In defining a “people,” the Commission recognized that “indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept [of a people] recognise the linkages between people, their land, and culture.” The Commission relied on the Endorois’s self-identification as a distinct community, objective features of the Endorois community, and the close interconnection between their culture, religion, traditional way of life, and their ancestral lands, as evidence of the Endorois being a people.

In assessing the right to development under Article 22 of the Charter, the Commission asserted that there are both procedural and substantive elements that must be met to satisfy this right. In this case, the Kenyan government’s failure to consult the community and obtain its prior consent in accordance with its customs and traditions, and the government’s failure to provide land of equal value to the land taken violated the Endorois’ right to development.

If fully implemented, this decision could have a significant impact on the Endorois people and far-reaching repercussions throughout Africa. The Commission’s expanded definition of a “people” and articulation of the right to development establish standards that will be applied in future cases involving other African indigenous groups who have lost ancestral land through government acquisition. Most importantly, both components of the Endorois precedent indicate a shift toward greater protection of the rights of minoritities whose attachment to land is vital but traditionally outside the mainstream legal framework for land ownership.

Gambia’s Compliance with the ECOWAS Court

On February 17, 2010, the Economic Community of West African States (ECOWAS) Community Court of Justice granted Gambia’s request to postpone until April 27, 2010 the initial hearing in the case of Gambian journalist Musa Saidykhan. In November 2007, the human rights watchdog Media Foundation for West Africa initiated the lawsuit against Gambia on behalf of Saidykhan, who currently resides in exile in the United States. The complaint alleges that Saidykhan, former Editor-in-Chief of the Gambian Independent, was detained and tortured by the Gambian National Intelligence Agency on March 28, 2006, after the newspaper printed the names of suspects in the March 21 attempted coup d’état. At the initial hearing, Saidykhan and his doctor were scheduled to give testimony concerning the injuries he sustained while in detention. Although Gambia’s history of contentious relations with the Court makes implementation of an outcome in Saidykhan’s favor questionable, Gambia’s continued engagement with the Court and other ECOWAS organs is reason for optimism.

President Yahya Jammeh has repeatedly sought to limit the effectiveness of the Court. In a 2008 case with similar facts to Saidykhan’s, where the Court declared the Gambian government’s arrest of reporter Ebrima Manneh “illegal” and urged his release and compensation, Jammeh refused to enforce the Court’s ruling. Neither widespread criticism nor the fact that Gambia’s rejection of the Court’s ruling contravened Article 24 of the 2005 Supplementary Protocol of the Court, which makes rulings binding on Member States, induced Jammeh’s compliance. Separately, in an effort to limit individuals’ standing before the Court, in September 2009 Jammeh attempted to amend the Court’s protocol to make exhaustion of domestic remedies a prerequisite.

Notwithstanding Jammeh’s overt protest of the Court, Gambia’s continued engagement with the Court and other ECOWAS institutions and agencies may tacitly bolster the legitimacy of the sub-regional court. By participating in Court proceedings, even when such involvement entails submitting requests for postponement, Gambia demonstrates recognition of the Court’s authority. Indeed, Gambia’s latest maneuver in the Saidykhan case marks the second occasion on which government lawyers have contested the proceedings, thereby demonstrating a genuine concern for potential outcomes. The Court’s legitimacy may also be augmented by Gambia’s involvement in other associated ECOWAS organs, such as the Commission, and its ratification of ECOWAS treaties. For example, Gambia is currently undergoing the process of acced-
A DEVELOPING ECOWAS PROVIDES HOPE FOR RESTORATION OF DEMOCRACY IN NIGER

