

# THE FRIENDLY SETTLEMENT OF HUMAN RIGHTS ABUSES IN THE AMERICAS

## I. INTRODUCTION

The mediation model of dispute settlement has long been praised as an effective tool in facilitating an open exchange of information and an increased understanding between two parties who by themselves may see little hope of compromise. However, the mediation model is not a panacea for resolving the world's most difficult and complex disputes. Despite the optimistic view of what mediation can achieve, there are situations when it may be inappropriate and even detrimental to the parties involved.

Within the United States, the use of mediation in the area of family law has led observers to question how far the mediation model can really go. Despite the affinity for alternative dispute resolution mechanisms and frustration with the adversarial method, use of mediation in family law has meant that mediators are faced with situations involving domestic violence. The difficulty of such scenarios has raised many questions; does the existence of violence in a relationship make the consensual model of mediation completely inappropriate? Can it realistically serve the interests of both parties when there is fear, distrust, and an imbalance of power that a mediator may not be able to counteract? In addition, should a model that "makes deals" with a party who has committed criminal acts of cruelty be tolerated? Questions and concerns about the use of the mediation model in situations of domestic violence are important in taking steps that help identify the needs of victims and the goals which the system is trying to attain in "resolving" these matters.

These issues are not only important to the domestic arena. Since the close of the Second World War, similar situations have arisen on an international level. In response to the atrocities committed by the Nazi regime, the global community began to strengthen its resolve to eradicate the occurrence of such grotesque violations of human rights. The goal was to create an unwavering respect for the sanctity of life and the dignity of individuals through international human rights treaties, direct intervention, and prosecution. In addition, the

international community began to use mediation to facilitate the “friendly settlement” of disputes involving human rights violations.

This use of mediation to “settle” disputes raises many of the same concerns regarding the rights of victims that arise in the domestic violence context. The horrific nature of the crimes involved raises questions about the ability of such a model to encourage respect for human rights, assign responsibility to abusers, and bring a sense of justice to the victims. Is mediation in the context of gross human rights abuses completely inappropriate or does it hold an important value in the search for resolution and change?

This Note will analyze the propriety of the mediation model in the framework of human rights abuses. Section II will describe the practical and philosophical development of the friendly settlement mechanism the manner in which it is specifically formulated under the American Convention on Human Rights. Section III will then utilize the framework of debate over the use of mediation in resolving situations of domestic violence within the United States in order to evaluate the implications of the mediation mechanism in the arena of human rights abuses. This discussion will lead to a more critical look at the manner in which the world attempts to encourage respect for the rule of law in nations torn by the devastation of cruelty and torture. Perhaps mediation will become a tool of empowerment to both victims and society as whole, but should we make deals with those responsible for gross violations of human rights? Can mediation really provide both reconciliation and justice? Can it fulfill the ideals of international human rights law?

## II. THE LEGAL FOUNDATION OF “FRIENDLY SETTLEMENT” UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS

The mechanism of “friendly settlement” has a long history in the resolution of international disputes. Traditionally, this mechanism has been referred to as “good offices,” which usually denotes a third party becoming involved in an attempt to bring conflicting parties together without actually becoming involved in the negotiation itself.<sup>1</sup> Although the use of this mechanism in the human rights arena has not been without challenge,<sup>2</sup> its use by international organizations<sup>3</sup>

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1. B.G. Ramcharan, *The Good Offices of the United Nations Secretary-General in the Field of Human Rights*, 76 AM. J. INT'L L. 130, 131 (1982).

2. *See id.*

has been extensive and its procedures have been integrated into some of the most important international and regional human rights instruments:<sup>4</sup> Article 48(1)(f) of the American Convention of Human Rights (American Convention)<sup>5</sup> and Article 28(1)(b) of the European Convention of Human Rights<sup>6</sup> call for the “friendly settlement” of complaints, and Article 41(1)(e) of the International Covenant on Civil and Political Rights<sup>7</sup> allows parties to utilize its “good offices.”

This Note will specifically focus on the friendly settlement mechanism under the American Convention. This limitation of scope will allow a more focused look at the mechanism’s strengths and weaknesses under an institutional framework that is often asked to resolve “disputes” involving allegations of gross violations of human rights such as torture, illegal arrest and detention, and forced disappearance. The following analysis of the Inter-American system can be applied to the use of friendly settlement throughout the arena of international human rights law.

#### A. The Procedural Framework of the American Convention on Human Rights

The American Convention on Human Rights establishes a system in which “any person or group of persons, or any non-

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3. See *id.* at 132-33. Examples of international organizations that utilize their “good offices” with respect to human rights are the United Nations, the U.N. High Commissioner for Refugees (UNCHR), the International Labor Organization (IGO), the U.N. Educational, Scientific, and Cultural Organization (UNESCO), and the International Committee of the Red Cross (ICRC).

4. See *id.* at 133.

5. See American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, OEA/ser. K/XVI/1, doc. 65, rev. 1, corr. 1, art. 48(1)(f) (1970) (entered into force July 18, 1978) [hereinafter American Convention], *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/ser. L/VII.71, doc. 6, rev. 1 (1988). “The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognised in this Convention.” *Id.*

6. See Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Sept. 3, 1953, 213 U.N.T.S. 221, art. 28(1)(b), *reprinted in* HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE 51 (Christopher Gane & Mark Mackarel eds., 1997). “In the event of the Commission accepting a petition referred to it: (b) it shall at the same time place itself at the disposal of the parties concerned with a view to securing friendly settlement of the matter on the basis of respect for Human Rights as defined in the Convention.” *Id.*

7. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. TREATY DOC. NO. 95-2 (1978), 999 U.N.T.S. 171, art. 41(1)(e). “. . . the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.” *Id.*

governmental entity . . . may lodge petitions . . . containing denunciations or complaints of violation of th[e] Convention by a State Party.”<sup>8</sup> Each petition filed is submitted to and reviewed by the Inter-American Commission on Human Rights (Commission).<sup>9</sup> If the Commission considers the petition admissible, it will then request information from the State concerned and, if necessary, conduct an investigation;<sup>10</sup> more importantly, the Commission “shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement on the basis of respect for the human rights recognised in th[e] Convention.”<sup>11</sup>

