

## **THE INTER-AMERICAN HUMAN RIGHTS SYSTEM FIFTY YEARS LATER: TIME FOR CHANGES**

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Résumé de l'article

Cet article examine les dernières réformes des lois et réglementations de la Commission Interaméricaine des Droits de l'Homme (CIDH) et de la Cour interaméricaine des droits de l'homme, ainsi que le fonctionnement général du système des droits de l'homme interaméricain. Plus particulièrement, cet article s'intéresse aux atouts et aux inconvénients de la « judiciarisation » de l'amparo interaméricain. Ce document introduit les mesures nécessaires afin de promouvoir le rôle décisif du système interaméricain en matière de protection des droits de l'homme. Parmi ces mesures, certaines consistent à recentrer le travail de l'OEA autour de questions de droits de l'homme, à instaurer dans la Charte interaméricaine des droits de l'homme un lien plus substantiel entre la démocratie et la protection des droits de l'homme, et à compenser le travail portant sur les plaintes individuelles par d'autres outils dont dispose la CIDH. Ces propositions visent à modifier fondamentalement le mode de participation de la CIDH au système de pétition individuel. La Commission ne devrait agir qu'en tant qu'organe de recevabilité et dans le but de faciliter les solutions à l'amiable, tandis que la Cour ne devrait agir qu'en tant que tribunal, poursuivant la découverte de faits nouveaux et jugeant du mérite légal des plaintes. La CIDH doit se concentrer de manière plus appuyée sur les activités politiques et promotionnelles qui contrebalancent sa participation restreinte au traitement de dossiers individuels.

# THE INTER-AMERICAN HUMAN RIGHTS SYSTEM FIFTY YEARS LATER: TIME FOR CHANGES

ARIEL DULITZKY\*

This article analyzes the latest reforms of rules and regulations of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights and the overall functioning of the Inter-American human rights system. Particularly the article focuses on the strengths and weaknesses of the *judicialization* of the Inter-American *amparo*. The paper identifies the measures necessary to allow the Inter-American system to play a more prominent role in the promotion and protection of human rights. Specific measures include mainstreaming the work of the OAS around human rights issues, including in the Inter-American Democratic Charter a stronger link between democracy and the protection of human rights, and balancing the work on individual complaints with other tools available to the IACHR. It proposes a fundamental change in the IACHR's profile through the modification of its participation in the individual petition system. The Commission should only act as an organ of admissibility and facilitator of friendly solutions, and the Court as a tribunal that carries out findings of fact and makes legal determinations on the merits of complaints. The IACHR needs to concentrate more heavily on political and promotional activities that complement its limited participation in the processing of individual cases.

Cet article examine les dernières réformes des lois et réglementations de la Commission Interaméricaine des Droits de l'Homme (CIDH) et de la Cour interaméricaine des droits de l'homme, ainsi que le fonctionnement général du système des droits de l'homme interaméricain. Plus particulièrement, cet article s'intéresse aux atouts et aux inconvénients de la « judicialisation » de l'amparo interaméricain. Ce document introduit les mesures nécessaires afin de promouvoir le rôle décisif du système interaméricain en matière de protection des droits de l'homme. Parmi ces mesures, certaines consistent à recentrer le travail de l'OEA autour de questions de droits de l'homme, à instaurer dans la Charte interaméricaine des droits de l'homme un lien plus substantiel entre la démocratie et la protection des droits de l'homme, et à compenser le travail portant sur les plaintes individuelles par d'autres outils dont dispose la CIDH. Ces propositions visent à modifier fondamentalement le mode de participation de la CIDH au système de pétition individuel. La Commission ne devrait agir qu'en tant qu'organe de recevabilité et dans le but de faciliter les solutions à l'amiable, tandis que la Cour ne devrait agir qu'en tant que tribunal, poursuivant la découverte de faits nouveaux et jugeant du mérite légal des plaintes. La CIDH doit se concentrer de manière plus appuyée sur les activités politiques et promotionnelles qui contrebalancent sa participation restreinte au traitement de dossiers individuels.

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In 2009, the Inter-American Commission on Human Rights (Commission or IACHR) and the Inter-American Court of Human Rights (Court) substantially reformed their rules and regulations, making important changes to the procedures for the processing of petitions and contentious cases.<sup>1</sup> These modifications were made in the year of the 50<sup>th</sup> anniversary of the establishment of the IACHR, the 40<sup>th</sup> anniversary of the adoption of the *American Convention on Human Rights*,<sup>2</sup> and the 30<sup>th</sup> anniversary of the installation of the Court. The year 2008 marked the 60<sup>th</sup> anniversary of the creation of the Organization of American States (OAS) and the adoption of the *American Declaration of the Rights and Duties of Man*,<sup>3</sup> as well as the 30<sup>th</sup> anniversary of the *Convention* coming into effect. These procedural reforms and important historical landmarks offer opportunities for reflection on goals that have been met and current challenges facing the Inter-American system. In other words, it is an ideal time to analyze the current situation of the Inter-American human rights system and to think about how to prepare for the next fifty years.<sup>4</sup>

The OAS has developed a complex mechanism designed to protect and promote human rights over the past fifty years. The Inter-American human rights system has brought attention to the OAS, making it well-known throughout the Americas and worldwide.<sup>5</sup> Throughout the dark times of military dictatorship and

<sup>1</sup> See *Rules of Procedures of the Inter-American Court of Human Rights*, 28 November 2009, LXXXII Ordinary Sess. in *Exposición de motivos de la Reforma Reglamentaria*, online: Court <[http://www.corteidh.or.cr/regla\\_esp.pdf](http://www.corteidh.or.cr/regla_esp.pdf)> and Inter-American Commission on Human Rights, Press Release, No. 84/09, “CIDH Publishes Its New Rules of Procedure” (9 December 2009), online: IACHR <<http://www.cidh.oas.org/Comunicados/English/2009/84-09eng.htm>>.

<sup>2</sup> *American Convention on Human Rights*, 22 November 1969, O.A.S.T.S. No. 36 (entered into force 27 August 1978) [*Convention*].

<sup>3</sup> OAS, General Assembly, 3<sup>rd</sup> Sess., *American Declaration of the Rights and Duties of Man*, OR OEA/AG/RES.1591 (XXVIII-O/98) (1998) [*Declaration*].

<sup>4</sup> In reality, when speaking of the Inter-American human rights system, one should think more broadly than the Commission and Court. States take primary responsibility for and are the intended recipients of the decisions handed down by the Commission and Court. But States should be considered multifaceted entities, not monolithic, with multiple actors with distinct agendas, responsibilities, and perspectives, from foreign relations ministers to judicial and legislative powers, offices of the Ombudsman, public prosecutors and defenders, as well as the multiple authorities at the national, provincial, and municipal levels, that have different responsibilities in the area of human rights. Additionally, the OAS and its organs, particularly the General Assembly, the Permanent Council, and the Committee on Political and Juridical Affairs, play very important roles within the system, such as electing members of the Commission and Court, the discussion of these organs’ annual reports, the approval of their budgets, and the adoption of new human rights instruments. The Secretary General of the OAS is also very important within the system, as he or she can influence the agenda of the regional organization, has the final word in the naming of Commission officials, and can interact politically with States as well as the human rights organs of the system. Civil society organizations—broadly conceived, not only those which specialize in human rights—are a fundamental part of the interrelations of the Inter-American system, as they are the principle users and present complaints, provide information to the human rights organs and to society, advise victims, and train local actors. Finally, and perhaps most importantly, is civil society, particularly abuse victims who come to the system looking for the justice that they have not been able to find in their home countries. Victims have influenced the work of the Commission and of the Court, including pro-victim normative interpretations. The protection of their rights is the ultimate goal of the Inter-American system.

<sup>5</sup> As the Dominican Republic’s ex-Ambassador to the OAS said, “*En casi cada ocasión en que un representante ante la OEA hace mención del sistema interamericano de derechos humanos, utilice adjetivos descriptivos superlativos, tal como ‘la joya de la corona de nuestra Organización’*.” (Almost

civil wars of the past, and during the current era of persistent structural human rights violations within democratic systems, the Commission and Court have been and continue to act as the conscience of the hemisphere, supporting States—when the conditions allow—and their inhabitants through the effective protection of human rights. The strengths of the Inter-American system, which lie in the resolution of individual cases, on-site visits, thematic and country reports, the Court’s judgments, and the adoption of precautionary or provisional measures, play a fundamental role in denouncing and providing an early warning of situations that could compromise the consolidation of democracy and rule of law, while at the same time protecting individual rights when they are not guaranteed at the domestic level. The Commission and Court have saved (and continue to save) lives, permitted the opening of democratic spaces in the past and contributed to the ongoing consolidation of democracy, combated impunity and helped establish the truth, and provided justice and reparations to victims of human rights violations.

All of these achievements have been attained when the system, particularly the IACHR, has strategically combined different available tools. Of all the available human rights mechanisms, the processing of individual cases – which various authors have dubbed the Inter-American *amparo*<sup>6</sup> – has become the Commission’s tool *par excellence*. The Inter-American *amparo* consists of the right to petition to appear before the Commission to complain about human rights violations carried out by the action, omission, or tolerance of State agents or entities of any of the OAS member States. Under certain circumstances, the Inter-American *amparo* can be decided through a judicial decision handed down by the Court.

One characteristic that distinguishes the Inter-American system from other human rights systems has been its capacity to adapt to hemispheric conditions within the last fifty years to respond the demands of specific historical moments.<sup>7</sup> The most successful tools of the system, namely the individual complaints mechanism, on-site visits, preparation and publication of reports, adoption of precautionary and provisional measures, friendly solutions, thematic reports, and jurisprudence on reparations, arose or were strengthened or redefined in specific historical contexts in

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every time an OAS representative mentions the Inter-American human rights system, he or she uses superlative descriptive adjectives, such as ‘the crown jewel of our Organization.’”) [translated by author]. See Roberto Álvarez Gil, “Desafíos y retos en el uso del sistema interamericano” (2007) 46 *Revista Instituto Interamericano de Derechos Humanos* 19 at 21.

<sup>6</sup> See generally Carlos Ayala Corao, *Del amparo constitucional al amparo interamericano como institutos para la protección de los derechos humanos* (San Jose, Costa Rica: Editorial Jurídica Venezolana, 1998); Eduardo Ferrer Mac-Gregor, “Breves notas sobre el amparo Iberoamericano” (2006) 15 *Dikaion: revista de actualidad jurídica* 173; Sergio García Ramírez, “La protección de derechos y libertades en el sistema jurisdiccional interamericano. El amparo interamericano” in Hector Fix-Zamudio & Eduardo Ferrer Mac-Gregor, eds., *El Derecho de amparo en el mundo* (Mexico City: Konrad-Adenauer-Stiftung, 2006), 985; Nestor Sagüés, “Tomo 3: Acción de Amparo” in *Derecho procesal constitucional: 5º Edición actualizada y ampliada* (Buenos Aires, Editorial Astrea, 2007); Humberto Nogueira Alcalá, “El Recurso de Protección en el Contexto del Amparo de los Derechos Fundamentales Latinoamericano e Interamericano” (2007) 13 no. 1 *Revista Ius et Praxis* 75.

<sup>7</sup> For a historical evolution of the system and the different mechanisms it uses, see Robert K. Goldman, “History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights” (2009) 31 no. 4 *Hum. Rts. Q.* 856.

response to the demands of the times. For this reason, it is not possible to think about the Inter-American system either outside the political, economic, and social context in which it operates or without taking into account the current human rights situation in the Americas.

This article analyzes the latest reforms of rules and regulations and commemorates the recent anniversaries of the OAS through a reflection on the overall functioning of the Inter-American human rights system, particularly the strengths and weaknesses of the judicialization of the Inter-American *amparo*. I identify the measures necessary to allow the Inter-American system to play a more prominent role in the promotion and protection of human rights in the region. I seek to reinforce mechanisms that work efficiently and that enjoy broad support; strengthen the successful areas of the work of the Commission and the Court; identify those situations or groups that are not adequately attended to; and, finally, to eliminate, modify, or improve those aspects that do not effectively advance the goal of protecting human rights.

The objective of this article is not to identify substantive tasks or jurisprudential guidelines to strengthen democracy in the region.<sup>8</sup> This is a more limited proposal, since it concentrates on certain issues that would fundamentally change the IACHR's profile through the modification of its participation in the individual petition system. I propose that the Commission only act as an organ of admissibility that negotiates friendly solutions, and that the Court act as a tribunal that carries out findings of fact and makes juridical decisions on the merits of complaints. I also propose that the IACHR concentrate more heavily on political and promotional activities that complement its limited participation in the processing of individual cases. This article only outlines crucial changes in other aspects of the system, so it should be understood as the first step in a much more ambitious project—a systematic and structural analysis of the treatment of human rights within the OAS.

## **I. Brief critical analysis of certain aspects of the Inter-American *amparo***

Considering the framework and context in which it operates, which at first glance may seem discouraging, the Inter-American *amparo*, remarkably,

has led to developments, including, among other things, the establishment of internal laws in the countries of the hemisphere based on international human rights standards in such areas as forced disappearance, the death penalty, and terrorism; the repeal of amnesty laws because of their incompatibility with the *Convention*; the repeal of the so-called “desacato laws” because of their incompatibility with freedom of expression; the adoption of laws to protect

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<sup>8</sup> For critiques on certain aspects of the Inter-American system case law, see Ariel Dulitzky, “El Principio de Igualdad y no Discriminación. Claroscuros de la Jurisprudencia Interamericana” (2007) 3 *Anuario de Derechos Humanos* 15, and Ariel Dulitzky, “Cuando los Afrodescendientes se transformaron en ‘Pueblos Tribales’: El Sistema Interamericano de Derechos Humanos y las Comunidades Rurales Negras” (2010) 41 *El Otro Derecho* 13.

women who are victims of domestic violence; the implementation of public policy to promote racial equality; the adoption of legislative and administrative measures for creating effective mechanisms for the delimitation, demarcation, and titling of properties of indigenous communities; the progressive adjustment of conditions in prison systems to international standards for the protection of human rights; and the development of judicial mechanisms for combating impunity for human rights violations.<sup>9</sup>

The processing of individual complaints has many other benefits that go beyond specific cases and produce a ripple effect in both the domestic sphere as well as in the international system. As indicated by a former President of the Commission:

The processing of cases has very valuable effects. In the first place, it allows for justice in situations in which there has been no domestic resolution of a dispute. Second, the system enriches the regional and national juridical tradition through its interpretation of human rights norms, creating a shared hemispheric vision of the basis of freely-ratified treaties. [...] [C]ases [...] offer solid, well-founded interpretations on [different] rights [...] From a procedural point of view, the group cases [...] offer valuable insight on different admissibility criteria [...] [T]he constant and growing judicial complexity on the cases that the Commission resolves [...] brings simultaneously growing demands that require expansive judicial knowledge, as much on the content of the rights themselves as on compliance with procedures already established within the system. The judicial processing of these cases contributes to the “depolitization” of human rights, strengthening the system and its legitimacy.<sup>10</sup>

In this context, it is possible to offer a critical view of the Inter-American system because its strengths and success outweigh fears that such criticism may weaken or discredit the system.

