



The Inter-American System of Human Rights

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THE ORGANIZATION OF AMERICAN STATES

The Inter-American System was created under the Organization of American States ('OAS'). The OAS is a regional inter-governmental organization which includes 35 member states from Latin America, the Caribbean and North America (Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, St. Kitts and Nevis, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela). (Pasqualucci, 2003) It is important to point out that these are very diverse states, including very impoverished countries such as Haiti or Nicaragua as well as wealthy, developed ones such as Canada and the United States (Nowak, 2003:190). The organization was created by a treaty, the OAS Charter, in 1948, and is headquartered in Washington, DC, in the United States.

The purpose of the creation of the OAS was to promote peace and security in the continent; representative democracy; economic, social and cultural development, respect for the essential rights of man; the eradication of extreme poverty; and to defend national sovereignty (OAS Charter, 1948: Art. 2). The OAS' four main pillars are democracy, human rights, security and development. The OAS is composed of the General Assembly, which is the principal OAS

body; the Meeting of Consultation of Ministers of Foreign Affairs; the Permanent Council; the Inter-American Council for Integral Development; the Inter-American Judicial Committee, and the Inter-American Commission on Human Rights, which is one of the two principal organs promoting and monitoring human rights issues (the other being the Inter-American Court of Human Rights).

Significantly, the OAS Charter makes express reference to the protection of human rights. It established as one of its principles the respect of 'the fundamental rights of the individual without distinction as to race, nationality, creed, or sex' (OAS Charter, 1948: Art. 3(l)). It also establishes that OAS member states 'shall respect the rights of the individual and the principles of universal morality' when exercising their right to develop their cultural, political and economic life (OAS Charter, 1948: Art.17).

THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

In 1948, at the same conference at which the OAS was established and two months before the adoption of the Universal Declaration of Human Rights, the world's first international human rights instrument was also adopted: the American Declaration of the Rights and Duties of Man ('American Declaration' or 'Declaration'). The Ninth International Conference of American States therefore marks the origin of the Inter-American System of Human Rights through the adoption of both the OAS Charter and the American Declaration.

The system remained aspirational during its first 10 years (Bantekas and Oette, 2013: 244). Although the OAS Charter provides for the creation of the Inter-American Commission on Human Rights as one of the principal organs of the OAS, whose function is to promote the observance and protection of human rights, this body was not brought into being until 1959. Since its creation, the Commission played a crucial role in the promotion of human rights in the region, especially during the 1970s when several countries in Latin America became the home of military dictatorships. Those who opposed these regimes were labelled as enemies of the state and many were subjected to persecutions, torture, forced disappearances and extrajudicial killings (Huneus, 2011). The Commission became an important body in the promotion of justice against massive and systematic human rights violations sponsored by states by bringing international press coverage to those cruel practices and raising public interest. Consequently, the Commission faced several states' proposals aimed at reducing, if not eliminating altogether, the Commission's power. However, and fortunately for the protection of human rights in the region, these attempts were unsuccessful.

On the contrary, thanks to international support and the efforts of civil society, the system was further consolidated in 1969 by the adoption of a treaty: the

American Convention on Human Rights ('American Convention'). Like the European Convention on Human Rights, the American Convention refers to the protection of civil and political rights such as the right to life, the right to personal liberty, the right to property and the right to freedom of expression. It also provides for the creation of a regional court: the Inter-American Court of Human Rights.

The Inter-American System has been strengthened by several legal instruments adopted within its framework. First of all, the Convention was complemented, in the area of economic, social and cultural rights, by the adoption of the Protocol of San Salvador, which entered into force in 1998. Other specialized regional instruments include the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belém do Pará'). It must be recalled, however, that the principal obligatory (binding) documents of the system are the American Declaration and the American Convention (Medina-Quiroga, 2012: 523). The Declaration was first considered to contain only guidelines (*soft-law*), but it acquired a binding status in 1960, as will be explained in the following section which elaborates on the Inter-American Commission.

Furthermore, the System is composed of several bodies. It has two main autonomous organs entrusted with the protection and promotion of human rights in the region, the Commission and the Court. It also includes two political bodies that deal with human rights matters in their mandate: the Permanent Council and the General Assembly. Additionally, the System is formed by diverse organs dealing with the promotion and study of specific rights such as the Inter-American Children's Institute and the Inter-American Commission of Women.

THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

The Commission is an autonomous body of the OAS and is headquartered in Washington, DC. In 1960 its Statute was approved and in the same year it started its work. According to its Statute, the Commission was entrusted with the following tasks: developing awareness of human rights; making recommendations to OAS states on the adoption of measures for the promotion and protection of human rights; preparing studies or reports; requesting states to send reports on adopted human rights measures; and serving as an advisory body (Medina-Quiroga, 1988: 79). The Statute of the Inter-American Commission of Human Rights establishes that 'for the purposes of [the mandate of the Commission], human rights are understood to be those set forth in the American Declaration of the Rights and Duties of Man'. Therefore, although the American Declaration was first considered as guidelines (*soft-law*) it is argued that it acquired a binding status through the adoption of the Commission's Statute (Buergethal, 1975: 835).

Significantly, the Commission was not expected to hear any individual complaints or to intervene in the internal affairs of OAS states regarding human rights, but rather to work on general human rights issues in the continent (Medina-Quiroga, 1988: 80). However, since the beginning of its work, the Commission interpreted its functions in a broad manner so as to include monitoring state compliance through on-site investigations of human rights, issuing country reports, and making recommendations to OAS member states. By virtue of its shaming country reports, general recommendations addressed to specific governments and its influence at the national level, the Commission became a unique regional forum where individuals could file petitions reporting human rights violations, which were a common feature of the states under the wave of authoritarian regimes from which the entire continent suffered.

