

The
Inter-American
Human Rights
System

Changing times,
ongoing challenges



Camila Barretto Maia
Edurne Cárdenas
Daniel Cerqueira
Raísa Cetra
Gastón Chillier
Mariana González Armijo
Celeste Kauffman
Gabriela Kletzel
Laura Lyons Cerón

Jefferson Nascimento
Miguel Pulido Jiménez
Silvia Ruiz Cervantes
César Rodríguez Garavito
Jaqueline Sáenz Andujo
Katya Salazar
María Sánchez de Tagle
Nelson Camilo Sánchez
Pétalla Timo

The Center for Legal and Social Studies (CELS) is an Argentine organization that was created during the civilian-military dictatorship. It promotes the protection and effective exercise of human rights, justice, and social inclusion. The CELS uses political advocacy, impact litigation, applied research, and the formation of partnerships to carry out its mission nationally and internationally.

Conectas Direitos Humanos is an international non-profit, non-governmental organization based in São Paulo (Brazil). Its mission is to promote human rights and the democratic rule of law in the Global South—Africa, Latin America, and Asia. Conectas works through three programs (South-South, Foreign Policy, and Justice) that act in conjunction to carry out national and international activities involving the strengthening of networks of activists and academics, foreign policy monitoring, and public interest and impact litigation.

The Center for the Study of Law, Justice, and Society (Dejusticia) is a Bogotá-based Colombian organization that works regionally and internationally. Its mission is to promote the building of a citizenry without exclusions and the operation of democracy, the rule of law, and human rights. Dejusticia conducts its activities based on legal and socio-legal research, reflected in academic publications and public policy documents; public speeches; participation in debates, forums, networks, and observatories; participation in impact litigation and public interest consultancies; training activities, and media presence.

The Due Process of Law Foundation (DPLF) is a regional organization comprised by a multi-national group of professionals. Its mandate is to promote the rule of law and human rights in Latin America through analysis and recommendations, cooperation with public and private organizations and institutions, the sharing of experiences, and advocacy.

Fundar - Center for Research and Analysis is a plural and independent organization based in Mexico that is governed by the principles of horizontal organization and transparency. Through applied research, evidence-based advocacy, impact litigation, and the creation of partnerships, it seeks to move toward substantive democracy and help create structural changes that positively transform the power relationships between society and government.

The
Inter-American
Human Rights
System

Changing times,
ongoing challenges

©2016 Due Process of Law Foundation
All rights reserved
Printed in the United States of America
Published by the Due Process of Law Foundation
Washington, DC 20036
www.dplf.org

ISBN 978-0-9912414-2-2

English editing by: Kelley Anne Reynolds

Graphic design: ULTRAdesigns.com

Spanish Edition:
Bogota, D.C., August 2015
English Edition:
Washington, D.C., July 2016

Acknowledgements

The work behind the initial reflections that later became the research interests collected in this book was practical rather than theoretical. The authors are therefore indebted to numerous individuals, organizations, and institutions. Given its nature, the process of reflecting on the future of the Inter-American System was a long and vertiginous undertaking that involved the exchange of arguments and collective construction.

Although it would be impossible to exhaustively thank everyone who helped create or strengthen these reflections, we would like to acknowledge those who took part in this process directly, whether as partners, critics, or even opponents of our ideas and arguments.

First, we received support for our advocacy work from different government bodies and public servants in the region, both in the capitals of the countries where we are based and in the missions to the OAS. The process included in-person and written exchanges that shaped what we thought and wrote in several of our chapters. We would especially like to acknowledge the openness to dialogue shown to us by the delegations to the political bodies of the OAS that allowed us to be a real stakeholder in these discussions.

We would also like to express our gratitude to the civil society organizations that supported us in this work, and with whom we share both similarities and discrepancies. We acknowledge their commitment to thinking about strengthening the system, and we thank them for their support, solidarity, and generosity in promoting the concerted advocacy work toward a common goal, even when our differences appeared to be significant.

We would also like to thank the members of the Inter-American Commission on Human Rights and the staff members of its Executive Secretariat for their intense work during these discussions, for

their openness to dialogue and self-examination on the best way to effectively protect human rights. The consultations and opportunities for participation that were afforded to civil society organizations and users of the system were critical in gathering the information we have presented and analyzed in certain chapters. A number of the staff members of the Executive Secretariat graciously assisted us, allowing us to investigate internal procedures in depth and providing us with valuable information to finish the chapters of this book. We are also appreciative of the dialogue and exchange with the Executive Secretariat of the MERCOSUR's Institute for Public Policy on Human Rights (IPPDH).

In addition, the organizations that took part in this project would not have been able to participate in the political process or get together to plan, write, and comment on these chapters without the generous assistance provided by the Open Society Foundations, especially the Latin America Program. The Konrad Adenauer Foundation's Rule of Law Program for Latin America also co-funded a regional seminar in Lima where we met with key actors involved in the system to discuss many of the issues addressed in this publication, which would not have been possible without the generous support of the Ford Foundation.

Finally, those of us who are members of civil society organizations know that all of the results of our work are the product of collective effort. Some of us appear in the chapters as authors, but we would not have been able to do any of this without the support of our colleagues from CELS, Fundar, Conectas, Dejusticia, DPLF, and IDL, who were fully apprised of the process, helped us be part of it, and shared in our joys and frustrations for over a year and a half. To all of you, thank you very much—this book is as much yours as it is ours.

Contents

	Introduction	9
Chapter 1	The Challenge of Complementarity in Latin America's New Institutional Architecture for Human Rights <i>Gabriela Kletzel, Camila Barretto Maia</i> Center for Legal and Social Studies (CELS)	17
Chapter 2	Counting Coins: Funding the Inter-American Human Rights System <i>Raísa Cetra, Jefferson Nascimento</i> CONCETAS Human Rights	53
Chapter 3	Towards a Model of Transparency and Access to Information in the Inter-American Human Rights System <i>Miguel Pulido Jiménez, Mariana González Armijo,</i> <i>María Sánchez de Tagle, Silvia Ruiz Cervantes,</i> <i>Jaqueline Sáenz Andujo</i> Fundar, Center for Analysis and Research	95
Chapter 4	The Functions of the Inter-American Commission on Human Rights Before, During, and After the Strengthening Process: Striking a Balance between the Desirable and the Possible <i>Katya Salazar, Daniel Cerqueira</i> Due Process of Law Foundation (DPLF)	129

Chapter 5	Democracy and Subsidiarity	171
	<i>Gabriela Kletzel, Pétalla Timo, Edurne Cárdenas, Gastón Chillier</i> Center for Legal and Social Studies (CELS)	
Chapter 6	The Elephant in the Room: The Procedural Delay in the Individual Petitions System of the Inter-American System	207
	<i>Nelson Camilo Sánchez, Laura Lyons Cerón</i> Center for Studies of Law, Justice, and Society (Dejusticia)	
Chapter 7	From Orders to Practice: Analysis and Strategies for Implementing Decisions of the Inter-American Human Rights System	249
	<i>César Rodríguez Garavito, Celeste Kauffman</i> Center for Studies of Law, Justice, and Society (Dejusticia)	
	Conclusions	285
	Authors	294

Introduction

Regardless of one's assessment of the work of the Organization of American States (OAS), there can be no doubt about the exceptional value of the bodies of the Inter-American human rights system (the Inter-American system). This system has served as an essential tool for promoting and protecting human rights in the region, both in times of dictatorship as well as democracy. The actions of the Inter-American Commission on Human Rights (the IACHR or the Commission) and the Inter-American Court of Human Rights (the Court) have been crucial to reporting, documenting, investigating, and prosecuting those responsible for gross and systematic violations committed under State terrorism or in the context of domestic armed conflicts, in keeping with the principles of truth, justice and reparation. The IACHR and the Court have also worked diligently to defend the rights of groups of victims of historical or structural processes of discrimination. In particular, this includes their work on the rights of women, migrants, indigenous peoples, persons deprived of liberty, and lesbian, gay, bisexual, trans, and intersex (LGBTI) persons.

Despite the enormous significance of its work, the Commission was the subject of an intense process of debate in recent years regarding its role and authority.¹ Several States asserted the need to reevaluate its

1 The IACHR established a specific section about the process on its website. See: <http://www.oas.org/en/iachr/mandate/strengthening.asp>. At the same time, the precedents and trajectory of the discussions in earlier years can be found in the 2013 Annual Report of the Centro de Estudios Legales y Sociales (CELS, Center for Legal and Social Studies). The Report also provides information on the actions carried out by the group of organizations that have compiled this book to influence the debates and protect the powers of the regional body. See in this regard "Debates actuales sobre la institucionalidad regional en derechos humanos. El futuro del sistema interamericano y las nuevas dinámicas de integración en América Latina," and in particular Section 3,

work in light of the region's current reality. In addition to discussions regarding the Commission's tools, its strategic agenda and thematic priorities were also questioned. This was a complex process due to the diversity of actors and interests at play in which some legitimate criticism of the IACHR's work was intermixed with proposals that endangered several of its essential powers, along with its autonomy and independence.

The process led to the reform of the Commission's *Rules of Procedure, Policies, and Practices* and culminated in the 44th Extraordinary General Assembly (EGA) of the OAS, whose final resolution managed to keep the Commission's powers unaltered and avert the potential disintegration of the regional protection system.² Even though the IACHR's so-called "strengthening process" was formally ended in the framework of the 44th EGA, the political discussion process regarding the powers and authority of the Commission continues and is not free of risks or tensions.³

The debates regarding the powers, functions, and work of the Inter-American system's bodies that began in 2011 were not the first to take place. In the past, the Inter-American system has faced numerous threats which, time and again, ended up dissipating because they were led by States that lacked sufficient weight and because the criticism and proposals put forth did not have the necessary legitimacy to prevail.⁴ In 2011, in contrast to previous episodes, intense discussions arose in

"El nuevo proceso de 'fortalecimiento' de la Comisión Interamericana" (CELS 2013). [http://www.cels.org.ar/common/documentos/CELS.%20Informe%202013%20\[completo\].pdf](http://www.cels.org.ar/common/documentos/CELS.%20Informe%202013%20[completo].pdf). It is also possible to find details of the debates in two issues of the magazine *Aportes DPLF*. See in this regard *Aportes DPLF* (2012, 2014).

2 See Resolution OEA/Ser.P AG/RES. 1 (XLIV-E/13) rev. 1, "Results of the Process of Reflection on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System."

3 This is reflected in the text of the final resolution, which gave a mandate to the OAS Permanent Council to "continue the dialogue on the core aspects for strengthening the IAHRs." These lines responded to the conciliatory solution that was devised to reach a multilateral consensus in light of the unyielding position (though it was an isolated, minority view) of the countries of the Bolivarian Alliance for the Peoples of Our America (ALBA). In particular, Bolivia, Ecuador, and Nicaragua threatened to imitate Venezuela's regrettable decision and denounce the American Convention on Human Rights (the American Convention) if the debate about the functions and limits of the IACHR's work did not remain on the agenda. Fortunately, more than two years after the 44th EGA, these countries have not gone down this path.

4 See the Committee on Juridical and Political Affairs, *Results of the Process of Reflection on the Inter-American System for the Promotion and Protection of Human Rights (2008-2009)*, March 18, 2009, CP/CAJP-2665/08 rev. 8 corr. 3.

which the positions of various States with the capacity for influence and traction converged. The questioning of the IACHR's powers mainly by Brazil, Ecuador, Bolivia, Nicaragua, Venezuela, and Colombia created the groundwork for a reform scenario.⁵

At the heart of the discussions was precisely the purpose of international human rights protection and its sometimes conflictual coexistence with the sovereign decisions of democratic States. This led some nations to assert the need for the IACHR to prioritize its role of *promotion*, rather than its actions for *protection* and ensuring individual and collective rights. This issue was particularly evident in the debate over the IACHR's power to grant precautionary measures. Disregarding these measures' essential role in protecting human rights, some States even characterized them as "undue interference" that directly affected their sovereignty to make decisions regarding, for example, national development projects.

An emblematic case lies in Brazil's harsh reaction to the precautionary measures initially granted by the IACHR to stop construction of the Belo Monte hydroelectric plant.⁶ Over time, and based on numerous decisions adopted by the IACHR (such as the one to restrict the original scope of these measures), Brazil's position regarding the extent of reforms that should be carried out grew more moderate.⁷ As a result, in contrast

5 In the case of Argentina, its position was not unequivocal throughout the process. At the beginning of the discussions it opted to not support the adoption of various recommendations that could have weakened the IACHR's powers. At the same time, its actions clearly demonstrated that it was not making efforts to seek the unconditional support of the Inter-American system that had long characterized its stance. Later, in a hearing convened by the IACHR in October 2012, Argentina even mentioned some proposals that sparked concern, such as questioning the Commission's authority to grant precautionary measures and proposing limits on its financing that would affect its functioning. Finally, in several formal presentations, Argentina changed this last position and emphasized its support for the IACHR's work and the need to safeguard its independence and autonomy.

6 See PM 382/10 – Indigenous Communities of the Xingu River Basin, Pará, Brazil, <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>. The Brazilian government responded harshly to this decision, characterizing the measures as "hasty and unjustified." In particular, it criticized the utilization of a tool such as precautionary measures for a decision of this magnitude regarding development-related public policy decisions by democratic governments. In light of this situation, Brazil made the decision at that time to withdraw its ambassador to the OAS and to forego formally presenting the candidacy of a Brazilian to become a member of the IACHR.

7 At the end of July 2011, the IACHR reassessed the measure affecting the project based on information submitted by the Brazilian State and the petitioners and decided to modify the aim of the measure, restricting its initial scope. It determined that "the debate between the parties on prior consultation and informed consent with regard

to other States such as Nicaragua and Ecuador, the Brazilian State supported the draft reform of the Commission's Rules of Procedure⁸ and proposed as a candidate for Commissioner Paulo Vanucchi, who was ultimately elected in June 2013.

The process was also affected by changes in the geopolitical scenario and the intention of some States in the South—such as Bolivia, Ecuador, Nicaragua and Venezuela—to distance themselves from the United States' influence, which they claimed to see manifested in the Commission's thematic agenda and analysis of certain countries' situations, as well as in its working methods.⁹

In these discussions, a central focus was Chapter IV of the IACHR Annual Report on the human rights situation in some specific countries which, due to their seriousness, warrant the attention of the regional protection body each year. Venezuela led the questioning of the grounds and criteria for selecting situations to be included in Chapter IV. Colombia, which tends to be mentioned in this chapter due to gross human rights violations related to the armed conflict in its territory, was also a strong critic of this work by the IACHR.¹⁰

to the Belo Monte project has turned into a discussion on the merits of the matter, which goes beyond the scope of precautionary measures." See PM 382/10 – Indigenous Communities of the Xingu River Basin, Pará, Brazil, <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>. This new decision appeared to mollify Brazil's original reaction to a certain extent and create a scenario in which it could begin to resume its dialogue with the Commission.

8 The new version of the Rules of Procedure maintains the Commission's authority to grant precautionary measures fully intact but regulates with greater specificity the characteristics and degree of explanation that must be included in the resolution granting them. See IACHR, Resolution 1/13, "Reform of the Rules of Procedure, Policies and Practices," <http://www.oas.org/en/iachr/mandate/strengthening.asp>

9 At the inauguration of the OAS General Assembly of 2012 in Cochabamba, Bolivia, the president of Ecuador gave a strongly-worded speech in which he denounced the IACHR's lack of independence, based on his view that it was influenced by hegemonic countries and civil society organizations that served foreign interests. He highlighted international financing as a factor that swayed the Commission, and particularly emphasized the fact that its headquarters is in Washington, D.C., even though the United States has not ratified the American Convention. He requested that the reform of the Inter-American system be analyzed "to bring it in to line with the new era in the region," and exhorted "respect for the sovereignty of our countries." See Telesur, "The OAS must be at the level of the changes in Latin America, states Ecuador" "(La OEA debe estar al nivel de los cambios en América Latina, afirma Ecuador)" <http://www.telesurtv.net/articulos/2012/06/04/correa-la-oea-debe-estar-al-nivel-de-los-cambios-en-america-latina-1823.html>

10 As the reform process advanced, Colombia decided to change its strategy and sought to have the Commission make a visit to the country to have Colombia be removed from Chapter IV of the Annual Report and instead have it be mentioned in

At the same time, North-South tensions were reflected in the discussions about the work of the IACHR's thematic rapporteurships. Ecuador spearheaded criticism of the asymmetrical resources and structure accorded to the Office of the Special Rapporteur for Freedom of Expression, as compared to the other mechanisms for thematic analysis of regional problems.¹¹ This disparity also prompted a discussion about the Inter-American system's sources of financing and, in particular, the weight of voluntary contributions that are specifically earmarked for certain topics on the Commission's agenda. This was compounded by criticism of the lack of universality of the Inter-American system, centered on the unjustifiable fact that neither the United States nor Canada¹² has yet to ratify the American Convention on Human Rights.¹³

the sections on follow-up to *in loco* visits. The visit finally took place on December 3-7, 2012. The final report is available at <http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf>

11 By then, the Office of the Special Rapporteur for Freedom of Expression had made statements on several occasions about the case of *El Universo* newspaper in that country. See in this regard the IACHR's Special Rapporteurship for Freedom of Expression, Press Releases R104/11, R20/12, R72/11 and R32/11, <http://www.oas.org/en/iachr/expression/artListCat.asp?year=&countryID=&IID=1&catID=1>. See also IACHR, PM 406/11-Emilio Palacio, Carlos Nicolás Pérez Lapentti, Carlos Pérez Barriga and César Pérez Barriga, Ecuador, http://www.oas.org/en/iachr/expression/jurisprudence/decisions_iachr_precautionary.asp

12 The United States signed the American Convention in 1977, but never ratified it. The Inter-American Commission has made significant efforts to address the human rights problems in States that have yet to ratify the Convention (part of the Caribbean, Canada, and the United States) and to include these into thematic reports, country reports, advisory opinions, precautionary measures, and reports on individual cases. In addition, the IACHR is the only forum, both at a regional and global level, where individual petitions and precautionary measures presented against the United States are considered—for example, the situation of persons deprived of liberty at the Guantanamo naval base.

13 In his speech at the OAS General Assembly in Bolivia, President Evo Morales stated: "To re-found the OAS, the universalization of the Inter-American Commission is important so that it may oversee enjoyment of human rights not only in Latin America but also in the United States, and if they don't want to protect human rights in the United States, it'd be better for the IACHR to disappear." See "Evo demands that the OEA be re-founded so that it not be subdued to the US" ("Evo exige refundar la OEA para que no esté sometida a EE.UU." http://www.la-razon.com/nacional/Evo-refundar-OEA-sometida-EEUU_0_1626437377.html). This scenario was compounded unfortunately by Venezuela's denunciation of the American Convention in September 2012. See "IACHR Regrets Decision of Venezuela to Denounce the American Convention on Human Rights," Sept. 12, 2012, http://www.oas.org/en/iachr/media_center/PReleases/2012/117.asp. Furthermore, in November 2014, the Dominican Republic's Constitutional Court (TC-0256-14) issued a ruling in which it found the instrument accepting the jurisdiction of the Inter-American Court to be unconstitutional. The specific consequences of this decision by the Dominican justice system remain to be seen.

The IACHR's direct involvement in the process was crucial to achieving a reform of its *Rules of Procedure, Policies, and Practices* with the approval of even some of the States that had spearheaded the initial criticism. When the last debate process was well under way, after the OAS General Assembly in Cochabamba, Bolivia in June 2012, the Commission took on a central role in the discussion¹⁴ and attained leadership in the exchanges, adopting a different profile than it had previously in the debates on "strengthening." Convinced that it should be the main protagonist in this process of reflection in order to preserve its autonomy and independence, the IACHR took a much more active approach. After a series of conversations on a political level, and a broad process of consultations with users of the Inter-American system, it initiated an analysis of its practices and expressed its agreement with the possibility of reforming some aspects of its Rules of Procedure. In this way, the resolution adopted at the 44th EGA managed to safeguard its powers not only for the promotion of human rights in the region, but also for their protection.

The debates continued then, above all, in forums outside the OAS. After the process formally ended, the Commission's agenda and working methods continued to be discussed in various sub-regional fora that have political decision-making bodies with real or potential impact on human rights. In this way, resistance to the IACHR's work continued to be manifested, for example, through the impetus and organization of the "Conferences of States Parties to the American Convention", or in meetings of MERCOSUR and UNASUR held after the formal process in the OAS had concluded.¹⁵

In recent years, the group of organizations that authored this book have worked together to safeguard the Inter-American Commission's essential powers in a situation in which they were at risk, to the detriment of the enforcement of human rights in the region. At the same time, this group actively participated in debates regarding constructive proposals to strengthen the Inter-American system.

In addition, it is worth noting that Ecuador has not been present during the latest period of sessions of the IACHR, a stance that warrants great concern and has prompted several statements by the Commission.

14 An initial result of this process was that on Oct. 23, 2012, the IACHR published and disseminated a document in response to the States' recommendations. See <http://www.oas.org/en/iachr/strengthening/docs/RespCPEn.pdf>

15 Regarding these forums, see the chapter in this book entitled "The Challenge of Complementarity in Latin America's New Institutional Architecture for Human Rights."

This book is the result of the experience gained by this group of human rights organizations, which has extensive in-depth familiarity with problems on the ground and came together in an informal alliance in light of the need to develop new strategies to accompany the so-called “strengthening process” of the Inter-American system. The participants in this initiative were the Centro de Estudios Legales y Sociales (CELS, Center for Legal and Social Studies) from Argentina; Instituto de Defensa Legal (IDL, Legal Defense Institute) from Peru; Due Process of Law Foundation (DPLF), a regional organization; Conectas Derechos Humanos (Conectas Human Rights) from Brazil; Centro de Estudios de Derecho, Justicia y Sociedad (DeJusticia, Center for Studies of Law, Justice, and Society) from Colombia; and Fundar, Centro de Análisis e Investigación (Center for Analysis and Research) from Mexico.

The chapters written by members of these organizations address various issues related to the IACHR’s functioning, topics of work, strategies, and potentialities in the region currently. They include an analysis of its functioning and structure, addressing the financial situation of the Inter-American system, which reveals the mismatch between States’ rhetoric and the system’s budgetary reality. There is also an evaluation made of the current transparency levels of the Commission and the Inter-American Court with regard to, for example, how appointments are made and cases are processed.

At the same time, we examine how the IACHR has performed the main activities that make up the pillars of monitoring, promoting, and protecting human rights, from its founding through to the strengthening process and its outcome. Furthermore, traditional interpretations of the principle of subsidiarity in international law are reviewed, in order to reflect on the role and work of the IACHR in light of the region’s current scenario. In addition, we suggest developing strategies focused on its thematic agenda, its modalities of intervention, and the forging of new grass roots support that may serve to neutralize new scenarios that put its valuable work of protecting human rights at risk.

Additionally, we analyze the intersections between the discussions on the IACHR’s functioning that developed in the last few years and the consolidation of sub-regional fora for integration in Latin America (MERCOSUR and UNASUR, for example), identifying possible paths for achieving a constructive complementarity between these fora and the traditional protection bodies of the Inter-American system, with regard to effective linkages to foster the enjoyment and exercise of human rights in the region.

In terms of case management, this publication presents an analysis

of the flow of petitions and cases received by the IACHR between 2002 and 2013, the strategies utilized to tackle delays and congestion in the Inter-American system, and a series of reflections aimed at addressing the procedural backlog. In addition, the book assesses the enforcement of reparation and non-repetition measures ordered by the Commission and the Court, describing various theories, practices, and challenges with regard to implementation, and developing an empirical analysis that contributes to identifying strategies for improvement for the Court, the Commission, States, and civil society. The final chapter, meanwhile, sums up the main conclusions and recommendations presented throughout the book, providing a concrete agenda for action in the “post-strengthening” context.

The organizations that have worked on this book hope that it serves as a constructive contribution to the debates about the present and future of the Inter-American system, as well as a proactive tool to bolster the regional human rights institutional framework.

References

- Aportes DPLF 16. Reflections on Strengthening the Inter-American Human Rights System.* 2012. <http://www.dplf.org/sites/default/files/1338572412.pdf>
- Aportes DPLF 19. The Reform of the Inter-American Commission on Human Rights.* 2014. http://dplf.org/sites/default/files/aportes_19_english.pdf
- Centro de Estudios Legales y Sociales (CELS). 2013. *Derechos Humanos en Argentina. Informe 2013. Buenos Aires: Siglo XXI.* [http://www.cels.org.ar/common/documentos/CELS.%20Informe%202013%20\[completo\].pdf](http://www.cels.org.ar/common/documentos/CELS.%20Informe%202013%20[completo].pdf)

Chapter 1

The Challenge of Complementarity in Latin America's New Institutional Architecture for Human Rights

Gabriela Kletzel, Camila Barretto Maia
Center for Legal and Social Studies (CELS)

Summary

One of the distinguishing features of the latest reform process that the Inter-American Commission on Human Rights (IACHR) has undergone is the variety of forums in which debates on its powers have taken place, including regional integration bodies outside of the specific purview of the Organization of American States (OAS). This chapter looks at the intersections between discussions carried out in recent years on the functioning of the IACHR, and the consolidation of sub-regional forums for Latin American integration. The first section reviews the current status of MERCOSUR's and UNASUR's development, identifying the political processes that led to their creation, their potential and limitations regarding the impact of their human rights mechanisms, as well as their differences with the bodies of the inter-American system. In the second section, we structure and analyze the way recent discussions on the inter-American system have played out at the Meeting of High-Level Authorities on Human Rights of MERCOSUR, in UNASUR and at the so-called Conferences of States Parties to the American Convention on Human Rights. Based on these two central themes, the chapter provides a critical reflection on potential paths for achieving constructive complementarity between the new sub-regional forums and the traditional protection bodies of the inter-American system. The aim of such a complementary relationship is to definitively overcome the risks of duplication and subsequent dispersal of efforts that could jeopardize effective coordination to promote the enjoyment and exercise of human rights in the region.

Initial reflections

One aspect that sets the latest reform of the Inter-American Commission on Human Rights¹ apart from previous discussions on the work of regional protection bodies² is the number of forums in which the present and future of the inter-American human rights protection system have been debated.

In recent years, in the framework of marked changes in the regional political scenario, the institutional architecture acquired new layers as a result of the promotion and creation of sub-regional mechanisms that have political decision-making forums with actual or potential impact on human rights. These mechanisms took on special visibility and relevance in the context of debates on the IACHR.

In this scenario, it seems necessary to begin a reflection to bring about and deepen the complementarity among the different entities of current regional and sub-regional human rights institutions, and thus prevent any attempts at duplication or substitution that might diminish the tools to respond to human rights violations available to the people of the hemisphere today.

To move forward on this objective, we will first review the different modalities of integration in Latin America and, in particular, the current status of development of the two regional blocs, MERCOSUR and UNASUR. In both cases we will attempt to take an initial look—far from exhaustive—that may serve as a basis for assessing their principal limitations and potential, in terms of mechanisms with both current and potential impact on human rights matters. With this in mind, the second section presents discussions on the role and future of the IACHR raised in these sub-regional forums. Finally, the third section will focus on the challenges and opportunities for achieving a constructive complementarity among the new sub-regional forums and the regional system's traditional bodies for the protection of human rights.

1 For more on the evolution and central issues of the latest process of debate on the IACHR, see this book's Introduction.

2 In the past, different discussions have taken place around the powers and work modalities of the bodies of the inter-American system. For an example, see Committee on Juridical and Political Affairs (CAJP), *Results of the Process of Reflection on the Inter-American System for the Promotion and Protection of Human Rights (2008-2009)*, March 18, 2009, CP/CAJP-2665/08 rev. 8 corr. 3.

Latin American integration and human rights

Sub-regional integration systems have arisen as a substantial presence in relations between the States of the Americas over the past two decades. In this sub-regional environment, the oldest integration scheme in Latin America is MERCOSUR.³ Its initial purpose was to increase the autonomy and global competitiveness of the markets of the southern sub-region, with the establishment of an integrated market including Argentina, Brazil, Paraguay and Uruguay, through the creation of a free trade zone and policies of production complementarity.⁴

Sub-regional integration forums gained new momentum at the turn of the millennium. On the heels of a significant crisis between 1998 and 2000, MERCOSUR was rethought and launched anew in 2001-2002, now not only as an economic trade bloc, but mainly as a political alliance. As of 2003, with the presence of populist-leaning governments in Argentina and Brazil, the idea of a “social MERCOSUR” also gained ground, and was reflected in different initiatives such as the creation of the bloc’s Social Summit, the institutionalization of the Meeting of High-Level Authorities on Human Rights and the establishment of a MERCOSUR Parliament.⁵ In that same period, the Andean Community of Nations (CAN),⁶ which, like MERCOSUR, had been founded with a predominantly commercial purpose,⁷ devised an Integrated Social Development Plan and agreed to promote regional integration aimed at a more balanced approach to social, cultural, economic, political, environmental and commercial matters.⁸

3 Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay, adopted in 1991, http://www.mercosur.int/innovaportal/file/719/1/CMC_1991_TRATADO_ES_Asuncion.pdf

4 In parallel to MERCOSUR, in 1993 the Andean Community of Nations (CAN), made up of Bolivia, Colombia, Ecuador, and Peru, also became a free trade zone.

5 See Coutinho, Ribeiro, and Kfuri (2008). The Andean Community took a similar route, incorporating a social pillar into its process of integration as of 2003. See an historical overview at <http://www.comunidadandina.org/Resena.aspx>

6 CAN was created in 1969 with Bolivia, Colombia, Chile, Ecuador, and Peru as its founding members. In 1973, Venezuela acceded to the agreement, but left the bloc in 2006. Chile pulled out of CAN in 1976.

7 The Caracas Declaration of 1991 establishes an Andean free-trade zone.

8 Quirama Declaration, XIV Meeting of the Andean Presidential Council, Colombia, June 28, 2003.

Parallel to this, new sub-regional systems were being created, such as the Bolivarian Alliance for the Peoples of Our America (ALBA),⁹ established in 2004, and also the Union of South American Nations (UNASUR), established in 2008. The latter has a broad reach in terms of its objectives and its members, encompassing all South American States.¹⁰ The latest of these initiatives was the creation in February 2010 of the Community of Latin American and Caribbean States (CELAC), successor to the Rio Group and the Latin American and Caribbean Summit on Integration and Development (CALC), which facilitated coordination and cooperation among the countries of the region for decades, with the exception of the United States and Canada.¹¹ CELAC's main objective is inherent in its name: to guarantee a forum that includes all the Latin American and Caribbean States, without exception. CELAC holds periodic high-level summits with the participation of the region's 33 countries.

Of all these initiatives, we will focus on MERCOSUR and UNASUR, which have established specific mechanisms centered on human rights. In the case of MERCOSUR, this approach is already a reality: over the years, it has created forums and institutions specialized in human rights. And as for UNASUR, the recent creation of a high-level group on human rights raises the question of how it should coordinate with existing mechanisms in order to have an effective impact on the human rights situation in the region.

