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The Inter-American System and Asylum

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Let me first recognize that I am not an immigration lawyer. I have, however, practiced extensively in the human rights area presenting cases concerning disappearances, arbitrary killings, or torture before the Inter-American Commission on Human Rights (ICHR) and other international bodies. I have also supervised governmental compliance with the right to political participation, particularly the right to free and fair elections, in Paraguay, Poland, Romania, Nicaragua, and Nepal.

An immigration law practitioner may meet a client whose case involves asylum and refugee law within the Inter-American system of protection of human rights. To illustrate the options available to the immigration lawyer in such circumstances, consider, for example, the case of Miguel from El Salvador. Imagine that Miguel leaves El Salvador in 1994, arrives in the United States seeking asylum, and seeks a lawyer's assistance. The immigration attorney may want to use the Inter-American system to help him.

The Inter-American system can be defined in several ways. It is a series of treaties and norms of general value; however, it also includes two authoritative texts that would apply in Miguel's situation. The first text is the American Convention on Human Rights, a treaty to which El Salvador is a party. The other text is the American Declaration on Rights and Duties of Man, which was adopted in 1948. Some of its provisions originally adopted as standards of achievement and as moral obligations are now customary law.

The Inter-American Commission on Human Rights evaluates member countries' adherence to the American Convention and the American Declaration. The United States signed the American Convention under President Carter, but has not yet ratified it. Accordingly, the Commission, a body composed of seven independent members elected by the General Assembly of the Organization of American States, measures

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United States compliance with the American Declaration of Human
Rights. The Commission also measures El Salvador's compliance with
the American Convention, ratified by that country in 1978.

The Commission can be used to prove the existence of mass human
rights violations. The Commission conducts visits *in loco*, usually fol-
lowed by authoritative reports which are sent to the General Assembly
of the Organization of American States. A country report on El Salvador
for the year in which Miguel is asking to be recognized as a political
refugee could be very persuasive with regard to the conditions existing
in El Salvador. Establishing only the balance of mass or gross violations
of human rights in El Salvador would not be sufficient since a "well-
founded fear of persecution" needs to be more individualized. Wide-
spread violations of human rights, however, would obviously increase
Miguel's chances to proceed further with his claim of individual fear of
persecution.

The Inter-American Commission's reports also include names and/or
specific situations that may bear upon the issues. For example, during its
last visit to Haiti in May 1994, the Commission reported serious human
rights violations in a northern village. It would undoubtedly strengthen
Miguel's case to link himself to a specific situation in his country re-
ported by the Commission. The country reports could be even more
useful if Miguel's name appears specifically in a Commission Report.

There are, however, other possibilities in addition to using country
reports. Miguel, or someone acting on his behalf, could claim that the
government of El Salvador is violating a right established under the
American Convention by El Salvador. The petition could be filed before
the ICHR while the decision on refugee status is still pending in the
United States. Once the Commission receives El Salvador's response, it
may declare the case admissible without passing judgment on the merits.
The existence of a case pending before the Commission provides a
persuasive argument not to reject a petition for refugee status.

If, on the other hand, the Commission declares the case inadmissible,
or rejects Miguel's claim on its merits, Miguel's claim for asylum will
be weakened considerably. Factors one must consider when deciding
whether or not to file a petition before the Commission include: the
Commission's view of the situation in a country (for example, through
country reports), and the status of the case in the United States. There is
no precise jurisprudence regarding when due process may be required or
regarding the role of administrative agencies and procedures in satisfying
international standards. The Inter-American system, however, provides
the possibility to challenge domestic determinations at any point in the

process. Obviously, a case of legal due process would be strengthened if additional rights, such as non-discrimination, are at stake.

Miguel could also file a petition against the country in which he is seeking asylum. If that country is the United States, the American Declaration on Human Rights would apply. The Declaration and the American Convention each contain a provision concerning the right to seek and receive asylum. Thus, if Miguel's right to seek asylum is arbitrarily denied, he could file a petition with the Inter-American Commission.

If Miguel wins his case before the ICHR on the merits, one must still consider the value of the Commission's finding. The value of decisions by an international body such as the Commission is influenced by its legitimacy (*e.g.* whether the body is perceived as authoritative), as well as the potential impact of a diverse publicity.

The weight of the Commission's decision is further enhanced if the case involves a state that has ratified the American Convention on Human Rights. It is also possible for the ICHR to bring cases before the Inter-American Court on Human Rights, if the country has declared its acceptance of the Court's compulsory jurisdiction.

Even without such acceptance, the Court could issue an Advisory Opinion on a general legal topic relevant to an issue concerning the case. While such an Opinion is not mandatory, it could play a role as a persuasive argument that would generate negative political reaction if ignored. The Inter-American Court has issued twelve such Advisory Opinions, some of which may potentially impact refugee law. Because of its humanitarian purpose, the Court believes human rights treaties should be interpreted "in favor of human beings," whereas in classic international law, derogations of state sovereignty would not be presumed.

The final function that the Inter-American system serves might not satisfy Miguel, but might not totally ignore him either. If Miguel is killed or tortured after a state returns him to his home country, claiming that he should not be afraid of persecution, a basis for claims of international responsibility could be established.

Finally the purpose of the Inter-American system is to grant Miguel asylum. The natural bodies which deal with request for asylum could prove that Miguel does not need the legal requirements of a "well-founded fear of persecution." Miguel's case, as well as all others, however, should always be taken seriously.