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## THE FUTURE OF THE INTER-AMERICAN SYSTEM FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

The panel was convened at 11:10 a.m., Friday, April 3, by its Chair, Claudio Grossman, who introduced the panelists: Robert K. Goldman, Washington College of Law, American University; Antônio A. Cançado Trindade, Inter-American Court of Human Rights; Dinah Shelton, Notre Dame Law School; José Miguel Vivanco, Human Rights Watch/Americas; and Michael Shifter, Inter-American Dialogue.

### STRENGTHENING THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: THE CURRENT DEBATE

by Claudio Grossman\*

Impressive developments have taken place in the promotion and protection of human rights in the Western Hemisphere. The importance of the fact that elections have been held in recent years in thirty-four out of the thirty-five independent states in the hemisphere cannot be exaggerated.<sup>1</sup> Authoritarian political regimes are breaking down, and systems of governance that respect and rely on the free will of the people are growing in legitimacy. The advent of elected governments has resulted in a dramatic decrease in disappearances, summary executions, and other forms of brutal repression that were, in the past, state policies implemented by dictatorial regimes as a means of retaining power.<sup>2</sup>

Serious problems remain, however. A closer look at reality shows societies in transition as they struggle to overcome the direct inheritance of dictatorship, which has produced deep-rooted authoritarian structures and traditions, together with abysmal poverty for many. While elections are a condition *sine qua non* for democratic rule and for the realization of political rights, democracy and human rights require many more fundamental and expansive changes in society. Democratic change demands a rich civil society; an independent, fair and modern judiciary; law-abiding and professional law enforcement agencies; freedom of the press; and assurances that no person is above the law, regardless of economic, social or political status. In a hemisphere where a high proportion of women are victims of domestic violence, indigenous populations face serious violations of their minority rights, millions of children live on the streets, and poverty is widespread, democracy must also embody a dynamic process of expanding fundamental values that ensures that every person counts.

The reality of this transitional struggle must be taken into account if there is to be a debate on the future of the Inter-American system of human rights, the combination of substantive norms, mechanisms and organs that protect human rights in the hemisphere.<sup>3</sup>

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<sup>1</sup>See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992).

<sup>2</sup>On the decrease in the number of dictatorships and disappearances, see Claudio Grossman, *Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation*, 15 HASTINGS INT'L & COMP. L. REV. 363 (1992).

<sup>3</sup>The system of inter-American protection of human rights consists basically of human rights norms laid out in the OAS Charter (see OAS Charter), the American Declaration of the Rights and Duties of Man, OEA/ser.L.V/II.92 doc.31 rev.3 at 17 (1996), and the American Convention on Human Rights (Pact of San José), OEA/ser.L.V/II.92 doc. 31 rev.3 at 25 (1996), together with corresponding supervisory organs: the Inter-American Commission on Human Rights, INTER-AM. C.H.R. OEA/ser.L.V/II.95 doc. 7 rev.(1997), and the Inter-American Court of Human Rights, OEA/ser.L.V/II.92 doc. 31 rev.3 at 163 (1996), as well as the system's political organs, consisting of the Permanent Counsel

Accordingly, this paper will define how the system operates within a framework that encompasses a complex reality of change and democratic transition. While we must recognize that rights apply equally to all, a system that covers industrial societies as well as developing countries requires flexibility to cope with human rights demands coming from widely different realities; we must also recognize that the “distance” between Canada and Ecuador is not wider than that between Barbados and Haiti.<sup>4</sup> Finally, in this paper I will discuss the role supervisory organs play in the protection of rights, the system’s accomplishments thus far, and the course of its future.

#### *Coping with Hemispheric Human Rights Issues*

In the framework of the Western Hemisphere and its reality of progress and challenge, it seems that the first challenge to the Inter-American system of human rights protection is to avoid authoritarian regressions and to react promptly to situations that threaten to destroy democratic achievements. The second challenge is the expansion of rights and freedoms.<sup>5</sup>

To meet these two challenges, the Inter-American system utilizes various approaches. For example, regression—particularly general breakdowns and situations of mass and gross violations of human rights—is addressed by the Inter-American Commission on Human Rights through visits *in loco* followed by the publication of country reports. Moreover, the Commission reports these types of violations in chapter V of its Annual Report to the General Assembly of the Organization of American States (OAS).