In 1965, the Commission extended its mandate through amendments to its Statute in order to examine and resolve individual complaints. In other words, it could decide whether a state had violated individual human rights, and if so, the Commission could recommend the state to implement remedies in order to compensate the victim of those violations. In 1970, an amended OAS Charter designated the Commission as the principal OAS organ responsible for the safeguarding of individual human rights. This responsibility was later shared with the Court, with the adoption of the first legally binding regional human rights treaty of the System; the American Convention on Human Rights.

In November 1969, the OAS member states adopted American Convention which came into force in 1978 after the eleventh member state ratified it (IAComHR, 1978). In addition to its functions of promotion and respect of human rights established by the American Declaration, the American Convention empowered the Commission to take action on petitions and other communications; in other words, to investigate individual claims alleging violations of human rights of the Convention and to pursue friendly settlements or eventually to refer those petitions to the Court. In this light, the Commission could act as a filter between petitioner and the Court.

Thus, the Commission was empowered with a duality of functions in the protection of human rights: on the one hand vis-à-vis OAS member states on the basis of the OAS Charter and the American Declaration, and, on a higher level of commitment, vis-à-vis states parties to the Convention. The Commission currently focuses on three main pillars: the individual petition system; monitoring the human rights situation in the member states; and attending to high-priority thematic areas.

The Inter-American Commission is composed of seven members elected in their personal capacity (they do not represent their governments or the interest of their states) who serve for four-year terms and can be re-elected only once. The commissioners are proposed by the member states and elected by the OAS General Assembly. Candidates must be persons of high moral character and recognized competence in the field of human rights.

The Commission's Role

The functions of the Commission vis-à-vis OAS states depend on whether a state has ratified the Convention, and whether it has recognized the Court's jurisdiction:

- i. *In relation to all OAS member states:* The Commission has competence to raise awareness on human rights; to recommend measures in favour of human rights in their national legislation and international commitments; to prepare studies or reports; to request states to report on adopted human rights measures; to respond to states' inquiries and provide them with advisory services; to submit annual reports; to conduct on-site observations upon states' invitation or with their consent; and to submit its programme budget to the Secretary General.
- ii. *In relation to OAS member states that are not a party to the American Convention:* The Commission's mandate allows it to monitor states' compliance regarding violations of human rights protected by the American Declaration; to examine communications; to verify that domestic legal procedures and remedies were exhausted; and to make recommendations when appropriate.
- iii. *In relation to states parties to the American Convention:* The Commission has the function to act on petitions and other communications; to examine inter-state complaints; to appear before the Inter-American Court of Human Rights; to request the Inter-American Court of Human Rights to grant provisional measures in serious and urgent cases; to consult the Court on the interpretation of the American Convention or other treaties concerning human rights; to submit additional draft protocols to the American Convention in order to progressively include other rights and freedoms under the system; and to submit proposed amendments to the American Convention.

Principal Functions of the Commission

While its powers regarding the individual petition system are a great instrument to promote states' compliance with human rights norms, the Commission has also extensively used two other powerful competences: the issuing of country reports and conducting on-site visits. In addition, the Commission has the power to grant precautionary measures.

- i. *Reports and special rapporteurs:* The Commission has the power to monitor the human rights situation of each OAS member state through the publishing of specific country reports. These reports usually follow a visit of the Commission to the state and can be conducted in two ways. First, they can address the human rights situation in general in a given country, as well as the situation of specific rights, such as the situation of children's or indigenous People's rights. Second, the Commission can publish thematic reports which address general areas or issues of human rights. These reports aim to analyse and explain the compliance status of a certain right in the region. Also, they describe the approach chosen by all OAS member states to given rights and recommend measures for its improvement. For these purposes, the Commission has appointed special rapporteurs with the mandate to elaborate reports, for instance, on migrant workers' rights, indigenous People's rights, freedom of expression and the death penalty.

Like the United Nations, the Commission has also considered it important to appoint special (thematic) rapporteurs to deal with specific areas of particular

relevance (Bantekas and Oette, 2013: 246). The Commission's designated rapporteurships include freedom of expression, women's rights, prison conditions, indigenous Peoples' rights, children's rights and human rights defenders. These special rapporteurs have comprised the commissioners themselves, with the exception of the rapporteur on freedom of expression (Gonzalez, 2009).

- ii. *On-site visits:* Following states' invitation or with their consent, the Commission conducts on-site visits to evaluate first-hand the human rights conditions in places where it deems it necessary. The on-site visits are carried out by a delegation composed of the relevant rapporteurs, other commissioners and staff members of the Inter-American Commission. They hold meetings with the highest authorities of the designated country and representatives of civil society, allowing the Commission to gain first-hand knowledge of what is happening in the country. This practice allows the Commission not only to gather information and conduct investigations on the human rights situation in member states in general, but also to obtain information regarding specific individual complaints lodged before this body. In order for the on-site visits to have more impact, the Commission has relied heavily on the press to make them more effective. It usually holds press conferences and publishes its findings, thus informing the general public. This has a direct impact on the debate on the human rights situation in a specific country, not only at the national level but also internationally. When the Commission reports its findings and reveals the human rights violations carried out by states, it becomes a sanction in itself, a sort of moral punishment which aims to improve respect for human rights by the responsible member states (Medina-Quiroga, 1988: 74).

