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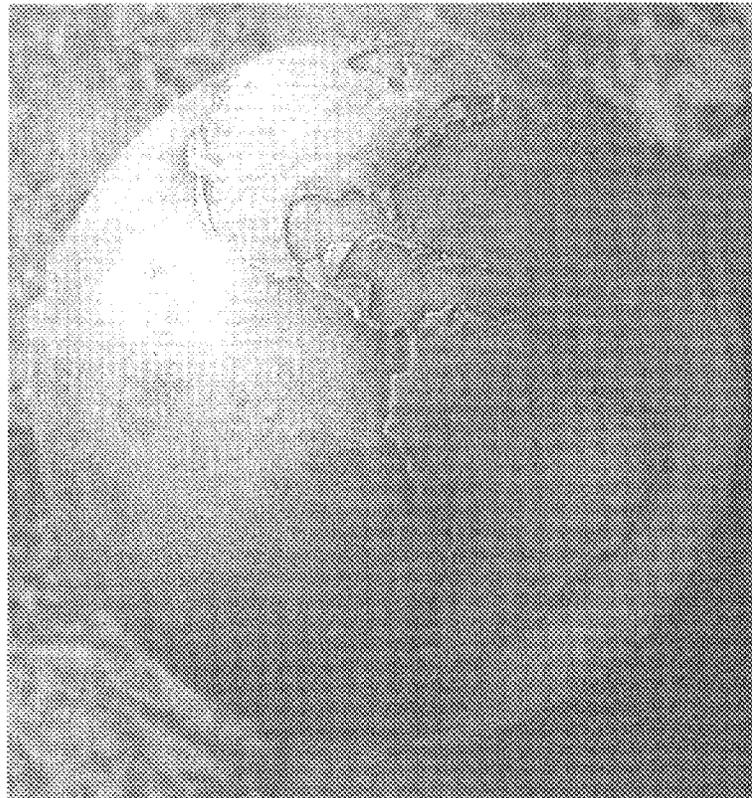
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Moving Toward Improved Human Rights Enforcement in the Americas

By Claudio Grossman



With the dawning of the new millennium, most of the states of the Americas have arrived at a point where civil and political rights are acknowledged and accepted, at least in the theoretical sense. These rights include life, liberty, and security of the person as set forth in the American Convention on Human Rights (American Convention), ratified by twenty-four countries and/or the American Declaration on Human Rights, which is binding on all thirty-five Organization of American States (OAS) member states. In addition, the states of the Americas have begun to link human rights with democracy, recognizing that only in a democratic political system is respect for human rights possible. In fact, thirty-four of the thirty-five independent states in the region now have democratically elected governments, and many are experiencing fewer incidences of arbitrary detentions, forced disappearances, and summary executions.

The implementation of the Inter-American System for the Protection and Promotion of Human Rights (Inter-American System)—the system of human rights instruments and institutions established by the OAS—is primarily responsible for these positive steps forward in the region.

The mass and gross violations of human rights that were once the general rule in many countries in the Americas when dictatorship was widespread are today more of an exception. Impunity for human rights violations continues to be a problem but increasing respect for international law and the authority of interna-

tional tribunals have lessened the possibility that violators will go unpunished. Support for the new International Criminal Court also is increasing. Additionally, Brazil, Mexico, Haiti, and the Dominican Republic recently accepted the compulsory jurisdiction of the Inter-American Court of Human Rights (Court), joining the sixteen countries that had already accepted its jurisdiction.

In this new reality, issues concerning human rights have been redefined mainly because human rights violations are now rarely pursued as a matter of state policy, as they often were in the past. As a result, there has been a refocusing of the role of the regional system in protecting and promoting human rights. The role the system used to play was basically to mobilize public opinion in order to defeat the states' policies of repression. Now, the reality is much more complex as most of the region's governments struggle to improve the level of rights enforcement. The heritage of dictatorship and authoritarianism, insufficient institutional devel-

opment (i.e., outmoded judiciaries and enforcement agencies), or simply a lack of proper attention, however, have impeded enforcement efforts and, unfortunately, human rights violations continue to persist. (Since the Inter-American System also encompasses the United States, Canada, and the Caribbean, human rights issues emerging in those countries are also processed through the case system. Issues that have been particularly important in these countries have included the application of the death penalty and the treatment of immigrants and refugees.)

