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THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS OF THE ORGANIZATION OF AMERICAN STATES: A CASE STUDY

David J. Padilla*

INTRODUCTION

On behalf of the Secretariat of the Inter-American Commission on Human Rights (IACHR or Commission) of the Organization of American States (OAS), I wish to thank Professors Claudio Grossman and Daniel Bradlow for their kind invitation to participate in the "Conference on the Changing Notions of Sovereignty and Private Actors in International Law." I would also like to thank my employer, the OAS, for allowing me to participate in today's panel discussion. The views I will express are based on my eighteen years with the OAS and my dozen years at the IACHR. Of course, all opinions and mistakes are mine alone.

Since its inception in 1959,¹ the Commission has offered a unique forum in the Western Hemisphere for the presentation of individual and collective denunciations of human rights violations by private individuals, attorneys, and human rights non-governmental organizations (NGOs). Some of the very first complaints presented to the Commission in the early 1960s were brought by victims and family members who had

* Assistant Executive Secretary, Inter-American Commission on Human Rights. I wish to thank my colleague, Elizabeth Abi-Mershed, for her research assistance in preparing this Article.


For materials providing constitutive and procedural rules, consult INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/ser. L/VII.82, dec. 6 rev. 1 (1992) [hereinafter BASIC DOCUMENTS].
suffered human rights violations by the dictators of that era: Castro, Trujillo, Somoza, and Stroessner.\(^2\) Initially, however, the Commission was merely a creature of a resolution adopted by the foreign ministers of the OAS member states.\(^3\) The Commission’s initial statute\(^4\) was weak and did not even empower the Commission to send individual communications to governments or oblige them to respond and explain what had transpired in given cases.\(^5\)

The Second Special Inter-American Conference remedied this defect in 1965 when it amended the Commission’s statute, empowering it to receive and process individual petitions alleging human rights violations.\(^6\) The new statute carried the concomitant duty for accused memb—

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2. *See Quiroga, supra* note 1, at 189-91 (1988) (describing the initial complaints to the Commission against Cuba); *id.* at 71-72 (describing the initial complaints against the Dominican Republic); *id.* at 222-23 (describing the initial complaints against Nicaragua); *id.* at 72 (describing the initial complaints against Paraguay).

3. *See* Final Act, *supra* note 1, at 10 (relating to the resolution); *see also* Quiroga, *supra* note 1, at 67-68 (noting that the initial draft resolution contained two provisions: the formulation of substantive standards for human rights and the establishment of a commission to improve government regard for human rights). Some delegates argued that a commission should not promote human rights until there was general agreement among the member states regarding what rights deserved protection. *Id.* Compromise resulted in a Commission authorized to study human rights conditions without lacking the power to interfere with state treatment of individuals. *Id.* at 69-70.


5. *See Quiroga, supra* note 1, at 67 (recounting the origins of the Inter-American Commission on Human Rights). Some of the founding states opposed authorizing the Commission to adjudicate specific complaints against states. *Id.* at 69-70. Consequently, the authorizing Statute granted the Commission the power to sponsor studies and conferences but denied it the power to hear individual complaints. *Id.* Still, individual petitioners asked redress of the initial Commission, and the first commissioners worked to expand their recognized powers to include hearing individual and collective human rights complaints against specific countries. *Id.* at 71-76.

6. *See* General Secretariat, *supra* note 4, at 601 (describing the meeting of the Second Special Inter-American Conference held November 17-30, 1965 in Rio de Janeiro, Brazil which strengthened the Commission’s statute by adopting Resolution XXII, “Expanded functions of the Inter-American Commission on Human Rights”). The amended text provided the Commission with explicit authority “to examine communications submitted to it and any other available information, so that it may address to the government of any American state a request for information . . . so
ber states to respond to such petitions. The statute also authorized the Commission to publish resolutions containing conclusions and recommendations on petitions once the Commission had completed the necessary fact-finding.\(^7\)

The widespread use of the IACHR as a complaint forum by private actors dates from the early 1970s when military dictatorships in Argentina, Chile, and Uruguay engaged in large-scale repression. The Commission became a vehicle for the presentation of denunciations and the issuance of condemnations of this repression.\(^8\) The same era gave birth to a host of human rights NGOs and saw the professionalization of a growing cadre of sophisticated human rights advocates who learned to use the tools of this emerging field of international law to represent victims and their families.

The NGOs had different areas of interest and concentration. Some, like Amnesty International, were global in scope. Others, such as Americas Watch, were regional. Some, like the Washington Office on Latin America (WOLA), focused on lobbying and informing public opinion. Others, for example, the Centro de Estudios Legales y Sociales (CELS) in Argentina, were essentially national, at least at the beginning. Still others, like FEDEFAM (The Federación Latinoamericana de Asociaciones de Familiares de Desaparecidos), which sought to combat the forced disappearances of individuals, and the Madres y Abuelas de la Plaza de Mayo, which advocated for children of victims, became specialized. There are secular NGOs as well as church-based organizations, like the Vicaria de Solidaridad in Chile. Some, like the Anti-Slave

\(^7\) Statute of the Inter-American Commission on Human Rights, art. 18, reprinted in BASIC DOCUMENTS, supra note 1, at 98 [hereinafter Statute].

