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# History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights

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# History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights

*Robert K. Goldman\**

## ABSTRACT

This article examines the historical origins of the Inter-American human rights system and key achievements of the Inter-American Commission on Human Rights over the past fifty years. It explores the Commission's use of on sight visits and country reports to expose human rights violations of military governments during the 1970s and its increased use of the case system since the restoration of democratic rule in the 1990s. The article also notes how shifts in US foreign policy toward the region impacted the Commission's work. It concludes by noting certain obstacles and challenges currently faced by the Commission.

## I. INTRODUCTION

The year 2009 marked the fiftieth anniversary of the creation of the Inter-American Commission on Human Rights (Commission) and the thirty-first anniversary of the entry into force of the American Convention on Human Rights (American Convention) and the creation of the Inter-American Court of Human Rights (Court). Although the Commission is neither as old, nor as

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well known for its accomplishments as the European Court of Human Rights or the former European Human Rights Commission, no regional human rights body has continuously had to cope with more crises and endemic problems in more countries than has the Commission and, to some extent, the Court. Indeed, if the saving of lives and the securing of broad reparations to victims are appropriate measurements of the effectiveness of any such supervisory bodies, then arguably no other system has been more successful than the Inter-American system.

This article traces the historical origins of the Inter-American human rights system and identifies some of the conflicting policies that helped shape it. The article also focuses on various notable activities and achievements of the Commission during three discreet periods between 1960 and 2004. In addition, it briefly notes key themes and shifts in US foreign policy toward the region and how they impacted the Commission's work. The article concludes by examining certain obstacles faced by the Commission in discharging its mandate.

## II. ORIGINS OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The persistent intervention of the United States into the domestic affairs of its Latin American neighbors in the early part of the twentieth century stimulated Latin American efforts to establish a regional public order system based on the principles of non-intervention and the sovereign equality of states. Early efforts in support of human rights were directed primarily toward this goal. One commentator has noted that “[t]he apparent readiness to overlook the inherent contradiction between the international protection of human rights and the regional doctrine of non-intervention has been a familiar and notable characteristic of Inter-American conferences and of the work product of regional juridical bodies. When the contradiction was perceived at all, it was some time resolved in favor of the doctrine of non-intervention.”<sup>1</sup>

Expressions of commitment to the protection of human rights were common in the early Inter-American conferences and occasionally were embodied in agreements concerning civil and political rights. For example, the Third Pan American Conference of 1906 approved the Convention Establishing the Status of Naturalized Citizens who Again Take up Their Residence in the Country of Their Origin. The Sixth International Conference of American

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1. José Cabranes, *The Protection of Human Rights by the Organization of American States*, 62 AM. J. INT'L L. 889, 892-93 (1968). See also THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS (4th rev. ed. 1995); SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (1997); THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS (David J. Harris & Stephen Livingstone eds., 1998).

States, held in Havana in 1928, approved the Convention on the Status of Aliens and the Convention on the Right to Asylum.

The Good Neighbor Policy, proclaimed by President Franklin D. Roosevelt in his inaugural address of 1933 put Latin America on notice that unilateral intervention would no longer be the operative principle of US diplomacy in the region. At the Seventh International Conference of American States held later that year, the United States and the Latin American republics ratified the Convention on the Rights and Duties of States, which declares: "No state has the right to intervene in internal or external affairs of another."<sup>2</sup> The Conference also approved conventions on Political Asylum and on Extradition. In 1936, at the Inter-American Conference for the Maintenance of Peace, the American states again affirmed their collective commitment to the principle of non-intervention by adopting a protocol declaring the inadmissibility of any form of intervention, regardless of the reason.<sup>3</sup> The Conference also approved a resolution on the Duties and Rights of Women with Respect to Problems of Peace. In 1938, the American states convened in Lima and adopted two significant resolutions concerning Freedom of Association and Freedom of Expression for Workers and Defense of Human Rights. It was not until the end of World War II, however, that concern for human rights became the subject of regional as well as worldwide attention.

The American states began shaping an incipient regional program for the protection of human rights at the Inter-American Conference on Problems of War and Peace, the so-called Chapultepec Conference, convened in 1945 to consider the postwar directions of the Inter-American system. The participants adopted a resolution on the International Protection of the Essential Rights of Man that stated in part:

International protection of essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of the principles of non-intervention and of equality between nationals and aliens, with respect to the essential rights of man.<sup>4</sup>

The language of the resolution highlights the intent of the states to strengthen the doctrine of absolute non-intervention.

The Conference assigned the Inter-American Juridical Committee (IAJC) the task of drafting a convention on the International Rights and Duties of Man for submission to an International Conference of American Jurists.

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2. Convention on Rights and Duties of States, Seventh International Conference of American States, *signed* 26 Dec. 1933, 49 Stat. 3097, T.S. No. 881, in *The International Conferences of American States* 121-23 (1st Supp. 1940).
  3. Additional Protocol Relative to Non-Intervention, Inter-American Conference for the Maintenance of Peace, *signed* 23 Dec. 1936, 51 Stat. 41, T.S. No. 922, in *The International Conferences of American States* 129 (1st Supp. 1940).
  4. Resolution XL, in *Report of the Delegation of the United States of America to the Inter-American Conference on Problems of War and Peace* 108 (1946).

The goal of the Latin American republics to establish non-intervention as an authoritative principle of the region's public order was finally realized by the signing of the Charter of the Organization of American States<sup>5</sup> at the Ninth International Conference of American States held in Bogotá in 1948. Articles 19 and 21 of the Charter restate the 1933 and 1936 declarations in the following language:

Art. 19: No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against its political, economic, and cultural elements.

Art. 21: The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.<sup>6</sup>

Another essential tenet of the new Inter-American system was expressed in the preamble of the Charter: "[T]he true significance of American solidarity and good neighborliness can only mean the consolidation on the continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man."<sup>7</sup>

### III. THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

Consistent with the preamble of the Charter and the declarations of the Chapultepec Conference, the American States signed on 2 May 1948, the world's first major international document on human rights, the American Declaration of the Rights and Duties of Man (American Declaration),<sup>8</sup> which preceded the UN Universal Declaration of Human Rights by seven months.

Reflecting natural law theory, the American Declaration asserts that the fundamental rights of man "are not derived from the fact that he is a national

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5. Charter of the Organization of American States, *adopted* 30 Apr. 1948, 2 U.S.T. 2394, 199 U.N.T.S. 3 (*entered into force* 13 Dec. 1951).

6. *Id.*

7. *Id.*

8. American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, *adopted* 2 May 1948, *reprinted* in Basic Documents Pertaining to Human Rights in the Inter-American System, O.A.S. Doc. OEA/Ser.L.V/II.82, doc.6 rev.1, at 17 (1992).

of a certain state, but are based upon attributes of his human personality."<sup>9</sup> The international protection of these rights "should be the principal guide of an evolving American law" and strengthened "as conditions become more favorable."<sup>10</sup>

The document enumerates civil and political as well as economic and social rights. The civil and political rights largely restate those already guaranteed in the constitutions of most American states. Among these are the rights to equality before the law, to due process of law, of petition and assembly, to religious freedom and worship, to protection from arbitrary arrest, and to the inviolability of the home. In contrast, the economic and social rights proclaimed therein had not been the objects of legislative prescription or judicial protection in many of the American republics. The most significant of these rights are: right to the preservation of health and to well-being; to the benefits of culture; to work and to a fair remuneration for work; to leisure time, to wholesome recreation, cultural, and physical benefit. The American Declaration also proclaims affirmative duties or standards of conduct which are meant to guide individuals in their societal relations. Among these are: the duty to receive instruction; to vote; to obey the law; to serve the community and the nation; to work; and to pay taxes.

Despite their noble statement, the American states chose not to make the American Declaration binding on its signatories, nor did they create any machinery to promote, much less protect, the rights they had just proclaimed. The Conference instead passed a resolution recognizing the need for an Inter-American Court to protect these rights and requested the IAJC to draft a statute for such organ. The IAJC politely declined the invitation on the ground that it was premature to do so and that it "would involve a radical transformation of the constitutional systems in all the American countries"<sup>11</sup> and also advised the Inter-American Council of Jurists that the preparation of a binding agreement on human rights should precede the statute of the proposed court.

Consideration of the statute was postponed until 1953 when the Council of Jurists asked the Council of the Organization of American States (OAS) if it would be appropriate to place the matter of the statute on the agenda of the Tenth Conference. The OAS Council, reflecting the views of the IAJC, felt that the time was not yet ripe to discuss the proposed statute. In the meantime, further development on human rights were still ongoing as evidenced by the approval of new resolutions on Improvement of the Social, Economic,

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9. *Id.*

10. *Id.*

11. Appendix III, Inter-American Juridical Committee, *Report to the Inter-American Council of Jurists concerning Resolution XXXI of the Bogotá Conference*, in Pan American Union, *Human Rights in the American States*, at 166 (1960).

and Cultural Levels of the Peoples of the Americas and The Strengthening and Effective Exercise of Democracy by the Ministers of Foreign Affairs at the Fourth Meeting of Consultation in 1951.