On February 18, 2010, Niger experienced its third coup d’etat in fourteen years. The coup was a response to President Mamadou Tandja’s bid to retain the presidency for a third term in violation of the 1999 Constitution of the Fifth Republic of Niger. News reports suggest that the coup was welcomed in Niger, as pro-coup demonstrators took to the streets in celebration. However, reaction from the international community was far less jubilant. The African Commission on Human and Peoples’ Rights (ACHPR) adopted a resolution condemning the coup, declaring it a violation of the African Charter and the Universal Declaration on Human Rights. The Court is well situated to hear a case challenging the legality of the coup, based on allegations of non-compliance with Articles 9(4) and 10(d) of the 2005 Supplementary Protocol (A/SP.1/01/05), the Court is well situated to hear a case challenging the legality of the military junta under Article 13 of the African Charter on Human and Peoples’ Rights. Moreover, seen in the ECOWAS case of Ugokwe v. Federal Republic of Nigeria (Unreported Suit No. ECW/CCJ/APP/02/05), a claim can be filed before the Court based on alleged violations of the African Charter and the Universal Declaration on Human Rights relating to national elections. If successful in restoring democracy in Niger — whether through legal action or diplomacy and sanctions — ECOWAS’s growing role in West Africa could serve as a model to other sub-regional organizations on the continent.

Andrew W. Maki, a J.D. candidate at the American University Washington College of Law, covers the African Regional and Sub-Regional Systems for the Human Rights Brief.

ECOWAS, through its capacity to coordinate diplomatic negotiations, impose sanctions, and conduct trials, is uniquely positioned to facilitate such a transition. Indeed, ECOWAS played a central role in Guinea’s return to democratic rule in February 2010 following a December 2008 military coup after the death of General Lasana Conté, Guinea’s dictatorial leader of 24 years. ECOWAS suspended Guinea’s membership within the regional organization, convened negotiations between coup leaders and pro-democracy groups, and marshaled diplomatic pressure from western and African countries. However, over a year of military rule and grave human rights abuses transpired before Guinea returned to democracy.

In Niger, ECOWAS has again assumed a central role. It suspended Niger’s membership in October 2009 because Tandja dissolved Parliament and the Constitutional Court flouted Niger’s obligation to promote democratic governance under Article 4(j) of the ECOWAS Revised Treaty. Additionally, since several months before the coup, ECOWAS has coordinated diplomatic efforts to resolve tensions in Niger through negotiations. However, the recent coup represents a significant setback to ECOWAS’s pre-coup diplomacy, and it is uncertain whether negotiations and sanctions alone will restore democracy in Niger.

In this context, the ECOWAS Community Court of Justice represents one additional mechanism that could be employed to encourage a return to democratic rule. With wide jurisdictional leeway to pursue cases of human rights violations and broad access to the court for individuals pursuant to Articles 9(4) and 10(d) of the 2005 Supplementary Protocol (A/SP.1/01/05), the Court is well situated to hear a case challenging the legality of the military junta under Article 13 of the African Charter on Human and Peoples’ Rights. Moreover, as seen in the ECOWAS case of Ugokwe v. Federal Republic of Nigeria (Unreported Suit No. ECW/CCJ/APP/02/05), a claim can be filed before the Court based on alleged violations of the African Charter and the Universal Declaration on Human Rights relating to national elections. If successful in restoring democracy in Niger — whether through legal action or diplomacy and sanctions — ECOWAS’s growing role in West Africa could serve as a model to other sub-regional organizations on the continent.

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UK’S “STOP AND SEARCH” POLICY DECLARED A HUMAN RIGHTS VIOLATION

On January 12, 2010, the European Court of Human Rights (ECtHR) determined that Sections 44–45 of the United Kingdom’s Terrorism Act 2000 (Terrorism Act), which provide police with significant discretion to “stop and search” individuals, violate the European Convention on Human Rights (ECHR). In Gillan and Quinton v. United Kingdom, police independently stopped the applicants, two British citizens, and searched their personal belongings during a protest at an arms fair on September 9, 2003. Each detention lasted less than thirty minutes, and when neither search revealed any incriminating evidence, the officers released the applicants. In each instance, the only explanation for apprehending the applicants was the exercise of the Terrorism Act’s stop-and-search powers. The applicants alleged violations of four provisions of the Convention: Article 5 (the right to liberty and security); Article 8 (the right to respect for private and family life); Article 10 (freedom of expression); and Article 11 (freedom of assembly and association).