\(^8\) See generally Report of the Work Accomplished During Its First Session, OEA/ser. L/VIII.1, doc. 32 (1961) (noting that the Commission itself played a role in strengthening its authority through interpretation).

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that it may make recommendations . . . with the objective of bringing about a more effective observance of fundamental human rights . . . .” Id. See generally Report of the Work Accomplished During Its First Session, OEA/ser. L/VIII.1, doc. 32 (1961) (noting that the Commission itself played a role in strengthening its authority through interpretation).

7. Statute of the Inter-American Commission on Human Rights, art. 18, reprinted in BASIC DOCUMENTS, supra note 1, at 98 [hereinafter Statute].

ery League, are older, and in recent times, new ones have emerged, like the Center for Justice and International Law (CEJIL), in the field of litigation to provide specialized services.

All of the organizations I have just mentioned, and hundreds more, have dealt with, and availed themselves of, the services of the Commission. In their capacity as pleaders, the NGOs have performed a number of discrete functions. These include:

1. presentation of complaints;
2. investigation, including the presentation of testimony of witnesses and other evidence;
3. advocacy in the course of hearings before the Commission;
4. assistance in the conduct of on-site visits;
5. negotiations aimed at friendly settlements;
6. service as legal advisors to the Commission in litigation before the Inter-American Court of Human Rights (Inter-American Court);
7. presentation of amicus curiae briefs and oral arguments in connection with requests for advisory opinions as well as contentious cases brought to the Inter-American Court;
8. requests for provisional measures in serious and urgent cases in order to avoid irreparable harm to persons;
9. monitoring compliance with Commission recommendations and Court decisions in terms of remedies; and
10. lobbying the political bodies of the OAS.

One reason for the pervasive influence of the NGO community in the IACHR system has been the creation of coalitions and networks that have become truly transnational in scope. Thus, today a victim can present a complaint to a human rights NGO in the victim's home country and, once duly investigated and verified, the matter might well be argued before the Commission and eventually the Inter-American Court by an international team of lawyers from the Americas and elsewhere.

To gain a better understanding of the Commission and its forum functions vis-à-vis private pleaders, I think it would be useful to separate the various functions I have just listed and provide real life examples by way of illustration.

9. See David Weissbrodt & James McCarthy, *Fact-Finding by Nongovernmental Organizations, in International Law and Fact-Finding in the Field of Human Rights* 186, 187-88 (B.G. Ramcharan ed., 1982) (discussing the cooperation that enables NGOs with limited resources to complement each other in persistence and flexibility). The pervasive presence of a loose network of NGOs around the world reduces the likelihood that mistreatment will remain undiscovered and unpublicized. *Id.* 190.
I. PETITIONS

Article 44 of the American Convention on Human Rights provides that:

Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization [of American States], may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention by a State Party.13

This right is matched by a corresponding duty on the part of state parties to provide information requested by the Commission when it determines that the complaint is admissible.11 Similarly, for those OAS member states that have yet to ratify the American Convention (twenty-five of the thirty-five OAS member states have ratified),12 the Commission’s Statute, a binding instrument adopted by a unanimous General Assembly vote, provides that:

In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18:

b) to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights. . . .13

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11. American Convention art. 48, supra note 10, at 42; see also id. art. 41 at 40 (delineating as a Commission function the ability to request information from member states concerning human rights measures they have adopted); id. art. 43 at 40 (providing that state parties shall provide to the Commission "such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention").
12. Inter-Am. C.H.R. 315, OEA/ser. I/V/II.83, doc. 14 corr. 1 (1993). The ten member states which have not yet ratified the American Convention are Antigua and Barbuda, the Bahamas, Belize, Canada, Cuba, Dominica, Guyana, St. Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines. Id.
13. Statute art. 20, reprinted in BASIC DOCUMENTS, supra note 1, at 99.
This provision obligates the Commission to act where it finds that a complaint from any source meets the admissibility requirements contained in its rules and determines that a Convention-protected right, or a right set forth in the American Declaration of the Rights and Duties of Man, in the case of non-states parties, has prima facie been violated. This is a truly liberal provision compared to those governing other international human rights systems. Private actors become active participants in an international forum. Also, member states ipso facto voluntarily commit themselves to participate in the Commission's quasi-judicial process aimed at clarifying and, when it so determines,remedying violations of internationally recognized human rights.

II. INVESTIGATIONS: EVIDENCE AND TESTIMONY

Private parties before the Inter-American "bar" perform the key function of investigating allegations of human rights violations. This task generally falls to the local NGO in cooperation with victims, their next of kin and res gestae witnesses. For obvious reasons of timing, access, and resources, the private attorney, intrepid journalist, or local NGO is the party most capable of visiting the scene of the violation, photographing it, videotaping or recording testimony, obtaining notarized witness affidavits, and seeking scientific and forensic verification of the complaint. Sometimes international teams of physicians or anthropologists supplement these investigations by conducting painstaking post mortems of the remains of victims of human rights violations.