9 At the time this chapter was written, ALBA members included: Venezuela, Cuba, Bolivia, Nicaragua, Dominica, Ecuador, Saint Vincent and the Grenadines, and Antigua and Barbuda. Of note is the inclusion of Caribbean nations in this bloc. <http://www.alianzabolivariana.org/modules.php?name=Content&pa=showpage&pid=2015>

10 Constitutive Treaty of the Union of South American Nations, Articles 2 and 3, http://www.unasursg.org/index.php?option=com_content&view=article&id=290&Itemid=339. UNASUR members are: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

11 The Permanent Mechanism for Consultation and Concerted Political Action, known as the Rio Group, was created in 1986 under the Declaration of Rio de Janeiro. Since its inception, the Rio Group has held annual meetings of cooperation, making it an alternative parallel political forum to the OAS, without the presence of the United States. The number of participants in this group grew consistently over the years, until it included nearly all the countries of Latin America and the Caribbean.

MERCOSUR: Its creation and political and institutional evolution

MERCOSUR was created in 1991 with the ratification of the Treaty of Asunción, and then consolidated in 1994 with the adoption of the Protocol of Ouro Preto,¹² which establishes the basis for its institutional structure. As mentioned previously, it was initially started with strictly economic objectives, namely, the establishment of a common market amongst its four original members: Argentina, Brazil, Paraguay and Uruguay.¹³

Over the years, and as the result of strong political will on the part of successive governments, MERCOSUR also began to be conceived as a strategic alliance based on certain shared principles. This aspiration led to the adoption of new agreements and declarations and, in particular, to additional protocols to the Treaty of Asunción. These protocols were incorporated into the core set of instruments considered to be foundational, constituent elements of the bloc. MERCOSUR, then, began to justify its actions based on principles such as “the full observance of democratic institutions as an essential condition for the development of integration processes;” entitlement of MERCOSUR’s workers “to effective equality of rights, treatment, and employment and occupational opportunities,” and even “respect for human rights and fundamental freedoms.”¹⁴

Along with the thematic broadening of MERCOSUR came an intense process of “institutional expansion” as well. In recent years, the number of forums and areas dedicated to specific themes has increased exponentially, to the point where the bloc now has more than one hundred groups, sub-groups, ad hoc groups, committees, commissions, specialized meetings, and meetings of ministers, among others.¹⁵

12 Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR (Ouro Preto), http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp

13 Currently the Bolivarian Republic of Venezuela has become a permanent, full member, and Bolivia, Chile, Colombia, Ecuador and Peru are associate members of the bloc.

14 See the Ushuaia Protocol on the Democratic Commitment in the MERCOSUR, the Republic of Bolivia and the Republic of Chile, Article 1, http://www.MERCOSUR.int/innovaportal/file/2485/1/cmc_1998_protocolo_es_ushuaia.pdf; the Social-Labor Declaration of MERCOSUR, December 10, 1998, http://www.MERCOSUR.int/innovaportal/file/2485/1/ushuaia_ii.pdf, and the Asunción Protocol on Commitment to the Promotion and Protection of Human Rights of MERCOSUR, 2005, Article 1, <http://www.mre.gov.py/v1/Adjuntos/MERCOSUR/Acuerdos/2005/espanol/88-protocolodeasuncionsobrepromocionyprotecciondelosderechoshumanosdelMERCOSUR.pdf>

15 For the complete MERCOSUR structure, see <http://www.mercosur.int/innovaportal/v/492/4/innova.front/organigrama>

In addition to the institutional expansion process, MERCOSUR has increased its strength as a political bloc. The presidential summits have proven to be a forum with high impact on different sub-regional issues. Some paradigmatic cases have been support for the government of Bolivia in the face of an attempted destabilization, and the suspension of Paraguay from the bloc, in compliance with the Ushuaia Protocol on Democratic Commitment.¹⁶

Nevertheless, if we analyze the specialized institutions of MERCOSUR, it is apparent that political strength does not fully translate into an institutional framework with clear impact. Historically, there have been some institutional shortcomings that have contributed to a reduced impact in practice.¹⁷ Effective social participation is also lacking. And while the speeches and declarations made by member state authorities might point to robust political will when it comes to broader participation in the bloc,¹⁸ in practice it can be seen that the policies of

16 "Joint Communiqué of the Presidents of the States party to MERCOSUR," June 29, 2012, http://www.MERCOSUR.int/innovaportal/file/4379/1/comunicado_conjunto_presidentes_ep.pdf. See also press clippings: TeleSur, June 29, 2012, "MERCOSUR suspende a Paraguay hasta las próximas elecciones," <http://www.telesurtv.net/articulos/2012/06/29/paraguay-queda-fuera-de-mercosur-hasta-las-proximas-elecciones-en-abril-4872.html>. ABC Color, June 30, 2012, "MERCOSUR suspende a Paraguay e incorpora a Venezuela," <http://www.abc.com.py/edicion-impresa/politica/MERCOSUR-suspende-a-paraguay--e-incorpora-a-venezuela-420574.html>

17 In this sense, for example, the meetings and specialized forums have limited decision-making power. If they wish to make a decision at the regional level, they must submit a draft resolution to one of the bloc's three decision-making bodies: the Common Market Council (CMC), made up of the bloc's ministers of foreign affairs and economy; the Common Market Group (GMC), made up of foreign affairs officials generally in charge of the MERCOSUR or foreign trade sections; or for exclusively trade-related matters, the MERCOSUR Trade Commission (CCM). This has the effect of "cascading concentrations of power." All relevant provisions must obtain the approval of the CMC, which meets just once every six months and ends up having little time to vote, making it very difficult to prioritize the most important provisions. See Deisy Ventura, "Sociedades efervescentes, governos sem gás," *Le Monde Diplomatique Brasil*, February 4, 2008, <http://www.diplomatique.org.br/artigo.php?id=135>

At the same time, the logic of "specialized meetings" gives rise to a huge overlap of issues and agendas, making tasks redundant sometimes, and other times, contradictory in the bloc's different forums. Thus, for example, without adequate coordination, it is possible that the same issues might be discussed in the Meeting of Ministers and High-Level Authorities on Women's Affairs (RMAAM) and also in the Working Groups of the Meeting of High-Level Authorities on Human Rights. This overlap may also occur with human rights problems related to the environment, health, education, migrant rights, labor, and poverty reduction, among others.

18 Brazilian President Dilma Rousseff stated in December of 2012, "The Social Summit is now also an organic part of the institutional framework of MERCOSUR

participation, despite being significant in quantitative terms, continue to lack in quality. Emblematically, the great participatory forum, the Social Summit¹⁹ functions in parallel and without any clear institutional link to the bloc's decision-making bodies. Therefore, the social organizations that take part in the numerous panels and meetings that make up the Summit—forums of immeasurable value when it comes to integration—end up issuing statements every six months that are publicized and touted in speeches, but that have little or no impact on the decisions made by the bloc.²⁰ Likewise, the current rotational system of the pro tempore presidency of MERCOSUR, which means that meetings are held every six months in a different country and organized by different government officials each time, is not conducive to participation (or to the continuity of discussions and the efficiency of the bloc). This often makes it difficult to obtain and systematize information on what goes on in the various forums.

[...] to bring in social movements [as] fundamental agents of integration" (Meeting of the MERCOSUR Heads of State, Associate States, and invited countries - Brasilia). Uruguayan president José Mujica stated in September of 2012, "Fundamentally it is the collective responsibility of the progressive forces of our Latin America: the phenomena behind integration are not of the masses. They are not phenomena that draw crowds, shake up the population, or touch on the great subjectivities. And [yet] history cannot be made, or even attempted, if there is no capacity for the great masses to participate." ("Issues and Challenges Facing MERCOSUR", speech given at the Second International Symposia of CEFIR, September 2012).

19 The MERCOSUR Social Summits have been held since 2006, when the first one was convened in the city of Brasilia. Due to the success of that first gathering, at the XXXII Summit of MERCOSUR Heads of State, held in 2007 in Rio de Janeiro, it was decided that the Social Summit would be incorporated as a permanent activity in the framework of the meetings of presidents, which occur two times a year. However, the formal decision creating and establishing the frequency of the Social Summit was only approved in 2012 (CMC/DEC, 56/12).

20 For example, one of the MERCOSUR Social Summit declarations demands "universal, compatible public policies among the countries of the bloc that effectively respond to the needs of men and women with regard to access to work, education, health, essential public services, and the full exercise of economic, social, political, cultural, and environmental rights." There are also specific demands, such as "the investigation into the Curuguaty massacre and an end to the persecution and annihilation of indigenous peoples, in particular the Kaiowá Guaraní people" (Declaration of the XIV MERCOSUR Social Summit, Brasilia, December 2012, Art. 7); it remains to be seen, however, what institutional mechanisms could facilitate the impact of this type of declaration on the bloc's effective decision-making. The decision in 2012 to institutionalize the Summit for the first time would seem to be a step forward, albeit insufficient, toward solving this problem as it resolved that "the results of the Social Summit will be presented at the first regular meeting of the Common Market Group (GMC) to take place after the Summit. The GMC shall submit said results to the competent forums within the MERCOSUR institutional framework." (CMC/DEC, 56/12, Art. 2).

Human rights in the Southern Common Market

The MERCOSUR forum devoted exclusively to human rights is its Meeting of High-Level Authorities on Human Rights (RAADH), created in 2004.²¹ The RAADH is attended by countries' national human rights secretaries and directors of the human rights divisions of their foreign ministries. It is a platform for political coordination and, as such, could be compared to the United Nations Human Rights Council,²² but it does not fit into the category of judicial or quasi-judicial human rights "protection mechanisms."²³

Beyond the geographic scope of its membership,²⁴ the biggest difference between the RAADH and the UN Human Rights Council is that the former does not have decision-making autonomy,²⁵ and thus, in cases where it considers that MERCOSUR must take some kind of measure, it must submit a draft decision to the Common Market Council (CMC). It is also worth noting that, in comparison to the Human Rights Council,²⁶ the RAADH does not have a fixed headquarters, rather, it is a meeting held at least once every six months, in the country holding the MERCOSUR pro tempore presidency. In any case, the RAADH's potential lies in the fact that it provides a space for open exchange between key political authorities on human rights matters in the sub-

21 CMC Resolution 40/04 does not establish any specific mandate for the RAADH, and only provides for "establishing a meeting of high-level authorities in the area of human rights, in which the competent bodies on the subject from member and associate states will participate, under the terms of CMC Decision 18/04, including the respective foreign ministries [...] To assign to the Forum for Consultation and Concerted Political Action (FCCP) the duties provided for in CMC Decisions 02/02 and 23/02 with regard to the activities of the Meeting of High-Level Authorities on Human Rights." http://www.mercosur.int/innovaportal/v/580/1/secretaria/decisiones_2004

22 It is worth noting that representation in both mechanisms is different. While the RAADH is conceived to draw the attendance of the highest-ranking human rights authorities from its member states (generally with the status of minister), States on the UN Human Rights Council are represented by members of the countries' missions to the international organizations in Geneva—in other words, officials from foreign affairs ministries who do not necessarily work exclusively on human rights issues.

23 Since 2010, CELS has participated regularly in the RAADH, attending the meetings in Foz do Iguazú (2010), Montevideo (2011 and 2013), Buenos Aires (2012), Porto Alegre (2012), and Brasilia (2012).

24 One is a sub-regional mechanism, while the other has universal scope.

25 The Human Rights Council (UNHRC) is the UN's principal political body on human rights. It is comprised of 47 States chosen by the UN General Assembly.

26 The UNHRC has its headquarters in Geneva, Switzerland.

region. At the same time, its relatively small number of members provides the conditions for effective coordination, both on foreign policy as well as domestic public policy in each of the member and associate countries.

The RAADH has, however, experienced some problems in its functioning since its creation. On the one hand, certain institutional practices have discouraged participation by civil society. For example, the bloc's presidents do not usually publicize the meetings' dates or locations. Likewise, for stakeholder organizations it is hard to obtain information on the content of the discussions so as to prioritize the meetings over others for advocacy purposes in a context of limited resources. The drafting of the agenda, especially that of the plenary session, has repeatedly been carried out without any advance notice, and with information provided only to those who request it, generally just a few days before the event.²⁷

Another possible critique has to do with the political relevance of the decisions made. The outcomes of several of the meetings raised questions as to just how much prior reflection the secretaries and foreign ministers of each country put into preparing for each meeting. As a result, agreements of a more political nature coming out of the RAADH have often been a direct reflection of statements made at a presidential level.²⁸ At the same time, for years numerous initiatives have been approved for the "promotion" of human rights, such as joint seminars, public information campaigns, and others, which have not proven to be tools that have any concrete impact on the problems the region faces.

Additionally, the RAADH has created a significant number of working groups and thematic commissions.²⁹ Devised to address specific human rights issues more systematically and with greater expertise,

27 It is noteworthy that these practices have often been implemented by the same officials who, in other international human rights forums, do prepare for their participation and publicize the agenda and draft resolutions with significant advance notice.

28 One example that can be mentioned is the idea that came out of the XXII RAADH to make a declaration on Paraguay's institutional rupture. Nevertheless, other than the proposal to replicate the condemnation issued by the presidents, high-level authorities did not take the initiative to think about the specific, differentiated contribution this forum could have on the matter; in the end, it was the MERCOSUR Public Policy Institute for Human Rights (IPPDH) and civil-society organizations present at the meeting who made the suggestion. We will look at this initiative more closely later in this chapter.

29 These address issues such as the rights of the child, the protection of the rights of older persons, discrimination, racism, and xenophobia; and LGBT rights.

many of these groups have had problems with continuity when it comes to the officials that comprise them and a lack of knowledge regarding the content of the specific mandate, among other difficulties. For this reason, in numerous cases the outcome of this work has had scant institutional, legal, or political weight, in addition to low representation or impact.³⁰

That said, this forum has undergone some changes in recent years. In 2010, the MERCOSUR Public Policy Institute for Human Rights (IPPDH) was created in the framework of RAADH, with the objective of “contributing to the strengthening of the rule of law in all member states, through the design and monitoring of public policies on human rights and to the consolidation of human rights as a fundamental pillar of MERCOSUR’s identity and development.”³¹ The Institute’s creation has provided an impetus for strengthening RAADH.

The Institute has contributed to a “reinterpretation” of the RAADH’s work through its efforts to have State officials take a deeper look at the impact of their work, and by suggesting a series of changes in practices and institutional adjustments so as to better harness the forum’s potential. In this sense, there have been initiatives since 2011 that aim to bolster the RAADH, such as formally adopting rules of procedure;³² gradually solidifying the idea of avoiding seminars and other costly actions of

30 Perhaps the most notable exception to this dynamic has been the Niñ@Sur Standing Committee on the rights of children and adolescents, which has managed to garner high levels of participation and function as a significant platform for dialogue and political coordination on the issue.

31 The IPPDH was created under CMC Decision 014/2009; its structure and first budget were approved in 2010 pursuant to CMC Decisions 012/2010 and 013/2010. The IPPDH began to function provisionally in 2010, with the designation of Víctor Abramovich as Executive Secretary of the Institute (GMC Resolution 05/10).

32 The rules of procedure are available at <http://www.ippdh.MERCOSUR.int/backend/Uploads/Reglamento-Interno-RAADDHH.pdf>. Although the document provides a regulatory framework for the forum’s functioning, increasing its transparency and predictability, and contains important clauses, such as the obligation to publish the agenda with a minimum advanced notice in relation to the dates of sessions, it also provides procedures for the participation of civil society, which could entail certain restrictions with regard to its effective implementation. In particular, it creates a system of accreditation that clearly allows the pro tempore presidency to refrain from making all requests effective, without specifying the criteria (Art. 31). Furthermore, it establishes that the priority arenas for participation shall be the working groups and thematic commissions, which opens the plenary sessions for oral interventions only on issues that have not been examined previously or are not present in draft agreements (Art. 33). Although the document was finally approved, it has still not been implemented given the absence of RAADH meetings since November 2013. It would be important to assess its practical use when drawing conclusions about its terms, and compare it with other models of participation in international human rights forums.

little impact, and focusing on more politically relevant agreements;³³ creating the first technical group in this area, made up of subject-specific experts,³⁴ and shuttering groups that have not shown much progress;³⁵ ascribing the IPPDH, whose permanent headquarters are based in Buenos Aires and which has a cadre of technical officials, mandates for preparing assessments and work plans in different areas; and creating and launching a website for the Institute³⁶ to publicize meetings and RAADH decisions and provide access to its official documents.

It was in this context, at the XX meeting held in Montevideo in December 2011, that the Uruguayan president pro tempore, with the support of the IPPDH, decided to lead a process to reorganize how the RAADH functions, with which the different commissions and working groups, as well as delegations of the States, were to submit duly written draft agreements to the plenary session for it to vote on. This process would be more compatible with more complex decision-making by allowing agreements to be negotiated based on previously prepared drafts. Furthermore, it would allow for negotiations to take place prior to the meeting, depending on how far in advance the States arranged to circulate the drafts. This methodology would also allow for a much clearer record to be kept in the minutes of the meetings of the agreements reached between the States parties, thus enabling social organizations to better understand what RAADH has done. These practices have been implemented, with greater or lesser success, in recent meetings.

At the same time, as we will see in more detail in the last section, the IPPDH's work in recent years has served as a catalyst for the discussion and adoption of a number of important initiatives. These include the request for an advisory opinion on migrant children³⁷ from the Inter-American Court of Human Rights; work on the drafting of a Guide to Archives and Document Collections on Coordinated Repression in the Southern Cone; and decisions regarding foreign policy coordination

33 At the XX session of the RAADH in Montevideo, the Uruguayan representative requested that a new proposal by one of the working groups to hold a seminar be rejected, arguing that this type of event incurred a very high expenditure of resources in terms of the limited impact demonstrated up to that point.

34 This refers to the Technical Group on Operation Condor, created at the XX RAADH in Montevideo.

35 For example, the group on indicators for economic, social and cultural rights was shuttered and the monitoring of this issue was delegated to the IPPDH.

36 <http://www.ippdh.MERCOSUR.int/>

37 OC-21/14 was issued by the Inter-American Court on August 19, 2014.

on positions submitted to the UN Human Rights Council, including the joint initiative for a special rapporteurship on the rights of older persons. These changes highlight the RAADH's potential as a forum for political coordination that also has the technical-substantive support of a permanent public policy institute on human rights.

In any case, there is still much work to be done and, above all, political commitment needed from States in order for this forum to reach its potential. In addition to the need for an effective policy to encourage public participation, it is possible to identify different issues that, either due to the shared history of the bloc's countries or its intrinsic transnational nature, could be given even more weight on the permanent working agenda of this forum and have a significant impact on foreign policy coordination, as well as joint formulation of public policies to address similar problems.

Even so, the forum's limitations and contradictions became starkly evident when its work was interrupted in the context of a political crisis in Venezuela, starting with the demonstrations that began in February 2014.³⁸ At the time, Venezuela held the pro tempore presidency and no further meetings were convened by the bloc or the RAADH after the last one held in November 2013 in Caracas. It was not until July 2014 that the presidency finally passed to Argentina, and in November of that year the 25th RAADH was held.

UNASUR: the new South American bloc

The principal objective of UNASUR is "to build, in a participatory and consensual fashion, a forum for coordinating the cultural, social, economic and political spheres among its peoples."³⁹ The bloc, made up of the 12 States of the subcontinent,⁴⁰ adopted its constitutive treaty in Brasilia in 2008 during the Special Meeting of the Council of Heads of State and Government. This instrument entered into force in March 2011, when Uruguay became the ninth country to ratify it.

38 The interruption in the RAADH meetings, precisely in the context of the demonstrations in Venezuela in which 43 people died and hundreds were injured, is particularly worrisome.

39 Constitutive Treaty of the Union of South American Nations, Article 2 (Objective), http://www.UNASURsg.org/index.php?option=com_content&view=article&id=290&Itemid=339

40 UNASUR member countries are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

UNASUR, according to its constitutive treaty, possesses a wide-ranging set of specific objectives. 21 in all, these objectives run the gamut from “strengthening political dialogue between the member states to ensure a forum of coordination to bolster South American integration and participation [...] on the international stage,” to “industrial and productive integration, with particular focus on small- and medium-sized enterprises, cooperatives, and other forms of productive organization,” as well as “equitable and inclusive social and human development to eradicate poverty and overcome inequalities in the region.”⁴¹

It is important to point out the regional political conception that underpinned the creation of UNASUR. The bloc was conceived in response to the South American States’ need for an integration mechanism that, in contrast to other existing initiatives, would encompass the entire subcontinent and thus contribute to its “systemic stability.”⁴² In geopolitical terms, the idea was to create a bloc that would fulfill the same role historically delegated to the OAS,⁴³ but without the participation of Central America and, especially, North America, specifically so that South America could position itself as an alternative

41 Other objectives include: universal access to social security and health services; cooperation on migration with a comprehensive approach in keeping with full respect for human and labor rights aimed at migration regularization and policy harmonization; cooperation to strengthen citizen security and promote cultural diversity and the manifestations of memory, knowledge, and know-how of the region’s peoples, so as to strengthen their identities. Also included are topics such as: the protection of biodiversity, water resources and ecosystems, as well as cooperation aimed at disaster prevention and the fights against the causes and effects of climate change, among others. See the Constitutive Treaty of the Union of South American Nations, Article 3, http://www.UNASURsg.org/index.php?option=com_content&view=article&id=290&Itemid=339

42 In line with this, former Brazilian President Luiz Inácio Lula da Silva stated before the United Nations General Assembly in 2008, “UNASUR, created in May, is the first treaty in 200 years of independence to bring together all of the countries of South America. [...] Slowly doing away with the old conformist alignment of the countries of the South with traditional [power] centers [...] Developing countries have been gaining credibility to take on a new role in the design of a multipolar world.” And he added, “a new political, economic and commercial geography is being built in the world. Today we are seeking to solve our problems from multiple angles; our north is sometimes in the south.” *Página12*, “Lula: ‘UNASUR es el primer tratado en 200 años de vida independiente,’” September 23, 2008.

43 Article 1 of the Charter of the Organization of American States sets forth the fundamental purpose of the regional organization: “The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.” http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm

power bloc to the great world powers, the US in particular.⁴⁴ In this framework, some of UNASUR's successful interventions include the creation of an investigative commission on the Pando, Bolivia massacre in 2008,⁴⁵ conflict mediation between Ecuador and Colombia in 2010,⁴⁶ and the reaction to the attempted coup d'état in Ecuador in 2010, which gave rise to the Democratic Clause.⁴⁷

Indeed, achieving stability in the sub-region was a challenge in view of the fact that this bloc was not based on shared fundamental political ideology, but on accommodating governments with different political views under a structure prioritizing unity and stability. Thus, UNASUR sought that stability in two essential ways: first, by creating mechanisms for dialogue and peaceful conflict resolution, complemented by democracy-strengthening policies in the region;⁴⁸ and second, by encouraging coordination and exchange on defense matters, with a view toward increased comprehension and mutual trust among the defense sectors of the South American States.⁴⁹

44 In her acceptance speech as UNASUR President pro tempore in 2008, Michelle Bachelet, then President of Chile, declared that the new bloc would provide "the opportunity to have a strong voice, a clear voice, in this 21st-century world. A world that is very different from the one of previous eras and that has required multiple international institutions begin to reform, in order for the 21st century to be a much better one for our populations. A fundamental concern that goes along with this reorganization is precisely the emergence of the developing world. And I am talking about China, India, Asia, but also about Brazil, Mexico, and Latin America, among other regions. And this emergence of new actors will have profound consequences on the international system." The complete speech is available at <http://unasursg.org/PDFs/presidencia-pro-tempore/discursos/Discurso-bachelet-brasilia.pdf>

45 See, for example, <http://exwebserv.telesurtv.net/secciones/noticias/37759-NN/UNASUR%20entreg%C3%B3%20a%20bolivia%20informe%20sobre%20masacre%20en%20pando/>

46 See, for example, <http://ambito.com/noticia.asp?id=536756>

47 See <http://www.telam.com.ar/notas/201403/55935-rige-desde-hoy-la-clausula-democratica-en-la-UNASUR.html>

48 See the Additional Protocol to the Constitutive Treaty of UNASUR on the Commitment to Democracy, <http://unasursg.org/PDFs/unasur/protocolo/Protocolo-adicionalcompromiso-con-la-democracia.pdf>

49 It is no coincidence, in this sense, that the South American Defense Council (CDS) was one of the first sectoral councils proposed in the bloc, nearly at the same time as its creation. The CDS was proposed by the Brazilian delegation at the meeting held in Brasilia in May 2008, the same one where the bloc's Constitutive Treaty was signed. Its formal creation came about in December of that same year by decision of the Council of Heads of State. See the language of the decision at <http://unasursg.org/PDFs/Consejos/Consejo-Suramericano-de-Defensa/Estatutos-de-creacion-Consejode-Defensa-Suramericano.pdf>

In terms of the bloc's institutional structure, UNASUR, like MERCOSUR, has a system of pro tempore presidencies held by a member state for one year, organized in alphabetical order. Likewise, nearly all of its bodies are organized as "councils." The four main entities in its structure are: the Council of Heads of State and Government, the Council of Ministers of Foreign Affairs, the Council of Delegates, and the General Secretariat.⁵⁰ Subordinate to these are the so-called sectoral councils, which are "political bodies for consultation and consensus, generally made up of the ministers of the member states in the respective areas of integration of their respective sectors." These councils have their own statutes, based on the principles set forth in the constitutive treaty.⁵¹ The agreements they produce must be submitted to the consideration of the principal body that created the council.⁵²

At present, UNASUR has two areas that address social topics, both as sectoral councils: the South American Health Council (CSS), created in 2008,⁵³ and the South American Social Development Council (CDS), created in 2009.⁵⁴ Both are comprised of ministers of their respective topics or their equivalents, who hold regular meetings once a year in keeping with each UNASUR pro tempore presidency;⁵⁵ special meetings may also be organized. The council chair is held by the State that holds

50 The Councils of Heads of State and of Ministers of Foreign Affairs are the bloc's highest bodies. The Council of Delegates is responsible for implementing the strategic guidelines defined by the other councils and for drawing up draft decisions, resolutions, and regulations for the approval of the Council of Ministers of Foreign Affairs. The General Secretariat is the executive body of the system, meaning "the body that, under the leadership of the Secretary General, executes the mandates conferred upon it by the bodies of UNASUR and exercises its representation by express delegation of said bodies" (Constitutive Treaty of the Union of South American Nations, Articles 6-10).

51 See the description of UNASUR published on the website of the South American Institute of Government in Health. <http://isagsunasul.org/interna.asp?lang=3&idArea=38>

52 Constitutive Treaty of UNASUR, Article 5.

53 The decision to establish a Council on South American Health, adopted by the Heads of State and Government meeting on December 16, 2008 in Bahía, Brazil, at the special meeting of UNASUR, <http://unasur.org/PDFs/Consejos/Consejo-Suramericano-de-Salud/Estatutos-Consejode-Salud-Suramericano.pdf>

54 Created by decision of the III Regular Meeting of the Council of Heads of State and Government, in accordance with the Constitutive Treaty of UNASUR, on August 10, 2009 in the city of Quito, <http://unasur.org/PDFs/Consejos/ConsejoSuramericano-de-Desarrollo-Social/PDF-Consejo-Desarrollo-Social/Estatutos-Consejo-de-Desarrollo-Social-Suramericano.pdf>

55 This means they meet once a year, as that is the term of each UNASUR president; MERCOSUR has six-month terms.

the pro tempore presidency, and the councils are in charge of creating technical groups by thematic area (CDS) or working groups to examine specific issues (CSS). These councils have a more solid institutional basis than the RAADH in that they have adopted their own statutes which, among other things, clearly establish the objectives of these forums.⁵⁶ This has allowed them to establish goals with a potential impact on the issues that are the subject of their work.⁵⁷

As we will see in the next section, during the debates on the reform of the inter-American human rights system in 2011, discussions also began on the possible creation of a forum dedicated to the issue of human rights under the purview of UNASUR. These discussions led to the establishment of a High-Level Group for Cooperation and Coordination on Human Rights.

Finally, with regard to the structure of UNASUR, it is worth noting the First Citizen Participation Forum held in August 2014 in Tiquipaya, Cochabamba province, Bolivia. In that first meeting of the Forum, there was a proposal to create thematic councils to address issues like migration, the environment, human rights, native peoples, peoples of African descent, sexual diversity, and gender identities, among others.⁵⁸ The initiative, while it does reflect to some extent the bloc's will to have a policy of public participation, also bears a remarkable similarity to the MERCOSUR Social Summit, which has been the target of significant criticism for some years now.⁵⁹ The problem with having

56 As seen in the previous section, MERCOSUR's RAADH was not given a mandate with specific content at the time of its creation (CMC Decision 40/2004).

57 In the case of the South American Health Council, for example, its statute includes among its specific objectives "to identify critical social determinants for health and promote inter-sectoral policies and actions, such as: food security, a healthy environment, climate change and others" and the "strengthening of member states' health care institutions, such as: institutions providing health services, regulatory institutions, public health institutes and schools, education and training institutions." These are two pillars with regard to which a political coordination body like this one could play an important role. In the case of the Council on Social Development, its statute establishes as its specific objective "to contribute to the development of effective social policies in the UNASUR member countries, aimed at consolidating comprehensive social development." See, in this sense, the South American Social Development Council's charter, point IV(a), <http://www.UNASURsg.org/images/descargas/ESTATUTOS%20CONSEJOS%20MINISTERIALES%20SECTORIALES/ESTATUTO%20CONSEJO%20DE%20DESARROLLO%20SOCIAL.pdf>

58 See the article on the Forum, <http://mesadearticulacion.org/noticias/concluyeste-viernes-el-primer-foro-de-participacion-ciudadana-de-UNASUR-con-una-directiva-y-propuestas-desde-las-organizaciones-sociales/>

59 See Deisy Ventura, "Sociedades efervescentes, governos sem gás," *Le Monde Diplomatique*, Brasil, February 4, 2008, <http://www.diplomatique.org.br/artigo>.

an area dedicated exclusively to public participation is its categorical separation from the bloc's decision-making areas. In these summits or forums, civil society does have a voice and some degree of visibility (because of its annual format and its "big event" attributes), but they solely make statements, which tend to be very general due to the variety of actors present, which may or may not be taken into account by the States' representatives.

An effective policy of participation should, on the contrary, encourage the presence of social movements and civil society at every one of the decision-making bodies or high-level forums on specific issues, conducting systematic follow-up broken down by issue, and directly impacting decisions. In this sense, it is yet to be seen what participation policy the UNASUR High-Level Group will adopt to address human rights issues in the region.

After this brief overview of the origins and current status of MERCOSUR and UNASUR, and to highlight the possible scenarios of complementarity among the entities of regional human rights institutions, we will now turn to the different points of overlap between the debates on reforming the regional protection system and the evolution and agendas of sub-regional human rights forums. Both the UNASUR initiatives to create a new mechanism with a human rights mandate, as well as the analysis of the work and discussions regarding the inter-American human rights system that came about in the RAADH warrant special attention. Likewise, while the Conferences of States Parties to the American Convention on Human Rights held in recent years may seem to be *ad hoc* meetings aimed at arriving at a consensus that was not possible in the OAS, they also deserve mention.