The Terrorism Act, signed into law in February 2001, affords police officers wide discretion to stop and search individuals without reasonable suspicion if the officers believe apprehension would be “expedient for the prevention of acts of terrorism.” Officers ranked as assistant chief constable or higher may assign subordinates a geographic zone of a public area within which to conduct searches. Section 45(2) allows the officers to apprehend anyone within their assigned area to search for “articles of a kind which could be used in connection with terrorism,” even absent grounds for suspicion. Although Section 45(3) prohibits police from “requiring a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves; a Code of Practice (Code A) issued by the UK Secretary of State permits more invasive public searches. Under Code A, the Terrorism Act does not “prevent an officer from placing his or her hand inside the pockets of the outer clothing, . . . collars, socks and shoes,” or from searching a person’s hair.

Using a two-part test, the ECtHR held that the stop-and-search police power of
sections 44 and 45 of the Terrorism Act violates ECHR Article 8 and, therefore, did not consider the applicants’ other claims. Applying the first prong, the Court found that the Terrorism Act interferes with the right to respect for private and family life, notwithstanding the fact that most searches under the Terrorism Act occur in public. Noting that Article 8 encompasses an individual’s interactions with others, even those occurring in public, the decision labels the law “a clear interference” with Article 8 because it subjects individuals to such personal searches in public areas, leading to embarrassment of those searched.

Second, the Court found that the interference was not “in accordance with the law” because it did not provide “adequate legal safeguards” to protect “against arbitrary interference” with an individual’s Article 8 rights. The section 44 requirement that searches be “expedient” in preventing terrorism is too broad, according to the Court. Reading “expedient” to mean only “helpful” or “advantageous,” the court held that this section reserves too much discretion for police in apprehending and searching individuals.

The decision expresses particular concern over use of the stop-and-search provisions to target racial minorities and political activists. From 2007 to 2008, despite the fact that Caucasians composed 92.1 percent of the UK’s population, only 61 percent of pedestrians stopped under Section 44 were Caucasian. Additionally, the ECtHR cites a study by the Parliamentary Joint Committee on Human Rights indicating abuse of Section 44 in detaining journalists and protestors at events garnering political attention, such as the arms fair where the police apprehended the applicants.

This decision fuels the debate over the continually shifting line between preventing terrorism and preserving individual rights, particularly because Article 8 allows public officials to interfere with the right to privacy to protect the security and well-being of the state and its citizens. David Hanson, the Minister of State for Crime and Policing at the UK’s Home Office, argued that the Act’s stop and search was “an important tool” used in the UK’s “ongoing fight against terrorism.” Rights groups including Liberty, which provided counsel to the applicants, called on the government to “tighten up the law without delay.” The UK plans to appeal the decision to the ECtHR Grand Chamber and will continue using the stop-and-search provisions until the appeal is resolved.

EU to Join the European Convention on Human Rights: A Step Forward or Backward in Resolving Human Rights Violations?

On March 17, 2010, the European Commission proposed directives for negotiations on the European Union’s forthcoming accession to the ECHR. While the ECHR already binds each individual EU Member State to secure the rights articulated in its articles, the EU and its institutions would also be bound and subject to suit before the ECtHR after accession is complete. This step represents a significant milestone in the integration of European international organizations, since the ECtHR is a subsidiary of the Council of Europe, which is an independent political organization from the EU.

After a 1996 European Court of Justice decision rejected accession for lack of treaty support, EU accession became legally permissible and also mandatory under the Lisbon Treaty, which entered into force on December 1, 2009. Protocol 14 to the ECHR, which will enter into force in June 2010, also permits the EU’s acces-
sion. Although neither document makes the EU a member of the Council of Europe, the Lisbon Treaty does allow the EU to receive representation on the ECtHR, representation and votes in the Council of Ministers on issues related to the Court, and representation on the Parliamentary Assembly when it selects judges for the ECtHR.

