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The Role of the Inter-American Commission and Court of Human Rights in the Protection of Human Rights: Achievements and Contemporary Challenges

*Remarks of Mónica Pinto**

The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) have been route companions for many, many years. The Commission was created by a political decision of the Consultation Meeting of Ministers of Foreign Affairs, in Santiago, Chile, in 1959 in order to further the respect for the human rights mentioned in the Organization of American States (OAS) Charter and embodied in the American Declaration, “to promote the observance and defense of human rights.” The Statute charges the Commission with developing an awareness of human rights among the peoples of the Americas, which is more far-reaching than the mere handling of cases or drafting of reports.¹ It clearly has a political scope, which includes the task of making human rights a cultural value.

The idea of having an organ dedicated to human rights was part of the region’s very essence. In fact, the American Declaration states that “the American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness” and that “the international protection of the rights of man should be the principal guide of an evolving American law.”² This means that, in contrast to the universal process in which human rights had to be listed and defined for a huge part of the world, in the Americas, because of the effect

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of European colonialism, individual rights and civil liberties were already in our constitutions and the regional process had the purpose of providing them with an international framework. The Declaration is a typical example of the listing of rights and duties of republican states.

In the 1960s, when several democracies in the region were overthrown, the IACHR was authorized to deal with communications lodged by any individual against any Member State alleging a violation of the human rights protected in the American Declaration.

It was in this capacity that the Commission started its *in loco* visits to many countries, including my own, Argentina, where it had to deal with the perverse enforced disappearance of many thousands, as well as with the criminal behavior of the military.

Today, its report remains a masterpiece of how the clandestine world of the military junta was built up and how it was able to breach all and every human right.³

In the 1970s, the Commission started to serve as a consultative organ of the OAS in this field. As such, the IACHR is one of the main organs of the OAS, and therefore, a political organ too.

When the American Convention entered into force, the Court was established in Costa Rica. It spent almost eight years delivering advisory opinions. Its jurisdiction was first recognized by Costa Rica in 1980; by Venezuela, Peru, and Honduras in 1981; by Ecuador and Argentina in 1984; by Colombia and Uruguay in 1986 (when the Court issued its judgment on the preliminary exceptions in the Honduran cases); and by Suriname and Guatemala in 1987.⁴ It is true then that the IACHR perhaps was not used to sharing its power with the newcomer court, but it is also true that the court’s constituency was not very broad at that time.

In 1988, the Inter-American Court of Human Rights produced its first judgment, the *Velásquez-Rodríguez* case,⁵ a manual of international human rights law, where the first chapter deals with the theoretical legal problems posed by the System and the following one applies the law to the given case. Still today, *Velásquez-Rodríguez* continues to be the leading case in the hemisphere for State obligations in human rights. The Court’s citation of its own jurisprudence has become lengthy; however, the vast majority of the citations refer to the founding paragraphs of *Velásquez-Rodríguez*. Furthermore, the wisdom of

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the definition of enforced disappearance (it was the first time that a court dealt with such a crime) as “a multiple and continuous violation of protected rights,” is such that even today it has continued to remain valid, even through the 1994 and 2006 Conventions dealing with enforced disappearance at the regional and at the universal level.⁶

The Court has now, as per the entering into force of the 2000 Rules of both the Commission and the Court,⁷ a good docket of cases. Its judgments are important and deal with fundamental aspects of the rights protected by the Inter-American System of Human Rights (IASHR).

THE IASHR'S ACHIEVEMENTS

The System has been able to strengthen human rights with few tools when authoritarian governments were the rule in the region, but it became stronger when democracies returned.