## A. An Unequal Protection System

There are currently three different models that the *amparo* can follow, depending on the rights it can protect and on the body and type of protection—judicial or quasi-judicial—that it offers. First, there is the “judicial” *amparo*, which applies to States that have ratified the *Convention*<sup>11</sup> and recognized the competence of the Court. This *amparo* protects the rights recognized by the *Convention* through a judicial mechanism with final decisions adopted by the Court after the case passes through the

<sup>9</sup> According to the Commission’s own description. See OAS, Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OR OEA/Ser.L/V/II.130/Doc. 22, rev. 1 (2007) at c.1, para. 7 [*IACHR 2007 Annual Report*].

<sup>10</sup> OAS, Committee on Juridical and Political Affairs, *Dean Claudio Grossman, President of the Inter-American Commission on Human Rights, Presenting the 2000 Annual Report of the IACHR to the Committee on Juridical and Political Affairs of the OAS Permanent Council*, OEA/Ser.G/CP/CAJP-1798/01 (2001).

<sup>11</sup> Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. Trinidad and Tobago, despite having ratified the Convention and accepting the jurisdiction of the Court, denounced the Convention in 1999.

IACHR. The “quasi-judicial” *amparo* has two facets: the conventional one applicable to those States which have ratified the *Convention* but do not recognize the jurisdiction of the Court.<sup>12</sup> This “conventional quasi-judicial” version of the *amparo* also protects the rights guaranteed in the *Convention*, but only through decisions handed down by the Commission. The “declarative quasi-judicial” *amparo* protects the rights included in the *Declaration* through the actions of the IACHR. It applies to member States of the OAS that have not yet ratified the *Convention*.<sup>13</sup>

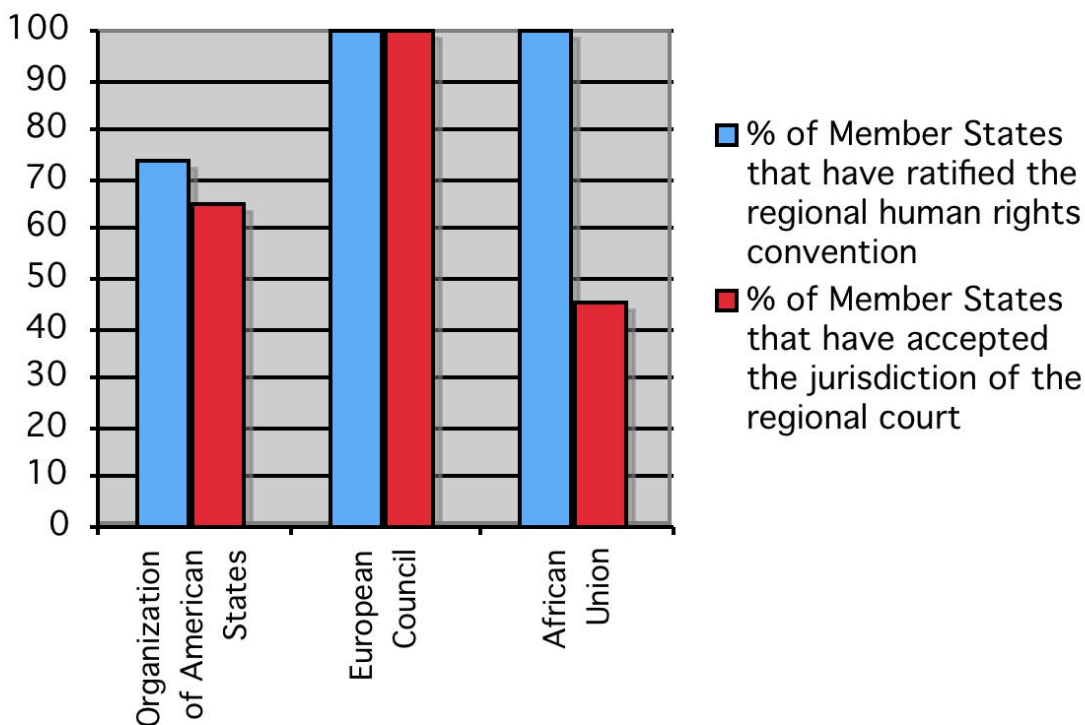
This is clearly a situation of unequal protection in the Americas, in a substantive as well as procedural sense, which is neither ideal nor satisfactory for the protection of human rights.<sup>14</sup> The following graph demonstrates the disadvantage the OAS faces in relation to other regional human rights systems:

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<sup>12</sup> Dominica, Grenada, and Jamaica.

<sup>13</sup> Antigua and Barbuda, the Bahamas, Belize, Canada, Cuba, Guyana, St. Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Trinidad and Tobago, and the United States. The Commission has power over these States, by virtue of being a principal organ of the OAS and for the attributes given to it through Article 20 of its Statute; OAS, General Assembly, 9<sup>th</sup> Sess., *Statute of the Inter-American Commission on Human Rights*, OR OEA/Ser. P/II.0.2 (1979) [*Statute of the Commission*]. See *Interpretation of the American Declaration of Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights* (1989), Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (Ser. A) No. 10, at paras. 35-45; *James Terry Roach and Jay Pinkerton v. United States of America* (1987), Inter-Am. Comm. H.R. No.3/87, at paras. 46-49, *Annual Report of the Inter-American Commission on Human Rights: 1986-87*, OR OEA/Ser.L/V/II.71/doc. 9, rev. 1; *Rafael Ferrer-Mazorra and Others v United States of America* (2001), Inter-Am. Comm. H.R. No.51/01, *Annual Report of the Inter-American Commission on Human Rights: 2000*, OR OEA/Ser.L/V/II.111/doc.20, rev.

<sup>14</sup> Additionally, it should be noted that the Commission and Court have jurisdiction to receive and process an *amparo* in relation to petitions that reference other international human rights treaties, see e.g. *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women “Convention of Belém do Pará”*, 9 June 1994, O.A.S.T.S. 1994 A-61 (entered into force 5 March 1995), art. 12 [*Convention of Belém do Pará*]; *Inter-American Convention on Forced Disappearance of Persons*, 9 June 1994, O.A.S.T.S. 1994 A-60 (entered into force 28 March 1996), art. 13 [*Convention on Forced Disappearances*]; *Inter-American Convention to Prevent and Punish Torture*, 12 September 1985, O.A.S.T.S. 1985 No. 67 A-51 (entered into force 28 February 1987), arts. 8, 16; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights “Protocol of San Salvador”*, 17 November 1988, O.A.S.T.S. 1988 No. 69 A-52 (entered into force 16 November 1999), arts. 19, s. 6.



Although in this system all OAS member States fell under the Commission's jurisdiction, the type of protection and supervisory mechanisms vary according to category of member State. Some individuals in the Americas benefit from the more specific legally-binding provisions of the *Convention*, while others can only depend on the *Declaration*. In a similar vein, some individual's rights are guaranteed through an Inter-American mechanism which ends with a contentious judicial procedure before the Inter-American Court, while others can only seek reparation through a more limited quasi-judicial *amparo* before the Commission.

## B. An Underfinanced System

One would hope that the OAS would be able to finance its activities adequately, particularly in the realm of human rights protection. In reality, however, the total budget of the Commission and the Court that is meant to finance all of these organs' activities, including the processing of the *amparo*, is less than 10 % of the total budget of the OAS. This has forced the Commission and the Court to rely on voluntary financial contributions from some member States and from various countries outside the region to finance their activities. For example, the Commission depends on the European Union to be able to attend its backlog of thousands of petitions that have been delayed due to the fact that the OAS cannot provide sufficient



personnel to process them. The Court depends on external support to be able to hold hearings outside of its headquarters, as a way of bringing the system closer to societies in the region.<sup>15</sup>

The following chart compares the Inter-American system to other international tribunals and commissions:

<b>International Court/Commission</b>	<b>Budget (US \$)</b>
Inter-American Commission on Human Rights	\$3,845,100.00
Inter-American Court of Human Rights	\$1,656,300.00
International Court of Justice <sup>16</sup>	\$36,785,000.00
International Criminal Court	\$120,015,000.00
European Court of Human Rights <sup>17</sup>	\$72,171,000.00
Central American Court of Justice	\$1,560,000.00 <sup>18</sup>
Andean Tribunal of Justice	\$1,137,600.00
African Commission on Human and Peoples Rights <sup>19</sup>	\$1,199,557.80 (fiscal year 2007)

### C. Increase in Complaints Received and Diminishing Capacity to Resolve Cases

In the last decade or so there has been an exponential increase in the number of petitions received by the Commission. This increase and the stagnation and reduction of the budget in real terms have caused a serious delay in the processing of the individual complaints. Between 1997 and 2002, the Commission received 4,048 complaints, and in the period 2003-2008, it received 7,803—an increase of 92.76 %. Nevertheless, the IACHR initiated the processing of 718 petitions in the period 1997-2002 and 816 between the years 2003-2008, an increase of only 14.44 %.<sup>20</sup> This

<sup>15</sup> This could be a topic for further investigation, on which States, foundations, inter-governmental agencies or regional organizations make monetary contributions to the Commission and Court, and which activities these contributions are intended to finance. Undoubtedly, this has a significant impact on the Commission and Court's capacities to effectively set priorities and work agendas, and it could generate profound imbalances in the dispersion of resources between each organ's respective areas of work.

<sup>16</sup> Budget for the two-year period 2006/2007.

<sup>17</sup> Budget for fiscal year 2008.

<sup>18</sup> "Mercosur y sistema de solución de controversias. El presupuesto más reducido de la región" (10 July 2008), online: Mercosurabc <<http://www.mercosurabc.com.ar/nota.asp?IdNota=1601&IdSeccion=14>>.

<sup>19</sup> Budget increased significantly for 2008 fiscal year to \$6,003,856.86 to decrease reliance on external funds and contributions by States Parties.

<sup>20</sup> OAS, Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights: 2008*, OR OEA/Ser.L/V/II.134/Doc. 5, rev. 1 (2008) at c. III [2008 *Annual Report*]. This increase also shows a greater emphasis on the part of those who come before the system to use the individual petitions mechanism over other available tools. Generally this increase is explained in light of the fact that democratic governments allow the possibility of presenting a complaint without fear of retaliation by authoritarian governments. However, it should be made clear that in moments of military dictatorship or authoritarian governments, the Commission received many complaints. During its on-site visit to Argentina in 1979, during a time of military dictatorship, the IACHR received 4,153 complaints. In November of 1998, when visiting Peru under the authoritarian

shows that either the delay in the preliminary analysis of petitions has increased exponentially in the last five years, or that the Commission has heightened the level of *in limine* rejection of complaints filed, making accessibility to the system more difficult. If the latter explanation is correct, it could be viewed as an indication of the “judicialization” of the system for its greater strictness in the application of requirements for processing cases. Given the lack of public statistical and qualitative information,<sup>21</sup> I can only speculate that the most plausible explanation is a combination of the two.

In the same period, the Commission’s capacity to adopt final decisions on the merits of petitions has fallen. The three ways in which the processing of a petition before the IACHR ends with some decision on the merits are as follows:<sup>22</sup> through reports that approve friendly settlements,<sup>23</sup> the publication of final reports on the merits of the complaint,<sup>24</sup> or the filing remission of the case to the Court for a final decision.<sup>25</sup> If the number of these three types of decisions is added up, the number of final decisions on petitions adopted by the Commission decreased 12.71 % between the years 2002-2008 in relation to the period 1997-2002, falling from 173 decisions to 151.<sup>26</sup>

#### D. A Slow System

The duration of processing an individual petition by the Commission is troubling, especially if one presumes that the processing of the *amparo*, even when done at the international level, should be simple and speedy.

For example, using data from the 747 reports that have been published by the IACHR between 1996 and 2007, there are two main phases or stages in the Commission’s procedure: admissibility and merits. The admissibility phase had an average duration of 3.10 years, with a median of 2.62. The fastest decision on admissibility was adopted in 0.47 years, and the longest was handed down in 15.12 years. The duration until the Commission’s publication of final decisions on the merits of the petition<sup>27</sup> was an average of 6.16 years, a median of 5.95. The case

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regime of Alberto Fujimori, the Commission received approximately 600 complaints. This demonstrates the importance, as outlined in this text, of the presence of the Commission in the countries of the region, as it facilitates victims’ access to the Inter-American system.

<sup>21</sup> For instance, the Commission does not provide information on the reasons for not processing petitions.

<sup>22</sup> Excluding the possibilities for withdrawal or archiving. If one takes into account the amount of cases decided by the IACHR, the data are equally revealing. In the period 1997/2002, 216 cases were archived, as were 93 in the last six-year period, without a single case being archived in the year 2008.

<sup>23</sup> *Convention*, *supra* note 2, art. 49.

<sup>24</sup> *Ibid.*, art. 51.

<sup>25</sup> *Ibid.*, arts. 51, 61.

<sup>26</sup> Data taken from Chapter III of the *2008 Annual Report*, *supra* note 20. Distribution is as follows: 1997/2002 2003/2008 Friendly Settlements 304 1 Final Reports Published 116 36 Cases Remitted to the Court 277 4 Total 173 151

<sup>27</sup> Duration from admissibility to final decision was computed if there were two separate decisions or from the processing of the petition until the final decision if the admissibility and the final decision were presented in a single report.

whose decision was reached most quickly was processed in 0.48 years, and the longest duration was 14.46 years. The decisions on friendly settlements do not perform better. Just to give one example of an extreme situation of delays, the IACHR approved a friendly solution report after over 20 years of processing.<sup>28</sup>

	<b>Duration for admissibility (years)</b>	<b>Duration for inadmissibility (years)</b>	<b>Duration for Friendly Settlement (years)</b>	<b>Duration for Substantive Decision (years)</b>
<b>Average</b>	3.10	4.03	5.79	6.16
<b>Median</b>	2.62	10.22	5.27	5.95
<b>Max</b>	15.12 <sup>29</sup>	12.34 <sup>30</sup>	20.28 <sup>31</sup>	14.46 <sup>32</sup>
<b>Min</b>	0.47 <sup>33</sup>	0.30 <sup>34</sup>	0.97 <sup>35</sup>	0.48 <sup>36</sup>
<b>Number of decisions</b>	420	111	68	148

In contrast, the duration of processing before the Inter-American Court has diminished considerably in the last few years. This is remarkable, given that the Court reduced its timeframe at the same time that the number of cases filed with the tribunal has multiplied. According to official information, under the rules of 1980, the duration of processing of claims was 39 months; under the rules of 1991, 38 months; under the rules of 1996, 40.5 months; and under the current rules of 2000, it has been 19 months.<sup>37</sup>

<sup>28</sup> *Jorge Alberto Rosal Paz v. Guatemala* (2004), Inter-Am. Comm. H.R. No. 29/04, at 710, *Annual Report of the Inter-American Commission on Human Rights: 2004*, OEA/Ser.L/V/II.122/doc.5, rev. 1 [*Jorge Alberto v. Guatemala*].