If the parties involved reach a friendly settlement, the Commission will then submit for publication a report to the petitioner, the States Parties to the Convention, and the Secretary General of the Organization of American States.<sup>12</sup> The report submitted will be limited in content only to a “brief statement of the facts and of the solution reached.”<sup>13</sup> Once a friendly settlement is reached, the case is considered closed.<sup>14</sup>

If a settlement is not reached within the time designated,<sup>15</sup> the Commission will “draw up a report setting forth the facts and stating its conclusions”<sup>16</sup> that will be transmitted to the States concerned along with any proposals and recommendations made by the Commission.<sup>17</sup> After the transmission of the report, the Parties concerned have three months to come to an agreement before the Commission issues its final opinion.<sup>18</sup> Where appropriate, the Commission will make recommendations and prescribe a time period within which the

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8. American Convention, *supra* note 5, art. 44.

9. *See id.* arts. 44-48.

10. *See id.* art. 48(a)-(e).

11. *Id.* art. 48(1)(f).

12. *See id.* art. 49.

13. *Id.*

14. *See* Christina Cerna, *The Inter-American Commission on Human Rights: Its Organization and Examination of Petitions and Communications*, in INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 65, 100 (David J. Harris & Stephen Livingstone eds., 1998).

15. *See* Regulations of the Inter-American Commission on Human Rights, art. 45(5) [hereinafter Regulations]. The Commission will fix a time for the conclusion of the friendly settlement procedure on a case-by-case basis.

16. American Convention, *supra* note 5, art. 50(1).

17. *See id.* art. 50(2)-(3). It is important to note that at this stage the parties are not at liberty to publish the report. *See id.* art. 50(2). This provision was included in order to keep the options for friendly settlement open as the procedures of the Commission continue forward.

18. *See id.* art. 51(1) (requiring an absolute majority of the Commission members).

State should take remedial measures.<sup>19</sup> The danger for the States Party in this scenario is that if after the prescribed period the Commission believes that adequate measures have not been taken, it may decide to publish its report.<sup>20</sup>

In summary, the Convention provides parties with two paths by which they may avoid either the “recommendations” of the Commission or the eventual publication of a report, which in all probability, will be unfavorable. The first is to reach a friendly settlement with the complaining party before the expiration of the final thirty-day period.<sup>21</sup> The second is to accept the jurisdiction of the Inter-American Court of Human Rights (the Court).<sup>22</sup> Therefore, the failure to reach a friendly settlement creates an interesting dilemma for the State Party accused of human rights abuses. If no agreement is reached, it faces the possibility of mandated “recommendations,” publication of a negative report, or an unfavorable ruling from the Court with which they must comply.<sup>23</sup>

## B. Practicing Friendly Settlement in the Americas

1. *The Inter-American Commission on Human Rights: The Reluctance to Implement the Friendly Settlement Provision.* The Commission has not always looked favorably upon the friendly settlement provision of the American Convention.<sup>24</sup> Its early disinclination to officially utilize its friendly settlement role has been attributed to the fact that the Commission, which was established twenty years prior to the Convention’s entry into force, has been generally reluctant to adapt its procedures to the Convention’s requirements.<sup>25</sup> The gap between the two phases of the Commission’s mandate arises from the fact that historically, the Commission’s role was to investigate the occurrence of human rights violations that it

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19. *See id.* art. 51(2).

20. *See id.* art. 51(3).

21. *See id.* art. 51(1).

22. *See id.* The Inter-American Court of Human Rights was established under Chapter VIII of the American Convention in order to supplement the workings of the Commission. *See id.* ch. VIII. However, unlike the Commission which can receive petitions from individuals and non-state entities, the Court can only receive petitions from the Commission and States Parties. *See id.* art. 61. If the Court does find that a State Party has violated a right protected by the Convention, it shall order that the injured party’s rights be ensured, and if necessary that the State give reparations. *See id.* art. 63.

23. *See id.* art. 68(1).

24. *See Cerna, supra* note 14, at 100.

25. *See id.* at 101.

perceived not to be conducive to friendly settlement.<sup>26</sup> On the other hand, the Convention's friendly settlement procedures were, written using the quite different philosophy that human rights violations are, in fact, capable of being resolved in a "friendly" manner.<sup>27</sup>

The Commission's initial reluctance and concern with the propriety of its new role as mediator is demonstrated in the first case that the Commission submitted to the contentious jurisdiction of the Court.<sup>28</sup> *Velásquez Rodríguez* was a seminal case in the history of both the Inter-American System as a whole and the Inter-American Court. For the Court, the case was of utmost importance, because it was the first contentious case submitted to its jurisdiction. In addition, it was vital to the integrity of the system that all procedural rules were correctly and strictly applied.<sup>29</sup> The case was also groundbreaking in nature because of the contents of the allegations—it would be the first binding decision on the status of the crime of forced disappearance under the American Convention on Human Rights.<sup>30</sup>

The factual background of *Velásquez Rodríguez* can further explain the severity of the substantive issues at stake. According to the petition filed with the Commission, on September 12, 1981 Angel Manfredo Velásquez Rodríguez, a student at the National Autonomous University of Honduras, was "violently detained without a warrant for his arrest by members of the Dirección Nacional de Investigación and G-2 of the Armed Forces of Honduras."<sup>31</sup> He was subsequently "accused of alleged political crimes and subjected to harsh interrogation and cruel torture," but the police and security forces denied his detention.<sup>32</sup>

Upon the submission of the case to the Court, the Honduran government communicated several objections to the Commission's

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26. *See id.* at 100.

27. *See id.*

28. *See Velásquez Rodríguez Case, Preliminary Objections, Inter-Am. Ct.H.R. (Ser. C) No. 1 (1994).*

29. *See id.* para. 10 (expressing the concerns of the Honduran Government communicated in its note to the Court dated March 13, 1997).