Visits to a particular state by the Commission are the result of a state’s formal invitation, either as a result of requests by the OAS political organs, the state’s own initiative, or the Commission’s own directive. The visit itself is a high-visibility event geared toward mobilization of public opinion. The Commission’s representatives go anywhere they deem necessary, often followed by members of the news media. Commission representatives are received at the highest governmental levels and meet with nongovernmental organizations and key individual actors (e.g., labor and business leaders, journalists and writers).<sup>6</sup> The Commission visits and the follow-up reports create powerful incentives for states to consider the international implications of their human rights policies. *In loco* visits and country reports, therefore, significantly contribute to the Commission’s work in dealing with gross and mass violations of rights. However, as the democratization process in the region continues to unfold, it is expected that these visits, if continued, will have different objectives, such as investigating individual cases or categories of rights.<sup>7</sup>

and the General Assembly of the Organization of American States (OAS).

<sup>4</sup>The disparity between economic and political situations, however, cannot justify denial of the existence of an Inter-American system. Rights are universal, even if the specific challenges to any given society differ. What this disparity calls for is a degree of flexibility that would allow for different approaches to different situations—for example, visits *in loco* to address mass and gross violations of human rights, and the case system approach to address specific, individual violations.

<sup>5</sup>The twin goals of avoiding regression and promoting democratic expansion are at a certain level indistinguishable. Their identification in the system as two conceptual categories is intended to provide an operational tool. To illustrate, consider the question: Is ensuring progress in improving prison conditions avoidance of the deterioration of human rights or democratic expansion?

<sup>6</sup>Meeting with the latter groups is particularly beneficial because of the mutual exchange that takes place—the Commission’s contacts with nongovernmental organizations enhances their legitimacy and, in turn, the meetings are a valuable source of information for the Commission.

<sup>7</sup>Categories of rights have included issues such as freedom of information, women’s rights, freedom of the press, and issues concerning refugees.

The Commission also opens cases either on its own initiative or as a result of petitions by individuals who claim that their rights under the American Convention<sup>8</sup> or the American Declaration<sup>9</sup> have been violated. However, the impact of the “case approach” in situations of mass and gross violations is more limited than the impact of visits *in loco*. When thousands of cases of disappearances are reported, for example, there is a breakdown of the rule of law of such enormous proportions that it is crucial to mobilize public opinion, as well as the OAS, as soon as possible. For this purpose, and as part of the effort to utilize the Commission’s already strained resources efficiently, the visits *in loco* are preferred to opening thousands of cases and going through all of the Commission’s procedural requirements for each case. The handling of mass and gross violations within the case system brings to mind the fable of the Dutch boy who tries to stop a flood by putting his finger in a hole in a dike as the whole structure collapses.

In dealing with human rights violations other than mass and gross violations, the case approach is undoubtedly a powerful mechanism, both in avoiding regressions and expanding rights. Moreover, individual violations could be handled more properly through the procedural steps that characterize the case system. The case system’s approach is particularly effective because it performs a preventive role and serves an early-warning function: a single violation could be the first indication of the beginning of a process that, if allowed to proceed, will result in regression back to an authoritarian structure. Furthermore, the case system is also an important mechanism for achieving democratic expansion by articulating regional human rights standards, which are often more protective than domestic interpretations.

The Commission is the first organ involved in a particular case, and in many cases the only one. Petitions are then handled through different phases: registration, admissibility, determination of the facts, friendly settlements and reports.<sup>10</sup> The Commission is the only organ that deals with petitions if a state has not ratified the American Convention or declared its acceptance of the Inter-American Court’s Compulsory Jurisdiction—and only seventeen have<sup>11</sup>—or if the Commission decides not to refer the case to the Court. In these situations—if a state did not follow its recommendations—the Commission adopts a new report providing the state with another opportunity for compliance.<sup>12</sup> At the end of the given

<sup>8</sup>The signatory states to the American Convention on Human Rights are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Uruguay, Peru, Suriname, Trinidad and Tobago, and Venezuela.

<sup>9</sup>The American Declaration of the Rights and Duties of Man was adopted in 1948 (OEA/ser.L.V/II.92 doc.31 rev.3 at 17, 1996). A member state of the OAS that has not ratified the American Convention on Human Rights has an obligation to promote human rights protected by the American Declaration. Under the Charter of the OAS, the OAS member states of the Convention are Antigua and Barbados, Argentina, The Bahamas (Commonwealth of), Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica (Commonwealth of), the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, the United States, Uruguay and Venezuela.

<sup>10</sup>Sec. 4, Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser.L.V/II.92 doc.31 rev.3 at 42–44 (1996). Articles 48 through 51 (Sec. 4) of the American Convention on Human Rights establish the procedure to be used by the Commission.