The Tenth Inter-American Conference, held in Caracas in 1954, did nothing to implement the American Declaration but discussed measures tending to promote human rights, without detriment to national sovereignty and the principle of non-intervention. The American states approved resolutions on Racial Discrimination, Universal Suffrage, and The Strengthening of the System for the Protection of Human Rights. Reaffirming the American states' commitment to the rights enunciated in the American Declaration, the Conference urged its constituency to "adopt progressively measures to adjust their domestic legislation to the Declaration" and to take appropriate measures "to ensure the faithful observance of these rights."<sup>12</sup> The Conference asked the Council of the OAS to continue studying the juridical aspects of regional protection of human rights and the feasibility of creating an Inter-American Court to protect them. The Council delegated the matter to its Juridical Committee and its Subcommittee on Human Rights, where no further action was taken until political events propelled the matter to the forefront.

In 1959 the Fifth Meeting of Consultation of Foreign Ministers was convened in Santiago, Chile to consider the political unrest in the Caribbean, followed by the Sixth Meeting of Ministers of Foreign Affairs which met in 1960 to hear Venezuela's charge that the Dominican Republic's dictator, Rafael Trujillo, had attempted to have Venezuela's president assassinated.

It was at these Conferences that the American states shed their apathy toward human rights problems and began to shape a regional program for their protection. José Cabranes noted that

[t]he alleged external terrorist activities of the Trujillo regime began to turn the O.A.S. toward the view that violations of human rights and denials of democratic freedoms within member states might affect the peace of the Americas and might thus become a proper concern of the Organization. It is important to stress, however, that it was the Dominican regime's alleged violation of the non-intervention doctrine itself that first prompted the O.A.S. to examine its role in promoting respect for human rights.<sup>13</sup>

Taking note of the wholesale disregard of fundamental liberties in Trujillo's country, the 1959 Conference stressed the interrelationship between the deprivation of human rights and the existence of anti-democratic regimes. The Foreign Ministers proclaimed this concern in the Declaration of Santiago

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12. *Id.* Appendix IV, Resolution XXVII, Strengthening of the System for the Protection of Human Rights, at 170.

13. José Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 MICH. L. REV. 1147, 1164 (1967).



which states that “the harmony among the American Republics only can be effective as long as respect of human rights and fundamental freedoms and the exercise of representative democracy are a reality in the internal workings of each of them.”<sup>14</sup> The Ministers, thereupon, passed a two-part resolution entitled Human Rights. Part I entrusted the Inter-American Court of Justice (IACJ) with the task of drafting a convention(s) establishing a regional court and other machinery to protect these rights, while Part II called for the creation of an Inter-American Commission on Human Rights having “the specific functions that the Council [of the OAS] assigns to it” and “charged with furthering respect of such rights.”<sup>15</sup>

In May-June 1960, the Council of the OAS approved the statute of the Inter-American Commission on Human Rights. Under the statute, the Commission is “an autonomous entity”<sup>16</sup> of the OAS whose function is to promote respect for human rights as set forth in the Declaration of the Rights and Duties of Man. The Commission was assigned the following functions and powers in Article 9 of its Statute:

- (a) To develop an awareness of human rights among the peoples of America;
- (b) To make recommendations to the governments of the member states general, if it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic legislation and, in accordance with their constitutional precepts, appropriate measures to further the faithful observance of those rights;
- (c) To prepare such studies or reports as it considers advisable in the performance of its duties;
- (d) To urge the governments of the member states to supply it with information on the measures of human rights;
- (e) To serve the O.A.S. as an advisory body in respect of human rights.<sup>17</sup>

The Commission would consist of seven members, all nationals of OAS member states, “of high moral character and recognized competence in the field of human rights.”<sup>18</sup> Its members are elected for four-year terms by the governments of the member states and may be re-elected for one additional term.

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14. Final Act, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser. C/11.5, at 3 (1960).

15. *Id.* at 10-11.

16. Statute of the Inter-American Commission on Human Rights, *adopted* 25 May 1960, O.A.S. Doc. OEA/Ser.L/V/I.1 (1960).

17. *Id.* art. 9.

18. *Id.*

#### IV. THE BACKGROUND OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

As previously mentioned, the American Declaration was merely a non-binding statement of moral obligations. In view of the widespread denial of fundamental liberties in many American states, the OAS realized that moral obligations are best observed when translated into binding legal obligations. As discussed in 1959, the Foreign Ministers at the Fifth Meeting of Consultation assigned the IACJ to draft a binding convention on human rights including the instrumentalities for their protection. However, compared with the rapid development of the Inter-American Commission, the elaboration of the American Convention proceeded slowly.<sup>19</sup>

The IACJ undertook the assignment and approved at its Fourth Meeting in Santiago on 8 September 1959, a draft convention on human rights for adoption at the Eleventh Inter-American Conference. Its draft enumerated substantive economic, social, and cultural rights as well as civil and political rights. Because of the Bay of Pigs fiasco, the Inter-American Conference was not held in 1961, and consideration of the draft convention was postponed until the Second Special Inter-American Conference that met in November 1965 in Rio de Janeiro. There it was decided to send the draft convention and alternative drafts submitted by Chile and Uruguay to the Council of the OAS. The Council was instructed to receive the views of the Commission and other interested bodies on the draft and prepare a final draft by 1966 for submission to a specialized conference on human rights in March 1967.

After reviewing the IACJ draft, the Commission suggested to the OAS Council that the economic, cultural, and social rights, except those rights concerning labor unions, be deleted. It also recommended the deletion of provisions on permanent sovereignty over natural resources and self-determination. The Commission stated that it was inappropriate to reaffirm and include such rights and principles in a convention on human rights. Instead, it suggested the inclusion of general provisions calling upon member nations to adopt domestic means to implement and further these rights.

Consideration of the new draft convention was postponed in 1967, once again, by a new development. The General Assembly of the United Nations, on 16 December 1966, approved the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, and an Optional Protocol to the latter covenant. By the end of September 1967, the first covenant was signed by Costa Rica, Colombia, Honduras, El Salvador, and Uruguay, and the second, by the same countries

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19. American Convention on Human Rights, *signed* 22 Nov. 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979) (*entered into force* 18 July 1978).

and Ecuador. (By the end of 1970, however, only Costa Rica, Colombia, Ecuador, and Uruguay had ratified the covenants.) Noting this action by member states and the similar substantive rights proposed in the IACJ draft and the UN covenants, but different institutional machinery to protect these rights, in May 1967, the OAS Committee on Legal and Political Affairs alerted the OAS Council of the possibility of conflict between the worldwide and regional programs aimed to protect human rights. Accordingly, it suggested, and the Council concurred, that further consideration of the IACJ draft be deferred until member states were consulted. The Council then submitted the following two questions to member states:

1. Whether the governments of the American states, in approving, at the Twenty-first Session of the General Assembly of the United Nations, Resolutions A, B, and C, concerning the international covenants on human rights, wished to establish a single universal system of regulation of human rights; or whether on the contrary they contemplated the possibility of the coexistence and coordination of the worldwide and regional conventions on the same rights.
2. Whether, in the latter case, those governments consider that the Inter-American Convention on Human Rights provided for in Article 112 of the Protocol of Amendment to the Charter of the Organization of American States should be limited to establishing an inter-American institutional and procedural system for the protection of those rights that would include the Inter-American Commission on Human Rights and, eventually, an Inter-American Court of Human Rights.<sup>20</sup>

Of the twelve states replying to the first question, ten—including Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, the United States, Uruguay, and Venezuela—expressed their opinion in favor of “the coexistence and coordination” of the UN covenants and an Inter-American convention. Only two countries, Argentina and Brazil, deemed it inadvisable to continue drafting a regional convention in light of the UN actions. In response to the second question, however, only five states—Ecuador, Guatemala, Venezuela, Colombia, and Costa Rica—advocated that the proposed convention should include procedural rules as well as substantive principles. Chile and Uruguay, on the other hand, stated that the Convention should provide only for the creation of an institutional and procedural system. Chile took the position that to avoid conflict between the two systems, the Inter-American machinery should apply only substantive law approved by the United Nations. The United States and Mexico took no definitive position on this question. The United States equivocated in its response, stating that the American

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20. Permanent Council, *Report on a Consultation with the Member States Regarding the Draft Convention on Human Rights*, submitted by the Committee on Juridical and Political Affairs, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.G/IV Rev. 3, 4 (1967).