14. See infra note 34 and accompanying text (describing the rights protected by the American Declaration of the Rights and Duties of Man).

15. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 25, 213 U.N.T.S. 221, 236-39 (providing that the European Commission of Human Rights may receive petitions from any victim against a state party only if that state has recognized the competence of the Commission to do so); see also G.A. Res. 2200, U.N. GAOR, 3d Comm., 21st Sess., 1496th plen. mtg., Supp. No. 16, at 49, 59, U.N. Doc. A/6316 (1966) (stating that the Human Rights Committee of the United Nations, charged with supervising implementation of the U.N. Covenant on Civil and Political Rights, is empowered to receive and consider complaints from individuals alleging violations by state parties only if the state has also ratified the Optional Protocol to the U.N. Covenant on Civil and Political Rights).

16. See, e.g., Bradley Graham, On the Track of Killings in Argentina; American Scientist Aids Investigation, WASH. POST, June 22, 1987, at A12 (relating that on-site post-mortems of human remains have provided evidence of atrocities in, among other countries, Argentina and El Salvador). In Argentina, Clyde Snow, a forensics anthropologist from the United States, uncovered remains of over 9,000 victims of the former military government. Id. In El Salvador, a forensics team trained by Snow uncovered evidence of children who were brutally clubbed and stabbed to death by soldiers in 1981. Douglas Farah, Skeletons Verify Killing of Salvadoran Children; Army Battalion Accused in 1981 Massacre, WASH. POST, Oct. 22, 1992, at
The Commission has conducted more on-site human rights investigations than any similar body in the world. Because of the number of complaints the Commission receives, however, it cannot and most likely will never be able to pursue more than a small fraction of the complaints in the expeditious and thorough manner they deserve. Because the investigation of a complaint is essential to the system, the private human rights actor is urged to fulfill this vital function upon which all of the various subsequent steps we shall discuss are clearly contingent.

III. HEARINGS

The pertinent part of Article 48 of the American Convention states:

1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:
   e) The Commission may request the states concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned.17

In recent years, the Commission has set aside a number of days prior to its biennial sessions exclusively for the purpose of hearing from interested persons, organizations, and governments regarding human rights questions. Although these meetings have been described as hearings, their actual character and content have varied a great deal. The most general hearings are ex parte in nature. A few are symbolic — a meeting with a distinguished church leader, president, or foreign minister in which compliments are exchanged and assurances given of continuing support for the Commission’s work and the cause of human rights. Other hearings, also ex parte, involve victims and/or their family members, often accompanied by NGO representatives who testify regarding specific allegations. Sometimes these hearings address the general human rights situation in a particular country or a region therein. In addition, ambassadors and legal experts from member state governments may appear before the Commission to underscore efforts they have taken to assure greater protection for the human rights of their citizens.

With increasing frequency, however, Commission hearings have become formal confrontations at which petitioners and their advocates

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17. American Convention art. 48.1.e., reprinted in BASIC DOCUMENTS, supra note 1, at 43.
make oral presentations on specific claims in the presence of diplomats and attorneys for the denounced government. These face-to-face proceedings allow the government’s representatives to hear firsthand the charges made against the government. The Commission always invites government representatives to reply and ask questions if they wish. Commission members, and, to a lesser extent, the Commission’s secretariat staff, then ask both parties questions. The decision to hold a face-to-face hearing is in the hands of the party seeking the hearing, whether the party is the private pleader or the member government. Sometimes, complainants and witnesses insist on giving their testimony in private, ex parte hearings because they fear reprisals from agents of the denounced government.

The demand for hearings before the Commission has increased markedly in recent years and, in my view, this process is beginning to bear fruit. There are two reasons for the increase in number and quality of hearings before the Commission. First, the return to democracy in so many OAS member states has led to a much greater openness on the part of governments. Democratic governments often staff the offices that deal with human rights issues with persons who are genuinely concerned about improving respect for human rights in their countries. Often, these same government representatives were leading critics of the dictatorial regimes before democracy was restored in their countries. In a number of instances, these spokespersons were themselves victims of human rights violations and private pleaders before the Commission during the years of repression in their homelands. The active participation of government representatives in the international process is very promising because these actors are often in a position to effect changes in their own government’s policies.

The second explanation for the improvement of Commission hearings is the growing sophistication of the system’s users. NGOs here and abroad realize that hearings provide a particularly effective forum for drawing state attention to their concerns. While Commission hearings are private, petitioners and, sometimes, governments hold press conferences following the hearings. These parties are, of course, at liberty to do this. Moreover, with the consent of the parties, photographers may take pictures in the hearing room before being asked to withdraw to allow the hearing to proceed.