The inter-American system in light of the new regional human rights institutional framework

UNASUR and the challenge of non-duplication

In tandem with the reform efforts at the OAS, in 2011 discussions also began on the possible creation of a human rights forum within UNASUR. This process started with a presentation by Ecuador to create a South American human rights coordination body and the launching of a working group to study a proposal on the treatment and promotion

php?id=135. See also Barretto Maia, Bascary, and Kletzel (2013).

of human rights in UNASUR. This initiative was so closely linked to the debates happening at the same time with regard to the inter-American system⁶⁰ that Ecuador's original proposal emphasized:

"...The organizations dedicated to ensuring observance of human rights in the Americas have disregarded what their main objective should be: the promotion and development of mechanisms that help the social, but above all, human development of all our peoples. The primary activity of these organizations currently is the receipt of petitions, analysis and adjudication of cases, but the reality and needs of our people go way beyond reading an annual report with recommendations to the States that may or may not be fulfilled. The creation of a forum focused on the protection, development, and, above all, practice of human rights at the UNASUR level, is imperative at this time."⁶¹

In light of this assessment, it proposed creating an "inter-State" coordinating body with a view toward addressing human rights problems in the region that even provided for the potential receipt and processing of complaints of human rights violations.

Different States and social organizations viewed this proposal with great concern; they saw it as a push to directly replace the inter-American system—or at least indirectly by way of de-legitimization—with a new, different structure within the UNASUR framework. It seemed to aim at replacing a mechanism composed of independent experts, who, among other duties, evaluate cases submitted by victims of human rights violations, with another system with a different approach and made up of only State representatives.

Demanding the replacement of one forum with another disregards the fundamental differences between a human rights protection system like the inter-American system, and an exclusively political forum or council on the subject. While mechanisms like the latter, such as the Universal Periodic Review (UPR) carried out in the context of

60 The parallel with the simultaneous discussions on the Inter-American System is so evident that the proposal by Ecuador highlights that: "To create the South American human rights coordination body, we will take into account the valuable recommendations made by the States to the Special Working Group on the functioning of the Inter-American Commission on Human Rights, approved by the Permanent Council on January 25, 2012, and *which, it would seem, have remained mere recommendations*" (emphasis added).

61 Ministry of Foreign Affairs, Trade, and Integration of Ecuador, *Proposal for the Creation of a South American Human Rights Coordination Body*.

the UN Human Rights Council, can contribute in different ways to improving the situation of such rights, they cannot replace judicial or quasi-judicial mechanisms made up of human rights experts.⁶² The notion of *international protection mechanisms* is related to the idea that individuals should have an additional instance of recourse in the case their fundamental rights are violated, once all domestic remedies have been exhausted. This international recourse entails a body that is intended to be separate and independent from national governments. Although a political forum made up of States could hear complaints from individuals, their interpretation of said cases would nearly rule out any possibility of impartiality when it comes to deciding them; nor would there be guarantees of expertise on the subject on the part of the political officials who comprised such forums.⁶³

Fortunately, the meetings to study the proposal managed to instill the idea that any mechanism created in that forum must “avoid duplicating existing universal or regional normative developments or bodies of protection, oversight, or coordination.”⁶⁴ After two opportunities for debate, it was concluded that a useful system for addressing human rights within UNASUR must, above all, aim to make the most of a political coordinating body among governments, rather than replace forums that have worked for decades for the promotion and protection

62 Any assessment of the achievements and potential of a mechanism like the UPR entails acknowledging the inherent limits of its own nature. It is a mechanism composed of State representatives, the majority of whom not only lack specific training in human rights, but furthermore do not tend toward objectivity because the rationale behind their work is to defend national interests. For this reason, the question as to whether the Review generates an “assessment undertaken in an objective and transparent manner of the human rights situation in the country under review, including positive developments and the challenges faced by the country” (cf. Resolution 5/1 of the Human Rights Council) principally and exclusively depends on the good will with which the States participate. In any case, the type of assessment offered by the UPR is a far cry from the kinds of protection provided by other mechanisms that examine specific complaints of human rights violations and seek their reparation, in addition to seeking guarantees of non-repetition of similar violations.

63 The differences between mechanisms made up of State representatives and judicial or quasi-judicial mechanisms comprised of experts explain how, for example, in the United Nations human rights system, the treaty bodies and the Human Rights Council coexist and are considered equally relevant. These two pillars of the UN system allow for diverse modes of action and response. One is predominantly technical, quasi-judicial, aspires to be independent, and is open to individual complaints from victims of human rights violations; the other is inter-governmental and has objectives that are more closely linked to political coordination and cooperation, as well as the handling of large-scale crises (Barretto Maia, Bascary, and Kletzel 2013).

64 See the minutes from Meeting I of the Working Group to Study a Proposal for the Treatment and Promotion of Human Rights in UNASUR, paragraph 3.

of human rights in the region. Thus, it was suggested that a High-Level Group for Cooperation and Coordination on Human Rights be created within UNASUR. According to the final minutes of the second meeting, "...this body would be in charge of coordinating cooperation among the States so that they may fulfill their obligations to promote, protect, guarantee, respect, and develop human rights by way of joint strategies and actions to strengthen their public policies, in keeping with their realities."⁶⁵ The themes they chose to prioritize in this forum included: strategies to promote inclusion and respect for the rights of persons with disabilities; to promote national mechanisms to prevent and eradicate torture; to guarantee the rights of persons deprived of liberty; and "to strengthen the view of economic, social, and cultural rights as a pillar of national strategies for economic and social development."⁶⁶ This proposal was approved by the Heads of State at the Paramaribo meeting held in late August 2013.

Although the risk of duplicating the inter-American system was averted, how this inter-governmental forum will turn out remains to be seen. In its first year, Peru held the chair but did not call a meeting. Considering the impetus around its creation, it is surprising that it has still not been put into operation, thus raising some questions as to the forum's concrete relevance.

The reform of the inter-American human rights system on the agenda of permanent and *ad hoc* political blocs

By the end of 2012, debates on the IACHR began to increasingly show up on the RAADH agenda as well. Given the back and forth in the discussion on the powers of regional protection bodies, at the IV Special Meeting in Brasilia the Uruguayan delegation proposed adopting a declaration of support for the inter-American human rights system.⁶⁷

65 See the minutes from Meeting II of the Working Group to Study a Proposal for the Treatment and Promotion of Human Rights in UNASUR, January 17-18, 2013.

66 Ibid.

67 The draft declaration, prepared with the support of the members of civil society present, highlighted the principles of autonomy and independence of the system's bodies, underscored the concrete impacts of the IACHR and Court both in times of dictatorship as well as democracy, and stressed the complementarity between forums like the RAADH and the work of regional human rights protection bodies. See Annex VIII, Minutes of the IV RAADH Special Meeting, Brasilia, November 2012.

At the time, however, high-level authorities from Brazil and Argentina were not present, having delegated the forum to lower-ranking officials. And Venezuela, which had just been incorporated as a permanent member of the bloc, sent an official who did not have decision-making authority.⁶⁸ Given this scenario and the fact that it made it impossible to have any profound political discussion leading to a regional position on the matter, it was agreed that Uruguay would call a special meeting to discuss the RAADH's position on the situation of the inter-American system prior to the OAS Special General Assembly scheduled for March 2013.⁶⁹

This was how the V Special Meeting of the RAADH ended up with just one item on the agenda: the current situation of the IACHR. By that time, the "Guayaquil Declaration"—made at the I Conference of States Parties to the American Convention on Human Rights, convened by Ecuador—had already been made public.⁷⁰ The Guayaquil initiatives and the decisions of the MERCOSUR body's special session thus ended up completely overlapping.

The Conferences of States Parties to the American Convention on Human Rights warrant special attention as *ad hoc* forums for political coordination, given the difficulties some States faced when trying to hold certain debates in the OAS setting. The Guayaquil meeting, convened in March 2013, was the first, and from then until January 2015, there were five more.⁷¹

The proposal by Ecuador to hold Conferences reserved for only those States party to the American Convention sought to focus the debates on the inter-American system just among those it considered were its legitimate actors, meaning those bearing a full relationship to the system's bodies by virtue of having ratified its treaty framework. The call for this meeting, intended to exclude the United States and Canada

68 Venezuela became a permanent member of MERCOSUR in mid-2012. Particularly deserving of criticism is the fact that, one week later, Venezuela decided to denounce the American Convention on Human Rights. Despite its new status as a permanent member of the bloc, no significant political processes were generated to reverse a decision that does nothing other than weaken the international protection available to the people under that country's jurisdiction.

69 See in this respect, Minutes of the IV RAADH Special Meeting, Brasilia, November 2012.

70 The I Conference of States Parties to the American Convention on Human Rights was held on March 11, 2013.

71 At the time this article was completed, four conferences had been held: March 2013 in Ecuador; May 2013 in Bolivia; January 2014 in Uruguay; May 2014 in Haiti; and December 2014 in Uruguay.

from its discussions,⁷² clearly represented one of the core issues of the reform process: the changes in the geopolitical scenario and the intention of some States of the South to distance themselves from the sphere of US influence, which they saw reflected in the agenda and working methodology of the Inter-American Commission on Human Rights and, in particular, the work done by its Special Rapporteur for Freedom of Expression. Thus, the key issues addressed, first at the meeting in Guayaquil and then in the special session of the RAADH in Montevideo, were: the supposed imbalance between efforts to protect and to promote human rights entrusted to the IACHR; the system's sources of financing; the work done by the Office of the Special Rapporteur for Freedom of Expression; the make-up of the Commission; and finally, the need to reevaluate the location of the IACHR's headquarters.

Even though it was feared that the IACHR's basic competencies might be affected by the discussions being held in these spheres far removed from the OAS Permanent Council, their outcome did not end up confirming that scenario. Nor did these forums reach the necessary consensus to do any damage to the IACHR's work. The Guayaquil Declaration, later taken up again at the 5th Extraordinary Session of RAADH, achieved only balanced commitments. For example, instead of adopting any decision that might weaken the work done by the only Special Rapporteurship, it opted to highlight that all thematic rapporteurships must have the necessary resources to fully do their jobs. Likewise, once the Declaration passed the filter of MERCOSUR, this generated an interesting scenario of opportunity, previously unexploited, in which "overcoming existing difficulties with regard to the implementation of decisions and progressive incorporation of the standards set by the bodies of the inter-American system" was incorporated as a priority topic for action by the RAADH.⁷³

Indeed, the 44th OAS Special General Assembly on the process of "strengthening" the IACHR was unquestionably a turning point for all debate scenarios. As we will highlight, despite different attempts to continue the discussion regarding the Commission's key powers, such as the possibility of granting precautionary measures, the session's final resolution held firm against these attacks, closing the door almost completely on an atmosphere conducive to weakening regional protection bodies, at least for the time being.

72 Neither the United States nor Canada has ratified the American Convention. The US signed it in 1977, but never ratified it.

73 See Minutes of the V Special RAADH, held in Montevideo on March 14, 2013.

Because this is a political process and, as a result, is flexible by nature, the Special [General] Assembly of March 2013 cannot be viewed as a definitive end to all discussion related to reforming the agenda and work methodology of the IACHR and the Court. The formal outcome of the process to some degree implies that the scenario is fraught with tension and discussion around the role of the inter-American system in the region. In fact, after the final resolution of the process in the OAS, there were still several instances of debate in which attempts at system reform remained on the agenda, but with little backing to achieve any concrete impact.

Thus, with less political support than the discussions in Guayaquil, and an unfavorable scenario for taking these matters to the Permanent Council of the OAS, Bolivia convened the 2nd Conference of States Parties to the American Convention in mid-March 2013. The agenda was once again marked by discussions on the universality of the inter-American system,⁷⁴ with the paradoxical absence of any efforts with regard to Venezuela's situation, which at that point could still have retracted its decision to denounce the American Convention. The other main areas of work were the issue of the location of the Commission's headquarters and its sources of financing. These matters were again addressed in the next two sessions of the RAADH in June and November 2013, but with no major announcements or conclusions.

The debate on whether to transfer the headquarters gained some momentum around the III Conference of States Parties in Montevideo in January 2014. At that meeting participants analyzed the report, *Budgetary, Regulatory, and Functional Challenges of Changing IACHR Headquarters*, put out by the Working Group composed of Uruguay and Ecuador at the II Conference held in Cochabamba.⁷⁵ The debates prior to the conference indicated that a specific decision was feasible. However, the proposal showed weaknesses in the two main points used to sustain the viability of the change of headquarters, namely, the

74 The discussions on the universality of the inter-American system refer to the fact that countries such as the United States and Canada, among others, have not ratified the American Convention on Human Rights.

75 In contrast to the contents of this report, any evaluation of a possible change of headquarters should take into account all factors – positive and negative – related to such a transfer, including not only legal, economic, and budgetary aspects, but also the impact on the visibility of the IACHR's work and accessibility to victims, user organizations, and media. The consequences of a potential transition on the Commission's daily work should also be weighed, so as to ensure that this does not weaken or distract from its capacity to act and react to the human rights problems in the region.

legal⁷⁶ and budgetary scenarios.⁷⁷ For this reason, they did not muster the consensus needed to achieve any concrete progress on the matter.

The meeting culminated in the adoption of the Montevideo Declaration, which on this point⁷⁸ resolved: to continue the debate on

76 With regard to the legal scenario, the report indicates that the IACHR headquarters is not defined in the Convention, but rather in Article 16 of the IACHR Statute, whereby, to move the body, that instrument must be amended by decision of the OAS General Assembly. However, a comprehensive, balanced reading of the language of the Convention, the Rules of Procedure, and the Statute, shows that any amendment to the Statute must be initiated by the IACHR as a prerequisite to be debated and approved by member states at the OAS General Assembly. This, in view of Article 39 of the American Convention on Human Rights, which states that “the Commission shall prepare its Statute” and “shall submit [it] to the General Assembly for approval.” For its part, the IACHR Statute, in Article 22, establishes that: “The present Statute may be amended by the General Assembly.” See the document entitled “Los límites jurídicos a las reformas al Estatuto de la Comisión Interamericana de Derechos Humanos (CIDH),” prepared by a group of jurists in the region on proposals to amend the inter-American human rights instruments in the process of *Reflection on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System*.

77 The report prepared by the Working Group lacks any precision with regard to the budgetary information presented. In order for this information to be of use for the process of deliberation over moving the headquarters, it should provide, at a minimum, detailed information on the costs/benefits of moving.

78 In other matters, it was decided: (a) *Universalization*: to instruct the OAS General Secretariat to undertake a study to analyze the legal impediments faced by those States that are not parties to the Convention with regard to their incorporation into the inter-American system and to propose potential practical solutions (paragraph 7); to realign the make-up of the Special Committee of Ministers of Foreign Affairs in representation of the following regions: South America (Uruguay and Ecuador), the Caribbean (Haiti), Central America (Guatemala) and North America (Mexico, pending confirmation), so that it shall, with assistance from the OAS General Secretariat, fulfill its commitment to approach States that are not parties to the American Convention, with a view to finding alternatives that allow for their accession to the Pact of San José, Costa Rica. The Committee shall be coordinated by Uruguay until the IV Conference of States Parties, whereby it must propose actions to achieve the universalization of the system (paragraph 5); to have the Special Committee of Ministers of Foreign Affairs further dialogue with the OAS member states that are not part of the inter-American human rights system and, to that end, in particular continue the contacts initiated with the CARICOM Chair pro tempore, with a view toward seeking alternatives for its incorporation into the system (paragraph 6); to pursue the efforts begun to expand consultations with the remaining member states that are not parties to the inter-American system and with organized civil society as provided for under operative paragraph 1 of the Guayaquil Declaration (paragraph 8); (b) *Rapporteurships*: to establish an open-ended Working Group to identify and recommend a new institutional framework for the current IACHR Rapporteurship structure (paragraph 10); (c) Rules of Procedure of the Conference: postpone addressing the issue of the Rules of Procedure of the Conference of States Parties to the American Convention on Human Rights until the next Conference (paragraph 12); (d) Link with other regional forums: to recommend that State Parties that are members of UNASUR submit a report on progress achieved at the Conferences of States Parties to the American Convention on Human Rights during

the change of headquarters and further expand on the Working Group's report on the legal, political, budgetary, regulatory, and functional aspects, among others, and to analyze the best alternatives, in keeping with the existing normative framework, to determine the consequences and requirements of an eventual change of headquarters; to invite States to offer to permanently host the IACHR; and to invite the Commission to hold its sessions in the States Parties to the American Convention.

This was again addressed at the IV Conference of States Parties in Haiti,⁷⁹ held nearly in parallel to the meeting of UNASUR, and just days before the OAS General Assembly in Paraguay.⁸⁰ The final declaration of that Conference included several provisions that took aim at the independence and autonomy of the IACHR. Those provisions were not upheld in the General Assembly (GA) of Asunción, the forum that could have made them a reality. For example, the declaration urged the GA to resolve that the IACHR hold sessions outside its headquarters and promoted the creation of an exclusive fund for receiving extra-budgetary contributions assigned according to a work schedule with previous approval from the States.

Different social organizations in the region announced their opposition to the terms of this declaration.⁸¹ Even several of the States that had accepted the Haiti Declaration rejected the language when it came to negotiating the text for an OAS document. In this scenario, Brazil, Peru, and Argentina negotiated the consensus needed to finally approve a resolution that did not jeopardize the powers or decision-making abilities of the Inter-American Commission, and recommended new steps to be taken toward constructive strengthening.

The direction taken in debates on the inter-American system henceforth will depend on the role played by the system's different actors in the construction of a strategic, proactive agenda for its core issues, lines of action, and alliances. This agenda should also provide for the dynamics of interaction and cooperation with new sub-regional human rights mechanisms. This last point will be the subject of the next section.

the next meeting of UNASUR Heads of State and other meetings of heads of state. See the III Conference of States Parties to the American Convention on Human Rights, Montevideo Declaration, January 22, 2014.

79 The IV Conference of States Parties was held May 26-27, 2014.

80 The General Assembly was held June 3-5, 2014 in Asunción, Paraguay.

81 See in this regard, *Statement by the International Coalition of Organizations for Human Rights in the Americas on the occasion of the General Assembly in Paraguay*. CELS signed that statement.

Coordination and complementarity of mechanisms: opportunities and challenges

The possibilities for effective coordination between the mechanisms and forums we have referred to throughout this chapter will depend, above all, on a precise understanding of the nature, the historical trajectory, and the institutional characteristics of each of these forums.

The new initiatives for regional integration in Latin America have represented the flip side of the crisis of legitimacy faced by the OAS. In this context, the creation of forums to address human rights issues within MERCOSUR and UNASUR has been largely linked to the idea that “the human rights problems in Latin America should be resolved in Latin America,” a region that has its own historical and political identity. This notion, while clearly legitimate in origin, has nevertheless been used in recent years as an argument to undermine the legitimacy of the inter-American human rights system by way of a questionable—at the very least—reassessment of the work done by this regional protection mechanism.

This disregards the differences between the inter-American system—effective and prestigious—and the OAS itself—which is highly discredited and ineffective—and with respect to which this regional protection mechanism is politically and institutionally independent from the latter.⁸²

Although the inter-American system consists not only of the IACHR and the Inter-American Court of Human Rights, but also of all the actors that actively contribute to its effective operation, including States, civil society organizations, and victims of violations, the system is independent and separate from State governments. Therefore, even though in its first decade the IACHR was influenced by the situation in Cuba and the Dominican Republic in the context of the Cold War and the fight against communism led by the United States, the work undertaken in the seventies and eighties in Latin America has made the mechanism an essential tool for the promotion and protection of human rights in the hemisphere.⁸³

82 It has been said, and rightly so, that the inter-American system is the jewel of the OAS. See in this respect, Barretto Maia, Bascary and Kletzel (2013: Chapter VI).

83 References to a variety of emblematic cases that managed to resolve this tension can be found in Chapter VI, “Debates actuales sobre la institucionalidad regional en derechos humanos. El futuro del sistema interamericano y las nuevas dinámicas de integración en América Latina,” in particular, Section 2, “Un poco de historia” (Barretto Maia, Bascary, and Kletzel 2013).

Furthermore, as pointed out previously, it is a mechanism made up of independent human rights experts who evaluate cases submitted directly by victims of violations, pursuant to regional treaties on the subject. In other words, the inter-American system is an *international human rights protection mechanism* with a regional human rights tribunal and it functions as a recourse for individuals or groups to demand their rights when these have been trampled on by their own State, after having exhausted all possible domestic remedies. It is, moreover, a system that mobilizes active collaboration by the different actors that comprise it, and who have acknowledged its importance over decades, namely, States, human rights organizations, victims, and their representatives. This type of regional institutional framework takes decades to come together. A system like the inter-American one cannot likely be replicated from scratch, because any attempt to do so would risk losing a wealth of now broadly accepted standards, which are both recognized and applied in the American States, especially in Latin America.

This of course does not preclude the creation of other forums or bodies that are complementary to the inter-American system. In this sense, it could be said that the potential of both the RAADH, as well as the recently created UNASUR High-Level Group for Cooperation and Coordination on Human Rights, lies precisely in the fact that they are something that the inter-American system is not. They constitute inter-governmental forums in which government representatives participate, thus allowing them to address specific ways of ensuring rights at the domestic level. These are settings that facilitate public policy decisions in a region that shares a long history, and whose countries therefore often face similar problems. Therefore, the exchange of experiences is pertinent, as is the establishment of common guidelines and even regionally coordinated policies.

To the extent that there is political will to endow these forums with the necessary expertise and political hierarchy,⁸⁴ the RAADH in MERCOSUR

84 The sub-regional forums with specific human rights mandates suffer from a lack of hierarchy, meaning the States end up being represented, not by secretaries or ministers of human rights, but by their assistants or embassy officials from the host country, who do not have the authority to make decisions or hold debates of great political impact. This situation is a recurring problem in the RAADH, to the point that it was the subject of forceful criticism by the Uruguayan delegation during the special session in Brasilia in 2012, and again at the XXIII Regular Session in Montevideo in 2013. According to the minutes of the XXIII RAADH, "the delegation of Uruguay [called upon] member and associate states to prioritize the RAADH as debated at the special meeting held in Brasilia, whereby the States shall make their best effort to send their highest authorities on human rights issues" in order to respond to "the need to have the greatest support possible in this arena." The minutes can be accessed at http://www.mercosur.int/innovaportal/v/383/1/secretaria/busqueda_avanzada

and the UNASUR High-Level Group can be seen as an opportunity to systematically address issues like the efficacy and effectiveness of public policies in guaranteeing rights; the design of indicators for evaluation and monitoring at different levels of disaggregation; the identification of best regional practices with the involvement of government agencies in charge of policy formulation and implementation; the status of compliance with decisions by regional and international human rights bodies; and the policies for citizen participation and oversight of state action.

In the MERCOSUR setting, the work done in recent years by the RAADH offers some examples of how this potential can be explored, while following and making use of the body of standards and recommendations accumulated by the inter-American system in the past decades, and in coordination with UNASUR.

The most relevant of these may be the request for advisory opinion on the rights of migrant children, made by the States of MERCOSUR to the Inter-American Court of Human Rights. At the XVIII RAADH, at the urging of the Niñ@Sur Standing Committee, the States parties decided to lead that initiative, expressing their concern for the grave situation faced by children and adolescents who migrate for economic, social, cultural, or political reasons in the hemisphere, a phenomenon that continues to occur despite significant progress made to bring migration regulations into line with standards of international human rights law. In requesting that the Court interpret the content of the American Convention, deciding on matters such as procedure, the system of guarantees to be applied, standards, protection measures, States' obligations, guarantees of due process, and the principle of non-refoulement in the case of child migrants, the States of MERCOSUR deemed that this mechanism's efforts could contribute to bringing their legislation, migration policy, and child protection policy into line with regional standards.⁸⁵

The request was drafted with technical assistance from the IPPDH and approved at the XIX RAADH in April 2011 in Asunción, Paraguay.⁸⁶

This is a risk that must also be contemplated when it comes to the UNASUR High-Level Group, perhaps even more so as it is a forum with a much larger membership, which makes it harder to coordinate both officials' agendas as well as the decision-making process. In any case, if the States want these forums to be relevant for debate and decision on human rights issues, they must ensure they have representation at the highest level.

85 The primary issues highlighted in the request were: procedures, system of guarantees, enforcement standards, protection measures, States' obligations, guarantees of due process, and the principle of non-refoulement in the case of migrant children.

86 The request can be accessed at http://www.corteidh.or.cr/solicitudoc/solicitud_eng.pdf

In October 2013, a public hearing was held on the request for an advisory opinion, with the participation of not only representatives from the MERCOSUR States, but also the delegations from Mexico, Guatemala, Costa Rica, the Dominican Republic, and Panama, and representatives from the Office of the UN High Commissioner for Refugees (UNHCR), Unicef, and the International Organization for Migration (IOM), among other organizations.⁸⁷ After submitting this request, the IPPDH began preparing a draft protocol on assistance to migrant children in the region.⁸⁸

On August 19, 2014, the Inter-American Court issued *Advisory Opinion 21/14 on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*.⁸⁹ The document underscores the limits of States' discretion to determine migration policy, pursuant to their international human rights commitments, international humanitarian law and refugee law. Among other issues, it clarifies that States' obligations with regard to human rights apply to all individuals under their jurisdiction, without discrimination of any kind, and therefore the cause, motive, or reason for which a person may be in a State's territory is irrelevant.

The interpretation provided by the Inter-American Court clarified the negative and positive obligations of States in relation to child migration, taking into account the duty to protect and the principle of the child's best interest. The Advisory Opinion specifies that States' obligations include the establishment of procedures to identify migrant children's needs for international protection. It also provides for the principle of non-deprivation of liberty of children owing to their irregular migratory situation, and specifies the content of due process guarantees that are applicable to them, and the features that comprehensive protection measures must have when it comes to child migrant rights,⁹⁰ as well as

87 A video of the hearing can be accessed at <http://vimeo.com/76568701>

88 See the minutes of the XXIV RAADH, held in November 2013 in Caracas.

89 Inter-American Court of Human Rights, OC-21/14, http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf

90 The Court deemed that liberty is the rule while the immigration situation is decided or safe voluntary repatriation is implemented, and the measures to be decided should not be conceived as alternatives to detention, but rather as measures whose main objective must be the comprehensive protection of rights, in keeping with an individualized assessment and the best interest of the child. The Court held that the measures to be adopted must be provided for under the domestic law of each State and the procedures for their implementation duly regulated.

the guarantees for their application.⁹¹ The Court sets forth, furthermore, a broad definition of the principle of “non-refoulement,”⁹² and a series of procedures to ensure the rights of children seeking asylum. Finally, the document lays out specific content in terms of children’s right to family life in the context of proceedings to expel or deport their parents for migration reasons.⁹³

The initiative is an excellent example of the harmony that can be achieved between the work done by an inter-State forum, like the RAADH, and a mechanism of international human rights protection, such as the Inter-American Court. It is about taking advantage of the powers these bodies have to develop and systematize precise human rights standards—based on a vast set of cases, extensive case law, and numerous reports—for the priority issues on their agendas. This type of coordination contributes, on the one hand, to a back-and-forth between the thematic agenda of the inter-American system and the priorities of the democratically elected governments of the region, thus acquiring greater legitimacy. On the other, it allows governments to qualitatively enhance their public policies by way of adapting them to international human rights law.

Indeed, an encouraging fact about the crossover between the discussions held in these forums and the work done by the bodies of the inter-American system is that, in 2013, the Inter-American Commission asked the RAADH to give it Permanent Observer status in its meetings. This has, for example, allowed Commissioner Rosa María Ortiz to participate in some of the RAADH sessions.⁹⁴ It remains

91 The States must: guarantee a competent administrative or judicial authority; take into account the views of the children concerning their preference; ensure the best interest of the child is a primary consideration when making the decision; and guarantee the right to a review of the decision where it is considered that it is not the appropriate or the least harmful measure.

92 The Court deems, in this sense, that in each context the content of the principle of non-refoulement recognizes a material and individual scope of application, and has specific correlative obligations that must be understood as complementary in nature. In the terms of the *pro homine* principle, Advisory Opinion OC-21 establishes that the States must make the most favorable interpretation for the effective enjoyment and exercise of rights, applying the provision that grants the greatest protection to the person.

93 The Advisory Opinion establishes that any administrative or judicial body that must decide on family separation owing to expulsion based on the migratory status of one or both parents must undertake an analysis that weighs the particular circumstances of the specific case and guarantees an individual decision, prioritizing in every case the child’s best interest.

94 For example, one of the remarks by the commissioner is contained in the minutes of the XXIII RAADH, SAM/GestDoc/PubWeb.nsf/OpenFile?OpenAgent&b

to be seen whether this presence will have the potential to catalyze a decision by the V Special RAADH to prioritize solving current obstacles to the implementation of decisions and the progressive inclusion of the inter-American system standards into the public policies of the bloc's countries.⁹⁵

Another recent case of complementarity happened between MERCOSUR and UNASUR in the context of the institutional rupture of June 2012 in Paraguay. The ousting of President Fernando Lugo Méndez prompted a rapid political reaction from the highest levels of both sub-regional blocs. Once Lugo's impeachment became a reality with such unprecedented speed,⁹⁶ both UNASUR and MERCOSUR decided to suspend Paraguay from their forums and mechanisms.⁹⁷ UNASUR formed a High-Level Group to Monitor the Situation in the Republic of Paraguay, which centered its mandate on ensuring observance of the country's political guarantees, with particular focus on the need for impartial elections—a requirement for the country to be reincorporated into the bloc.⁹⁸

In the realm of MERCOSUR, the IPPDH presented an innovative document at the Presidential Summit in Mendoza, with proposals for actions to be taken on the human rights front in this context, including the possibility of the Institute monitoring the situation in Paraguay. The mandate for the IPPDH to compile and organize information on the human rights situation in that country was granted at the XX RAADH in Porto Alegre,⁹⁹ whereby the Institute sent three reports to the

ase=SAM%5CGestDoc%5CDocOfic0Arch.nsf&id=1CFFA876AE9ACF0C83257CC300634609&archivo=RAADDHH_2013_ACTA01_ES.pdf

95 See in this regard, the minutes of the V RAADH, held in Montevideo on March 14, 2013.

96 The ousting of then President Fernando Lugo by the Paraguayan Congress became official on June 22, 2012, one week after the massacre of Curuguaty, and did not apply the necessary guarantees of impartiality and due process. See the press release issued by CELS on that occasion, <http://www.cels.org.ar/comunicacion/index.php?info=detalleDoc&ids=4&lang=es&ss=46&idc=1516>

97 In fact, in response to the imminent impeachment, UNASUR managed to send a preventive mission of foreign ministers to Asunción, which, as it is known, did not have the desired effect.

98 This is revealed by the public statements made by Group Chairman Salomón Lerner from Peru. See, for example press release, <http://www.telesurtv.net/articulos/2012/07/24/unasur-exige-elecciones-democraticas-y-transparentes-en-paraguay-7740.html>

99 See IPPDH article in this regard, <http://www.ippdh.MERCOSUR.int/cooperacion-MERCOSUR-con-haiti-en-derechos-humanos/>

MERCOSUR High-Level Authorities as well as to the UNASUR High-Level Group.¹⁰⁰

The case of Paraguay shows existing potential in terms of complementarity between the two blocs, in which the capabilities of a technical MERCOSUR institution, with a permanent headquarters and its own resources, are put to use to strengthen initiatives by UNASUR. And this further sheds light on an overlapping issue, which is the possibility that these regional institutions develop a human rights-based approach with regard to impactful political decisions that they make, putting in motion the specific mechanisms they have created for that purpose. With a view toward future crises, the Paraguayan case has established the precedent of having support from the IPPDH to provide status reports as part of the resources available to leaders for decision-making purposes at the regional level.