The System set standards in many areas:

1. In 1992, the IACHR adopted two reports, 28 and 29/92,⁸ in the cases of the so-called “pardon laws” adopted by Argentina and Uruguay. In both cases, and notwithstanding the differences between them, both countries were in breach of their duties according to the American Declaration and the American Convention on Human Rights. Those reports gave birth to a regional rule according to which States are under the duty to prosecute and punish those responsible for gross human rights violations, to which the statute of limitations is not applicable, and to provide reparation to the victims of these violations.
2. A bunch of Argentinean cases the year before allowed the first friendly settlement dealing with reparations. The Court decided the cases on massacres, both in Colombia and in Guatemala, through friendly settlement as well. The duty to prosecute for gross violations of human rights and the inapplicability of amnesties, self-amnesties, any pardon laws or measures, and the statute of limitations were the object of the Court's judgment in the case of *Barrios Altos* in 2001.⁹ The *Lapaco* case in 1999 gave room to the right to truth.¹⁰
3. The Commission has its own leading case on the compatibility between the Inter-American System of Human Rights and domestic laws — the *Marzioni* case on the “fourth instance formula” in 1996.¹¹
4. The System has established many landmarks on freedom of expression. It has not only created a rapporteurship that works independently, the head of which is currently Catalina Botero of Colombia, but in 1996, the Commission also decided that the *desacato*,¹² a crime included in various criminal codes, breached freedom of expression and equality, and it drafted a report stating that crimes relating to freedom of expression should be abolished from criminal legislation. The Court's ruling on *The Last Temptation of Christ*¹³ and the *Kimel*¹⁴ cases sets standards that are universally recognized. Access to information is the theme of *Claude Reyes*.¹⁵
5. Women's rights are dealt with in many relevant cases. Violence against women has a leading case with *Maria*

da Penha.¹⁶ Rape as torture is considered in the case of *Raquel Mejía*.¹⁷ The lack of adequate legislation and the need to introduce amendments to the laws in force are considered in the cases of *Maria Eugenia Morales de Sierra*¹⁸ and *Maria Teresa Morini*.¹⁹ Gender identity and the rights derived from this are the object of the Court's judgment in *Atala Riffo*.²⁰ Last but not least, the reports on the *Ciudad Juárez*²¹ cases brought the international responsibility of the State by omission to the table.

6. The rights of the child are wisely dealt with in the *Street Children*²² case, which also proposes an interesting cross-fertilization with the universal system and the respective Convention on the Rights of the Child.
7. The right to a free and fair trial is involved in the vast majority of cases lodged against Peru when the Fujimori administration introduced the use of “faceless judges.” That is when it formalized the anonymity of judges allegedly to protect their integrity but, at the same time, inhibiting the prosecuted to know who was judging them and *de facto* inhibiting the possibility of challenging the judges.
8. The rights of indigenous peoples are considered in the *Awás Tigny* case.²³
9. The overlapping of international human rights law and international humanitarian law, namely Common Article 3 of the Geneva Conventions, is dealt with in the Commission's report on the attack to the *La Tablada* barrack.²⁴
10. Limits to military jurisdiction are considered in many cases by both the Commission and the Court.

All of these cases and many others gave room for a fluid dialogue with domestic laws, and because of that, have exerted a crucial influence on human rights as enjoyed and exercised by men, women, and children in this region.

We arrived to this point because our states adopted and ratified the conventions and accepted the customary rules. When I say states, I mean states with democratic governments. Neither Videla nor Pinochet, the dictators in Argentina and Chile in the 1970s, ratified the American Convention. We had to wait for elected presidents Alfonsín and Alwyn to express the consent of our communities to be bound by those conventions.

However, the System is not universal. Only 24 out of the 35 OAS Member States have actually ratified the American Convention and have it in force and only 21 of those 24 have accepted the Court's jurisdiction.²⁵ It should also be mentioned that seven Caribbean countries — Antigua & Barbuda, the Bahamas, Belize, Guyana, St. Kitts & Nevis, St. Lucia, and St. Vincent & the Grenadines — have only ratified the Convention of *Belém do Pará*.²⁶ This is a typical attitude of many countries that view the rights of women and children as “soft” and, as a result, become bound by those treaties but actually never enforce them. Two other Caribbean countries — Dominica and Grenada — are States Parties to the American Convention and to *Belém do Pará*. Finally, the United States and Canada are outside any conventional link, and last but not least, Cuba has not made up its mind yet on the possibility of returning to the OAS.

In the 21st century, the System became more institutionalized; when the Commission's Article 50 report is not observed by the given government, the case is sent to the Court. The role of the victim is increased in the procedure.

Nowadays, the Inter-American System on Human Rights applies to 500 million individuals. However, it is more Latin American than Inter-American. There is a strong demand for the U.S. and Canada to become States Parties to the Inter-American treaties. The traditional position of the English-speaking Caribbean States of remaining outside the System should also be the object of debate.