30. This is extremely important because the Convention itself does not explicitly state that the crime of forced disappearance is a violation of the Convention. Yet, the crime of forced disappearance is one that was perfected to a level of horrific proportion throughout Latin America.

31. *Velásquez Rodríguez Case, supra* note 28, para. 15.

32. *Id.* These allegations of detention and disappearance were presumed true by the Commission after the Honduran government repeatedly ignored repeated requests for more information. *See id.* para. 19.1.

procedural handling of the case,<sup>33</sup> one of which was the complaint that the Commission “ignored” the friendly settlement provision.<sup>34</sup> The Honduran government argued that the provision in Article 48(1)(f) is mandatory and that the discretionary power granted in Article 45 of the Regulations of the Inter-American Commission on Human Rights (Regulations)<sup>35</sup> is inapplicable because it contradicts the Convention.<sup>36</sup> The government’s objection to the Regulations stemmed from the fact that Article 45 gives the Commission discretion over whether “to offer itself as an organ of conciliation”<sup>37</sup> when the “case, by its very nature, is not susceptible to a friendly settlement.”<sup>38</sup> The government further argued that the failure to attempt a friendly settlement made the application inadmissible under Article 61(2)<sup>39</sup> of the Convention, which establishes that before the Court can hear a case, the friendly settlement procedures in Articles 49 and 50 must be exhausted.<sup>40</sup> The Commission, on the other hand, “argued that the friendly settlement procedure is not mandatory and that the special circumstances of this case made it impossible to pursue such a settlement.”<sup>41</sup> The Commission based this conclusion on three reasons: (1) the Honduran government’s lack of cooperation; (2) the Government’s refusal to accept responsibility; and (3) the Commission’s finding that the right to life, humane treatment, and personal liberty “cannot be effectively restored by conciliation.”<sup>42</sup>

The Court’s response to these arguments was rather puzzling in that it acknowledged the obligatory nature of the language of Article 48(1)(f), yet declared that the context of the Convention calls for the maintenance of the Commission’s discretion.<sup>43</sup> The Court only limited the Commission’s discretion by stating that it is not to be exercised “arbitrarily.”<sup>44</sup> Essentially, the Court’s decision stands in

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33. *See id.* para. 25(1-7).

34. *Id.* para. 25.5.

35. *See* Regulations, *supra* note 15, art. 45(7).

36. *See* Velásquez Rodríguez Case, *supra* note 28, para. 42.

37. Regulations, *supra* note 15, art. 45(2).

38. *Id.* art. 45(7).

39. *See* American Convention, *supra* note 5, art. 61(2). “In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been exhausted.” *Id.*

40. *See* Velásquez Rodríguez Case, *supra* note 28, para. 25.

41. *Id.* para. 43.

42. *Id.*

43. *See id.* para. 44.

44. *See id.* para. 45.

agreement with the Commission's finding that in a charge of "disappearance," a denial by the State will make it very difficult to reach a settlement that sufficiently promotes the human rights protected in the Convention.<sup>45</sup> The Court balances the two goals of seeking an amicable solution<sup>46</sup> and promoting human rights by giving the Commission the ability to assess "the circumstances of each case . . . , the nature of the rights affected, the characteristics of the acts denounced, and the willingness of the government to cooperate in the investigation and to take the necessary steps to resolve it."<sup>47</sup>

However, the Commission's discretionary power to preclude the possibility of friendly settlement was not left unchallenged. The mandatory language of Article 48(1)(f) again was used against the Commission's policy in the 1994 case, *Caballero Delgado and Santana*.<sup>48</sup> Here, the Court was not as sympathetic to the Commission's appraisal of the procedure's propriety. The distinction is important, because *Caballero Delgado* again involved allegations of forced disappearance, but unlike the Honduran government in *Velásquez Rodríguez*, the Colombian government undertook an investigation.<sup>49</sup>

Upon submission to the Court's jurisdiction, the Colombian government presented preliminary objections again based on the failure of the Commission to initiate friendly settlement proceedings.<sup>50</sup> The Government objected to the Commission's failure because (1) it is arbitrary for the Commission simply to state that the facts of the case are, by their nature, not subject to friendly resolution; and (2) that the Commission should undertake the procedure on its own initiative.<sup>51</sup> In addition, the Colombian government stressed that it, unlike the Honduran government in *Velásquez Rodríguez*, had never denied the occurrence of the facts.<sup>52</sup>

On the first point, the Court concurred with the Colombian government. *Velásquez Rodríguez* clearly states that the Commission's

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45. *See id.* para. 46.

46. *See id.* para. 58.

47. *Id.* para. 60.

48. *See Caballero Delgado and Santana Case, Preliminary Objections, Inter-Am. Ct.H.R. (Ser. C) No. 17 (1994).*

49. *See id.* para. 13. According to the petition, Isidro Caballero-Delgado and María del Carmen Santana were detained on February 7, 1989 by the Colombian Army and despite witnesses to their detention, the Colombian Government denied their detention. *See id.* paras. 10 & 13.

50. *See id.* para. 19.

51. *See id.* para. 20.

52. *See id.* para. 22.



discretionary powers are to be, in no way, arbitrary.<sup>53</sup> The Commission may only omit the procedure in exceptional circumstances and for substantive reasons.<sup>54</sup> Therefore, the Commission's cursory statement about the "nature" of the case was insufficient to justify its use of discretion.<sup>55</sup> In contrast, the Court found that the Commission was obligated to initiate the proceedings provided that the Government could have freely proposed it.<sup>56</sup> The implication of this decision is that (1) the Commission must explicitly offer reasons for rejecting friendly settlement and (2) the mere existence of the allegation of forced disappearance is an insufficient basis for concluding that the mediation procedure is inappropriate.