Another institutional coordination initiative worthy of mention is the establishment at the end of 2011, under the purview of the RAADH's Permanent Commission on Memory, Truth and Justice, of a technical group for collecting data, information, and archives on repressive coordination throughout the Southern Cone and, in particular, on Operation Condor.¹⁰¹ The work done by this group, with technical support from the IPPDH, culminated in the drafting and publication in September 2013 of the first Archival Guide to Operation Condor.¹⁰² This Guide, written according to international standards for archival description, compiles information on the content and criteria for accessing more than 100 documentary collections held in institutions in Argentina, Brazil, Chile, Paraguay, and Uruguay. The goal of this project is to contribute to the processes of truth, memory, and justice in the region, while strengthening the policies associated with the identification, organization, and accessibility of public archives kept by the governments of the Southern Cone region.¹⁰³

This is yet another action that is clearly complementary to the inter-American human rights system. While the inter-American system has,

100 See IPPDH activity report included in the minutes of the XXIII RAADH, held in 2013 in Montevideo, http://www.mercosur.int/innovaportal/v/383/1/secretaria/busqueda_avanzada

101 See the minutes of the XX RAADH held in Montevideo in November 2011, <http://www.ippdh.mercosur.int/backend/Uploads/Actas-XIX-a-XXII-RAADDHH.pdf>

102 The Archival Guide is available at <http://www.ippdh.MERCOSUR.int/ArchivoCondor>

103 See the IPPDH's press release on the Guide's presentation, <http://www.ippdh.mercosur.int/Novedad/Details/70126>

over the decades, contributed to providing reparations to numerous victims of crimes against humanity and established valuable standards that have then been applied by national courts, the Archival Guide provides governments and civil society with a practical tool for finding invaluable information on the coordinated repression that took place in the Southern Cone, which may have an important impact on the search for truth and justice.

By way of conclusion

The examples presented in the previous section show that there has been an incipient effort by MERCOSUR in recent years to coordinate its human rights work with other specific mechanisms in the region. One example was the effort to cooperate with initiatives started by UNASUR, such as in the case of the disruption of democracy in Paraguay. Another was the request for an Advisory Opinion by the Inter-American Court on child migrants submitted by a group of States, highlighting possible complementary forms of action between the RAADH and the inter-American system. The IACHR has also given signals in this regard, for example, by becoming a permanent observer of the RAADH.

In any case, there continue to be clear challenges to the effective consolidation of these trends, including the creation and institutionalization of channels for dialogue amongst the different forums and mechanisms to facilitate their coordination and joint strengthening.

Furthermore, while social organizations of the region have a role to play in pushing a strategic agenda to channel the potential of sub-regional mechanisms and finally put to rest the threat of replacing or duplicating other human rights mechanisms, practices must be put into place to provide incentives for citizen participation in the RAADH and the new UNASUR High-Level Group.

The creation of a UNASUR Citizen Participation Forum would seem to indicate that sub-regional bodies have yet to internalize the idea that large-scale social summits cannot be the sole source of truly participatory integration. Both blocs appear to still lack a solid willingness to prioritize participation in decision-making arenas and in specific high-level debates. This can be seen in the RAADH, despite the aforementioned progress, in the persistence of several problems.¹⁰⁴ In UNASUR, the

104 We are referring to practices such as the lack of advance notice about dates and locations of meetings; the absence of a single page where minutes of the meetings can be accessed; the confusing wording of documents, which makes it difficult to track the activities carried out and agreements signed at each session; the unjustified delays,

establishment of the Participation Forum seems to reproduce a concept of participation similar to the one MERCOSUR has historically had, which creates a parallel setting to decision-making arenas without any policy of participation in its framework. This situation demands increased attention from States and civil society with regard to the new High-Level Group for Cooperation and Coordination on Human Rights, whose practices must ensure the effective participation of social organizations and movements, particularly in its plenary sessions.

In any case, in order to truly carry out a strategy of complementarity and coordination among distinct actors of the regional human rights institutional framework, the different pieces in play must, above all, accept and maximize the differences between the inter-state forums for political coordination and the supranational mechanisms that safeguard and protect human rights. Part of this process requires acknowledgement of the accomplishments of decades of effort put forth not only by the Inter-American Commission and Court, but also by the victims, social organizations, and States themselves, which have many times transformed the standards set by the inter-American system into national policies aimed at enhancing the human rights of their inhabitants. To be sure, taking proper advantage of the potential of new regional MERCOSUR or UNASUR structures that have an impact on human rights will require focusing efforts to generate opportunities for coordinated action and reaction that complement the long-standing work done by the inter-American system.

References

Barretto Maia, Bascary, and Kletzel. 2013. "Debates actuales sobre la institucionalidad regional en derechos humanos: el futuro del sistema interamericano y las nuevas dinámicas de integración en América Latina." CELS, *Derechos Humanos en Argentina. Informe 2013*. Buenos Aires: Siglo XXI Editores.

Coutinho, Marcelo, Andrea Ribeiro Hoffmann, and Regina Kfuri. 2008. "Mercosur: un análisis multidimensional del proceso de integración." *Cuadernos sobre Relaciones Internacionales, Regionalismo y Desarrollo*, 3 (5). Mérida: Universidad de los Andes. <http://www.saber.ula.ve/bitstream/123456789/30707/1/articulo5.pdf>.

generally of several months, in publishing the final proceedings, the distribution of the meeting agendas on short notice, among others.

Chapter 2

Counting Coins: Funding the Inter-American Human Rights System

Raísa Cetra, Jefferson Nascimento
Concetas Human Rights

Summary

55

This chapter aims to describe the current funding situation of the inter-American human rights system (the inter-American system) by analyzing the OAS Regular Fund and voluntary contributions from States. It will seek to examine changes in States' commitments to funding for the inter-American system following the conclusion of the "strengthening process" that took place from 2011 to 2013. During this process, OAS member states provided, *inter alia*, criticism and proposals on the operations model and actions of the bodies of the system. Brazil's commitment to the inter-American system's funding will be used as a case study for this analysis. We thus intend to show the inconsistencies between member states' rhetoric during the process and their financial contributions, which has resulted in the precarious budget situation the inter-American system currently faces.

Introduction

The financial sustainability of the bodies of the inter-American human rights system (the inter-American system)—the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (the Court)—has deteriorated over recent decades, thus compromising their ability to fully discharge their duties. This issue, a subject of ongoing debate at the Organization of American States (OAS),¹ requires a serious and effective response from the states and the entities committed to the protection and promotion of human rights in the hemisphere. OAS member states² have a special role to play, as they assumed clear human rights responsibilities when they joined the Organization.³ These include a commitment to the system's bodies,⁴ which entails ensuring that they have the means they require to operate.

Currently, both the IACHR and the Court operate with approximately half of the resources they need to be fully operational. In 2010, both bodies established short-, medium-, and long-term objectives⁵ to ensure that their resources would be sufficient to fund all of their activities and guarantee enhanced performance of their duties. The IACHR indicated that as of 2014, it would require a budget of

1 AG/RES. 2761 (XLII-O/12); AG/RES. 2672 (XLI-O/11); AG/RES. 2601 (XLO/10); AG/RES. 2522 (XXXIX-O/09); AG/RES. 2409 (XXXVIII-O/08); AG/RES. 2290 (XXXVII-O/07); AG/RES. 2227 (XXXVI-O/06); AG/RES. 2128 (XXXV-O/05).

2 The OAS currently has 35 member states: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, United States of America, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay, and Bolivarian Republic of Venezuela, Barbados, Trinidad and Tobago, Jamaica, Grenada, Suriname, Commonwealth of Dominica, Santa Lucia, Antigua and Barbuda, Saint Vincent and the Grenadines, Commonwealth of the Bahamas, Saint Kitts and Nevis, Canada, Belize, and Guyana.

3 The principles found in the Charter of the Organization of the American States, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights.

4 The Charter of the OAS created the Inter-American Commission on Human Rights (IACHR) (Article 106), whose mandate applies to all States Parties to the American Convention on Human Rights. For those States that have not ratified the American Convention, the petitions system is based on the American Declaration of the Rights and Duties of Man (Article 51 of the Rules of Procedure of the IACHR). The Inter-American Court only receives petitions related to States that have ratified the American Convention and recognize its adjudicatory jurisdiction.

5 The Inter-American Court defines short term as a period of one to three years; medium term as four to six years; and long term as seven to ten years. *Corte Interamericana de Derechos Humanos, Necesidades Financieras (corto, mediano y largo plazo)*, May 12, 2010, accessed August 20, 2014, <http://scm.oas.org/pdfs/2010/CP24463.pdf>

around US\$24,787,000.⁶ In 2013, however, the IACHR operated with a total budget of US\$11.1 million (Annex 1). As for the Court, it predicted that as of 2014 it would need US\$10 million to be able to operate at full steam.⁷ In 2013, it only received US\$5.2 million in funding (Annex 2).

Funding for the inter-American system currently comes from two types of funds: the “Regular Fund,” from which OAS budget resources are allocated to bodies of the inter-American system,⁸ and “Specific Funds,”⁹ which are voluntary and may come from member states, observer states,¹⁰ and other institutions.

This chapter aims to describe the situation of these two sources of funding of the inter-American system. Specifically, it will analyze fluctuations in funding during and after the so called “strengthening process”—launched in 2011 and concluded in 2013—in which member states expressed their criticisms and made proposals regarding the inter-American system’s operations and scope, including its funding (Salazar, 2014). The process can be considered the latest framework for discussion on this issue. The intention is to thereby reveal the contradictions between member states’ discourse in this process and their financial contributions, which result in the inter-American system’s precarious

6 Inter-American Commission on Human Rights Strategic Plan 2011-2015, Part III, pp. 148-152, accessed December 21, 2014, <http://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf>

7 *Corte Interamericana de Derechos Humanos, Necesidades Financieras (corto, mediano y largo plazo)*, *supra* note 5.

8 “Article 72. Regular Fund. This is made up mainly of the quotas collected from the member states and includes the contributions from other funds for technical supervision and administrative support provided by the General Secretariat. [...] The purpose of this Fund is to finance: the regular secretariat and general support services provided by the Secretariat; technical supervision and administrative support to the programs; and multilateral integral development programs, as established in Article 32 of the Charter and as specified in the approved program-budget.” General Standards to Govern the Operations of the General Secretariat, Chapter IV, General Provisions of a Financial and Budgetary Nature, accessed August 20, 2014, <http://www.oas.org/legal/english/Standards/GenStandCapIV.htm>

9 “Article 74. [...] Specific funds are made up of special contributions, including those received without purposes and limitations specified by the donor, from member states and permanent observer states of the Organization and from other member states of the United Nations, as well as from individuals or public or private institutions, whether national or international, for the execution and or strengthening of development cooperation activities or programs of the General Secretariat and other organs and entities of the Organization.” General Standards to Govern the Operations of the General Secretariat, Chapter IV, *supra* note 8.

10 The list of OAS observer states, accessed August 20, 2014, http://www.oas.org/en/ser/dia/perm_observers/countries.asp

budget situation. The analysis will look at the participation of Brazil, which, as the second largest economy in the hemisphere, is responsible for an important part of the OAS budget, and examine the country's contribution to the Regular Fund, as well as its voluntary contributions to the inter-American system.

The chapter is divided into two parts. The first section presents a detailed study of the positions and proposals that member states defended at the OAS with regard to funding for the inter-American system which are reflected in the Organization's official documents.¹¹ The second part examines the situation of the Regular Fund and member states' voluntary contributions. The analysis of voluntary contributions will focus on the Inter-American Commission on Human Rights due to the attention the Commission received during the strengthening process. The study of both the situation of the Regular Fund and the voluntary contributions will include an assessment that considers Brazil's commitment, for the reasons mentioned previously.

The methodology used for the analysis of the inter-American system's funding sources consisted of systematizing and scrutinizing data from primary sources.¹² The analysis was conducted using two timeframes. The macro-period examined is between 2006 and 2013. 2006 was chosen as the starting point for this period because it was the year when the OAS Secretary General announced new fundraising strategies for the Regular Fund of the Organization, in an effort to address its financial crisis.¹³ The micro-period in which we seek to identify changes

11 For this analysis, documents of the Committee on Administrative and Budgetary Affairs and the Permanent Council of the OAS were used.

12 Research was carried out using (a) the reports of the Board of External Auditors to obtain data on adjusted budgets and the specific uses of voluntary contributions (http://www.oas.org/en/saf/accountability/external_audit.asp); (b) OAS Annual Budgets, which contain the adjusted budget for the Inter-American Court and resource allocations by program areas (<http://www.oas.org/budget/>); (c) reports on the IACHR's financial resources, which contained the adjusted budget for the IACHR and data on its specific funds (http://www.oas.org/en/iachr/mandate/financial_resources.asp); and (d) the summary reports on contributions and donations to the Inter-American Court of Human Rights and the Court's Annual Reports containing data on its specific funds (<http://www.corteidh.or.cr/index.php/en/court-today/publicaciones> and <http://www.corteidh.or.cr/index.php/en/court-today/contributions-and-donations>). Accessed August 20, 2014. Where there were discrepancies between the amounts published by the IACHR and the Court and those of the Board of External Auditors were found, the amount reported by the audit was used.

13 Report to the Permanent Council. Annual Audit of Accounts and Financial Statements for the Years Ended December 31, 2006 and 2005, p. 14, accessed August 20, 2014, <http://www.oas.org/saf/docs/OASAuditofAccountsandFinancialStatements2006.pdf>.

in funding begins precisely the year the first report was produced in the framework of the strengthening process and ends the last year for which data is available on amounts actually spent (“adjusted amounts”). In other words, we are looking for increases or decreases in contributions in 2011, 2012, and 2013.

Finally, by way of conclusion, we will present the challenges with regard to funding the inter-American human rights system, as well as proposals on how to overcome such challenges. Our intention is for this analysis to prompt collection of data and spark ideas on this important issue so that human rights defenders may use this and build on it in the day to day political and administrative debates on the strengthening of the inter-American system.

Part I - Framework of the discussion on the inter-American human right system’s funding: the strengthening process

In 2011, OAS member states established the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System (WG). The WG voiced harsh criticism of the workings of the inter-American system and made proposals on its different activities, namely those of the Commission, such as precautionary measures, friendly settlement proceedings, and handling of cases, among others. The WG, which headed up the so-called strengthening process, specifically addressed the positive relationship between the inter-American system’s financial sustainability and the improvement of its operations:

[...] the Working Group agreed that *financial strengthening of the IAHRs is necessary and urgent in any effort to achieve its comprehensive consolidation*. It emphasized that through adequate resource allocation it will also be possible to improve the workings of the organs and ensure the predictability, sustainability, and planning of its activities and priorities. The Working Group recognized that some of the above-mentioned recommendations will require adequate financing for implementation.¹⁴ (Emphasis added)

14 Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System for consideration by the Permanent Council (Approved by the Working Group at its meeting held on December 13, 2011), GT/SIDH 13/11 rev. 2.

It is noteworthy that in the years prior to the reform, the Commission, in the performance of its duties as a human rights monitoring body in the region, had sparked backlash from some member states. It was precisely in this context that the “reform process” was launched, and some of the proposals for change aimed to reduce the IACHR’s independence and autonomy (Amato 2012: 5). It is thus necessary to discuss and analyze the proposals related to the inter-American system’s funding and the discrepancies between what was agreed to during the process and reality.

Some countries such as Brazil,¹⁵ Paraguay,¹⁶ Bolivia,¹⁷ Chile,¹⁸ and Mexico¹⁹ openly supported increasing the annual allocations from the OAS budget—the Regular Fund—as a solution to the financial difficulties of the IACHR and the Court. This change would supposedly provide greater independence to the inter-American system, as it would reduce the importance of Specific Funds, which receive contributions from outside actors, such as observer states and other institutions.

15 “In light of this, the medium- and long-term solution to the problem will be greater allocation of resources from the Regular Fund of the OAS, with priority given to the Inter-American Court of Human Rights, regardless of the resources that continue to be offered by other States on a voluntary basis.” *Presentation by the Delegation of Brazil*, GT/SIDH/INF. 30/11, 3 November 2011. (All of the presentations of the delegations quoted in this article are at: <http://www.oas.org/council/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>).

16 “There needs to be a progressive move towards financing the activities of the inter-American system with regular funds from member state quotas. Bearing in mind that currently about 50% of the budget is funded with specific funds, a medium- and long-term plan needs to be drawn up to include increased input from regular funds in the budget of the inter-American system.” *Proposals by the Delegation of Paraguay*, GT/SIDH/INF. 47/11.

17 “[With] a view to [...] moving toward a gradual increase in the regular funds of the Organization needed to guarantee the workings of the inter-American system for the protection of human rights.” *Proposals by the Delegation of Bolivia*, GT/SIDH/INF. 39/11, December 1, 2011.

18 “We are in favor of greater support from the Regular Fund of the OAS as a way of boosting the autonomy and independence of the system and allowing it to pursue its promotional and dissemination functions more vigorously, while diminishing its backlog of cases pending.” *Proposals by the Delegation of Chile*, GT/SIDH/INF. 33/1, November 11, 2011.

19 “[A]dequately funding the IACHR and the Inter-American Court of Human Rights is the main challenge in any effort to strengthen the inter-American human rights system. The budgetary constraints of both organs have a universally debilitating impact on all their areas of endeavor and, therefore, negative ramifications for human rights advancement and protection activities in the region.” *Proposals by the Delegation of Mexico*, GT/SIDH/INF. 49/11, December 7, 2011, accessed September 15, 2014, <http://www.oas.org/council/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>

Furthermore, the Regular Fund would provide greater budget predictability for the system, as its funds come from mandatory, annual contributions and therefore, are less volatile. Ecuador, for its part, explicitly presented a proposal that would have made OAS resources the only source of funding for the inter-American system's bodies.²⁰

With regards to voluntary contributions, it was argued that they generate an imbalance in the inter-American system's activities, as they are not allocated to the Commission outright and therefore do not allow it the freedom to choose how it will use the funds it receives. In the majority of cases, donations are made for specific purposes—the discussions highlighted earmarked donations that target a given topic—which purportedly affect the rapporteurships' activities.²¹ The practice of earmarking donations for specific issues allegedly generates inequalities among thematic and special rapporteurships, as it strengthens some activities at the expense of others. Unearmarked voluntary contributions would thus increase equality among the inter-American system's activities. In the words of the Delegation of Ecuador:

Depending on the level of success in having the financing of the bodies of the IAHRs covered with the Organization's own resources, it is proposed that the organs of the inter-American human rights system establish as a policy, without exception, *that voluntary contributions they receive cannot be conditioned or earmarked, in order to preserve the independence, objectivity, non-selectivity, and non-politicization of the handling of sensitive issues for which they are responsible. The Inter-American Commission on Human Rights (IACHR) should correct the imbalance of economic and human resources in its Rapporteurships*, so that the rights that each Rapporteurship is called upon to monitor and warn about can be addressed on an equal footing, in terms of human as well as financial resources, according

20 "Financing of the inter-American human rights system (IAHRs) from the OAS' own resources should be established as a goal to achieve in the shortest time possible, which requires immediately engaging the internal work that would accomplish that undertaking." *Proposals by the Delegation of Ecuador regarding the topics of "Financing", "Universality", "Procedural Matters" and "the Annual Report of the IACHR,"* GT/SIDH/INF. 46/11, December 5, 2011.

21 Thematic and country rapporteurships are comprised of IACHR commissioners, whereas special rapporteurships have one rapporteur dedicated exclusively to the issue in question. Today, the IACHR has only one fully functioning special rapporteurship, which is that of Freedom of Expression. The Commission is in the process of setting up the Office of the Special Rapporteur on Economic, Social, and Cultural Rights. For more information: <http://www.oas.org/en/iachr/mandate/composition.asp>

to the principles of universality, equality, and interdependence of human rights.²² (Emphasis added).

In December 2011, at the end of the Working Group's evaluation process and with various proposals before it, the WG recommended that the first steps to overcome this situation be taken in 2012. It indicated two possible paths for strengthening the IACHR and the Court financially: raising the amount allocated from the OAS Regular Fund to these bodies and increasing unearmarked voluntary contributions.²³

According to the WG, these processes would be "parallel and complementary." Indeed, they would increase the allocations from the Regular Fund, on the one hand, thereby increasing the predictability of the inter-American system's budget. On the other hand, they would seek to raise voluntary contributions, which involve fewer bureaucratic obstacles—given that they do not have to go through negotiating processes within the structure of a complex international organization—thus enabling the inter-American system to achieve financial sustainability in a shorter period of time.

The WG's vision was later endorsed and deepened by the resolution that marked the end of the reform process in March 2013.²⁴ This resolution formalized another commitment made in the report mentioned above: the inter-American system should operate wholly through the Regular Fund in the long term. In the short term, again, the system would be strengthened by increasing voluntary contributions, preferably ones that are not designated for a specific purpose:

THE GENERAL ASSEMBLY RESOLVES:

[...] To reaffirm its commitment *to attaining full financing of the inter-American human rights system through the Regular Fund of the Organization of American States (OAS) without prejudice to the financing of the other mandates of the Organization. While that*

22 *Proposals of the Delegation of Ecuador on the topics of "Financing", "Universality", "Procedural Matters" and "the Annual Report of the IACHR,"* GT/SIDH/INF. 46/11, December 5, 2011.

23 *Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System for consideration by the Permanent Council (Approved by the Working Group at its meeting held on December 13, 2011),* GT/SIDH 13/11 rev. 2.

24 AG/RES. 1 (XLIV-E/13). "Results of the Process of Reflection on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System," March 22, 2013.

commitment is gradually fulfilled, to invite member states, observer states, and other institutions to continue making voluntary contributions, preferably not earmarked, in the framework of the Guidelines of the Inter-American Court of Human Rights 2011-2015 and the Strategic Plan of the IACHR 2011-2015.

To request the Secretary General to submit to the Permanent Council as soon as possible a detailed, up-to-date analysis of the full operating costs of the organs of the inter-American human rights system. (Emphasis added).

Furthermore, the reform process established new functions and procedures (Orozco 2014) for the already overburdened and underfunded Commission. During this process, in an effort to satisfy some of the requests of member states, the Commission decided to make changes to its Rules of Procedure—approved in March 2013²⁵—as well as to its policies and practices. Many of these reforms depend directly on increased funding for the IACHR, among them, greater transparency, stronger legal bases in the handling of cases, and greater attention to the Commission’s promotion activities, such advocating for universality of the American Convention.

More than two years have passed since the WG presented its report and it is still not clear if any progress has been made in improving the inter-American system’s funding either through the Regular Fund or voluntary contributions. Financial strengthening is a fundamental precondition for any progress to be made based on the results of the strengthening process and it is a concrete step member states could take to show that their rhetoric during this process is not at odds with their actions.

25 Resolution 1/13, “Reform of the Rules of Procedure, Policies, and Practices,” March 18, 2013, accessed September 14, 2014, <https://www.oas.org/en/iachr/decisions/pdf/Resolution1-2013eng.pdf>

Part II – Member states' contributions to the inter-American system: mandatory and voluntary

The Regular Fund of the OAS

The current reality of its allocations

Theoretically, the allocation of resources from the OAS Regular Fund to the IACHR and the Court, which are provided for in the Organization's budget and come from the compulsory contributions of member states, could enhance the predictability of the internal budgets of the inter-American system's bodies. This, in turn, would improve the organization and distribution of resources among the system's activities, thereby contributing to its independence. These characteristics are not found, however, in voluntary contributions. This advantage of the Regular Fund was pointedly underscored during the strengthening process and was the reason why member states declared that the Regular Fund should make up, if not all, at least the majority of the funding for the inter-American system; and that, therefore, its gradual increase was necessary. For example:

...the delegation of Brazil wishes, first, to acknowledge the *importance of developing ways in the medium and long term to ensure that the resources allocated to the financing of IAHRs organs are more predictable and adequate and have clearer objectives*. The *excessive dependence of the IACHR and Inter-American Court of Human Rights today on sporadic voluntary resources* jeopardizes the good operations of both organs. In light of this, the medium- and long-term solution to the problem will be greater allocation of resources from the Regular Fund of the OAS...²⁶ (Emphasis added)

Meanwhile, with the bodies currently operating with half of the budget they require, the current allocations from the OAS are far from being sufficient to guarantee their sustainability. Between 2006 and 2013, the Regular Fund's allocations only exceeded voluntary contributions out of the total resources of the bodies for three years at the IACHR (Graph 1), and four years at the Court (Graph 2). It underwrote, on average, 50% of the budget for both bodies (Annexes 1 and 2). This contradicts the States' assertions that the Regular Fund should make up

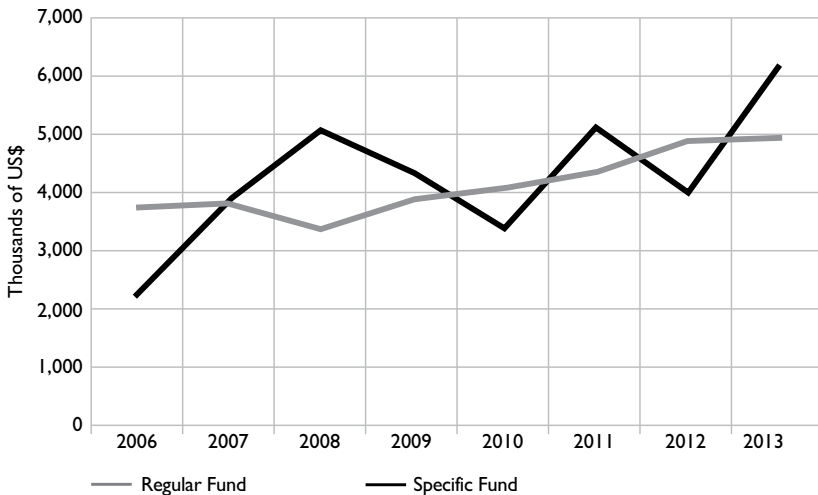
26 Presentation by the Delegation of Brazil, GT/SIDH/INF. 30/11, November 3, 2011.

the lion's share of funding for the inter-American system. According to the Delegation of Mexico:

As member states, we have often expressed our wholehearted commitment to the system and recognized that we have a primary responsibility to provide it with enough resources to enable it to act in a timely, efficient, and effective manner. To that end, *we have concurred on the need that the majority of funding for the system come from the Organization's regular budget, a goal that should be gradually achieved over the medium and long term.*²⁷ (Emphasis added)

GRAPH 1

**Regular Fund and Specific Funds for the IACHR
2006-2013***

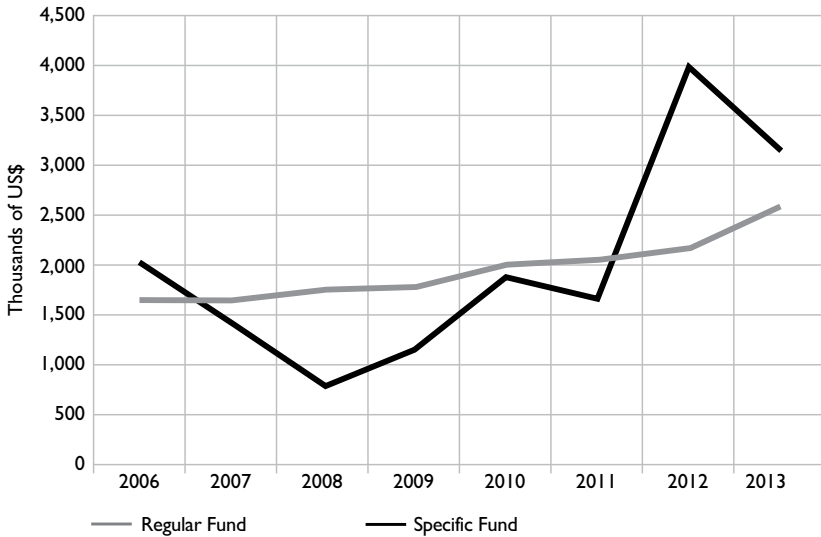


*Data in Graph 1 was taken from the financial reports available on the IACHR website and data provided by the Board of External Auditors, accessed on August 21, 2014, http://www.oas.org/en/iachr/mandate/financial_resources.asp and http://www.oas.org/en/saf/accountability/external_audit.asp

27 The Delegation of Mexico referring to conclusions made prior to the strengthening process. GT/SIDH/INF. 49/11, December 7, 2011, <http://www.oas.org/consejo/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>, accessed September 15, 2014.

GRAPH 2

Regular Fund and Specific Funds for the Court 2006-2013*



*Data in Graph 2 was taken from the financial reports available on the Inter-American Court of Human Rights website and data provided by the Board of External Auditors., accessed on August 21, 2014, http://www.oas.org/en/iachr/mandate/financial_resources.asp and http://www.oas.org/en/saf/accountability/external_audit.asp

Two other facts related to the Regular Fund confirm this gap between the rhetoric regarding the importance of financially strengthening the inter-American system bodies and the actual budget they receive from the OAS. First, only a small proportion of the OAS budget is set aside for the system's bodies. Indeed, the amount allocated for both bodies totaled approximately 9% of its budget in 2013.²⁸ In a note sent in 2003, the Brazilian government took up the demands of the Court and the Commission, pointing out that for 2007, 10% of the overall budget of

28 This amount was calculated based on the adjusted values for 2013 solely for the IACHR and the Court, and not the budget that had been approved, in which 9.5% was allocated to both bodies, and 11% for the entire human rights pillar. These data were taken from the report of the Board of External Auditors and the IACHR's 2013 report. *Annual Audit of Accounts and Financial Statements for the Years Ended December 31, 2013 and 2012*, <http://www.oas.org/en/saf/accountability/docs/201405071900-Audit-Book-FY13-EN.pdf>; and *Source of Financing and Execution of Resources*, Inter-American Commission on Human Rights, 2013, accessed August 20, 2014, <http://www.oas.org/en/iachr/mandate/finances/2013-recursos-financieros-en.pdf>

the OAS should be allocated to them.²⁹ After a lapse of almost 7 years, this percentage has yet to be reached. Second, this percentage contrasts with the fact that the Commission and the Court are the central bodies of one of the four pillars of the OAS:³⁰ human rights.³¹ The other pillars—democracy and governance,³² integral development,³³ and multidimensional security³⁴—received, respectively, 8.5%, 18.7%, and 6.5% of the Organization’s budget in 2013 (Annexes 3 and 4).³⁵

Even though human rights is the number two pillar as far as OAS Regular Fund allocations are concerned, it is important to highlight the marked difference between the budget for this pillar and that of integral development (Graph 3). Based on the data, the importance of the human rights pillar *per se* can be called into question. It should be noted,

29 *Note from the Permanent Mission of Brazil Proposing an Increase in OAS Member States’ Regular Fund Quota Assessments*, CP/CAAP-2646/03, accessed August 21, 2014, www.oas.org/consejo/CAAP/docs/cp10672e07.doc

30 In December 2005, the Secretary General presented the areas of priority to the Permanent Council of the OAS (CP/doc.4071/05). Since then, they have been recognized as the “four pillars” of the Organization. This definition was reaffirmed in 2012 in the Secretary General’s presentation of the document *A Strategic Vision of the OAS* (CP/doc.4673/11) and its revised version (CP/doc.4673/11 rev. 1), presented by the Secretary General in April 2013.