<sup>29</sup> *El Mozote Massacre v. El Salvador* (2006), Inter-Am. Comm. H.R. No. 24/06, *Annual Report of the Inter-American Commission on Human Rights: 2006*, OEA/Ser.L/V/II.124/doc.5.

<sup>30</sup> *Pedro Velázquez Ibarra v. Argentina* (2007), Inter-Am. Comm. H.R. No. 40/06, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.127/doc.4, rev. 1.

<sup>31</sup> *Jorge Alberto v. Guatemala*, *supra* note 28 at 710.

<sup>32</sup> *Parque São Lucas v. Brasil* (2003), Inter-Am. Comm. H.R. No. 40/03, at 677, *Annual Report of the Inter-American Commission on Human Rights: 2003*, OEA/Ser.L/V/II.114/doc.70, rev. 2.

<sup>33</sup> *Yvonne Neptune v. Haiti* (2005), Inter-Am. Comm. H.R. No. 64/05, *Annual Report of the Inter-American Commission on Human Rights: 2005*, OEA/Ser.L/V/II.124/doc.5.

<sup>34</sup> *Christián Scheib Campos v. Chile* (2001), Inter-Am. Comm. H.R. No. 69/01, at 379, *Annual Report of the Inter-American Commission on Human Rights: 2001*, OEA/Ser.L/V/II.114/doc.5, rev. (2001).

<sup>35</sup> *Victor Hugo Arce Chávez v. Bolivia* (2007), Inter-Am. Comm. H.R. No. 70/07, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.130/doc.22, rev. 1.

<sup>36</sup> *Alejandra Marcela Matus Acuña et al. v. Chile* (2005), Inter-Am. Comm. H.R. No. 90/05, *Annual Report of the Inter-American Commission on Human Rights: 2005*, OEA/Ser.L/V/II.124/doc.5.

<sup>37</sup> *2008 Annual Report*, *supra* note 20 at 67.

## E. A System that Duplicates Processes

There are two areas in which the Inter-American system's processing of individual petitions seems to be duplicative. The first is related to questions of admissibility, which the Commission decides and which could be and sometimes is re-examined by the Court as preliminary exceptions. Even when the *Convention* clearly indicates that the Commission has the power to declare a petition admissible or inadmissible,<sup>38</sup> the Court uses Article 62, Section 3, which indicates that it has jurisdiction over "all cases concerning the interpretation and application of the provisions of [the] *Convention* that are submitted to it", as the basis for reviewing everything that has been decided by the Commission, including its determination on admissibility.<sup>39</sup> If, for example, after two or three years of processing, the Commission determines that a case is admissible, years later the Court can go back and deliberate the exact same issue with the exact same arguments and facts if the State requests that it be done. Worse, this possibility of appealing the determinations on admissibility at the request of States does not exist for individuals whose petitions were declared inadmissible by the Commission, because they cannot appear before the Court to challenge the inadmissibility decision.

A dysfunctional duplication of efforts is the presentation of evidence and finding of facts. The IACHR should receive, debate, and analyze all questions relating to the determination of fact as well as the examination of documents and testimony. Then, once the case is in front of the Court, all the evidence should be produced anew and reevaluated by the Tribunal. Article 57, paragraph 1 of the new *Rules* of the Court (*New Rules*), which literally replicates Article 44, paragraph b of the previous *Rules*,<sup>40</sup> stipulates that "[i]tems of evidence tendered before the Commission will be incorporated into the case file as long as they have been received in adversarial proceedings, unless the Court considers it indispensable to duplicate them."<sup>41</sup> The Court has never explicitly invoked this stipulation since it was included in the rules of 2001 nine years ago. The situation is so dysfunctional that the Court has made full factual determinations even when the State has accepted the version of the facts presented by the Commission.<sup>42</sup>

<sup>38</sup> See *Convention*, supra note 2, arts. 46, s. 1 ("Admission by the Commission of a petition or communication [...] shall be subject to the following requirements"), 47 ("The Commission shall consider inadmissible any petition or communication"), 48, s. 1, para. a ("When the Commission receives a petition or communication [...] it shall proceed as follows: a. If it considers the petition or communication admissible").

<sup>39</sup> See generally *Constantine and others Case (Trinidad and Tobago)* (2001), Inter-Am. Ct. H.R. (Ser. C) No.82, at para. 71, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54/doc.4 (2000) 29.

<sup>40</sup> *Rules of Procedures of the Inter-American Court of Human Rights*, 4 December 2003, LXI Ordinary Sess.

<sup>41</sup> *Rules of Procedures of the Inter-American Court of Human Rights*, 28 November 2009, LXXXII Ordinary Sess., art. 57, at para. b [*New Rules or Rules*].

<sup>42</sup> For example, in the cases *Goiburú and Vargas Areco v. Paraguay* the government accepted the facts presented by the Commission. The Court established that the dispute over these facts had ended. However, it required the parties to produce testimonial, witness, and documentary evidence about the undisputed facts that had already been determined by the Commission and recognized by the State. *Vargas Areco v. Paraguay* (2006), Inter-Am Ct. H.R. (Ser.C) No. 155, *Annual Report of the Inter-American Court of Human Rights: 2006*, at 14 online: Inter-Am. Ct. H.R.

This duplication of procedures on the part of the Court generates unnecessary financial, human, and time expenditures in a system that already lacks resources for all three. This problem, which has been reproduced since the Court processed its first contentious case over 20 years ago, has been aggravated since 2001, given the increase of cases that go before the Court, the autonomous representations of the victims, and the greater emphasis that has been placed by the Court on the factual determinations. With the *New Rules*, which substantially limit the Commission's participation, it remains to be seen if the tribunal can strike a balance between the non-repetition of production of evidence and establishing a clear judicial record.

#### F. A System with a Low Level of Compliance with its Decisions

Once the Commission renders a decision on petitions finding human rights violations, it makes recommendations to the State to resolve the situation. Said recommendations may be contained within the agreements reached in friendly settlement procedures or in merits final reports.<sup>43</sup> The level of compliance with these recommendations is far from ideal. Almost 60 % of the IACHR's recommendations contained in merits reports are never carried out. Just under 40 % are partially complied with. In contrast, there has not been a total failure to comply with any agreement reached through friendly settlement. In fact, approximately 85 % of these agreements have had to be partially complied with.<sup>44</sup>

The situation is similar with the Court. The tribunal reports that 81 % of compensatory aspects of its sentences are totally or at least partially complied with.<sup>45</sup> However, the ex-President of the Court has said that only 11.57 % of the cases resolved have met total compliance, allowing the Court to close these cases.<sup>46</sup>

In any case, these data should not be used to judge the effectiveness of the system of petitions or individual cases. The degree of compliance with recommendations or decisions is one element to take into consideration. It is more important to analyze the total impact of the system to advance its objectives of protecting and promoting human rights.<sup>47</sup>

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<<http://www.corteidh.or.cr/docs/informes/20063.pdf>>; *Goiburú and others vs. Paraguay (2006)*, Inter-Am. Ct. H.R. (Ser. C) No. 153, *Annual Report of the Inter-American Court of Human Rights: 2006*, at 30, online: Inter-Am. Ct. H.R. <<http://www.corteidh.or.cr/docs/informes/20063.pdf>>.

<sup>43</sup> See *Convention*, *supra* note 2, arts. 49, 51.

<sup>44</sup> OAS, Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights: 2006*, OR OEA/Ser.L/V/II.127/Doc.4, rev. 1 (2007), c. 3.

<sup>45</sup> OAS, Inter-American Court of Human Rights, *Annual Report of the Inter-American Court of Human Rights: 2008*, at 75, online: Inter-Am. Ct. H.R. <<http://www.corteidh.or.cr/docs/informes/eng2008.pdf>>.

<sup>46</sup> See the Summary of Paolo Carroza, *Presentation of the 2007 Annual Report of the Inter-American Commission on Human Rights to the Committee on Juridical and Political Affairs of the Permanent Council of the Organization of American States* (Washington, D. C., 2008), online: Inter-American Commission on Human Rights <<http://www.cidh.oas.org/discursos.eng.htm>>; and EFE, "Sólo el 12% de las sentencias de la Corte Interamericana han sido cumplidas por los Estados" online: Soitu.es <[http://www.soitu.es/soitu/2009/03/30/info/1238450213\\_900885.html](http://www.soitu.es/soitu/2009/03/30/info/1238450213_900885.html)>.

### G. Increase in the Number of Cases Filed with the Court

In the last decade the number of cases that the IACHR has remitted to the Court has increased by 190 %, from 20 cases in the period 1997/2001 to 58 between the years 2002-2007. Recently, the IACHR has indicated that “in the past two decades, the Commission has submitted a total of 114 cases to the Court, more than half of these cases (65) submitted from the year 2003 to the present.”<sup>48</sup> Obviously, these figures need to be contextualized, since the percentage of complaints that are presented to the Commission and eventually end with a Court sentence has remained at a constant figure of hardly 1 %.<sup>49</sup>

In conclusion, speaking of individual petitions or of the Inter-American *amparo* is really a discussion on a system with at least three different levels of protection, with a tendency toward an increase in the number of petitions, with a slow timeline for processing them, with a low level of compliance with recommendations from the Commission, and with a tendency toward judicialization.

## II. The Regional Human Rights Situation as a Point of Departure

Discussions on the evaluation, reform, and perfecting or strengthening of the Inter-American system cannot take place without considering the historical context and human rights needs and challenges that arise within each time period. Although many times the terms “evaluation,” “reform,” “perfecting,” and “strengthening” are used interchangeably,<sup>50</sup> they have very different meanings and serve different purposes, coming from different positions on the current and future value of the Inter-American human rights system. To speak of evaluation and reform generally implies that the Inter-American system is not carrying out its functions adequately, presupposing either that the system continues operating under the logic of dealing mostly with States under dictatorship or that the system does not adequately guarantee the “rights” of States that appear before the Commission and Court. For this reason, the “evaluation” and “reform” of the system generally are proposed to limit in one way or another the power of the Inter-American Commission. On the contrary, “improving” and “strengthening” are generally used to convey that the system is largely perceived as legitimate and effective, and that it would be possible to adopt measures to make States comply with the decisions of the organs of the Inter-American system, to incorporate Inter-American norms within the domestic arena, to

<sup>47</sup> See Ariel Dulitzky, “The Inter-American Commission On Human Rights” in Katya Salazar & Thomas Antkowiak, eds., *Victims Unsilenced: The Inter-American Human Rights System And Transitional Justice In Latin America* (Washington, DC: Due Process of Law Foundation, 2007) 129.

<sup>48</sup> *IACHR 2007 Annual Report*, *supra* note 9 at c.1.

<sup>49</sup> See Víctor Abramovich, “De las violaciones masivas a los patrones estructurales: nuevos enfoques y clásicas tensiones en el Sistema Interamericano de Derechos Humanos” (2009) 63 *Revista Derecho PUC* 37 [Abramovich].

<sup>50</sup> For an example of the indiscriminate use of these terms, see OAS, General Assembly, 7<sup>th</sup> Sess., *Evaluation and Improvement of Workings of the Inter-American System for the Promotion and Protection of Human Rights*, OR OEA/AG/RES.1488 (XXVII-O/97) (1997).

facilitate broader access and participation for victims, to increase its budget, and, of particular interest to this piece, to further “judicialize” the system. Yet, almost dogmatically, the “improvement” and “strengthening” positions are opposed in any initiative to reform the *Convention*.<sup>51</sup>

One constant throughout the last 20 years has been that State proposals regarding changes to the system have been volatile and contingent on a number of factors. Generally speaking, these proposals reflect individual reactions of State representatives, rather than coherently-articulated State policies. Many have tended to arise in response to an IACHR decision or report, or, more recently, from a Court’s sentence.<sup>52</sup> There have been few instances in which State proposals for reform have been based on a detailed analysis of human rights realities and needs.

In fact, discussions on the system tend to limit themselves to proposing reforms of the rules of the Commission or Court, or to procedures on admissibility, merits, precautionary measures, the role of the Commission before the Court, etc. In other words, they tend to focus on the procedures rather than on ways to improve the human rights situation in member States or in the region as a whole. In fact, there have been very few if any profound reflections on whether the individual petition system is the best response to meet the human rights needs of the region.<sup>53</sup> These

<sup>51</sup> It is usually argued that, if States are not willing to comply with the Commission’s decisions or to provide the Inter-American organs with a sufficient budget, they also will not be willing to pass reforms to the Convention that would strengthen protective mechanisms. For these reasons, they maintain that now is not the proper time to discuss changes to the *Convention*. It is interesting to note that this position has been maintained throughout the last 10 or 15 years. If it is indeed difficult to empirically demonstrate that there is room for progressive reform at the international level, it would at least signal that Latin America and the Caribbean have been at the forefront of promoting the adoption of the most important and progressive norms during the last decade that contain important mechanisms for international prosecution, such as the *Rome Statute of the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex II, U.N.Doc A/CONF. 183/9 (1998) the adoption of the new *Convention on Forced Disappearances*, *supra* note 14 or the *Convention on the Rights of Persons with Disabilities (CRPD)*, adopted December 13, 2006 G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008, U.N. Doc. A/61/611.

<sup>52</sup> Felipe Gonzalez, “La OEA y los derechos humanos después del advenimiento de los gobiernos civiles: expectativas (in)satisfechas” in Felipe Gonzalez, ed., *Cuaderno de Análisis Jurídicos Serie Publicaciones Especiales: Derechos Humanos e Interés Público No. 11* (Santiago: Universidad Diego Portales, 2001) 147.

<sup>53</sup> The most recent example of the “procedural” position is the proposal that a group of States offered as a dialogue on the functioning of the Inter-American human rights system. The document is divided into three parts: A. Proposals to the Commission on modification of the current rules and regulations, which lists the following: 1. Necessity of establishing time limits in the IACHR; 2. Filing of petitions; 3. Obligation to individualize and name the alleged victims to effect admissibility of petitions before the IACHR and of complaints before the Court; 4. Establishment of admissibility and background; 5. Precautionary measures; 6. Thematic hearings; and 7. Hearings on petitions or cases. B. Proposals to the Court on: 1. The need to guarantee procedural equality; 2. Obligation to individualize and name the alleged victims, to effect admissibility of petitions before the IACHR and complaints before the Court; and 3. Reparations; and, finally, C. General proposals that do not suggest normative modification, including: 1. The necessity of contextualizing the IACHR’s recommendations; 2. Improving accessibility to the system: Judicial assistance for Victims; 3. Strengthening of the advisory capacity of the Court; 4. Hearings with the participation of experts and witnesses; 5. Processing friendly settlements; 6. Functioning and financing of the system; 7. Principle of subsidiarity in relation to an action aimed at obtaining reparation; and 8. Diffusion of the system. Only in the last section are there

debates on the Inter-American system usually also mention, but do not find a solution to, the triad of problems that face the system: budget shortfalls, lack of compliance with Commission and Court decisions, and a lack of universal ratification of Inter-American human rights treaties.