The on-site visits have had great impact on the protection of human rights in the Americas. In the words of Robert Goldman, former Inter-American Commissioner, 'the Commission's visit to Argentina in 1979 was its most successful in terms of results' (Goldman, 2009). During that visit, the Commission investigated the systematic practice of enforced disappearances in the country by gathering testimonies of victims and visiting prisons. On these visits, the Commission heard people screaming from behind a wall 'we are here, we are here!' ('!Estamos aquí, estamos aquí!') (Gonzalez, 2009:108). Those prisoners were clandestinely detained and most probably waiting to be disappeared. This evidence, along with all the testimonies obtained, allowed the Commission to publicly report the systematic human rights violations committed or sponsored by Argentina. After the publishing of the Commission's report, there were fewer reports of enforced disappearances there.

- iii. *Individual complaints:* As a result of the powers it derives from its Statute and the Convention, the Commission can receive individual complaints from individuals or groups of individuals alleging violations to the American Declaration and the American Convention by OAS member states. The Commission as a quasi-judicial body investigates the individual complaints it receives and seeks a friendly settlement between the claimant and the state concerned. Although the Commission encourages such settlements, according to its 2011 Annual Report, less than 10 per cent of the cases under examination actually reached such a friendly agreement (8 out of 67 cases) (IAComHR, 2011). If a settlement is not reached, the Commission drafts a report, which includes the facts of the case, its conclusions and some recommendations to the state in order to remedy the violations. This first report is not public. If the state fails to comply with the report's recommendations within three months, the Commission may

either send the case to the Court (if the state has recognized the Court's jurisdiction) or issue a second, public, report revealing its findings and decision on the case, and recommending to the state different ways to remedy the situation.

The reports issued by the Commission are not judicial decisions or judgments; however, they are binding documents. Having accepted the OAS Charter and the American Declaration, states have agreed to comply with diverse human rights obligations. They have also agreed to create and accept the Commission's competence to monitor and promote the fulfilment of those obligations. The Commission's recommendations are therefore legitimately binding on the states.

Under international law, the question of states' compliance depends for a great part on states' will and good faith, as international bodies have no coercive powers. However, international bodies rely on public opinion to exert pressure on states. Of all the Commission's recommendations, states tend to comply with at least one or some of them (IAComHR, 2011). If there is only partial compliance, the Commission follows the case until the state has satisfactorily observed all recommendations.

- iv. *Precautionary measures*: The Commission has the power to grant precautionary measures to petitioners in serious and urgent cases or whenever the Commission believes it is necessary. These precautionary measures can be requested by the party or ordered at the Commission's own initiative. Thus, the Commission can request the state concerned to adopt precautionary measures to prevent irreparable harm to one or more persons. Through these measures, the Commission asks states to take specific actions in order to ensure individuals' safety and prevent them from becoming victims of (further) human rights violations. These measures are not considered to be a prejudgment on a specific case or concession of an actual violation, but do recognize concerning signs.
- v. *Inter-state Complaints*: This is not a common practice under the System. Thus far, there have been only two. In 2006 Nicaragua filed a complaint against Costa Rica, but the Commission declared it inadmissible. And in 2010, Ecuador filed a complaint against Colombia; this time the case was declared admissible; however upon Ecuador's decision to desist from its petition, the case was archived in November 2013 (IAComHR, 2013) Thus, as of today, the Court has not rendered a single judgment on the merits (Bantekas and Oette, 2013: 248)

The Inter-American Commission's Individual Complaint Procedure under the American Convention

The proceedings before the Inter-American Commission include five steps: initial review, declaration of admissibility, friendly settlement, merits and referral/public report. Who may lodge individual petitions? The following individuals and entities may lodge individual petitions: any person or group of persons; any non-governmental entity legally recognized in one or more OAS member states; a third party with or without the victim's consent as long as the absence of consent is duly justified; the Commission of its own motion; or any OAS State Party to the American Convention against another State Party (inter-state complaints).

The petition must be addressed to the Executive Secretary of the Inter-American Commission on Human Rights. The Registry of the Executive Secretariat will review that the petition meets the formal and admissibility

requirements. The formal requirements are: the name and contact information of the petitioner; whether the petitioner wishes that his or her identity be withheld from the state; the date, place and details of the alleged human rights violations; the name of the victim(s); and the state responsible for alleged human rights violations.

The admissibility requirements are: indication that national remedies were exhausted; that the petition is lodged within a period of six months from the date of the final judgment exhausting national remedies; and that the petition has not been submitted before another international proceeding for settlement. Yet, there are some exceptions regarding the exhausting of national remedies: when the domestic legislation does not afford due process of law; when the petitioner has been denied access to the remedies or has been prevented from exhausting them; and when there has been unwarranted delay. In case the petitioners fail to meet these criteria, the Executive Secretariat may request the petitioner to fulfil them.

Admissibility

The Commission informs the state responsible for the petition. The state must submit its response within two months. The Commission may also ask the petitioner and the state to submit additional written observations or eventually hold a hearing in order to obtain more information from the parties. The Commission will evaluate: i) if the facts alleged by the petitioners constitute a violation of the American Convention; ii) if the victim indeed exhausted national remedies or is exempt from this requirement (due to unavailability or denial); and iii) if the petition was sent within a six-month period since the decision that exhausted the domestic remedies. In cases of exhaustion of domestic remedies, the petition must be presented within a reasonable time. The standard to define reasonable time is based on a test that evaluates the interaction between the relevant actors, such as the gravity of the matter, the context in which the relevant actions happened, if the potential violations are continuing, the measures taken by the state and the actions of the petitioners.