The Commission and Court Challenge the System

How is the system reacting to challenges in the Americas that require more than the mobilization of public opinion? Two organs supervise compliance with human rights norms in the region: the Inter-American Commission on Human Rights (Commission), comprising seven independent members elected by the General Assembly of the OAS to represent the OAS member states for terms of four years, and the Court, comprising seven individuals elected for six-year terms. The Commission has very broad powers compared with other regional and universal supervisory agencies; these include visits *in loco* (local visits to countries accused of rights violations), adjudicating cases, referring cases to the Court for adjudication, appointing rapporteurs on human rights issues, and drafting declarations and treaties.

Visits *in Loco*. In the past, due to the vast number of mass and gross human rights violations in the Americas, visits *in loco* were the primary responsibility of the Commission. It was crucial at least to attempt to enter a country (which the Commission cannot do without that country's permission) and then to "show the human rights flag" there and abroad. The purpose was to bring human rights violations to the attention of the world community and to send a message that such violations would not be tolerated. The visits produced authoritative reports that documented human rights violations and provided moral and legal support to those fighting dictatorship.

Even with the recent democratic changes in the region, visits *in loco* are still used in rare instances where there are charges that state policies violate

human rights. In addition, the Commission has modified the visits *in loco*, now using them to analyze alleged violations of a category of rights, such as prison conditions or the condition of refugees in a given country. Visits *in loco* are also increasingly requested by states as a means of showing support for human rights, to promote cooperation with the Inter-American System, or to address problems before they escalate. For these reasons, *in loco* visits may continue to play a significant role.

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Case System. Meanwhile, the case system has acquired a much more important role than it had in the past, becoming the most valuable tool for the protection and promotion of human rights. The case system allows individuals from OAS member states to file a petition with the Commission, alleging a violation of their human rights by the government of a member state. Under the American Declaration of the Rights and Duties of Man or the American Convention on Human Rights, the Commission can hear the case and publish a report, establishing the violation of human rights by a member state. The Commission may also decide to refer the case to the Court for adjudication if the state has accepted the Court's compulsory jurisdiction. (As indicated earlier in this article, twenty OAS member states have accepted this jurisdiction.) In addition to dispensing justice in concrete cases, the case system is a means to avoid regression, expand democracy, and articulate regional human rights standards. The case system also serves as an early warning mechanism, based on the rationale that a single human rights violation could be the first indication of a

process that, if allowed to proceed, could result in regression to authoritarianism.

Recognizing the importance of the case system has led in recent years to significant improvements in the system that are designed to increase efficiency and compliance. The previously flexible, less-regulated method of filing cases before the Commission has been replaced by more standardized procedures including registration of complaints, rulings on admissibility, fact gathering, the promotion of amicable settlements, adoption of reports, publication of decisions, and referrals to the Court.

Accurate registration of complaints has played a positive role in allowing statistical data to be analyzed. In addition, the Commission's ability to rule on admissibility prior to reaching the merits of the case ensures more focused hearings that address the merits after procedural issues have been decided. New procedures on fact gathering, including using visits *in loco* to gather evidence for cases before the Commission, have greatly increased access to information and improved the quality of the Commission's decisions. The Commission places itself at the disposal of the parties in all cases and provides a settlement-friendly atmosphere that allows parties to negotiate mutually agreeable settlements, which ultimately shortens procedures and increases the likelihood of compliance. As a result, the Commission has developed an expertise in promoting amicable and confidential settlements.

Referrals to the Court. In addition to hearing cases itself, the Commission has referred thirty-four cases to the Court and has contributed to the Court's responsiveness to victims of human rights violations. When it refers a case to the Court, the Commission becomes "counsel" for the case, representing the victims. Although individuals may present a petition to the Commission, they cannot directly petition the Court. To allow for their participation, the Commission (following historic European precedent) appoints the victims' lawyers as legal advisors to the Commissioner who is handling the case.

The Court's decisions have resulted in a rich line of cases, often quoted by domestic courts. The cases interpret the scope of basic rights, such as due process, humane treatment, equality before the law—as well as key procedural issues,

including exhaustion of local remedies, burden of proof, and preliminary objections, among others. This jurisprudence has been further developed by sixteen advisory opinions given by the Court on noncase-related requests for interpretation of human rights treaties. In addition, the Court and the Commission have issued provisional and precautionary measures, such as protective orders, that have probably saved numerous lives and avoided other irreparable violations of basic rights in urgent cases. (The Court has issued twenty such provisional measures and the Commission more than 100 precautionary measures in the past three years.)