Convention should not necessarily be limited to institutional and procedural articles, although this might be a satisfactory approach.<sup>21</sup> In view of the possible conflict between the UN covenants and the IACJ draft, the United States indicated that it could make an informed judgment on the matter if a study comparing the substantive provisions of the UN covenants and the various Inter-American conventions were made available to member states. The Secretariat of the Commission undertook these studies and concluded that both systems could coexist.<sup>22</sup> Specifically, it stated:

The need for, and the desirability of, a regional convention for the Americas are based on the existence of a body of American international law built up in accordance with the specific requirements of the countries of this hemisphere. That need and desirability also follow from the close relationship that exists between human rights and regional economic development and integration, in accordance with the statements of the Chiefs of State made at the meeting in Punta del Este.

Consequently the Inter-American Convention on the Protection of Human Rights should be autonomous rather than complementary to the United Nations covenants, although it should indeed be coordinated with those covenants.<sup>23</sup>

Despite the failure of many American states to respond to either question and the obvious reluctance of many of those responding to support a separate regional system to protect substantive rights, in 1968 the OAS Council asked the IACJ to prepare a final text of the draft convention for submission to member states and adoption at a Special Inter-American Conference to be held in San Jose, Costa Rica during November 1969. The Special Conference finally approved the American Convention on Human Rights, also called the Pact of San Jose, that November.<sup>24</sup> The American Convention entered into force in 1978 after eleven states ratified it.

## V. THE AMERICAN CONVENTION ON HUMAN RIGHTS

The American Convention with its substantive guarantees and institutional machinery is perhaps the most ambitious and far-reaching instrument of

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21. *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.19, doc. 18, at 10 (1968).

22. *Id.* See also *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the Draft*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/II.19, doc. 26 (1968).

23. *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the Draft*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/II.19, doc. 26, at 3 (1968).

24. American Convention on Human Rights, *supra* note 19.

its kind ever developed by an international body.<sup>25</sup> It considerably widens the scope and content of the 1948 American Declaration by the inclusion of more elaborate and specific civil and political rights. The organs for the protection of these rights in the American Convention parallel, in large measure, the institutional machinery of the European Convention. The American Convention provides for a Commission, which replicates the existing body and a purely jurisdictional organ, the Court. Unlike its European and UN counterparts, the American Convention incorporates both the rights guaranteed and their means of protection.

The entry into force of the American Convention effectively created a dual system for protecting human rights throughout the hemisphere. The American Convention became the primary source of the human rights obligations of state parties thereto, while the American Declaration and the OAS Charter continued to define the human rights obligations of those states not parties to the American Convention. The Commission, under its Statute and Regulations, is empowered to receive petitions and decide cases lodged against both kinds of states. However, it can only refer cases to the Court that are directed against states that have ratified the American Convention and have expressly accepted the Court's jurisdiction.

It is from its far-reaching nature that the American Convention derives both its strengths and weaknesses. The creation of a regional machinery to supervise domestic implementation of American Convention based rights seemed to suggest at the time that the doctrine of non-intervention was waning in the human rights area. Recognition of the right of individuals to make claims regarding violations of human rights certainly constituted a step toward the goal of vesting individuals with juridical personality under international law. Additionally, the existence of such agreements helped to promote regional and global awareness of efforts undertaken for the protection of human rights and thereby strengthened the efforts of domestic proponents supporting such measures.

It is clear, however, that at the time of its drafting, the American Convention guaranteed many civil and political rights which, although enshrined in domestic law, were largely ignored by the governments of many hemispheric countries. In this sense the American Convention essentially prescribed maximum, not minimum, human rights. Moreover, the framers of the American Convention largely transposed or projected a whole set of values and attitudes toward the law that were not widely entrenched in Latin America. The American Convention, as conceived and propounded, was surely more readily adoptable to nations with well developed, stable legal institutions and a political culture that cherished and upheld the rule of law. For example, the states that drafted and approved the European Conven-

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25. *Id.*

tion were mostly genuine liberal democracies with strong and independent judiciaries. Their purpose in elaborating that convention was to strengthen and preserve existing rights, rather than to create new rights. The experience of Latin America stands in stark contrast.

Despite their nominal commitment to constitutional democracy, many Latin American states had histories of vacillating between authoritarianism and rather unsuccessful experiments in democracy. Professors Henry Steiner and Philip Alston have observed:

The development of the inter-American system followed a different path from that of its European counterpart. Although the institutional structure is superficially very similar and the normative provisions are in most respects very similar, the conditions under which the two systems developed were radically different. Within the Council of Europe, military and other authoritarian governments have been rare and short-lived, while in Latin America they were close to being the norm until the changes that started in the 1980s.

The major challenges confronting the European system are epitomized by issues such as the length of pre-trial detention and the implications of the right to privacy. Cases involving states of emergency have been relatively few. The European Commission and Court have rarely had to deal with completely unresponsive or even antagonistic governments or national legal systems, or with deep structural problems that led to systematic and serious human rights violations. . . . By contrast, states of emergency have been common in Latin America, the domestic judiciary has often been extremely weak or corrupt, and large-scale practices involving torture, disappearances and executions have not been uncommon. Many of the governments with which the Inter-American Commission and Court have had to work have been ambivalent towards those institutions at best and hostile at worst.<sup>26</sup>

## VI. THE CREATION OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: ITS PRINCIPAL ACTIVITIES BETWEEN 1960 AND 1973

Even in its formative years, the Commission attempted rather vigorously to promote and protect human rights in the Americas by examining individual complaints, making recommendations, and preparing reports concerning flagrant violations of these rights. As the late Professor Durward V. Sandifer, an early member of the Commission, observed: "With no other sanction than publicity, the Commission has effectively established its role of guard-

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26. HENRY STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 869 (2d ed. 2000). See also Thomas Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 *AM. U. L. REV.* 155 (1980).

ian and critic, a substantial gloss on the jealously guarded doctrine of non-intervention."<sup>27</sup>

For example, at its first session in 1960, the Commission broadly interpreted its authority under its statute as permitting it to make general recommendations to each, as well as to all member states concerning the adoption of progressive human rights measures within the framework of their domestic legislation.<sup>28</sup> In a related matter, the Commission determined that it was not empowered to rule on petitions filed with it by individuals or groups alleging human rights violations by member states. Nevertheless, it determined that it could take cognizance of such petitions by way of information. However, the uncertainty surrounding this interpretation of its competence prompted the Commission to request the OAS Council to make explicit those powers it had implicitly carved out for itself.

In 1965 the OAS passed Resolution XXII, which called for expanding the Commission's functions and powers. Accordingly, the Commission's statute was amended in 1966 to include Article 9(bis) which formally empowered it

[t]o examine communications submitted to it and other available information; to address the government of any American state for information deemed pertinent by the Commission; and to make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights.

The revised statute, Article 9(bis)(a), also requested the Commission to pay "particular attention" to observing the following human rights referred to in the American Declaration of 1948: right to life, liberty, and personal security; equality before the law; religious freedom; freedom of investigation, opinion, expression and dissemination; right to fair trial; protection from arbitrary arrest; and to due process of the law. In addition, Article 9 (bis)(c) requested the Commission

[t]o submit a report annually to the Inter-American Conference or to the Meeting of Consultation of Ministers of Foreign Affairs, which should include: (i) a statement of progress achieved in realization of the goals set forth in the American Declaration; (ii) a statement of areas in which further steps are needed to give effect to the human rights set forth in the American Declaration; and (iii) such observations as the Commission may deem appropriate on matters covered in the communications submitted to it and in other information available to the Commission.

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27. Durward V. Sandifer, *Human Rights in the Inter-American System*, 11 *How. L.J.* 508, 521-22 (1965).

28. *Report on the Work Accomplished During its First Session*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/III.1, doc. 32, art. 9-10 (1961).

Certainly, some of the Commission's early priorities and activities were shaped in part by the realities of the Cold War and by the agenda that the United States was pushing within the political organs of the OAS, which the United States effectively dominated at the time. With the advent of the Cold War, US Latin American policy underwent significant transformation. The Roosevelt administration's Good Neighbor Policy was replaced in the 1950s by a policy that sought to contain the spread of communism in the hemisphere. Accordingly, the United States began providing a variety of support to numerous authoritarian regimes with questionable human rights practices on the ground that they were bulwarks against communist expansion. Thus, despite its formal espousal of non-intervention and support for human rights, the United States began to intervene, militarily and otherwise, in the domestic affairs of those Latin American states it deemed sympathetic to communist ideologies.