Periodically, in its Annual Report, the Commission evaluates the human rights situation in the Americas. This situation should be the guide to discuss the Inter-American system. Consistently, the Commission indicates that citizen security, social inequality, access to justice, and democratic consolidation are areas which require ongoing attention for their relation to human rights. It highlights the structural weaknesses of democratic institutions, as well as the gaps and contrasts present within the most socio-economically unequal region. It mentions the fragility of the judiciary in the region; the attacks on its independence and impartiality; and problems of unequal access, slow trials, and impunity in cases of serious violations of fundamental rights and of due process. According to the Commission, marginalization and social exclusion continue to characterize the region. It also mentions that intolerable prison conditions, arbitrary detentions, police brutality, and the inequality that affects women, as well as other groups that have traditionally been discriminated against—such as indigenous peoples, Afro-descendants and homosexuals—has also not changed.<sup>54</sup>

If this diagnostic, along with others that may put more or less emphasis on some of the same factors, is correct,<sup>55</sup> it is worth inquiring what type of Inter-

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any brief references to the States' specific needs, such as strengthening the governability or fomenting dialogue between the Commission and national entities. See the note of the delegations of Panama, El Salvador, Brazil, Chile, Peru, Colombia, and Mexico, remitting a document for dialogue between the member States and the members of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights in OAS, Committee on Political and Juridical Affairs, *Results of the Process of Reflection on the Inter-American System for the Promotion and Protection of Human Rights (2008-2009)*, OR OEA/Ser.G/CP/CAJP-2584/08 rev. 8 (2009).

<sup>54</sup> See e.g. OAS, Inter-American Commission of Human Rights, *Annual Report of the Inter-American Commission of Human Rights: 2009*, OR OEA/Ser.L/V/II/Doc.51, corr.1 (2009), c. 1.

<sup>55</sup> For example, in its Annual Report of 2008, Amnesty International indicated that institutional weaknesses continued to perpetuate problems of impunity, denial of equal protection before the law, and police brutality in many Latin American countries, particularly in Central America; *Amnesty International Report 2008: State of the World's Human Rights. Regional Overviews: America*, online: Amnesty International <<http://archive.amnesty.org/air2008/eng/regions/americas.html>>. Human Rights Watch discussed the situation of 10 Latin American countries in its World Report of 2008 (Argentina, Brazil, Chile, Colombia, Cuba, Guatemala, Haiti, Mexico, Peru, and Venezuela). Some of the patterns common to these ten countries are: deplorable prison conditions, weakening of the freedom of expression, corruption, problems associated with lack of judicial independence and violence associated with problems to access of land, elections, narcotrafficking or with the presence of paramilitaries and guerrillas; *World Report 2008*, online: Human Rights Watch <[www.hrw.org/legacy/wr2k8/introduction/index.htm](http://www.hrw.org/legacy/wr2k8/introduction/index.htm)>. The Political Terror Scale (PTS) gave Latin America a score of 2.4 in 2007, on a scale of 1 to 5. This puts the region approximately halfway between levels 2 and 3. Level 2 is assigned to States which have a limited number of detentions for nonviolent political activities, and where torture and beatings, as well as political assassinations, are rare. Category 3 is made up of States that have extensive political detentions or a recent history with these detentions, where political executions and brutality are common, and arbitrary detention is accepted. PTS includes Brazil, Colombia and Guatemala among the 31 worst States with regard to protection of physical integrity; *Political Terror Scale Data*, online: Political Terror Scale <<http://www.politicalterror scale.org/ptsdata.php>>. Transparency International indicated in its Annual



American system is required to overcome these challenges. In other words, a reflection on the system should not be made exclusively from a *procedural* perspective, which focuses on the rules and regulations or how the Commission or the Court processes individual petitions, but from a *substantive* perspective that is attuned to the human rights demands of the region and how to approach them from within the regional system. This requires an analysis of the role of the Inter-American system in a regional political scenario with democratically-elected governments but with grave problems of social exclusion and institutional degradation.

From this perspective, it is necessary to strengthen the ability of the Inter-American system to influence the general orientation, formulation, implementation, evaluation, and supervision of public policies that overcome the weaknesses and structural problems of the region. To achieve this goal, it is necessary to rethink the thematic and jurisprudential agenda of the Inter-American system as well as its institutional design, the coordination and balance between its political and judicial tools, its insertion within the OAS, and its working relationship with the States.<sup>56</sup> To put it briefly, the reflection should transcend the simple analysis of procedural questions in the processing of individual complaints.

### III. A Brief Interlude on the Legalization and *Judicialization* of the Inter-American System

As previously noted, in the last two decades, there has been a strong emphasis placed on the process of the “judicialization” of the system, or in other words, on the central focus placed on the Inter-American *amparo* as an instrument *par excellence* of the system.

In fact, judicialization is part of a wider process that has been dubbed “legalization” in international relations. Legalization, in international relations, is understood as a form of institutionalization along three dimensions.<sup>57</sup> *Obligations*, in the sense that States are juridically related through international rules, and to this end are subject to the rules and procedures of international law, such as those present in the *Convention*. *Precision* in the sense that the rules are clear, defining behavior that is required, authorized, or prohibited. Obligations and precision could explain the preference of a system built around the *Convention* rather than the *Declaration*. Finally, legalization is understood through *delegation* that grants authority to institutions—created by but distinct from States—to implement, interpret, and apply rules, as well as to resolve disputes and, in certain cases, adopt new juridical norms. This dimension could be applied to the Commission, and, more particularly, the

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Report of 2007 that the level of perceived transparency in Latin America is 3.8 on a scale of 0 to 10, where 0 represents the highest level of corruption and 10 the highest level of transparency; *Transparency International's Global Corruption Report 2007*, online: Transparency International <[http://www.transparency.org/regional\\_pages/americas/publicaciones](http://www.transparency.org/regional_pages/americas/publicaciones)>.

<sup>56</sup> Abramovich, *supra* note 49.

<sup>57</sup> See Kenneth W. Abbott *et al.*, “The Concept of Legalization” (2000) 54 *International Organization* 401.

Court, as the institutions created to interpret and apply the *Convention*.

Judicialization could be defined as the manifestation of this latter aspect, when dispute resolutions are assigned to a judicial organ. Some have limited the use of the term “judicialization” to the process by which an administrative entity monitors member States through means that resemble legal procedures. This type of institution functions with a judicialized instrumentation of a formal tribunal, as happens when formal legal opinions are handed down, through the development of “jurisprudence”, the presence of judicial criteria to evaluate evidence or criteria of active or passive procedural standing.<sup>58</sup> This could be the case with the Commission that increasingly adopts a judicial approach to the individual complaints despite the fact that the IACHR is not a judicial body.

The system’s approach to “legalization”/“judicialization” can be analyzed from definitions that are not offered in international relations theory, but from political science. For example, Brinks and Gauri maintain that “legalization” of a particular policy area requires that (i) the case successfully becomes a legal case (legal mobilization), (ii) the case reaches a decision, (iii) the guarantee of its compliance, and, in many cases (iv) some type of post-litigation follow-up. Legalization of politics or of a specific policy occurs once the courts and lawyers are considered important actors and legal categories and legal discourse are prominent in the design and implementation of public policies.<sup>59</sup> This is precisely what is happening, at least in part, within the Inter-American system, where debates on human rights are increasingly rising out of the processing of individual cases in lieu of other mechanisms and, are being shaped in the domain of lawyers who specialize in litigation (representatives of victims, State’s legal bureaucracies, staff of the Secretariats of the Court and the Commission, and judges and commissioners). For instance, in the last 10 years only one Commissioner, Susana Villarán, was not a lawyer.

In the case of the Inter-American system, I apply the term “judicialization” to understand three parallel and complementary processes: (i) an increased emphasis in the processing of cases over other tools within the system such as on-site visits or technical assistance; (ii) a belief that the judicial Inter-American *amparo* is better than the quasi-judicial *amparo* and (iii) an increased understanding that the individual petitions should be handled as a judicial process (particularly by the Commission, a quasi-judicial).<sup>60</sup>

<sup>58</sup> See Edgard Weisban, “Verdictive discourses, shame and judicialization in pursuit of freedom of association rights” in Mecklend-Garcia & Çali Başak, eds., *The Legalization of Human Rights* (New York: Routledge, 2006) 134.

<sup>59</sup> Varun Gauri & Daniel Brinks, “Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights” in Varun Gauri & Daniel Brinks, eds., *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2008) 1.

<sup>60</sup> For example, in the IACHR’s Report, OAS, Inter-American Commission on Human Rights, *Access to Justice as a Guarantee of Economic, Social, and Cultural rights. A Review of the Standards Adopted by the Inter-American System of Human Rights*, OR OEA/Ser.L/V/II.129/Doc.4 (2007), the Commission indicates that it “elaborated this study with the goal of revising and systematizing the jurisprudence of the Inter-American System of Human Rights, as much the IACHR as the Court [...] on

The type of judicialization of most concern is the concentration of the IACHR's resources and time in the processing and resolution of individual cases.<sup>61</sup> Faced with non-full-time commissioners who only meet three or four times per year, the concentration on cases leaves the Commission and its Secretariat with very limited time for the development of its political and promotional functions. Additionally, these cases become one of the Commission's main, if not only, sources of information on the human rights situation. This is especially problematic because individual cases do not necessarily address structural problems. Many collective demands cannot be litigated given the general lack of action such as class action cases or collective *amparos*. The cases also only reflect the interests of the organizations that come before the Inter-American system and that know how to deal with another aspect of "judicialization" (the strictest application of procedural and judicial criteria). Finally, many times the focus on the processing of cases limits the possibility or is invoked to facilitate the limitation of the Commission's involvement in current events or in general debates or public policies, since it could mean a pre-judgment on a case that could eventually reach the IACHR.<sup>62</sup>

#### IV. The Need to Centralize Human Rights Within the OAS

The Inter-American human rights system is a mechanism that operates within a regional intergovernmental organization. For this reason, the member States collectively and the OAS as an institution should integrate a human rights perspective in a more systemic, coherent, and prominent way.<sup>63</sup> The Secretary-General of the

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four central themes that it has prioritized with respect to judicial protection" [emphasis added] [translated by author].

<sup>61</sup> Some have called attention to the risks that *legalization* and *judicialization* may pose, especially through the phenomenon of *overlegalization* that occurs when substantive rules of a treaty or the processes inherent to international monitoring of obligations outlined in human rights instruments are too invasive to States' sovereignty, which leads governments to fail to comply with international supervisory organs, or they may go as far as withdrawing from or denouncing the treaty at hand. In other words, expensive interpretations by international organs that expand the reach of treaties could demand profound changes in domestic practices and legislation. This could provoke internal opposition to compliance with such interpretations and even pressure to modify or denounce the treaty. Two examples that illustrate this phenomenon within the Inter-American system are: 1) the withdrawal of the contentious jurisdiction of the Court by the government of Peru under Alberto Fujimori, after the Court had resolved a few cases on terrorism and that the Commission had remitted to the Court the complaints on the situation of the television channel belonging to regime opponent Baruch Ivcher and the removal of independent judges from the Peruvian Constitutional Tribunal, and 2) the denouncing of the Convention on the part of Trinidad and Tobago upon seeing itself judicially complained against before the Court for its way of regulating and applying the death penalty. See Laurence R. Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes" (2002) 102 *Colum. L. Rev.* 1832. I agree with the conclusions on the risks inherent to excessively legalizing the mechanism for protection of rights, although not with the examples used to illustrate this point, and neither with the idea that a stronger concern should be placed on the dangers of being too invasive to State's sovereignty.

<sup>62</sup> See Abramovich, *supra* note 49. See also *infra*, note 101 and accompanying text.

<sup>63</sup> I will leave for another opportunity a reflection on if, within the next fifty years, the OAS and the Inter-American human rights system will continue to be the regional forum *par excellence* with regard to human rights. It is worth briefly mentioning a few initiatives that could be indicative of either new regional trends alternative to the role of the OAS with regard to human rights or, on the contrary,

OAS has noted that “[a]s far as the Secretary General is concerned, in line with the mandates of the Presidential Summits and the OAS General Assemblies, I have included the area of human rights as one of the four programmatic themes of the hemispheric agenda, which will orient its work during the remainder of the term.”<sup>64</sup> However, this and other similar manifestations do not translate in the daily operation or in the strategic short-, medium-, or long-term work agenda of the different Inter-American organs, nor in the collective OAS actions.

Normatively, Article 2 of the *Charter of the Organization of American States* does not include the defense or promotion of human rights as part of the Organization’s “essential purposes.”<sup>65</sup> If the effective promotion and protection of

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expressions of subregional complementarity to regional Inter-American mechanisms. For example, the Andean Presidential Council adopted the *Andean Charter for the Promotion and Protection of Human Rights*, Bolivia, Columbia, Ecuador, Peru and Venezuela, 26 July 2002, online: UNHCR <<http://www.unhcr.org/refworld/docid/3de4f94a4.html>>. The *Charter* declares that it “is the first comprehensive manifestation of the Andean Community on the subject of human rights in the Community sphere, and that it complements national, international, and universal regulations thereon” (Article 63) and States indicate that “[t]hey shall cooperate actively with the United Nations and Inter-American systems for the protection and promotion of human rights, and foster cooperation between both systems” (Article 82). However, it leaves the door open, since “[t]hey agree to promote the principles and objectives of the *Andean Charter for the Promotion and Protection of Human Rights* through the mechanisms mentioned in this section, without prejudice to the future incorporation of other follow-up ways and means through the pertinent Community channels” (Article 86). The XI Reunion of the High-Level Authorities in Human Rights of MERCOSUR and Associated States approved a proposal for the creation of a Human Rights Public Policy Institute for MERCOSUR. This project has been brought to the Common Market Council for its final consideration. The Institute, according to the adopted proposal, will arrange the design of and compliance with public policies related to the subject matter. It would be designed to provide technical assistance to the States. The institution’s activities should “be complementary to the efforts of the various actors operating within the region” (Preamble). See “MERCOSUR Human Rights Public Policy Institute” *INTAL Monthly Newsletter* (June 2008), online: INTAL <[http://www.iadb.org/intal/articulo\\_carta.asp?tid=5&idiom=a=eng&aid=448&cid=234&carta\\_id=759](http://www.iadb.org/intal/articulo_carta.asp?tid=5&idiom=a=eng&aid=448&cid=234&carta_id=759)>. In 1997, the Heads of State of the Caribbean Community (CARICOM) approved a *Charter of Civil Society* that enumerated a series of rights and established a system of reporting to CARICOM on the implementation of the *Charter* in every country. The Caribbean Court of Justice, also created under CARICOM, has jurisdiction of appeal over the majority of the Caribbean countries and the mandate to unify the interpretation of the advisory norms of CARICOM; *Charter of Civil Society for the Caribbean Community*, online: <<http://actrav.iticilo.org/actrav-english/telearn/global/ilo/blokit/caricha.htm>>. The President of the Supreme Court of Venezuela, Magistrate Luisa Estella Morales Lamuña, in the IV Summit of Presidents of Judicial Powers of the Union of South American Nations (Unasur), which took place in Cartagena de Indias, Colombia, from August 26-29 of 2009, proposed the creation of a Tribunal to promote, protect, and enforce human rights in the region. See “Presidenta del TSJ expresó necesidad de crear Tribunal Regional de Derechos Humanos” online: Supreme Court of Venezuela, <<http://www.tsj.gov.ve/informacion/notasdeprensa.asp?codigo=7119>>. Many have analyzed the recently-concluded Summit of Unity, which took place in Rivera Maya, Mexico, as the embryo for the birth of a new regional organization. See e.g., Alberto Najjar, “Cumbre de Cancún: ¿Adiós a la OEA?” (22 February 2010), online: BBC Mundo <[http://www.bbc.co.uk/mundo/americas\\_latina/2010/02/100222\\_0950\\_mexico\\_cumbre\\_rio\\_sao.shtml](http://www.bbc.co.uk/mundo/americas_latina/2010/02/100222_0950_mexico_cumbre_rio_sao.shtml)>.