At this stage, the petitioner can request the Commission for financial assistance in order to afford the costs of the proceedings. This financial assistance is given by the Legal Assistance Fund of the System if the petitioner meets the criteria.

After this evaluation, the Commission publishes a report on admissibility. If the petition is admissible, the petition is given a case number. In some cases, the Commission may decide the admissibility of a case when deciding the merits (third step).

Friendly Settlement

The Commission, on its own or at the request of any of the parties, will try to reach a friendly settlement. If a friendly settlement is reached, the Commission

adopts a report that concludes the case. If efforts to reach a friendly settlement fail, the Commission continues with the valuation of the merits.

Merits

After issuing the report on admissibility, the petitioner has three months to submit initial arguments, after that, the state will also have three months to present its initial arguments. The Commission may also request the parties to provide additional information or hold a hearing or a working meeting in order to gather more information.

After gathering the information, arguments and hearings, the Commission decides whether the state is or is not responsible for violations of the American Convention or Declaration, and it prepares a report. If the report declares that the state has not violated human rights protected by the Convention, this is transmitted to the parties and the case is concluded. If the Commission has found the state responsible, it prepares a preliminary report which includes some recommendations aiming to repair the violation committed. The recommendations of the Commission usually include measures to provide full reparation to the victims and to prevent further violations. In the report, the Commission also sets a deadline by which the state must comply with those recommendations. This deadline can be extended by the Commission if justified. The recommendations are binding even though they are not part of a judgment but of a report. The obligations arise from the OAS Charter and American Convention.

Referral to the Court

Under the old rules, the Commission enjoyed discretionary power to submit the case to the Court. If the Commission considered that the state had not complied with the recommendations established in the preliminary report, it could decide to: i) publish a report stating its final observations and recommendations and continue monitoring the state's compliance with the report; or ii) refer the case to the Court. Since 2009, the Commission has had new rules. Nowadays, if the Commission considers that the state has not complied with the recommendations established in the preliminary report, as a general rule it: i) refers the case to the Court; ii) publishes a report stating its final observations and recommendations and continues monitoring the state's compliance with the report without referring it to the Court.

INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court of Human Rights is the only independent judicial organ of the System and is based in San José, Costa Rica. It was created by the American Convention in 1969. The Court is in charge of the application and interpretation of the American Convention. By the same token, the American

Convention is the principal legal instrument which establishes OAS states' obligations regarding human rights. It protects a wide range of political and civil rights such as the rights to life, personal liberty, personal integrity, equality before the law, due process and fair trial, property, freedom of religion, freedom of expression and freedom of association. It also protects economic, social and cultural rights such as social security or education.

The Inter-American Court of Human Rights is a non-permanent one as it holds periodical and special sessions. The Court is not meant to be a *fourth instance* judicial body, but rather to supplement and complement national judicial systems. National systems bear the principal and primary responsibility to promote, protect and enforce the rights established by the American Convention which states have agreed to respect. Thus, any case brought to the Court must, as a rule, first have exhausted national remedies and sought a solution within the national legal system. Hence, the Court plays a subsidiary role, acting only when the state has not succeeded in enforcing the legal instruments of the System, thus not complying with its international obligations.

The Court is composed of seven judges who are elected by the OAS member states which are parties to the Convention. The judges are elected in their individual capacities and not as representatives of their own states and they may be nationals of any OAS member state, including those who are not party to the American Convention. Judges are elected for a period of six years and may be re-elected only once. The Convention also allows states to appoint *ad hoc* judges, judges appointed by one party to serve as judge on a specific case (Von Bahten, 2012: 30) in inter-state cases. Yet, until 2009, the Court also allowed *ad hoc* judges in several individual cases (Advisory Opinion OC-20, 2009).

Principal Functions of the Court

The Court has two main types of jurisdiction: contentious and advisory. In addition, the Court has also adopted other non-judicial activities as part of its functions (Dulitzky, 2007).

- i. *Contentious Jurisdiction*: The Court has the power to apply and interpret the Convention by issuing judgments addressed to states that have previously accepted its competence. In this light, it has the power to hear and adjudicate cases between individuals and states or between states. Unlike applications to the European Court of Human Rights, individual complaints cannot be sent directly to the Court, but first must be submitted to the Commission. Following the proceedings with the Commission, a complaint can be sent to the Court either by the Commission or by the state. Although the Commission lodges the case before the Court, the victim or legal representative may submit their brief containing pleadings, motions and evidence autonomously and shall continue to act in the proceedings. The Court's judgments are final and not subject to appeal, although any party to a case may request the Court to interpret or clarify the meaning of the judgment.
- ii. *Advisory Jurisdiction*: The Court can also give advisory opinions about the interpretation of human rights obligations under the American Convention or any other treaty at the request of any OAS member state or organ. It can also provide states with opinions regarding the compatibility of national laws with the System's human rights instruments. The Court's opinions are considered

authoritative but not binding (Pasqualucci, 2003:29). The advisory competence was the one most used by the Court during the first eight years after it started its works in 1980, year in which its Statute was approved (Pinto, 2013: 35). This allowed the Court to address sensitive human rights questions (Pasqualucci, 2002:242). The Court has given its advisory opinion on several topics such as restrictions to the death penalty, the content on children's rights, and the rights of undocumented migrants. For example, in 2002 Mexico requested the Court's opinion on the deprivation of undocumented migrants' labour rights and its compatibility with international human rights, which resulted in the Juridical Condition and Rights of Undocumented Migrants' Advisory Opinion. Based on the non-discrimination principle, the Court concluded that migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labour-related nature. It also established that '[un]documented migrant workers possess the same labour rights as other workers in the State where they are employed, and the latter must take the necessary measures to ensure that this is recognized and complied with in practice' (Advisory Opinion OC-18, 2003: 173(10)) Thus, through its advisory jurisdiction, the Court contributes to the evolution of the understanding of the scope and content of human rights. (Pasqualucci, 2003:80). Despite its importance, the Court's use of its advisory competence has waned during the last decade.