In a 2009 draft report, the European Parliament enumerated several benefits of EU accession to the ECtHR. Once the EU is bound by the ECHR, individual citizens and Member States may bring complaints against the EU and its institutions for acts believed to be incompatible with the Convention, thereby expanding human rights protections. Politically, the Commission expects the move will harmonize both the law of the European Court of Human Rights and the European Court of Justice, and the policies of the EU and the Council of Europe. Furthermore, binding the EU to the ECtHR will potentially “enhance the credibility of the [EU]” in its negotiations with third countries; non-EU Member States will be more likely to heed the EU’s call for adherence to the ECHR and decisions of the ECtHR if the EU itself is also bound.

While José Manuel Barroso, President of the European Commission, believes the accession holds “political, legal and symbolic importance,” the process is not without flaws. The ECtHR already struggles with an ever-growing caseload. Adding an entire international organization to the list of parties that may be sued will — to say the least — not help solve this problem. The Parliament’s draft report acknowledged that unless the structure of the ECtHR is amended to alleviate the burden of “the excessive workload” and repetitive cases on the Court, “the system is in danger of collapse.” The draft report relies on Protocol 14 to ameliorate this problem. To improve efficiency and allow the Court to cope with the increasing caseload, Protocol 14 allows for three-judge committees to issue judgments and for a single judge to determine admissibility. Because the Protocol 14 reforms have not yet entered into force, however, its effect on the Court’s efficiency remains unknown.

EU accession will afford greater potential to redress human rights violations in Europe. According to President Barroso, “The EU’s accession to the European Convention on Human Rights will provide a coherent system of fundamental rights protection throughout the continent,” ensuring compliance with the ECHR by the EU institutions and symbolizing Europe’s universal commitment to preserving human rights. The accession will become official upon the unanimous approval of the Commission’s directives by both the Council and all 47 current States Parties to the ECHR, and with the Parliament’s permission.

**GRAND CHAMBER TO EXAMINE DEATH OF G8 PROTESTOR**

A five-judge panel of the ECtHR Grand Chamber accepted referral requests by both the Italian government and the parents of Carlo Giuliani, an Italian protester killed at the 2001 Group of Eight conference in Genoa, Italy. On August 25, 2009, the Court issued a Chamber judgment finding that Italy violated Article 2, the right to life, by failing to conduct an adequate investigation of the incident. The Court did not, however, find that the officer who shot Giuliani used excessive force.

Following the Chamber judgment, Giuliani’s parents vowed to challenge the latter finding, seeking to hold the state responsible for the carabiniere’s excessive use of force. The Chamber was unable to find for the applicants on this issue because Giuliani’s body had been cremated and the scene of the shooting altered before adequate ballistic investigation could be conducted. Therefore, a finding by the Grand Chamber that the carabiniere applied excessive force appears unlikely. The appeal hearing is set for September 29, 2010.

**Editor’s Note: For a complete analysis of the Court’s decision, see Whitney Hayes, European Court of Human Rights: Death of Italian G8 Protester Not a Violation of Right to Life, 17 No. 1 Hum. RTS. BRIEF 59.**

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**INTER-AMERICAN SYSTEM**

**IACtHR FINDS MEXICO VIOLATED CONVENTION ON ERADICATION OF VIOLENCE AGAINST WOMEN**

On November 16, 2009, the Inter-American Court of Human Rights (IACtHR) issued an opinion finding Mexico violated the American Convention of Human Rights (ACHR) for failing to effectively investigate, prosecute, and prevent the murders of Claudia Ivette González, Esmeralda Herrera Monreal, and Laura Berenice Ramos Monárriz.

In González and others (“Campito Algodonero or Cotton Field”) v. México, the Court established jurisdiction to hear and decide cases based on violations of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), which Mexico ratified on November 12, 1998.

Two of the three female victims in Campo Algodonero were minors. All three bodies were discovered on November 2001 in an abandoned cotton field. These murders are among many cases of disappearance, rape, and murder of women and girls in Ciudad Juárez, a city on the U.S.-Mexico border. Unfortunately, many of these cases have been poorly investigated by Mexican authorities and remain unsolved. The irregular prosecution, investigation, and prevention of these crimes has led to widespread impunity and continued serious gender-based violence against women and girls in Ciudad Juárez.

