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THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: AN EFFECTIVE INSTITUTION FOR REGIONAL RIGHTS PROTECTION?

LEA SHAVER*

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights are charged with protecting human rights in the Western Hemisphere. This Article explains the workings of this regional human rights system, examining its history, composition, functions, jurisdiction, procedure, jurisprudence, and enforcement. The Article also evaluates the system's historical and current effectiveness. Particular attention is given to the disconnect between the system's success with the region's Latin-American nations and its rejection by Anglo-American States, as well as to the potential to use the system to improve human rights in Cuba.

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INTRODUCTION

For almost half a century, the Inter-American human rights system has played an important role in the consolidation of democratic norms in the Western Hemisphere. Yet its workings are largely unknown to human rights advocates and legal scholars in the United States. As economic globalization and transnational adjudication continue to rise in importance, it becomes more and more important that U.S. legal scholars, students, and practitioners understand the workings of these influential regional institutions.

This Article advances that understanding in two parts. The first part of the Article develops the first detailed and systematic description of the Inter-American human rights system to be published in English. This introduction to the Inter-American Commission and Court of Human Rights proceeds in six parts, examining the twin institutions' history, composition, functions, exercise of jurisdiction, trends in jurisprudence to date, and the methods and effectiveness of enforcement of the institutions' rulings. The second part of the Article builds upon the introduction to evaluate the historical effectiveness of the Inter-American human rights system. It also explores how the system might confront several key challenges facing it today. The first challenge is how to improve human rights compliance in Cuba, the region's most problematic State. The second is to address the increasing disconnection between the Inter-American human rights system and the English-speaking States of the Western Hemisphere.

The Article concludes that although the regional system is unlikely to regain popularity with the English-speaking States, it could have an important role to play in advancing human rights in Cuba, if U.S. policymakers will let it.

I. STRUCTURE AND FUNCTION

The Inter-American Court of Human Rights (the Court) and its sister institution, the Inter-American Commission on Human Rights (the Commission, or IACHR) are charged with protecting human rights in the Western Hemisphere.

The Commission was established in 1959 and began to operate in 1960.¹ In 1969, the Organization of American States ("OAS") adopted the

1. Inter-American Commission on Human Rights, Brief History of the Inter-American Human Rights System, <http://www.cidh.org/what.htm> (last visited Sept. 1, 2009).

American Convention on Human Rights (the American Convention), which called for the creation of the Court.² The Court began to actually operate in 1979, after the eleventh state ratification brought the American Convention into force.³

Within the Inter-American Human Rights System, the Court and the Commission play distinct yet complementary roles. The Court resolves contentious disputes and issues advisory opinions on specific questions of law.⁴ The Commission has a much broader role. It acts as the first step in the admissibility process for contentious cases, promotes friendly settlements between parties, and investigates and presents reports on human rights conditions in American States, even where no legal claim has been filed.⁵

The Commission is based in Washington, D.C., home of the OAS headquarters; the Court is located in San José, Costa Rica.⁶ The official languages of the OAS, the Court, and the Commission are English, Spanish, Portuguese, and French. Most work, however, is conducted in Spanish and English. In Spanish, the institutions are known as the Corte Interamericana de Derechos Humanos (“la Corte Interamericana” or “la Corte”) and the Comisión Interamericana de Derechos Humanos (“CIDH”).

A. History

The Inter-American human rights system arose out of an older, more general regional system. Regional governance in the Americas has its roots in the International Union of American Republics, formed in 1890 and reborn in 1948 as the OAS.⁷

2. American Convention on Human Rights, July 18, 1978, O.A.S.T.S. 36, 1144 U.N.T.S. 123, available at <http://www.oas.org/juridico/english/treaties/b-32.html> [hereinafter American Convention].

3. Inter-American Court of Human Rights, History, <http://www.corteidh.or.cr/historia.cfm?%CFID=97682&CFTOKEN=15299118> (last visited Sept. 1, 2009).

4. See generally *infra* Parts I.C–H.

5. *Id.*

6. Inter-American Commission on Human Rights, IACHR Home, <http://www.cidh.org/DefaultE.htm> (last visited May 15, 2010); Organization of American States, OAS—Our Locations, http://www.oas.org/en/about/our_locations.asp (last visited May 15, 2010). San José, Costa Rica, had earlier been the seat of the world’s first regional court, the Central American Court of Justice. Rodrigo Carazo-Odio, Former President of the Republic of Costa Rica, Speech at the Installation of the Inter-American Court of Human Rights (Sept. 3, 1979), in INTER-AMERICAN COURT OF HUMAN RIGHTS: PROCEEDINGS OF INSTALLATION 105 (2d ed. 1999).

7. JOSE RIVERA, LATIN AMERICA: A SOCIOCULTURAL INTERPRETATION 218 (2d ed. 1978), available at <http://books.google.com.mx/books?id=i1i8S175-d0C&lpg=PA218&dq=international%20union%20of%20american%20republics&hl=en&pg=PR4#v=onepage&q=international%20union%20of%20american%20republics&f=false>.

Although there were relatively few democracies in the Western Hemisphere during the first half of the twentieth century, intellectual leaders in the American region shared a common heritage of philosophical agreement on human rights, stemming from the Enlightenment.⁸ Statements of human rights were commonplace in national constitutions throughout the region as American colonies achieved their independence from European powers in the nineteenth century.⁹ There was thus broad regional support for the adoption of an American Declaration on the Rights and Duties of Man during the same 1948 conference that created the Charter of the Organization of American States.¹⁰ The American Declaration was the first international human rights document, preceding the Universal Declaration of Human Rights by a few months.¹¹

The American Declaration stopped short of translating its expression of shared human rights norms and aspirations into binding legal obligations.¹² Although several States advocated binding commitments at that time, the United States and other regional powers opposed the move.¹³ The idea for a regional Court to enforce these rights was, however, already conceived. The founding conference of the OAS adopted a resolution recommending the creation of an Inter-American Court to Protect the Rights of Man, pending further study.¹⁴

Despite initial enthusiasm, three decades would pass before this vision was realized. According to political scientist David Forsythe, the Roosevelt Administration strongly supported the push for international

8. See Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633, 639 (2000).

9. See David Forsythe, *Human Rights, the United States and the Organization of American States*, 13 HUM. RTS. Q. 66, 75–76 (1991).

10. *Id.* at 77.

11. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 868–69 (2d ed. 2000).

12. Like the Universal Declaration of Human Rights, the Inter-American Declaration was drafted as an official statement, rather than as a treaty. Becoming a party to the Declaration therefore does not entail contractual obligations to other States Parties. See Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention of Human Rights: Requested by the Government of Colombia, Advisory Opinion OC/10-89, Inter-Am. C.H.R., paras. 33–34, *excerpted by* HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1031 (3d ed. 2008).

13. For a fuller political history of the 1948 OAS human rights negotiations, see Forsythe, *supra* note 9, at 76–80.

14. Ninth International Conference of American States (Bogotá, Colombia, 1948), Resolution XXXI, Inter-American Court to Protect the Rights of Man, *reprinted in* International Conferences of American States, Second Supplement 1942–1954, Washington, D.C.: Pan American Union, 1958 at 270, *cited in* Inter-American Court of Human Rights, General Information, *in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 13 n.19 (1992), *available at* <http://www1.umn.edu/humanrts/iachr/general.html>.

recognition of human rights.¹⁵ The Ninth Conference of American States, which adopted both the Inter-American Charter and the American Declaration, occurred during the final days of the fourth Roosevelt Administration. Later U.S. foreign policy, however, emphasized the fight to resist and contain Communism, with mixed results for U.S. regional leadership on human rights.¹⁶ U.S. leadership on human rights was also hampered during the 1950s and 1960s by Southern senators who recognized the development of such international institutions as a threat to the maintenance of racial segregation.¹⁷

The move to establish regional enforcement institutions did not regain momentum until 1959, when situations in Cuba and the Dominican Republic prompted renewed regional concern for human rights.¹⁸ Ultimately, the OAS approved a compromise measure, establishing the Inter-American Commission on Human Rights with a limited mandate.¹⁹

The American Convention on Human Rights was adopted in 1969 at the Inter-American Specialized Conference on Human Rights in San José, Costa Rica.²⁰ The Declaration's statements of human rights have, at best, the status of regional customary law. The Convention, in contrast, was designed to impose specific and legally binding obligations on ratifying States.²¹ The Convention also established the Inter-American Court of Human Rights to adjudicate the obligations set forth.²²

The Convention did not garner the eleven state ratifications needed to enter into force, however, until July 18, 1978.²³ For the first two decades,

15. See Lea Shaver, *The Right to Science and Culture*, 2010 WIS. L. REV. 121, 134–35 (discussing the role of the Roosevelt Administration in building human rights institutions in the American region and at the United Nations).

16. See Forsythe, *supra* note 9, at 79–80.

17. See, e.g., CYNTHIA SOOHOO ET AL., BRINGING HUMAN RIGHTS HOME 76 (2008) (noting resistance of Southern Senators to signing of the Genocide Convention, resulting in presidential promise not to forward any more human rights treaties for ratification); Natalie Hevener Kaufman, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 10, 37 (1990) (explaining that the major Senate arguments against all human rights treaties were presaged in opposition to the Genocide Convention, including concerns for the domestic civil rights situation of African Americans).

18. Forsythe, *supra* note 9, at 82.

19. See *id.* at 81–83.

20. American Convention, *supra* note 2.

21. See *id.* arts. 67–68.

22. *Id.* arts. 52–69.

23. The original eleven parties to the convention were (with date of ratification): Costa Rica (1970), Colombia (1973), Venezuela (1977), Honduras (1977), Haiti (1977), Ecuador (1977), Dominican Republic (1978), Guatemala (1978), Panama (1978), El Salvador (1978), and Grenada (1978). Four additional states followed within the next year: Peru (1978), Jamaica (1978), Bolivia (1979), Nicaragua (1979). The United States signed the Convention in 1977, but never followed through with ratification. Organization of American States, General Information of the American

then, the Commission operated in the absence of a regional Court or any regional charter of legally binding human rights obligations.

The Convention might never have come into force if not for the Carter Administration's emphasis on human rights as a central goal of U.S. foreign policy between 1977 and 1981. President Carter lobbied American neighbors to ratify the Convention, and most of the region's smaller powers followed his lead.²⁴ Bolivia, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Venezuela, and the Dominican Republic all ratified the Convention during Carter's term.²⁵ Although President Carter signed the American Convention on behalf of the United States during his first year in office, the U.S. Senate never consented to ratification. Carter transmitted four human rights treaties to the Senate in February of 1978, including three United Nations covenants and the American Convention.²⁶ He invested little political capital, however, in winning the Senate's consent.²⁷ Only in the 1990s did the United States ratify the International Covenant on Civil and Political Rights²⁸ and the International Covenant on the Elimination of All Forms of Racial Discrimination.²⁹ The United States has never ratified, and is therefore not bound by, the American Convention and the International Covenant on Economic, Social and Cultural Rights.³⁰

Convention on Human Rights "Pact of San Jose, Costa Rica" <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited Feb. 15, 2011).