Publicity, favorable or not, is the primary lever used by petitioners to redress human rights violations. Non-governmental petitioners have often held press conferences and issued communiques following Commission hearings. In the future, though, governments also might choose to employ this tactic more often as friendly settlements of individual cases are achieved.
IV. ON-SITE VISITS

The pertinent part of Article 48 of the American Convention on Human Rights provides:

1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:
   d) If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts . . . ;

2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed.18

In 1961, the Commission conducted its first on-site visit in the Dominican Republic.19 In later years, the Commission had a prolonged presence in the Dominican Republic following the 1965 invasion of that country by the United States Marines. In the early 1960s, the Commission also conducted on-site investigations in Miami, Florida where it interviewed Cubans fleeing persecution in the early years of the Cuban revolution.20 In fact, the creation of the Commission was in part prompted by the situation in Cuba.21 During the 1969 war between

18. American Convention art. 48, reprinted in BASIC DOCUMENTS, supra note 1, at 42.
20. See Report on the Situation of Political Prisoners in Cuba 205, OEA/ser. L/V/II.7, doc. 4 (1963) (noting that the decision to conduct on-site interviews in Miami was one of practical necessity). Between November 1961 and September 1962, the Commission submitted three written requests to the Government of Cuba for either information or consent to visit the country to conduct an investigation. Id. As the Cuban Government did not reply, the Commission agreed in January 1963 to take other action. Id.
   Many former prisoners of the Cuban Government who had previously submitted written complaints desired to convey their experiences orally to the Commission. Id. Because of logistical concerns, the Commission, with the consent of the United States Government, temporarily transferred its operations to Miami, Florida. Id. The Commission delegation interviewed more than 80 people while in Miami. Id.
21. David Padilla, The Inter-American System for the Promotion and Protection
Honduras and El Salvador, the Commission sent members and staff to monitor several towns in those countries, including border and refugee areas. The Commission also played a humanitarian role in that situation by reuniting families in a number of instances.

Not until the 1970s and 1980s, however, did the Commission create a more elaborate modus operandi in the conduct of its in situ investigations. Initially in Chile and later in Argentina, the Commission relied greatly on the assistance of national and local NGOs and church organizations to arrange interviews with victims, witnesses, representative labor leaders, clerics, journalists, indigenous leaders, educators, students, and political dissidents.

In the intervening years, the Commission has conducted more than fifty on-site visits to sixteen member states and several countries that are not members of the OAS. In order to interview refugees who had fled repression in their home countries, the Commission has sent delegations to the Netherlands, Mexico, the United States, and French Guiana.


23. Report of the Subcommittee on the Situation in the Republics of Honduras and El Salvador in Relation to Human Rights, OEA/ser. LV/II.22, doc. 13 rev. 1 (1970). The Commission designated a subcommittee that investigated the situation throughout the fall of 1969. Id. As a consequence of the subcommittee’s on-site investigation, the Commission transmitted requests for information to the governments, many of which concerned the detention or forced displacement of individuals resulting in the separation of the families. Id. The subcommittee also intervened in specific cases, requesting, for example, that the authorities allow the departure of a pregnant woman to join her husband and the departure of a father and two sons in order to reunite a family. Id.

24. See QUIROGA, supra note 1, at 265-69 (noting that the Commission utilized a variety of investigatory techniques during an on-site visit to Chile from July 22 to Aug. 2, 1974).

25. See IACHR Reports, supra note 8; see also Shirley Christian, Chile Challenged on Military Rule, N.Y. TIMES, Oct. 10, 1985, at A3 (stating that, in preparing its report on human rights in Chile, the Commission relied on information from human rights organizations in Chile, the Roman Catholic Church’s Vicariate of Solidarity and the human rights commission created by members of the Christian Democratic Party).

course, before the Commission may carry out an on-site visit to a member state, it must obtain that government's invitation or consent.\textsuperscript{27}

During all on-site visits the Commission relies on the government to arrange appropriate meetings with governmental authorities. Typically, the Commission's delegation might meet with the president, the ministers of foreign relations, interior, defense, labor, and the chief of police, among others. In addition, the Commission always obtains prior assurances from the host government regarding the delegation's freedom of mobility, access to jails, respect for the Commission's privacy in meeting with individuals and organization leaders, and the security of the delegation. The Commission also expects the host government to issue a public expression that persons cooperating with the Commission will not be subject to reprisals for having come forward to give testimony. This cooperation is essential if an on-site visit is to prove fruitful.

At the same time, to assure a balanced presentation of all representative views, the Commission relies on local NGOs to suggest persons and groups they believe the Commission should hear. Naturally, the Commission is master of its own work program but invariably the NGOs' recommendations and logistical assistance in scheduling appointments and making local travel arrangements are extremely helpful.