- iii. *Extra non-judicial activities*: The Court also carries out non-judicial activities which are of relevance for the protection and promotion of human rights protected by the American Convention. Those activities are seen as educational practices, such as participation in conferences and workshops as well as the publication of specialized magazines. For example, along with other organizations, the Court has at times published the magazine, *Diálogo Jurisprudencial* (Jurisprudential Dialogue), which is devoted to the study of the reception and impact of the Court's jurisprudence in national jurisdictions. (IACtHR, 7 July 2009: 23–8).
- iv. *Provisional measures*: The Court is also empowered to adopt provisional measures in cases of extreme gravity and urgency in order to avoid irreparable damage to persons. Thus, those measures aim to 'protect the victims against potential human rights violations' (Rodríguez-Pinzón and Martín, 2010: 366). These measures may be requested with respect to both cases before the Court and cases not yet submitted to it. The petitioner must demonstrate sufficient grounds to assume that rights protected by the American Convention 'are likely to be violated' as a consequence of a complaint against a state (Haack et al., 2011). Most of the provisional measures granted by the Inter-American Court aim at preventing violations of the right to life and the right to personal integrity (Gonzalez, 2010:61).

The Inter-American Court's Individual Complaint Procedure under the American Convention

The proceedings before the Inter-American Court include five steps: initial written step, public hearings, final written step, delivery of a judgment and monitory compliance.

First Written Step

As explained before, only states and the Commission can refer cases to the Court. Once a case is received, the Court Secretary will notify the Court judges, the state involved and the victim's legal representative. The requirements of a Commission's case referral are: the names of the Commission's representatives (delegates); the name and contact information of the alleged victims' legal representatives (if the victim does not have a legal representative, the Court may appoint an Inter-American defender as his/her legal representative); the reasons for referral to the

case; the Commission's observations on the state's answer to the recommendations of its report; a copy of the case file; the Commission's statement on whether the Inter-American public order of human rights is affected in a significant manner; the possible appointment of expert witnesses; and the claims, including those relating to reparations. If these criteria are not met, the Court may request the Commission to submit any missing information.

Although the case is referred by the Commission, along with all related information and evidence, the victim has the right to participate independently in the proceedings. In this light, the victim (through his/her legal representative) is given two months to present a brief containing pleadings, motions, evidence, request for specific forms of reparations, declarants and proposed expert witness. This brief may include additional allegations or forms of reparations than what is in the Commission's report. After the victim's brief submission, the state has four months to respond in writing whether it accepts or rejects the victim's claims and to make observations on the reparations. The state may include preliminary objections in its response. If this is the case, the Commission and the alleged victims will have 30 days to present their observations regarding such objections.

Public Hearings

Once all written information and briefs are submitted, the Court President will indicate the date on which oral proceedings will open and convoke the parties to hearings. These hearings shall be public but the Court may decide to hold a hearing in private if there are exceptional circumstances justifying it. The victims or their representatives, the Commission, the state and the declarants proposed by the parties and accepted by the Court are convoked to participate in the hearings. The deliberations of the Court shall be private; however both the hearing and the deliberations are to be kept on audio-recordings.

Final Written Step

Once the hearings are closed, the alleged victims or their representatives, the Commission and the state are given the opportunity to present their final written arguments within a period of time established by the Presidency.

Delivery of a Judgment

Having received the final written arguments, the Court will examine the case and all evidence to issue a final binding judgment not subject to appeal. In this judgment the Court will decide on the preliminary objections and the merits, and will order reparations in a single judgment. Yet, during the first years of its work, the Court used to deliver a judgment per preliminary objections, merits and reparations. If any judge does not agree with the Court's reasoning or wants to extend an analysis on it, he or she may annex a separate opinion to the judgment. At the request of the parties, the Court can interpret the meaning or scope of the judgment.

Monitory Compliance

The American Convention establishes the state's obligation to comply with the Inter-American Court's judgments, but it does not explicitly establish a fixed time in which this compliance must be fulfilled. Yet, the Court has generally given six months from the date the judgment is issued to the state complying with its judgments (Pasqualucci 2003: 283). Since the Convention is also silent about any monitoring compliance mechanism, the Court at its own initiative may request the state to report on the measures adopted in order to comply with the judgments (De Schutter, 2010: 936). This initiative was once challenged by the State of Panama in the case, *Ricardo Baena et al.*, but the Court responded that '[t]he effectiveness of judgments depends on their execution' and therefore concluded that it 'has the authority inherent in its jurisdictional function to monitor compliance with its decision' (IACtHR, 28 November 2003: 73 and 131).

Friendly Settlement

The American Convention allows for a friendly settlement at any time of the proceedings. If the parties reach an agreement while the case is pending, the Court has the power to continue the consideration of a case if it deems this necessary.