24. Forsythe, *supra* note 9, at 85–88.

25. *Id.*

26. See Jimmy Carter, Human Rights Treaties Message to the Senate (Feb. 23, 1978), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=30399>.

27. See Forsythe, *supra* note 9, at 87.

28. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by the United States June 8, 1992); see also OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, RATIFICATIONS AND RESERVATIONS: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2006).

29. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (ratified by the United States Oct. 21, 1994); see also OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, RATIFICATIONS AND RESERVATIONS: INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2006).

30. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; see also OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, RATIFICATIONS AND RESERVATIONS: INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2006).

B. Composition

Both the Court and the Commission are composed of seven members. Judges on the Court serve six-year terms and may be reelected once.³¹ Members of the Commission serve four-year terms and may also be reelected once.³²

Candidates are proposed by Member States of the OAS, and voted upon by the General Assembly—including those States which have not recognized the jurisdiction of the Court.³³ Judges and Commission Members serve in their personal capacity, and may be nominated by any Member State, not just their country of citizenship.³⁴

The American Convention on Human Rights specifies that members of the Court should be “jurists of the highest moral authority and of recognized competence in the field of human rights.”³⁵ The Court’s founding members were highly qualified and possessed impeccable human rights credentials—four had been political prisoners.³⁶ Later appointments, however, have not always maintained these high standards. Nominations have occasionally been marred by politics, cronyism, and perhaps intentional attempts to undermine the effectiveness of the Court.³⁷ Procedures which have helped to professionalize and insulate the European human rights court from sabotage appointees have yet to be adopted within the OAS.³⁸

Article 55 of the Convention provides that a country called to appear before the Court may appoint a national to be involved in the hearing of that case only, if there is not already one member of the bench from that country.³⁹ This provision was meant to ensure that at least one member of the deliberating panel understands the domestic legal system, which is often relevant for the exhaustion of remedies analysis.

Unfortunately, the procedure was frequently abused. Peru and Guatemala in particular have had a practice of appointing *ad hoc* judges who dissent from an otherwise unanimous bench to recommend a holding

31. American Convention, *supra* note 2, art. 54.

32. *Id.* art. 37.

33. *Id.* arts. 36, 53.

34. *Id.*

35. *Id.* art. 52(1). Similar language applies to members of the Commission. *Id.* art. 34.

36. JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 348–49 (2003).

37. *Id.*

38. *See id.* at 349.

39. American Convention, *supra* note 2, art. 55 (implemented by the Statute of the Inter-Am. C.H.R. art. 10, Oct. 1979, O.A.S. Res. 447(IX), DEA/Ser.P/IX.0.2180).

more favorable to their State.⁴⁰ The Court closed the door to such abuse in 2009, issuing an advisory opinion interpreting Article 55 to apply only in cases brought by one State against another.⁴¹ The Court subsequently revised its rules of procedure to prohibit even regular judges from sitting in any case brought by alleged human rights victims against their own State.⁴²

Currently, members of the Commission and the Court serve part-time, usually alongside academic appointments in their home countries.⁴³ The Commission typically observes two regular sessions per year, of two weeks each, with additional special sessions as necessary.⁴⁴ The Court convenes for one to three weeks at a time, generally four times per year.⁴⁵

The Court and the Commission are each supported by a full-time Secretariat.⁴⁶ The Commission is supported by approximately fifty-seven full-time staff members.⁴⁷ The Court appoints a Secretary, Deputy

40. See, e.g., Neira Alegría *et al.* Case, 1991 Inter-Am. Ct. H.R. (ser. C) No. 13 (Dec. 11, 1991) (Orihuela-Iberico, J. *ad hoc*, dissenting); Panel Blanca Case, 1996 Inter-Am. Ct. H.R. (ser. C) No. 23 (Jan. 25, 1996) (Larraondo-Salguero, J. *ad hoc*, dissenting); Durand & Ugarte Case, Preliminary Objections, 1999 Inter-Am. Ct. H.R. (ser. C) No. 50 (May 28, 1999) (Vidal-Ramírez, J. *ad hoc*, dissenting); Myrna Mack Chong Case, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003) (Martínez Gálvez, J. *ad hoc*, dissenting in part); Maritz Urrutia Case, 2003 Inter-Am. Ct. H.R. (ser. C) No. 103 (Nov. 27, 2003) (Martínez Gálvez, J. *ad hoc*, dissenting in part). *But see* Blake Case, Preliminary Objections 1996 Inter-Am. Ct. H.R. (ser. C) No. 77 (July 2, 1996) (Novales-Aguirre, J. *ad hoc*, concurring) (writing separately to decry the state's responsibility for the death of Nicholas Blake, even though the Court ruled that it could not review the case, since the facts occurred before Guatemala had accepted the jurisdiction of the Court). All opinions may be accessed via the Court's website: <http://www.corteidh.or.cr/casos.cfm>. Occasional abuse of the *ad hoc* provision appears not to influence actual case outcomes, as the Court almost never rules upon a narrow margin—indeed, 100 out of the first 119 cases entertained by the Court (85%) have been unanimously decided.

41. Advisory Opinion OC-20/09 of September 29, 2009, Requested by the Republic of Argentina (Art. 55 American Convention on Human Rights), Advisory Opinion OC-20/09, Inter-Am. Ct. H.R. (Sept. 29, 2009).

42. INTER-AM. CT. H.R. R. CIV. P., arts. 19 (National Judges), 20 (Judges *Ad Hoc* in Interstate Cases); 2009 Rep. Inter-Am. Ct. H.R., http://www.corteidh.or.cr/docs/informes/eng_2009.pdf at 16 [hereinafter Court Report 2009] (noting change in procedures related to national judges, based upon the Advisory Opinion's interpretation of Article 55).

43. See biographies of members of the Court at <http://www.corteidh.or.cr/composicion.cfm>.

44. See Publications of the Inter-American Commission on Human Rights, available at <http://www.cidh.oas.org/publi.eng.htm>.

45. See Annual Reports of the Inter-American Court of Human Rights, available at <http://www.corteidh.or.cr/informes.cfm>. In the last decade, the Court has been in-session for an average of fifty days per year. See 2005 Rep. Inter-Am. Ct. H.R., at 59, available at <http://www.corteidh.or.cr/informes.cfm>.

46. American Convention, *supra* note 2, arts. 40 (establishing Secretariat for the Commission), 59 (establishing Secretariat for the Court).

47. The Secretariat is currently composed of an Executive Secretary and Assistant Executive Secretary, thirty-eight additional professional staff members, and seventeen administrative staff members. See Staff of the Inter-American Commission on Human Rights, <http://www.cidh.oas.org/personal.eng.htm> (last visited Apr. 20, 2010).

Secretary, and professional staff,⁴⁸ and hosts approximately twenty-five interns at any given time.⁴⁹

According to the rules of the Convention, the Court is entitled to draft its own budget, which must be funded in full by the OAS.⁵⁰ In 2005, the Court's budget was nearly 1.4 million USD.⁵¹

The Commission does not enjoy this privilege and has complained of serious difficulties in fulfilling its mandate due to resource limitations.⁵² In addition to OAS funds, the Commission relies on direct contributions from a number of States, as well as support from charitable organizations and the European Commission.⁵³

C. Functions

Functionally, the Court and the Commission play quite distinct roles in promoting human rights in the Americas. The Court operates as a forum of last resort for complaints of human rights abuses that are not adequately addressed by domestic remedies. The Commission assists the Court in identifying and handling these cases, and also develops separate activities of human rights monitoring and promotion in order to prevent future abuses.

Under the American Convention, the Commission is broadly charged with the responsibility "to promote respect for and defense of human rights."⁵⁴ The Commission fulfills this mandate through a variety of activities. First, the Commission monitors the situation of human rights in all countries of the hemisphere, publishing reports on subjects and countries of special concern.⁵⁵ The Commission may also establish special

48. See INTER-AM. CT. H.R. R. CIV. P., arts. 7–10, <http://www.cidh.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm> (last visited Dec. 10, 2010) [hereinafter Court Procedures].

49. See Inter-Am. Ct. H.R., Definitive List of Interns and Visiting Professionals for the Period January through April 2011, <http://www.corteidh.or.cr/listado.cfm>.

50. American Convention, *supra* note 2, art. 72.

51. 2005 Rep. Inter-Am. Ct. H.R., at 5, <http://www.corteidh.or.cr/informes.cfm>.

52. See, e.g., Inter-Am. C.H.R., *Annual Report 2005*, OEA/Ser.L/V/II.124, doc. 5 ¶¶ 107–08 (Feb. 27, 2006) [hereinafter Annual Report 2005].

53. *Id.* ¶ 108.

54. American Convention, *supra* note 2, art. 41.

55. See, e.g., Inter-Am. C.H.R., *Report on the Demobilization Process in Colombia*, OEA/Ser.L/V/II.120, doc. 60 (Dec. 13, 2004), <http://www.cidh.oas.org/countryrep/Colombia04eng/toc.htm>; Inter-Am. C.H.R., *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. (Oct. 22, 2002), <http://www.cidh.oas.org/Terrorism/Eng/toc.htm>; Inter-Am. C.H.R., *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, doc. 70 rev. (Feb. 28, 2000), <http://www.cidh.oas.org/countryrep/Canada2000en/table-of-contents.htm>.

rapporteurships to bring attention to topics and themes of concern in the Americas⁵⁶ and propose amendments and additional protocols to the Convention, to be voted upon by the General Assembly of the OAS.⁵⁷ Second, the Commission receives and processes complaints of specific human rights abuses. If the claim is admissible and has merit,⁵⁸ the Commission will seek to negotiate a friendly settlement between the offending State and the injured party,⁵⁹ or make a finding of fault and recommendations as to how the State should resolve the matter.⁶⁰ In one recent year, the Commission received over 1376 individual petitions, declaring forty-nine to be admissible, reaching four friendly settlements, and producing seven reports on the merits.⁶¹

If the State does not comply with the recommendations and has accepted the contentious jurisdiction of the Court, the Commission may submit the matter to the Court,⁶² which has the power to issue legally binding orders to the State.⁶³ A State may also refer a case to the Court if it wishes to challenge the Commission's finding of responsibility.⁶⁴

The Court determines whether it has jurisdiction to hear the case, entertains preliminary objections, and rules on whether a State has committed a violation of human rights as set forth in the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.⁶⁵ If the Court finds that a violation has occurred, it may award injunctive relief and compensatory damages.⁶⁶ The Court has resolved more than 100 contentious cases to date.⁶⁷

56. Currently, rapporteurships exist to address migrant workers and their families, freedom of expression, and the rights of women. See Rapporteurships of the IACHR, <http://www.cidh.oas.org/relatorias.eng.htm> (last visited Apr. 20, 2010).

57. Statute of the Inter-Am. C.H.R. art. 19(e)-(f), Oct. 1979, O.A.S. Res. 447(IX), available at <http://www.cidh.org/basicos/english/Basic17.Statute%20of%20the%20Commission.htm>.