<sup>11</sup>They are Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

<sup>12</sup>Art. 50, Basic Documents Pertaining to Human Rights in the Inter-American System,

time period for implementation of its recommendations, the Commission decides whether or not to publish its report.<sup>13</sup>

If a case is taken to the Court, the Commission changes its role, in accordance with the American Convention, from that of a judge to that of a plaintiff, and seeks to obtain confirmation of its findings of fact and legal conclusions by the Court. Once a case has been brought to the Court, the Commission appoints the original petitioners as its advisers. In this capacity, the advisers work with the Commission to make pleadings, examine witnesses and present proof. The Court will hear a petitioner's views directly during the phase of reparation.<sup>14</sup>

The Commission has appointed rapporteurs or working groups to address human rights issues that have a "collective component," such as women's rights, indigenous populations, migrant workers, prison conditions and freedom of expression. The Commission's purpose in taking these actions is to bring disturbing situations to the attention of the hemispheric community, to adopt general recommendations or to propose adoption of declarations or treaties. In a hemisphere where numerous countries adhere to the civil law tradition, these initiatives are sometimes seen as a way to adopt a "civil law approach" to the expansion of rights or to avoid their deterioration. In addition, the Court has issued advisory opinions on points of law and human rights treaties in the Americas. The advisory opinions advance human rights interpretations and give guidance to organs and states as to the scope of human rights norms.

#### *Looking to the Future in Light of the System Experience*

The existence of international norms establishing rights and procedures has provided intellectual, legal and ethical ammunition against the dictatorial regimes. The development of the case system was part of the struggle against dictatorships, as many resorted to its rights and procedures to denounce authoritarian rule and keep democratic ideals alive. Country reports and visits *in loco*, the most important mechanisms of the system, then performed a role similar to that of truth commissions at the regional level, by producing authoritative accounts of violations. For countries whose repressive governments allowed the visits *in loco*, the visits signaled an awareness on the part of these governments that they needed to improve their human rights records. For countries whose governments did not allow visits *in loco*, opportunities for additional pressure on the regime were created.

The movement from dictatorship to democracy during the 1980s—a dynamic to which the existence of the case system contributed—also required a shift in the priorities of the system. The case approach began to acquire critical importance as the proper mechanism for

OEA/ser.L.V/II.92 doc.31 rev.3 at 43–44 (1996). Article 50 of the American Convention on Human Rights establishes the procedure followed when a state does not follow the Commission's recommendations.

<sup>13</sup>Publication might occur in the Annual Report of the Commission to the General Assembly and/or in a separate publication. The General Assembly of the OAS, the political organ to which the reports are sent, has thus far neither agreed to discuss the issue of compliance nor take proper action concerning states' failure to implement recommendations of the Commission Reports. As a result, the system's only sanction is the negative publicity attending a report's publication with a finding of state responsibility by an authoritative organ such as the Commission.

<sup>14</sup>Because the Commission must act in the role of judge and plaintiff, the Court should provide petitioners with full autonomy when a case comes before the court, allowing the petitioners to present their views before the Court without a need for Commission approval. Doing so would also prevent the misguided perception by states that the Commission, as an independent judge, sides with the petitioner at the Court level.

handling alleged individualized human rights violations, instead of the “wholesale approach” that characterized the visits *in loco*.<sup>15</sup>

The Commission started an ambitious process of structuring the case system and enhancing its efficiency. Toward that purpose, it revitalized the issuance of provisional measures and requests for precautionary measures to the Court (in urgent cases), established the registration of petitions, introduced the requirement of a declaration of admissibility for new cases, revised its system of hearings (e.g., by creating chambers that report to the plenary body), enhanced its investigative capacity by using visits *in loco* to gather evidence for cases before the Commission, established the requirement of a phase of friendly settlement in each case, modified its regulations to protect confidentiality when required by the Convention, presented guidelines to bring cases to the Court, and continued its practice of appointing petitioners’ counsel as legal advisers before the Court. This process of change is still proceeding. The Commission has announced a review of its regulations to strengthen its procedures further.

As a result of the Commission’s emphasis on cases, numerous lives have been saved by precautionary and provisional measures. Friendly settlement procedures in cases involving Argentina, Colombia, Guatemala, Paraguay and Venezuela resulted in new legislation, collective or individual reparations, and a rich body of jurisprudence. The Commission’s legitimacy has been enhanced by visits *in loco* to Brazil, Canada, the Dominican Republic and Mexico, and by case-related visits to Argentina, Brazil, the Dominican Republic, Mexico and Paraguay, which have resulted in further development of the Commission’s investigative abilities.

As new cases were brought to the Court, the emphasis of the Court’s work shifted from issuing advisory opinions to deciding contentious cases that raise issues of state responsibility and reparations. The Commission has brought twenty-six cases to the Court and presented eighteen requests for provisional measures in urgent cases. Costa Rica submitted one case to the Court, not contested. In addition, there have been sixteen requests for advisory opinions; one is still pending.