THE INTER-AMERICAN COURT'S PROGRESSIVE AND VICTIM-FRIENDLY APPROACH

Since its first judgment on reparations in 1989, *the Velásquez Rodríguez case*, the Inter-American Court has excelled in producing landmark judgments due to its progressive role in the interpretation of human rights such as reparations, victims' rights, indigenous people's rights, transitional justice and amnesty laws, and the vindication of economic, social and cultural rights, among others (Pasqualucci, 2009; Bantekas and Oette, 2013). Its jurisprudential progressivity has been globally celebrated but also criticized as it portrays the Court in an activist role (Huneus, 2011: 501;). Finally, the Court has also been progressive as regards the manner in which the claimants would prove their allegations to the extent that it has shifted the burden of proof in some cases.

Reparations

Article 63 (1) of the American Convention empowers the Court to award reparations to the victims of human rights violations protected by it. Reparations may include compensation to the victims and their relatives, restitution of the rights violated, as well as measures of rehabilitation, satisfaction or guarantees of non-repetition. In principle, these measures are intended to wipe out all the consequences of the violations suffered by the victims. Since it is virtually impossible

to wipe out all consequences of human rights violations, reparations aim to help the victims make their suffering more bearable (Separate Opinion of Cançado Trindade, *Bulacio Case*; IACtHR, 18 September 2003).

In this light, the Court has consistently ordered the state to pay compensation to the victims and their relatives. The Court has not limited its reparations to monetary compensation as it has ordered states to: reform their internal laws; develop social programmes in communities where a massacre or widespread human rights violations took place (for example, the implementation of a housing plan); name a street with the victims' names; build a monument in their victims' honour; find the remains of a murdered victim so that his or her family can bury him/her in accordance with their beliefs; prosecute and punish those responsible for a given human rights violation. (Antkowiak, 2008),

While these measures aim to address the different consequences of a violation and are awarded in accordance to their gravity (*Goiburú Case*; IACtHR, 22 September 2006: para. 416), their ambitious scope and the complexity of implementing them, the fragility of democracy in the region (Neuman, 2008: 101, 105), and the lack of an independent body in charge of monitoring state compliance with the judgments, have negatively impacted on full compliance with the judgments (Rodríguez-Pinzon and Martin, 2010: 379).

Although the lack of full compliance with its judgments could be seen as a factor undermining the value of the Court's progressive interpretation (Van Boven, 2003), the Court has set up standards of reparations which have guided national reparation programmes and have been embraced by other international tribunals, such as the European Court of Human Rights and the International Criminal Court.

Economic, Social and Cultural Rights (ESCR)

During recent years, the Court has increasingly dealt with the rights of the most disadvantaged groups in Latin America: street children, workers, migrants, detainees and prisoners, displaced people and indigenous communities (Tinta, 2007: 437). The legal basis for it is to be found in Article 26 of the American Convention, which establishes that states are to undertake measures to reach full realization of ESCR, and the Protocol of San Salvador, which protects several rights of this category and empowers the Court to deal with cases related to trade union rights and the right of education. Nonetheless, the Court's jurisprudence indicates that the Court has addressed a wide range of ESCR violations. For example, in *Street Children v. Guatemala*, the Court was confronted with the cruel murder of street children at the hands of state agents. The Court looked at the meaning of the right to life not only because the children were murdered but also because they had been deprived of the minimum means to guarantee a decent life such as housing and education, and special assistance, in particular, for the ones having abandoned their homes as a consequence of suffering abuse. The Court emphasized that children are vulnerable groups and that they must be

afforded special protection. In *Girls Yean and Bosico v. Dominican Republic* (IACtHR, 23 November 2006), the Court dealt with the violation of the right to education of two children of Haitian descent who were denied the Dominican nationality and therefore had no access to education. The Court has also dealt with workers' rights in three cases: *Five Pensioners v. Peru*, *Baena Ricardo et al. v. Panama* and *Acevedo Jaramillo et al. v. Peru* (Tinta, 2007: 445–51). In addition, when dealing with indigenous communities, the Court has constructed jurisprudence related to the right to land and basic ESCR of the indigenous communities. In the *Yakye Axa* case, which dealt with violations of the right to property and the right to life by depriving the community of traditional means of livelihood, the Court interpreted the right to life by taking into account the vulnerable group's access to food, water, health and education. Finally, in cases involving violations of the right to life, personal liberty and freedom from torture of a large number of victims (massacres cases, for example), the Court has awarded reparations which aim at providing access to health, housing, infrastructure, education or food. (Contreras-Garduño, and Rombouts, 2010; Contreras-Garduño, 2012)

Burden of Proof

In principle, the Court uses the general principle of law which dictates that the claimant needs to prove the allegations. Yet, in some cases, the Court has inverted this principle and established that it is not the claimant who needs to prove the allegations but rather that the state must demonstrate that those allegations did not occur. This is especially true in cases regarding enforced disappearances. This crime implies that the state has the intention to hide or destroy all evidence related to the disappearance of a person (Paúl, 2012). Sadly, this crime was widespread in the region during the time of authoritarian regimes. Many people who opposed or disobeyed the governments had disappeared. The Court's approach in these cases has been widely accepted, since, otherwise, this crime would have never proven before the Court.

Facilitating Access to Justice for Victims

In 2009, the Court and the Commission undertook reforms to their Rules of Procedure. The main purpose of this reform was to ensure a better and more direct access of victims to the Inter-American System. The most important reform is that the Commission would no longer act as the 'legal representative' of the victims. Until 2009, the Commission litigated a given case against the state before the Court. This situation was very controversial because the Commission, the independent body seeking for a friendly settlement between a victim and a state, became the defendant of the victims before the Court. This reform recognized victims as parties of the proceedings. They are entitled to present their claims and arguments autonomously. In addition, the reform created the figure of

Inter-American Defence Attorney (IADA) and a Legal Assistance Fund (LAF) was created (Rules of Procedure, IACtHR, 2009).