Following the IACtHR’s landmark decision in Velásquez-Rodríguez v. Honduras, Campo Algodonero underscores that states can be liable under international human rights law for failing to exercise due diligence when investigating and responding to gender-based violence committed by private actors. In other words, even though the Court could not find that the murders were committed through state action, Campo Algodonero holds Mexico internationally responsible for failing to effectively prevent, investigate, and prosecute the murders of the three women.

Article 1 of the ACHR provides that States Parties have the obligation to respect the rights in the Convention. This obligation includes the duty to ensure that all persons subject to its jurisdiction have free and full exercise of the rights and freedoms without any discrimination on the basis of gender, race, or any other social condition. Article 2 of the ACHR declares that States Parties have a duty to adopt legislative or any other measures as may be necessary to give effect to the rights and freedoms recognized by the Convention. In Campo
Algodonero, the Court found that Mexico violated the ACHR by failing to guarantee, protect, respect, and adopt necessary measures to give effect to the Convention, specifically its guarantees of the rights to life, humane treatment, and personal liberty.

Remarkably, the Court also decided for the first time whether it had jurisdiction to hear claims based on violations of the Convention of Belém do Pará. Mexico argued that the IACtHR did not have jurisdiction because the Convention of Belém do Pará did not specifically grant it such jurisdiction. The IACtHR disagreed, explaining that international human rights law is composed of both a set of rules and a set of values. In this case, the IACtHR interpreted the rules that determine jurisdiction of the Convention of Belém do Pará by taking into account the values the Inter-American System intends to safeguard and protect.

Campo Algodonero also recognized that gender-specific violence can constitute femicide and allocated state responsibility for failing to protect women from such violence. Femicide is an extreme form of violence against women; it is the murder of girls and women for the sole reason of their gender. In Campo Algodonero, the Court concluded that the petitioners were victims of violence against women and held Mexico responsible for failing to prevent these crimes because the Mexican government was aware of the pattern of violence yet it failed to prevent it.

IACtHR Condemns Use of Mandatory Death Penalty in Barbados

The IACtHR found that Barbados's violated Tyrone DaCosta Cadogan's rights guaranteed under Articles 4 (right to life) and 8 (right to fair trial) of the ACHR when it sentenced him to death by hanging, pursuant to a Barbadian statute that requires capital punishment for murder. DaCosta Cadogan v. Barbados, decided September 24, 2009, is the second time the tribunal denounced a Barbadian statute requiring the death penalty in murder cases. Significantly, the Court considered for the first time whether a law that only makes available, rather than requiring, a psychiatric evaluation for a defendant facing the death penalty satisfies due process requirements under Article 8 of the ACHR.

Article 8 of the ACHR requires states to ensure that every person has the right to a hearing with due guarantees and within a reasonable time by a competent, independent, and impartial tribunal previously established by law. This obligation is most exacting when the death penalty may be imposed.

During proceedings before the IACtHR, Cadogan was evaluated and diagnosed with personality disorder as well as alcohol dependence. However, during his criminal trial in Barbados, he was not evaluated by a mental health professional. The Court found that the state violated Cadogan's right to a fair trial because neither the trial judge nor the defense attorney requested a psychiatric evaluation, which could have allowed Cadogan to raise the defense of diminished responsibility.

While Barbadian law provides that all criminal defendants are entitled to a full psychiatric evaluation by a state-employed mental health professional, the judge is not required to request or explicitly inform the accused that the evaluation is available. The state's passive conduct in Cadogan, the IACtHR held, constituted a violation of the defendant's right to a fair trial. Even though the state's omission may not have violated due process rights in other criminal proceedings, Cadogan's case demanded the most ample and strict observation of due process because it involved the possibility of a mandatory death sentence. Moreover, considering Cadogan was afforded state-appointed legal, the judge had the duty to adopt a more active role in ensuring that all necessary measures were carried out in order to guarantee a fair trial. The Court explained that Cadogan's particular situation at the time of the offense reasonably required at least an assessment of whether alcohol dependency or some personality disorder existed, especially because the judge submitted before the jury the issue of the effect that alcohol and drugs may have had on the accused's mental state.

