters, but this practice has since been discontinued in the Commission's most recent reports.

The Inter-American Court, in the *Aloeboetoe et al.* case,[111] made reference to the protection of economic, social and cultural rights while granting, as reparations, certain benefits to the population of Saramaca, including the reopening of a school and of a medical clinic.

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[108] Article 26 of the American Convention refers to economic, social, and cultural rights in the following manner, "[t]he State Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires." American Convention, *supra* note 1, at art. 26.

[109] Protocol of San Salvador, *supra* note 2 and accompanying text.

[110] American Convention, *supra* note 1, at art. 42.

[111] Aloeboetoe Case (Reparations), 15 Inter-Am Ct. H.R. (ser. C) (1993).

Articles 1(1) and 24 of the American Convention, which prohibit discrimination,[112] could pave the way towards the protection of economic, social and cultural rights. Thus far, the Court, unlike the Commission, has not had the opportunity to handle matters related to discrimination in any of its judgments. Thus, the juridical protection of these rights will not be fulfilled until the Protocol of San Salvador enters into effect.

Unfortunately, the entrance into force of this Protocol would likely fail to resolve the problems related to economic, social, and cultural rights. To wit, Article 19, "Means of Protection," represents a modicum effort to protect workers' rights to unionize and the rights to education. Moreover, infringement upon all other rights referred to in this Protocol, such as the right to work, the right to strike, the right to social security etc.,. does not in itself constitute a violation of the American Convention. Thus, these violations cannot be the basis of an individual petition and may only be mentioned during the Country Reports process.

C. Procedural Problems

1. Admissibility of Petitions Before the Commission

The Commission takes extensive periods of time to determine the admissibility of an individual petition. One solution could be to determine admissibility *in limine litis*, except in those cases where the admissibility and the merits of a case are closely entangled.

2. Admissibility of a Case Before the Court

State Parties often use preliminary exceptions to review the admissibility of a case brought against them. To eliminate this

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[112] Article 1(1) states that "The State Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." American Convention, *supra* note 1, at art. 1(1). Article 24 states that: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." *Id.*, at art. 24.

practice, the norm should require all State Parties to argue issues of admissibility only before the Commission, with the exception of cases involving a statute of limitations issue. The Inter-American Court has repeatedly found that if a State Party does not present a preliminary exception before the Commission for failure to exhaust domestic remedies, then it cannot later be presented as an objection before the Court.

3. Fact-finding Investigations

In practice, the Court and the Commission duplicate tasks through the gathering of witness and expert testimony. During this year, the Inter-American Court will listen to approximately one hundred and fifty witnesses in nine cases, clearly a massive undertaking when conducting fact-finding investigations.

The OAS Secretary, in an official document presented by the Permanent Council of the Organization regarding the reform of the inter-American system, proposed that the State Parties' attorney's office take charge of the corroboration of the facts of a particular matter. However, there remains the problem regarding the independence and suitability for an organ of a State Party to carry out such functions.

It is clear that it is the Court's function to act as fact-finder in regards to human rights complaints. Therefore, the duplicity of such roles between the Commission and the Court should be eliminated. Both bodies carry out factual investigations with separate procedures. Moreover, there is a considerable lapse of time between these investigatory stages. As long as this practice continues, prompt resolution of matters before the inter-American system cannot be achieved.

4. Criteria for Submitting Cases Before the Court

There is no definitive guideline of how the Commission submits cases to the Court nor how it decides to publish a particular report pursuant to Article 51 of the American Convention.[113] What is clear is that the approaches should not be political. During the

[113] American Convention, *supra* note, at art. 51(1)(3).

external session of the Hague Convention that took place in San José, Costa Rica, Judge A. Cançado-Trindade proposed the following guidelines in regards to the submission of cases before the Court: cases that entail serious human rights violations; cases that review matters which are susceptible to prompt judicial solution; cases which involve State Parties from throughout the Americas; cases whose resolution allows the judicial interpretation of the Convention and of other treaties.

Additional guidelines could also be added as prerequisites for the submission of cases before the Court: first, cases of violations of inherent rights; second, cases which share a common denominator with other cases before the Commission and where the judgment would depend on precedential jurisprudence that could facilitate other forms of conflict resolution like settlement, arbitration, etc. These types of cases would likely cause a chilling effect, resulting in preventing State Parties from committing comparable human rights violations in the future. Third, cases that represent recurring problems in the Americas: prison conditions, due process, unjustified delay, etc. Finally, cases that are unique to the Court and that have caused significant controversy within a countries judicial system.[114]

5. Locus Standi

The Court modified its Rules of Procedure so that the victims or their relatives could present independent requests for reparations before the Commission. The doctrine and practice mandate the recognition of *locus standi* for an individual throughout the process before the Court. Without having to reform the American Convention, the Court could further reform its Rules of Procedure to allow a victim or its relatives to argue their cases independent of the Commission. The formula is not unique and it has proven to be a success in the European system, which allows direct access to the European Court without proceeding before the European Commission.