In this light, if the victims of a given case act without legal representation because of a lack of economic resources, the Court appoints an IADA to represent them. By providing victims with a lawyer free of charge, the System seeks to facilitate the access to justice.

Likewise, the LAF was created to assist 'persons who currently lack the resources [to] bring their cases before the system'. The fund is intended to provide financial means to petitioners who cannot afford the costs of the proceedings before the Commission and the Court. Interestingly, the LAF is funded by voluntary contributions and not by the OAS's budget (OAS, AG/RES. 2426, (2008).

CONCLUSIONS AND FUTURE DIRECTIONS

Undoubtedly, the work of the Commission and the Court has played a pivotal role in the protection of human rights in the region. They both have not only greatly contributed to the understanding of human rights scope but also helped to strengthen democracies and a culture of human rights respect by putting the victims at the centre of the system. However, their work cannot be free of criticism. To date, the Commission has not revealed the methodology used to refer some cases to the Court and not others, or why it waits several years before deciding on a given case. Furthermore, the Court's progressive approach might be undermined by the lack of a uniform line when solving cases of similar nature. In short, the system is in need of more transparency.

Although the Inter-American System was consolidated rapidly during the past decades by the adoption of several specific regional instruments and rules facilitating victims the access to justice at the international level, the System's main challenges remain the same since its creation: the lack of political will and commitment of the states to comply with their obligations, which can be exemplified by the non-universal ratification of the American Convention, and the acceptance of the Court's jurisdiction in the continent. For example, the United States and Canada have not ratified the American Convention. Most of the states which have accepted the Court's jurisdiction are from Latin America. The current political landscape in the region is very complex; on the one hand, states continuously reaffirm their commitment to strengthen the Inter-American System of Human Rights and foster human rights protection; on the other hand their support seems very vague as they try to avoid any monitoring human rights mechanism. For example, the United States often reiterates its support to strengthen the System in order to advance the protection of human rights in the region. Yet, it refuses to become a state party to the American Convention. Similarly, member states' commitment seems very artificial when looking at states' compliance with the Court's judgments and the refusal to fund the System.

At the moment, there is great uncertainty as to what the future of the System holds because it is facing a difficult time. States usually threaten the System when they are subjects of scrutiny by the Commission or/and the Court. States' reluctance to fund the System and threats of leaving the System are examples of it. In addition, the avoidance of both compliance with the Court's orders and the adoption of recommendations or human rights standards are facts that render the System to be ineffective and might suggest that the System will have a short life. Yet, it must be recalled that the System has survived more stormy political times, especially during the time of common, widespread violence and internal conflicts. Despite all the difficulties, the System's achievements at the institutional level and in the realization of human rights are enormous.

Having said that, it is clear that this difficult time is expected to impede further strengthening of the System. If states continue with their half-hearted support, the System will remain as it is today: a more consolidated human rights mechanism in the region but still in need of improvement. An informed and organized civil society that is able to influence public policies is needed in order to avoid a stationary era.

REFERENCES

- Antkowiak, Thomas (2008) 'Remedial approaches to human rights violations: the Inter-American Court of Human Rights and beyond', *Columbia Journal of Transitional Law*, 46: 351–419.
- Bantekas, Ilias and Oette Lutz (2013) *International Human Rights Law and Practice*, Cambridge: Cambridge University Press.
- Burgenthal, Thomas (1975) 'The revised OAS Charter and the protection of human rights', *American Journal of International Law*, 69: 828–36.
- Contreras-Garduño, Diana and Rombouts, Sebastiaan (2010) 'Collective reparations for indigenous communities before the Inter-American Court of Human Rights', *Merkourios, Utrecht Journal of International and European Law*, 27(72): 4–17.
- Contreras-Garduño, Diana (2012) 'Are all victims entitled to reparations? The case of the Inter-American System of Human Rights', *SIM Special*, 37: 120–41.
- De Schutter, Olivier (2010) *International Human Rights Law*. New York: Cambridge University Press.
- Dulitzky, Ariel (2007) '50 años del sistema interamericano de derechos humanos: una propuesta de reflexión sobre cambios estratégicos necesarios', *Revista IIDH*, 46: 33–42.
- Goldman, Robert K. (2009) 'History and action: The Inter-American Human Rights System and the role of the Inter-American Commission on Human Rights', *Human Rights Quarterly*, 31: 856–87.
- Gonzalez, Felipe (2009) 'The experience of the Inter-American Human Rights System', *Victoria University of Wellington Law Review*, 40(1): 103–25.
- Gonzalez, Felipe (2010) 'Urgent measures in the Inter-American Human Rights System', *International Law Journal on Human Rights*, 7(13): 50–73.
- Haeck, Yve, Burbano-Herrera, Clara and Zwaak, Leo (2011) 'Strasbourg's interim measures under fire: Does the rising number of state incompliances with interim measures pose a threat to the European Court of Human Rights?', *European Yearbook on Human Rights*. Vol. 11, 2011. Available at: www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1543945 (accessed 11 April 2014).
- Huneus, Alexandra (2011) 'Courts resisting courts: Lessons from the Inter-American Court's struggle to enforce human rights', *Cornell International Law Journal*, 44: 493–533.
- Medina-Quiroga, Cecilia (1988) *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System*. Dordrecht: Martinus Nijhoff.