58. The admissibility decision is made according to Commission Procedures articles 26–36. The determination of merit is made according to Commission Procedures articles 38–43. See INTER-AM. C.H.R. R. CIV. P. arts. 26–43, available at <http://www.cidh.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm> (last visited Dec. 10, 2010) [hereinafter Commission Procedures].

59. *Id.* art. 40 (Friendly Settlement).

60. *Id.* arts. 43–44 (Decision on the Merits & Report on the Merits).

61. Inter-Am. C.H.R., *Annual Report 2008*, ch. III, para. 3, <http://www.cidh.oas.org/annualrep/2008eng/Chap3.c.eng.htm>.

62. Commission Procedures, *supra* note 58, art. 45 (Referral of the Case to the Court).

63. American Convention, *supra* note 2, art. 68(1).

64. PASQUALUCCI, *supra* note 36, at 7.

65. Court Procedures, *supra* note 48, arts. 42 (Preliminary Objections), 65–67 (Judgments).

66. American Convention, *supra* note 2, art. 63(1).

67. As of the end of 2009, the most recent year for which complete data was available, the precise number of cases resolved stood at 120. Court Report 2009, *supra* note 42, at 4 (depicting cases solved in a bar graph).

The Court has two additional tools available to protect and promote human rights in the hemisphere. First, it has the power to order “provisional measures”—also referred to as “precautionary measures”—to prevent irreparable harm “in cases of extreme gravity and urgency.”⁶⁸ Procedurally, this is similar to the use of a preliminary injunction in U.S. courts. These may be issued, at the request of the Commission, even where no case is before the Court.⁶⁹ In practice, provisional measures are most frequently used to order State Parties to delay an imminent execution or provide protection to other persons who have been threatened with other bodily harm.⁷⁰ In its first three decades, the Court issued eighty-one such orders.⁷¹

Second, the Court may issue advisory opinions interpreting the human rights obligations of States under the American Convention or other treaties protecting human rights in the hemisphere, upon the request of a State Party or any OAS organ including the Commission.⁷² States may also request the Court to issue an advisory opinion regarding the compatibility of their laws with applicable human rights instruments.⁷³ In its first three decades (1979–2009), the Court issued twenty advisory opinions.⁷⁴ The majority of these were requested by Member States; a smaller portion by the Commission.⁷⁵ Of these opinions, thirteen provided interpretation of the American Convention, while four provided interpretations of other regional human rights treaties.⁷⁶ In addition, four advisory opinions examined the compatibility of national legislation with regional human rights obligations.⁷⁷

68. American Convention, *supra* note 2, art. 63(2).

69. Commission Procedures, *supra* note 58, art. 25(2) (Precautionary Measures).

70. *See, e.g.*, 19 *Tradesmen v. Colombia*, Provisional Measures, Order of the Court (Inter-Am. Ct. H.R. Sept. 3, 2004), available at http://www.corteidh.or.cr/docs/medidas/comerciantes_se_01_ing.pdf (ordering that Colombia take steps to protect the life and personal integrity of the relatives of victims in the case); *Genie-Lacayo v. Nicaragua*, Provisional Measures, Order of the Court (Inter-Am. Ct. H.R. Feb. 2, 1996), available at http://www.corteidh.or.cr/seriee_ing/aleman_se_01_ing.doc (ordering that presidential candidate be provided with security detail and armored car following attack).

71. Court Report 2009, *supra* note 42, at 4 (indicating “Provisional measures” for the years 1979–2009 in bar graph). For a complete listing of these orders and access to their full texts, visit <http://www.corteidh.or.cr/medidas.cfm> (last visited Apr. 20, 2010).

72. American Convention, *supra* note 2, art. 64(1).

73. *Id.* art. 64(2).

74. Court Report 2009, *supra* note 42, at 4 (indicating “Advisory opinions” for the years 1979–2009 in bar graph). For a complete listing of these opinions and access to their full texts, visit <http://www.corteidh.or.cr/opiniones.cfm> (last visited Apr. 20, 2010).

75. 2008 Rep. Inter-Am. Ct. H.R. 78, available at <http://www.corteidh.or.cr/docs/informes/eng2008.pdf> [hereinafter Court Report 2008].

76. *Id.*

77. *Id.*

D. Jurisdiction

The jurisdiction of the Commission and Court is bounded both geographically and by subject matter. Both institutions have supreme competence to interpret and apply the human rights treaties of the OAS. In resolving petitions and cases, the Inter-American human rights bodies may also consider other international human rights treaties ratified by a particular State, which may impose additional obligations or aid in the interpretation of regional treaties.⁷⁸

The Commission may investigate and report on the human rights situation in any country in the hemisphere.⁷⁹ The Commission may receive individual petitions alleging a violation of the American Convention or other OAS convention or protocol⁸⁰ by any State Party to the Convention.⁸¹ It may also receive petitions alleging a violation of the American Declaration by States which have not ratified the Convention.⁸²

The Court's contentious jurisdiction may be exercised only over States which recognize the Court's jurisdiction.⁸³ In order to do so, a State must both ratify the Convention and issue a separate statement acceding to the jurisdiction of the Court.⁸⁴ A State that has declined to grant full jurisdiction may permit the Court to consider a particular case by recognizing its jurisdiction on an *ad hoc* basis.⁸⁵ A State that has

78. See American Convention, *supra* note 2, art. 29 (Restrictions Regarding Interpretation). Article 29(b) has been interpreted by the Court as imposing a "duty . . . to give legal effect to the provision(s) . . . with the higher standard(s) applicable to the right(s) or freedom(s) in question." Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 165 (1998).

79. This includes all thirty-five members of the Organization of American States, as well as Cuba, which is barred from membership.

80. Aside from the American Declaration of the Rights and Duties of Man (1948), American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 17 (1992), *available at* <http://www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm> [hereinafter American Declaration], and the American Convention on Human Rights (1969), the human rights treaties of the OAS include the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (1988); the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990); the Inter-American Convention to Prevent and Punish Torture (1985); the Inter-American Convention on Forced Disappearance of Persons (1994); the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women "Convention of Belem do Para" (1994); and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (1999).

81. Commission Procedures, *supra* note 58, art. 23 (Presentation of Petitions).

82. *Id.* art. 49 (Receipt of the Petition).

83. PASQUALUCCI, *supra* note 36, at 11.

84. American Convention, *supra* note 2, art. 62.

85. *Id.*

previously recognized the Court's jurisdiction may later renounce it.⁸⁶ The State remains responsible to the Court for any human rights violations committed before the date of renunciation.⁸⁷

States over which the Court currently has jurisdiction include: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.⁸⁸ Members of the OAS that have not submitted to the jurisdiction of the Court include: Antigua & Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts & Nevis, St. Lucia, St. Vincent & Grenadines, Trinidad & Tobago (withdrawn), and the United States.⁸⁹

The Court's jurisdiction is also limited by subject matter. The Court is specifically empowered to hear allegations of state violations of the American Convention and other binding human rights instruments of the OAS.⁹⁰ Several categories of human rights violations that may be considered by the Commission may not be considered by the Court. Petitions arising from the Declaration against a State that is not a party to the Convention may not proceed to the Court. Thus, alleged violations of economic, social, and cultural rights may be heard by the Court only if the State involved has ratified the San Salvador Protocol.⁹¹

The Court's contentious jurisdiction is limited by two additional procedural requirements. The Court must be satisfied that the petitioner alleging the human rights violation has exhausted available domestic remedies.⁹² Also, the case must be referred to the Court by the State

86. *Id.* art. 78.

87. *Id.*

88. Organization of American States, B-32 American Convention on Human Rights (Pact of San Jose, Costa Rica): Signatories, <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited Dec. 10, 2010).

89. *Id.* As the only country in the western hemisphere that is not a member of the Organization of American States, Cuba is ineligible to recognize the jurisdiction of the Court. *Id.*

90. American Convention, *supra* note 2, art. 62(3).

91. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, *available at* <http://www.oas.org/juridico/english/treaties/a-52.html> [hereinafter Protocol of San Salvador]. To date, fifteen states have ratified this Protocol: Argentina (2003), Brazil (1996), Bolivia (2006), Colombia (1997), Costa Rica (1999), Ecuador (1993), El Salvador (1995), Guatemala (2000), Mexico (1999), Nicaragua (2009), Panama (1993), Paraguay (1997), Peru (1995), Suriname (1990), and Uruguay (1996). Organization of American States, Chart of Signatories Maintained by the OAS, <http://www.oas.org/juridico/english/sigs/a-52.html> (last visited Dec. 10, 2010).

92. American Convention, *supra* note 2, arts. 46(1)(a) (exhaustion of domestic remedies required for admissibility of a case to the Commission), 61(2) (compliance with procedures of Commission required for referral of a case to the Court).

involved or by the Commission, after the latter has duly followed its procedures for seeking a resolution to the case outside of the Court.⁹³

The Court's advisory jurisprudence is also limited by principles of personal and subject matter jurisdiction. A request for an advisory opinion may be initiated only by an OAS Member State or by an OAS organ within its field of competence.⁹⁴ Thus, the Inter-American Commission on Human Rights may request an advisory opinion on any matter relating to the American Convention.

E. Procedure

All individual petitions originate in the Commission, and are subject to the requirement of domestic exhaustion.⁹⁵ Once a petition has made its way through the Commission, if no settlement has been reached, it may be forwarded to the Court for adjudication.⁹⁶

An individual petition may be initiated with the Commission by any person, groups of persons, or non-governmental organization.⁹⁷ Petitions may allege a violation of the petitioner's own rights or those of another person.⁹⁸ The Executive Secretariat of the Commission first performs an initial review to ensure that the petition is complete and properly submitted.⁹⁹ It then forwards the relevant portions of the petition to the State involved for comment on the petition's admissibility.¹⁰⁰ The identity of the individual or organization lodging the petition will be withheld from the State unless the petitioner expressly authorizes its disclosure.¹⁰¹ In general, the State has two months to file its observations on admissibility, although extended or expedited schedules are possible depending on the merits of the case.¹⁰²

93. American Convention, *supra* note 2, art. 61(1).

94. *Id.* art. 64.

95. *Id.* arts. 44 (petitions deposited with the Commission), 46(a)(1) (exhaustion of domestic remedies required).

96. *See text infra* notes 112 et. seq.

97. American Convention, *supra* note 2, art. 44.

98. Commission Procedures, *supra* note 58, art. 23 (Presentation of Petitions). The Inter-American Convention grants standing to any concerned individual or NGOs, not merely the alleged victim or next-of-kin. American Convention, *supra* note 2, art. 44. One aim of this provision is to enable petitions to be filed where the parties most closely affected might be too intimidated to file for relief.

99. Commission Procedures, *supra* note 58, arts. 26–29 (Initial Review, Condition for Considering the Petition, Requirements for the Consideration of Petitions, & Initial Processing).

100. *Id.* art. 30(2).

101. *Id.*

102. *Id.* art. 30(3–4).