31 Since 2013, in addition to the IACHR and the Inter-American Court, the Executive Secretariat of the Inter-American Commission of Women has been a part of the human rights pillar.

32 Comprised of: the Inter-American Juridical Committee; the Secretariat for Political Affairs; the Secretariat for Legal Affairs; Department of Electoral Cooperation and Observation; Department of International Law; Department of Sustainable Democracy and Special Missions; Department of Legal Cooperation; and the Department for Effective Public Management.

33 Comprised of: the Executive Secretariat for Integral Development, the Department of Economic Development, Trade, and Tourism; the Department of Sustainable Development; Department of Social Development and Employment; the Department of Human Development, Education and Culture; Inter-American Council for Integral Development (CIDI) Meetings; Ministerial and Inter-American Committees Meetings; Pan American Development Foundation; Trust for the Americas; Secretariat of the Inter-American Telecommunication Commission (CITEL); Secretariat of the Inter-American Committee on Ports (CIP); and Director General of the Inter-American Children’s Institute.

34 Comprised of: the Secretariat for Multidimensional Security; the Secretariat of the Inter-American Committee against Terrorism (CICTE); Secretariat for the Inter-American Drug Abuse Control Commission (CICAD); Department of Public Security; Inter-American Defense Board (IADB).

35 *Program-Budget of the Organization approved by the General Assembly*, XLIII Special Session - November 2012, AG/RES. 1 ((XLIII-E/12), accessed August 21, 2014, scm.oas.org/doc_public/ENGLISH/HIST_13/AG06213E06.doc

however, that this situation is currently being discussed in the process of the “OAS Strategic Vision,” which, among other things, is seeking to fine tune the roles of each pillar. The pillar causing the most concern—for its unnecessary accumulation of functions and concentration of the Regular Fund’s resources—is precisely that of development, with its decentralized bodies.³⁶ In the words of the former OAS Secretary General, José Miguel Insulza, “Development is probably the area where a dialogue with other agencies of the system is most needed; this, in order to identify the real hemispheric priorities and decide on what functions each agency can perform, thereby avoiding duplication.”³⁷

Thus, the Regular Fund is far from providing the inter-American system’s bodies with the most of their resources; moreover, the amount allocated to these bodies is well below the level it should be given their importance and institutional position.

With respect to the increase in allocations from the Regular Fund in recent years, since 2008 there has been a gradual increase. However, it is important to highlight that these increases may not have had any real impact on the budget. According the Strategic Plan of the IACHR:

In 2007 and 2010, with the backing of the OAS General Secretariat, there were some increases to the Commission’s budget. However, they had no significant impact in terms of the resources available for the Commission’s operations, because from the outset the States determined that the increases should be used for other purposes.³⁸

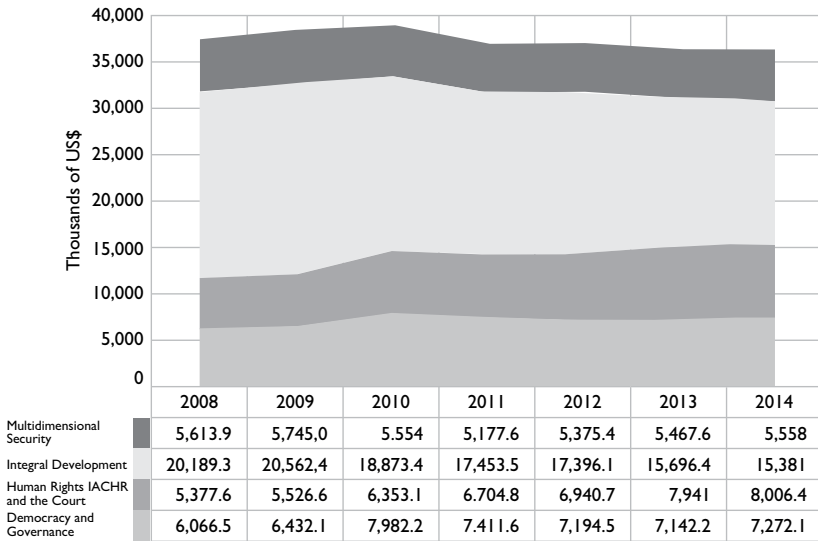
36 “The purpose of this exercise, therefore, will be to try and reach areas of consensus regarding the best way, now, to achieve the goals of the Organization in the 21st century. To my mind, it should include: [...] Setting a timetable for agreeing, with each of the institutions that depend on other agencies, the elimination of their financing from the Regular Fund. The role that the member states would like the so-called “decentralized bodies” to play should be determined as soon as possible. We are referring here to the Inter-American Defense Board, the Inter-American Telecommunication Commission, the Inter-American Committee on Ports, the Pan American Development Foundation, Trust for the Americas, the Inter-American Children’s institute, and the Art Museum of the Americas. The fact that almost all of these bodies originated in different legal instruments and are governed by ministerial meetings outside the structure of the Organization should be taken into account in the analysis. Such an agreement could include other forms of material assistance that the OAS could continue to provide them, to the extent that their main funding would come from other sources.” *A Strategic Vision of the OAS, Second Presentation, Secretary General*. April 17, 2013, accessed December 21, 2014, http://www.oas.org/en/media_center/speech.asp?sCodigo=13-0027

37 Ibid.

38 *Strategic Plan of the IACHR 2011-2015, Part I*, p. 61, accessed December 21, 2014, <http://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf>

GRAPH 3

Proposed budget for the four pillars of the OAS*

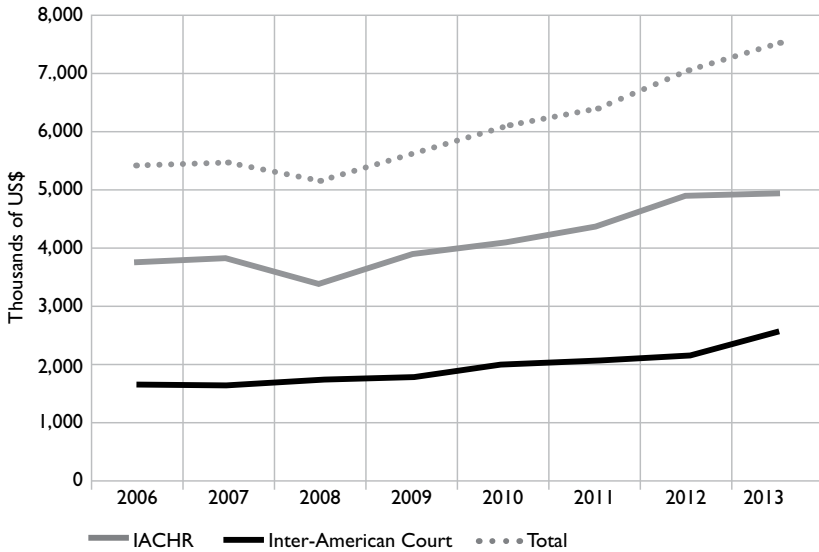


*Data for Graph 3 have been taken from each year's approved budgets. The 2012 and 2013 amounts were adjusted with respect to official reports because as from 2012 the OAS has included the Inter-American Commission of Women (CIM) under the human rights pillar (funding for CIM was subtracted from the amount presented). Data for 2006 and 2007 were not used, as in the budget proposals for these years, data was not divided up by pillars, accessed on August 21, 2014, <http://www.oas.org/budget/>

Additionally, one can also see that these increases have not followed a trend, nor have they happened on a regular basis—either before or after the process (Graph 4 and Annex 4). What must be noted, therefore, is that if these increases are not made for the required amounts in a planned, ongoing manner, they will fail in their attempt to bring greater predictability and financial independence to the inter-American system. In that case, therefore, the rhetoric of change and the justifications used throughout the strengthening process are far removed from the practical reality of recent years. Indeed, this is precisely what the data reveals: a situation that changed very little between the time the process was launched in 2011 and when it concluded in 2013.

GRAPH 4

Adjusted allocations from the Regular Fund*



70

Raísa Cetra, Jefferson Nascimento

*Data for Graph 4 was taken from the financial reports published on the IACHR website and adjusted based on data from the Board of External Auditors. Differences were found in the data from these two sources for 2006 and 2007, accessed August 21, 2014 http://www.oas.org/en/iachr/mandate/financial_resources.asp and http://www.oas.org/en/saf/accountability/external_audit.asp

When considering these amounts in nominal terms,³⁹ even though the IACHR’s budget from the Regular Fund grew 12% from 2011 to 2012, this rate of increase was not sustained in the following period (2012-2013), only rising 1.5%. As for the Court, there was a 5% increase from 2011 to 2012, while the increase reached nearly 20-19.5% [*sic*] from 2012 to 2013. Likewise, the average growth in allocations from the Regular Fund from 2011 to 2013—7% for the IACHR and 12% for the Court⁴⁰—shows that the rate of increase in funding for the inter-American system

39 It is important to verify whether there was also an increase in nominal terms, as with the reduction of the Organization’s overall budget, the percentages may be misleading.

40 It is noteworthy that this average may already be low, since the increase in the amount from the Regular Fund for the IACHR for 2013-2014 and 2014-2015 was 1.2% and 1.5% respectively. As for the Court, there have been no increases since 2013. However, these data were not taken into account because they correspond to only approved amounts, i.e. projections, and not adjusted amounts, which are the ones used in this chapter.

bodies from the Regular Fund is insufficient to cover their financial needs.

In 2014, the Executive Secretariat of the IACHR estimated that in the medium term (that is, from four to six years),⁴¹ the Commission's budget should be US\$32,519,000.⁴² With the average growth rate seen above, it would take 16 years for the Commission to obtain this amount from mandatory contributions. It is important to highlight that the IACHR's estimate already includes the changes to the body's operations that were requested by States during the reform process, such as the ongoing presence of commissioners at its headquarters and equitable budgets for all rapporteurships. As for the Court, according to 2010 projections, it would take 10 years to obtain the estimated 16 million dollars it would need for 2020.⁴³

This means that if the average rate of increase in allocations from the Regular Fund were to remain the same, the targets defined for the IACHR and the Court would be met, respectively, between ten to four years late, by which time they would evidently be outdated. If the targets were met within the stipulated time period and only through increases in the amounts from the Regular Fund, the Fund would provide approximately 80% of the budget for the inter-American system's bodies.

The Regular Fund's current pace of growth is insufficient to ensure that the bodies of the inter-American system are fully operational in the medium term and to enable the OAS to provide the majority of their funding, given that other sources will have to be found to cover the deficits. As for the assertions that the Regular Fund should cover at least most of the funding for the inter-American system bodies so that there may be greater efficiency, transparency, and equality, the numbers reveal that the Organization and its member are far from achieving this. They likewise reveal an absence of serious commitment to these objectives.

Therefore, it is necessary to redistribute the OAS's existing resources and allocate greater funding to the inter-American system, acknowledging the Commission and the Court's importance for the observance of human rights in the hemisphere. Even so, in order for this

41 *Definición de mediano plazo en la Corte Interamericana de Derechos Humanos. Necesidades financieras (corto, mediano y largo plazo)*, May 12, 2010, accessed August 20, 2014, <http://scm.oas.org/pdfs/2010/CP24463.pdf>

42 *Working document prepared by the Executive Secretariat of the Inter-American Commission on Human Rights (IACHR)*, November 2014.

43 *Corte Interamericana de Derechos Humanos. Necesidades financieras (corto, mediano y largo plazo)*, *supra* note 41.

increase to be consistent with the system's needs and to foster budget predictability, it is urgent that the OAS prepare a clear and specific plan of action to increase Regular Fund allocations to the inter-American system bodies and implement it as soon as possible.

The structural reality of the OAS: obstacles to increasing Regular Fund contributions to the inter-American system

Despite the commitments undertaken by member states to increase allocations from the Regular Fund to the inter-American system, it is important to highlight that this Fund is closely linked to the structural and political problems of the OAS. The Regular Fund depends almost entirely on the payment of annual mandatory quotas by member states.⁴⁴ The non-payment of quotas and continuous cuts in the budget to ensure that revenues collected cover expenditures are but a few of the challenges that are lurking with regard to increasing OAS allocations to the inter-American system. The acute financial crisis the Organization is facing is one of the main arguments used to justify the meager allocations to the inter-American system bodies and the timid increases over the years.

Repeated warnings from the Board of External Auditors point precisely to payment of quotas by member states as one of the Organization's major budget challenges, which leads to the actual revenues collected being lower than the amount expected.⁴⁵ According to the Board:

In fact, the OAS is extremely dependent on every expected dollar of quota revenues, and any non-payments or significant late payments place the OAS in jeopardy of default or non-payment of its expenditures.⁴⁶

Moreover, it was already evident in 2006 that the quotas collected from member states were clearly insufficient to cover the organization's operational expenses.⁴⁷ In this context, the then Secretary General, José

⁴⁴ *Supra* note 8.

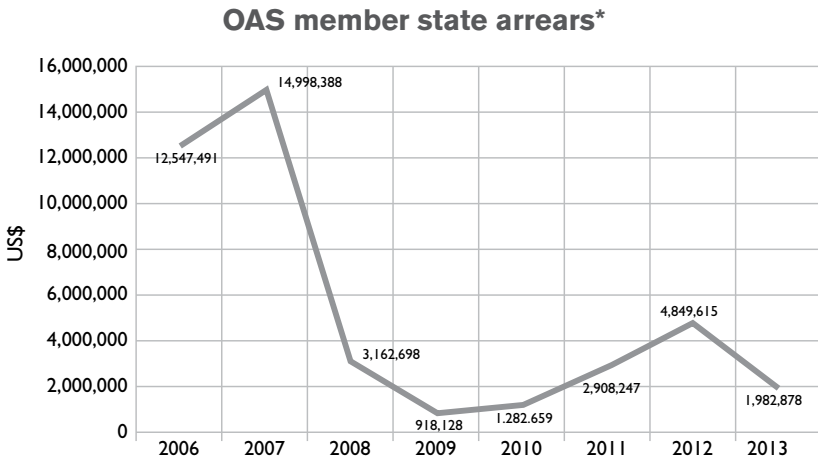
⁴⁵ *Note for the Information of the CAAP: Business Case for Available Options to Address the Gap between Expenditures and Timely Payments*, CP/CAAP 3218/13, accessed August 20, 2014, <http://www.oas.org/council/pr/CAAP/Cotas.asp>

⁴⁶ *Report to the Permanent Council, Annual Audit of Accounts and Financial Statements for the Years Ended December 31, 2011 and 2010*, p. 14, accessed August 20, 2014, <http://scm.oas.org/pdfs/2012/CP28579E.pdf>

⁴⁷ *Report to the Permanent Council, Annual Audit of Accounts and Financial Statements for the Years Ended December 31, 2006 and 2005*, p. 14, accessed August 20, 2014, <http://www.oas.org/saf/docs/OASAuditofAccountsandFinancialStatements2006.pdf>

Miguel Insulza, committed to freezing a real increase in the budget of the OAS Regular Fund as from 2007.⁴⁸ In parallel to this, timid annual increases in the total assigned quotas [Annex 6(a)] were accompanied by a reduction in the total amount of arrears member states owed to the OAS (Graph 5), thanks to increased collection of quotas for current and prior years (Graphs 5.1 and 5.2). Furthermore, budget cuts were made in attempt to bring projections in line with the funds actually received.⁴⁹

GRAPH 5



*Information taken from Table 8 of the 4th Quarterly Resource Management and Performance Report, accessed August 20, 2014, <http://scm.oas.org/pdfs/2014/CP32282E.pdf>

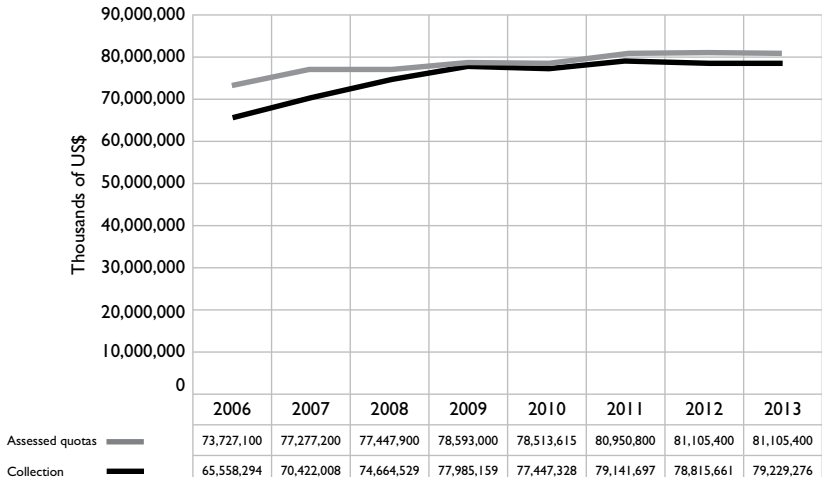
However, progress can be noted, which would suggest that the Organization could revisit its prior strategy of budget cuts and meager increases in quota amounts. Since 2009, the Organization has succeeded in collecting more than 90% of assessed quotas (Annex 6). Accumulated arrears to the OAS were rapidly reduced, though not permanently, as can be seen in Graph 5. Whereas in 2006, these arrears totaled US\$12,547,491, in 2013, it dropped to 1,982,878. Of the countries

48 Ibid.

49 Annex 4 shows how the Regular Fund has suffered major cuts over the years. Seeking a solution to this long-standing crisis, a series of attempts have been made in recent years to try to reorganize the budget and quotas. For example, in 2007, quotas began to be calculated not only on the basis of the UN's calculations, but also taking into account variables that are indicative of the size of a country's economy, such as its foreign debt. This change aimed to enhance compliance with Article 55 of the Charter of the OAS, which stipulates that the definition of the quota for each member state must take into account the state's ability to pay it. Another example is the fiscal incentive for those that made the so-called "timely payment," i.e. payment on January 1.

GRAPH 5.1

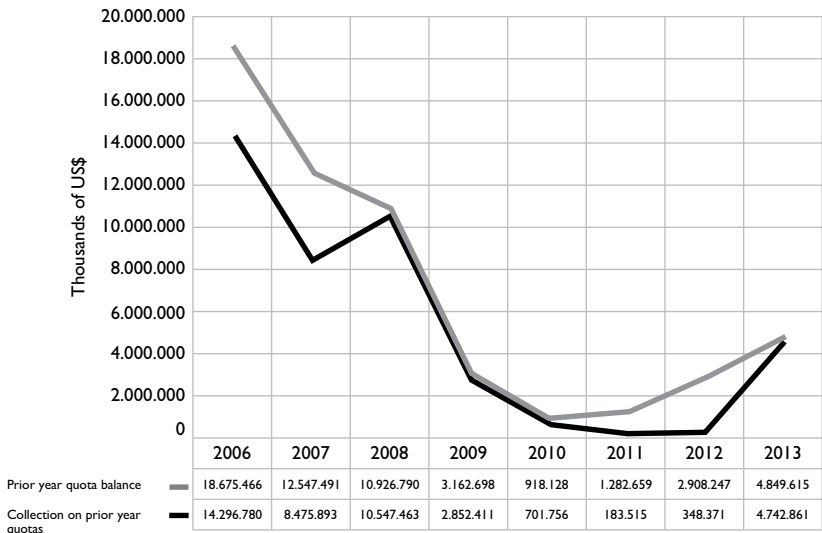
OAS member states' collection balance* (US\$)



*Information taken from Table 8 of the 4th Quarterly Resource Management and Performance Report, accessed August 20, 2014, <http://scm.oas.org/pdfs/2014/CP32282E.pdf>

GRAPH 5.2

Prior year collection balance* (US\$)



*Ibid.

in arrears in 2013, Venezuela and Uruguay owed the most.⁵⁰ Today, Venezuela alone accounts for 80% of total arrears owed.

Thus, during the period analyzed (from 2006 to 2013), the nominal increase in the collection of quotas was possible thanks to more frequent payments of these mandatory contributions. This, together with the ongoing budget cuts in an attempt to balance revenue and expenditures, seems finally to have led to a more favorable scenario as regards the Organization's track record of arrears and budget deficits. In 2013, for example, the Organization was able to collect almost the entirety of assessed amounts and the amount owed by member states decreased.

What appears to be lacking, then, is for the countries to accept real and larger increases to their quotas so the Organization's budget can finally grow, thereby making larger allocations to the inter-American system more feasible. However, this decision clashes with the diminished political credibility that the member states themselves give to the OAS. The major historical influence of the United States in the Organization, combined with integration efforts further to the south—particularly, the success of the Union of South American Nations (UNASUR)⁵¹—raise doubts as to how willing member states are to invest in the OAS. Other budget alternatives, therefore, must be seriously considered.

Brazil as a contributor to the OAS Regular Fund

Brazil has historically been the third largest contributor to the OAS Regular Fund. The percentage is calculated based on the size of a country's economy and its capacity to contribute (Table 1).

The total amount of Brazil's contributions to the OAS, though relatively significant for the Organization, is quite small when one takes into account the country's strategy for cooperation with international organizations. At the national level, Brazil uses the Brazilian Cooperation for International Development (Cobradi) concept as a unit of analysis for the country's activities abroad, especially those related to the provision of personnel, infrastructure, and financial resources with the aim of training individuals and strengthening organizations and institutions on the international level (IPEA 2010). International development cooperation includes all of the resources Brazil invests in other countries and international organizations in order to bolster their capacities

50 *Informe del pago de cuotas, Informe de la Junta de Auditores Externos de 2013*, p. 55, Anexo 1, http://www.oas.org/es/saf/rendicion_cuentas/docs/201405130918-Audit-Book-FY13-SP.pdf

51 See chapter one of this book, "The Challenge of Complementarity in Latin America's New Institutional Architecture for Human Rights."

TABLE 1

Year	Brazil's quota (US\$)	Regular Fund (US\$)	Brazil's quota (%)
2006	6,382,800	81,497,700	8.55
2007	6,382,800	84,900,000	7.62
2008	6,382,800	87,500,000	7.62
2009	6,298,700	90,125,000	7.95
2010	6,292,300	90,125,000	7.95
2011	6,361,800	85,349,800	7.95
2012	8,109,400	85,350,800	9.94
2013	8,109,400	83,870,500	9.94

Brazil's quota in the OAS budget and Regular Fund total amounts. OAS, *Approved Program Budget 2006*, <http://www.oas.org/budget/2006/Approved%20Budget%202006%20-%20English.pdf>. OAS, *Approved Program Budget 2007*, http://www.oas.org/budget/2007/Approved%20Budget%202007_E_optimized%201%20.pdf. OAS, *Approved Program Budget 2008*, http://www.oas.org/budget/2008/Approved%20Budget%202008_E.pdf. OAS, *Approved Program Budget 2009*, <http://www.oas.org/budget/2009/Budget%20Approved%202009%20English.pdf>. OAS, *Approved Program Budget 2010*, [http://www.oas.org/budget/2010/RF%20Approved%20Program%20Budget%202010%20\(Final%20Version\).pdf](http://www.oas.org/budget/2010/RF%20Approved%20Program%20Budget%202010%20(Final%20Version).pdf). OAS, *Approved Program Budget 2011*, <http://www.oas.org/budget/2011/FINAL%20Approved%20Program%20Budget%202011%20English.pdf>. OAS, *Approved Program Budget 2012*, http://www.oas.org/budget/2012/Approved%20Program%20Budget%202012%20ENG%20_%20No%20posts.pdf. OAS, *Approved Program Budget 2013*, http://www.oas.org/budget/2013/APPROVED_Program_Budget_2013.pdf, accessed on October 17, 2014.

Brazil's contributions and donations to international organizations is a significant amount in the country's strategy for international development cooperation. According to the most recent study on the subject (IPEA 2013), this amount represents 33.6% (US\$311.57 million) of Brazil's total expenditures on international cooperation (US\$1.625 billion), a percentage that is only exceeded by the total spent on peacekeeping operations. The level of public resources allocated to contributions and donations to international organizations confirms the importance of this kind of action as an instrument for international cooperation and, consequently, foreign policy.

In the Cobradi, contributions to international organizations are divided up into regular mandatory contributions to international organizations, quotas for development funds, and other expenditures. The regular contributions represent, according to the latest study, 43.1% of total contributions to international organizations, which are broken down in Table 2.

In the list of the Brazilian government's regular contributions to international organizations, the Organization of American States, which is currently the oldest active regional body in the world, holds a modest position among beneficiaries:

TABLE 2

Type of contribution to international organizations	Total (US\$)	Percentage (%)
Regular contributions to international organizations	134,218,452	43.1
Quotas to development funds	174,305,383	55.9
Other expenditures	3,045,455	1.0
Total	311,569,290	100

Expenditures by the Brazilian government in contributions to international organizations (IPEA 2010: 90)

TABLE 3

Organization	Total (US\$)	Percentage (%)
UN System	58,228,731	43.4
United Nations Organization for Education, Science and Culture (UNESCO)	7,798,733	5.8
United Nations Industrial Development Organization (UNIDO)	7,475,017	5.6
Pan American Health Organization (PAHO)	7,228,581	5.4
Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO)	6,938,633	5.2
Organization of American States (OAS)	6,320,940	4.7
Food and Agriculture Organization of the United Nations (FAO)	4,234,327	3.2
World Health Organization (WHO)	4,142,768	3.1
Inter-American Institute for Cooperation on Agriculture (IICA)	3,413,515	2.5
World Meteorological Organization (WMO)	2,894,985	2.2
Pan American Center for Foot and Mouth Disease (Panaftosa)	2,361,739	1.8
International Criminal Court (ICC)	2,068,440	1.5
Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials (ABACC)	1,987,603	1.5
Others	19,124,441	14.2
Total	134,218,453	100

Expenditures of the federal government to pay contributions to international organizations (Cobradi), 2010 (IPEA 2010: 91)

Voluntary contributions to the IACHR

In light of the complex situation of the OAS Regular Fund, the bodies of the inter-American system need to diversify their sources of funding in order to ensure their independence. This is why the decision of the strengthening process seems to be the right one: until means can be found to guarantee regular funding for the inter-American system's activities, voluntary contributions are extremely important for its bodies and must urgently be increased. In this section, our attention will be focused on the Specific Funds for the Inter-American Commission, since they were the primary target of the strengthening process. To avoid confusion, "voluntary contributions" will be used to refer to the official term "Specific Funds." We do so to stress that the donations are voluntary in nature and not always for a specific purpose.

Between 2006 and 2013, OAS member states only provided 50% or more of the total voluntary contributions over three years (2006, 2008 and 2013). This means that external actors, i.e. observer states and other institutions, were the main donors in the over the period analyzed (Annex 5). It is worthwhile reiterating that voluntary contributions represent half the budget of the IACHR.

The scant voluntary contributions made by member states is revealed again when we take a closer look at the States that makes these contributions to the IACHR and see that they are almost always the same ones (Table 4). The United States and Chile donated regularly during the period analyzed. Mexico and Costa Rica only failed to make donations in one of the years analyzed, and Colombia and Canada, in only three. Indeed, these countries are the ones that donate to the Commission most frequently.

Therefore, the other 29 member states of the OAS which are bound to the IACHR either did not make donations with the appropriate regularity, or simply did not make any at all. In the period analyzed, Brazil and Argentina only contributed for three years, and Venezuela, the Dominican Republic, Ecuador, and Paraguay, only one year. Similarly, countries such as Bolivia, Peru, Nicaragua, and Uruguay have not made this kind of contribution in the last eight years.

TABLE 4

Member State	2006	2007	2008	2009	2010	2011	2012	2013
Argentina	----	----	----	----	----	50,000	50,000	400,000
Brazil	98,500	----	300,000	10,000	----	----	----	----
Canada	----	----	853,300	175,000	748,600	611,200	----	612,400
Chile	55,000	10,000	10,000	10,000	10,000	15,000	55,000	80,000
Colombia	----	500,000	100,000	----	105,000	----	10,500	122,600
Costa Rica	3,000	3,200	2,900	2,800	3,900	3,000	3,100	----
Ecuador	----	----	----	----	----	1,500	----	----
United States	875,400	770,000	1,360,000	1,510,400	400,000	1,540,000	1,350,000	2,550,000
Mexico	100,000	100,000	100,000	62,500	----	100,000	285,000	305,000
Paraguay	----	----	----	----	----	----	24,900	----
Dominican Republic	25,000	----	----	----	----	----	----	----
Venezuela	120,000	----	----	----	----	----	----	----
Total (US\$)	1,276,900	1,383,200	2,726,200	1,770,700	1,267,500	2,320,700	1,778,500	4,070,000

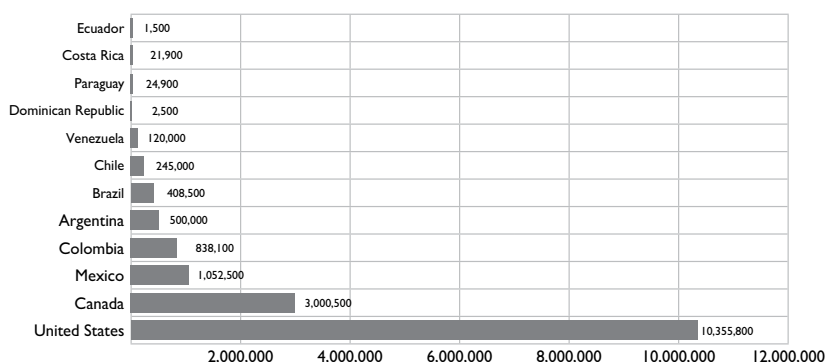
Member states' voluntary contributions to the IACHR

Data from Table 4 was taken from financial reports available on the IACHR website, Accessed August 21, 2014, http://www.oas.org/en/iachr/mandate/financial_resources.asp

Even so, the amounts contributed by those who voluntarily allocated resources can be questioned. During this period, the United States was responsible, on average, for 30% of all voluntary contributions to the IACHR. Costa Rica, while contributing every year, only donated US\$3,000, which does not even cover the airfare of a commissioner to the IACHR sessions. As for Chile, the country gave the IACHR amounts that were less than US\$100,000, and during four of the years, it only donated US\$10,000. These differences are visible in Graph 6, which shows the total contributions made during the period analyzed.

GRAPH 6

MEMBER STATES' VOLUNTARY CONTRIBUTIONS TO THE IACHR (US\$) 2006-2013*



*Data from Graph 6 were taken from financial reports published on the IACHR website, http://www.oas.org/en/iachr/mandate/financial_resources.asp

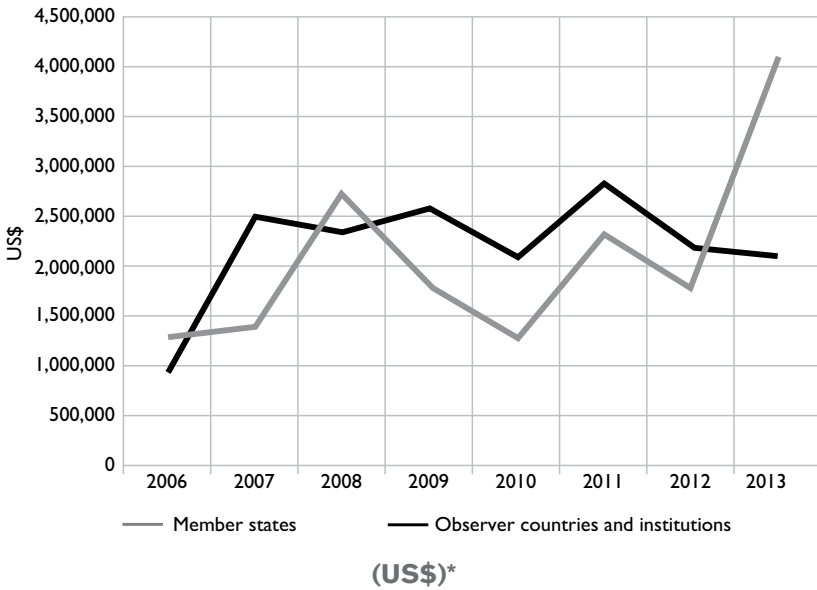
Nevertheless, at the end of the reform process (2012-2013), donations from member states increased, as shown in Graph 7. For example, in 2013, member states were responsible for 67% of the donations received. In 2013, Canada and Colombia began once again to provide the amount of funds they usually have given. Argentina, which began making voluntary contributions in 2011, increased its contributions seven-fold in 2013, whereas Chile and Mexico had already significantly raised their contributions in 2011 and 2012.