Ariel Dulitzky, former Deputy Executive Secretary of the Commission and currently Clinical Professor of Law and Director of the Human Rights Clinic, and Director of the Latin America Initiative at the University of Texas Law School, summarized the present situation of the IACHR by stating that there are actually three levels of protection (Commission & Court, Convention, Declaration), and the number of complaints lodged with the Commission is increasing, the procedure is slower than desired, there is a low level of observance of the recommendations, and the trend is to send to the Court the non-observed reports. However, the System has the capacity of producing an important positive impact on actual human rights in the region.

It is said that the IASHR is facing a crisis and that it needs a reform. This is not the first time in which the System faces a situation considered as critical. Beyond the threats, there have been at least three situations in which the IASHR turned into a more sensitive environment. In each of those situations, some states played on the side of the System and a few others on a different one.

When Fujimori decided to withdraw Peru's acceptance of the Court's jurisdiction, the System reacted by drafting a democratic clause that was later included in the OAS Charter and both the Commission and the Court expressed a position. The OAS sided with the human rights system and this helped a lot. Afterwards, on different grounds, an international commission composed of very well-known jurists, including former Inter-American Commissioner and Professor Robert K. Goldman and former Minister of Justice of Argentina León Carlos Arslanian, visited Peru and went public with a critical report. We all know that Fujimori left the government through the back door and that Valentín Paniagua's government came back home.²⁷

When Trinidad and Tobago denounced the American Convention because of the enforcement of the Privy Council's ruling in *Re Pratt and Morgan v. the Attorney General for Jamaica*²⁸ on the human rights of death row inmates, many states made known in the General Assembly that the government could not be released from the observance of a great number of obligations that had already entered into the "property" of each individual.

Now we have the decision of the Bolivarian Republic of Venezuela of September 6, 2012, to denounce the Convention.²⁹ This is along with the criticism from Brazil because of the precautionary measures granted by the Commission for the members of indigenous communities in the basin in which the Belo Monte hydroelectric power plant is being constructed; the loud criticism of President Correa of Ecuador because of the freedom of expression standards applicable to the dispute he has with *El Universo* (this was the object of a press release by the Special Rapporteur on Freedom of Expression of the IACHR and of the UN);³⁰ the uncomfortable situation of Peru that came with the Commission's decision to bring to the Court the case on the recovery of the Japanese diplomatic mission in Lima on the grounds that the Government did not conduct an exhaustive investigation on the *Operation Chavin de Huántar*, especially on the extrajudicial execution of three members of MRTA; and the inexplicable silence of Argentina.³¹

How close or how far from the System are these governments? Venezuela was the land of asylum when our southern countries were under military rule; it was the friend who opened the door to a safer life.

All of these heads of state propose reforming the System to be more functional to the popular democracies that rule the majority of the countries in the region. The IACHR decided to take the lead in that sense and started a consultation on what could or should be the object of a reform. The Court — which lacks jurisdiction on Trinidad and Tobago and will experience the same with respect to Venezuela next year — observes this process. The IACHR — which maintains its capacity to handle complaints against those states on the grounds of the rights protected by the American Declaration — is viewed as the main protagonist at this time.

Victims and rights are absent from this debate. Instead, democracy is the main issue. The point is: What are we talking about when we talk about democracy? Only periodical free and fair elections? Democracy is also a system in which each individual should be in a position to enjoy and exercise his or her human rights. Democracy comes into the human rights picture as a context element; it is the better-known system for human rights to be respected. Through the protection of human rights, democracy is strengthened.

Some years ago, writing on the future of the Inter-American System on Human Rights, Juan Méndez, former Inter-American Commissioner and Special Rapporteur of the United Nations on Torture, stated that it must be noted that the OAS instruments refer to "representative democracy" and not simply to democracy. This expression seems to be different from "participatory democracy" and is meant to convey an emphasis on the legitimacy of the representation of those who have been elected to posts and who for that reason are supposed to know what is best for all concerned.

What are we talking about when we talk about democracy? Only periodical free and fair elections? Democracy is also a system in which each individual should be in a position to enjoy and exercise his or her human rights.