Once the Commission receives the State's observations, or if the State fails to reply within the allotted time, the Commission will proceed to make a determination of admissibility.¹⁰³ The Working Group on Admissibility studies each petition to make an initial recommendation on admissibility.¹⁰⁴ The Commission Members make the final decision.¹⁰⁵ To be admissible, three conditions must hold. First, the petition must allege facts which establish a violation of the recognized human rights.¹⁰⁶ Second, the petitioner must have reasonably exhausted remedies available in the domestic legal system,¹⁰⁷ and must have lodged the petition within six months of notification of the final domestic decision.¹⁰⁸ Third, the petition must not duplicate proceedings in another international body.¹⁰⁹

When the Commission deems a petition admissible, a case is opened and proceedings on the merits are initiated.¹¹⁰ Petitioners must file observations on the merits within three months, after which the State has three months to prepare its reply.¹¹¹ If a State refuses to cooperate with the Commission and files no reply, the facts alleged in the petition may be presumed true.¹¹² The Commission may also request that the parties appear at a hearing or that an on-site investigation be permitted to establish facts in dispute.¹¹³

If both parties are willing, the Commission will attempt to negotiate a friendly settlement of the claim.¹¹⁴ Any agreement reached must receive the consent of the victims or their next of kin, where this person is not the petitioner.¹¹⁵ If no friendly settlement can be reached, the Commission will deliberate on the merits of the case, examining the arguments and evidence presented by both sides, as well as evidence obtained from any on-site investigation.¹¹⁶

103. *Id.* art. 30(6). The Commission may also request additional information, or a hearing, if necessary to clarify the facts of the case. *Id.* art. 30(5).

104. *Id.* art. 35 (Working Group on Admissibility).

105. *Id.* art. 36 (Decision on Admissibility).

106. *Id.* art. 34(a) (Admissibility Procedure).

107. *Id.* art. 31 (Exhaustion of Domestic Remedies). In practice, the exhaustion rule is applied rather flexibly, in the interests of equitable justice. Antônio Augusto Cançado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of a New Century*, 8 TUL. J. INT'L & COMP. L. 5, 13 (2000).

108. Commission Procedures, *supra* note 58, art. 32 (Statute of Limitations for Petitions).

109. *Id.* art. 33 (Duplication of Procedures).

110. *Id.* art. 37(1) (Procedure on the Merits).

111. *Id.* Prior to the 2009 procedural revisions, the time limit was two months.

112. *Id.* art. 38 (Presumption).

113. *Id.* arts. 64 (Hearings on Petitions or Cases), 39 (On-Site Investigation).

114. *Id.* art. 40 (Friendly Settlement).

115. *Id.* art. 40(5).

116. *Id.* art. 43 (Decision on the Merits).

When the Commission concludes that a violation of human rights has taken place, it prepares a preliminary report including its recommendations for how the State should redress the violation, and transmits it to the State.¹¹⁷ The preliminary report also includes a deadline by which the State is expected to report what measures it has adopted to comply with the recommendations.¹¹⁸ If any part of the Commission's report on the merits does not represent the unanimous conclusion of the members, they may file a separate opinion.¹¹⁹

At any point from the lodging of the petition, if the Commission feels it is necessary, it may request the State to take precautionary measures to prevent irreparable harm.¹²⁰ At the Commission's recommendation, the Court may order temporary protective measures on the basis of the facts as alleged; it is not necessary that these be proved beforehand.¹²¹

Although the Commission may issue a final report with a finding of responsibility and recommendations, such a report is not legally binding.¹²² If a State chooses not to comply with the recommendations, the Commission may refer the case to the Court, which does have the power to issue legally binding findings and awards.¹²³ Technically, this decision to bring the case to the Court rests solely with the Commission, not the individual petitioner.¹²⁴ The Procedures of the Commission instruct, however, that the desires of the petitioner should be given weight in the decision to refer a case to the Court.¹²⁵ A State may also choose to refer the case to the Court, if it wishes to challenge the Commission's finding of responsibility.¹²⁶ Cases retain the name of *Petitioner v. State* by which they were known during proceedings in the Commission.

Recent procedural reforms have significantly altered the role of the Commission in Court proceedings. Formerly, the Commission functioned as the party opposing the State, and bore primary responsibility for prosecuting the case. The alleged victims were permitted to intervene

117. *Id.* art. 44 (Report on the Merits).

118. *Id.* art. 44(2).

119. *Id.* art. 43(4).

120. *Id.* art. 25 (Precautionary Measures).

121. Cançado Trindade, *supra* note 107, at 26.

122. Commission Procedures, *supra* note 58, arts. 44 (Report on the Merits), 47 (Publication of the Report).

123. *Id.* art. 45 (Referral of Case to the Court); American Convention, *supra* note 2, arts. 67–68 (establishing that States Parties undertake to comply with the judgments of the Court, which shall be final and not subject to appeal).

124. Commission Procedures, *supra* note 58, art. 45(1).

125. *Id.* art. 45(2).

126. Court Procedures, *supra* note 48, art. 36 (Filing of the Case by a State).

throughout the proceedings by submitting briefs, evidence, and motions through their counsel.¹²⁷ This model was more similar to a criminal proceeding prosecuted by a district attorney, as opposed to a civil proceeding where the victim brings claims through private counsel.

The 2009 reforms, however, give the alleged victims greater control of the legal proceedings, while relegating the Commission to a supporting role.¹²⁸ Concretely, the Commission no longer files briefs or leads questioning of witnesses; these responsibilities are assumed by the alleged victims, through their counsel.¹²⁹ The new model is thus more similar to domestic constitutional rights litigation in the United States. A key difference is that the Court will appoint, at its own expense, legal representation for alleged victims who cannot afford to retain private counsel.¹³⁰ The Court has justified the reforms as providing greater agency to victims and preserving the neutrality of the Commission.¹³¹ Pragmatically, the shift also reduces the workload of the under-resourced Commission.¹³²

Written proceedings before the Inter-American Court of Human Rights are somewhat more streamlined than in civil litigation in the United States. The Commission initiates proceedings by filing its own final report.¹³³ The alleged victims or their representatives have two months to file the brief.¹³⁴ The responding State has an additional two months to file its answer.¹³⁵ The State's reply brief must present all preliminary objections and simultaneously address the merits of the case.¹³⁶ Additional briefs may be filed only by special permission.¹³⁷

127. *Id.* art. 25 (Participation of the Alleged Victims or their Representatives).

128. *See* Inter-Am. Ct. H.R., Statement of Motives for the Reform of Rules of Procedure, 2–3, http://www.corteidh.or.cr/reglamento/motivos_ing.pdf (last visited Dec. 12, 2010) [hereinafter Statement of Motives]; Center for Justice and International Law (“CEJIL”), The Inter-American Court and Inter-American Commission Reform their Rules of Procedure (Dec. 18, 2009), <http://cejil.org/en/comunicados/inter-american-court-and-inter-american-commission-reform-their-rules-procedure>.

129. Court Procedures, *supra* note 48, arts. 40(1) (Brief containing Pleadings, Motions and Evidence), 52(2) (Questions during debate).

130. *Id.* art. 37 (Inter-American Defender).

131. Statement of Motives, *supra* note 128, at 2.

132. *See* discussion *supra* notes 51–53.

133. Court Procedures, *supra* note 48, art. 35(1) (Filing of the case by the Commission). If the party filing is the State, article 36 applies (Filing of the case by a State).

134. *Id.* art. 40 (Brief containing Pleadings, Motions, and Evidence). The two-month time limit is firm. *Id.*

135. *Id.* art. 41 (The State's Answer). Extensions of time are not available. *Id.*

136. *Id.* arts. 41–42 (Preliminary Objections).

137. *Id.* art. 43 (Other Steps in the Written Proceedings).

When written proceedings are completed, the Court will fix a date for oral proceedings.¹³⁸ These hearings may include examination of witnesses by the advocates as well as by the judges, and closing arguments from both sides.¹³⁹ In addition to receiving evidence provided by the parties, the Court may also act on its own initiative to obtain evidence as it feels is appropriate by establishing evidentiary hearings, requesting a report from a government office or private association, or summoning expert witnesses.¹⁴⁰ Witnesses may give their testimony remotely, in lieu of traveling to Costa Rica.¹⁴¹ Hearings may be public or private.¹⁴²

If the parties decide at a late stage to reach a friendly settlement, it is within the Court's discretion to continue to hear and decide the case, or to strike it from its list.¹⁴³

After written and oral proceedings are completed, the Court generally waits until its next general session to convene deliberations.¹⁴⁴ The Court's deliberations are conducted in private.¹⁴⁵ The Court's decision on the preliminary objections and on the merits are typically published in the same opinion,¹⁴⁶ generally issued a short while after deliberations.¹⁴⁷

A decision on reparations is generally postponed to permit parties time to reach a friendly settlement in light of the Court's ruling on the merits.¹⁴⁸ The court may also issue a decision on reparations as part of the original judgment, or at a later date.¹⁴⁹ Generally, the processing of a case from filing to judgment on the merits takes a bit over two years; the reparations phase may take an additional year or year and a half.¹⁵⁰

Any judge may publish a separate concurring or dissenting opinion.¹⁵¹ In practice, however, dissents are rare. Taking the year 2009 as a sample, a

138. *See id.* art. 45 (Oral Proceedings: Opening).

139. *Id.* art. 51 (Hearing).

140. *Id.* art. 58 (Procedure for Taking Evidence).

141. *Id.* art. 51(11).

142. In one recent year, two-thirds of hearings on contentious cases were closed to the public. Court Report 2009, *supra* note 42, at 9 (reporting eleven public and twenty-four private hearings).

143. *Id.* arts. 63 (Friendly Settlement), 64 (Continuation of a Case).

144. Cançado Trindade, *supra* note 107, at 22.

145. Court Procedures, *supra* note 48, art. 15 (Hearings, deliberations, and decisions).

146. *Id.* art. 42(6) (Preliminary Objections).

147. Cançado Trindade, *supra* note 107, at 22.

148. Court Procedures, *supra* note 48, art. 66(2) ("If the Court is informed that the victims or their representatives, the respondent State, and, if applicable, the petitioning State have reached an agreement with respect to the execution of the judgment on the merits, it shall verify that the agreement accords with the Convention and rule accordingly.").

149. *Id.* arts. 65(1)(h), 66(1).

150. Cançado Trindade, *supra* note 107, at 21–22.

151. American Convention, *supra* note 2, art. 66(2).

total of nineteen judgments were issued.¹⁵² More than half of these judgments were published with one or more separate opinions; a total of sixteen such opinions across thirteen judgments.¹⁵³ Few of these separate opinions, however, are true dissents. Ten are concurrences that merely laid out additional reasoning in support of the Court's holding.¹⁵⁴ Two are dissents on minor issues unrelated to the central holding.¹⁵⁵ In two cases, a single judge wrote separately to recommend a holding even more favorable to the victim than the one adopted by the Court.¹⁵⁶ The three true dissents were each lone votes by ad-hoc judges, written to express an opinion more favorable to the States that had appointed them.¹⁵⁷

152. As of December 10, 2010, the website of the Inter-American Court of Human Rights listed 217 published judgments. Inter-Am. Ct. H.R., Jurisprudence, Decisions, and Judgments, <http://www.corteidh.or.cr/casos.cfm> (last visited Dec. 10, 2010). Of these, nineteen are dated in the year 2009. Cases from 2010 were not used on the belief that the list may not yet be complete. Note that the number of judgments is greater than the number of resolved cases each year, because many cases involve multiple stages of judgment. For example, a single contentious case may involve one judgment on the preliminary objections, a second on the merits, and a third fixing the amount of reparations to be paid. Advisory proceedings are not included in these numbers.