With the exception of the new contributions from Argentina, the general uptick in voluntary contributions was not the result of a greater number of member states allocating funds to the IACHR, as one would expect based on the requests and decisions made during the strengthening process. The increase in contributions came principally from countries that were already frequent donors, such as the United

States, which was responsible for nearly half of this growth. Thus, countries that were extremely active during the reform process, from which one would expect a greater commitment to the strengthening of the inter-American system, such as Brazil, Peru, and Uruguay, did nothing to increase the IACHR's voluntary contributions in the years since the reform process. It is important to note that these countries have a smaller contributive capacity than the United States; however, it is similar or greater than that of other donor countries, such as Mexico, Colombia, Chile, Argentina, and Costa Rica.⁵²

GRAPH 7

VOLUNTARY CONTRIBUTIONS TO THE IACHR BY SOURCE



*Data in Graph 7 were taken from financial reports available on the IACHR website, http://www.oas.org/en/iachr/mandate/financial_resources.asp

In addition to the amount of funding governments provide to the IACHR, the discussion regarding the use of these resources is of utmost importance (Annex 7). During the process, many of the concerns revolved around the specific use of the voluntary donations, mainly due

52 This comparison was made based on the quotas assigned to member states for the OAS Regular Fund, which take into consideration their ability to pay. The percentage assigned to each member state in 2012 is available at: <http://scm.oas.org/pdfs/2012/CP28847E.pdf>, accessed October 1, 2013.

to thematic earmarking of funding for the Commission, which, among other consequences, purportedly ends up creating an imbalance among the activities of the IACHR rapporteurships.⁵³ One of the principal criticisms was directed at the United States, pointing out that the Office of the Special Rapporteur for Freedom of Expression received disproportionate amounts of funding from the US government, while other rapporteurships had limited resources.

A thorough analysis shows that by making more donations, member states could eliminate some of these imbalances, as they tend not to earmark their donations for certain issues. On average, close to 33% of all voluntary contributions from member states are for specific thematic purposes. This means that the majority of the funds are not earmarked for specific activities (Graph 8).⁵⁴

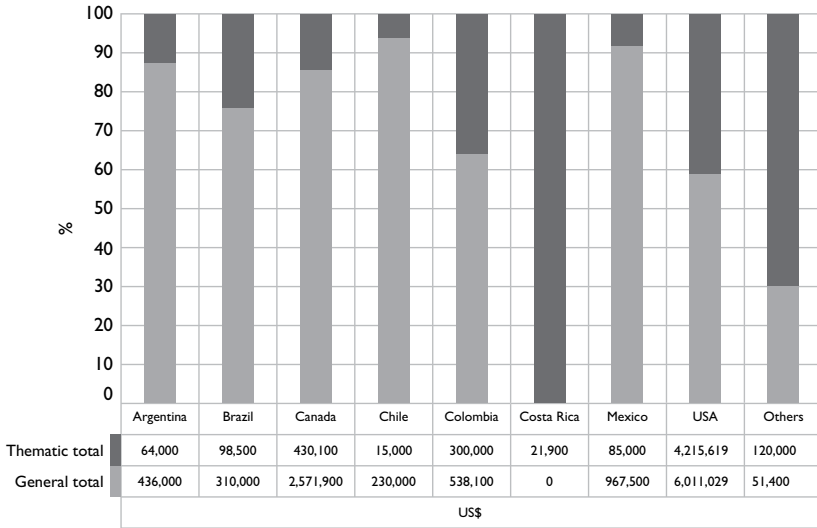
The United States is, in fact, the country that donates the most to thematic issues, with nearly 40% of its specific funds allocated for such purposes. Nevertheless, while in 2006 the funding for the Office of the Special Rapporteur for Freedom of Expression represented 42% of the total funds from this country, in 2012, this number fell to 25%, and in 2013, it was only 12%. Even though it still can be shown that the United States—the country that allocates the most resources to the Organization’s Specific Funds—directs its donations towards certain issues, the overall distribution of these funds has improved over the years (Annex 8).

53 See Ecuador’s speech during the reform process: “The Inter-American Commission on Human Rights (IACHR) should correct the imbalance of economic and human resources in its Rapporteurships, so that the rights that each Rapporteurship is called upon to monitor and warn about can be addressed on an equal footing, in terms of human as well as financial resources, according to the principles of universality, equality, and interdependence of human rights”. *Proposals by the Delegation of Ecuador regarding the topics of “Financing”, “Universality”, “Procedural Matters” and “the Annual Report of the IACHR, GT/SIDH/INF. 46/11, December 5, 2011.*

54 To perform these calculations, the authors created arbitrary classifications. “Thematic total” is the sum of the voluntary contributions allocated specifically to one issue (for example, indigenous peoples, freedom of expression, women, children, etc.). All the others (petition system, country situations, laws, etc.) were considered general areas with no thematic purpose (“General total”). Unearmarked contributions would be somewhat more restricted than what this interpretation allows for, as only donations with no specific purpose would be taken into consideration, which currently would only apply to the General Funds for the Strategic Plan. Similarly, the “thematic areas” program was not included in the thematic allocations of resources because it does not choose one issue or another. Annex 8, on donations from the United States, provides an example of the methodology adopted for these calculations.

GRAPH 8

Allocation of voluntary contributions from state members (2006-2013)*



*Data for Graph 8 were taken from the reports of the Board of External Auditors, from the sums of columns B and C from the table entitled “Statement of Changes in Fund Balance (Summary by Subprogram)”. The groupings were made based on data available from previous reports, http://www.oas.org/en/saf/accountability/external_audit.asp

In view of the situation regarding voluntary contributions by member states, it is urgent that they resume or increase their donations, helping to enhance the results of the Commission’s activities in the short term. Furthermore, since it is the OAS member states themselves that are committed to the inter-American system as a whole, the pursuit of a better distribution of the system’s activities is entirely their responsibility. Given that member states do not tend to earmark their donations, an increase in their contributions would help to reduce the imbalance in funding among the Commission’s thematic activities. Therefore, it would be better that they donate voluntarily to the IACHR without defining any specific purpose for the funds and let the Commission manage and distribute the funds it receives.

Brazil as a voluntary contributor to the inter-American system

Despite its position during the reform process, Brazil did not substantially alter its policy on voluntary contributions to the inter-American human rights system.

In relation to the Inter-American Human Rights Commission, since 2006, Brazil has contributed voluntarily to the IACHR on only three occasions (2006, 2008, and 2009). Its last contribution to the IACHR—only US\$10,000—was made before the reform process began (Table 5).

TABLE 5

2006	2007	2008	2009	2010	2011	2012	2013	2014
Brazil's donations to the IACHR (US\$)								
98,500	–	300,000	10,000	–	–	–	–	–

Federal government expenditures for voluntary contributions to the IACHR

Additionally, Brazil donated US\$20,000 in 2013 to the Inter-American Court in 2013; prior to that its last contribution (US\$100,000) was made via the Embassy of Brazil in Washington in 2009. The 2013 contribution was for a project to disseminate the Court's case law in Portuguese, which was a joint initiative between the Court and the Brazilian Ministry of Justice⁵⁵—that is, an initiative without any connection to the negotiations conducted in the framework of the reform process, which are under the purview at a national level of the Brazilian Ministry of Foreign Affairs.

Brazil's lack of commitment to voluntarily contributing funds to the bodies of the inter-American system coincides with the country's political decision to adopt a critical stance and distance itself from the OAS and the IACHR in 2011. This decision was a consequence of the Inter-American Commission's granting of precautionary measures in favor of the indigenous peoples of the Xingu River basin due to the impacts of the construction of the Belo Monte hydroelectric dam.⁵⁶ The foregoing led to, among other things, a policy note by the Ministry of Foreign Affairs rejecting the Commission's decision,⁵⁷ and the withdrawal of Brazil's candidacy for one of the vacancies on the Commission in the

55 See Inter-American Court of Human Rights. 2013 *Annual Report*, p. 85, accessed September 26, 2014, <http://www.corteidh.or.cr/index.php/en/court-today/informes-anales>.

56 IACHR, *PM 382/10 - Indigenous Communities of the Xingu River Basin, Pará, Brazil*, accessed October 17, 2014, <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>

57 Ministério das Relações Exteriores, *Nota nº 142 - Solicitação da Comissão Interamericana de Direitos Humanos (CIDH) da OEA*, accessed October 17, 2014, <http://www.itamaraty.gov.br/sala-de-imprensa/notas-a-imprensa/solicitacao-da-comissao-interamericana-de-direitos-humanos-cidh-da-oea>

IACHR's 2011 elections,⁵⁸ as well as that of the Brazilian ambassador to the OAS.⁵⁹ Since that time, Brazil has had an acting representative at the OAS. Indications of a change in this situation have only begun to appear very recently. However, to date, there have yet to be any important discussions regarding the policy on voluntary contributions for the bodies of the inter-American system.

Part III – Conclusion

The data presented here allow us to observe the staggering disconnect that exists between the agreements and political guidance of the inter-American system reform process and the financial reality of member states' mandatory and voluntary contributions to its bodies. Despite some increases in the Regular Fund and the Specific Funds in the wake of the strengthening process, member states are still far from providing the financial support the Commission and the Court need to ensure the proper functioning of their activities in the short and medium term. Combining mandatory and voluntary contributions appears to be the right way to effectively strengthening the system, as neither of these alone is enough to guarantee the financial sustainability, predictability, and independence of the inter-American system.

As a short-term solution, member states must truly commit to making voluntary contributions to the IACHR and the Inter-American Court without earmarking these funds for specific purposes. Although these commitments were undertaken during the reform process, there have been no major changes in the pattern of donations in the time since the strengthening process that occurred from 2011-2013. This means that the countries that already donate to the system—such as the United States, Canada, Mexico, Colombia, Chile, Argentina, and Costa Rica—need to commit to giving larger amounts. At the same time, it is urgent for the other countries in the region to begin to make or to resume their voluntary contributions on a regular basis and in sizeable amounts, in accordance with their ability to pay. This especially applies to the countries, such as Brazil, Peru and Uruguay, which were extremely active in the strengthening process, during

58 Agência Brasil, "Brasil retira candidatura de Vannuchi para cargo na OEA," April 14, 2011, accessed October 17, 2014, <http://memoria.ebc.com.br/agenciabrasil/noticia/2011-04-14/brasil-retira-candidatura-de-vannuchi-para-cargo-na-oea>

59 Folha de São Paulo, "Dilma retalia OEA por Belo Monte e suspende recursos," April 30, 2011, accessed October 17, 2014, <http://www1.folha.uol.com.br/fsp/mercado/me3004201117.htm>

which they highlighted the funding issue and demanded changes that require more resources.

Even though voluntary contributions are mainly seen as a quick fix to the inter-American system's financial problems, they allow countries to give more to financially strengthen the most important human rights bodies in the hemisphere without having to wait for the OAS's budgetary and political tangles to be resolved. The bodies of inter-American system must be capable of operating regardless of the Organization's crisis.

As a medium-term solution, the OAS must increase its annual allocations to the inter-American system on an ongoing basis and in reasonable amounts to meet the Commission and the Court's financial needs. To achieve this, preparing an action plan with clear objectives for the inter-American system's regular budget is fundamental. Similarly, to address the budgetary crisis the Organization is currently facing, member states must consider significantly increasing their mandatory contributions to the OAS. By doing so, budgetary obstacles will be overcome and allocations to the inter-American system will become only a matter of political choices for the OAS and its member states.

Although this chapter focuses on the responsibility of OAS member states to allocate more resources to the bodies of the inter-American system, it is important to highlight the gap in our analysis on how the funds currently allocated are being used. Indeed, if the situation improves, civil society must be able to participate in the process of defining the priorities to which the IACHR and the Court decide to devote their scarce resources. The invitation remains open to whoever wishes to engage in further discussion.

Annex 1. Regular Fund and Specific Funds for the IACHR between 2006 and 2013

IACHR	2006	2007	2008	2009	2010	2011	2012	2013
Allocation from the OAS Regular Fund (thousands of US\$)	3,728.30	3,793.90	3,362.90	3,845.10	4,057.50	4,329.80	4,865.40	4,936.30
Percentage (%)	63	50	40	47	55	46	55	44
Specific Funds (thousands of US\$)	2,203.70	3,845.10	5,045.50	4,329.80	3,354.70	5,135.20	3,982.50	6,164.40
Percentage (%)	37	50	60	53	45	54	45	56
Total financial resources (thousands of US\$)	5,932.00	7,639.00	8,408.40	8,174.90	7,412.20	9,465.00	8,847.90	11,100.70

Data in Annex 1 were taken from the financial reports available by the IACHR and adjusted based on data provided by the Board of External Auditors, http://www.oas.org/en/iachr/mandate/financial_resources.asp and http://www.oas.org/en/saf/accountability/external_audit.asp

Annex 2. Regular Fund and Specific Funds for the Court between 2006 and 2013

IACHR	2006	2007	2008	2009	2010	2011	2012	2013
Allocations from the OAS Regular Fund (thousands of US\$)	1,656.3	1,656.3	1,756.3	1,780.5	1,998.1	2,058.1	2,161	2,581.2
Percentage (%)	45	48	67	56	52	56	35	50
Specific Funds (thousands of US\$)	2,011.60	1,772.70	0,857	1,375.90	1,881.60	1,613.90	3,982.50	2,580.10
Percentage (%)	55	52	33	44	48	44	65	50
Total financial resources (thousands of US\$)	3,667.90	3,429.00	2,613.30	3,156.40	3,879.70	3,672.00	6,143.50	5,161.30

Data in Annex 2 were taken from the financial reports made available by the IACHR and data provided by the Board of External Auditors, <http://www.corteidh.or.cr/index.php/en/court-today/publicaciones> and http://www.oas.org/en/saf/accountability/external_audit.asp

Annex 3. Budget provided for the four pillars of the OAS

Programmatic area	2008	2009	2010	2011	2012	2013	2014
Democracy and governance (thousands of US\$)	5,377.60	5,526.60	6,353.10	6,704.80	6,940.70	7,941	8,006.40
Human Rights - IACHR and the Court (thou-sands of US\$)	63	50	40	47	55	46	55
Integral development (thousands of US\$)	20,189.30	20,562.40	18,873.40	17,453.50	17,396.10	15,696.40	15,381
Multidimensional security (thousands of US\$)	5,613.90	5,745	5,554	5,177.60	5,375.40	5,467.60	5,558
Total	37,247.30	38,266.10	38,762.70	36,747.50	36,906.70	36,247.40	36,217.50

Data for Annex 3 were taken from each year's approved budget. 2012 and 2013 amounts provided for in the budget were adjusted because in 2012 the OAS placed the Inter-American Commission of Women under the human rights pillar. Data for 2006 and 2007 were not collected, as they were not divided up by pillars in the program budget for those years, <http://www.oas.org/budget/>.

Annex 4. Regular Fund adjusted budgets

	2006	2007	2008	2009	2010	2011	2012	2013
Regular Fund Total (thousands of US\$)	81,497.7	84,900	87,500	90,125	90,125	85,349.8	85,350.8	83,870.5
For the IACHR (thousands of US\$)	3,728.3	3,793.9	3,362.9	3,845.1	4,057.5	4,329.8	4,865.4	4,936.3
Percentage (%)	4.57	4.47	3.84	4.27	4.50	5.07	5.70	5.89
For the Court (thousands of US\$)	1,656.3	1,656.3	1,756.3	1,780.5	1,998.1	2,058.1	2,161	2,581.2
Percentage (%)	2.03	1.95	2.01	1.98	2.22	2.41	2.53	3.08
Total for the IAHRs (thousands of US\$)	5,384.6	5,450.2	5,119.2	5,625.6	6,055.6	6,387.9	7,026.4	7,517.5
Percentage (%)	6.61	6.42	5.85	6.24	6.72	7.48	8.23	8.96

Data for Annex 4 were taken from the financial reports published on the IACHR website and adjusted according to data from the Board of External Auditors. Discrepancies were found in the data for 2006 and 2007 from these two sources, in which cases, data from the external audit was used, accessed August 21, 2014, http://www.oas.org/en/iachr/mandate/financial_resources.asp and http://www.oas.org/en/saif/accountability/external_audit.asp

Annex 5. Voluntary contributions to the IACHR by source

IACHR Specific Funds	2006	2007	2008	2009	2010	2011	2012	2013
Member States (thousands of US\$)	1,276.90	1,383.20	2,726.20	1,770.70	1,267.50	2,320.70	1,778.50	4,070
Observers (thousands of US\$)	0,738.5	2,341.80	2,280.80	2,028.50	1,154.90	2,415.60	1,109.50	1,903.20
Institutions (thousands of US\$)	0,188.3	0,120.1	0,038.6	0,530.6	0,932.3	0,398.9	1,094.5	0,191.2
Total (thousands of US\$)	2,203.70	3,845.10	5,045.50	4,329.80	3,354.70	5,135.20	3,982.50	6,164.40

Annex 6. OAS member states quota payments and debts

	(a) Assessed Quotas (US\$)	(b)		(c = a - b)		(d = b/a)		(e)		(f)		(g = e - f)		(h = c + g)
		Collection on Assessed Quotas (US\$)	Current Period Collection Balance (US\$)	Current Year Collection Progress (US\$)	Current Year Collection Progress (US\$)	Prior Year Quota Balance (US\$)	Prior Year Collection on Prior Year Quotas (US\$)	Collection on Prior Year Quotas (US\$)	Prior Year Collection Balance (US\$)	Total Owed (US\$)				
2006	73,727,100	65,558,294	8,168,806	89%	18,675,466	14,296,78	4,378,685	12,547,491						
2007	77,277,200	70,422,008	6,855,192	91%	12,547,491	8,475,893	4,071,598	14,998,388						
2008	77,447,900	74,664,529	2,783,371	96%	10,926,790	10,547,463	379,327	3,162,698						
2009	78,593,000	77,985,159	607,841	99%	3,162,698	2,852,411	310,287	918,128						
2010	78,513,615	77,447,328	1,066,287	99%	918,128	701,756	216,372	1,282,659						
2011	80,950,800	79,141,697	1,809,103	98%	1,282,659	183,515	1,099,144	2,908,247						
2012	81,105,400	78,815,661	2,289,739	97%	2,908,247	348,371	2,559,876	4,849,615						
2013	81,105,400	79,229,276	1,876,124	98%	4,849,615	4,742,861	106,754	1,982,878						

4th Quarterly Resource Management and Performance Report, 2013 (Table 8), accessed December 21, 2014, <http://scm.oas.org/pdfs/2014/CP32282E.pdf>

Annex 7.

Allocation of Specific Funds		2006	2007	2008	2009	2010	2011	2012	2013
Argentina	General total (US\$)	0	0	0	0	0	35,000	35,600	365,400
	Thematic Total (US\$)	0	0	0	0	0	15,000	14,400	34,600
	Total (US\$)	0	0	0	0	0	50,000	50,000	400,000
	Thematic as percentage of total (%)	0.00	0.00	0.00	0.00	0.00	30.00	29.00	8.66
Brazil	General total (US\$)	0	0	300,000	10,000	0	0	0	0
	Thematic Total (US\$)	98,500	0	0	0	0	0	0	0
	Total (US\$)	98,500	0	300,000	10,000	0	0	0	0
	Thematic as percentage of total (%)	100.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Canada	General total (US\$)	0	0	698,700	0	649,600	611,200	0	612,400
	Thematic Total (US\$)	0	0	154,600	175,000	100,500	0	0	0
	Total (US\$)	0	0	853,300	175,000	750,100	611,200	0	612,400
	Thematic as percentage of total (%)	0.00	0.00	18.12	100.00	13.40	0.00	0.00	0.00
Chile	General total (US\$)	55,000	10,000	10,000	10,000	10,000	10,000	45,000	80,000
	Thematic Total (US\$)	0	0	0	0	0	5,000	10,000	0
	Total (US\$)	55,000	10,000	10,000	10,000	10,000	15,000	55,000	80,000
	Thematic as percentage of total (%)	0.00	0.00	0.00	0.00	0.00	33.00	10.00	0.00
Colombia	General total (US\$)	0	200,000	100,000	0	105,000	0	10,500	122,600
	Thematic Total (US\$)	0	300,000	0	0	0	0	0	0
	Total (US\$)	0	500,000	100,000	0	105,000	0	10,500	122,600
	Thematic as percentage of total (%)	0	60.00	0	0	0	0	0	0

Annex 7. (continues)

Allocation of Specific Funds		2006	2007	2008	2009	2010	2011	2012	2013
Costa Rica	General total (US\$)	0	0	0	0	0	0	0	0
	Thematic Total (US\$)	3,000	3,200	2,900	2,800	3,900	3,000	3,100	0
	Total (US\$)	3,000	3,200	2,900	2,800	3,900	3,000	3,100	0
	Thematic as percentage of total (%)	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00
Mexico	General total (US\$)	100,000	100,000	100,000	62,500	0	100,000	258,000	247,000
	Thematic Total (US\$)	0	0	0	0	0	0	27,000	58,000
	Total (US\$)	100,000	100,000	100,000	62,500	0	100,000	285,000	305,000
	Thematic as percentage of total (%)	0	0	0	0	0	0	10	19
United States	General total (US\$)	431,400	450,000	685,000	899,229	400,000	660,000	898,000	1,587,400
	Thematic Total (US\$)	444,000	320,000	675,000	481,319	0	880,000	452,000	963,300
	Total (US\$)	875,400	770,000	1,360,000	1,380,55	400,000	1,540,000	1,350,000	2,550,700
	Thematic as percentage of total (%)	51.00	41.00	50.00	35.00	0.00	57.00	33.00	38.00
Others	General total (US\$)	25,000					1,500	24,900	
	Thematic Total (US\$)	120,000	0	0	0	0	0	0	0
	Total (US\$)	145,000	0	0	0	0	1,500	24,900	0
	Thematic as percentage of total (%)	82.76	0.00	0.00	0.00	0.00	0.00	0.00	0.00
TOTAL	General total (US\$)	611,400	760,000	1,893,700	981,729	1,164,600	1,417,700	1,272,000	3,014,800
	Thematic Total (US\$)	665,500	623,200	832,500	659,119	104,400	903,000	506,500	1,055,900
	Total (US\$)	1,276,900	1,383,200	2,726,200	1,640,848	1,269,000	2,320,700	1,778,500	4,070,700
	Thematic as percentage of total (%)	52.00	45.00	30.50	40.00	8.00	39.00	28.00	26.00

"Thematic total" is the sum of the voluntary contributions allocated specifically to an issue (for example, indigenous peoples, freedom of expression, women, children, etc.). All others (petition system, country situations, laws, etc.) were considered general areas with no thematic purpose ("General total"). Data for Annex 7 were taken from the reports of the Board of External Auditors, based on the sum of columns B and C of the table "Statement of Changes in Fund Balance (Summary by Subprogram)". The groupings were made based on data available from previous reports. See: http://www.oas.org/en/saf/accountability/external_audit.asp

Annex 8.

Allocation of Specific Funds		2006	2007	2008	2009	2010	2011	2012	2013
Strategic Plan		----	----	----	----	----	110,000	99,800	367,800
Program 1 (Laws)		----	----	----	----	----	350,000	360,000	555,400
Program 2		0	0	0	0	0	50,000	50,000	400,000
(Petition System)		----	----	----	----	----	93,000	198,400	539,800
Program 3		0	0	300,000	10,000	0	0	0	0
(Country Monitoring)		----	----	----	----	----	----	155,000	49,800
Program 4		98,500	0	300,000	10,000	0	0	0	0
(Thematic Areas)		----	----	----	----	----	----	----	31,600
Program 6		0	0	698,700	0	649,600	611,200	0	612,400
(Other Activities)		----	----	----	----	----	----	65,000	43,000
Program 8		0	0	853,300	175,000	750,100	611,200	0	612,400
(Development)		----	----	----	----	----	67,000	19,800	----
Promote and Protect Human Rights		431,400	450,000	685,000	899,229	400,000	40,000	----	----
General Total		431,400	450,000	685,000	899,229	400,000	660,000	898,000	1,587,400
Freedom of Expression		371,000	200,000	550,000	249,701	----	600,000	350,000	300,000
Women		50,000	50,000	50,000	77,297	----	80,000	----	43,000
Afro-Descendants		----	----	25,000	50,000	----	50,000	68,000	192,800

Annex 8. (continues)

Allocation of Specific Funds	2006	2007	2008	2009	2010	2011	2012	2013
Indigenous	----	20,000	----	50,000	----	50,000	----	41,500
Migrants	----	----	----	10,000	----	----	7,000	44,000
Child	----	----	----	----	----	----	11,000	45,000
Deprived of liberty	----	----	----	----	----	----	16,000	97,900
LGTBI	----	----	----	----	----	100,000	----	182,400
ESCR	----	----	----	----	----	----	----	16,700
Human Rights Defenders	23,000	50,000	50,000	44,321	----	----	----	----
Thematic Total	444,000	320,000	675,000	481,319	0	880,000	452,000	963,300
Total	875,400	770,000	1,360,000	1,380,548	400,000	1,540,000	1,350,000	2,550,700
Percentage - Freedom of Expression (%)								

References

Amato, Victoria. 2012. "Una mirada al proceso de reflexión sobre el funcionamiento de la CIDH." *Aportes DPLf*, 16 (5). <http://www.dplf.org/uploads/1338931610.pdf>

Instituto de Pesquisa Econômica e Aplicada (IPEA). 2010. *Cooperação brasileira para o desenvolvimento internacional 2005-2009*. Brasília: Dec. Accessed October 30, 2014. <http://goo.gl/EI7r98>

Instituto de Pesquisa Econômica e Aplicada (IPEA). 2013. *Cooperação brasileira para o desenvolvimento internacional: 2010*. Brasília: Ipea - ABC. Accessed October 30, 2014. <http://goo.gl/sGQCml>

Orozco, Jesús. 2014. "El proceso de fortalecimiento. Miradas desde el interior." *Aportes DPLf*, 19 (7). http://www.dplf.org/sites/default/files/aportes_19_web_0.pdf

Salazar, Katya. 2014. "Entre la realidad y las apariencias." *Aportes DPLf*, 19 (7). http://www.dplf.org/sites/default/files/aportes_19_web_0.pdf

Chapter 3

Towards a Model of Transparency and Access to Information in the Inter-American Human Rights System

*Miguel Pulido Jiménez, Mariana González Armijo,
María Sánchez de Tagle, Silvia Ruiz Cervantes,
Jaqueline Sáenz Andujo*
Fundar, Center for Analysis and Research

Summary

97

The bodies of the inter-American human rights system, as part of their strengthening, and to build trust and legitimacy, need an active transparency policy and institutional design that allow users access to important information. Although international organizations are subject to transparency and information access policies, and the Organization of American States (OAS) published its own policy to that effect in May 2012, the OAS is a long way from an active and proper implementation that achieves maximum disclosure of the information it holds. This chapter provides inputs showing the state of affairs regarding transparency at the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. These inputs attest to the importance of developing clear guidelines for several aspects of transparency, including appointment processes, individual case processing, and the financial situation, and providing criteria in keeping with international standards in order to achieve real progress on this issue.

Introduction

In a society that prides itself on being democratic, citizens must have information available in order to form an opinion on public matters. Furthermore, the sustainability of a participatory democracy requires ensuring society's access to sufficient, timely, and truthful data on government's actions, management of public resources, the impact of its decisions, and the reasons behind such decisions. All of these issues are directly related to the democratic legitimacy of a State's institutions. Thus, transparency, by virtue of being related to the administration and knowledge of public government information, is a topic that is ever more ingrained and present in political speeches, academic debates, and the demands of civil society—especially organized civil society.

The rationale for transparency is rooted in arguments from various disciplines, such as law, political science, public administration, and even public service ethics. This is the case in democracies as it assumes a flow of information that is considered non-negotiable inasmuch as we accept that the information the State "uses to perform its functions does not belong to it, but [rather, belongs] to the set of individuals and groups that enable the State to exist, and which are its ultimate *raison d'être*" (Aguilar y Bautista 2005: 16).

Seen through a democratic prism, transparency encompasses a wide breadth of institutions and spheres of interactions which are considered to be of a public nature. We would do well to remember that the State, for purposes of carrying out its duties, maintains the classic system of separation of powers, i.e. an executive, legislative, and judicial branch. However, in the Americas, the evolution of relations between the government and the governed, coupled with the public's increased demand for more efficient and effective public institutions has given rise to a complex system that provides for bodies with specific functions but whose nature differs from traditional ones. Among such agencies we can mention: electoral bodies, autonomous central banks, and agencies charged with judicial and non-judicial protection of human rights.

Again, from a democratic perspective and in keeping with a broad notion of public institutions, international organizations and their interactions with States are highly significant for society. In light of the foregoing, it is particularly important to address the manner in which the bodies of the inter-American human rights system (the inter-American system) make their work transparent. As public bodies of international law they are subject to a set of normative provisions which regulate their functioning, but they need democratic legitimacy.

This point is significant as traditionally the inter-American system has promoted transparency in the States of the region. In fact, its contribution to the adoption of regulatory frameworks, institutional design, and promotion of citizen's access to information is notable. Nevertheless, this chapter takes a novel approach: the inter-American system as a subject of transparency, in keeping with its own rules and procedures. To this end, this chapter develops several arguments that attest to and substantiate the need for the system to have a transparency policy.

The chapter first addresses some conceptual fundamentals, reviews the status of the matter at hand in the inter-American system, compares different standards, and finally proposes a synthesis of principles and frameworks for a transparency and access to information policy that can improve the current operating conditions of the inter-American system's bodies.

The notion of transparency in general and in the inter-American system

One of citizens' repeated demands in recent years has been to establish a regulatory and institutional framework that allows for concepts like access to information, transparency, and accountability to move from academic and political discourse to reality for the public. These concepts have largely fueled the debate over what new ideas, means, and practices are required in the process of consolidating public institutions. Implicit therein is a new kind of relationship between public bodies and citizens which allows society at large a better understanding of the terms under which authorities are required to fulfill their mandates, in addition to greater oversight over their role, and finally, the opportunity to influence their decisions.