Cadogan's broad interpretation of the state's obligation to ensure due process to include the mandatory offer of a mental health evaluation in a capital punishment case is remarkable in that it creates an affirmative obligation on the state not only to ensure that all criminals are able to have a free and full psychiatric evaluation by a state-employed mental health professional, but also that they are aware that this evaluation is available prior to judgment.

IACHR Condemns Vagueness of Amnesty Decree in Honduras

On January 27, 2010, Honduran president Porfirio Lobo Sosa signed an Amnesty Decree (Decree No. 2) for political and common crimes committed between January 1, 2008 and January 27, 2010, a period of civil strife that followed the coup d'état that deposed the democratically-elected President José Manuel Zelaya. Amnesty International reported serious human rights abuses during these months, including arbitrary arrests, police and military abuse, suppression of speech, and several episodes of violence against women.

On February 3, 2010, the IACHR expressed concern with the Amnesty Decree, noting that its ambiguous language did not establish precise criteria or a concrete mechanism for its application. It urged Honduran authorities to review the decree and remember Honduras's obligations under international law.

The IACHR's concern is warranted as the Decree could result in widespread impunity of serious human rights violations. Moreover, the IACHR noted that amnesty laws that hinder access to justice in cases involving serious human right violations contravene Honduras's obligations under the ACHR. As a State Party to the ACHR, Honduras is required to ensure that its laws do not deprive victims of serious human rights violations access to justice. Moreover, it may not invoke existing provisions of domestic law, such as an amnesty decree, to avoid complying with its obligations under international law. Honduras may therefore not use the Amnesty Decree to justify its failure to prosecute and punish human rights violations.

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**Interview: Dinah Shelton, A New Commissioner at the Inter-American Commission on Human Rights**

Dinah Shelton was recently elected to serve as one of seven members of the Inter-American Commission on Human Rights, and is the first woman to be nominated by the United States for this position. Shelton has experience advising and working with regional human rights systems, has authored countless articles and books on human rights law, and is a professor at George Washington University Law School.

**Human Rights Brief:** You have a very broad perspective on regional protection of human rights. We have textbooks of yours that are volumes long. How do you see this new role with the Commission fitting into your overall work and how did you come to this point in your career?

**Dinah Shelton:** It is certainly a different role. When you sit outside and look at the Commission, comparing it to other human rights bodies, you can have the outsider perspective to critique areas in which you see some real problems. When you get inside, you see the source of those problems and you see that perhaps in some areas it is easy to move relatively quickly to correct them and other areas where it is a more long-term and perhaps intractable problem.

**HRB:** What do you see coming up in the short-term future?

**D.S.:** One of the problems is that the Commission is a part-time body and human rights problems are not. So, when you have a seven-member Commission and none of the members of the Commission live in Washington, D.C., it means that the Commission members themselves have limited interaction with the staff, with the files, with the pleadings and the memos that are deposited, etc. And, of course we all have our day jobs, which is another problem. I think we are all trying to be more proactive in terms of looking at the cases that come in. I think we have a very collegial committee right now, and one that is eager to make the process work as best it can.

**HRB:** Are there any particular areas of focus that you would like to see given attention in the Commission during these next few years?

**D.S.:** We each have our country rapporteurships and a thematic rapporteurship. I have the rights of indigenous peoples, which alone would keep me busy if that were the only thing I had to do in the next four years. One of the striking things about this first session of the Commission [in March 2010] is the high level of representation governments are sending to the hearings. It is not like twenty years ago when governments, on the whole, never really responded to the Commission. I think it gives us more of an opportunity to promote human rights instead of trying to put out major forest fires.

There is a third pillar, along with human rights and democracy, that I think is critically important, and that is the Commission is going to start looking at in more depth: the rule of law. When you put together the components of a just society, you want human rights, democracy, and rule of law. But, until recently, rule of law has not gotten the same focus as democracy and human rights. Some of the problems that continue to occur within the hemisphere are very closely linked in many countries to problems with the lack of an independent and competent judiciary. I think this is something that some of the new members on the Commission have given high priority.