153. Of the nineteen published judgments, thirteen had one or more separate opinions; a total of sixteen such separate opinions.

154. *Tristán-Donoso v. Panama*, Preliminary Objection, 2009 Inter-Am. Ct. H.R. (ser. C) No. 193 (Jan. 27, 2009) (García-Ramírez, J., concurring); *Kawas-Fernández v. Honduras*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 196 (Apr. 3, 2009) (García-Ramírez, J. & García Sayán, J., concurring); *Acevedo Buendía et al.* ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru, 2009 Inter-Am. Ct. H.R. (ser. C) No. 198 (July 1, 2009) (García-Ramírez, J., concurring); *Escher et al. v. Brazil*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 200 (July 6, 2009) (García-Ramírez, J., concurring); *Anzualdo-Castro v. Peru*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 202 (Sept. 22, 2009) (García-Ramírez, J., concurring) (García-Toma, J., concurring); *Garibaldi v. Brazil*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 203 (Sept. 23, 2009) (Figueiredo-Caldas, *ad hoc* J., concurring); *Usón Ramírez v. Venezuela*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 207 (Nov. 20, 2009) (García-Ramírez, J., concurring); *The "Las Dos Erres" Massacre v. Guatemala*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 211 (Nov. 24, 2009) (Cadena-Rámila, *ad hoc* J., concurring).

155. *Acevedo Buendía et al.* ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru, 2009 Inter-Am. Ct. H.R. (ser. C) No. 198 (July 1, 2009) (García-Ramírez, J., concurring) (García-Toma, *ad hoc* J., dissenting only on the methodology used to calculate reparations); *Escher et al. v. Brazil*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 200 (July 6, 2009) (Figueiredo-Caldas, *ad hoc* J., concurring in the substance and dissenting on imposition of deadlines for timeliness of submissions).

156. *Dacosta-Cadogan v. Barbados*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 204 (Sept. 24, 2009) (García-Ramírez, J., writing separately to express a view even more favorable to the victims); *González et al.* ("Cotton Field") v. Mexico, 2009 Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009) (García-Sayán, J., concurring) (Medina-Quiroga, J., dissenting to express a view even more favorable to the victims).

157. *Ríos et al. v. Venezuela*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 194 (Jan. 28, 2009) (Pasceri-Scaramuzza, J., dissenting to recommend a holding favorable to the State); *Perozo et al. v. Venezuela*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 195 (Jan. 28, 2009) (Pasceri-Scaramuzza, J., dissenting to recommend a holding favorable to the State); *Reverón-Trujillo v. Venezuela*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 197 (June 30, 2009) (Biel-Morales, *ad hoc* J., dissenting to recommend a holding favorable to the State). This embarrassment, three times in one year, prompted the Court to reform the practice of *ad hoc* judge appointments. See discussion *supra* notes 40–42 and accompanying text.

The Court's advisory jurisprudence procedures are slightly different. A request for an advisory opinion may be submitted by a Member State, by the Commission, or by other organs of the OAS.¹⁵⁸ Because there is no specific case or controversy, there is no requirement of exhaustion of domestic and Commission procedures.

The procedures for addressing advisory opinions are somewhat less formalized than those governing contentious disputes.¹⁵⁹ Generally, however, the same procedures for written briefs and oral arguments are applied, with modifications as the Court feels appropriate.¹⁶⁰ The Court's advisory jurisprudence proceeds significantly faster than its contentious jurisprudence—requests are typically answered in under a year.¹⁶¹

In addition to resolving petitions, cases, and requests for advisory opinions, the Commission performs a number of activities not related to the petition system. These include the production of annual and topical reports and on-site fact-finding missions.

These non-judicial functions comprise a historically significant part of the Inter-American Commission's work. Between the signing of the American Convention in 1966 and its entry into force in 1978, these activities formed the whole of the Commission's activities to promote human rights in the hemisphere.

This extra-judicial role for the Commission, comparable to that of an ombudsman or administrative agency, is also a feature of the Inter-American human rights system that distinguishes it from the European one.

F. Publications

The Commission has its own publications, including the Annual Report of the Inter-American Commission on Human Rights.¹⁶² Occasionally, the Commission also publishes Special Reports on thematic topics and Country Reports examining the situation of human rights in particular Member States.¹⁶³

158. American Convention, *supra* note 2, arts. 56, 64.

159. For instance, timelines for submissions are established by the President of Court on an *ad hoc* basis. Court Procedures, *supra* note 48, art. 73(2). Any interested party may be authorized by the President to submit a written opinion. *Id.* art. 73(3).

160. *Id.* art. 74 (Application by Analogy).

161. Cançado Trindade, *supra* note 107, at 27–28.

162. Inter-Am. C.H.R., Annual Reports, <http://www.cidh.oas.org/annual.eng.htm> (last visited Apr. 21, 2010).

163. Inter-Am. C.H.R., Special Reports and Country Reports, <http://www.cidh.oas.org/pais.eng.htm> (last visited Dec. 10, 2010).

A yearly account of the Court's cases and activities—including summaries of proceedings and the full text of its judgments—is contained in the Annual Report of the Inter-American Court of Human Rights, published by the Court through the OAS.¹⁶⁴ Annual reports, a list of current cases, past judgments, advisory opinions, provisional measures, press releases, and other publications are available at the website of the Court.¹⁶⁵

All records related to the Court's cases, including parties' briefs, evidentiary documents, and transcripts of public hearings, are also published. These documents are not available online, but can be accessed through the Court's library in Costa Rica in their original languages.¹⁶⁶ The Court's deliberations are recorded, but are not made public.¹⁶⁷

G. Jurisprudence

The Court's annual caseload has increased significantly during its existence.¹⁶⁸ In its first three years, 1987–1989, the Court decided only three cases on the merits.¹⁶⁹ In the three years 2006–2008, the Court decided thirty-seven cases.¹⁷⁰ The most frequent violations of human rights addressed by the Court include the right to a fair trial (eighty-one violations declared), the right to humane treatment (sixty-six violations),

164. Inter-Am. Ct. H.R., Annual Reports, <http://www.corteidh.or.cr/informes.cfm?&CFID=790400&CFTOKEN=97475536> (last visited Dec. 10, 2010) (consisting of the Court's Annual Reports since 1998).

165. Inter-Am. Ct. H.R., Jurisprudence, <http://www.corteidh.or.cr/buscaadores.cfm> (last visited Apr. 21, 2010); session information, news, and press releases may be found at <http://www.corteidh.or.cr/>; Inter-Am. C.H.R., Annual Reports, <http://www.cidh.oas.org/annual.eng.htm> (last visited Apr. 21, 2010). The judgments of the Commission are not currently available through Lexis-Nexis and Westlaw. Selected judgments of the Court may be accessed through these services, however, where they have been reprinted in *International Legal Materials*, a bi-monthly publication of the American Society of International Law. American Society of International Law, *International Legal Materials Index of Table of Contents of International Legal Materials*, <http://www.asil.org/ilm/ilmindx.htm> (last visited Feb. 21, 2011). The full texts of the advisory judgments are accessible from the Court's website. Inter-Am. Ct. H.R., Advisory Opinions, http://www.corteidh.or.cr/seriea_ing/index.html (last visited May 12, 2006).

166. Court Procedures, *supra* note 48, art. 32 (Publication of Judgments and Other Decisions).

167. *Id.* art. 15(4) (Hearings, Deliberations and Decisions). According to the 2009 revised procedures, deliberations are to be audio-recorded. *Id.* This suggests that at some point in the future they might be made public, perhaps for historic purposes.

168. See the complete list of the Court's decisions at Inter-Am. Ct. H.R., Jurisprudence, Decisions, and Judgments, <http://www.corteidh.or.cr/casos.cfm> (last visited Apr. 21, 2010).

169. See Court Report 2008, *supra* note 75, at 59.

170. *Id.*

the right to personal liberty (fifty-one violations), and the right to life (forty-one violations).¹⁷¹

The pattern of cases heard and violations found reflects the Court's emphasis on classic civil rights, often referred to as "basic human rights."¹⁷² During the early years of the Court, most of its cases dealt with extra-judicial executions or disappearances; more recently, however, the Court has heard a broader range of alleged rights violations.¹⁷³ Cases submitted to the Court during one recent year involved allegations of: torture and massacre of civilians,¹⁷⁴ censorship of the press through criminal libel law,¹⁷⁵ torture and coerced confession of criminal suspects,¹⁷⁶ corporal punishment by flogging,¹⁷⁷ violations of indigenous groups' land claims,¹⁷⁸ failure to respect labor rights,¹⁷⁹ and deprivation of nationality rights to children of immigrants,¹⁸⁰ among other issues.

Although political rights constitute an important part of the American Convention, these are rarely addressed in the Court's contentious jurisprudence. In resolving its first 105 cases, the Court has only rarely applied the Convention's articles relating to freedom of thought and

171. *Id.* at 75.

172. Human rights may be understood as falling within three categories. The classic civil rights to life, liberty, equality, legal fairness, privacy, and property, etc. comprise the first seventeen articles of the Universal Declaration of Human Rights. Universal Declaration of Human Rights, G.A. Res. 217(A) III, U.N. GAOR, 3d SESS., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html> [hereinafter UDHR]. The next four articles of the Universal Declaration articulate the political or democratic rights, including freedom of religion, expression, association, and participation in elected government. *Id.* arts. 18–21. The last nine articles comprise the category of economic, social, and cultural rights, which include the rights to work, fair wages, an adequate standard of living, social insurance, education, and participation in cultural life. *Id.* arts. 22–28. The American Convention mirrors the Universal Declaration in the recognition it accords to civil and political rights. The third category of rights found in the Universal Declaration, however—the economic, social, and cultural rights—is deemphasized in the American Convention. The Convention contains only one article committing the states to adopt measures to pursue the progressive achievement of economic, social and cultural rights. American Convention, *supra* note 2, art. 26.

173. PASQUALUCCI, *supra* note 36, at 1–12.

174. *Mapiripán v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 122 (Mar. 7, 2005).

175. *Herrera-Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107 (July 2, 2004) ("*La Nación* Newspaper v. Costa Rica").

176. *Alfonso Martín del Campo-Dodd v. Mexico*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 113 (Sept. 3, 2004).

177. *Caesar v. Trinidad & Tobago*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 123 (Mar. 11, 2005).

178. *Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

179. *Acevedo-Jaramillo et al. v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 144 (Feb. 7, 2006).