Over the years, the Commission has come to know the principal human rights actors in the member states. The most respected and serious of these organizations play a crucial role in helping the Commission to obtain a firsthand, balanced view of the human rights situation in a particular country. These NGOs also make fact-finding in individual cases more effective. In some countries, for instance, NGO statistics on violence, common delinquency, and abuse of power by police and the military have come to be accepted by the government, the citizenry, and the human rights community as an accurate measure of the prevailing human rights standards.\textsuperscript{28}

The Commission is indebted to NGO workers who often perform thankless, even dangerous tasks to bring human rights violations to public attention.\textsuperscript{29} In this regard, the Commission takes seriously its

\textsuperscript{27} Statute art. 18, \textit{reprinted in} \textit{BASIC DOCUMENTS, supra} note 1, at 98.

\textsuperscript{28} Padilla, \textit{supra} note 21, at 401; \textit{see also} Weissbrodt & McCarthy, \textit{supra} note 9, at 187, 215 (stating that, although the raw data provided by NGOs is of extremely diverse reliability, NGOs nevertheless perform a substantial portion of the monitoring and reporting of human rights violations in the world).

\textsuperscript{29} \textit{See} Christian, \textit{supra} note 25, at A3 (stating that the Roman Catholic
duty to try to protect NGOs from acts of reprisal by agents of governments, terrorists, or criminals. Thus, the Commission has successfully urged the OAS General Assembly to call on governments to respect the physical integrity of private human rights monitors and the persons who cooperate with them.30

Tragically, the efforts of the Commission and the Inter-American Court to assure respect for human rights monitors and witnesses who have provided testimony of abuses have not always been effective. There have been a number of instances in which these persons have been assassinated, disappeared, or driven into exile.31 Human rights advocacy on the front lines is all too often a dangerous undertaking.

V. FRIENDLY SETTLEMENTS

Article 48.1.f. of the American Convention on Human Rights establishes that:

1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:
   f) The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.32

Just as the return to democracy of so many states has had the salutary effect of making more on-site visits possible, the Commission is beginning to see another heartening trend toward the civilized and amicable resolution of admitted human rights violations. Not unlike the belated, but nonetheless welcome, compensation provided to Nisei Japa-

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30. See Inter-Am. C.H.R. 34, G.A. Res. 1044, OEA/serr. P/XX.0.2, vol. 1 (1990) (recommending that states “grant the necessary guarantees and facilities to enable nongovernmental human rights organizations to continue contributing to the promotion and protection of human rights, and that they respect the freedom and safety of the members of such organizations”); see also Inter-Am. C.H.R. 61, OEA/serr. P/XXII.0.2, vol. 1 (1990) (recording General Assembly Resolutions 1102 (1991) and 1169 (1992) which reiterate the recommended call for safety and protection of investigating NGOs).

31. See, e.g., Velásquez Rodríguez Case, Inter-Am. Ct. H.R. 43, OEA/serr. L/VIII.19, doc. 13 (1988) (noting that despite an order by the Court of Human Rights that the Government of Honduras protect several witnesses in this case, a policeman who was scheduled to testify was killed on a Tegucigalpa street by men who placed the insignia of a Honduran rebel movement on his body).

32. American Convention art. 48.1.f., reprinted in BASIC DOCUMENTS, supra note 1, at 42.
nese citizens of the United States who were interned during World War II, there have been significant efforts made by the various branches of democratic governments to rectify past abuses.33 The most notable to date has been the friendly settlement of a series of cases in which Argentine authorities arbitrarily detained citizens in the 1980s under an executive decree known as the Poder Ejecutivo Nacional (PEN). At the time, the cases were brought to the Commission under the American Declaration of the Rights and Duties of Man.34 The Commission adopted resolutions in these cases finding that the Government of Argentina had violated the prohibition against arbitrary detention contained in the Declaration, and recommended just compensation for the victims.35 Not until representative democracy was restored in Argentina, however, and the government of President Raúl Alfonsín ratified the American Convention on Human Rights, did the victims in those cases, through their NGO lawyers, seek to enforce the Commission's recommendations.36 Hence, new cases were brought under the American Convention. After considerable negotiation and a number of hearings, the Argentine Congress sanctioned a law proposed by the administration of President Carlos Menem, who had himself been imprisoned under the PEN decree. The law provided for financial indemnities to the victims of wrongs committed years earlier.37 At last, the conciliatory and pragmatic spirit of the Convention had taken hold, and a mature and sensitive government addressed a dark part of its legacy in a positive and forthcoming manner.

Other efforts in this regard have also borne fruit or the promise thereof. For example, Costa Rica was recently in clear violation of an American Convention provision requiring access to an appellate court in criminal matters, until the Constitutional Chamber of its Supreme Court remedied the situation. The Costa Rican Court judicially mandated appellate review in misdemeanor proceedings with retroactive applications, producing an amicable resolution of a long-festering problem in Costa Rican

34. American Declaration of the Rights and Duties of Man art. 18 (1948), reprinted in BASIC DOCUMENTS, supra note 1, at 17 [hereinafter American Declaration].
36. Id. at 35.
37. Id. at 38-39.
At present, another serious effort is afoot in Argentina to derogate aspects of a press law on defamation known as desacato, which has a chilling effect on freedom of expression. The Argentine Government has provided written assurances that the matter will be cured soon, and, in the process, will resolve an important case still pending before the Commission.