In the wake of *Caballero Delgado*, the Commission now asks the parties in every case if they have an interest in using the friendly settlement provisions.<sup>57</sup> This means that the discretion to use the procedure is in the hands of the parties.<sup>58</sup> Now, the parties have the sole discretion to accept or reject the initiation of this procedure. If one or both reject it, the friendly settlement procedure will not be used.<sup>59</sup>

2. *The Case of Argentina: The Successful Use of the Friendly Settlement Provision.* The previous section surveyed the Commission's concerns regarding its mediating function. However, there have been several cases where parties have successfully resolved their dispute using the friendly settlement procedure.<sup>60</sup> Most helpful to this discussion are recent cases involving the Argentine government, which are frequently referred to as representative of a successful friendly settlement.<sup>61</sup> In these cases, the complaints originated from the arbitrary arrest and detention of the petitioners. The issue actually before the Commission, however, was whether the Argentine government had failed "to provide effective judicial remedies to victims of human rights violations."<sup>62</sup> Upon submission,

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53. *See id.* para. 27.

54. *See id.*

55. *See id.*

56. *See id.* para. 30.

57. *See Cerna, supra* note 14, at 102.

58. *See id.*

59. *See id.*

60. *See* Report No. 1/93, Report on the Friendly Settlement Procedure in Cases 10.288, 10.310, 10.436, 10.496, 10.631, and 10.771, Inter-Am. C.H.R. 35, OEA/ser. L/V/II.83, doc. 14 corr. 1 (1993) (Annual Report 1992-1993).

61. *See* Report on the Friendly Settlement Procedure, *supra* note 60.

62. *Id.* sec. I, para. 4; *see also* American Convention, *supra* note 5, art. 25.

the petitioners requested that the Commission place itself at the disposal of the parties.<sup>63</sup> The Argentine government agreed to submit to the friendly settlement procedure and conveyed a genuine sympathy towards the victims; a sympathy evidenced through a reference to Argentine President Carlos Menem's own detention and desire to adequately compensate them.<sup>64</sup>

The negotiations concluded with a commitment by the Argentine government to pass a congressional bill to provide for the payment of compensation to the petitioners.<sup>65</sup> Thus, subsequent to the occurrence of several hearings in which the Commission monitored the Government's progress and the actual payment of the petitioners,<sup>66</sup> the Commission thanked the parties and closed the case.<sup>67</sup>

The difficulty with this report of successful settlement is its required brevity. It reveals little of the negotiation/mediation process and leaves many questions as to the methods used to reach this agreement. Although, the remainder of this note will be limited in the depth of its analysis, it should not severely undermine the discussion of the general value of mediation as a tool in situations involving human rights violations.

### III. IS MEDIATION REALLY A "FRIENDLY" SOLUTION IN THE CONTEXT OF HUMAN RIGHTS ABUSES?

The friendly settlement mechanism described above raises several normative and procedural questions about its propriety and/or efficacy. First, and most importantly, the nature of the dispute and the identity of the parties involved create a power imbalance that may make the use of mediation in the international human rights arena inappropriate and even destructive to the promotion of human rights. Secondly, there are a number of procedural characteristics of the model that also raise red flags. The most obvious procedural concern is the dual role of the Commission. The Commission is not simply the neutral, disinterested facilitator, for if negotiations break down, the Commission will act as prosecutor—recommending referral to the Court and publishing its own findings and recommendations. Another procedural question is the manner in which the parties enter the mediation process. Because the Commission has

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63. See Report on Friendly Settlement Procedures, *supra* note 60, sec. II, para. 2.

64. See *id.* sec. II, para. 2.

65. See *id.* sec. II, para. 3.

66. See *id.* sec. III, para. 1.

67. See *id.* sec. III, paras. 5 & 6.

largely been stripped of its discretionary role, a question exists as to whether there is a sufficient mechanism in place to screen the types of cases that will be mediated. The last area of evaluation is a bit more normative and it explores the efficacy of the friendly settlement mechanism in relation to both the individual petitioner and to society as a whole. The question arising in both contexts is whether this model adequately safeguards the rights protected by the American Convention and the goals of international human rights law.

The issues raised by the use of mediation in the context of international human rights law have been extensively explored in the domestic arena in the United States. In the United States, there has been an increasing use of mediation to settle family disputes such as divorce and child custody hearings, which has also meant that issues of domestic violence often enter the process. Faced with the complexities that a history of abuse brings to a relationship, there has been a great deal of criticism over whether the mediation model is appropriate. After all, as the Commission stated in its arguments in *Velásquez Rodríguez*, some disputes simply cannot be resolved through conciliation.<sup>68</sup> Throughout the analysis below, the work of scholars and practitioners regarding the use of mediation in situations of domestic violence will be used to bring greater insight to the effects of violence on the relationship between the parties and the mediation process itself.

#### A. The Imbalance of Power Created by the Nature of the Dispute and the Identity of the Parties

The most important concern arising from the domestic violence debate is the power imbalance created by the history and relationship of violence.<sup>69</sup> There is wide recognition that the power imbalance created and maintained through violence does not dissipate at the negotiating table.<sup>70</sup> Simply because the two parties are seated across from one another does not mean that the power relationship has

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68. See *Velásquez Rodríguez Case*, *supra* note 28, para. 43.

69. See Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or is it a Train on the Track?*, 70 N.D. L. Rev. 255, 263 (1994); see also Colleen N. Kotyk, *Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick*, 6 WM. & MARY BILL OF RTS. J. 277, 287 (1997); Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not be Mediated*, 34 EMORY L.J. 855, 861 (1985).

70. See Rowe, *supra* note 69.

changed; the presence of fear makes the mediation process unsuitable for friendly settlement.<sup>71</sup>

This same pattern of violence and domination is often present in situations of human rights abuses, where the allegations are of systematic abuse extending beyond the victimization of one individual. The violence inflicted extends to family, friends, children, and the countless thousands who stand under the suspicion of a government capable of uncontrolled repression. The disputes settled here literally revolve around life and death matters. Although the dispute can arise from alleged violations of any of the American Convention's enumerated rights, there is a strong possibility that the nature of the dispute involves violence, torture, murder, illegal detention, or forced disappearance, and an equally strong possibility that the fear, distrust, and subordination created by this pattern of violence will continue to exist in the "friendly settlement" proceeding.