180. *The Girls Yean & Bosico v. Dominican Republic*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 156 (Nov. 23, 2006).

expression (ten violations), freedom of association (four violations), or the right to participate in government (two violations).¹⁸¹

Economic, social, and cultural rights play even less of a role in the Inter-American Court's human rights jurisprudence. Although these rights were explicitly recognized in extensive detail in the American Declaration,¹⁸² they were largely excluded from the 1969 Convention, which listed no specific obligations of States to respect socioeconomic rights.¹⁸³ Since its establishment, the Court has never found a State to be in violation of Article 26, the sole provision of the American Convention which references economic, social, and cultural rights.¹⁸⁴ In 1988, the OAS adopted the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights.¹⁸⁵ As with the American Convention, however, Member States were relatively slow to ratify, and the Protocol entered into force only in late 1999.¹⁸⁶

The jurisprudential concepts permitting adjudication of socioeconomic rights have only recently become better developed.¹⁸⁷ Since the Court has authority to apply this Protocol to those States that have ratified it, it is possible that socioeconomic rights will come to play a greater role in the Court's future jurisprudence. In this respect, it is notable that in 2009, the Court explicitly asserted its competency to determine violations of Article 26, although concluding that the right was not violated in that case.¹⁸⁸

181. Court Report 2008, *supra* note 75, at 75.

182. *See, e.g.*, American Declaration, *supra* note 80, arts. 7 (Right to protection for mothers and children), 11 (Right to preservation of health and to well-being), 12 (Right to education), 13 (Right to the benefits of culture), 14 (Right to work and to fair remuneration), 15 (Right to leisure time and to the use thereof), 16 (Right to social security), 23 (Right to property).

183. *Id.* art. 26. The sole nod toward economic, social and cultural rights appears in Article 26 (Progressive Development), which states:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Id. Note, however, that the right to form a labor union is explicitly protected in a separate provision. American Convention, *supra* note 2, art. 16 (Freedom of Association).

184. *See* Court Report 2009, *supra* note 42, at 7. Article 26 does not appear in the graph of provisions found violated in the Court's jurisprudence in the period 1979–2009.

185. Protocol of San Salvador, *supra* note 91.

186. As of 2010, the States Parties included: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay. Organization of American States, Protocol of San Salvador: Signatories and Ratifications, <http://www.oas.org/juridico/English/signs/a-52.html> (last visited Dec. 11, 2010).

187. *See* Shaver, *supra* note 15.

188. Acevedo Buendía *et al.* ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru, Preliminary Objection, Merits, Reparations, Costs, Judgment, Inter-Am. Ct.

Despite the hurdles to bringing socioeconomic rights petitions against States that are not parties to the Protocol, the Inter-American system has found other ways to address these rights.¹⁸⁹ The Commission has included economic, social, and cultural rights issues in its Thematic and Country Reports, even where such violations are not admissible through the petition system.¹⁹⁰ The Court has also managed to vindicate socioeconomic rights claims indirectly, where these have been presented in the context of cases relying primarily on civil and political rights, such as the right to nondiscrimination.¹⁹¹

In large part, the Court devotes its resources to ascertaining the facts of a situation to determine if a human rights violation has taken place.¹⁹² The Court is also very active in issuing binding requests for provisional measures to protect vulnerable persons.¹⁹³

In a broader sense, the Court also has an important law-making role as the authoritative interpreting body of the American Convention. The Court's judgments serve to clarify the specific duties of States Parties to the Convention, as well as what practices constitute a violation of its terms. For example, the Court has interpreted Article 1 of the Convention (Obligation to Respect Rights) to impose upon States the four-fold duty to

H.R. (ser. C) No. 198, ¶¶ 16–19 and 92–103 (July 1, 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_210_esp1.pdf, English translation at http://www.rtdh.eu/pdf/seriec_198_ing.pdf (finding that failure to pay state pensioners increased amounts as awarded by domestic courts violated the rights to judicial protection and to property only).

189. See generally Tara J. Melish, *The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW (M. Langford ed., New York 2008), available at <http://ssrn.com/abstract=1000275>.

190. See, e.g., Inter-Am. C.H.R., *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111, Apr. 6, 2001, available at <http://www.cidh.oas.org/countryrep/Guate01eng/TOC.htm>. A portion of this report discusses the situation of economic, social, and cultural rights of children in Guatemala. *Id.* ch. XII, available at <http://www.cidh.oas.org/countryrep/Guate01eng/chap.12.htm>. See also Inter-Am. C.H.R., *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II.100, ch. VIII, Sept. 24, 1998, available at <http://www.cidh.oas.org/countryrep/Mexico98en/Chapter-8.htm>.

191. See generally James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217 (2004).

192. See Cançado Trindade, *supra* note 107 (suggesting that the Court reform its practice to rely more on the Commission to determine the facts, and dedicate itself to developing good case law). The 2009 procedural revisions suggest, however, that the Court may be moving in the opposite direction. Numerous new rules of procedure have been introduced to govern the presentation of evidence, facilitate oral hearings, and decrease the role of the Commission in Court proceedings in favor of a more adversary procedure. See Court Report 2009, *supra* note 42, at 16–18 (summarizing changes in the new Rules of Procedure).

193. Between 1979 and 2005 the Court has resolved sixty-eight contentious cases and ruled upon sixty-two requests for provisional measures. Annual Report 2005, *supra* note 45, at 57.

prevent, investigate, punish, and redress violations of the other substantive rights provisions of the Convention.¹⁹⁴ Similarly, the Court has interpreted Article 2 (Domestic Legal Effects) to require States to harmonize their domestic laws with the American Convention.¹⁹⁵

It should be noted that the Inter-American Court of Human Rights considers itself as a court of equity, responsible to the principles of human rights that underlie the regional treaties, rather than to strict principles of interpretation based on the intent of the sovereign actors that created them. Because human rights are understood as based in natural law, existing prior to and independent of state recognition, the content of legal duties to respect rights can evolve as international human rights norms are clarified and expanded, subjecting States to increasing obligations without specific authorization.

H. Enforcement

The American Convention and the OAS Charter are vague on the subject of how the Court's judgments should be enforced. The European human rights system invests the Committee of Ministers with the responsibility of ensuring that States comply with the ECHR's rulings.¹⁹⁶ No similar provision exists in the American system. The Convention does, however, direct the Commission and the Court to submit annual reports to the General Assembly of the OAS,¹⁹⁷ which provides some enforcement oversight.

The General Assembly regularly discusses human rights issues at its sessions.¹⁹⁸ Occasionally, it issues resolutions urging action on issues of special concern identified by the Commission and Court.¹⁹⁹

194. See *Velásquez Rodríguez v. Honduras*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988); *Godínez Cruz v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 8 (July 21, 1989).

195. For instance, in the *Loayza-Tomayo* case (1997), the Court held that Peru's prosecution of citizens under terrorism and treason statutes in secret courts was not compatible with the right to a fair trial under article 8. *Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 47 (Mar. 8, 1998).

196. Convention for the Protection of Human Rights and Fundamental Freedoms art. 46(2), Nov. 4, 1950 Europ. T.S. No. 005 [hereinafter *European Convention*].

197. American Convention, *supra* note 2, art. 41(g) (Commission).

198. See, e.g., *Declarations and Resolutions Adopted by the General Assembly, Thirty-Sixth Regular Session, Organization of American States*, OEA/Ser.P/AG/doc.4634/06, Nov. 9, 2006, available at http://oas.org/dil/general_assembly_resolutions.htm (including declarations and resolutions on: Right to the truth, Cooperation among OAS Member States to ensure the protection of human rights and the struggle against corruption, Water as a fundamental right of peoples, Promotion and strengthening of democracy, Fighting the crime of trafficking in persons, Promotion of women's human rights and gender equity and equality, Human rights defenders: Support for the individuals, groups, and organizations of civil society working to promote and protect human rights in the Americas, American Declaration on the Rights of Indigenous Peoples, etc.).

The General Assembly of the OAS also has the discretionary authority to pass sanctions against States that have not complied with the recommendations of the Commission or orders of the Court. For example, the General Assembly instituted broad-based economic sanctions against Haiti in the 1990s after a military junta took over the government and ousted the elected president.²⁰⁰ Many observers criticized these sanctions, however, as causing more humanitarian harm than good.²⁰¹ The General Assembly has not always been inclined to exercise these enforcement powers. In the 1970s, the Commission took a strong stance against the human rights abuses of the Pinochet regime in Argentina.²⁰² The OAS declined to adopt follow-up measures, prompting several Commission Members to resign in protest.²⁰³ Today, however, substantial normative pressure exists to cooperate with the Commission and the Court, apart from any formal sanctions by the OAS, and States usually comply with orders for reparations.²⁰⁴

The Court itself has assumed responsibility for monitoring the domestic enforcement of its reparations decisions, a practice which consumes a considerable amount of its attention and resources.²⁰⁵ The Court's efforts in this regard should be understood as merely a sustained application of the Court's moral force, not as a truly distinct enforcement mechanism.

199. *See, e.g.*, Assaults upon Freedom of the Press and Crimes Against Journalists, AG/RES. 1550 (XXVIII-O/98) (June 2, 1998), available at <http://www.oas.org/JURIDICO/english/ga-res98/eres1550.htm> (condemning violations of the American Declaration and American Convention and urging Member States to support the work of the IACHR Special Rapporteur for Freedom of Expression).

200. *See* Inter-Am. C.H.R., *Report of the Human Rights Situation in Haiti 1995*, OEA/Ser.L/V/II.88, doc. 10 rev., Feb. 9, 1995, <http://www.cidh.oas.org/countryrep/EnHa95/eh95p1.htm> (noting adjustments made in OAS sanctions against Haiti during October of 1994).

201. *See, e.g.*, ELIZABETH D. GIBBONS, *SANCTIONS IN HAITI: HUMAN RIGHTS AND DEMOCRACY UNDER ASSAULT* (1999) (finding that broad-based economic sanctions imposed great harm on the health and well-being of the general Haitian public and recommending adjustments). Aristide was eventually reinstated by American troops directed by President Clinton. For a fuller account of human rights violations in Haiti and regional efforts to address them, see Paul Farmer, *Who Removed Aristide?*, 26(8) LONDON REV. BOOKS 28 (2004), available at http://www.lrb.co.uk/v26/n08/farm01_.html.

202. Forsythe, *supra* note 9, at 90.

203. *Id.*

204. The nation of Trinidad & Tobago long served as a consistent exception. It eventually withdrew its recognition of the Court's jurisdiction, in large part due to conflicts over its use of the death penalty, which the Court strongly disfavors. Overall, the Court reports that more than 80% of its contentious cases have resulted in total and partial compliance, with slightly under 20% "pending compliance." Court Report 2009, *supra* note 42, at 12.

205. In 2009, for instance, the Court resolved fifteen contentious cases. Court Report 2009, *supra* note 42, at 7. In the same year, it issued forty-three orders and held twenty-five hearings on monitoring compliance with 104 previous judgments in which compliance was not yet fully resolved. *Id.* at 10–11.

II. EFFECTIVENESS AND RECOMMENDATIONS

The effectiveness of an international tribunal may be judged in several aspects, not all of which are easily measured. In simple terms, a court's effectiveness may be measured by the number of cases it resolves, and whether the orders that it issues are in fact followed. Ultimately, however, human rights tribunals exist in large part to achieve much broader effects. Here a system's effectiveness should be judged by its success in encouraging adhesion to human rights norms and influencing the behavior of state political actors in order to prevent violations of rights. A regime's effectiveness along these latter dimensions is somewhat harder to quantify, as well as more difficult to attribute clearly to the influence of any one institution.