<sup>64</sup> José Miguel Insulza, Address (Secretary General of the Organization of American States in the Inaugural Session of the 127th Period of Sessions of the Inter-American Commission on Human Rights, 26 February, 2007) online: OAS <[http://www.oas.org/en/media\\_center/videos.aspxCodigo=07-0032](http://www.oas.org/en/media_center/videos.aspxCodigo=07-0032)> [translated by author].

<sup>65</sup> These essential purposes are: a) to strengthen the peace and security of the continent; b) to promote and consolidate representative democracy, with due respect for the principle of nonintervention; c) to

these rights is effectively among the priorities of the region, the text of the *OAS Charter* should be modified to include this promotion and protection of human rights as one of the central goals of the Organization. In fact, the normative lacuna is indicative that the OAS was not created to be and does not act as a regional organization to protect or promote human rights. Also, this explains why, in many aspects, the Commission and the Court are so marginalized within the OAS. In the same sense, given that the central organs of the system are the Court and Commission, the *OAS Charter* should include the Court to fill the gap, as the *OAS Charter* currently only recognizes the Commission.<sup>66</sup> This would mean that the Court is an integral part of the OAS and it is a collective duty of all OAS member States to enforce its judgments but not that the Court has full jurisdiction over all member States of the OAS.

The principal source of effectiveness, legitimacy, and credibility of the Inter-American system is the independence and autonomy of the Commission, the Court, and its respective Secretariats. The process of judicialization requires that the organs that handle individual petitions act with independence and impartiality. Obviously, independence and autonomy are also essential for the development of the political/promotional activities of the Commission. Impartiality, independence, autonomy, and technical expertise are important elements in the development of its activities in the matters of cooperation, technical assistance, promotion, and supervision with relevant political and social actors of the different countries. For this reason, the OAS should guarantee the independence and impartiality of the IACHR and Court as well as the financial and administrative autonomy of their Secretariats. At the same time, the OAS should adopt a more transparent process for the selection of commissioners and judges that assures that members that arrive at the Commission and Court are the most capable and qualified.<sup>67</sup>

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prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the member States; d) to provide for common action on the part of those States in the event of aggression; e) to seek the solution of political, juridical, and economic problems that may arise among them; f) to promote, by cooperative action, their economic, social, and cultural development; g) to eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere; and h) to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the member States. *Charter of the Organization of American States*, 30 April 1948, O.A.S.T.S. Nos. 1-C & 61, 119 U.N.T.S. No. 1609 (entered into force 13 December 1951), art. 2 [*OAS Charter*].

<sup>66</sup> Articles 53 and particularly 106 of the *OAS Charter*, *ibid.*, only refer to the Inter-American Commission on Human Rights. There is no explicit reference to the Court in the *OAS Charter*.

<sup>67</sup> The actual system for naming judges and commissioners is as follows: nomination of up to three candidates by the States (members of the OAS for the Commission and parties to the Convention for the Court), followed by election by the General Assembly (with votes from all member States in the case of the Commission and only States parties to the Convention for the Court). Both nomination and election lack transparency and control. At the domestic level, States enjoy complete and absolute discretion with respect to the system of nomination that they adopt. The *OAS Charter*, the *Convention*, and the *Statutes* of the Commission and the Court do not say anything about the domestic nomination process; *Statute of the Commission*, *supra* note 13; OAS, General Assembly, 9<sup>th</sup> Sess., *Statute of the Inter-American Court of Human Rights*, OR OEA/Ser. P/II.0.2 (1979). The OAS has not established any criteria on the nomination procedures at the domestic level, nor does it require States to indicate which mechanism they have used. At the moment of election, at the international level, the OAS only utilizes the perfunctory Resolutions AG/RES.2120 XXXV-O/05 that invites “to consider the possibility

More than just a normative change, it is required that the OAS itself centralize its work on human rights. If the budget reflects the political priorities of the OAS, then the promotion and protection of human rights is only 5 % of those political priorities. If what the Secretary General has indicated is true, that human rights make up one of the four central themes in the programmatic agenda of the hemisphere, then 25 % of the Organization's budget should go toward the Inter-American human rights system. Likewise, the external fundraising efforts of the OAS should also reflect this centrality. By providing limited financial resources, the OAS conditions the functioning of the human rights system in a highly political way. It is not only that the OAS does not provide enough resources to hire more lawyers or have more sessions; it also affects the work the system is able to carry out. The processing of the individual petitions is less costly than the permanent or frequent presence of the Commission in the OAS countries, or the development of stable and sustainable technical assistance programs. At the same time, this lack of resources creates tensions in decisions on how to use the few resources that the IACHR and Court have. If the Commission is not able to hold more sessions, should it grant more hearings to hear arguments on individual cases or on general human rights situations? Should the IACHR hire more lawyers to deal with the backlog and problems of procedural delay indicated above, or more personnel to make economic, social, political, or anthropological analyses that would allow it, in turn, to make better, more precise diagnostics on domestic and regional human rights realities? The latter would also allow the Commission to design proposals for the elaboration, adoption, implementation, evaluation, and investigation of public policies from the Inter-American human rights perspective.

Placing the human rights agenda at the center of the activities of the OAS would require more cooperation between the IACHR and the key areas functioning within or under the auspices of the OAS, such as the Inter-American Committee

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of organizing consultations with civil society organizations in order to help propose the best candidacies for positions with the Inter-American Commission and the Inter-American Court of Human Rights" and asks the Secretary General to "publish the corresponding candidate's curriculum vitae on the OAS website."; OAS, General Assembly, 4<sup>th</sup> Sess., *Presentation of Candidates for Membership of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights*, OR OEA/AG/RES.2120 (XXXV-O/05) (2005). However, there is no space that allows for the questioning of the suitability of the candidates for each position, for them to be able to make public presentations on their positions and qualifications in the area of human rights, for them to be questioned by the States, nor for States to express which criteria have been used to evaluate and support candidates. International mechanisms for judge selection generally suffer from the same problems, but there are incipient advances in mechanisms provided for the selection of judges for the International Criminal Court and the European Court of Human Rights. These mechanisms are meant to increase transparency and ensure the quality of those who are part of the international judiciary. See Neil Falzon, Matthias Goldmann & Ketevan Khutsishvili, eds., *Nomination and Election of Judges to International Courts: A Comparative Study* (Brussels: The European Law Students' Association Legal Research Group, 2002); Jutta Limbach et al., *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (London: Interights, 2003); Ruth Mackenzie & Phillippe Sands QC, "Judicial Selection for International Courts: Towards Common Principles and Practices," in Kate Malleson & Peter Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006) 21. In fact, the mechanism that has been established by the IACHR for the election of Special Rapporteurs, Resolution 04/06, could be a model for consideration by the OAS.

against Terrorism, the Executive Secretary for Integral Development, the *Mechanism for Follow-Up on Implementation of the Inter-American Convention Against Corruption*,<sup>68</sup> Meeting of Ministers of Justice, and Attorneys General of the Americas (REMJA), to name a few. Although these institutions or meetings include human rights issues in their mandates, rarely do they interact with the IACHR, and neither do they take the case law developed by the Court seriously.

For example, one of the means of monitoring the *Convention of Belém do Pará* on violence against women is through the *Mechanism for Follow-Up on Implementation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (MESECVI)*. This Mechanism's statute establishes that the Secretariat should be made up of the Permanent Secretariat of the Inter-American Women's Commission and "with the assistance, when necessary, of the Inter-American Commission of Human Rights (IACHR)".<sup>69</sup> However, the *Method for Evaluation of and Follow-Up on the Implementation of the Provisions of the Convention of Belém do Pará*, approved by States parties, does not foresee any formal role for the IACHR as a source of information, as a technical assistant for evaluation, or for monitoring the implementation of the recommendations.<sup>70</sup> Normatively, it is assumed that there would be a relationship between the States and the IACHR, but in practice, the OAS and its member States do not implement the central role that the IACHR should have in putting the human rights perspective in practice.

The same can be said for the Inter-American Council for Integral Development (CIDI). According to its *Statute*, "it is an organ of the Organization of American States (OAS) that directly answers to the General Assembly, with decisive powers in the subject of solidarity and cooperation for integral development. It also constitutes a forum for Inter-American dialogue on matters of interest in the hemisphere in this area." It has "as an end goal to promote solidarity and cooperation among member States to support integral development, and in particular to contribute to the elimination of poverty" and "it carries out its objectives through the *Strategic Plan for Partnership for Integral Development and Solidarity*." However, the *Strategic Plan for Partnership for Integral Development and Solidarity 2006-2009 (Plan)* only mentions human rights in the following point: "To contribute to member States' efforts to develop educational materials on the matters of democracy and human rights, including women's human rights." This approach highlights the fact that the OAS has still not developed a human rights perspective on integral development.<sup>71</sup> Additionally, the Executive Secretary of Integral Development, who coordinates activities of cooperation among the different departments and other

<sup>68</sup> OAS, General Assembly, 3rd Sess., *Mechanism for Follow-Up on Implementation of the Inter-American Convention Against Corruption*, OR OEA/AG/RES.1784 (XXXI-O/01) (2001).

<sup>69</sup> OAS, General Assembly, 4th Sess., *Mechanism for Follow-Up on Implementation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, "Convention of Belém do Pará"*, OR OEA/AG/RES.2371 (XXXVIII-O/08) (2008), art. 5.4.

<sup>70</sup> OAS, Committee of Experts on Violence, *Method for Evaluation of and Follow-Up on the Implementation of the Provisions of the Convention of Belém do Pará*, OR OEA/Ser.L/II.7.10/MESECVI/CEVI/Doc.7/05 rev.1 (2005).

<sup>71</sup> Of course, it is important to keep in mind that development and respect for human rights, though they may be interrelated, are not the same.

dependencies of the General Secretary who deal with this *Plan*, has never developed activities in conjunction with the IACHR, nor has it sought the Commission's advice. It has also never invited the Commission to any of its meetings.

REMJA also serves as an example of the lack of strategic vision of the Inter-American organs. At a meeting of the Attorneys General and Ministries of Justice there is no doubt that human rights issues should and are on their agendas. However, there is no evidence that REMJA has ever included the Inter-American Commission in a discussion on the administration of justice, judicial issues, or related matters.

Finally, the seriousness and credibility of the OAS as a whole and of each member State depends on the integration and full participation of all member States in the human rights system. The OAS should encourage, and ideally require, its member States to be parties to the *Convention* and accept the jurisdiction of the Court. In other words, the Inter-American *amparo* should be a recognized right of all residents of the OAS member States. This would require the creation of sufficient incentives so that, within a reasonable time frame, all member States would become parties to the *Convention* and would be under the jurisdiction of the Court.<sup>72</sup> For example, the year 2019—almost eight years from now and fifty years after the adoption of the *Convention*—could be an appropriate time for general ratification of the *Convention* and acceptance of the jurisdiction of the Court. To achieve this ambitious goal, the Commission and General Secretary should design a strategic plan, together with the States, to support them and provide them with incentives throughout this process. Perhaps at the end of this suggested time frame for full participation in the human rights system, the OAS should consider whether those States that have not adhered to the central human rights treaty should still be part of the Organization,<sup>73</sup> or if they can enjoy the same rights as the States that do fully participate in the Inter-American system.<sup>74</sup>

The States that have still not ratified the *Convention* nor accepted the jurisdiction of the Court could be required to periodically inform the Permanent Council, the Secretary General, and the Commission of the status of legislation and practice of rights protected through the *Convention*, indicating in what ways they either have implemented or propose to implement any of the provisions of the *Convention*. They should also indicate the steps they have taken toward ratification of the *Convention*, as well as the difficulties that impede or delay ratification and

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<sup>72</sup> This is the system that is used within the European Council, where full acceptance of the European Convention on Human Rights, including acceptance of the jurisdiction of the European Court of Human Rights, is a condition for the admission of new States to the European Council. See Peter Leuprecht, "Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?" (1998) 8 *Transnat'l L. & Contemp. Probs.* 327.

<sup>73</sup> The exclusion from the OAS of important countries due to the non-ratification of the *Convention* is not only a political impossibility in current conditions, but it could also be harmful for protection of human rights and put the existence of the OAS itself in risk. Precisely for this reason, all possible mechanisms and incentives should be used to fully integrate said States in the regional human rights system.

<sup>74</sup> For example, this could stop said States from nominating members to the IACHR or to participate in elections for commissioners or judges – in a case in which the State has ratified the *Convention* but has not accepted the Court's jurisdiction.



measures that have been adopted to overcome these obstacles.<sup>75</sup> The Commission should then elaborate a working plan, including technical assistance, to facilitate the process of ratification and acceptance of the jurisdiction of the Court.