However, there is a possibility that the balance of power between parties can be maintained through the presence of the mediator.<sup>72</sup> If the mediator is well-trained and sensitive to the power dynamic at the table, he or she can respond in a manner that permits only equal exchange.<sup>73</sup> This argument especially may be true in the friendly settlement procedure, because the Commission is composed of highly trained human rights specialists who clearly understand the tools used by abusive governments.<sup>74</sup> The presence of the Commission and the political and moral force it carries in the Inter-American system may comfort the victim and cause the abusing state to think carefully about its tactics and positions. Although this point will be discussed more fully later, it is also important to consider that the state is aware that the Commission is not simply a mediator. If the friendly settlement procedure fails, the Commission will be in a position to refer the case to the Court or to publish its own findings and recommendations. This dual role of the Commission may be crucial in balancing the power relationship.

Despite the presence of a well-trained mediator, there are still limitations as to what can be achieved in equalizing the power relationship. In the domestic violence arena, one limitation is that the

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71. See Knowlton & Muhlhauser, *supra* note 69, at 267-68.

72. See *id.* at 266-67.

73. See *id.*

74. See American Convention, *supra* note 5, art. 34. "The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognised competence in the field of human rights." *Id.*

relationship between a victim and an abuser is one often characterized by subtlety.<sup>75</sup> The history of abuse creates a situation in which a victim knows every weapon that the abuser is capable of using—even a small gesture can have enormous implications.<sup>76</sup> Thus, the remaining question is whether even a well-trained mediator can control this type of pressure.

The power imbalance created by the nature of the dispute alone should raise sufficient hesitation in using the mediation model, because it is only increased by the identity of the parties. Typically, in the international arena, the parties in mediation are two states each carrying the power of sovereignty and national resources. Under the American Convention, most of the petitioners will be individual citizens or groups of citizens.<sup>77</sup> Therefore, the issue is whether the individual has the power to make demands to force a solution that brings justice. The identity of the parties, in itself, immediately suggests that the individual has little to “offer” at the negotiating table. It appears to be a gap that even the mediator’s presence may not be able to bridge.<sup>78</sup>

The power imbalance arising from the position of the parties can be lessened by international human rights laws and the growing intolerance of human rights violations by the international community. The weight of international condemnation stands firmly behind the victims of human rights abuse. This support gives the individual a political and moral force the offending state cannot ignore. In addition, in this new era of democratization, it is more likely than not that the government representatives in the negotiation are not from the abusing regime. As was seen in the Argentine friendly settlement, there was a democratically elected government at the table openly

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75. See Knowlton & Muhlhauser, *supra* note 69, at 266-67.

76. See *id.*; see also Kotyk, *supra* note 69, at 279. “Mediation advocates assert that mediation in the domestic violence context is ‘potentially unsafe and inherently unfair.’ Victims argue that the ‘dynamics endemic to an abusive relationship preclude the possibility of collaborative decision making, even with a skilled mediator.’” *Id.*

77. See American Convention, *supra* note 5, art. 44. State Parties are not listed among those able of filing petition with the Commission. Only individuals, groups of individuals, or non-governmental entities legally recognized by the States Parties may file.

78. In the domestic violence arena, Paul Wahrhaftig comments that when such an imbalance exists “a mutually acceptable solution tends to be one in which the less powerful tolerates a less satisfactory solution since the mediator cannot impose an unfavorable decision on the more powerful party.” Rowe, *supra* note 69, at 861. This comment relates to the specific problems involved in forcing a state to bend to the demands of the individual. Although the Commission can publish its findings and recommendations, technically, the Commission has no real power to impose a decision unfavorable to the State.

committed to justice and reconciliation—breaking with the abuses of the “dirty war.” These two factors alleviate much of the concern over the imbalance of power and the continuation of the abusive relationship at the bargaining table.

## B. Procedural Shortcomings of the Friendly Settlement Mechanism

1. *The Dual Role of the Commission.* The role of the mediator in negotiations is not one that is automatically accepted or trusted. In fact, the involvement of a third party often creates apprehension.<sup>79</sup> However, an effective mediator can facilitate increased communication, organizational clarity, and serve as bridge that the parties can cross to reach mutual understanding. It is generally agreed that in addition to the benefits of training, the mediator achieves these functions in his or her role as a neutral, disinterested third party committed to confidentiality.<sup>80</sup> These characteristics are considered necessary for the mediator to establish a trust with the parties that will facilitate an atmosphere of full disclosure and honest exchange.<sup>81</sup>

With the above ideals in mind, the friendly settlement procedure of the American Convention raises questions as to the propriety of using the Commission as both mediator and would-be prosecutor. The Commission carries a dual mandate to investigate and issue reports and to make available its good offices. The Commission is not a neutral, disinterested third party, and if a settlement is not reached, the Commission will either refer the case to the Court’s jurisdiction and/or publish its own recommendations and findings on the merits.<sup>82</sup> This duality destroys the delicate nature of the traditional role of the mediator. As recognized by Gary W. Paquin, “getting parties to disclose their motivations and feelings about the dispute [is] difficult enough . . . and informing the parties that such information could be used in court would destroy any trust that might develop.”<sup>83</sup> Consequently, the Commission’s dual role may undermine the entire process. Absent genuine good faith and full acceptance of responsibility,

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79. See Richard B. Bilder, *When Neighbors Quarrel: Canada-U.S. Dispute Settlement Experience*, 33, 34 (Disputes Processing Research Program Working Paper No. 8:4, 1987).

80. See Gary W. Paquin, *The Development and Organization of Domestic Relations Mediation in a Multi-Function Mediation Center in Kentucky*, 81 KY. L.J. 1133, 1135 (1993).