Present criticism does not include any consideration on the financing of the System, which today depends mainly on foreign sources. It does not include any proposal for new recruitments in order to cope with the great number of complaints more efficiently and in less time. It does not underline any of the obstacles that the System — mainly the Commission — faces as a victim of its own success. The number of complaints lodged every year with the IACHR reaches 1,500, a figure that expresses the confidence of individuals and NGOs in the Commission as an independent body to monitor human rights. Its autonomy is the System's greatest asset, an autonomy that can be dramatically killed or hurt, but also that can be undermined through details, which is an important threat. Facts brought to this process are not the expression of new patterns. The Commission's decision in the Peruvian case of the Japanese Embassy (in which President Fujimori entered the Embassy to assure that no one would survive) is consistent with its previous report on the *La Tablada* case in 1997 (in which President Alfonsín entered the barrack to assure that all those alive would survive).³²

Unfortunately, there is no room to believe that governments' approach to the IASHR is fair. It seems like a process that is after the softening of the States' duties towards the System. As explained above, all of the governments mentioned have *parti pris* against the System. All of them are popular democracies, which seem to believe that as such they should not be the object of any human rights monitoring. It should be recalled that being an effective democracy is a condition to be an active member of the Council of Europe, a status that includes the binding nature of the European Convention on Human Rights and of its organs' decisions. There are no alternatives to this system because it is an expert system and others are mainly political, be it the UNASUR, ALBA, or CELAC,³³ where political necessity plays

a central role and where chiefs of state and of government are in command.

Human rights emerged after the Second World War and became the great feature of the legal and political order that was established then. Its "western" origin was nuanced by the political action of the decolonization process and the third world positions, as well as by the strong interpretations provided by treaty

bodies and fed by NGOs and civil society. In this field, the IASHR has achieved important goals that impose themselves as regional rules and look broader than the reading in force in the United States, Canada, and even the European System.

Lots of technicalities may be amended or even introduced in this process. In fact, an academic community to study and construct a critical analysis of the decisions and judgments should be established. A formal statute for civil society expressed by NGOs should be considered. New and clearer rules should be adopted relating to precautionary measures, to rights protected, and to the integration and the

role of rapporteurships in the protection system. But it is not because of their absence that we are here now. We are here because we need this Inter-American System of Human Rights to be there — amended or not — composed by the best, protecting human beings, elevating the level of protection, enlarging the scope of existing human rights, and increasing the protected rights. We, the community of individuals living in the countries covered by the Inter-American System do need the System; we do thank the expert and independent advice of the experts. Our governments should adopt a decisive policy in favor of the strengthening of the System; they should speak loudly because they are bound to this System.

It is our hope that the end of this transition will leave us with a better, stronger Inter-American System to further advance the actual enjoyment of human rights in the region.

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Endnotes

¹ Statute of the Inter-American Commission on Human Rights, art.18(a), Oct. 1, 1979, O.A.S. Res. 447 (IX-0/79), OEA/Ser.P/IX.0.2/80.

² American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L.V/II.23, doc. 21 rev. 6 (1948) (reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L.V/II.82, doc. 6 rev. 1, at _ (1992)).

³ Report on the Situation of Human Rights in Argentina, OEA/Ser.L/V/II.49, doc. 19 corr.1 (April 11, 1980).

⁴ Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at <http://www.oas.org/en/iachr/mandate/Basics/4.RATIFICATIONS%20AMERICAN%20CONVENTION.pdf>.

⁵ Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No.4 (July 29, 1988).

⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 10, 1984, 1465 U.N.T.S. 85; Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 83, 25 I.L.M. 519 (1992).

⁷ Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L.V/II.82 doc.6 rev.1 at 17 (1992), available at <http://www.corteidh.or.cr/docs/libros/Basingl01.pdf>.

⁸ Report N° 28/92, Inter-Am. Comm'n H.R. (Oct. 2, 1992) (concerning cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 re Argentina), available at <http://www.cidh.oas.org/annualrep/92eng/Argentina10.147.htm>;

Report N° 29/92, Inter-Am. Comm'n H.R. (Oct. 2, 1992) (concerning cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 re Uruguay), *available at* <http://www.cidh.oas.org/annualrep/92eng/Uruguay10.029.htm>.