The friendly settlement procedures contained in the American Convention and the appropriate use of the Commission by state and non-state parties is a very promising development, one in which the private actor plays a crucial role. Human rights NGOs are just beginning to press for such solutions; it is the wise and enlightened government that will capitalize on this procedure. By any measure, friendly settlement procedures are more humane and less costly than litigation and condemnation at the bar of public opinion.

VI. LEGAL ADVISOR TO THE COMMISSION

In his article, Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation, Professor Claudio Grossman points to the practice of the European Court on Human Rights in which private attorneys are permitted to argue before the European Court that individuals' human rights have been violated by states subject to that body's compulsory jurisdiction.

The Inter-American human rights system is modelled on the European system. Like the European Commission on Human Rights, the Inter-American Commission acts, for all practical purposes, as sole gatekeeper in deciding on the admissibility of petitions, adopting reports thereon and selecting cases to be taken to the Inter-American Court. At present, however, private parties are not authorized to litigate contentious cases before the Inter-American Court. Rather, attorneys for the victims have appeared in the capacity of legal advisors to the Commission in contentious cases before the Inter-American Court. In addition to the Honduran cases, in which Professor Grossman and attorneys for

40. Id. at 377.
41. See American Convention art. 61.1, reprinted in BASIC DOCUMENTS, supra note 1, at 46 (stating that only states parties and the Commission may submit cases to the court).
Americas Watch played a vital role as the Commission's advisors, private lawyers are currently serving as advisors in pending cases against Suriname, Peru, and Colombia. There are also other cases now under consideration by the Commission for possible Inter-American Court prosecution. Undoubtedly, NGO lawyers will participate alongside the Commission in the capacity of advisors in the prosecution of those cases.

As legal advisors to the Commission, NGO attorneys have played an active role in the relatively few contentious cases the Inter-American Court has heard. This involvement has included formulating petitions, conducting hearings before the Commission, formulating requests that certain matters be taken to the Court, drafting demands and memorials to the tribunal, proposing and examining witnesses and experts, and rendering oral arguments. The Commission's legal advisors, subject to Commission control, have participated in every phase of the various cases litigated to date, taking an active part in arguing on the merits and on procedural aspects, as well as for damages demanded on behalf of the victims. Recently, in Aloeboetoe et al. Case, the Commission's legal advisor, while contributing his services on a pro bono basis, has asked the Inter-American Court for costs both on behalf of his sponsoring organization as well as on behalf of Moiwana'86, the Suriname NGO which first brought the case to the attention of the Commission. Thus, the private actor in the Inter-American system has quickly achieved unprecedented status through participation in fora before the Commission and Inter-American Court — a status that would not have been dreamed of just a generation ago.

Notwithstanding these developments, however, one must ask, as Professor Grossman does, whether the private actor should not have an even more expanded role in the system. My personal response is a rather cautious "yes, but not right now."

At present, only two-thirds of the thirty-five member states of the OAS have ratified the Convention, and of these, only fifteen have voluntarily accepted the compulsory jurisdiction of the Inter-American Court. One more member, Bolivia, has announced its intention to do so, but has yet to communicate formally its decision to the OAS. Moreover, several OAS member states are seriously considering ratification of

the American Convention. These include Antigua and Barbuda, Canada, and Dominica. A change in administration in the United States could also bring that state within the Convention system.

In Europe, by contrast, all the member states of the Council of Europe have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms45 and have accepted the jurisdiction of the European Court. More importantly, a glance at the Commission’s recent annual and special country reports reveals a quantitatively and qualitatively different picture regarding the volume and nature of violations in a number of OAS member states. The Inter-American system, despite its rapid development of a comprehensive system, is still a long way from obtaining the type of consensus which characterizes the European system.

I believe it would be imprudent if not downright risky to accelerate and expand the role of the private actor in the conduct of contentious cases before the Inter-American Court until and unless a substantial majority of the OAS member states are likely to acquiesce to such changes. Rejection of these developments could jeopardize broader acceptance by reticent member states of the OAS whose participation in the system is essential for future progress.

At the same time, there are factors militating toward an expanded role for private actors in litigation before the Inter-American Court. The Commission’s designation of a member as its delegate for purposes of litigation tends to overburden that member-delegate, given the recent increase in human rights litigation. The member-delegate shares these tasks with a Secretariat attorney responsible for the development, research, drafting of pleadings, Inter-American Court appearances, oral argument, and logistical preparations. This responsibility could well threaten the Commission’s human and financial capacity to bring a sufficient number of exemplary cases to the court. Such cases are essential to create a credible deterrent against future violations and provide a realistic avenue of redress for all but a handful of “lucky” victims.