For example, in 1954 the CIA engineered the overthrow of Jacobo Árbenz Guzmán, Guatemala's left leaning President, and succeeded in replacing him with a pro-American, rightist regime. In 1962, after the Bay of Pigs, the Eighth Meeting of Consultation, at the urging of the United States and its supporters, declared that the principles of Marxist-Leninism were incompatible with the Inter-American system and that "the alignment of . . . a government with the communist bloc breaks the unity and solidarity of the Hemisphere."<sup>29</sup> Shortly thereafter, Castro's government was expelled from the OAS. In 1965, President Johnson dispatched US forces without prior consultation with the OAS to the Dominican Republic with the ostensible purpose of rescuing US nationals endangered by civil strife. He subsequently clarified that the real goal of the US intervention was to help prevent the establishment of another communist government in the hemisphere.<sup>30</sup>

It is not surprising, therefore, that the condition of human rights in Cuba was an early priority of the Commission and has remained the object of the Commission's scrutiny since 1961. At that time, the Commission began receiving numerous petitions denouncing the inhuman treatment accorded to political prisoners by Cuban authorities. In 1962, the Commission requested the government's permission to visit and to supply relevant information concerning these denunciations. The Cuban government did not respond to either request. Thereafter, the Commission detailed human rights violations in Cuba in three reports published in 1962, 1963, and 1967.<sup>31</sup>

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29. Part One, Resolution II of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, (22-31 Jan. 1962), Inter-Am. C.H.R., O.A.S. Doc. available at [http://avalon.law.yale.edu/20th\\_century/intam17.asp](http://avalon.law.yale.edu/20th_century/intam17.asp).

30. *Statement by President Johnson*, 52 DEP'T ST. BULL. 740, 747 (1962).

31. *Informe sobre la Situación de Derechos Humanos en la República de Cuba*, Inter-Am.C.H.R., O.A.S. Doc. OEA/Ser.LV/II.4, doc. 2 (1962); *Informe sobre la Situación de los Presos Políticos y su Familiares en Cuba*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.LV



The Commission also published two reports in 1963 and 1969, regarding charges of repeated human rights violations in Haiti.<sup>32</sup> In 1962 and 1964, it addressed communications to the Haitian government asking for information concerning these charges and requested permission to hold sessions in that country. The government refused to cooperate with the Commission, denouncing its requests for information as intervention in its domestic affairs. During this period, the Commission investigated and published reports concerning human rights violations in Guatemala, the Dominican Republic, Paraguay, and Nicaragua, for its own use.<sup>33</sup> Undoubtedly, the Commission's most notable success in this period occurred during its extraordinary mission to the Dominican Republic in 1965.<sup>34</sup>

Following the US intervention in the Dominican civil strife of 1965, the Foreign Ministers of the American states decided to create and send an Inter-American Peace Force whose purpose was to restore normal conditions and to uphold the human rights of the people in the Dominican Republic. Shortly thereafter, the Secretary General of the OAS asked the Commission to visit Santo Domingo to investigate numerous charges of human rights violations lodged by rival factions contending for power. From the time it arrived, the Commission played an active and important role in the peacekeeping operations. It helped protect the lives of innocent bystanders, negotiated mutual prisoner releases, and secured the release and safe-passage from the country of various political leaders. The Commission, at the invitation of the Provisional Government of the Dominican Republic, remained in the country to observe and report on the presidential election held in June of 1966. This historic mission marked the genesis of the *in loco* visit by the Commission to OAS member states.

In recognition of these efforts and others designed to protect human rights, the American states at the Third Special Inter-American Conference, held in Buenos Aires in 1967, made the Commission "a principal organ" of the OAS by signing a Protocol of Amendment to the Organization's Charter.<sup>35</sup> Two years later, the Commission once again became actively engaged in protecting human rights under difficult circumstances.

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II.7, doc. 4 (1963); *Informe sobre la Situación de Derechos Humanos en la República de Cuba*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.17, doc. 4 (1967).

32. *Informe sobre la Situación de Derechos Humanos en Haití*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.8, doc. 5 (1963); *Informe sobre la Situación de Derechos Humanos en Haití*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.21, doc. 6 rev. (1969).

33. See Organization of American States, Country Reports, Inter-Am. C.H.R., O.A.S. Doc. available at <http://www.cidh.org/pais.eng.htm>.

34. *Report on the Activities of the Inter-American Commission on Human Rights in the Dominican Republic*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.13, doc.14 rev. (1965).

35. Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUM. RTS. Q. 510, 515 (1997).

Prior to the outbreak of hostilities between Honduras and El Salvador in July 1969, each state had requested that the Commission send a mission to its territory to investigate charges of atrocities committed against its nationals within the borders of the other state. The Commission immediately appointed a subcommittee to visit both countries to investigate the acts denounced. From 4-10 July 1969, the Subcommittee interviewed officials and private parties and received complaints from both governments. When hostilities erupted between the two countries on 14 July the Commission, at the request of El Salvador and other American states, sent the Preliminary Report of its Subcommittee to the Thirteenth Meeting of Consultation of Ministers of Foreign Affairs, which had convened to consider the crisis. The Commission continued to study the situations in both countries and recommended that both governments adopt appropriate procedures to ensure effective remedies to those injured and to protect against future human rights violations.<sup>36</sup>

In the early 1970s, the Commission began expressing concern over increasing and destabilizing acts of violence frequently perpetrated by non-state actors. Specifically, in its 1971 Annual Report, the Commission denounced terrorist acts within member states as “a massive crime that tends to create a climate of insecurity and anxiety, on the pretext of bringing about a greater degree of social justice for less-favored classes.”<sup>37</sup>

The Commission also began urging member states to streamline judicial proceedings so that accused persons could be tried without undue delay. In addition, it stressed that penal systems should be improved so that prisons would fulfill their purpose of rehabilitation and that prisoners not endure inhuman and degrading treatment. The Commission similarly called for states to ensure that everyone have access to education, noting that illiteracy had actually increased throughout the Americas in recent years.

Most importantly, the Commission began to stress the link between the effective exercise of democracy and respect for human rights—a theme that it has continuously reiterated to this day. Taking note of the political instability in the Americas in the early 1970s, it warned rather presciently, that unless countries began to address and solve the root causes of this problem, efforts to protect human rights would be largely ineffective.

## VII. COMMISSION ACTIVITIES FROM 1973 TO THE EARLY 1990S

It is worth recalling that when the American Convention was being negotiated in the mid 1960s, most OAS member states, despite their pronounced

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36. *Informe sobre la situación de Derechos Humanos en El Salvador y Honduras*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 9 rev. (1970).

37. *Annual Report of the Inter-American Commission on Human Rights 1971*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.27, doc. 11 rev. (1972).

institutional weaknesses, did have nominally democratic and freely elected governments. However, by the time the American Convention entered into force in 1978, Argentina, Brazil, Bolivia, Chile, Peru, and Uruguay, as well as several Central American states, were ruled either by coupist military regimes or weak civilian governments under military tutelage. Many of these regimes, facing leftist insurgents or other violent groups, instituted policies that violated the most basic human rights and norms of international humanitarian law. Systematic murder, torture, and disappearances; proscription of political parties, unions, and student groups; and the censorship of the media, were among their most common emblematic practices. Furthermore, many of these regimes, particularly in South America, were particularly zealous advocates of the doctrine of national security and justified their actions, which amounted to state sponsored terrorism, as necessary to win the so called "Third World War" against international communism at home and abroad.

These regimes consistently labeled local and foreign based NGOs that denounced their excesses to the Commission as apologists for subversion. Human rights advocacy in the 1970s through the late 1980s thus became identified by many elites throughout the Americas as a kind of leftist ideology which, in turn, had the unfortunate effect of tainting and politicizing the subject. Indeed, many of these governments regarded the Commission's inquiries into and eventual exposure of their illicit practices as providing aid and comfort to their internal enemies.

For its part, during the 1970s and 1980s, the United States, with the notable exception of the Carter administration, pursued policies throughout the hemisphere that further helped to politicize the effort to promote respect for human rights. This was especially the case during the Reagan administration. By largely viewing human rights through the prism of the Cold War, Reagan's government supported many of the worst human rights violators in the hemisphere based on their avowedly anti-communist credentials. In furtherance of its policy to confront and "bleed" the Soviet Union and its putative proxies throughout the world, it armed, financed and/or backed the counter-insurgency efforts of the governments of El Salvador, Guatemala, and Honduras, as well as the Nicaraguan insurgents, despite their abysmal human rights practices. It is little wonder that many in the hemisphere came to identify human rights not as a body of protective legal rules and procedures, but rather as a tool of US foreign policy that was perceived as being selectively and often inconsistently applied. At the same time, while more states in the region edged toward ratifying the American Convention, the United States declined to do so. These realities need to be understood in order to appreciate the complex environment in which the Commission operated during this period.