## V. Links Between the Protection of Democracy and the Defense of Human Rights

The *Inter-American Democratic Charter* clearly points to the inter-relationship between democracy and human rights.<sup>76</sup> In practice, however, the OAS has limited itself to the application of mechanisms to defend democracy outlined in the *OAS Charter* and in the *Democratic Charter* on the exercise of the right to vote (origins of the democratic system), but not on the overall quality of democracy. This is dangerous for two clear reasons. On the one hand, it gives international legitimacy to governments with hints of authoritarianism that comply with basic democratic requirements, but only in a formal way. On the other hand, it prohibits the democratic clause from being understood and interpreted as the fundamental axis around which governments should act to protect and guarantee all the rights espoused in the Inter-American system.<sup>77</sup>

It is of fundamental importance to link the reactionary mechanisms of the Organization before the crisis of democratic governability with the full guarantee of human rights. Particularly, grave and systematic violation of human rights and consistent, repeated failure to comply with the decisions of the Inter-American human rights system should be recognized as disparaging elements of the mechanisms for protection of democracy that are included in the *Democratic Charter*. At the same time, in order to avoid worsening a crisis that often unfolds with institutional degradation or generates political violence, the *Democratic Charter* should establish a preventive mechanism to react to the calls to attention and early warnings that the Commission issues.

Lastly, it is essential to give the IACHR the capacity to activate the mechanisms of institutional protection of democracy as outlined in the *Democratic Charter* (Articles 18 and 20). This would not only grant more credibility and

<sup>75</sup> This proposed system is similar to the mechanism outlined in Article 19 of the *Constitution of the International Labor Organization with respect to international labor conventions*. International Labour Organization, *Constitution of the International Labour Organisation*, art. 19, 1 April 1919, online: UNHCR <<http://www.unhcr.org/refworld/docid/3ddb5391a.html>>.

<sup>76</sup> OAS, General Assembly, 4<sup>th</sup> Session, *Inter-American Democratic Charter*, OR OEA/AG/RES.1838 (XXXI-O/01) (2001) [*Democratic Charter*]. Article 3 of the *Democratic Charter* establishes that essential elements of representative democracy, among others, are the respect of human rights and fundamental liberties. Article 7 says that democracy is indispensable to the effective exercise of fundamental liberties and human rights, through its universal, indivisible, and interdependent character, written in the States' respective constitutions and in Inter-American and international human rights instruments.

<sup>77</sup> Even before the adoption of the *Democratic Charter*, the limitation of the IACHR's role and the governability crisis were criticized. See Juan Méndez & Gastón Chillier, "La Cláusula Democrática y el Derecho Interamericano", online: Universidad Diego Portales <[http://www.udp.cl/derecho/publicaciones/clausula\\_demo.pdf](http://www.udp.cl/derecho/publicaciones/clausula_demo.pdf)>.

independence to this mechanism; it would also introduce a means by which to analyze the democratic quality of our countries, through a human rights perspective.<sup>78</sup>

## VI. New Roles for the Commission and Court

The reform of the rules and regulations of the Commission and Court in the year 2001<sup>79</sup> affected the various areas of the system. To name a few: a larger number of cases were sent to the Court; there was greater autonomous participation of victims before the Court; there was an exponential increase in the area of Inter-American jurisprudence; a larger number of decisions on admissibility from the Commission, and a decrease in number of published final reports by the Commission. There has been an overall decrease in the total number of cases that reach final decision in the system. In sum, “judicialization” has not brought a rise in productivity in the processing of the Inter-American *amparo*.<sup>80</sup> The reforms to the rules and regulations of the year 2009 have fundamentally changed the role that the Commission plays in contentious cases before the Court, but not the nature of its work or the focus on individual cases.

Aside from the many virtues that can be attributed to the process of “judicialization,” it has not been able to give an adequate response to the demands of wide sectors of the population, as the human rights situation in the region shows. Nor has it taken advantage of all the spaces that democratic societies have offered.

### A. The Proposal for Reform

To fix the dysfunctional aspects, but fundamentally to make the Inter-American system more effective, efficient, and to have more presence in domestic political processes, there is a need to free time and necessary resources of the Commission to allow it to be able to focus more heavily on its political and promotional activities. In order to accomplish this goal, the procedural aspects of the *Convention* must be reformed. The reformed *Convention* should more clearly establish the division of duties between the Commission and Court in the matter of the processing of individual complaints.

In this new conventional model, the Commission would be exclusively an organ of admissibility and friendly settlements, and the Court would be in charge of

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<sup>78</sup> States rejected the proposal to include the Commission as one of the bodies that would oversee the implementation of the *Democratic Charter* and implement its protective mechanisms. See Andrew F. Cooper & Thomas Legler, *Intervention without Intervening? The OAS Defense and Promotion of Democracy in the Americas* (New York: Palgrave MacMillan, 2006) at 152.

<sup>79</sup> The reforms in rules and regulations for the Commission and Court came into force in the year 2001. For all of them, see Veronica Gomez, “Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: New Rules and Recent Cases”, (2001).1 Human Rights Law Review 111

<sup>80</sup> By this, I do not mean to imply that productivity should be the parameter *par excellence* by which to measure the effectiveness of the system.

gathering and receiving evidence and deciding on factual and legal matters. The Commission, in addition to its tasks outside of the case system, would be limited to approving reports on admissibility and to opening a stage of friendly settlements.<sup>81</sup> The production of evidence before the IACHR would be strictly limited to aspects of admissibility. Its decision on the admissibility of a petition would be final and unable to be appealed before the Court, and the Court would not have jurisdiction to review them.

The conciliatory phase, or that of friendly settlement, should have a pre-determined time frame, of six months, for example, which could be extended only by agreement between the petitioners and the respective State.<sup>82</sup> If the matter is resolved, the Commission would publish a report, as it currently does. If the friendly settlement fails, the case would automatically go to the Court without the Commission preparing a complaint or becoming a complainant. Most importantly, the Commission would send the case to the Court without making any determination of fact or law on the matter. Once the case reached the Court, the dispute would be between the alleged victim and the respective State. The Commission would not play the role of litigant, but only as the principal organ of the Organization that represents States and as an assistant in the search for justice. In this regard, the Commission should have the right to question the parties (States and victims). In this way, it could help the Court rule on the essential points in the dispute and contextualize the structural dimensions of a case. It should also be possible for the IACHR to be able to interrogate witnesses and experts. Given that the Court only decides on alleged and proven facts, and that these are essential for the determination of the amount, form, and mode of reparations, the Commission should be able to question those who inform the Court on these aspects. Later the IACHR should be able to present its views, legal opinion, and proposed solution for the Court's consideration.<sup>83</sup>

The *New Rules* of the Court partially and inconsistently adopt certain proposals, outlined here. On one hand, they establish that the Commission is no longer required to present a complaint. It is only required to file its Article 50 report. The *New Rules* also do not require the Commission to represent victims who do not have a legal representative. The *New Rules* created the Inter-American Public

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<sup>81</sup> Other articles of this special edition discuss specific procedures in detail.

<sup>82</sup> In fact, the *Statute of the Commission*, in Article 23, point b, states that: "If the friendly settlement referred to in Articles 44-51 of the *Convention* is not reached, the Commission shall draft, within 180 days, the report required by Article 50 of the *Convention*." I am not aware of any case in which the Commission has applied this article. *Statute of the Commission*, *supra* note 13.

<sup>83</sup> This proposal would be similar to that of the Advocate-General of the Court of Justice of the European Communities. First, the IACHR would not act as a party. The Advocate-General is considered integral to the European Court of Justice. In our proposal, the Commission would be considered a conventional organ distinct from the intervening parties. Second, it would not be the responsibility of the Commission – as it is not the responsibility of the Advocate-General – to prove facts or produce witnesses, experts, or documentary evidence. Third, the Commission would act impartially and independently as an organ of the OAS – like the Advocate-General – but not as a complainant. Fourth, the Commission would be able to question parties on facts and law. Finally, in a way similar to that of the Advocate-General, it would present its conclusions for the Court's consideration. See generally, Noreen Burrows & Rosa Greaves, *The Advocate General and EC Law* (Oxford: Oxford University Press, 2007) at 19-30.

Defender to assist victims who lack legal representation to appear before the Court.<sup>84</sup> The *New Rules* also limit the Commission's ability to present and interrogate witnesses, since it can only question experts about prior authorization from the Court and only if it is relevant to the Inter-American public order.

The Court's *New Rules* reaffirm the role of the Commission as a body of the system rather than as a litigant. Article 51 of the *New Rules* establishes that the oral hearing will be open by the IACHR<sup>85</sup> and it will also conclude with the Commission's presentation. The *New Rules* indicate that, upon submitting a case, the Commission should give its reasons for bringing the case to the Court (Article 35.1.c),

<sup>84</sup> The *New Rules* of the Court neither explain nor develop any standard on the Inter-American Public Defender. They do not explain who would be able to fill this position, who would cover its costs, to which professional ethics norms it would be subject, nor the pertinent disciplinary mechanism. Nor do they determine when the Inter-American Public Defender would be elected, what would happen if, during the two-month period given to present its statement, the Defender has not yet been chosen, or if it has not had sufficient time to digest the case. In September of 2009, the Court made an agreement with the Inter-American Association of Public Defenders (Asociación Interamericana de Defensorías Públicas or AIDEF), with the objective of "providing free legal assistance to alleged victims who lack economic resources or legal representation to appear before the Inter-American Court of Human Rights." [translated by author]. The agreement specifically develops a mechanism for the naming of an Inter-American Public Defender as a representative of victims who lack legal representation. In fact, it was recently reported that 35 of the public defenders who belong to AIDEF would be trained by the Inter-American Court of Human Rights in "techniques for litigation before the Court" in a series of seminars that would take place at the tribunal. See "Propician actividades académicas en la Defensa Pública" *El país* (28 February 2010), online: <<http://www.elpais.cr/articulos.php?id=20035>>. Aside from the potential conflicts of interest, roles, and appearance of lack of impartiality that could arise out of the fact that the tribunal would be training public officials to litigate against the States, agreements and this training program seem to indicate that the States' public defenders would be the ones to fill the position of the Inter-American Public Defender. If this were so, many questions would arise immediately. How can a State official, which the Inter-American Public Defender is, represent a victim before an international tribunal against the State? What would happen if an act that triggered the international responsibility of the State was an action or omission of a Inter-American Public Defender? Would there be conflicting responsibilities? Do Inter-American Public Defenders have legal authorization to appear before international tribunals? Do they have the technical knowledge to do so? If Inter-American Public Defenders generally concentrate on criminal cases within domestic legal systems, why would they have the training to assist victims in non-criminal cases, for example in cases that deal with access to and protection of land (as in the *Sawhoyamaxa Indigenous Community Case (Paraguay)* (2006) Inter-Am. Ct. H.R. (Ser. C) No. 146, *Annual Report of the Inter-American Court of Human Rights: 2006*, at 13, online: Inter-Am. Ct. H.R. <<http://www.corteidh.or.cr/docs/informes/20063.pdf>> [*Sawhoyamaxa Case*], cases dealing with social security (as in the case *Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Alvarez Fernández, Reymer Bartra Vásquez & Maximiliano Gamarra Ferreyra v. Peru* (1999), Inter-Am. Comm. H.R. No. 89/99, *Annual Report of the Inter-American Commission on Human Rights: 1999*, OEA/Ser.L/V/II.106/doc.6, rev. c.3.), cases on labor rights (as in the *Baena-Ricardo Case (Panama)* (2003), Inter-Am. Ct. H.R. (Ser. C) No. 104, OAS, Inter-American Court of Human Rights, *Annual Report of the Inter-American Court of Human Rights: 2003*, OEA/Ser.L/V/III.61/doc.1 (2004) 36.), or on access to information (*Claudio Reyes Case (Chile)* (2006), Inter-Am. Ct. H.R. (Ser. C) No. 151, *Annual Report of the Inter-American Court of Human Rights: 2006*, at 46, online: Inter-Am. Ct. H.R. <<http://www.corteidh.or.cr/docs/informes/20063.pdf>> [*Claudio Reyes Case*]).? Is the Court equating the Inter-American Public Defenders' representation in a domestic criminal trial of a person charged with a crime with the representation of a victim of human rights abuse in an international tribunal? What would happen to the independence and impartiality of the Inter-American Public Defender? How would they be guaranteed? Do they have sufficient economic resources? In the signed agreement, it says that reasonable costs will be covered through a victim assistance fund. However, the *Rules of Procedure of the Fund* state that if a person

demonstrating that the IACHR is an impartial representative of the Inter-American public interest. The Court then authorizes the Commission to propose and question experts “when it legitimately affects the Inter-American public order of human rights” (Article 35.1.g and 52.3). Nevertheless there are some shortcomings in the *New Rules*. They still maintain certain aspects of the Commission in its role as an active litigant and closer to the victims rather than as an impartial entity. For example, the *New Rules* require that the IACHR give the “names, address, telephone number, email address, and fax number of the representatives of the alleged victims” (Article 35.1.b) when it is not necessary in the Commission’s process to present due and formal accreditation, neither is it the Commission’s responsibility to obtain this information. The *New Rules* also require the Commission to establish the “claims, including those related to reparations,” as if the IACHR should have plans for reparations before knowing the reparations requested by the victims or offered by the State. It is unclear why the *New Rules* do not limit the participation of the Commission in this area to request only those reparations necessary for maintaining the “Inter-American public order” (as it is referred to in various articles of the *New Rules*) or those that have a structural character.<sup>86</sup>

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lacks economic resources, he or she can say so in the statement of application, argument, and evidence (ESAP: Escrito de Solicitudes, Argumentos y Pruebas); OAS, Permanent Council, *Rules of Procedure for the Operation of the Legal Assistance Fund of the Inter-American Human Rights System*, OR OEA/Ser.G/CP/RES.963 (1728/09) (2009) art. 2 [*Rules of Procedure of the Fund*]. According to Article 40.2.b of the *New Rules*, *supra* note 41, alleged victims should present all documentary evidence and offer expert and witness evidence in the ESAP. In this crucial stage of the proceedings, neither the alleged victim nor the public defender (now transformed into the Inter-American Public Defender) can count on having economic resources from the assistance fund. Will they be relieved of their domestic duties while they exercise their international representation? What would happen to the people they represent in the domestic arena? Would Inter-American Public Defenders litigate in cases from their own countries or from third countries? In the case of third countries, how would knowledge of language, facts, and domestic legal systems of that country be guaranteed? Who would finance travel to the country in question? How would continual communication with the represented victim be ensured? Countries that are neither members of the OAS nor independent States participate in AIDEF – like Puerto Rico. It is also made up of States who have not ratified the Convention nor accepted the jurisdiction of the Court, such as Antigua and Barbuda or the United States, or who have not accepted the jurisdiction of the Court, like Jamaica. What are the consequences of this? Could an Inter-American Public Defender from a country that is not a member of AIDEF, such as Canada or Dominica, be named as an Inter-American Public Defender? If that is not possible, it would seem that it is not the quality of the Inter-American Public Defender, but membership to a civil association like AIDEF, that would qualify someone to be a potential Inter-American Public Defender. Why does the Court grant this monopoly to a civil organization? Finally, why could other non-State entities not exercise this representation and fill the role of inter-American defender, such as for example, law schools, non-governmental organizations, or legal clinics within universities? Why could other State institutions, such as offices of the Ombudsman or State human rights commissions, or even prosecutors, not fill this role? For now, we have nothing but questions and it would be important for the Court to clarify publicly the role of this innovative mechanism, which is meant to fill the essential role of representing victims before the Court.