Special Rapporteurs. Special rapporteurs and working groups have been created by the Commission to address categories or clusters of human rights issues. This has been required particularly in the Americas where democratic change is often inhibited by weaknesses in judicial and enforcement institutions—the legacy of dictatorship, poverty, and lack of resources. Judiciaries in the region are generally not modern and efficient, and many of the police forces in the area have not adapted themselves to new investigative techniques. As a result, human rights norms are often disregarded when dealing with issues involving citizens' security and criminal proceedings. Procedures are frequently outmoded, and penal practices developed by Spain in the early days of colonization are still used in some countries. In these systems, which are inquisitorial in nature, the judge who decides a case can also serve as its prosecutor. Jail conditions are another area of concern, as is the fact that more than 70 percent of inmates in the region are incarcerated without benefit of trial and conviction.

Rapporteurs study these problems, make proposals for legal reform, and bring the situations to the attention of the hemispheric community. Rapporteurs and working groups also address problems faced by marginalized groups such as women, indigenous populations, immigrants, and children. One out of every four women is the object of domestic violence; economic development and participation by indigenous peoples are far below that of nonnative groups; and millions of Latin American children live in the streets. Additionally, to highlight concern over the killing of more than 150 journalists in the region

during the last ten years and the importance of freedom of expression, the Commission created a Special Rapporteur on Freedom of Expression.

Declarations and Treaties. The Commission also involves itself in the area of rights creation by preparing declarations and conventions and by engaging in consultations with other organs. For example, in consultation with the office of the Secretary General of the OAS, the Democracy Promotion Unit, the Inter-American Indigenous Institute, the Indigenous Development Fund, and the Inter-American Development Bank, the

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Commission participated in the drafting of the American Declaration of the Rights of Indigenous Groups. The Declaration is the first step toward placing the rights of indigenous groups, which historically have been overlooked, on the international agenda. The Commission, as an independent semijudicial body, has been instrumental in bringing about new legislation protecting the rights of marginalized groups.

Problems with Enforcement

Inter-American entities have created a positive and dynamic layer within the international system that allows for the expansion of rights and guards against their regression. This process, though valuable, is by no means guaranteed. Recently, for example, Peru withdrew its recognition of the Court due to being criticized for not providing due process in a trial. (The Court subsequently ruled that the withdrawal was not legal.) Trinidad and Tobago, facing internal pressures to fight crimes through the use of the death penalty, also ignored a provisional measure of the Inter-American Court of Human Rights and withdrew

from the American Convention. Because compliance with recommendations and rulings still depends primarily on the goodwill of the state involved, there is little action that the Commission or the Court can take against such blatant regressions. It is therefore imperative that the political organs of the OAS—the General Assembly and Permanent Council—act by debating these situations and calling for strict compliance with the decisions of the supervisory organs.

Regardless of the ability (or inability) of the organs of the Inter-American System to enforce their decisions directly, they are having a growing impact on domestic legislation and policies in a number of states. Both the Commission and the Court are developing important contributions to jurisprudence that national courts increasingly take into account at the domestic level. These include matters such as interpretations of due process, reasonable length of detention, issues involving torture and inhumane or degrading treatment (including rape as a form of torture), illegality of amnesty laws, the problem of disappearances, scope of obligation by states to secure enjoyment of rights, direct applicability of some of the American Convention's norms, the requirement of exhaustion of local remedies, burden of proof, standard of proof, admissibility of evidence, and the procedure for interpretation of human rights treaties.

Acceptable human rights conditions and the expansion of democracy in a country are more often than not the result of complex processes that include education, strengthening of domestic institutions and procedures, and interaction with international organs and norms that promote and protect human rights and the rule of law. It is crucial, therefore, to continue to support the slow and exhausting process of reform and expansion of rights in the Americas on all possible levels. Only through vigilance and adherence to the Inter-American System will it be possible to bring this region into full compliance with human rights norms and to avoid being surprised in the future with crises that might have been averted.

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