Both the Court and the Commission are developing important contributions to jurisprudence that are increasingly taken into account at the domestic level by national courts. This development includes interpretations of due process, reasonable length of detention, the concepts of torture and inhumane or degrading treatment, the illegality of amnesty laws, rape as torture, the concept of disappearances, the scope of the obligation to secure the enjoyment of rights by states, the direct applicability of some of the 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. Further developments are expected through ongoing efforts to systematize the jurisprudence of the Court and the Commission.<sup>16</sup>

The current process of priority shifting by the organs, with its emphasis on cases and strengthening of jurisprudence, faces serious challenges, however. Compliance with the Commission’s reports is, for lack of a better word, uncertain. This uncertainty is compounded by the attitude of the political organs of the OAS, as stated above, which so far

<sup>15</sup>In the 1990s, the Inter-American Commission on Human Rights began to dedicate most of its resources to the case system, revising and streamlining its procedures and strengthening the quality of its decisions.

<sup>16</sup>The *Inter-American Human Rights Digest*, a publication funded by the Dutch government and issued by the American University, has been instrumental in disseminating information on current developments in international human rights law and closely monitors and reports on activities of the Commission.

do not debate—let alone take action on—cases of failure to comply with reports and decisions of the Commission and the Court in individual cases.<sup>17</sup> Change has not been easy, as intense diplomatic activity has been deployed against it. For example, the Commission's decision to prioritize the case system required, in its view, different leadership and, accordingly, selection of a new Executive Secretary in 1995. Considerable time and energy had to be devoted by the Commission to defeating attempts by a group of opposing states to thwart its legitimate action.<sup>18</sup>

Often, insufficient knowledge of the system is a reason for mobilization against the system. At times, the mere opening of a case is seen as an unfriendly and threatening act. Human rights violations are understood by some to be practiced solely by dictators, and hence a petition filed against a democratic government is sometimes misinterpreted.

Underfunding and understaffing are also among the problems besetting both the Commission and the Court. The Commission's permanent staff—only twelve lawyers—covers a hemisphere inhabited by 900 million individuals. By comparison, sixty lawyers supervise the compliance of 400 million inhabitants under the European Convention. Lawyers in the European system share a caseload consisting of approximately 900 cases, about 100 fewer than the number of cases taken by the much smaller cohort of lawyers working in the Inter-American system. With limited resources, the Commission and the Court have only two or three meetings per year, making it impossible to give adequate treatment to each case.<sup>19</sup> Moreover, the Commission is not able to select its own staff; consequently, the Commission cannot guarantee the highest level of professionalism in the administration of its docket. Finally, because the system is under constant threat of "reform," its possibilities of mobilizing support against mass and gross violations or ensuring enforcement are reduced, since the system itself is "being reviewed" and its legitimacy questioned.

The Commission and the Court can indeed do their work better, as can OAS political organs—the Permanent Council and the General Assembly. Should the Commission declare admissibility in all cases? Are there ways to further guarantee transparency and fulfillment of due process requirements? Can the Commission and the Court be even more coherent and rigorous? Can they be more efficient? Should petitioners act independently in cases before the Court? Does the system always choose the best judges and commissioners? How does the system guarantee that the poor, the weak and the elderly have access to it? Should OAS political bodies develop mechanisms to ensure compliance with the decisions of the Commission and the Court?

<sup>17</sup>While the Court's decisions have generally been implemented, the OAS General Assembly has repeatedly failed to discuss them, let alone take action. In one case, *Manfredo Angel Velásquez Rodríguez v. Honduras*, full compliance with the Court's order did not take place for almost six years.

<sup>18</sup>This and other reform initiatives by the Commission have, however, been successful thanks to reliable group of state friends of the system, whose existence is owed to the process of democratization existing in the hemisphere.

<sup>19</sup>Since mass and gross violations of human rights continue to occur, the Commission cannot focus exclusively on the case system. For purposes of efficiency, the Commission needs to devote part of its resources in dealing with these violations in the most efficient way, namely: visits *in loco*, country reports, and chapter V reports in the Annual Report to the General Assembly. However, the Commission should continue to make visits *in loco* and file reports. Because the Commission is the only authoritative organ at the regional level that can undertake these critical functions, and the only organ that has the credibility to carry them out, it would be a serious loss to human rights if it did not continue to perform these functions. Proposals to transfer these functions to other organs, such as a proposal to create a High Commission in Human Rights in the region, are not advisable since another organ competing for very limited resources is unnecessary.