Perhaps the Commission's foremost achievement during this difficult period of authoritarian rule was its preparation and publication of country reports that evaluated the human rights practices of governments throughout the region, especially in Southern Cone countries.<sup>38</sup> Particularly noteworthy in this regard were its 1974, 1976, and 1977 reports on Chile;<sup>39</sup> its 1978 reports on Paraguay and Uruguay;<sup>40</sup> and its 1980 report on Argentina.<sup>41</sup> Several of these reports were the result of *in loco* visits by the Commission, while others were written at the Commission's own initiative because the states denied it permission to visit. Tom J. Farer, a member of the Commission during this period, aptly described the Commission's role thusly: "it converted itself into an accusatory agency, a kind of "Hemispheric Grand Jury," storming around Latin America to vacuum up evidence of high crimes and misdemeanors and marshalling it into bills of indictment in the form of country reports for delivery to the political organs of the OAS and the court of public opinion."<sup>42</sup> These reports and *in loco* visits significantly enhanced the Commission's credibility, visibility, and prestige throughout the region.

Undoubtedly, the Commission's visit to Argentina in 1979 was its most successful in terms of results.<sup>43</sup> Arriving in Buenos Aires at the height of the *de facto* regime's "dirty war," the Commission received the testimonies of thousands of persons, including relatives of the disappeared and other victims of the regime's excesses. The Commission's 1980 report chronicled and exposed the systematic nature of the human rights violations being perpetrated by that country's military government.<sup>44</sup> The report's publication has been widely credited in Argentina as having helped decrease the number of reported disappearances. Outside the hemisphere, the report was relied upon by governments and intergovernmental bodies in Europe in shaping their policies toward Argentina.

During this period, the individual petition system was not widely known outside of the Southern Cone and, hence, not that frequently used by victims

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38. See Farer, *supra* note 35 for an insightful discussion of the Commission's activities during the late 1970s and early 1980s by a former president of that body. See also CECILIA MEDINA, *THE BATTLE FOR HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS OF HUMAN RIGHTS AND THE INTER-AMERICAN SYSTEM* (1988).

39. *Report on the Status of Human Rights in Chile*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.34, doc. 21 corr. 1 (1974); *Second Report on the Situation of Human Rights in Chile*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.37, doc. 19 corr. 1 (1976); *Third Report on the Situation of Human Rights in Chile*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.40, doc. 10 (1977).

40. *Report on the Situation of Human Rights in Paraguay*, Inter-Am. C.H.R. O.A.S., Doc. OEA/Ser.L/V/II.43, doc. 13 corr. 1 (1978); *Report on the Situation of Human Rights in Uruguay*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.43, doc. 19 corr. 1 (1978).

41. *Report on the Situation of Human Rights in Argentina*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.49, doc. 19 corr. 1 (1980).

42. Farer, *supra* note 35, at 512.

43. *Report on the Situation on Argentina*, *supra* note 41.

44. *Id.*

of human rights violations from other parts of the hemisphere. Moreover, when the Commission did open cases, many governments either disputed the facts or simply refused to cooperate with the Commission by ignoring its requests for information.<sup>45</sup> Consequently, decisions finding violations of rights under the American Declaration or the American Convention did not constitute a significant part of the Commission's work until the 1990s. This does not mean, however, that the Commission did not render some very important and innovative merits decisions. For example, its decisions that found the amnesty measures in Argentina and Uruguay violative of the American Convention were truly ground breaking and gave impetus to the global movement against impunity.<sup>46</sup> In addition, in early 1986 the Commission, fortunately, broke with its past practice and began submitting cases to the Inter-American Court.

### VIII. COMMISSION ACTIVITIES FROM THE EARLY 1990S TO THE PRESENT

The late 1980s marked the end of most authoritarian regimes throughout the region. By the early 1990s all OAS member states had freely elected governments except for Cuba. The collapse of the Soviet Union, the end of the Cold War and the armed conflicts in Central America, and the emergence and strengthening of civil society institutions throughout the hemisphere seemed to bode well for enhancing respect for human rights at the national and regional levels. At the same time, the Clinton administration maintained a less ideological and more multilateralist approach in its policies toward the region than had the two previous administrations. Although it continued

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45. Farer, *supra* note 35, at 528. "[W]hile European cases almost always presented issues of law, in Inter-American ones it was almost invariably the facts which were disputed. No government claimed that torture and summary execution were permissible even in states of emergency; they simply denied torturing and killing." "Occasionally, certain governments absolutely failed to respond [to the commission's request for information regarding petitioner's claimed violations] no matter how often prodded and were finally subjected to the time limit and the presumption of truth set by the Commission's Regulations." Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 31, 48 (David J. Harris & Stephen Livingstone eds., 1998).

Indeed, because many governments, particularly *de facto* military regimes, compromised the already fragile independence of the civilian judiciary by the wholesale purge of judges and/or transferring jurisdiction from civilian to military courts to try suspected "subversives," the Commission excused petitioners from exhausting domestic remedies and in effect became a court of first instance where petitioners could press their human rights claims against the offending state.

46. *Consuelo v. Argentina*, Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.31, Inter-Am. C.H.R., Report No. 28/92, OEA/Ser.LV/II.83, doc. 14, corr.1 (1992-93); *Mendoza v. Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Inter-Am. C.H.R., Report No. 29/92, OEA/Ser.LV/II.83, doc. 14, corr. 1 (1992-93).

supporting past policies to isolate Castro and to eradicate coca production in the Andean region, it undertook new initiatives to improve the rule of law and democratic institutions in Latin America by promoting judicial reform and anti-corruption measures. It also took a far more aggressive approach in pursuing US economic interests throughout the region, insisting on market liberalization as a condition of external financial assistance. In addition, it strongly supported the work of the Commission and the Court within the political organs of the OAS.

Within the region, a number of states emerging from years of authoritarian rule took certain symbolic and important steps to break from the past. Truth Commissions were established in Argentina, Chile, El Salvador, and eventually Guatemala. Moreover, among the first acts of the newly elected governments of Argentina, Chile, and Uruguay were to ratify the American Convention and accept the Court's contentious jurisdiction. By the mid 1990s, the governments of Mexico and Brazil for the first time invited the Commission to carry out on site visits to evaluate the human rights situation in both countries, and, in 1998, they both accepted the jurisdiction of the Court. During this period, several states, including Argentina, Brazil, Colombia, and Mexico, also began to design national human rights plans, which were in part shaped by the jurisprudence of the Commission and the Court.

Another rather immediate consequence of the new political conditions throughout the region was a substantial increase in the number of petitions filed with the Commission seeking redress for past violations under authoritarian rule. Although the newly elected governments in the region no longer violated human rights as a matter of state policy, it soon became apparent from the nature of other complaints received that many countries had deep seated structural deficiencies and/or endemic problems, such as police violence, racial and other forms of discrimination, exclusion of vulnerable groups from meaningful political participation, and inefficient, corrupt, or weak judiciaries. Moreover, and disturbingly, a significant number of these new complaints, echoing the past, detailed violations of fundamental rights, such as the right to life and freedom from torture.

Realizing that these problems and deficiencies, unless remedied, could undermine democratic institutions and respect for human rights, the Commission, in the early 1990s, began to closely monitor those countries with the most fragile democratic institutions and/or which were still experiencing political violence. The situations in Guatemala and Haiti were particularly worrisome in this regard. Apart from periodic visits to both countries, the Commission published four reports on the human rights situation in Haiti between 1990 and 1995<sup>47</sup> and three reports on Guatemala between 1993

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47. *Report on the Situation of Human Rights in Haiti*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.77, doc. 18 rev.1 (1990); *Report on the Situation of Human Rights in Haiti*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.83, doc. 18 rev. 1 (1993); *Report on the*

and 2001.<sup>48</sup> Colombia and Peru, which were, at the time, the only countries in the hemisphere with ongoing internal armed conflicts, also received special attention, albeit for different reasons.<sup>49</sup>

Despite protracted internal hostilities and failed negotiations with dissident armed groups that have controlled at times large portions of national territory, Colombia has had relatively strong democratic institutions, regular elections, a free press, and governments that have largely cooperated with and sought advice from the Commission and other inter-governmental bodies. Since the late 1990s, the Commission's concerns in Colombia have primarily focused on the close links between the country's security forces and various paramilitary groups, extreme violence both within and outside of the context of the armed conflict, the plight of millions of internally displaced persons, the use of military courts to shield members of the security forces from responsibility for serious human rights violations, attacks against human rights defenders, and a pervasive culture of impunity reflecting the inability of law enforcement authorities and the civilian judiciary to investigate and punish virtually all kinds of criminal conduct.