Due to this potential, transparency in public institutions of an international nature—like the bodies of the inter-American system—is one of the factors to be studied and promoted. With the aim of shedding light on the implications of transparency, we make the following observations.¹

1 It is important to highlight the lively and interesting academic debate regarding the definitions and applications of transparency. In this sense, this is a proposed conceptualization whose main purpose is to identify the key components that allow it to be distinguished from other related concepts like accountability and access to information. Other references on the concept can be found in Concha Cantú, López-Ayllón, and Tacher Epelstein (2004); Merino (2005); SFP (2005); Vergara (2005); Peschard (2005); Cárdenas (n.d.); Ruiz (2006).

Transparency in a broad sense

From the outset it should be stated that transparency can be understood in a broad and a strict sense. The former is understood as the result of a set of measures and policies implemented as a consequence of the nature of public responsibilities, which enable the public to have access to truthful, complete, and timely information on an ongoing basis about how the State conducts its business. Transparency is a characteristic, a quality, i.e. there is either transparency or there is not. In this sense, a government or any public office, agency of the State, or international organization is transparent when it manages to create conditions that allow society to be fully aware of its actions, such that any decision, the rationale behind it, “as well as the costs and resources committed to implementing a decision, are accessible, clear, and communicated to the public at large” (Hofbauer and Cepeda 2005: 39).

This broad concept of transparency has been associated with [the metaphor of] a glass box or a public display case and has also been one of the foundations of the democratic exercise of public service. Seen in this light, transparency necessarily implies disclosure of actions, which “constitutes the most decisive factor for oversight—or for legitimizing—representatives’ exercise of power” (Abramovich and Courtis 2003).

Transparency in a Strict Sense

Underlying the scenario previously outlined, is transparency in a strict sense—also referred to as active transparency or public information made available by operation of law—which is nothing more than the statutory obligation public institutions have to make specific information on its functions available to its citizens through remote means on an ongoing basis.

Active transparency tends to regulate, implicitly or explicitly, the obligation to pro-actively undertake different measures to disseminate information and penalize authorities who disregard their obligation. The most important of these measures is to process the information in order to fulfill the mandate of presenting to the public specific processed data.

Thus, transparency, in a strict sense, is one of the components which allows for transparency in a broad sense. It is an instrument to make the metaphorical public display cabinet a reality, which, in principle, is also provided for in the majority of international standards and normative instruments issued on the subject.²

2 See, for example, the *Model Inter-American Law on Access to Public Information*,

Conditions for transparency

As previously highlighted, transparency, in a broad and strict sense, is not aimed at anyone in particular that has been pre-defined or identified. One of its main characteristics is that it is directed towards the public at large. In other words, each citizen is a potential recipient and beneficiary of transparency. In the case of active transparency, it is fundamental to create the conditions for the minimum required information to be known by the widest array of citizens, thus effectively placing information on display.

Availability, accessibility, permanence, and remote access are key to achieving this. Information is available to the public when there is enough of it, and the public entity is able to provide it. It is accessible when it is materially obtainable for the public, in the broadest sense, i.e. when they can find out about it, see it, obtain it, understand it, and subsequently use it. Permanence implies that the aforementioned characteristics will be sustained over time. Remote access means it is not necessary to travel to the place where the data has originally been archived in order to access it.

The sum of these four factors results in the following: active transparency is accomplished when the public is able to get to know, whenever and wherever it decides, all the information that provisions indicate should be made available to it.

As is to be expected, this raises new questions: How much information is enough for each category that needs to be included? What is the best medium to satisfy the requirements for availability, accessibility, permanence, and remote access? Lastly, in what manner or format should information be displayed in order to meet the availability and accessibility requirements?

The public nature of the bodies of the inter-American human rights system and the notion of public interest

In order to identify the public interest in the functioning of institutions like the OAS and the bodies of the inter-American system—the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (the Court)—a brief reference to the origin, nature, and role of this system is called for.

The Organization of American States (OAS) is an international organization created by the States of the Americas with a view to achieving an order of peace and justice, promoting solidarity, and defending their sovereignty, territorial integrity, and independence.³

Since the creation of the OAS, the States of the Americas have adopted a series of international instruments that have become the normative basis of the regional system for the promotion and protection of human rights, through the recognition of these rights, the establishment of obligations aimed at their promotion and protection, and the creation of organs to oversee their observance.⁴

For its part, the principal function of the IACHR is to promote the observance and defense of human rights in the Americas. Among its multiple duties we can highlight reviewing individual petitions, *in loco* visits, thematic or case hearings, as well as country, thematic, or annual reports.

The Court was created in 1969 under the American Convention on Human Rights, and was established and organized when the Convention entered into force. It was formally installed at its headquarters in San Jose, Costa Rica, on September 3rd, 1979. As for its functions, the Court is an autonomous judicial institution whose purpose is to interpret and apply the American Convention on Human Rights. To fulfill such purpose, the Court has two primary functions: a judicial one, and an advisory one.

In keeping with the foregoing, it is indispensable that the main bodies of the inter-American system—the IACHR and the Court—not only have the legal and material resources to perform their duties, but also a high degree of legitimacy that allows them exercise with authority the persuasion required to carry out their mandate and achieve the degree of influence inherent therein.

According to Claudio Nash, transparency must be applied to the bodies of the inter-American system, given that: (a) greater transparency increases the legitimacy of its bodies; (b) it has positive effects on improving individuals' access to justice; and (c) it enables civil society to carry out oversight of the inter-American bodies' functioning (Nash *et al.* 2012: 12).

3 Article 1 of the OAS Charter.

4 Inter-American Commission on Human Rights (IACHR). 2012. Basic Documents in the Inter-American System. Introduction. (Updated on April 30, 2012). Washington D.C., p. 2, <http://www.oas.org/en/iachr/mandate/Basics/introduction-basic-documents.pdf>

Its legitimacy stems principally from: appropriate exercise of its powers; timely compliance with its obligations; its proximity to the victims' plights; justified and efficient use of economic and material resources; as well as the recognition and public prestige of those who comprise their executive bodies. To this end, communication with society (in general terms, the people of the States Parties) is necessary in order to achieve strengthening of this trust. Absence or inadequate dissemination of results, as well as lack of transparency or even people's simple ignorance of the nature or management of the inter-American system, can lead to its weakening.

Thus, the inter-American system's work must be part of the public debate and subject to public scrutiny. Dissemination of sufficient information and transparency in its management are obligations that stem from its public nature, but also from the need to build legitimacy. This is why it is so important it have adequate administrative policies and decisions made to further public outreach and disseminate its activities.

Given their nature as public institutions of international law and the public interest that imbue their activities, individuals are entitled to know the information that is in the hands of the bodies that make up the inter-American system. This right is not limited to having access to documents created and information held by said bodies, but, rather, also extends to the duty to report on actions they are taking and the results they obtain through such activities. This means that the OAS, the IACHR, and the Court are obligated to disseminate their activities and the impact they have on the inter-American community. In other words, the guarantees of the regions' citizens include the right to know—with the inter-American system having the duty to keep them informed in a timely and truthful manner, and subsequently disclose the what, how, with what, and why of its work, to which end the different bodies that make up the system must process their data and provide it in an easy to understand manner.

Conclusions on the inter-American system as a repository of public information

We reiterate that the information the bodies of the inter-American system possess must be considered of public interest, since it is a decisive factor in understanding the human rights situation in the inter-American region, insofar as the inter-American system is the competent entity for the protection and promotion of human rights and

the guarantor of oversight both judicially—through the Court—as well as quasi-judicially—through the IACHR—with regard to human rights violations in the region.

Hence, transparency, in its broadest sense, is the most effective, efficient, and legitimate manner in which the regions' inhabitants can verify that the actions of officials of the inter-American system are in keeping with the normative framework that regulates it, that the resources it has available are being allocated to a system that produces reliable and tangible results, and that it also fosters observance of human rights. Additionally, the public can thus be certain of what to expect if they ever turn to the inter-American system.

Transparency and access to information as a source of legitimacy of the bodies of the inter-American system

Two of the sources of democratic legitimacy, when it comes to institutions which are not created as a result of direct elections, are the processes of appointing their members, as well as the management and performance of their functions. When appointment mechanisms are transparent, trust is created through positive public opinion and the active participation of society in matters of their interest.

In general terms, an appointment procedure which contributes to the democratic legitimacy of institutions must meet ten requirements (it should be noted that these are not the only ones nor should they limit the process, as it depends on the context and the kind of procedure to be carried out): (1) an appointment mechanism through an outside entity; (2) an inclusion mechanism for candidates; (3) defined stages and deadlines; (4) a detailed outline of the desired profile; (5) a description of the post; (6) consolidation and publication of each candidate's file; (7) an inclusion mechanism for the public; (8) a technical instrument to evaluate and assess candidates; (9) reports on the intermediate and final decisions that include an explanation; (10) public access to the information generated by the previous requirements (Fundar 2009).

Furthermore, one must keep in mind that human rights institutions must have inclusion procedures which guarantee a plurality of representation of those interested in human rights protection⁵ in order to have diverse interest group that can consolidate and influence decision-

5 The Paris Principles, *Principles relating to the Status of National Institutions*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

making. This will result in an institution with a multiplicity of visions, ideas, and opinions on how to resolve issues in a more balanced manner.

The following is a general description of the most important characteristics of an appointment process and its implementation. The process must provide everyone the chance to apply for the post on equal terms and without any kind of discrimination. Anyone who meets the requirements of profile sought must be able to participate. The application for the post must state the selection criteria and the specific deadlines to be selected, which will give certainty to the process. The desired profile, the work and activities to be performed, the documentation requested, and the evaluation criteria must be specified.

Once you have candidates for the post, there must be as much information about them as possible in order to make appropriate decisions about their selection. In addition to this, society's opinions and perspectives must be brought in, thus involving it in the decisions to be taken about the candidates.

The candidate chosen will be the person who most closely fits the profile sought and has the abilities to fill the post. An explanation is to be provided on why s/he has been chosen and the reasons why the others were not. The appointment shall preferably be made during an official act which shall establish the specific term of his or her mandate.⁶

It is important that the entire process be public so that it can be easily found and accessed in order to legitimize the decisions made and keep the public informed about the path that was taken in order to arrive at the appointments. As mentioned previously, shedding light on the selection generates an environment of trust, thus contributing to the legitimacy of institutions.

Transparency in the designation or appointment processes of bodies of the inter-American system

Both the Rules of Procedures and Statutes of the IACHR and the Court regulate the way in which the members of each institution are appointed. In general, their content provides for how commissioners, judges, and executive secretaries are selected, the term of their mandate, and their role. However, when comparing these procedures with the standard outlined above, there are gaps that could easily be overcome, thus substantially

6 Ibid.

contributing to the inter-American system's transparency and legitimacy.

One of these gaps is in the selection of commissioners,⁷ as well as judges of the Court.⁸ In both cases, it is provided that their appointment by the OAS General Assembly will be in a personal capacity from a list of candidates proposed by the governments of the member states, where each government may nominate up to three candidates. These provisions do not make clear what criteria the General Assembly uses to select these officials, nor does it list the procedures and criteria used by State Parties to the Convention for selecting candidates.

The need to delve into these issues has already been noted during the inter-American system's strengthening process, initiated by the same bodies that comprise it. Among other things, the need to review and regulate national appointments was highlighted by means of introducing citizen participation, transparency, and the possibility of public oversight that ensures the independence, suitability, and diversity of the individuals who aspire to a post within the inter-American system (Krsticevic and Vicente 2014: 36). In fact, the selection process of the individuals who comprise the system has been described as "nontransparent and closed to citizens, who have no means to know or opine on the potential candidates" (Salazar and Galvis 2012: 21).

In this regard, proposed criteria for Brazil—developed by the organization Conectas Direitos Humanos (Conectas Human Rights) for independent specialists who are candidates for international human rights posts—should be taken up by other countries.⁹ Through the use

7 The Statute of the IACHR, article 3:

1. The members of the Commission shall be elected in a personal capacity by the General Assembly of the Organization from a list of candidates proposed by the governments of the member states.
2. Each government may propose up to three candidates, who may be nationals of the state proposing them or of any other Member State of the Organization. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the proposing state.

8 Statute of the I/A Court H.R., article 7:

1. Judges shall be elected by the States Parties to the Convention, at the OAS General Assembly, from a list of candidates nominated by those States.
2. Each State Party may nominate up to three candidates, nationals of the state that proposes them or of any other Member State of the OAS.
3. When a slate of three is proposed, at least one of the candidates must be a national of a state other than the nominating state.

9 See the proposed criteria available in Portuguese, "Proposta de critérios e processo para definição de indicações do estado brasileiro a Candidaturas de especialistas independentes para cargos internacionais de direitos humanos," June 2014, http://dhpoliticaexterna.org.br/docs/2013/CBDHPE_Of%C3%ADcio_CandidaturasInternacionais_09jun14.pdf

of minimum requirements that the candidates' profiles and the process itself must meet, the goal is to strengthen international organizations and comply with the principles of disclosure and transparency which enable society to have some degree of oversight. As noted previously, improving the conditions of this process requires a commitment on the part of each and every one of the region's States to establish guidelines on internal selection mechanisms for submission of candidacies.

The second dimension of this process is under the purview of the international organizations. In this case, it is important to highlight progress achieved. Prior to the election of commissioners during the 43rd Regular Session of the OAS General Assembly held in Guatemala in June 2013, a new practice was adopted in order to have public oversight of candidates for IACHR Commissioner. The OAS Permanent Council convened a special session May 1, 2013, where it held a public forum for IACHR candidates.¹⁰ This exercise was the first of its kind, and candidates had to give a presentation and take questions from State Parties and civil society.¹¹

While each State's vote remains secret and no justification needs to be given for a vote in favor of a particular candidate, this process does represent an improvement in the appointment mechanisms, increased transparency, and the possibility that there is a greater political cost for electing candidates that have publicly shown themselves to be unsuitable. For example, the personal interview through a public appearance provides reasonable information regarding whether a candidate has the best qualities, skills, and profile to fill the post and not the minimum requirements for it.¹²

Another best practice can be found in the guidelines established by the IACHR via Resolution 04/06 for the appointment of special rapporteurs or independent experts.¹³ This Resolution outlines the requirements for the vacancy announcement and its publication, and for the pre-selection of the candidates. It also sets forth the obligation to include in detail the selection process and criteria, and allows civil society organizations and

10 See the Minutes of the Special Session held on May 1, 2013, <http://www.oas.org/consejo/sp/actas/acta1917.pdf> For the video recording see <https://www.youtube.com/watch?v=OLY6LBd5y80&index=65&list=PLkh9EPEuEx2sNOv3Z8kwhcHuDZXHHQTt8>

11 See <http://www.justiciaviva.org.pe/notihome/notihome01.php?noti=1046>

12 DPLF, *La entrevista personal en la selección de autoridades judiciales*, <http://dplf.org/sites/default/files/1332509827.pdf>

13 See <http://www.cidh.oas.org/resolutions/resolution4.06text.htm>

States to comment on the selection criteria. The Resolution notes that finalists selected must fulfill the minimum requirements and that their curriculum vitae are to be made public for a reasonable amount of time; provides for comments to be received from civil society during a specific period; notes that finalists are to be interviewed; and finally, outlines the election process, to be held by secret vote and requiring an absolute majority of the members of the IACHR.

As can be seen, this procedure represents substantial progress in light of the standards and arguments presented herein. Nevertheless, there are areas open to improvement. One of them, in keeping with best practices, would be to publicly interview each candidate and provide a rationale for the IACHR's decision in selecting the Rapporteur.

For its part, the selection of the IACHR Executive Secretary has been clearly regulated in the IACHR's Rules of Procedure,¹⁴ as of the inter-American system's strengthening process. However, it is important to note that the Rules of Procedure do not regulate the appointment of the Assistant Secretary or the hiring of professional, technical, and administrative staff of the Secretariat. The Rules do not indicate the organizational structure either or how the Secretariat is structured or

14 Article 11:

1. The Executive Secretariat shall be composed of an Executive Secretary, and at least one Assistant Executive Secretary, as well as the professional, technical and administrative staff needed to carry out its activities.
2. The Executive Secretary shall be a person of independence and high moral standing, with experience and recognized expertise in the field of human rights.
3. The Executive Secretary is appointed by the Secretary-General of the Organization. The Commission shall undertake the following internal procedure to identify the best qualified candidate and forward his or her name to the Secretary General, proposing appointment for a four-year term that can be renewed once.
 - a. The Commission shall open a public competition to fill the vacancy, publicizing the criteria and qualifications for the office and description of the functions and duties to be fulfilled.
 - b. The Commission shall review the applications submitted and identify three to five finalists who shall then be interviewed for the post.
 - c. The curriculum vitae of each finalist shall be made public, including on the Commission's website, during one month prior to the final selection, in order to receive observations on the candidates.
 - d. The Commission shall determine the best qualified candidate, taking into account the observations, by an absolute majority of its members.
4. Prior to and during their period of appointment, the Executive Secretary and Assistant Executive Secretary shall disclose to the Commission any interest which may be considered to be in conflict with the exercise of his or her functions.

divided. Under these circumstances, it is important to shed light on and regulate the general criteria for selection, profile, salary, activities, and the term of some members, as well as the terms for hiring Executive Secretariat personnel. This, in order to have clear and accurate processes set forth in an operations manual or a document with minimum guidelines on what is to be known about staff, beyond the profiles and requirements that are drawn up *ad hoc* for each job vacancy announcement.

As regards the selection of members of the Court Secretariat,¹⁵ it is only provided that the Court will appoint its Secretary, but there are no details about the selection process, nor is the profile required to fulfill this post outlined. It is mentioned that for the performance of the Secretary's duties, he will have staff appointed by the OAS Secretary General in consultation with him, but without listing the duties, positions, profiles, or the manner in which the staff that comprise the Secretariat of the Court will be hired. The selection process for the Assistant Secretary is not defined either and it is only provided that he will assist the Secretary in his work and will replace the Secretary in his absence.¹⁶ This process not only needs to be modified to bring it into line with best practices implemented in other cases, but should also have some kind of manual, guidelines, or criteria that allow the Secretariat flexibility in how it conducts its business while providing certainty for its operation.

In order to ensure transparency in keeping with the ten requirements that were furnished as an example, both institutions must provide public access to the information that was said to be missing, or should create it where appropriate. This, with the aim of not only having a transparent system and informing society about its activities, but also so it may build the legitimacy that gives it the capacity to achieve its objectives and enforce its decisions.

15 Article 14:

1. The Secretariat of the Court shall function under the immediate authority of the Secretary, in accordance with the administrative standards of the OAS General Secretariat, in all matters that are not incompatible with the independence of the Court.
2. The Secretary shall be appointed by the Court. He shall be a full-time employee serving in a position of trust to the Court, shall have his office at the seat of the Court and shall attend any meetings that the Court holds away from its seat.
3. There shall be an Assistant Secretary who shall assist the Secretary in his duties and shall replace him in his temporary absence.
4. The Staff of the Secretariat shall be appointed by the Secretary General of the OAS, in consultation with the Secretary of the Court.

16 While the Rules of Procedure provide that the Assistant Secretary will be chosen in keeping with a statute (art. 8), the procedure is not found in the Statute, the Rules of Procedure, or on the Court's websites.

Transparency in Budget Management

Another point to address in order to provide legitimacy to the inter-American system is the importance of shedding light on the management of its functions. In this realm, budget management is extremely important, especially in order to answer questions like: How is the money allocated to the IACHR and the Court spent? How is the budget distributed? What priorities does it address? How are expenditures accounted for?

In order to have strong institutions, with the capacity to act, and legitimacy to exercise their duties, sufficient allocation of resources is required,¹⁷ just as has been discussed by the Working Group on this issue. In 2012, this Group highlighted the significance of bolstering funding, recommending the adequate allocation of resources in order to bring about enhanced performance and sustainability of the inter-American system. Although another chapter in this book entitled “Counting Coins: Funding the Inter-American Human Rights System” broaches in depth the financial situation of the bodies of the system, as well as the difficulties of learning about budget execution in detail, we deemed it important nonetheless to highlight some findings on budget transparency.

The main recommendation was for member states to increase the funding allocated to the inter-American system. Additionally, the Working Group proposed that another source of funding be obtained from international cooperation resources through public competitions. It likewise proposed the creation of a technical group comprised of the OAS, member states, and the inter-American system’s bodies, which would prepare a report laying out the financial requirements for establishing alternatives that would allow for financial stability to be achieved.¹⁸

As indicated above, transparency—in a broad and strict sense—is a source of legitimacy for institutions in general, and specifically for those of a public nature. From this perspective, institutions must implement diverse measures to make pertinent information available to society regarding execution of funds, criteria for prioritization, and the outcomes achieved.

17 In 2005 the IACHR had a budget of US\$3,077,500.00, an 11% budget cut as compared to 2004. In 2007 and 2010, there were budget increases but nonetheless the funds allocated from the OAS regular budget are insufficient for the performance of its duties. See *Position Document on the Strengthening Process of the Inter-American System for the Protection of Human Rights*, April 2012.

18 *Report of the Working Group*, December 13, 2011, pp. 16 and 17.

In the case of the IACHR, it is possible to find ample budget information on contributions it receives and funding execution. On its website, for example, the budget execution is listed by rapporteurships or thematic units and a list of donors is included along with the donation amount; also included is the distribution of the OAS Regular Fund through 2013, with adequate details by object of expenditure and funding source. One detail worth highlighting is the disclosure of information on distribution of funds to staff and consultants. In keeping with this trend, the IACHR could also itemize the total amount executed for each individual who works at the Commission, as well as the total amount allocated for the commissioners.

This progress regarding transparency must be supplemented with additional information in order to reach an appropriate standard of accountability. In order to do so, it will be necessary to combine this information with reasonable justifications and explanations on outcomes, as well as the kinds of financial implications behind them. One way would be to classify this information in simple categories which answer questions like: Who is making expenditures? What is the expenditure made on? Why is the expenditure made? Where is the expenditure made? Another way would be to use the budgetary classifications that are most widely accepted in the public sphere: administrative, economic, and functional. Jointly disseminating the draft budget, the budget, and a budget execution report is also important insofar as it provides some order that makes it more accessible to users.

The Court, in contrast, has a long way to go when it comes to budget transparency. Article 26 of its Statute¹⁹ provides that the Court has the authority to prepare its own draft budget and to administer it. However, this information is not available, at least not through remote means. In other words, while there is a list of donors that includes the purpose of their donation and the total amount donated, there is neither an institutional budget nor any information on what and for what purpose the funds donated were spent or on their internal allocations.

19 Article 26 of the Statute of the I/A Court H.:

1. The Court shall draw up its own budget and shall submit it for approval to the General Assembly of the OAS, through the General Secretariat. The latter may not introduce any changes in it.
2. The Court shall administer its own budget.

Transparency in Institutional Management

The institutional management of the bodies of the inter-American system is provided for in different articles of their respective Statutes and Rules of Procedure. The provisions thereof reveal several areas of focus due to the marked importance they have for the observance of human rights in the region.

A 2012 comprehensive study on transparency in the inter-American system and its relationship to access to justice (Nash *et al.* 2012) concludes that while information is available on the IACHR and the Court websites, the organization of such information is quite inadequate. It likewise concludes that although there is an abundance of information on processing individual petitions, there are stages of the procedure which do not meet minimum information standards, namely: the initial processing stage, the discretionary nature of merits reports publication under Article 51 and submission of cases to the Court; regulatory obstacles due to lack of clarity; and non-transparent practices that hinder monitoring of cases.

Moreover, according to the authors of another chapter in this book, “The Elephant in the Room: The Procedural Delay in the Individual Petition System in the Inter-American System,” they had difficulties accessing information that could have given them a clear overview of the individual petition system and the challenges the IACHR faces in this regard.

For example, they note that in the overwhelming majority of cases, the dearth of information made it impossible to obtain consolidated data for showing trends and identify the real problem. They further note that the information collected does not allow the existing procedural backlog to be accurately measured given that not all of the decisions of the system’s bodies are public.

Among the difficulties in accessing information, they also refer to: the impossibility of finding out the total number of unpublished merits reports approved since the IACHR does not release them; lack of sufficient information to determine the year in which each of the pending petitions awaiting initial review was received by IACHR; the Commission’s reports from 2002 to 2010 have no information on the number of petitions rejected; there is little information on the number of petitions pending an admissibility decision as only the number of petitions being processed is provided; despite improvements in its annual reports, there is still no timely publication of comparable data by the IACHR.

In conclusion, we consider the abovementioned chapter to be pertinent as it determines that access to key information for following up on cases remains precarious and fragmented, despite attempts to remedy the situation. The scant information published by the IACHR to monitor the status of individual petitions continues to be inconsistent and is generally not helpful for doing appropriate follow-up. The chapter concludes that the lack of access to information results in incomplete evaluations that are not really reliable, and do not allow for true progress on the issue. Indeed, for this reason, dialogue should be initiated with researchers to determine the kind of useful and necessary information that needs to be produced, systematized, and published on an ongoing basis.

Furthermore, it is important to reiterate the need for the IACHR to have guidelines for active transparency, degrees of transparency, and exceptions with regard to not only its administrative work, but also its political and quasi-judicial work. A telling example in this respect is that of the Argentine prosecutor who has been involved in some of the trials against the military dictatorship in the ESMA case. He repeatedly requested that the IACHR provide him the files needed to supplement and strengthen his investigations in light of the enormous amount of information that the Commission had thanks to the in-depth research it had done since the seventies. The request took at least five years, since according to the then Executive Secretary, it was necessary to analyze whether to provide documents furnished confidentially, and if so, to establish a general protocol for these kinds of situations.²⁰ The IACHR finally provided the information in December 2011;²¹ however, we are unaware of any comprehensive policy that was developed for these kinds of cases, with regard to handling files, information, and public usefulness, not just for [the benefit of] the IACHR, but also for countries that are fighting for justice and against impunity.

20 See the interview with Santiago Cantón by Alejandra Dandan, November 29, 2011, <http://www.pagina12.com.ar/diario/elpais/1-182294-2011-11-29.html>; see also <http://www.estaesmia.com/index.php/archives/1494>.

21 See *La Jornada*, "Entrega la CIDH a Argentina archivos desclasificados de vuelos de la muerte," December 17, 2011, <http://www.jornada.unam.mx/2011/12/17/mundo/022n1mun>

Towards a policy of transparency and information access in the inter-American human rights system

Building a transparency and accountability agenda in the international sphere

Concern regarding transparency in international and multilateral institutions and organizations has grown consistently over the past two decades. In fact, different multilateral organizations currently have information disclosure policies and access mechanisms in place. Despite the inherent differences in the nature of each institution, we find that one of the common factors that has driven processes of change in disclosure policies is organized civil society movements.

The majority of the regulatory measures adopted as a result of these processes share guiding principles. For example, since the mid-1980s the World Bank (WB)²² began to speak of a “presumption in favor of disclosure,” as a result of pressure by civil society and social movements (Fox and Brown 2000), categorizing for the first time its information as published, available to specific audiences, and restricted (World Bank 2014). The first World Bank disclosure policy was issued in 1993 and it wasn’t until 2010 that the Bank approved its Access to Information Policy, recognizing that “transparency and accountability are of fundamental importance to development processes,” and that said policy responds to the different roles the institution plays as: a development finance institution, an intergovernmental organization belonging to countries; a lending institution and employer (World Bank 2013).

For its part, the Inter-American Development Bank (IDB) enacted its first information disclosure policy in 1994 (following the World Bank’s footsteps) (IDB 2009). After several revisions thereto, in January 2011, the IDB issued a policy in which disclosure had been changed to access, which has a broader scope.

In this same vein, several agencies of the United Nations (UN) have established their own information disclosure policies. For example, the United Nations Development Programme (UNDP) approved its policy in 1997 and only just revised it in 2013 (UNDP 2013). The United Nations Children’s Fund (UNICEF) has an information disclosure policy

22 When we say World Bank, we are referring to the International Bank for Reconstruction and Development (IBRD), the public sector lending arm of the World Bank Group.

(UNICEF, n.d.), the United Nations High Commissioner for Refugees (UNHCR) calls it an archives access policy (UNHCR, n.d.), while the United Nations Environmental Programme approved its information access policy in 2014 (UNEP, n.d.), just to mention a few.

In summary, the emergence and development of information access policies in the international arena is a process that is increasingly widespread, in terms of coverage, and depth, in terms of detail and accuracy. Table 1 shows the guiding principles behind information access policies from the World Bank, the Inter-American Development Bank, and the United Nations Environmental Programme (as it is the most recent). Also included are the guiding principles for the Model Inter-American Law on Access to Information (OAS 2010), which is one of the benchmarks and has some of the highest standards regarding information access, in addition to coming from the organization that houses the inter-American system.

TABLE 1.

Organization	World Bank	IBD	UNEP	Model Law
Information Access Policy Principles				
	<ul style="list-style-type: none"> ■ Maximize access to information. ■ Establish a clear list of exceptions. ■ Ensure the deliberative process. ■ Promote clear procedures to make information available. ■ Recognize the requester's right to appeal. 	<ul style="list-style-type: none"> ■ Maximize access to information. ■ Clear and narrow exceptions. ■ Simple and broad access to information. ■ Explanation of changes and right to review. 	<ul style="list-style-type: none"> ■ Allow access to all [otherwise] stipulated in the policy. ■ Information is principally to be disseminated through the website. ■ The policy will have a non-definitive list of what is to be published normally. ■ A clear list of exceptions. ■ Procedures specified for providing information on member states and other entities. ■ Under exceptional or extraordinary circumstances, the UNEP will be under the obligation to provide specific information that would normally be exempted or under restricted access. 	<ul style="list-style-type: none"> ■ In principle, all information is accessible ■ The right to information access includes all public organizations at all levels of government. ■ The right to information access means all meaningful information, the definition of which must be broad, including all information that is kept and archived in any format or medium. ■ Public organizations must publish information about their duties and activities in a routine and proactive manner, even in the absence of a specific request, and in a manner that ensures information is accessible and comprehensible. ■ Clear, fair, non-discriminatory, and simple rules must be enacted with regard to handling information requests. These include deadlines and cost-free provision of information.
Principles				

Organization	World Bank	IBD	UNEP	Model Law
	<ul style="list-style-type: none"> ■ Maximize access to information. ■ Establish a clear list of exceptions. ■ Ensure the deliberative process. ■ Promote clear procedures to make information available. ■ Recognize the requester's right to appeal. 	<ul style="list-style-type: none"> ■ Maximize access to information. ■ Clear and narrow exceptions. ■ Simple and broad access to information. ■ Explanation of changes and right to review. 	<ul style="list-style-type: none"> ■ Procedures will be established to petition for information that is not on the website and to appeal a decision. ■ Institutional arrangements will be established so the UNEP Secretariat may oversee the policy's implementation. 	<ul style="list-style-type: none"> ■ Exceptions to the right to information access must be established by law, be clear and specific. ■ The burden of proof to justify denying information access must fall onto the agency from which information was requested. ■ The right to appeal any denial or obstacle to information access through an administrative body must exist, as well as the right to appeal the decisions [thereof]. ■ Any person who intentionally denies or obstructs access to information must be punished. ■ Measures to promote, implement, and ensure the right to information access must be adopted.
	<p>Principles</p>			

Source: prepared by authors based on WB policies (2013: para. 5), IBD (2009: para. 2.1), UNEP (n.d.: para. 9, a-h), and OAS (2008).