81. See *id.* at 1137.

82. See American Convention, *supra* note 5, art. 51.

83. Paquin, *supra* note 80.

neither side may feel comfortable to come forward with a full disclosure of the truth (an end deemed vitally important in the resolution of human rights abuses.)<sup>84</sup>

2. *Limitations on the Commission's Discretion to Screen Cases Submitted for Friendly Settlement.* Another important procedural characteristic of mediation is that it is, ideally, voluntary in nature; the parties mutually agree that they both have a legitimate interest in resolving the dispute through mediation.<sup>85</sup> This is an ideal the Inter-American system has attempted to maintain, as demonstrated by the Court's rejection of the argument that the friendly settlement procedure must always be exhausted.<sup>86</sup> Although the Court stripped the Commission's absolute discretion, it did leave the parties the choice of whether to avail themselves of the Commission's good offices. As noted above, the Commission formally offers its services to the parties in every case, but if either party rejects the offer, the matter is closed until requested at a later time in the proceeding.<sup>87</sup>

The remaining question in the process of initiating the procedure is whether voluntary participation is a sufficient screening method to insure the rejection of a case that is inappropriate for mediation. Prior to the Court's ruling in *Caballero Delgado* that the Commission must offer its good offices, the Commission made its own evaluation as to the propriety of mediation on a case-by-case basis. Now, the Commission's screening power has been severely limited because it must offer substantive reasons for a rejection of the friendly settlement procedure. The Commission's limited authority has not, as of yet, been sufficiently tested due to the small number of cases that have used this procedure. Perhaps this is a sign that the voluntary nature of the process is sufficient.

### C. Does the Friendly Settlement Mechanism Further the Principles of International Human Rights Law?

In dealing with the aftermath of gross human rights violations, the international community seems to stand at the divide between the principles of justice and the complexities of the socio-political reality.

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84. See *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 177 (1988).

85. See Knowlton & Mulhauser, *supra* note 69, at 260; see also Kotyk, *supra* note 69, at 277-78.

86. See *Caballero Delgado and Santana Case*, *supra* note 48, para. 30.

87. See *Regulations*, *supra* note 15, art 45(7).

At one end of the spectrum there is a philosophy of strict adherence to the letter of the law, which usually means prosecution or extradition. This purely retributive approach to the resolution of human rights violations often proves to be a political impossibility which, in the end, may only exacerbate the conditions of injustice. The other end of the spectrum comes from a more utilitarian perspective which simply calls for blanket amnesties—to forgive and forget in the name of political stability. The powerful forces working on both of these positions have led the Inter-American system to tread carefully down the middle road that attempts to remain faithful to the rule of law while remaining cognizant of the political impediments and the need for reconciliation.

Article 1(1) of the American Convention imposes affirmative obligations upon the States Parties “to respect” and “to ensure” the rights protected by the Convention.<sup>88</sup> The Inter-American Court has interpreted this affirmative duty to include the duty to “prevent, investigate, and punish any violation of the rights recognized by the Convention and . . . to restore the right violated and provide compensation as warranted.”<sup>89</sup> The Court’s interpretation of the duty to ensure the protection of human rights also outlines the growing international commitment to reveal the truth of past abuses committed by the State Party.<sup>90</sup> Under international law, the right of victims to know the truth about who abused them and why, and the right of the victims’ families to know the whereabouts and fate of missing loved ones has become paramount in the effort to bring both justice and reconciliation to society.<sup>91</sup> It is seen as a necessary step in providing the victim with an effective remedy<sup>92</sup> and more importantly, with a sense of healing. The obligation to “ensure” the protection of human rights is not only a duty to the individual victim, but it is also a duty to society as a whole.<sup>93</sup> This broader duty is evidenced by the rising

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88. American Convention, *supra* note 5, art. 1(1). “The States Parties to this Convention undertake *to respect* the rights and freedoms recognised 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, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” *Id.* (emphasis added).

89. Velásquez Rodríguez Case, *supra* note 84, at para. 166.

90. See Jo M. Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT’L L.J. 321, 323-24 (1994).

91. See *id.* at 331-32.

92. See *id.* at 332.

93. See *id.* at 330.



call for the naming of names, the punishment of perpetrators, and the government's public acceptance of responsibility.<sup>94</sup> Revealing the whole truth about the horrific events of the past is seen as an essential step in the continuing struggle to establish the rule of law and to prevent the occurrence of collective amnesia.<sup>95</sup> In the words of the Inter-American Commission, "Every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future."<sup>96</sup>

The existence of this dual mandate means that the success of the friendly settlement mechanism depends upon its ability to ensure the rights of both the individual and society as a whole. The following analysis will demonstrate that this model of individual versus state mediation brings a sense of empowerment that allows the individual victim to direct the outcome of the proceedings and to meet his or her abuser face-to-face. The model offers an opportunity for the victim to break the silence of oppression by providing a forum where his or her own voice can be heard. It serves as a chance to regain a sense of identity that has been stripped away by the abusing state. The discussion that follows will also demonstrate that the friendly settlement mechanism falls short when the rights of society as a whole are considered. The required confidentiality of the friendly settlement agreement and the limited scope of the settlement only to those victims before the Commission do not seem to fulfill the societal right to know the truth of what occurred during the violence and oppression.

1. *Empowering the Individual.* From the perspective of the individual petitioners, the friendly settlement procedure may have provided an effective end to the legal and moral battle they had been fighting with the Argentine government since the years of the Dirty War. After nearly a decade of fighting to gain legal recognition of the crimes committed against them by the military junta, the petitioners successfully negotiated a settlement agreement. The final report of the Friendly Settlement Procedure in the Argentine cases reveals that the Commission granted the parties a hearing where, after listening to the petitioners, the Argentine government expressed that it "did not necessarily disagree" with the petitioners

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94. *See id.*

95. *See id.* at 331.