In light of the country's endemic violence and civil strife, the Commission's top priority during this period was to try to save the lives of as many persons as possible who were under serious threat of harm from state agents, their proxies, and other violent actors. To this end, the Commission issued numerous precautionary measures requiring the government to take concrete actions to protect hundreds of human rights defenders, labor union leaders, and reporters, as well as members of indigenous and Afro-descendant communities and large groups of internally displaced persons. While not always effective, these measures, which Colombia's Constitutional Court has declared binding on the state, unquestionably have helped save the lives of innumerable persons. More recently, the Commission has closely monitored the legal measures and process that have led to the demobilization of some of the country's most notorious paramilitary groups. The

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*Situation of Human Rights in Haiti*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.85, doc. 9 rev. 1 (1994); *Report on the Situation of Human Rights in Haiti*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.88, doc. 10 rev. (1995).

48. *Fourth Report on the Situation of Human Rights in Guatemala*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.83, doc. 16 rev. (1993); *Special Report on the Human Rights Situation in the so-called "Communities of Peoples in Resistance" in Guatemala*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.86, doc. 5 rev. 1 (1994); *Fifth Report on the Situation of Human Rights in Guatemala*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.111, doc. 21 rev. (2001).
49. *Report on the Situation of Human Rights in Peru*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.83, doc. 31 (1993); *Second Report on the Situation of Human Rights in Peru*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.106, doc. 59 rev. (2000); *Second Report on the Situation of Human Rights in Colombia*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.84, doc. 39 rev. (1993); *Third Report on the Situation of Human Rights in Colombia*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.102, doc. 9 rev. 1 (1999).

Commission has also regularly visited Colombia. For example, it undertook on-site visits in 1990, 1992, and 1997. Based on the information gathered during its 1997 visit, the Commission published in 1999 a major report on the human rights situation in Colombia in which for the first time it used international humanitarian law, i.e., the law of armed conflict, to identify the legal regime governing the ongoing internal armed conflict and to detail emblematic violations of international humanitarian law attributable to state security forces, paramilitary groups, and dissident armed groups alike.<sup>50</sup> Furthermore, it is worth noting that Colombia in the 1990s enacted legislation that streamlined procedures for its compliance with Commission recommendations regarding the payment of monetary compensation to victims of human rights violations. In addition, the country's Constitutional Court, the most progressive in the hemisphere, has issued numerous innovative opinions and orders that have protected the effective exercise of basic rights enshrined in the American Convention.

The nature and tenor of the Commission's relations with the Fujimori government in Peru were quite different. After his "self-coup" in April 1992, which shut down the legislature and effectively purged judicial personnel involved in every aspect of the administration of justice, President Fujimori made various commitments to the OAS concerning the prompt restoration of democracy. Unfortunately, the political organs of the OAS did little to hold him to those undertakings. The Commission soon began receiving a flood of complaints detailing violations of fair trial guarantees in connection with the application of Peru's anti-terrorist legislation. Other petitions tended to reveal systematic violations of the right to life, including disappearances, the right to humane treatment, the right to personal liberty, and freedom of expression.

Because the government refused to settle cases or adopt the Commission's recommendations where it had found violations, the Commission began referring to the Inter-American Court cases that were most emblematic of the Fujimori government's illicit practices. In response, Peru spearheaded—unsuccessfully—several initiatives within the political organs of the OAS supposedly to "strengthen" the region's human rights system, but whose real purpose was to dramatically curb, if not gut, the supervisory powers of the Commission. Furthermore, in 1999, Peru attempted to withdraw its declaration of acceptance of the Court's jurisdiction to avoid litigating several high profile cases. Although the Court found Peru's putative withdrawal to be without effect and thereafter proceeded to decide these cases<sup>51</sup> and

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50. *Third Report on the Situation of Human Rights in Colombia*, *supra* note 49.

51. *See Second Report on the Situation of Human Rights in Colombia*, *supra* note 49; *Bronstein v. Peru*, Case 11.762, Inter-Am. C.H.R., Report No. 20/98, OEA/Ser.L/V/II.98, doc. 6 rev. (1997); *Constitutional Court v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 55 (24 Sept. 1999).



other cases against Peru, Fujimori's government continued to defy the Court by ignoring its orders and decisions. In the face of that defiance, the OAS remained largely passive despite its role as the ultimate guarantor of the integrity of the human rights system.

In 1998, the Commission effectively maneuvered Fujimori into inviting it to conduct an on-site visit to Peru, and, based on that visit and other material, it prepared a comprehensive report on the human rights situation. Although the report was completed in early 2000, the Commission decided not to release it until 4 June 2000 on the eve of the OAS General Assembly meeting in Windsor, Canada in order to have maximum media exposure and impact on the organization.<sup>52</sup>

The strategic release proved successful as the report's findings dominated the discussions during the General Assembly. The report meticulously detailed the progressive destruction of the rule of law and democracy during Fujimori's tenure and contained a challenge to the OAS to act by pointedly stating that the recent presidential election, whereby Fujimori was elected to a third term, was "an irregular interruption of the democratic process." This time, the political organs of the OAS rose to the occasion by requiring the Fujimori government to take a series of measures that most certainly influenced Fujimori's decision to resign the presidency in disgrace several months after the publication of the report.

The Commission's overall work on Peru during the Fujimori era showed it at its best. Not since its visit to and reporting on Argentina in the late 1970s had the Commission been so effective in its efforts to expose rank lawlessness in an OAS member state. By utilizing all the tools at its disposal, including exercising its "diplomatic/political" role within the OAS, the Commission, together with the Court, was not only able to mete out justice in individual cases, but also through its public reporting to act as an "early warning" mechanism which kept the region as a whole informed of things that were going terribly wrong in an important hemispheric state.

Another country which merits special mention is Argentina. Since the restoration of democracy in 1983, Argentina has done more than any other hemispheric state to squarely confront and break with the legacy of its authoritarian past. Specifically, it annulled the military's self-amnesty law, created the National Commission on the Disappeared (CONADEP), prosecuted members of the military juntas, and enacted a broad reparations scheme for victims of the military regime's human rights violations. In addition, apart from ratifying the American Convention, Argentina in 1994, as part of its constitutional reform, accorded constitutional rank to that treaty. This, in turn, has resulted in Argentine judges at all levels regularly applying the

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52. *Second Report on the Situation of Human Rights in Peru*, *supra* note 49.

Court's and the Commission's jurisprudence in assessing the compatibility of national laws with the American Convention.

This period also marked the beginning of a rather unique pattern of cooperation between successive Argentine governments and litigants with the Commission in the use of the friendly settlement mechanism established in the American Convention. Indeed, in 1993 Argentina pioneered the use of this mechanism for resolving litigation before the Commission in the case of *Guillermo Birt, et al.*<sup>53</sup> Thereafter, every Argentine government has entered into at least two such settlements with the assistance of the Commission. Many of these settlements were quite innovative in that they recognized a new right under domestic law, for example, the right to the truth concerning the disappeared in the *Lapaco* case<sup>54</sup> or required the state to change its domestic law by eliminating the crime of contempt from the criminal code in the *Verbitsky* case.<sup>55</sup> Additionally, many other Argentine cases, which were not so settled, presented sophisticated questions of first impression whose resolution contributed greatly to the development of the Commission's jurisprudence, especially on due process and related issues. Moreover, Argentina has been in the forefront of those OAS member states that have consistently opposed periodic attempts to curb the Commission's powers, and thereby weaken the region's human rights system.

During this same period, human rights NGOs, which were flourishing and proliferating throughout the region, began filing numerous petitions posing new and novel legal claims involving, women's rights, freedom of expression, indigenous people's rights, environmental rights, labor rights, HIV/AIDS, and other economic, social, and cultural rights. Their efforts were certainly spurred on by the entry into force of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belem Do Para)<sup>56</sup> and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)<sup>57</sup> in 1995 and 1999, respectively.

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53. Report on the Friendly Settlement Procedure in Cases 10.288, 10.310, 10.436, 10.496, 10.631, and 10. 771, Inter-Am. C.H.R., Report No. 1/93, OEA/Ser.L/V/II.83, doc. 14, corr. 1 (1992-93).
  54. Augiar de Lapacó v. Argentina, Case 12.059, Inter-Am. C.H.R., Report No. 21/00, OEA/Ser.L/V/II.106, doc. 6 rev. (1999).
  55. Verbitsky v. Argentina, Case 11.012, Inter-Am. C.H.R., Report No. 22/94, OEA/Ser.L/V.88, doc. 9 rev. 1 (1994).
  56. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women ("Convention of Belem Do Para"), adopted 9 June 1994, 24th Sess., O.A.S. Doc. OEA/Ser.L/V/II.92 doc. 31 rev. 3 (1994) (entered into force 5 Mar. 1995), reprinted in 33 I.L.M. 1534 (1994).
  57. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), adopted 7 Nov. 1988, O.A.S.T.S. No. 69 (entered into force 16 Nov. 1999), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS Doc. OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992).