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[114] This was the criterion established by the Inter-American Court in its advisory opinion OC-5/85. *See* Advisory Opinion No. 5, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), 1985 Inter-Am. Ct .H.R. (ser. A) No. 5.

6. Articles 50 and 51 of the American Convention

The interpretation of both the norms and their practical effects is what has caused the Court the most problems with regard to its advisory opinions. What represents the greatest procedural imbalance is the issue of confidentiality within Article 50.[115] This Article provides that the Report of the Commission will be sent to the State Party. Two main problems exist with such a system: first, the country remains unaware of the identity of the victim; second, the victim is neither provided with the contents of the Report presented by the Commission nor aware of the status of the process. Thus, there is no procedural equality.

The solution requires a reinterpretation of these Articles. The language of the Articles does not specifically prohibit the Court from sending a report to the victims, nor refer to the term confidentiality per se. The Convention only prohibits the State from publishing the Reports presented by the Commission. Since the Commission functions as regulatory body for the petitions process, it may interpret that any procedural act not expressly prohibited by the American Convention should be deemed permissible. Therefore, the aforementioned procedural imbalance would be eradicated.

The Court has referred to the reports of Articles 50 and 51 in several advisory opinions, most recently in OC-15/97.[116] In this opinion, the Court considered that the reports emanating from Article 50 could be subject to revision in extremely rare cases. An example would be the discovery of new facts that would have produced different results had they been uncovered earlier.

7. Provisional Measures

Provisional measures may be the most frequently used and efficient mechanism within the inter-American system. In recent years, these measures have been exercised more frequently with satisfactory outcomes. Nevertheless, it is a mechanism that should be used appropriately in order to avoid weakening its effects. Such a

[115] American Convention, *supra* note 1, at art. 50.

[116] *See* Advisory Opinion No. 15, Reports by the Inter-American Commission on Human Rights, 1997 Inter-Am. Ct. H.R. (ser. A) No. 15.

problem occurs when a provisional measure becomes, in practicality, a permanent one, because the Commission decides not to send a case before the Court. Another problem involves the inability of the Court to follow-up on its adopted measures.

8. Costs and Damages

To date, the Inter-American Court has determined damages under civil law criteria. The Court directly appoints the beneficiaries of any compensation. Therefore, the Court acts as a reparations tribunal with all the problems that such bodies encounter. For example, problems exist when beneficiaries appear subsequent to a judgment and/or where the modification of internal legislation alters the actual recipients of compensation. Therefore, what should be done is to modify the damages in a generic form, in favor of the injured party, or in lieu of the victim, his or her relatives, as determined by the State domestic legislation.

It is also imperative to define the guidelines for expenditures and costs before the Inter-American Court. In the reparations phase of the *Garrido* and *Baigorria* case,[117] the Court modified its customary jurisprudence of non-concession of expenses and fees to the victims for the processes before the Commission and the Inter-American Court. This was the first case to address this issue since the modification of the Rules of Procedure in 1997. The Court found that in order for a case to be presented before it, all internal domestic remedies had to be exhausted and all the Inter-American Commission and Court's procedural requirements satisfied. These expenses should be adequately compensated thereafter.

CONCLUSION

The improvement and reformation of the inter-American human rights system should not be solely viewed with respect to the reformation of the inter-American instruments. On the contrary, there are many ways for the human rights bodies to apply the American Convention and interpret it in a more effective manner. Progressive

[117] Garrido and Baigorria Case, 26 Inter-Am. Ct. H.R. (ser. C) (1998).

reformation of the Rules of the Commission and of the Court, more coordinated efforts, the use of advisory opinions to clarify points that necessitate interpretation, and the increased political will of the OAS member countries are a few tools at the disposition of those interested in reforming the effectiveness of the Inter-American human rights system. In addition, the political bodies of the OAS and its member countries must stop continuing the "double talk" that has characterized yearly budgetary discussions. The member countries must manifest a commitment to human rights in the Americas by approving theses bodies annual budgets. This would allow the Court and the Commission to sustain the adequate levels of work and activities necessary to function properly. The implementation of such measures would avoid having to appeal for more complex reformations of the system, which would likely be counterproductive.

Prior to the complete reformation of any system, it is necessary for it to be obsolete. This is not the case for the inter-American human rights system. Human rights in the Americas still has many unexploited areas and implementing the minor reforms outlined in this Article would widen the parameters of the system and result in more efficient and effective human rights bodies. By serving a broader spectrum of human rights victims and utilizing rights of the Convention which have never been exercised, a progressive human rights system will be ready to blossom in the twenty-first century.