96. Inter-American Commission on Human Rights, Annual Report 1985-86, OEA/Ser. L/V/II.68, doc. 8 rev. 1 191, 192-93 (1986).

and that President Menem wanted to give them “adequate compensation.”<sup>97</sup> The settlement eventually agreed upon by the parties came under Decree 70/91 enacted by the Argentine Congress on January 10, 1991,<sup>98</sup> which was adopted for the specific purpose of monetarily compensating the petitioners.<sup>99</sup> It authorized the payment of compensation to requesting persons “who proved that they had been detained by executive order during the military government.”<sup>100</sup>

On a concrete level, the benefit to the individual petitioners rises from the monetary settlement they succeeded in getting from the Argentine government. The fact that this was authorized by a congressional decree provided a sense of public recognition of the government’s wrongdoing; the government accepted responsibility for its actions. However, the mere transfer of funds is often seen as an inadequate remedy for the suffering inflicted by years of pain and terror; this could not be more true than in a situation of systematic abuse. Money, although it is seen as an acknowledgement of wrongdoing, it does not close wounds nor does it bring back a sense of dignity and respect to the individual. Therefore, something more cathartic is needed—the silence of oppression must be broken. The Inter-American Commission’s friendly settlement mechanism gives the individual the opportunity to attain a broader sense of healing than that achieved by monetary compensation. The mediation model provides the victim a chance to be heard and actually to control the outcome of its relationship with the state.

In the human rights arena, prosecution is often seen as the only avenue toward justice, but the definition of justice is not static. By its very nature, the definition of justice differs for every individual,<sup>101</sup> and the friendly settlement mechanism gives the individual an opportunity to achieve his or her own sense of what justice looks like. Sitting down at the bargaining table with the government of a state gives the individual an unprecedented level of power on the international level. It allows the individual direct involvement in the final resolution of the dispute rather than waiting for the outcome of a trial that may never occur. Recognizing the importance of the individual on an

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97. Report on Friendly Settlement Procedures, *supra* note 60, sec. 2, para.1.

98. *See id.* sec. 2, para. 3. On December 23, 1991, this decree was confirmed by National Law 24043. *See id.*

99. *See id.*

100. *Id.* Subsequent decrees allowed compensation to petitioners not detained by executive order and to those whose arrest by the executive branch had been upheld by the courts. *See id.*

101. *See* Mike Perry, *Beyond Dispute: A Comment on ADR and Human-Rights Adjudication*, 53 DISP. RESOL. J. 50, 53-54 (1998).

international level brings a sense of empowerment to the victim. The process itself tells the individual that his or her interests are of value and are not subordinate to the interests of the state but rather, that they are equal. This, in itself, encourages a fundamental respect for the human dignity of the individual. The friendly settlement procedure sends the message to state governments that, in the end, they will always have to answer to the needs of their citizens, and if they do not, they will be held accountable not only to the international community but to the individual as well. Deeply connected to this sense of empowerment is the gift of voice provided by the friendly settlement mechanism. The mediation model allows the victim to narrate his or her own story in a face-to-face confrontation with the abusing state. Although the government representatives sitting at the table are not the individual perpetrators, they represent the source of the victim's suffering. The international forum forces the government to recognize the value of those it has victimized, and perhaps allows victims to hear the apology for which they have been waiting.

In addition to emotional empowerment, the friendly settlement mechanism also provides the individual with his or her only opportunity at legal recognition on an international level. Although the Inter-American Court almost always allows the individual petitioner to appear before it to tell his or her story, the individual does not have the power to bring the case before the Court.<sup>102</sup> The individual must depend upon the Commission or the state itself to refer the case to the Court's contentious jurisdiction.<sup>103</sup> Due to the fact that the Inter-American Court has been asked to exercise its contentious jurisdiction only ten times in the twenty years it has been in existence,<sup>104</sup> the friendly settlement mechanism may be the best opportunity for the individual to state his or her interests. In addition, bringing the state into a non-adversarial atmosphere and allowing it to participate brings a greater likelihood that the measures agreed upon will actually be put into action. Instead of receiving a list of "recommendations" from the Commission, which the State Party is not required to implement, the state voluntarily agrees to a plan of action with which it can live.

Despite the optimism regarding the benefits that the friendly settlement mechanism provides for the individual victim, there is a

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102. See American Convention, *supra* note 5, art. 51.

103. See *id.*

104. See *Contentious Cases of the Inter-American Court of Human Rights* (visited Jan. 22, 1999) <<http://heiwwww.unige.ch/humanrts/iachr/contntus.htm>>.

cause for concern in the fact that the report of the settlement agreement contains no evidence that the Argentine government either investigated the abuse endured by the petitioners or identified and punished the perpetrators. The language of Decree 70/91 even suggests that it was the petitioner's burden to prove that they had been detained and thus were entitled to compensation. How is this acceptable in light of the *Velásquez Rodríguez* ruling that imposes an affirmative duty upon the state to investigate? The settlement is also troubling in that it does not provide for the punishment of those responsible for the detainment and abuse suffered by the petitioners. There was no naming of names, no acknowledgement of the events surrounding the detainment, nor even any explanation for why they were abused. The government's failure to investigate is a clear violation of the individual's right to know the truth about those responsible for his or her suffering and the state's duty to investigate.

Although the missing layers of the settlement agreement are incredibly damaging to friendly settlement's ability to enforce the affirmative obligations imposed by the American Convention, they can be countered by one mitigating factor that may explain or at least dissuade some of the apprehension the absence may have created. It is important to remember that the issue in this case was narrowed to a procedural denial of a fair trial by the Argentine government in the years after the fall of the military regime. To avoid the statute of limitations arguments made by the Argentine government, the petitioners did not raise issues as to the unlawful arrests and physical injuries; instead, they simply protested the dismissal of their cases by the Argentine Supreme Court.<sup>105</sup> Thus, technically, the Argentine government had no perpetrators to punish and no investigation to undertake.