By the mid-1990s, despite holding regular elections and the existence of freer and more open societies, many states, most particularly in South America, began experiencing severe economic problems and a sharp deterioration in the functioning of democratic institutions, which helped spark attempted coups and other means to achieve regime change. If such attacks on the constitutional order were not yet entirely a thing of the past, the OAS at least began to take action to repudiate them. Resolution 1080,<sup>58</sup> excluding coupist regimes from the OAS, and the 2001 Inter-American Democratic Charter<sup>59</sup> make clear that coups are no longer acceptable to the Organization and its member states. Consistent with these positive developments, the Commission began playing close attention to the conflictive political situation in Venezuela, especially since the attempted coup against President Chavez in April 2002. In March 2003, the Commission published a comprehensive report on Venezuela that analyzed the reasons for the highly polarized political climate in that country and its negative impact on human rights protections.<sup>60</sup> It has also closely followed the situations in Bolivia, Ecuador, Guatemala, and Haiti.

The region's human rights system suffered something of a setback in 1998 when Trinidad and Tobago formally denounced the American Convention. This unprecedented action was largely taken in response to the Commission's examination of numerous petitions alleging that Trinidad and Tobago's imposition of the mandatory death penalty in all capital cases violated numerous provisions of the American Convention. The Commission's preliminary reports in 1999<sup>61</sup> and the Court's 2002<sup>62</sup> judgment confirmed these violations. In 1999, the Trinidadian government also executed several persons in direct contravention of binding orders issued by the Court. However, the OAS's political organs did nothing. Although the Commission has rendered comparable decisions on the use of the mandatory death penalty by other Caribbean states, none of these states has followed Trinidad and Tobago's example. Hopefully, Trinidad will decide to re-accede to the American Convention in due course.

As a result of the increased number of petitions received, the Commission made resolution of cases its top priority during this period. Many of the Commission's decisions since the mid 1990s consolidated existing juris-

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58. *Representative Democracy*, adopted 5 June 1991, AG/RES. 1080 (XXI-O/91), 21st Sess., O.A.S. Doc. OEA/Ser.P/XXI.O.2 (1991).

59. *Resolution of San Jose, Costa Rica Inter-American Democratic Charter*, adopted 5 June 2001, AG/RES. 1838 (XXXI-O/01), 31st Sess., O.A.S. Doc. OEA/Ser.P/XXXI-O.2 (2001).

60. *Report on the Situation of Human Rights in Venezuela*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.LV/II.118, doc. 4 rev. 2 (2003).

61. See, e.g., *Hilaire v. Trin. & Tobago*, Case 11.816, Inter-Am. C.H.R., Report No. 43/98, OEA/Ser.LV/II.102, doc. 6 rev. (1998).

62. *Hilaire v. Trin. & Tobago*, 2002 Inter-Am Ct. H.R. (ser. C) No. 94 (21 June 2002).

prudence or broke new ground in such diverse areas as amnesty laws, the death penalty, military justice, anti-terrorism measures, fair trial guarantees, indigenous peoples' rights, rights of disabled persons, and labor rights. In addition, the number of friendly settlements brokered by the Commission in recent years has increased dramatically. These settlements, which the Commission routinely offers to litigants generally after declaring a petition admissible and opening a case, offer an attractive alternative to protracted litigation before the Commission and the Court. As previously noted, they frequently have resulted in highly creative and generous reparation measures for broad categories of victims of human rights abuses. As such, they have become a significant, albeit very time consuming, activity of the Commission.

This new emphasis on cases has not been to the detriment of *in loco* visits and the preparation of country reports. These continue to be an important part of the Commission's work, particularly with respect to those countries experiencing armed conflict or serious institutional problems, such as Colombia, Guatemala, Haiti, and Venezuela. However, "working" visits in recent years by the Commissioner and staff member responsible for the country have supplanted to some degree the more cumbersome and expensive on-site visit by the entire Commission. It can be expected that future country visits and ensuing reports, instead of examining the "global" human rights situation in the country concerned, will be far more focused by addressing and formulating recommendations concerning very specific human rights practices. The Commission's recent country report on Haiti<sup>63</sup> published in April 2007 and the various thematic reports on access to justice<sup>64</sup> are indicative of this trend.<sup>65</sup>

During the 1990s, the Commission considerably expanded the number of its Special Thematic Rapporteurships either at its own initiative or in response to requests from NGOs and the political organs of the OAS. These rapporteurships have not only spotlighted public attention on the plight of certain vulnerable groups or obstacles to the free exercise of certain key rights, but also have led to new standard setting in the field. The work of these mechanisms also has enriched and reinforced the Commission's more general monitoring of human rights practices in the countries visited.

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63. *Observations of the Inter-American Commission on Human Rights upon Conclusions of its April 2007 Visit to Haiti*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.131, doc. 36 (2008).

64. *Access to Justice as a Guarantee to Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, Inter-Am. C.H.R. OEA/Ser.L/V/II.129, doc. 4 (2007); *Report on the Implementation of Justice and Peace Law: Initial Stages of the Demobilization of the AUC and First Judicial Proceedings*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.129, doc. 6 (2007).

65. *Justicia e Inclusión Social: Los Desafíos de la Democracia en Guatemala, 2003*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.118, doc. 5 rev. 1 (2003); *Report on the Situation of Human Rights in Venezuela*, *supra* note 60.

As of 2009, the Commission had Special Rapporteurs for the rights of the child, women, indigenous peoples, internally displaced persons, migrant workers, prison conditions, Afro-descendants and against racism, and freedom of expression. Reflecting its concern about the growing number of attacks on human rights workers in the region, in 2001 the Commission established within its Executive Secretariat the Human Rights Defenders Functional Unit. This unit regularly evaluates the situations of at risk human rights workers and organizations and recommends to the Commission the issuance of precautionary measures to protect these persons and groups from irreparable harm. Many of these thematic mechanisms are supported by voluntary financial contributions from OAS member states, the Inter-American Development Bank, or various European aid agencies. Assuming an infusion of additional resources to support these rapporteurships, it is most likely that working visits by these thematic mechanisms to member states will increase dramatically.

By the close of the 1990s, the so-called decade of transition to democracy in the region had ended. It is clear that initial hopes for consolidating democratic institutions and the rule of law, which are indispensable for protecting human rights at the local level, fell well short of expectations in many nations. Progress, however, has been made in certain areas. The people of the region are now far more knowledgeable of their entitlement to basic human rights and how to seek legal redress from the Commission. Moreover, they have shown themselves to be far less tolerant of official corruption and generally expect far more transparency and accountability from their elected representatives than they had in the past. In addition, various governments, most notably in Argentina, Chile, and Mexico, have recently taken new steps to fight impunity and come to grips with the divisive legacies of the past.

As previously indicated, changes in governments and their policies, as well as changing political and economic conditions in the region, have presented new challenges to the Commission over the years. In this regard, there are certain challenges and obstacles facing the Commission and the Court that merit special attention and are discussed below.

## **IX. CHALLENGES AND OBSTACLES**

Without question, the single greatest obstacle to the effective functioning of the Commission and the Court is the lack of adequate human and financial resources. Simply put, the system of petitions and cases is in imminent danger of collapse. The Commission's thirty staff lawyers, who are presently handling nearly 1,250 open cases, cannot keep pace with the annual increase in the number of petitions and thus cannot meet the reasonable

expectations of states and victims for their prompt resolution. The annual average number of petitions received between 1997 and 2001 was 609.<sup>66</sup> The Commission received 1,456 new complaints in 2007, an approximate 70 percent increase in a ten-year period.<sup>67</sup>

The situation of the Court is even more precarious. As a result of the Commission's reform of its regulations in 2001, whereby presumptively all cases are now referred to the Court, that body's thirteen staff lawyers cannot be expected to deal with the fifty-plus current cases and over sixty provisional measures on its docket, much less with the anticipated referral of fifteen to twenty new cases a year from the Commission.

Although the Commission is the OAS's principal organ in the area of human rights, its budget represents less than 4.6 percent of the organization's total budget. It is important to understand that the commissioners and the judges of these organs are not salaried employees of the organization. Instead, they receive an honoraria and a per diem when they are in session or engaged in other official activities. Approximately two-thirds of the Commission's total budget goes to staff salaries and benefits. The remainder is barely adequate to cover the costs of two regular sessions, publication of the annual and special reports, and the costs of performance contracts. This means that the budget contains no money for a single *in loco* visit or for litigating a single case before the Court. In order to carry out these and other mandated activities, the Commission has had to rely on the voluntary contributions from the United States and various European countries. For its part, the Court has received funds from the European Union to help cover the costs of its publications. It is clear that without additional resources, neither organ will be able to continue carrying out many of the tasks entrusted to them. As the OAS is an organization in perpetual financial crisis, the prospects of increased funding are quite bleak.