- Medina-Quiroga, Cecilia (2012) 'The Inter-American System for the Protection of Human Rights', in *International Protection of Human Rights: A Textbook*, 2nd, Turku/Åbo: Åbo Akademi University Institute for Human Rights.
- Neuman, Gerald L. (2008) 'Import, export and regional consent in the Inter-American Court of Human Rights', *The European Journal of International Law*, 19(1): 101–23.
- Nowak, Manfred (2003) *Introduction to the International Human Rights Regime*. Leiden: Martinus Nijhoff.
- Pasqualucci, Jo M. (2002) 'Advisory practice of the Inter-American Court of Human Rights: Contributing to the evolution of international human rights law', *Stanford Journal of International Law*, 38: 241–88.
- Pasqualucci, Jo M. (2003) *The Practice and Procedure of the Inter-American Court of Human Rights*. Cambridge: Cambridge University Press.
- Pasqualucci, Jo M. (2009). 'International Indigenous land rights: a critique of the jurisprudence of the Inter-American Court of Human Rights in light of the United Nations declarations on the rights of indigenous People's', *Wisconsin International Law Journal*, 27(1): 51–98.
- Paúl, Álvaro (2012) 'In search of the standards of proof applied by the Inter-American Court of Human Rights' (7 September 2011). *Revista Instituto Interamericano de Derechos Humanos*, 55: 57–102. Available at: www.ssrn.com/abstract=1923908 or www.doi.org/10.2139/ssrn.1923908.
- Pinto, Mónica (2013) 'The role of the Inter-American Commission and Court of Human Rights in the protection of human rights: Achievements and contemporary challenges', *Human Rights Brief*, 20(2): 34–8.
- Rodríguez-Pinzon, Diego and Martin, Claudia (2010) 'The Inter-American Human Rights System: selected examples of its supervisory work', in Joseph, S. and McBeth, A. (eds), *Research Handbook in International Human Rights Law*. Cheltenham: Edgar Elgar Publishing.
- Tinta, Mónica (2007) 'Justiciability of economic, social and cultural rights in the Inter-American System of Protection of Human Rights: beyond traditional paradigms and notions', *Human Rights Quarterly*, 29(2): 431–59.
- Van Boven, Theo (2003) 'Reparations: a requirement of justice', in *El sistema interamericano de protección de derechos humanos en el umbral del siglo XXI. Memoria del Seminario*, Tomo I, 2d edn. San José, Costa Rica: Inter-American Court of Human Rights.
- Von Bahten, Gustavo (2012) 'The role of judges ad hoc on International Permanent Courts: a critical analysis', *Revista Ars Boni et Aequi*, 8 (2): 25–80

Documents

- Charter of the Organization of American States (1948). Available at www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm (accessed 11 April 2014)
- IAComHR (1978) 'Annual Report of the Inter-American Commission on Human Rights 1978'. Available at: www.cidh.org/annualrep/78eng/section.1.htm (accessed 11 April 2014).
- IAComHR (2011) 'Annual Report of the Inter-American Commission on Human Rights 2011'. Available at: www.oas.org/en/iachr/docs/annual/2011/TOC.asp (accessed 4 March 2014).
- IAComHR (2013) 'Report No.96/13'. Decision to archive. Inter-state case 12.779. Available at: www.oas.org/en/iachr/decisions/2013/EC-COAR12779EN.doc (accessed 15 April 2014)
- IACtHR, 'Case of Velásquez Rodríguez v. Honduras'. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7
- IACtHR, 'Case of the "Five Pensioners" v. Peru. Merits, Reparations and Costs'. Judgment of 28 February 2003. Series C No. 98.
- IACtHR, 'Juridical Condition and Rights of Undocumented Migrants'. Advisory Opinion OC-18 of 17 September 2003. Series A No. 18.
- IACtHR, 'Case of Bulacio v. Argentina, Merits, Reparations and Costs'. Judgment of 18 September 2003, Series C No. 100, Separate Opinion Judge Cançado Trindade.

- IACtHR, 'Case of Baena Ricardo et al. v. Panama'. Competence. Judgment of 28 November 2003. Series C No. 104.
- IACtHR, 'Case of Yakye Axa Indigenous Community'. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125.
- IACtHR, 'Case of Acevedo-Jaramillo et al. v. Peru'. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 7, 2006. Serie C No. 144.
- IACtHR, 'Case of Goiburú et al. v. Paraguay. Merits, Reparations and Costs'. Judgment of 22 September 2006. Series C No. 153.
- IACtHR, 'Case of the Girls Yean and Bosico v. Dominican Republic. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs'. Judgment of 23 November 2006. Series C No. 156.
- IACtHR, 'Case of Valle Jaramillo et al. v. Colombia. Interpretation of the Judgment on the Merits, Reparations and Costs'. Judgment of 7 July 2009. Series C No. 201.
- IACtHR, 'Article 55 of the American Convention on Human Rights'. Advisory Opinion OC-20/09 of September 29, 2009. Series A No. 20.
- IACtHR (2009). 'Annual Report of the Inter-American Court of Human Rights'. Available at: www.cor-teidh.or.cr/docs/informes/2009.pdf (accessed 4 March 2014).
- IACtHR (2009). 'Rules of Procedure of the Inter-American Court of Human Rights'. Available at: www.oas.org/en/iachr/mandate/Basics/24.RULES%20OF%20PROCEDURE%20COURT%20FINAL.pdf (accessed 14 April 2014)
- OAS, AG/RES. 2426 (XXXVIII-O/08) (2008), Establishment of the Legal Assistance Fund of the Inter-American Human Rights System. Available at: www.oas.org/dil/AGRES_2426.doc (accessed 14 April 2014)