A. *Evaluating Impact*

In terms of the first set of measures—number of cases resolved and state compliance with the indicated resolution—the weaknesses of the under-resourced Commission are apparent. In one recent year, the Commission received 1,330 complaints of human rights violations.²⁰⁶ It was able to process and resolve only eighty-four.²⁰⁷

The record of state compliance with Commission recommendations is also uneven. Of roughly ninety cases decided by the Commission between 2002 and 2005, full state compliance has been achieved in only six cases.²⁰⁸ The majority of cases are characterized by partial or progressive compliance, while in twenty-four cases the State has completely failed to comply with the recommendations of the Commission.²⁰⁹ This record of uneven compliance constitutes a situation of the glass seen as half-full or half-empty. Since individual petitions necessarily reflect situations where the State had not previously been disposed to resolve the human rights violation internally, each instance of compliance represents some measure of effectiveness of the regional human rights system. The present record, however, clearly leaves much to be desired.

206. Annual Report 2005, *supra* note 52, ch. 3, ¶ 6, available at <http://www.cidh.org/annualrep/2005eng/chap.3.htm>.

207. *See id.* ch. 3, ¶ 3.

208. *See id.* ch. 3, ¶¶ 44 ff.

209. *Id.*

The Court's provisional measures practice also has uneven results. In 2005, the Court observed that in seven cases, state non-compliance with orders for protective measures had already resulted in deaths.²¹⁰

Despite these failures, the Inter-American system's relative strength is remarkable given the low level of political will to protect human rights prevailing within the region at the time it was established. In 1969, when the Convention was adopted, more than half of Latin America was ruled by authoritarian regimes. In 1978, when the Court was established, there were still only four democracies in all of Latin America.²¹¹

The fact that the Inter-American human rights system was as effective as it was during decades characterized by widespread national disregard for human rights in the region has been described as something of a paradox.²¹² Human rights scholar David Forsythe has described the puzzle in these terms:

A functioning regime for the promotion and protection of international human rights exists in the Western hemisphere, despite a milieu of gross violations of those rights. . . . How did it come to be that the OAS operates a regional human rights regime second only to the Council of Europe, but without the same underlying political commitment to implementing rights?²¹³

Jack Donnelly has suggested that the Inter-American human rights system was able to be so surprisingly effective because of the support and influence exercised by the United States as the hemispheric hegemon.²¹⁴ Forsythe, however, convincingly disputes this explanation.²¹⁵ He points out that U.S. regional support for human rights has been intermittent and of limited effect, given that many American States react negatively to the assertion of U.S. foreign policy priorities.²¹⁶ Thus, although U.S. leadership was occasionally an important factor, it should not be overestimated.²¹⁷

Forsythe suggests instead that the Inter-American system's effectiveness at promoting human rights within the region must be

210. 2005 Rep. Inter-Am. Ct. H.R., *supra* note 45, at 34.

211. These were: Colombia, Costa Rica, the Dominican Republic and Venezuela.

212. *See, e.g.*, Forsythe, *supra* note 9, at 66.

213. *Id.*

214. Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599, 625 (1986).

215. Forsythe, *supra* note 9, at 73.

216. *Id.* at 74.

217. *Id.* at 73-74.

attributed in large part to dynamics of moral leadership—influence on state elites to behave in a particular way—which gathers an important part of its effectiveness not from threat of external force but from mutual recognition that it is the right thing to do.²¹⁸ According to Forsythe, such moral leadership was sometimes exercised by the United States, and sometimes by a shifting coalition of less powerful States.²¹⁹ After the establishment of the Commission and Court, it has also been exercised by the professionals of these institutions.

The last three decades have witnessed a tremendous shift in respect for human rights in the Americas. In the late 1970s and early 1980s, Latin American governments “disappeared” an estimated 11,000—13,000 individuals.²²⁰ Today, such abuses are almost unthinkable in most of Latin America. A similar shift has been noted in democratization throughout the region.²²¹ Ellen Lutz and Kathryn Sikkink have described the human rights transition experienced in Latin America during this period as a “norm cascade”—a rapid shift toward recognizing the legitimacy of human rights norms and international and regional action on behalf of those norms.”²²²

These observations, however, do not answer the question of how much credit for the shift is due to the activities of the Inter-American system. In 1991, Forsythe characterized the impact of regional human rights mechanisms as “modest.”²²³ A more favorable assessment may be justified, however, in light of the continued shift to greater democratization and fewer violations of human rights in the region since 1991.

States do not always comply with the recommendations of the Commission and orders of the Court in the specific cases that reach those bodies. Yet the very existence of these mechanisms—the threat that they will intervene, subjecting States to reputational sanctions—undoubtedly has some positive influence on state compliance with human rights norms.

The Inter-American Commission first innovated the strategy of human rights fact-finding and reporting in the 1960s and 1970s. Today, such “name and shame” tactics are the backbone of human rights promotion activities by non-governmental human rights organizations such as

218. *Id.* at 72–73.

219. *Id.* at 73–74.

220. *See* Lutz & Sikkink, *supra* note 8, at 637 (citing this as the number of Latin American cases reported by the United Nations Working Group on Disappearances in its 1981 report).

221. *Id.* at 638.

222. *Id.*

223. Forsythe, *supra* note 9, at 89.

Amnesty International and Human Rights Watch, which did not come into being until the end of the 1970s.

The creation of the Inter-American Commission and Court was initially a way for advocates of human rights within the Americas, at different points in history, to advance their human rights goals in the region. These institutions took on a life of their own, however, independent of their initial supporters. Both the Commission and Court have gradually assumed more powers than originally intended and probably expanded the content of rights beyond what their creators had hoped.²²⁴ They have continued to advance the cause of human rights in the Americas even when their original proponents were out of power and those in power did not particularly care about human rights. The Inter-American human rights system thus performed an important function in the region as a sustained source of moral leadership for human rights, even as individual States' commitment to these norms changed with passing regimes and administrations.

It must be noted, however, that the system continues to experience significant limits to its potential effectiveness. The Commission and Court do not have the institutional resources to address the majority of allegations filed.²²⁵ The Inter-American human rights system has also barely begun to address economic, social, and cultural rights in the region. Both failures should be understood as stemming from a lack of political will within the OAS system to strengthen the Inter-American human rights system. Currently, one-third of OAS States are not signatories to the Convention, including both the United States and Canada.²²⁶

B. Comparisons

The Inter-American human rights system bears many similarities to the European system that preceded it, yet there are also significant differences.

Most fundamentally, the European system does not have a distinct Commission body. The European Court of Human Rights directly processes all received petitions.²²⁷ In contrast, the African regional human rights system has followed the American model, establishing a

224. See generally Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L L. 585 (2010).

225. See discussion *supra* notes 206–07.

226. Organization of American States, *supra* note 23.

227. See European Convention, *supra* note 196.

Commission charged with promoting human rights in 1987 and adding a Court empowered to hear individual petitions many years later.²²⁸

In addition, the Inter-American system handles significantly fewer cases than its European counterpart. The Commission administers approximately 1,500 individual petitions in a year, approximately one percent of which will eventually go before the Court.²²⁹ In contrast, the European Court of Human Rights (“ECHR”) in Strasbourg deals with approximately 10,000 individual petitions per year.²³⁰ With its forty full-time judges, the ECHR offers an effective right of appeal to all victims of human rights violations in Europe.²³¹ The comparatively tiny and under-resourced American system must pick and choose the most serious cases, and hope that its rulings have a ripple effect through gradual norm strengthening and imitation by national courts. Although it has frequently been proposed that the OAS transform the part-time Inter-American Court into a permanent body,²³² there appears to be little political will to allocate the necessary resources to this project.

The American system also lacks an independent body charged with overseeing enforcement of the Court’s decisions, such as the Committee of Ministers of the Council of Europe.²³³ Rather, a significant portion of the Court’s time is consumed by monitoring compliance with its previous judgments. The Court’s reticence to delegate this enforcement responsibility to the general regional governance body may be well-placed. Two of the OAS’ most influential members, the United States and Canada, have never recognized the competency of the Court.²³⁴ The United States, moreover, has historically displayed a willingness to overlook human rights violations of allied nations in the pursuit of regional geopolitical objectives.²³⁵

228. See generally Makua Mutua, *The African Human Rights System: A Critical Evaluation*, UNDP Human Development Report Background Paper (2000), available at http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF.

229. In 2009, for example, the Commission received 1,431 complaints. Inter-Am. C.H.R. 2009, *Annual Report 2009: Statistics*, <http://www.cidh.oas.org/annualrep/2009eng/Chap.III.eng.htm#B> [hereinafter Commission Report 2009]. In the same year, the Court accepted twelve contentious cases. Court Report 2009, *supra* note 42, at 6 (showing a graph of contentious cases accepted each year 1982–2009).

230. MANFRED NOWAK, *INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME* 189–90 (2003).

231. See *id.*

232. See, e.g., *id.*

233. *Id.* at 199.

234. Organization of American States, *supra* note 23.

235. See Forsythe, *supra* note 9, 86.

These differences must also be understood in light of the Inter-American human rights system's very different geopolitical context from the European system. The Inter-American human rights system was tasked with enforcing human rights standards in a region where systematic gross violations of human rights by military dictatorships were the norm, particularly in the 1970s and 1980s.²³⁶ In contrast, for most of its history the ECHR exercised jurisdiction only over members of the Council of Europe, which required democratic governance and basic respect for human rights as a condition of membership.²³⁷ Thus, while it is generally accepted that the European human rights system is stronger than the American one, the Inter-American system's accomplishments are noteworthy given the circumstances.

Several unique features of the Inter-American system in contrast to the European one reflect this different political context and the corresponding greater need to engage in promotional activities outside the narrow jurisprudential role. The Inter-American system places great emphasis on efforts to reach friendly resolutions through negotiations, which permits the Commission to take on an attitude of constructive engagement with state governments. The practice of site visits by the Commission—functioning as something of a national human rights “checkup”—is also unique to the Inter-American system. The Court's practice of advisory jurisprudence, which emphasizes the pure interpretation of norms as opposed to their concrete application, also has no parallel in the European system.²³⁸

These innovative approaches reflect the needs of a region characterized by widespread human rights violations, where commitment to rule of law and human rights principles has historically been thin. For the Court to be effective, the States within its jurisdiction must have a pre-existing domestic commitment to the judicial and substantive norms of human rights, which is sufficiently strong to influence a State that loses a case to obey the judgment on principle. In contrast, the Commission relies on engagement, voluntary settlement, investigation of complaints, and exposure of offending regimes rather than the informal sanctions of regional opinion. It is thereby able to gain a foothold and have an

236. NOWAK, *supra* note 230, at 189–90.

237. *Id.* As the European Union and the ECHR expand to include the nations of Central and Eastern Europe, the European Court may begin to experience challenges similar to those historically faced by the Inter-American system.