Despite all of the concerns and all of the unanswered questions that the Argentine cases have left, the friendly settlement mechanism provides an unprecedented opportunity for the individual to vindicate his or her rights under international human rights law. First, it is a momentous occasion when the individual is given the opportunity to stand in front of the government that once victimized him or her in order to be heard, recognized, and compensated. Although the report does not reveal the substance of the conversations at the negotiating table, it can only be hoped that the petitioners were allowed this small chance of satisfaction. The second bit of comfort in this process

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105. See Report on the Friendly Settlement Procedure, *supra* note 60, sec. 1, para. 8.

stems from the fact that both the individual and the Commission still have the right to reject any settlement offer that does not comply with the ideals set forth in the Convention.<sup>106</sup> The individual retains the power to walk out of the negotiations and to reject any settlement he or she finds unjust; the Commission, through its continuing power of discretion, may terminate its role as an organ for conciliation when there is an absence of good will in reaching a settlement that respects the rights set forth in the Convention.<sup>107</sup>

2. *Undermining Society's Right to Know the Truth.* The above discussion has centered on the benefits that the friendly settlement mechanism offers the individual victim, but it is also necessary to evaluate the proceedings from a broader societal standpoint. While the absence of an investigation may be tolerable to the individual victim looking to find some sense of resolution to a decades-long battle against injustice, is this acceptable from a societal standpoint? Within the international community, there is a growing recognition of the need to reveal the truth about the past.<sup>108</sup> This recognition is evidenced by the number of transitional governments that have formed either truth commissions or who have at least issued official historical reports. Therefore, knowing the truth about abuse and repression is not simply the right of the individual. It is essential to larger societal healing that must occur in order to achieve a true sense of reconciliation, respect for the sanctity of life, and commitment to the rule of law. Therefore, the Argentine settlement, which did not require a thorough government investigation, denied the societal right to know the extent and nature of the government's involvement in the infringement of the petitioners' rights.

This denial of the societal right to know the truth is further undermined by the confidential nature of the friendly settlement proceedings. Even if the government did agree to investigate fully the petitioners' allegations, the report would not necessarily disclose the content of the settlement agreement. The proceedings remain closed and the Commission's report is limited to a "brief statement of the facts and the solution reached."<sup>109</sup> The Commission cannot issue a more in-depth report on what took place at the negotiating table and it cannot issue its own findings as to the circumstances of abuse and

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106. See Regulations, *supra* note 15, art. 45(7).

107. See *id.* 15

108. See Pasqualucci, *supra* note 90, at 330.

109. Regulations, *supra* note 15, art. 45(6).

the government's responsibility for those crimes.<sup>110</sup> Therefore, while the friendly settlement agreement allows the individual the power to demand the truth and to insist upon a settlement that he or she finds just, the state's larger citizenry is denied any sort of veto power. The community must accept whatever agreement is reached.

Perhaps more important than this notion of a societal right to know the truth, is the sense that negotiating with any person, group, or state responsible for gross violations of human rights actually condones their actions.<sup>111</sup> The question of whether or not we should even consider the interests of the Hitlers of the world looms large; the preceding discussion has assumed that we should. Is this assumption correct if the true aim of international human rights law is to instill a respect for the rights of all individuals and for the rule of law? The answer to this question is not an easy one and would require much more thought than this Note is meant to cover. Yet, the concern created by bringing the abusing party to the negotiating table rather than to a court of law, can be overcome by the strength of commitment that both the Inter-American Commission and the individual petitioners display in enforcing a state's obligation to ensure the protection of human rights. The Commission retains the discretion to deny the settlement option when it finds either the nature of the case inappropriate or the state's lack of good faith.<sup>112</sup> This screening process will exclude the perpetrator or abusing state that lacks a true commitment to the ideals of the American Convention; in fact, it will only allow the transitional government committed to breaking with the past to sit down at the negotiating table. The friendly settlement mechanism is thus not a procedure that allows the murderer to negotiate his or her fate with the victim's family, but rather it is a procedure that allows successor governments that are committed to change the opportunity to share interests and to participate in the rebuilding of a nation.

#### IV. CONCLUSION

The above analysis demonstrates that the use of the mediation model in the resolution of situations involving human rights abuses may not always be "friendly." While the use of mediation in the international arena may be appropriate in encouraging more coopera-

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110. *See id.*

111. *See Perry, supra* note 101, at 57.

112. *See Regulations, supra* note 15, art. 45(7).

tive relations between nations, it may not hold such promise in disputes arising from histories of systematic abuse and terror. Assuming that mediation is theoretically appropriate for the resolution of these disputes, this analysis reveals three main procedural concerns that arise in its implementation under the American Convention. First, the imbalance of power created by both the history of violence and the complainant's individual status are a substantial cause of concern in the use of mediation. Second, the dual role of the Commission, as both mediator and prosecutor, may serve to undermine the trust and confidence of the parties, which are usually considered essential to facilitating an open and honest exchange of information. The third concern is that the Commission, in its role as mediator, has been stripped of its absolute discretion in whether to allow the parties to use its good offices. This raises questions as to whether the Commission's remaining discretion and the voluntary participation of the parties are sufficient screening mechanisms to determine when the nature of the dispute is not susceptible to conciliation.

The next level of concern speaks to a more overriding question about the general propriety of the mediation model. Even if the above procedural concerns were absent, are the friendly settlement procedures capable of producing a satisfactory result in light of the goals of international human rights law? The analysis of the final settlement agreement in the Argentine cases suggests that the procedures may provide a window of opportunity for offending states to escape some of the harsher obligations imposed by the American Convention. In addition, there are concerns about the propriety of even allowing human rights violators the opportunity to make amends, to make a deal with the victims, and to escape the possibility of prosecution and punishment. Without clear standards as to what type of dispute is unsuitable for mediation, where should institutions such as the Commission draw the line?

Despite the above concerns, the mediation model should not be completely rejected as an option in this complex area of violence and abuse. As societies attempt to rebuild in the aftermath of violence and oppression and consolidate a genuine respect for human rights and the rule of law, there is more to consider than blindly complying with the purist ideals of punishment. There is an urgent cry for creative solutions that simultaneously address the past and move into the future. The mediation model, facilitated by such well-trained institutional bodies as the Commission and coupled with the moral force of the principles of international law, may prove to be the solution the

world is seeking. It is a forum where the victim has a voice and the offending government is asked to come to terms with its responsibilities. Mediation is not a perfect solution but perhaps it can provide the same sense of self-empowerment among the parties that it has done in the domestic arena. Instead of working against each other to rebuild war torn societies, human rights activists and struggling nations can sit down together to formulate a mutually beneficial plan.

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