Thus, in my opinion, it is urgent that a significant number of additional states become active participants in the Inter-American system and accept the court’s jurisdiction so that an expanded role for the private actor can become a reality sooner rather than later. This recommendation would also permit the increased use of litigation and the independent functioning of private counsel before the Inter-American Court.

The Commission is now considering a proposal which could alleviate this problem: the establishment of a specialized bar of distinguished counsel who would be invited to represent the Commission in particular cases on a pro bono basis. The Commission has made no firm decision

on this proposal yet, but the fact that it is being actively debated reveals the Commission's concern regarding its own limitations and the need to strengthen its capacity to litigate more contentious cases before the Inter-American Court.

VII. AMicus CURiae

Private actors and governments are not only free to, but are encouraged to provide amicus curiae briefs to the Inter-American Court in contentious cases as well as on questions posed to the court by the Commission or member states seeking advisory opinions.\(^46\) Many have taken advantage of this invitation. For example, more than a dozen amici submitted briefs to express their views before the Inter-American Court rendered its thirteenth advisory opinion.\(^47\) Over the years, more than 100 amicus curiae briefs have been presented to the Inter-American Court by national, regional, and worldwide NGOs, as well as by individual attorneys, law professors, and students. On occasion, friends of the Court have also made oral presentations in public hearings on questions that require advisory opinions. Judges of the Inter-American Court have told me that the amici curiae have provided invaluable contributions to the court's deliberations and judgments.

In addition to NGOs and private parties, governments have also provided amicus curiae briefs. For instance, the Prime Minister of Dominica, Madame Charles, wrote an amicus brief to the Inter-American Court on the question of "Other Treaties,"\(^48\) the subject of the Inter-American Court's first advisory opinion. Similarly, the Government of the United States submitted its views on the issue of the legal effects of the American Declaration of the Rights and Duties of Man.\(^49\) Neither of these countries, however, had ratified the American Convention.\(^50\) Neverthe-

\(^{46}\) Handbook of Existing Rules, Rules of Procedure, art. 34(i), 157, OEA/ser. L/VII.65, doc. 6 (1985) (authorizing the Inter-American Court to hear testimony or statements that would assist in its decision-making function).

\(^{47}\) Opinion Consultiva OC-13/93 del 16 julio de 1993, Ciertas Atribuciones de la Comision Interamericana de Derechos Humanos.

\(^{48}\) "Other Treaties," Inter-Am. Ct. H.R. (ser. B) No. 1 (providing observations on the subject of "other treaties" pursuant to art. 52 of the American Convention).


\(^{50}\) Following the delivery of this paper at the conference on "Changing Notions of Sovereignty", Dominica presented its instrument of ratification of the American Convention on Human Rights, signed June 3, 1993, during the General Assembly
less, the Inter-American Court welcomes the views of non-states parties to the American Convention.

VIII. PROVISIONAL MEASURES

Article 29 of the Commission Regulations provides:

1. The Commission may, at its own initiative, or at the request of a party, take any action it considers necessary for the discharge of its functions.
2. In urgent cases, when it becomes necessary to avoid irreparable damage to persons, the Commission may request that provisional measures be taken to avoid irreparable damage in cases where the denounced facts are true.
3. If the Commission is not in session, the Chairman, or in his absence, one of the Vice Chairmen, shall consult with the other members, through the Secretariat, on implementation of the provisions of paragraphs 1 and 2 above. If it is not possible to consult within a reasonable time, the Chairman shall take the decision on behalf of the Commission and shall so inform its members immediately.
4. The request for such measures and their adoption shall not prejudice the final decision.

Article 63.2 of the American Convention states:

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

In recent years, NGOs have petitioned the Commission on a number of occasions to take special action in an effort to protect the lives of witnesses, family members of victims in ongoing cases, and human rights monitors.

In response, the Commission has acted in one of two ways. The first involves the application of Article 29 of its Regulations, which authorizes the Commission to request that the relevant government adopt special measures to ensure the well-being of specific persons. Usually, these

held in Managua, Nicaragua, June 7-11, 1993.

51. Regulations art. 29, reprinted in BASIC DOCUMENTS, supra note 1, at 113.
52. American Convention art. 63.2, reprinted in BASIC DOCUMENTS, supra note 1, at 47.
53. See generally Juan E. Mendez & Jose M. Vivanco, Disappearances and the Inter-American Court: Reflections on a Litigation Experience, 13 HAMLIN L. REV. 507, 528 (1990) (noting that the American Convention permits NGOs to file petitions on behalf of individuals).
54. See Regulations art. 29(1),(2), reprinted in BASIC DOCUMENTS, supra note
requests are general, though at times they are more specific. An example of this springs from the adoption of Argentine children whose parents disappeared during the military dictatorship in that country. The Commission recently requested that the Government of Argentina place the Reggiardo-Tolosa twins in the custody of guardians designated by the children’s blood relatives and that the youngsters be provided with psychological care.