238. PASQUALUCCI, *supra* note 36, at 45.

influence even in regimes characterized by poor rule of law and internal commitment to human rights.

The lessons of Inter-American history suggest that the much younger African regional human rights system may yet come to play a significant role in entrenching human rights norms on the continent. Africa today is characterized by a similar mixture of rights-respecting and rights-abusive regimes as was Latin America at the time its regional human rights system came into being. As in Latin America, the African region began by forming a Commission with a limited mandate in 1986,²³⁹ later adding a Court entitled to hear petitions lodged against consenting States in 2004.²⁴⁰ It may be hoped that the African continent will see a similar gradual but powerful shift to democracy and compliance with human rights norms over the next decades. In this light, it is encouraging that the African system has managed to progress from the creation of a regional charter of rights to the establishment of a regional court in only seventeen years, a process which took thirty years in the American region.

C. The Problem of Cuba

Although the founders of the Inter-American human rights system intended it to govern the entire Western Hemisphere, several limitations hold it back from being a truly regional system. First, two of the hemisphere's most powerful nations, Canada and the United States, have not ratified the American Convention.²⁴¹ Second, the system has had limited success in engaging the Caribbean sub-region. These two factors suggest that the Commission and Court function more as a Latin American human rights system than a truly Inter-American one.

In addition, the system has very limited influence over Cuba, which was long barred from OAS membership. Cuba was among the founding members of the OAS in 1948.²⁴² In 1962, however, the Castro government

239. African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986), *available at* http://www.achpr.org/english/_info/charter_en.html.

240. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, O.A.U. Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force 2004), *available at* http://www.achpr.org/english/_info/court_en.html.

241. Organization of American States, *supra* note 23 (showing that the United States signed in 1977 but never ratified; Canada neither signed nor ratified).

242. Organization of American States, General Information on the Charter of the Organization of American States, http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm (showing Cuban signature Apr. 30, 1948).

was barred from participation in the OAS, following strengthened ties with the Soviet Union.²⁴³ Cuba thus could not legally ratify the Convention or recognize the jurisdiction of the Court, even if it were politically inclined to do so.

The Commission has long maintained, however, that the limitations on Cuba's participation do not exempt the Cuban State from its continued status as an OAS member and therefore the obligation of adherence to regional standards on human rights.²⁴⁴ Accordingly, the Commission regularly hears petitions and issues reports on the country's human rights situation. The Commission's influence on States comes from the reputational rewards or sanctions that States experience within the OAS system by virtue of their perceived efforts to cooperate with the regional human rights system. Precisely because of Cuba's outcast status in the region, it has little incentive to work with the Commission.

Recently, the situation has shown some hope of changing. In June of 2009, a consensus resolution of the General Assembly indicated a willingness to restore Cuba's full privileges of membership, subject to its willingness to pursue a "human rights dialogue."²⁴⁵ Cuba has so far indicated little eagerness to accept the invitation.²⁴⁶ Politically, this decision makes sense for Cuba given the stated conditions. A regional dialogue on the poor state of human rights in Cuba would surely be embarrassing, both domestically and internationally. In return, there is no real guarantee that the process would lead to Cuba's restored OAS privileges without further conditions, which might be unacceptable to Cuban leaders.

Indeed, the United States has suggested that Cuba will not be permitted to resume its place at the OAS until it becomes a democracy.²⁴⁷ Imposing

243. See Inter-Am. C.H.R., *Sixth Report on the Situation of Political Prisoners in Cuba: The Organization of American States and the Government of Cuba*, OEA/Ser.L/V/II.48 doc. 24, Dec. 14, 1979, <http://www.cidh.oas.org/countryrep/Cuba79eng/intro.htm> (establishing competency to review Cuba's human rights situation, despite Cuba's 1962 expulsion from the OAS).

244. *Id.* ¶¶ 3-9.

245. Resolution on Cuba, AG/RES. 2438 (XXXIX-O/09), June 3, 2009, available at <http://www.oas.org/columbus/docs/CubaAGEng.doc>; see also Arthur Brice, *OAS lifts 47-year-old suspension of Cuba*, CNN.COM, June 3, 2009, <http://www.cnn.com/2009/WORLD/americas/06/03/cuba.oas/index.html>.

246. See *Declaration of the Revolutionary Government*, DIGITAL GRANMA INTERNACIONAL, June 8, 2009, <http://www.granma.cu/ingles/2009/junio/lun8/Declaration.html> (declaring in the Cuban government's official press organ declaring Cuba's firm intention to remain apart from the Organization of the American States).

247. See Editorial, *A New Day for Cuba*, VOANEWS.COM, June 7, 2009, <http://www.voanews.com/uspolicy/2009-06-08-voa2.cfm>. ("The United States looks forward to the day when a democratic

such high barriers to Cuba's participation may be counterproductive. In principle, an insistence upon democracy prior to membership is defensible. Democratic governance has, albeit only very recently, become the strong norm in the Americas. Excluding the region's only non-democratic government from participation may work an important function of reinforcing this norm. Historically, however, it has never been the policy of the OAS or the Inter-American human rights system to require a democratically elected government as a condition of membership or participation. This raises questions not only about whether it is fair to impose such a standard upon Cuba, but more importantly, whether it is wise.

The lessons of the Inter-American human rights system over the past several decades suggest that membership in the OAS, combined with the normative influence of the human rights institutions, has, on the whole, been an impressively effective force for human rights improvements. The Commission in particular has a proven track record of successful diplomacy with rights-violating regimes. There is good reason to expect that over time, engagement with the Inter-American human rights system would work a positive effect on Cuban practices, an achievement that the U.S. strategy of isolation has yet to produce.

Only once Cuba escapes its current pariah status within the OAS, however, would it have something to lose from a failure to engage with the Commission's efforts. Those parties concerned about the state of human rights in Cuba should, therefore, seriously consider supporting the readmission of Cuba to the OAS without preconditions.

A more demanding approach would be to restore Cuba's OAS privileges, provided that it ratifies the Convention, recognizes the jurisdiction of the Court, and remains in compliance with any judgments. Obviously, the United States is in somewhat of an awkward position to urge this approach, since it has not satisfied these conditions. Other countries could take the lead in negotiating this diplomatic compromise if the United States does not oppose it. The condition to remain in compliance with judgments of the Court would certainly also represent a major hurdle of political will to Cuba as well.

A middle-ground approach, however, might offer the right mix of incentives, requiring Cuba to ratify the Convention and the Protocol of San Salvador but not to recognize the jurisdiction of the Court. In this

Cuba rejoins the inter-American system. Until then, we will seek new ways to engage Cuba that benefit the people of both nations and the hemisphere.”).

limited-conditions approach, the Commission would gain the moral advantage of Cuba's having recognized regional human rights in principle. Yet Cuba would retain the sovereignty to adjudicate these rights internally, making the compromise seem a smaller sacrifice. Indeed, the ability to claim some element of moral superiority to the United States in having ratified two human rights treaties that the United States has not, might operate as an additional incentive for Cuba to accept.

Both the no-conditions and the limited-conditions approaches rely on a conviction that, over time, the soft-power mechanisms of Commission engagement and regional pressure will promote substantial human rights improvements. With either of these approaches, the Commission would likely benefit from additional resources—already inadequate to the task—as it moves to expand its efforts to promote human rights in Cuba. Although the United States and Canada are not parties to the Convention, they might be able to support the provision of these resources.

D. The Cultural Divide

Cuba and the United States are not the only nations in the hemisphere that are effectively outside of the Inter-American human rights system. Notably, all of the Spanish- and Portuguese-speaking nations within the region (with the exception of Cuba) have acceded to the jurisdiction of the Court, yet most of the English-speaking nations have not.²⁴⁸ What explains this Anglo-American trend of non-participation?

One reason that Canada and the United States might choose not to participate in international human rights regimes is to protect the privileges of states within a federal system. The federal republics of Mexico and Brazil, however, have both managed to ratify the Convention.²⁴⁹ Moreover, the many English-speaking island States that are not parties can hardly claim a federalism excuse.

A better explanation may lie in the fact that the English-speaking countries of the hemisphere have long enjoyed effective systems of appellate courts in stable democratic regimes, and therefore did not perceive a need to join the Inter-American one. The United States was one of the first nations in the world to develop domestic constitutional adjudication protecting the civil and political rights recognized in the

248. English-speaking countries which have acceded to jurisdiction are: Barbados, Dominica, Grenada, and Jamaica. Barbados issued a provisional order to stay an execution in 2004. Dominica issued new reservations in 1998, revoking its recognition of the jurisdiction of the court.

249. Organization of American States, *supra* note 23.

Convention. For decades, the English-speaking Caribbean countries and Canada were governed by the British Commonwealth appellate system. Long-established and well-financed, the Judicial Committee of the Privy Council provides a more effective institutional structure for human rights review than the Inter-American system could fairly claim. Canada opted out of the Commonwealth system in 1982, replacing it with a national constitution and a constitutional court empowered to adjudicate individual rights.²⁵⁰

More recently, Caribbean nations have expressed increasing discontent with British judicial rule, particularly in the area of death penalty jurisprudence.²⁵¹ Caribbean nations have also increasingly chafed at membership in the Inter-American system, which still issues many of its decisions only in Spanish. The Inter-American system's opposition to the death penalty, however, has particularly motivated the push by some English-speaking islands to create a substitute human rights body.²⁵² As a result, the Caribbean Court of Justice came into being in 2005 and has issued approximately sixty judgments to date.²⁵³

Culturally, linguistically, and jurisprudentially, there are good arguments for the "Inter-American" human rights system to concede the issue and embrace its true role as the Latin-American regional human rights system. Canada and the United States have little need for international oversight, and the Caribbean nations have decisively expressed their preference for their own, English-language system. Such fragmentation is problematic, however, to the extent that the Inter-American system relies on the OAS for its enforcement since many members of the OAS are already committed to not participating in that system.

250. Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

251. Laurence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

252. Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2001, available at http://www.caricom.org/jsp/secretariat/legal.../agreement_ccj.pdf.

253. See Caribbean Ct. of Justice, *Annual Report 2007-08*, at 15, available at <http://www.caribbeancourtofjustice.org/annualreport0708.html> (stating that thirty-five judgments have been issued to date); Caribbean Ct. of Justice, *Judgments*, <http://www.caribbeancourtofjustice.org/judgments.html> (last visited Feb. 22, 2011) (reporting on the official website an additional twenty-four judgments between January 1, 2009 and August 16, 2010). No more recent annual reports had been published as of December 9, 2010.

CONCLUSIONS

As the Inter-American human rights system enters its fifth decade of operation, there are many achievements to celebrate. The Commission and Court have played an important role in the region's democratic transition and today constitute the world's second-strongest international human rights regime. The innovative investigative and promotional activities of the Commission have also served as a model for non-governmental human rights organizations and the African human rights system.

Yet many challenges remain. The institutions require a greater investment of resources to effectively process the many petitions they receive. Also, the system still lacks comparably effective promotion of socioeconomic rights. Moreover, enforcement of the system's recommendations and orders remains a challenge with no easy solution in a regional political system with inconsistent commitment to human rights.