**HRB:** At the end of 2009, the Court issued new Rules of Procedure with a somewhat new role for the Commission. It also mentioned the creation of an Inter-American public defender as part of the reforms. Do you see any changes or challenges in the adjustment of the Commission’s role in proceedings before the Court?

**D.S.:** Not really. Actually, I think it may improve consideration of cases because as the role of individuals and their representatives before the Court has increased, their focus is on repairing the harm to the individuals involved in the case. The Commission’s role becomes, then, increasingly one similar to a *ministerio público* (a governmental office in many Latin American countries that performs functions similar to those of a public prosecutor). That is, the Commission has taken on the role of upholding the public interest in the hemisphere, looking not back at what happened to the victim so much as forward to changes in law and practice in the particular society.

I see these two roles as very complementary and the adjustment really allows the Commission to focus on the changes that need to be made as we look forward in trying to prevent human rights violations from occurring again. Of course, one of the developments is the creation of a Legal Defense Fund to help litigants, and we’re still in the process of figuring how that’s going to operate. But, I think that if the appellants get experienced representation, that again will just enhance the proceedings before the Court.

**HRB:** A lot of the earlier discussions in the Inter-American human rights system compared it to the European human rights system, which eventually merged their versions of the Court and Commission. Are there particular advantages for the Inter-American system of maintaining two human rights bodies?

**D.S.:** Absolutely. We should never go the European route. In the European context, until recently, my guess would be that 90 to 95 percent of cases were purely issues of law. There was no factual disagreement whatsoever between the petitioners and the government. The only question was, “Is this particular law
or this particular practice in violation of the Convention?” It is the reverse in the Inter-American system where, in cases of alleged extrajudicial killings or disappearances, the facts are critical. If you have 1,200 cases and the facts are in dispute in 95 percent of them, the Inter-American Court would never be able to do the kind of fact-finding necessary, and would be relying almost entirely on presumptions and inferences.

I think one of the advantages the Commission has now is that several countries have an open-door policy. We can go any time we want to look into issues that may come up in the context of a particular case. I think the fact-finding the Commission does is really critical to the whole system being able to function.

**HRB:** How was the nomination process going into the Commission?

**D.S.:** I was nominated in March 2009. There is really a role for NGOs and human rights advocates to play in this process. Normally there are discussions within the U.S. Mission to the Organization of American States (OAS) and within the legal department of the U.S. State Department about people who are within the realm of possibility as nominees.

And then, of course, there is the three-month campaign between the nomination and the actual election. That, again, involves meeting with NGOs to elicit support and trying to get them to contact their counterparts in other countries, because it’s an election by 34 of the 35 Member States. (Cuba does not participate.) So, we make the rounds to all the state missions to the OAS and speak with the different ambassadors and legal advisors, answer their questions, and make public presentations.

In my election it came down to the final ballot because the two candidates vying for the third seat were tied with one vote left to count. So, it was tense. It was closer than past elections we have had. I will say that I found the campaign extremely useful because I could hear the concerns of each of the different countries. So, it did not just serve the nomination process but it also prepared me to sit on the Commission now.

I think the only unfortunate thing, although I really like my two new colleagues, is that the person who lost the election was a nominee for a second term. There is certainly a perception among many that the reason that he did not get a second term was that he was too good, and that because he was the rapporteur on a couple of the countries that are among those most seriously criticized today. There was a campaign against him to make him personally pay for the human rights work that he had done, and it was a successful campaign. So, that is a bit disturbing. I think that the new commissioners who have come in, if they want to do their job well, have to take the position that they are not concerned about their second term. Because if they are, they will not do the job that they are supposed to do.

Charles Abbott, a J.D. candidate at the American University Washington College of Law and an M.A. candidate at the American University School of International Service, and Santiago Vázquez, an LL.M. student at the American University Washington College of Law, collaborated on this interview for the Human Rights Brief. Both are Dean’s Fellows at the Academy on Human Rights and Humanitarian Law. **HRB**