<sup>85</sup> To present “the report provided for in Article 50 of the *Convention*. The Commission’s application shall be accompanied by certified copies of the items in the file that the Commission or its delegate considers pertinent” [translated by author].

<sup>86</sup> *New Rules*, *supra* note 41.

## B. Some benefits of the proposal

The Commission, upon being relieved of its duties to make factual and legal determinations on the merits of a complaint, can count on having more time and resources to make more detailed and precise decisions on admissibility, with better and more juridical analyses. Additionally, upon no longer having to eventually become a decision-making and at the same time a litigation organ, can play a more active and impartial role in the friendly settlement process. The possibility that the case would automatically go before the Court within an established time frame if a friendly settlement was not reached would be an incentive for the State to use all of its efforts to reach a solution before it would be judicially mandated.

The Court, for its part, would continue to be a judicial tribunal that should conduct the hearing as well as the finding of fact. The Court should not admit preliminary exceptions related to the admissibility of the petition, as it should go directly to the presentation of evidence. This would reduce the topics and points to be proven, debated, and resolved. The only difference with the current system is that it would rely neither on the body of evidence produced in the IACHR, nor on the factual determinations that the Commission carries out. Given that the Court grants little or no weight to the evidence produced before the Commission, this should not overburden the Court.

The implementation of this proposal would require precise management of the victim assistance fund, given the differentiated role that it would grant the IACHR.<sup>87</sup> Since full ratification of the Convention and acceptance of the jurisdiction of the Court has not yet been reached, the IACHR should keep its current authority with relation to States that have not ratified the *Convention* or accepted the Court's jurisdiction.

This proposal, aside from reducing instances of duplication of procedures, would leave intact the two decisions of the organs of the Inter-American system with a higher degree of compliance: friendly settlements at the Commission and judgments of the Court. It also eliminates the existing tension between the Commission's role as an impartial decision-maker in the petitions that are brought before it, and its later role as plaintiff before the Court. Additionally, it would resolve the apparent disadvantage that States have before the Court, as they have to respond simultaneously to the arguments of the Commission and of the victim.<sup>88</sup> Finally, this proposal would

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<sup>87</sup> The General Assembly of the OAS decided to create this fund. See OAS, General Assembly, 4<sup>th</sup> Sess., *Establishment of the Legal Assistance Fund of the Inter-American Human Rights System*, OR OEA/AG/RES.2426 (XXXVIII-O/08) (2008). It was also regulated through Resolution of the Permanent Council CP/RES 963, *Rules of Procedure of the Fund*, *supra* note 84. The Court has just outlined the rules for the fund for the phase of litigation in front of the tribunal: *Rules of Procedure of the Inter-American Court of Human Rights on the Functioning of the Legal Assistance Fund*, 4 February, 2010. The Court has just announced that the government of Norway has made a donation to this fund.

<sup>88</sup> I do not believe that there is a situation of inequality of arms. The State is guaranteed full procedural opportunities to respond to the victims' and the Commission's claims, as well as procedural equality. In all procedural systems, there could potentially be multiple complainants. Even in criminal procedure, the majority of modern procedural codes predict that the accused should defend him- or

significantly reduce the Commission's workload, and ideally the total duration of processing cases within the system, allowing the IACHR to carry out its political/promotional functions, as well as provide technical assistance. Fundamentally, this increase in the Commission's available time would allow it to focus its financial, human, and time resources to more—and more profound—activities of promotion, cooperation, assistance, and impact.

## VII. New Profiles for the Commission and the Court

The change in procedures and division of labor in the processing of individual petitions is not sufficient, however. Nor is it merely a thematic expansion of cases that are processed. On the contrary, given the human rights situation in the Americas, it is necessary to reform the methodology of the Commission's work and its profile. The proposed new assignment of responsibilities within the individual petition system would ostensibly grant the Commission more freedom with its human and financial resources to carry out more tasks related to the promotion of human rights, giving advice, general monitoring, and interacting with governments and civil society, as well as reacting expeditiously to humanitarian crises.

The structural problems limiting the effective guarantee of rights and political spaces for democratic governance call for the strengthening of the political tools of the IACHR to balance out the judicialization process of the Inter-American system. The Commission should play a more important role in the processes associated with the adoption of public policies, making use of the opportunities that democratically-elected governments offer, and where important government sectors are genuinely interested in improving the overall human rights situation.

To carry out this role, the Commission should reinforce its technical cooperation with the governments of the region and create and develop better strategic alliances with different relevant actors in each one of the member States. For example, in countries where they exist and function efficiently, national human rights institutions could become strategic allies of fundamental importance.<sup>89</sup> Supreme or constitutional courts could also become allies of the Commission, given their central institutional position.<sup>90</sup> However, the Commission currently focuses very little or not at all on these sectors.

The Commission should draw up a thematic agenda based on an evaluation and contributions from governmental and civil society actors in the region, identifying priority areas for work in each State and in the region as a whole. This would allow

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herself against the accusations of the prosecutor, joint plaintiff, amicus curiae, civil complainant, or similar entities.

<sup>89</sup> See e.g. Emilio Álvarez Icaza Longoria, "El papel de los organismos públicos de derechos humanos en el fortalecimiento y promoción del sistema interamericano. La experiencia suscitada desde la Comisión de DDHH del DF" (2003) 1 *Revista CEJIL* No. 2 147.

<sup>90</sup> See e.g. Diego García Sayán, "Una Viva Interacción: Corte Interamericana y Tribunales Internos," in *La Corte Interamericana de Derechos Humanos: Un Cuarto de Siglo: 1979-2004* (San Jose, Costa Rica: Organization of American States, 2005) 323.

the Commission to better focus its efforts.

One example of a sustained effort to influence public policy that is just beginning to unfold is that of the IACHR's following of the demobilization process in Colombia, and in particular the discussion on integral reparations in the country. In the past few years, the Commission's work in Colombia has shown how the use of its multiple tools can effect change in the adoption of concrete, far-reaching public policies.<sup>91</sup>

This change in profile would also imply a reorganization of the IACHR's activities. To this end, the tools that allow for clearest diagnosis of the human rights situations and needs in the countries of the region—on-site visits, thematic hearings, the preparation and elaboration of general reports<sup>92</sup>—should be reinforced. This would also imply an internal reorganization of the Secretariat of the Commission, which is essentially made up of lawyers who are experts in the processing of cases and petitions. Very few, if any, of the professionals within the Secretariat of the Commission have any training in relevant disciplines such as economics, political science, or sociology, nor do they have experience in the design, implementation, or evaluation of public policy or legislative techniques.

Changes in its work profile and of its methodology, a more permanent

<sup>91</sup> See for example the IACHR reports: OAS, Inter-American Commission on Human Rights, *Principle Guidelines for a Comprehensive Reparations Policy*, OR OEA/Ser.L/V/II.131/Doc.1 (2008); OAS, Inter-American Commission on Human Rights, *Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia*, OR OEA/Ser.L/V/II.126/Doc.16 (2006); OAS, Inter-American Commission on Human Rights, *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*, OR OEA/Ser.L/V/II/Doc.3 (2007); OAS, Inter-American Commission on Human Rights, *Violence and Discrimination Against Women in the Armed Conflict in Colombia*, OR OEA/Ser.L/V/II/Doc.67 (2006); OAS, Inter-American Commission on Human Rights, *Report on the Demobilization Process in Colombia*, OR OEA/Ser.L/V/II.120/Doc.60 (2004). See also the Commission's arguments on reparations in various Colombian cases before the Court, like, for example, *Rochela Massacre Case (Columbia)* (2007), Inter-Am. Ct. H.R. (Ser.C) No.163, *Annual Report of the Inter-American Court of Human Rights: 2007*, at 9 online: Inter-Am. Ct. H.R. <<http://www.corteidh.or.cr/docs/informes/Inf%20anua%202007%20ING.pdf>>. However, it should not be forgotten that these results, which particularly influence the discussion and adoption of a global plan for reparations, have been handed down in a context of continual armed conflict. Violence against vulnerable sectors of society continues, the problem of displacement has not been solved, impunity continues to be a serious problem, and paramilitary groups are re-forming and resurging. This would require a more profound investigation on how to evaluate the effectiveness and efficiency of the Inter-American human rights system. It would also require contextual consideration on the situation in each country. For example, what are the factors that contribute to Colombia's dialogue with the IACHR, in a country with a judicial system that is highly sophisticated in many areas, but that still has a high level of violence and absence of the State in many regions of the country? In this context, how would one measure the effectiveness of the IACHR? This is a crucial, central question that goes beyond the scope of this article, but that is part of its broader agenda.

<sup>92</sup> On the importance of country reports, see especially Tom Farer, "The future of the Inter-American Commission on Human Rights: Promotion versus Exposure" in Juan Méndez & Francisco Cox, eds., *El Futuro del Sistema Interamericano de Protección de los Derechos Humanos* (San Jose, Costa Rica: Instituto Interamericano de Derchos Humanos, 1998) 515; Felipe Gonzalez, "Informes sobre Países, Promoción y Protección" in Juan Méndez & Francisco Cox, eds., *El Futuro del Sistema Interamericano de Protección de los Derechos Humanos* (San Jose, Costa Rica: Instituto Interamericano de Derchos Humanos, 1998) 493 [Gonzalez, "Informes"].



presence in the field, and increased interaction with relevant social and governmental actors would also improve the analytical capacity of the Commission, and, to paraphrase the Court, would permit the IACHR to comprehend more clearly “the difficulties implicit to the planning and adoption of public policies and the choices of operative character that should be taken in light of priorities and resources” as well as the need to prevent the interpretation of positive State obligations as measures that would “impose an impossible or disproportionate task upon the authorities.”<sup>93</sup>

The Commissioner’s rapporteurs would play a fundamental role. They already carry out important tasks in the selection of priority areas for the Commission’s work, as well as in advocacy for legislative reform and for the adoption of certain public policies. For example, the Special Rapporteur on Indigenous Peoples has focused heavily on the protection of collective rights to indigenous territories. It has done this through friendly settlements,<sup>94</sup> resolution of cases,<sup>95</sup> strategic litigation of cases before the Court,<sup>96</sup> the inclusion of chapters on the situation of indigenous rights in various country reports,<sup>97</sup> and providing technical advice to the Working Group discussing the American Declaration on the Rights of Indigenous Peoples.<sup>98</sup> It is also worth mentioning the sustained work of the Commission and its Rapporteur for Freedom of Expression on the subject of

<sup>93</sup> See *Sawhoyamaya Case*, *supra* note 84 at para. 155.

<sup>94</sup> *Comunidades Indígenas Enxet-Lamenxay y Kaleypapopyet-Riachito v. Paraguay* (1999), Inter-Am. Comm. H.R. No. 90/99, Annual Report of the *Inter-American Commission on Human Rights: 1999*, OEA/Ser.L/V/II.106/doc.6 rev. (1999) 350.

<sup>95</sup> *Mary and Carrie Dann v. United States* (2002), Inter-Am. Comm. H.R. No. 75/02, *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II/doc.106, rev. (2002) 860.

<sup>96</sup> *Mayagna (Sumo) Awas Tingni Community Case (Nicaragua)* (2001), Inter-Am Ct. H.R. (Ser.C) No. 79, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54/doc.4 (2000) 29; *Indígena Yakye Axa Community Case (Paraguay)* (2005), Inter-Am. Ct. H.R. (Ser.C) No. 125, *Annual Report of the Inter-American Court of Human Rights: 2005*, at 8 online: Inter-Am. Ct. H.R. < <http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf>>; *Sawhoyamaya Case*, *supra* note 84.

<sup>97</sup> See generally OAS, Inter-American Commission on Human Rights, *Justicia e Inclusión Social: Los Desafíos de la Democracia en Guatemala*, OR OEA/Ser.L/V/II.118/Doc.5, rev. 1 (2003), c. IV; OAS, Inter-American Commission on Human Rights, *Tercer Informe Sobre La Situación De Los Derechos Humanos En Paraguay*, OR OEA/Ser.L/VII.110/Doc.52 (2001), c. IX; OAS, Inter-American Commission on Human Rights, *Segundo Informe Sobre La Situación De Los Derechos Humanos En El Perú*, OR OEA/Ser.L/V/II.106/Doc.59 (2000), c. X; OAS, Inter-American Commission on Human Rights, *Tercer Informe Sobre La Situación De Los Derechos Humanos En Colombia*, OR OEA/Ser.L/V/II.102/Doc.9 rev. 1 (1999), c. X; OAS, Inter-American Commission on Human Rights, *Informe Sobre La Situación De Los Derechos Humanos En México*, OR OEA/Ser.L/V/II.100/Doc.7, rev. 1 (1998), c. VII; OAS, Inter-American Commission on Human Rights, *Informe Sobre La Situación De Los Derechos Humanos En Brasil*, OR OEA/Ser.L/V/II.97/Doc.29, rev. 1 (1997), c. VI; OAS, Inter-American Commission on Human Rights, *Informe Sobre La Situación De Los Derechos Humanos En Ecuador*, OR OEA/Ser.L/V/II.96/Doc.10, rev. 1 (1997), c. IX.

<sup>98</sup> See “Proyecto de Declaración Americana sobre los Derechos de los Pueblos Indígenas”, online : Inter-Am. Comm. H.R. <<http://www.cidh.org/Indigenas/ProyectoDeclaracion.htm>>.

decriminalization of criticism of public officials<sup>99</sup> and on access to public information.<sup>100</sup>

In order to assure and increase visibility, credibility, and legitimacy of the Commission and its rapporteurs, the IACHR should analyze their work holistically and establish a few common parameters to guide the various rapporteurs' work. For example, various rapporteurs have conducted important visits to document some of the central themes of their work, creating the expectation that they would produce reports on these areas and offer concrete recommendations to the States. However, several years after these visits, these reports were not published, and the Commission lost its opportunity to influence public discussions and brought disillusionment and frustrations among State officials and members of civil society who collaborated with the rapporteurs during their visits, and who were genuinely interested in the IACHR's positions on these matters.<sup>101</sup> The Commission should also adopt clearer parameters

<sup>99</sup> See e.g. *Verbtsky v. Argentina* (1994), Inter-Am. Comm. H.R. No. 22/94, *Annual Report of the Inter-American Commission on Human Rights: 1994*, OEA/Ser.L/V/88/Doc.9, rev. 1 (1995) 40; OAS, Inter-American Commission on Human Rights, *Report of the Compatibility of Desacato Laws and the American Convention on Human Rights*, OR OEA/Ser. L/V/II.88/Doc.9., rev. (1995) at 206; and the cases litigated before the Court, *Herrera Ulloa Case (Costa Rica)* (2004), Inter-Am. Ct. H.R. (Ser.C) No. 107, *Annual Report of the Inter-American Court of Human Rights: 2004*, OEA/Ser.L/V/III.65/doc.1 (2004) 8; *Ricardo Canese Case (Paraguay)* (2004), Inter-Am. Ct. H.R. (Ser.C) No. 111, *Annual Report of the Inter-American Court of Human Rights: 2004*, OEA/Ser.L/V/III.65/doc.1 (2004) 14; *Palamara-Iribarne Case (Chile)* (2005), Inter-Am. Ct. H.R. (Ser.C) No. 135, *Annual Report of the Inter-American Court of Human Rights: 2005*, at 12 online: Inter-Am. Ct. H.R. <<http://www.corteidh.or.cr/docs/informes/Inf%20anua%202005%20diag%20ingles.indd.pdf>>; *Kimel Case (Argentina)* (2008), Inter-Am. Ct. H.R. (Ser.C) No. 177, *Annual Report of the Inter-American Court of Human Rights: 2008*, at 14 online: <<http://www.corteidh.or.cr/docs/informes/eng2008.pdf>>.