The failure of most state parties to the American Convention to adequately implement that instrument's rights and guarantees under domestic law or to fully comply with orders and decisions of the Commission and Court have also adversely affected the functioning and integrity of the system. It is a frequently overlooked fact that the primary responsibility for implementing the American Convention rests with the states parties themselves. Under the American Convention, states parties not only pledge to secure to all persons subject to their jurisdiction the free exercise of the rights and freedoms recognized in that instrument, but also undertake to accord domestic legal effect to, as well as harmonize their interpretations of domestic rules with

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66. *Annual Report of the Inter-American Commission on Human Rights 2002*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2003), at Ch. III.B.

67. *Annual Report of the Inter-American Commission on Human Rights 2007*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007), at Ch. IIIB.

those rights and freedoms. As a corollary, they may have to modify and perhaps even derogate any domestic legal norm that is incompatible with their obligations under the American Convention. States parties are similarly required to provide effective judicial remedies to all persons claiming violations of these rights and freedoms.

It is therefore quite troubling that the Commission has routinely encountered many instances where states parties have not made Convention based rights operative under domestic law or where judges have applied norms of domestic law in contravention of their state's engagements under the American Convention. Clearly, if such rights are not recognized under domestic law, there can be no effective domestic remedies to redress their violation. Fortunately, various states have taken certain measures to remedy this situation. For example, some states, such as Argentina and Peru, directly incorporate provisions of the American Convention into domestic law, while others, such as Colombia, Costa Rica, and Guatemala have constitutions which accord supremacy to the American Convention and other human rights treaties over domestic law.

It is worth noting that the record of state party compliance with Commission and Court decisions relating to the payment of monetary compensation to victims of human rights violations has improved when compared to the period of authoritarian rule. However, no state has yet put in place internal legal mechanisms and procedures that mandate *full* compliance with the decisions and orders of the Commission and the Court. The great majority of states parties regularly plead *res judicata* or prescription under domestic law as excuses for their failure to comply with orders and decisions requiring them to identify, prosecute, and punish state agents responsible for human rights violations. As a consequence, impunity for such violations continues to be the norm throughout the region. This in turn undermines the credibility and efficacy of the system.

If the region's human rights system is to be fully effective, then member states of the OAS must take seriously their role as the collective and ultimate guarantors of the system's integrity. It is quite revealing that the political organs of the OAS generally showed greater willingness to take initiatives supporting Commission decisions when dictatorships held sway in the region than they have in the last decade under freely elected governments. As noted previously, these organs did absolutely nothing when the governments of Peru and Trinidad and Tobago were openly defying the Commission and the Court. It was only after the fall of Fujimori in 2002 that several member states began presenting various proposals to establish an annual review procedure by the General Assembly and Permanent Council of the OAS to assess compliance with Commission and Court decisions. However, despite ongoing debate, the OAS has not yet created any kind of mechanism for this purpose. Consequently, when it revised its regulations

in 2000, the Commission included a new provision whereby it can adopt the follow-up measures it deems appropriate, such as requesting information from litigants and holding hearings, in order to verify compliance with its decisions. Further, it introduced in its 2001 Annual Report a new chapter that depicts the status of compliance with its recommendations in cases decided and published during the previous two years.<sup>68</sup> It is worth noting that within the Council of Europe, noncompliance with decisions of the European Court of Human Rights is subject to sanctions, including exclusion from the regional system.

Another challenge for the Commission is the need to develop a coherent strategy for dealing with economic, social, and cultural rights. Although the Protocol of San Salvador entered into force in 1999 and the Commission has dealt with these rights in its country reports and various cases, it has not yet fully articulated its views concerning the justiciability of these rights under the American Declaration and the American Convention.<sup>69</sup> Backsliding throughout the region in the protection of basic civil and political rights, which has required very time consuming scrutiny and action by the Commission, largely accounts for this. However, substantial cutbacks in social spending in many countries, combined with increased awareness of economic, social, and cultural rights, have generated new and difficult cases that the Commission will have to address in a more comprehensive manner than it has in the past.

Terrorism has been a rather commonplace feature in Latin America and has presented significant challenges to the Commission over the past fifty years. Consequently, the Commission has acquired considerable expertise in dealing with the subject. For example, in the 1970s and 1980s the Commission's reports analyzed and exposed state sponsored terrorism being perpetrated by the military regimes in the Southern Cone. In the 1980s and 1990s anti-terrorist legislation and related counter-insurgency measures in Guatemala and Peru were priority concerns of the Commission. Since the 1990s, it has closely scrutinized comparable laws and practices in Colombia. Although states are the primary focus of its mandate and activities, the Commission has repeatedly condemned terrorist acts perpetrated by private persons or dissident armed groups. In recognition of the threat that terrorism poses to democracy and the protection of human rights, the Commission has consistently affirmed the right and duty of states to protect their citizens from terrorist violence. At the same time, it has recognized that the people of the region must be protected against disproportionate state responses to such violence.

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68. See *Annual Report of the Inter-American Commission on Human Rights 2001*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser./L/V/II.114, doc. 5 rev. (2002), at Ch. III.

69. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *supra* note 57.



As a result of the Bush administration's legislative and other initiatives in the wake of the 11 September 2001 terrorist attacks, the Commission realized that it had to provide guidance to OAS member states on how to craft anti-terrorism and related measures so that they do not run afoul of their international legal obligations. Accordingly, in late 2002, the Commission published its comprehensive Report on Terrorism and Human Rights.<sup>70</sup> This several hundred page report was the result of twelve months of intensive study and deliberations within the Commission and drew in part upon the views of internationally recognized experts on human rights law and terrorism, as well as the written observations of member states and various NGOs. As part of its methodology, the report recognizes that terrorist violence may occur in times of peace, in states of emergency, and in situations of armed conflict, and therefore examines member states' obligations under both international human rights and international humanitarian law. The report considers standards of protection under these legal regimes in six main areas: the right to life; the right to humane treatment; the right to personal liberty and security; the right to a fair trial; freedom of expression; the right to judicial protection and non-discrimination; and the protection of migrants, refugees, asylum seekers, and other non-nationals.

The report makes clear that, in taking measures to prevent, punish, and eradicate terrorist violence, states remain bound by their human rights obligations in all circumstances, subject only to suspensions and restrictions expressly authorized by applicable instruments. The Commission emphasized that the terrorist attacks of 11 September, although unprecedented in their magnitude, have not changed this basic precept. The Commission also made clear that the report would guide it in assessing the anti-terrorism practices of all OAS member states. In this connection the Commission, while preparing this report, felt it necessary to adopt precautionary measures requesting that United States take urgent measures to have the legal status of the detainees at Guantánamo Bay, Cuba determined by a competent tribunal.

The Commission's report was well received by the OAS and has been widely disseminated and cited within the United Nations and the Council of Europe. In light of the continuing threat of terrorist violence and the proliferation of anti-terrorism measures within the region, it is clear that the the subject of terrorism will continue to figure prominently on the Commission's agenda.

Finally, ratification of the American Convention by all OAS member states remains an elusive goal and challenge for the system. By virtue of the distinctive nature of the region's human rights arrangements, member states are not obliged to ratify the American Convention or other human

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70. *Report on Terrorism and Human Rights*, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. (2002).

rights treaties elaborated by the Organization. The United States, Canada, and various Caribbean island states are currently the only members that have not yet ratified this instrument. This means that the system established under the American Convention, including supervision by the Court, applies by and large only to Latin American states.

This situation is hardly ideal for various reasons. From a human rights standpoint, it creates a disadvantage for the inhabitants of non-ratifying countries by effectively denying them access to the Court in claims against their respective states. From a political standpoint, it also has negative consequences, particularly for non-signers. By remaining outside of the Convention structure the United States and Canada have increasingly found their clout and credibility challenged in the Organization's political bodies when they have pressed various Latin American states to live up to their human rights obligations under the American Convention. This was abundantly clear when, during discussions in 1999 concerning possible reform of the American Convention, various Latin American governments, led by Brazil, Mexico, and Peru, initially sought to exclude the United States and Canada from participating in the deliberations because they were not states parties to that treaty.

Moreover, from a policy perspective, it is highly desirable for a region that is moving increasingly toward integration in other areas to have all its states be bound by the same legal obligations and their peoples have the same rights, as well as equal access to the protections offered by both of the American Convention's supervisory organs. In this regard, it is worth noting that although the prospects of ratification by Canada in the near future have improved, the same, unfortunately, cannot be said in the case of the United States, unless the Obama administration seriously pushes for the treaty's ratification.