The other technique the Commission uses is to petition the Inter-American Court to issue provisional protection measures for particular persons. The court has granted some of the Commission’s petitions and denied others. In some cases, public hearings have been held in which the moving parties, the NGOs, accompanied the Commission and confronted the accused government’s representatives before the Inter-American Court on the issue of whether provisional measures should be imposed or lifted, and what measures, if any, the government has taken to give effect to the Inter-American Court’s orders.

1, at 113 (providing that the Commission is authorized to take any action appropriate to perform its role).

55. American Convention art. 63.2, reprinted in BASIC DOCUMENTS, supra note 1, at 47. Article 63.2 states:

In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

Id.

56. See, e.g., Inter-Am. Ct. H.R. 12, OAS/ser. L/V/III.25, doc. 7 (1992) (petitioning the court, pursuant to article 63.2 of the American Convention and article 76 of its Regulations, for protective measures in the Chunimá case in order to protect witnesses, relatives, surviving victims, judges, and human rights activists associated with the Mutual Support Group (GAM) and Council of Ethnic Communities “We Are All Equal” (CERJ) in Chunimá, Guatemala). The President of the Inter-American Court, pursuant to his powers under article 23.4 of the court’s Rules, issued an order to the Government of Guatemala to adopt necessary measures to protect the life and integrity of those named on July 15, 1991. Id. The court confirmed the order of the President on August 1, 1991. Id. at 13.


IX. MONITORING COMPLIANCE

When the Commission determines that a violation has occurred, it issues findings in individual reports which are published in the Commission’s Annual Report. The reports invariably contain recommendations on what measures, including compensation, the accused governments should take to rectify the violations. Similarly, when the Inter-American Court orders an indemnification, the award of damages along with other adopted measures are reported to the General Assembly in the Inter-American Court’s Annual Report.

Again, private actors play an active role in monitoring compliance, or the lack thereof, with these decisions. Well-organized and respected NGOs provide an oversight function through direct contact with the beneficiaries of the Commission and the Inter-American Court’s decisions and reports. Reports of the NGOs, duly verified by the Commission and Inter-American Court, assist in ensuring proper fulfillment of these quasi-judicial and judicial remedies. For example, the NGO community denounced the Honduran Government for not fulfilling the required compensatory measures ordered by the court in the Velásquez Rodríguez Case.

X. LOBBYING

Private actors in the Inter-American system also contribute to the ongoing debate that takes place in the political organs of the OAS: the Permanent Council, the General Assembly, and the Meetings of Consultation of Foreign Ministers. Ordinarily, NGOs assign representatives to present position papers and to meet with foreign ministers, ambassadors, and other diplomats in an effort to ensure that human rights


61. BASIC DOCUMENTS, supra note 1, at 2 (noting that the Permanent Council considers matters referred to it by the General Assembly and the Meeting of Consultation of Ministers of Foreign Affairs).

62. Basic Documents, supra note 1, at 2. The General Assembly, the supreme organ of the OAS, determines general action and policy. Id.

63. Basic Documents, supra note 1, at 2. The Meeting of Consultation of Ministers of Foreign Affairs can be convened by any member state to consider urgent problems that are of common interest. Id. The meeting may also serve as the Organ of Consultation to consider any threat to the peace and security of the hemisphere. Id.
issues are given due consideration by these multilateral organs.

There is a new and promising initiative on NGO participation. Modelled after the United Nations practice in Geneva, a number of NGOs have sought permission to play a formal and institutionalized role in treaty drafting and standard setting. For example, a working group of the OAS Permanent Council is in the process of preparing a draft convention on forced disappearances. A coalition of hemispheric NGOs have sought and obtained the approval of a number of countries to submit draft language and critique draft texts of the convention. In my view, this is a constructive development, one that should be nurtured and strengthened.

CONCLUSION

With some pride as a participant in the developments I have discussed, accompanied by a large dose of realism and a keen sense of the distance yet to be travelled, I can say that in the past fifteen years the notion of state sovereignty and the role of private actors in the Inter-American human rights system have undergone a sea change. While some states argue that state sovereignty is still a sacred barrier separating governors and the governed, the facts show that state sovereignty is not an absolute obstacle to those who seek to pursue justice responsibly. The role of the private actor in the current system is developing and the restoration and strengthening of democracy in the Americas must indicate that the ordinary citizen will be heard.

Finally, the active and even ubiquitous role of the private actor in the Inter-American system should be seen as desirable — the conscious result of the wishes of the people of the Americas and their governmental representatives who have written and ratified the instruments that constitute our system. It is not true that the broad role played by the private actor in the system means that the system lacks objectivity or impartiality — that somehow the system has been captured by “activists” with a “political” agenda. Access should not be confused with control. The organs of the system, the Commission and the Inter-American Court, are truly independent. The members and judges on these bodies serve in their individual capacities, and not as representatives of their states. The state still enjoys ample procedural safeguards that assure due process of law. The Commission and the Inter-American Court however, are fora of last resort when national judicial systems are unwilling or unable to provide justice to their citizens.