<sup>100</sup> See e.g. *Annual Report of the Special Rapporteur for Freedom of Expression 2003*, vol. III, c. IV "Special Study on the Right of Access to Information" online: OAS <<http://www.cidh.org/relatoria/showarticle.asp?artID=139&IID=1>>; *Claudio Reyes Case*, *supra* note 84.

<sup>101</sup> The following can be mentioned as examples of rapporteur visits to countries that do not produce reports, despite the fact that it could be so: Rapporteur for the Rights of Children, together with UNICEF, to analyze the situation of children and adolescents linked to gangs in El Salvador, Guatemala and Honduras in December of 2004; of the Rapporteur for the Rights of Women to Guatemala in September of 2004; and finally the visits of the Rapporteur on Rights of People Deprived of Liberty in the Americas, between 2004 and 2007 to Argentina, Bolivia, Brazil, Colombia, the Dominican Republic, Guatemala, Haiti, and Honduras. See generally Inter-American Commission on Human Rights and UNICEF, Press Release, No. 26/04, "Inter-American Commission on Human Rights and UNICEF Express Concern over Situation of Boys, Girls and Adolescents Involved with Gangs in el Salvador, Guatemala, and Honduras" (4 December 2004), online: Inter-Am. Comm. H.R. <<http://www.cidh.org/Comunicados/English/2004/26.04.htm>>; Special Rapporteur for the Rights of Women, Press Release, No. 20/04, "IACHR Special Rapporteur evaluates the effectiveness of the right of women in Guatemala to live free from violence and discrimination" (18 September 2004), online: Inter-Am. Comm. H.R. <<http://www.cidh.oas.org/women/Press20.04.htm>>; Rapporteur on the Rights of Persons, Press Release, No. 38/05, "The Rapporteurship on the rights of persons deprived of freedom of the IACHR and the Office of the United Nations High Commissioner for Human Rights to pay a visit to Colombia" (8 November 2005), online: Inter-Am. Comm. H.R. <<http://www.cidh.org/Comunicados/English/2005/38.05eng.htm>>; Rapporteur for Bolivia and Rapporteur on the Rights of Persons Deprived of Liberty in the Americas, Press Release, No. 48/06, "IACHR checks situation of persons deprived of liberty in some jails in the Republic of Bolivia" (30 November 2006), online: Inter-Am. Comm. H.R. <<http://iachr.org/Comunicados/English/2006/48.06eng.htm>>; Rapporteur on the Rights of Persons Deprived of Liberty, Press Release, No. 29/06,

on the motives for using a Special Rapporteur for Freedom of Expression who is not a member of the Commission and has not been elected by the General Assembly, and who, unlike other thematic rapporteurs, works full-time for the Commission and can manage a budget and staff autonomously from the rest of the budget and staff of the IACHR. This creates perceptions of disparities between the different thematic rapporteurs, which, in turn, affects the work of the Commission as a whole.

Special recognition should also be given to country reports, which allow for more holistic diagnoses and recommendations. The Commission has begun to take steps to assure that these reports are written and published in the quickest manner possible.<sup>102</sup> At the same time, it should also work toward more sustained and timely follow-up on the recommendations offered in these reports, ensure their widest possible diffusion, especially that they are sent to relevant domestic and international actors, and ensure that they are presented publicly in the countries on which they focus.

The diffusion of the Commission's work is an essential element to any strategy for greater political advocacy. One positive measure that the IACHR has taken recently is the creation of a press office that is designed to ensure the heightened presence of the Commission in the Inter-American public opinion.

Of course, this political and promotional role, along with technical assistance, should not affect or diminish the autonomy, independence, and impartiality of the Commission, which constitutes its greatest strength. Nor should this role imply the abandonment of the role of processing the *individual petitions*. The Commission should find a balance between the pressing need to cooperate with the national governments of the region and its capacity for critical independent analysis of the human rights situation in different States, which it is able to do through its various mechanisms, including the processing of petitions and cases.

The proposed new role for the Commission in the processing of the individual petitions would permit it to complement its role as a technical assistant. With a deeper involvement in the process of reaching friendly settlements, the Commission could advocate for the adoption of policies that attempt to resolve not only the specific case at hand, but also the structural problems that brought it into being. Additionally, by playing the role of neither complainant nor litigant before the Court, and given its auxiliary capacity, it should be able to play a more active role in the facilitation of compliance with the judicial decisions of the Court and the carrying out of the recommendations that it itself has made, thereby influencing the adoption

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"IACHR Rapporteur on the Rights of Persons Deprived of Liberty visits the Dominican Republic" (8 August 2006), online: Inter-Am. Ct. H.R. <<http://iachr.org/Comunicados/English/2006/29.06eng.htm>>; Rapporteur on the Rights of Persons Deprived of Liberty, Press Release, No. 32/07, "Rapporteur on the Rights of Persons Deprived of Liberty concludes visit to the Republic of Haiti" (21 June 2007), online: Inter-Am. Ct. H.R. <<http://www.iachr.org/Comunicados/English/2007/32.07eng.htm>>; *Visitas*, online: Inter-Am. Comm. H.R. <<http://www.cidh.org/PRIVADAS/visitas.htm>>.

<sup>102</sup> See e.g. OAS, Inter-American Commission on Human Rights, *Informe Acceso A La Justicia E Inclusión Social: El Camino Hacia El Fortalecimiento De La Democracia En Bolivia*, OR OEA/Ser.L/V/II/Doc.34 (2007), prepared in less than six months.

and/or modification of public policy.

The synergy that is produced between the political and promotional activities of the IACHR and the processing of individual petitions should also not be forgotten. As noted, and as the work in various countries and of some rapporteurs exemplifies, the Commission can develop fundamental standards for the implementation of its thematic agendas through paradigmatic cases. Judgments or reports that carry orders or recommendations for structural changes can open spaces for the political and promotional work of the Commission. Decisions in individual cases also legitimize social actors that could have been questioned by States.<sup>103</sup> They also open spaces for negotiation and dialogue between governments and social actors through friendly settlement procedures and orders to implement precautionary or provisional measures, and through processes of negotiating reparations through consultations and coordination between governments and civil society. All of these processes facilitate and reinforce the political/promotional work of the IACHR.

Some have rejected proposals such as those outlined here because a significant strengthening of these initiatives for technical assistance would imply a reduction in financial and human resources for other areas and would also require that the Commission evaluate and make an early judgment on issues that might later come to it through the case system.<sup>104</sup> This proposal would overcome this criticism because it proposes that the IACHR reduce its participation in these cases, as it would no longer need to decide on their merits, nor would it appear before the Court as a litigant. This would free up human and financial resources to be able to focus on other areas. Additionally, technical advice or political/promotional activities do not constitute prejudgment. Even now the IACHR has this dual role as it is called in individual cases to consider a specific situation in a concrete case, while it speaks to general situations—not specific, concrete cases—in its political/promotional activities. If there were a problem with prejudgment, it would also exist in the case of thematic or country reports,<sup>105</sup> which even the critics of the proposals outlined here maintain are fundamental to the IACHR's duties,<sup>106</sup> an idea that we share with them.

The reconfiguration of the functions of the IACHR cannot leave out those of the Court. As a judicial tribunal, it lacks the political/promotional role of the Commission, but this does not mean that its functioning, procedures, and jurisprudence do not have a political impact, nor that they can be conceived of as mere technical questions of juridical interpretation. It is particularly important for the Court to be conscious of the fact that simple orders contained in its sentences are not

<sup>103</sup> Thomas M. Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond" (2008) 46 *Colum. J. Transnat'l L.* 351 at 360.

<sup>104</sup> As expressed by the President of the IACHR in Felipe Gonzalez, "La Comisión Interamericana de Derechos Humanos: antecedentes, funciones y otros aspectos" (2009) 5 *Anuario de Derechos Humanos* 35 at 55.

<sup>105</sup> The Commission has maintained that its statements on specific situations in general reports do not constitute prejudgment nor do they prevent the Commission from studying, processing, and resolving individual petitions on the same issues. See *Díaz et al. v. Colombia* (1997), Inter-Am. Comm. H.R. No. 5/97, *Annual Report of Inter-American Commission on Human Rights: 1996*, OEA/Ser.L/V/II.95/doc.7, rev., c. III.

<sup>106</sup> See Gonzalez, "Informes", *supra* note 92 at 39, 55.

necessarily sufficient to promote permanent or structural changes. These changes are brought about through a confluence of social actors who are dedicated to them, such as social movements, human rights defenders, mass media, governmental officials, and other allies. In this sense, the Court's efficiency would depend on the extent to which its procedures as well as its jurisprudence are relevant to short, medium, and long-term goals of the social actors dedicated to defending human rights.<sup>107</sup>

From this perspective, the organization of the Court's procedures is an important consideration, as it constitutes a space for development of lobbying and promotional activities, diffusion of information, public debate, and accountability. This means that if the number of the Court's public hearings were reduced, if the number of witnesses were to diminish, and if hearings on compliance with judgments were to be private rather than public, the public visibility of the Court's actions and of the governments' positions would diminish, and there would therefore be no generation of domestic public mobilization. This would also mean that juridical and factual findings of the Court should pay particular attention to the structural factors that give rise to human rights violations, as well as those that would promote greater respect for human rights. In other words, it should be understood that human rights violations and implementation of reparations are not produced in a vacuum, but in specific social and political contexts that require consideration in finding of fact, in the application of the law, in orders for reparation, and in supervision of compliance with Court sentences.<sup>108</sup> The legitimacy and credibility of the tribunal does not depend exclusively upon the supposed progressive jurisprudential developments, if these same developments do not translate into systematic domestic changes. At the same time, notions of jurisprudence that import ideas from other systems, or that go beyond the regional consensus might also affect the credibility of the tribunal.<sup>109</sup> This does not mean that the Court should limit itself to reflecting the existing consensus on judicial interpretation in its decisions, especially given the problems confronting the judicial systems of the region. It should just be conscious of the consensus, of existing regional trends, and of jurisprudential developments that have been carried out in certain national tribunals, and of the factors that have brought about said developments.

Finally, a new form of supervision and implementation of the decisions of the organs of the Inter-American system is essential. In order to facilitate compliance with the decisions and following recommendations, each State should establish a domestic mechanism to coordinate and implement the decisions of the Inter-American system.<sup>110</sup> This mechanism would need the participation of the most relevant

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<sup>107</sup> James Cavallaro & Stephanie Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: the Case of the Inter-American Court" (2008) 102 A.J.I.L. 768.

<sup>108</sup> On the implementation of reparations and the context in which they occur, see especially Carlos Beristain, *Diálogos sobre la reparación: experiencias en el sistema interamericano de derechos humanos* (San Jose, Costa Rica: Instituto Interamericano de Derechos Humanos, 2008).

<sup>109</sup> Gerald L. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" (2008) 19 E.J.I.L. 101.

<sup>110</sup> Conventions that demand the establishment of a domestic mechanism for the implementation of treaties already exist. For example, Article 3 of the Optional Protocol of the Convention against Torture relative to the periodic visits to places where there are persons deprived of liberty, stipulates

institutions and ministries, such as those in the areas of justice, foreign and internal relations, defense, economy, the Attorney General, Inter-American Public Defender, and the Ombudsman or similar institution.<sup>111</sup> The Commission should be a permanent member of this institutional body and periodically participate in its meetings, giving technical advice and highlighting best practices from its regional and historical experience. This domestic mechanism and the Commission should offer reports twice a year on its work to the OAS. Victims should be invited to participate in this mechanism's meetings when their cases are being analyzed.

All of the proposals outlined here are interdependent. Since they intend to rethink the Inter-American system in its entirety, each should be understood as part of the whole system of the OAS and should not be considered in isolation.

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The perspective outlined in this article posits that the Inter-American system has worked against States during periods of dictatorship, and often in spite of States during periods of democratic transition. Now, it is essential for the system to work with States when possible. New examples of collaboration between the States and the IACHR are developing, showing that it is possible for the Inter-American system to be an ally in increasing the effective protection of fundamental rights and liberties, as well as finding justice in numerous individual cases. With this in mind, the role of the Commission should be modified and strengthened in the upcoming years to include the cooperation with and counsel for member countries on how to tackle the many structural problems that predominate in the region.

The proposal to rethink the Inter-American system maintains that the individual petition system should continue playing an important role. However, it should neither be the sole focus nor use the majority of the Commission's time and resources. The processing of individual petitions should be reconfigured to respond to human rights needs in the region in the most efficient manner possible.

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that "[e]ach State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment (hereafter referred to as the national preventive mechanism)." *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 18 December 2002, 2375 U.N.T.S. 237, art. 3, GA Res. A/RES/57/199 (entered into force 22 June 2006).

<sup>111</sup> An interesting model is the Inter-institutional Commission that Paraguay created to comply with decisions handed down by the Commission and Court. Said Commission is made up of the Ministries of the Interior, Foreign Relations, Housing, Public Health and Social Welfare, Justice and Labor, Education, and Culture, the Attorney General of the Republic and the Secretary General of the Presidency of the Republic. As an advisory board, it is made up of 16 State entities and, in a "guest" capacity, a representative of the petitioner who appeared before the system. Decree number 1595, approved on February 26, 2009 in Paraguay, created the "Interinstitutional Commission responsible for the Implementation of Actions Needed for Compliance with International Statements issued by the Inter-American Court of Human Rights and the recommendations of the Inter-American Commission on Human Rights." See Paraguay's Ministry of the Interior online: <[www.cej.org.py/files/decreto1595\\_ComisionInterinstitucionalCumplimientoSentenciasInternacionales.pdf](http://www.cej.org.py/files/decreto1595_ComisionInterinstitucionalCumplimientoSentenciasInternacionales.pdf)>.

The emphasis on the Inter-American individual petition system at the expense of other available tools presumes that structural human rights problems in the region can be resolved through legal and judicial responses. I believe that this is an erroneous view.