⁹ *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

¹⁰ Report N° 70/99, Inter-Am. Comm'n H.R. (May 4, 1999) concerning Case No. 12.059, *Carmen Aguiar De LaPaco v. Argentina*, *available at* <http://www.cidh.oas.org/annualrep/99eng/Admissible/Argentina12059.htm>.

¹¹ Where it states that “in democratic societies, where the courts function according to a system of powers established by the Constitution and domestic legislation, it is for those courts to review the matters brought before them. Where it is clear that there has been a violation of one of the rights protected by the Convention, then the Commission is competent to review.” Report N° 39/96, Inter-Am. Comm'n H.R., ¶ 60 (Oct. 15, 1996) (concerning case No. 11.673 re. Argentina), *available at* <http://www.cidh.oas.org/annualrep/96eng/Argentina11673.htm>.

¹² *Desacato* laws criminalize expression which offends, insults, or threatens a public official in the performance of his or her official duties. *See* Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights, Inter-Am. Comm'n H.R., OEA/Ser. L/V/II.88, doc. 9 rev., 212 (1995).

¹³ “The Last Temptation of Christ” (*Olmedo-Bustos et al. v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001).

¹⁴ *Kimel v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177 (May 2, 2008).

¹⁵ *Claude-Reyes et al. v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006).

¹⁶ Report N° 54/01, Inter-Am. Comm'n H.R. (April 16, 2001) (concerning Case No. 12.051: *Maria Da Penha Maia Fernandes & Brazil*), *available at* <http://www.cidh.oas.org/women/Brazil12.051.htm>.

¹⁷ Report N° 5/96, Inter-Am. Comm'n H.R. (March 1, 1996) (concerning Case No. 10.970: *Peru*) *available at* <http://www.cidh.oas.org/women/Peru10970.eng.htm>.

¹⁸ *Sierra v. Guatemala*, Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2001).

¹⁹ *Morini v. Argentina*, Case 11.307, Inter-Am. Comm'n H.R., Report No. 102/99, OEA/Ser.L/V/II.106 doc. 3 rev. (1999).

²⁰ *Atala Riffo and daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

²¹ *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

²² *Street Children v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999).

²³ *Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

²⁴ *Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. (1998).

²⁵ States bound by the American Convention are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. All of them with the exception of Dominica, Grenada, and Jamaica have accepted the Court's jurisdiction. Trinidad and Tobago denounced the Convention in 1999 and Venezuela announced its denunciation in 2012. *See* American Convention on Human Rights, *supra* note 5.

²⁶ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, OAS Treaty Series A- June 9, 1994, 33 I.L.M. 1534 (entered into force on March 5, 1995).

²⁷ Alberto Fujimori was a democratically elected President of Perú. On April 5, 1992 he dissolved the Parliament and started governing *de facto*. In May 1999, he decided to unrecognize the jurisdiction of the Inter-American Court of Human Rights. Valentín Paniagua took office as President of Perú when Fujimori was removed from office through the impeachment process by the National Congress in 2000.

²⁸ *Pratt and Morgan v. Jamaica*, Comm'n No. 210/1986, U.N. Doc. CCPPR/C/35/D/210/1986 (1989). In its decision, the Privy Council considered that inmates on death row for more than five years were suffering cruel treatment and were being punished twice for a crime, thus, in breach of the *non bis in idem* principle.

²⁹ The Bolivarian Republic of Venezuela denounced the American Convention on the grounds of the unequal standards applied by the Inter-American Commission of Human Rights.

³⁰ Press Release R72/11: Office of the Special Rapporteur Expresses Profound Concern Regarding Conviction of Journalist, Directors and Media Outlet in Ecuador, ORGANIZATION OF AMERICAN STATES (July 21, 2011), *available at* <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=857&IID=1>.

³¹ IACHR Takes Case Involving Peru to Inter-American Court, Press Release No. 137/11 (Dec. 30, 2011).

³² *Cruz Sanchez v. Peru*, Petition 136/03, Inter-Am. Comm'n H.R., Report No. 13/04 (2004); *Abella v. Argentina*, Inter-Am. Comm'n H.R., *supra* note 24.

³³ Union of South American Nations, Bolivarian Alliance for Peoples of Our America, Community of Latin American and Caribbean States.