It should be noted that a key difference between the policies of the WB, the BID, the UNEP and the Model Law is that the latter has a rights-based approach. While the multilateral organizations acknowledge the importance of information access and transparency for accountability, development effectiveness, furthering their goals, building and maintaining public dialogue, among others, they do not explicitly state that it corresponds to a guaranteed right. The Model Law, however, is based on explicit recognition of information access as a fundamental human right, as well as the need to draw up principles that support the drafting and implementation of laws to enforce this right.

The history of the OAS access to information agenda and policy

The Organization of American States has been developing an agenda on access to information for several years.²³ In national arenas, the IACHR Office of the Special Rapporteur for Freedom of Expression has included a section on the right to information in its reports since 1999 (IACHR 1999). Furthermore, during the Third Summit of the Americas held in Quebec, Canada in April 2001, heads of State and government committed to supporting the Office of the Special Rapporteur in disseminating work on case law and ensuring that national legislation on the subject is in line with international agreements. Pursuant thereto, in 2001 it presented the “Report on Action with Respect to Habeas Data and the Right of Access to Information in the Hemisphere,”²⁴ which outlines regulatory frameworks and the status of the right to access to information in each one of the countries. The Office has kept working on the issue, and in 2012 published the report “The Right to Access to Information in the Americas: Inter-American Standards and Comparison of Legal Frameworks.”²⁵

Along the same lines, it is important to highlight that in its 2007 special report, the Office of the Special Rapporteur, revisiting several international instruments, stated that:

In terms of responsibility one cannot neglect to point out that currently this obligation includes international organizations. In

²³ See http://www.oas.org/en/sla/dil/access_to_information_references.asp

²⁴ See <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=570&IID=1>

²⁵ See <https://www.oas.org/en/iachr/expression/docs/publications/access%20to%20information%20in%20the%20Americas%202012%2005%2015.pdf>

this sense, the 2006 Joint Declaration of rapporteurs is enlightening, as it declares that “public bodies, whether national or international, hold information not for themselves but on behalf of the public and they should, subject only to limited exceptions, provide access to that information.” Furthermore, the report affirmed that international public bodies and inter-governmental organizations should adopt binding policies recognizing the public’s right to access the information they hold. Such policies should provide for the proactive disclosure of key information, as well as the right to receive information upon request.²⁶

For over a decade the OAS General Assembly (GA) has approved annual resolutions aimed at furthering the right to access to information in the Americas.²⁷ In 2003 the GA approved a resolution²⁸ that reaffirmed that access to public information is an indispensable requirement for democracy, and reminded States of their obligation to respect access to public information for all individuals and to promote the adoption of legislative or other measures necessary for its recognition and effective enforcement. Among other issues, it instructed the Office of the Special Rapporteur for Freedom of Expression of the IACHR to continue including in its annual report a section on access to public information in the region.

Periodically, the Assembly has reiterated this mandate and broadened the agenda to make progress in regulations, guidelines, and principles on access to information. For example, in 2009 the GA requested that the Office of the Special Rapporteur for Freedom of Expression, Department of International Law, and other entities—with the cooperation of member states and civil society—prepare a model law on access to information and a guide for its implementation,²⁹ which was approved in 2010.³⁰

26 IACHR Office of the Special Rapporteur for Freedom of Expression, *Estudio especial sobre el derecho de acceso a la información*, 2007, para. 106, (internal citations omitted), [http://www.cidh.oas.org/relatoria/section/Estudio Especial sobre el derecho de Acceso a la Informacion.pdf](http://www.cidh.oas.org/relatoria/section/Estudio_Especial_sobre_el_derecho_de_Acceso_a_la_Informacion.pdf)

27 See https://www.oas.org/en/sla/dil/access_to_information_references.asp

28 OAS General Assembly. AG/RES. 1932 (XXXIII-O/03), “Access to Public Information: Strengthening Democracy,” adopted on June 10, 2003, https://www.oas.org/juridico/english/ga03/agres_1932.htm

29 See https://www.oas.org/dil/AG-RES_2514-2009_eng.pdf

30 See https://www.oas.org/en/sla/dil/access_to_information_model_law.asp

In 2011, the GA also addressed the issue within the OAS itself and resolved:

To instruct the General Secretariat to develop an internal policy and prepare a directive for access to public information within the Organization, in line with the standards followed in other multilateral organizations, and to put it into effect prior to the forty-second session of the General Assembly.³¹

In 2012 the OAS General Secretariat issued its *Access to Information Policy*,³² in keeping with the mandate to follow other multilateral organizations' standards and develop its own internal institutional policy. This Policy³³ represents an important regulatory framework for progress bearing in mind that it took the OAS more than a decade after it had begun promoting changes in member states to recognize the need to make its own activities transparent. The policy's goal is to make its activities transparent, respect privacy, and facilitate access to information held by the OAS General Secretariat.

The OAS Access to Information Policy

The policy establishes an obligation to disclose and actively update information by means of the OAS webpage.³⁴ Furthermore, the Policy created both: (a) an Information Officer, who is the principal point of contact and is responsible for receiving and deciding on requests for information, and (b) the Access to Information Committee, comprised of the Secretary for Administration and Finance,³⁵ the Secretary for External Relations,³⁶ and the Director of the Department of Legal Services,³⁷ which is tasked with interpreting the policy, establishing costs, and making final decisions on appeals.

31 OAS General Assembly, AG/RES. 2661 (XLI-O/11), "Access to Public Information and Protection of Personal Data," adopted on June 7, 2011, para. 7, http://www.oas.org/dil/AG-RES_2661-XLI-O-11_eng.pdf

32 OAS General Secretariat, Executive Order 12-02, *Access to Information Policy*, May 3, 2012. See AG/RES. 2727 (XLII-O/12), para. 6.

33 Available at <http://www.oas.org/legal/english/gensec/EXOR1202.DOC>

34 See: www.oas.org

35 See: <http://www.oas.org/en/saf/>

36 See: <http://www.oas.org/en/sre/>

37 See: <http://www.oas.org/legal/intro.htm>

The process for requesting information is described below:

1. An application is made either electronically, by mail, or by fax to the Information Office. The application must contain the applicant's contact information, a detailed description of the information required, including the title and date, where relevant, and the preferred medium for delivery of the information.
2. The Information Office shall receive and register the application and assign it a number for follow-up purposes. Within ten calendar days of receipt of the application, the Office shall acknowledge such receipt and inform the applicant of the number assigned to the application.
3. When information is requested that is already available through the website, the Information Officer shall respond to the applicant within 20 calendar days of the application's submission. If the application is complex or voluminous the deadline may be extended by a further 20 calendar days after notifying the applicant of the extension.
4. Failure to respond by the aforementioned deadlines shall be construed as a denial of the application. A denial for information may be issued because: (a) the information requested falls within the exceptions listed in Chapter IV; (b) the General Secretariat does not have the information requested; or (c) the data provided by the applicant are insufficient for locating the information. If the General Secretariat confirms that it possesses the information, it shall include the cost of copying and sending it. The information is to be sent within 10 business days of confirming receipt.
5. If a request is denied, there is an appeals process before the Committee that is handled via the Information Officer within 30 calendar days. Appeals shall contain the application number, the applicant's contact information, a description of the information originally requested, and a statement of the facts and grounds that substantiate the appeal.
6. The Committee shall make a final decision within 30 calendar days following receipt of the appeal. It may either confirm the Information Officer's decision or overturn it, in which case the information requested will be provided. Under exceptional circumstances this deadline may be extended an additional 20 calendar days.

Chapter IV of the Policy sets forth a series of exceptions “to protect the confidentiality of certain information provided by other organs of the OAS, its member states, staff, independent contractors, and other parties involved.” Pursuant to this standard, the OAS does not provide (a) personal information (medical information and personal communications); (b) audit reports; (c) information that could compromise the security of staff and independent contractors and their families; (d) information on bidding processes; (e) information subject to professional secrecy; (f) information bound by confidentiality agreements; (g) commercial or financial information whose disclosure could be harmful to the commercial or financial interests of the OAS or of other parties involved; (h) deliberative information; (i) information provided by a member state or a third party on the understanding that it is confidential; (j) information whose disclosure could compromise security or international or intergovernmental relations; (k) information protected by copyright; (l) *information on individual petitions and cases, precautionary measures, and any document relating to the Inter-American Commission on Human Rights and its Executive Secretariat, which are governed by pertinent rules and procedures on the provision of information;* and (m) any other information that, in the opinion of the Information Officer or the Committee, is as sensitive as the information protected by the aforementioned exceptions.

Lastly, the policy contains a liability disclaimer whereby the OAS “does not guarantee the integrity and veracity of the information provided” and “shall not be liable for any damages derived from use of the information provided.”

Challenges regarding the OAS Access to Information Policy

Undoubtedly, the Access to Information Policy is a first step towards implementing institutional transparency practices and making ongoing strides in the right to access to information at the OAS. However, the provisions contained therein are not fully in keeping with international principles on the subject, those upon which other multilateral organizations base their policies, or with the Model Law approved by the OAS General Assembly.

For example, the list of exceptions is worded in an ambiguous and general manner. One exception states that the OAS does not disclose “information bound by confidentiality agreements,” but without establishing parameters that meet criteria of proportionality, legitimacy,

and need. Thus, practically any document could contain a clause of this kind in order to keep it from being disclosed. It also restricts audit reports, which should be public, as according to the Model Law's standard what is subject to secrecy is the process but not the final documents. What is more, the policy broadens the possibility that any other information may be restricted at the discretion of the Information Officer or the Committee without explicitly providing for the obligation to show how the disclosure would be damaging. This does not meet the standard of public interest that the Office of the Special Rapporteur for Freedom of Expression and the resolutions of the IACHR and the Court have established.

Another technical shortcoming of the Policy regards the determination of its scope, which in domestic arenas is referred to as "subjects compelled by the law." The Policy exempts all information related to the IACHR—although it says nothing about the Court, perhaps because it considers it an autonomous decentralized entity of the OAS General Secretariat—but this is the only exception that explicitly refers to any other body; given this lack of explicit reference, in principle it could be interpreted that the Policy applies to any OAS body.

For the moment, it is hard to tell how far the OAS Access to Information Policy has been implemented. There is no information available on the number of requests made to the General Secretariat through the Information Officer. The OAS, through its corresponding office, has not published a report recounting the two years the information access system has been in operation. The only reference found was in the Secretary General's 2013 Annual Report which noted that the Columbus Memorial Library had handled 257 requests for information under its Access to Information Policy.³⁸

In order to obtain more information, an access to information request was submitted through the system available on the OAS website. The request was for the number of requests users had submitted since May 2012, when the policy was approved, until the date of the request—August 20, 2014—broken down by year. The request also asked for the number of requests for which the information was provided and for which it was denied, specifying the grounds, as well as the number of appeals lodged and their outcome.³⁹ The answer from the OAS

38 2013 Annual Report of the Secretary General, p. 17, <http://scm.oas.org/PDFS/2014/AG06456e.PDF>

39 Public Information request OAS/RFI-#00002979, presented August 20, 2014, by Fundar, Center for Analysis and Research. The answer is from August 28, 2014.

Information Officer was to refer us to the Secretary General's Annual Report—mentioned in the preceding paragraph. Additionally, the Officer reported that 2,723 requests had been handled in 2014 and that the total would appear in the 2014 report to be published in April 2015; finally, he pointed out that there had been one appeal in 2013.

This small exercise reveals that the system is simple and accessible. Furthermore, confirmation of receipt was immediate and the request was answered in short order. Nevertheless, the information provided was incomplete, some questions went unanswered, and further information is not available on the website nor is it updated periodically. Moreover, nothing is known about the criteria developed by the Access to Information Committee, who are charged with interpreting the Policy, with regard to providing or denying information requests. In other words, there is not enough information to determine whether changes should be made.

Notes on a transparency and access to information policy in the bodies of the inter-American human rights system

Given the significance of the inter-American human rights system's bodies for the region as regards issues of public interest, it is important to review the scope of the OAS Access to Information Policy and to modify it or promote the approval of other regulatory frameworks in order to ensure this right.

Thus, a basic starting point for developing a policy for the inter-American system would be to conduct a general review of the existing OAS Policy as compared to the principles of the Model Law and the policies of other multilateral organizations and push to bring it into line with this standard.

Also, according to studies on the issue, bearing in mind that many IACHR procedures fall under its judicial function, as does of course the mandate of the Court itself, it is important to apply standards of judicial transparency. Such standards include the principle of maximum disclosure, clear regulations for exceptions that allow for disclosure restrictions, the length of time for secrecy exemptions, the mechanisms to request information, and the channels to appeal a denial (Nash *et al.* 2012: 15-17).

This would entail having a policy that is based on some basic principles, such as:

- Maximum disclosure of any information held by public institutions, in a complete, timely, and accessible manner, subject to a clear and narrow regime of exceptions.⁴⁰
- Presumption of access to information, which means in principle that all information from the IACHR and Court is public, unless otherwise stipulated in the policy.
- Clear and narrow list of exceptions. In other words, confidentiality is provided for specific information and cases where disclosure would be harmful. Thus, criteria must be established, as well as a list that avoids ambiguity in interpretation, and responds to the particular needs of each of the bodies of the inter-American system.
- Routine disclosure of certain information in a systematic fashion, complied in clear and accessible platforms.
- Clear, public, and participatory procedures for appointing commissioners, judges, special rapporteurs, and other high-ranking officials.
- Clear and simple procedures to request information about the different OAS entities and the inter-American system in particular.
- Recognize the right to challenge and appeal a decision in case information is denied, and have the necessary mechanisms to ensure these rights.
- Ensure the resources needed to effectively implement the policy, which entails ensuring there are measures in place at the OAS and the bodies of the inter-American system to promote, implement, and guarantee access to information.

40 See *Model Inter-American Law on Access to Information*, OAS, 2009, para. 2, https://www.oas.org/dil/CP-CAJP-2840-10_Corr1_eng.pdf

References

Abramovich, V. and Ch. Courtis. 2003. "Acceso a la información y derechos sociales." In *Derechos Sociales, instrucciones de uso*, by V. Abramovich, M. J. Añón, and Ch. Courtis. Mexico: Fontamara.

Aguilar E. and J. Bautista (coords). 2005. *Manual de acceso a la información, transparencia y rendición de cuentas para el fortalecimiento de las organizaciones civiles*. Mexico: Indesol-Iteso-IFAI-IFE-SFP.

Cárdenas, J. "El derecho a saber y los partidos políticos." www.juridicas.unam.mx/sisjur/informac/pdf/4-113s.pdf

Concha Cantú, H., H. López-Ayllón and L. Tacher Epelstein. 2004. *Transparentar al Estado: la experiencia mexicana de acceso a la información*. Mexico: UNAM.

Fox, Jonathan and Dana Brown. 2000. *The Struggle for Accountability. The World Bank, NGOs and Grassroots Movements*. Boston: Institute of Technology.

Fundar. 2009. *Construyendo legitimidad y confianza*. Mexico: Fundar, Center for Analysis and Research, Article XIX. http://fundar.blend.mx/construyendo-legitimidad-y-confianza-transparencia-rendicion-de-cuentas-y-participacion-ciudadana-en-los-nombramientos-de-titulares-de-organos-y-autonomos-y-de-autonomia-limitada/#.U_pKTLx5O1J

Hofbauer, H. and J. A. Cepeda. 2005. "Transparencia y rendición de cuentas," in M. Merino (coord.), *Transparencia: libros autores e ideas*. México: IFAI, CIDE.

IACHR. 1999. *Annual Report of the Special Rapporteur for Freedom of Expression*. <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=135&IID=1>

Inter-American Development Bank. 2009. *Disclosure of Information Policy (OP-102)*. Accessed August 20, 2014. <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35021015>

Krsticevic, Viviana y Alejandra Vicente. 2014. "¿Qué hace falta para fortalecer el sistema interamericano de derechos humanos?" *La reforma de la Comisión Interamericana de Derechos Humanos. Aportes DPLF 19 (7): 36*. http://dplf.org/sites/default/files/aportes_19_web_0.pdf

Merino, M. (coord.). 2005. *Transparencia: libros autores e ideas*. Mexico: IFAI, CIDE.

Nash, Claudio et al. 2012. *Estudio sobre acceso a la justicia en el sistema interamericano de derechos humanos: transparencia y representación legal*. Santiago de Chile: Centro de Derechos Humanos, Universidad de Chile, April 2012. <http://www.cdh.uchile.cl/media/publicaciones/pdf/92.pdf>

OAS. 2008. *Principles on the Right of Access to Information*. Accessed August 20, 2014. https://www.oas.org/cji/eng/CJI-RES_147_LXXIII-O-08_eng.pdf

OAS. 2010. *Model Inter-American Law on Access to Information*. https://www.oas.org/dil/CP-CAJP-2840-10_Corr1_eng.pdf

Peschard, J. 2005. *Transparencia y partidos políticos*. Mexico: Cuadernos de transparencia, IFAI.

Ruiz, A. (coord.). 2006. *Transparencia y rendición de cuentas*. México: Fontamara, Center for U.S.-Mexican Studies.

Salazar, Katya and María Clara Galvis. 2012. "Transparencia y participación en la selección de integrantes de la Comisión y de la Corte Interamericana de Derechos Humanos: una tarea pendiente." *Selección de miembros de altas cortes e independencia judicial. Aportes DPLF* 17 (5): 21. http://www.dplf.org/sites/default/files/aportes_17_web.pdf

SFP. 2005. *Transparencia. Buen gobierno y combate a la corrupción en la función pública*. Mexico: FCE, Colección Editorial Gobierno del Cambio.

UNDP. 2013. *Information Disclosure Policy*. Accessed August 20, 2014 http://www.undp.org/content/undp/en/home/operations/transparency/information_disclosurepolicy/

UNEP. n.d. *Access to Information Policy of the United Nations Environment Program*. Accessed August 20, 2014. <http://www.unep.org/environmental-governance/UNEPsWork/policy/tabid/794452/Default.aspx>

UNHCR. n.d. *Archives Access Policy*. Accessed August 20, 2014. <http://www.unhcr.org/3b03896a4.html>

UNICEF. n.d. *Information Disclosure Policy*. Accessed August 20, 2014. http://www.unicef.org/about/legal_disclosure.html

Vergara, R. 2005. *La transparencia como problema*. Mexico: Cuadernos de transparencia, IFAI.

World Bank. 2013. *The World Bank Policy on Access to Information*. Paras. 1 and 2. Accessed August 20, 2014. http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/07/01/000442464_20130701112846/Rendered/PDF/790340BR0SecM200Box0377330B00OU0090.pdf

World Bank. 2014. *Evolution of the World Bank's Disclosure Policies*. Accessed August 20, 2014. <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTANDOPERATIONS/EXTINFODISCLOSURE/0,,contentMDK:21868955~menuPK:6813250~pagePK:64865365~piPK:64864641~theSitePK:5033734,00.html>

Chapter 4

The Functions of the Inter-American Commission on Human Rights Before, During, and After the Strengthening Process: Striking a Balance between the Desirable and the Possible

Katya Salazar, Daniel Cerqueira
Due Process of Law Foundation (DPLF)

Summary

131

This article examines the way in which the Inter-American Commission has performed the functions that make up the pillars of its work, from the time of its creation through the end of the strengthening process. This will be done by outlining primary sources published by the Commission and analyzing secondary sources consisting of studies by experts in the field. A review of this information indicates that, starting in the 1990s, the protection pillar—related to the individual petition system and the mechanism of precautionary measures—ended up taking priority on the agenda and in the use of material and human resources by the Commission and its Executive Secretariat. With the so-called strengthening process, the trend toward enhancing the protection pillar has been disrupted, with a visible decrease in the number of reports on petitions, cases, and decisions granting precautionary measures. This stands in contrast to the stabilization and, in some cases, the increase in activities associated with the promotion and monitoring pillars. This article addresses this evolution, highlighting the importance of the Commission's ability to strike a balance in its programmatic decisions between the expectations of the users of the inter-American system and the broader context in which the system's bodies have been criticized by various governments.

Introduction

The first Statute of the Inter-American Commission on Human Rights (IACHR) focused its mandate on promoting a culture of human rights and monitoring situations in countries undergoing some type of institutional crisis. However, since its initial working session, the members of the IACHR recognized the need for tools to protect victims of human rights violations. Along these lines, and under the influence of the evolution of other supranational bodies, the regulatory framework that governs the IACHR's mandate underwent successive changes to improve its three pillars of work, namely: the monitoring, promotion, and protection of human rights.¹ This evolution saw the predominance of the first two pillars from the 1960s to the 1990s, greater emphasis on the protection pillar 1990–2011, and the current situation reflected in the decreased number of decisions related to the protection pillar (understood here as the individual petition and precautionary measure system), as well as the increase in monitoring and promotion activities.

During the strengthening process, several countries insisted that the IACHR needed to be more active in advising national authorities on the design of laws and public policies. The recommendations contained in the report of the Special Working Group for the Strengthening of the Inter-American Human Rights System (the inter-American system) reflect an understanding shared by some governments that, despite the consolidation of democratic regimes in the region, the IACHR continued to prioritize an adversarial relationship that curtailed dialogue and initiatives geared toward promoting human rights. Several of the Special Working Group's recommendations asked the IACHR to more rigorously substantiate the reasoning behind its decisions on precautionary measures and individual petitions, extend deadlines for submitting observations in the petition

1 For purposes of this article, the terms protection, monitoring, and promotion are related to the functions and powers that make up the respective pillars of the IACHR's work, defined in its 2011-2015 Strategic Plan under the terms "the individual petition system; monitoring the human rights situation in the countries, and following up on thematic issues." See IACHR, 2011-2015 Strategic Plan, p. 1, <https://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf>. The protection pillar includes the powers to hear and decide individual petitions and requests for urgent measures (precautionary and provisional). Monitoring encompasses supervision of the enjoyment of human rights in OAS Member States, mainly through country and thematic reports, press releases, thematic hearings, and sections of the Annual Report analyzing the situation in specific countries or other issues of interest to the IACHR. Finally, the promotion pillar includes thematic reports, trainings, professional development programs, and other initiatives for the dissemination of the standards established by the bodies of the inter-American system.

system, and adhere to the criteria of the Inter-American Court of Human Rights (Inter-American Court), among other measures that result in an increased number of cases being brought to the Court under the protection pillar. In addition, the OAS Member States recommended that the IACHR draft a number of thematic reports, studies, and fact sheets on different issues, create new lines of work geared toward advising governments and national human rights institutions and, in general, devote more attention to the promotion pillar.

Although various civil society organizations maintained that this insistence on broadening promotion activities disguised the true purpose of weakening the protection pillar, the impetus of the amendments to the Rules of Procedure, policies, and institutional practices made by the IACHR in March 2013 shows greater attention to the first pillar. This fact is also clear in the agreements made during the strengthening process—most of which pertained to promotion activities—and in the current downward trend in the number of decisions granting precautionary measures and decisions on petitions and cases.

This article examines the evolution of how the IACHR has performed the functions of its work pillars at different times. An analysis of information published by the Commission, reports, and specialized studies reveals that the strengthening process had a profound impact on the actions of the IACHR and on the manner in which it has prioritized its resources. In examining the main trends stemming from the strengthening process, we underscore the risks that a sudden new litigation-centric shift could pose, as long as some governments continue to attempt to amend the instruments governing the Commission's mandate. Along these lines, we suggest that the actions of the IACHR should be guided by the search for balance between the expectations of the victims and petitioner organizations and the increasingly pronounced resistance of some governments to effective international scrutiny.

The strengthening process officially came to a close in March 2013. Nevertheless, in view of the persistence and intensity of the criticism from some governments, we believe it is naïve to expect the IACHR to be solely responsible for the improvement of its functions. It is essential for civil society to expose the inconsistencies in the positions of those States that, on one hand, demanded profound changes in the IACHR's actions and, on the other hand, have failed to assume the costs of the new institutional practices in line with their own demands. Finally, we must not lose sight of the political context in which the IACHR must perform the functions of its work pillars and, in this respect, decide how best to manage the resources at its disposal.

The initial decades of the IACHR: prioritization of the promotion and monitoring of country situations

134

Katya Salazar, Daniel Cerqueira

Upon adoption of the first Statute of the IACHR in 1959, the delegations in attendance at the Fifth Meeting of Consultation of Ministers of Foreign Affairs, held in Santiago, Chile, entrusted it with the mission of developing an awareness of human rights, making recommendations to the governments for the adoption of progressive measures in favor of human rights, drafting studies, and serving as an advisory body to the OAS on this subject.² In the absence of express authorization to hear and decide individual petitions, the IACHR was originally envisaged as a body dedicated to the promotion of human rights and a guarantor of democracy in the region. In this regard, the Fifth Meeting of Consultation of Ministers of Foreign Affairs underscored that “Harmony among the American republics can be effective only insofar as human rights and fundamental freedoms and the exercise of representative democracy are a reality within each one of them.”³

The Commission’s initial activities were limited to engaging in dialogue with government authorities and monitoring the human rights situation in places where there had been a breakdown in the democratic and constitutional system. From the 1960s to the 1980s, its most visible work consisted of making in loco visits and publishing reports on the human rights situation in Cuba (1962, 1963, 1967, 1970, 1976, 1979, and 1983), the Dominican Republic (1965 and 1966), Haiti (1969, 1979, and 1988), El Salvador (1970 and 1978), Honduras (1970), Chile (1974, 1976, 1977, and 1985), Uruguay (1978), Nicaragua (1978, 1981, and 1983), Panama (1978 and 1989), Paraguay (1978 and 1987), Argentina (1980), Bolivia (1981), Colombia (1981), Guatemala (1981, 1983, and 1985) and Suriname (1983 and 1985).⁴ With the exception of the 1963 Report on the Situation of Political Prisoners and their Relatives in Cuba and the 1983 Special Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, the others sought to address

2 I/A Court H.R., *Certain Attributes of the Inter-American Commission on Human Rights* (Articles 41, 42, 44, 46, 47, 50, and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93 of July 16, 1993, Series A, No. 13, para. 23.

3 *Final Act of the Fifth Meeting of Consultation of Ministers of Foreign Affairs held in Santiago, Chile*, August 12-18, 1959; doc. 89 (Spanish), August 18, 1959, p. 5.

4 See IACHR, Country Reports: <http://www.oas.org/en/iachr/reports/country.asp>

the systematic human rights violations arising from coups d'état, internal armed conflicts, or other forms of institutional breakdown. It is important to note that up until the end of the 1980s, several country reports were preceded by in loco visits requested by constitutional or *de facto* governments, or at the request of the political bodies of the OAS.⁵ An example of this is the 1965 Report on the Situation of Human Rights in the Dominican Republic, when the two groups involved in the country's civil war at that time and the Secretary General of the OAS requested the IACHR's presence on the ground to examine the violations that were being reported.⁶

Although the IACHR conducted significant activities to monitor conditions under dictatorships from the time of its creation, some political situations led it to act discreetly in conspicuous cases. This was reflected, for example, in the absence of an in loco visit or a more forceful statement with respect to the military regime that held power in Brazil 1964–1985. Aside from this and other omissions, it is undeniable that the populations of most of the region's countries, particularly in the Southern Cone, benefitted from IACHR reports on unlawful detention, torture, extrajudicial execution, and forced disappearance—violations that were being committed systematically. On this point, the visit of the full IACHR to Argentina in 1979 bears special mention, as it helped raise international public awareness of the phenomenon of mass forced disappearance and the existence of dozens of clandestine detention centers, which the country's *de facto* Military Junta had previously denied.⁷

In view of the scourge of violence stemming from the internal armed conflicts in Central America during the 1970s and 1980s, the IACHR once again implemented its monitoring powers to sound the alarm on the abuses committed by both government forces and unlawful armed

5 Although the IACHR's country reports during the first decade of its activities were, as a general rule, preceded by an in loco visit at the request of the *de facto* or constitutional government, in some cases the reports were drafted based on information received through other monitoring mechanisms because the IACHR's presence on the ground had not been authorized by the respective government. This occurred, for example, with the reports on the situation of human rights in Cuba, in which the findings were based on reports and testimony received by the IACHR outside the framework of an in loco visit.

6 IACHR, *Report of the IACHR on its Activities in Dominican Republic*, Chapter I, Background, OEA/Ser.L/V/II.13 14 Rev., October 15, 1965, <http://www.cidh.org/countryrep/Rep.Dominicana65sp/indice.htm>

7 IACHR, *Report on the Situation of Human Rights in Argentina*, OEA/Ser.L/II.49, doc. 19, April 11, 1980, <http://www.cidh.org/countryrep/Argentina80sp/indice.htm>

groups. The peace accords that signaled the end of those conflicts in El Salvador and Guatemala focused on the need to put a stop to the human rights violations reported by the IACHR in its country reports, press releases, and other public statements.

Although by the end of the 1980s the most impactful activities of the IACHR fell within the category of monitoring, from the first working session in 1961 the Commissioners stated that proper fulfillment of its mandate of “promoting the observance and defense of human rights”⁸ required that they be able to examine complaints, communications, or individual petitions. The first members of the Commission were of the opinion that the absence of specific protection powers in the Statute adopted in 1959 would not allow it “to fulfill the mission in defense of human rights that the American peoples can expect from it, since it felt that its obligation should not be limited simply to promoting respect for such rights, but rather it [was] obliged to see to it that these are not violated.”⁹

In view of this position, and the establishment of individual petition mechanisms in the European and universal human rights systems, the OAS member states decided to amend the Statute of the Commission during the Second Special Inter-American Conference, held in Rio de Janeiro, Brazil, in November 1965.¹⁰ The authority to hear and decide individual petitions was expressly recognized,¹¹ and was exercised in 1967 with respect to the 44 petitions that the IACHR had received by then, 19 of which were forwarded to the respondent States.¹² Although the most impactful decisions of the IACHR during the 1970s and 1980s

8 Article 106 of the OAS Charter establishes that “There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.”

9 IACHR, *Report on the Work Accomplished during Its First Session*, October 3 to 28, 1960, Pan American Union, OEA/Ser.L/V/II.I, doc. 32; March 14, 1961, p. 11.

10 IACHR, *Report on the Work Accomplished during Its Thirteenth Session*, April 18 to 28, 1966; Pan American Union, General Secretariat of the OAS, Washington, D.C. OEA/Ser.L/V/II.14, doc. 35; June 30, 1966, p. 3.

11 Operative paragraph 3 of Resolution XXII of the Second Special Inter-American Conference resolved: “To authorize the Commission to examine communications submitted to it and any other available information, to address to the government of any American State a request for information deemed pertinent by the Commission, and to make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights.”

12 IACHR, *2011-2015 Strategic Plan*, p. 5, <https://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf>

were derived from the monitoring pillar, several reports on individual petitions addressed the State's obligation to investigate serious human rights violations and, when appropriate, to identify and punish the perpetrators.¹³

Up until the 1980s, the decisions issued within the individual petition system were characterized by a much abbreviated analysis of the position of the parties and a flexible determination of the facts, in many cases based on presumptions arising from the State's failure to respond to the complaint. With few exceptions, most of the final reports on petitions issued up to the mid-1980s were limited to reporting the position of the petitioner and, when possible, that of the State, followed by conclusions and general recommendations. With the entry into force of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), and especially with the submission of the first cases to the jurisdiction of the Inter-American Court, the reports on individual petitions underwent a process of progressive juridification, characterized by increasingly rigorous parameters for the determination of the facts, identification of the victims, and specification of the purpose of the litigation.¹⁴

With the adoption of the American Convention on November 22, 1969, the powers of monitoring and promotion and, above all, the individual petition system, became subject to a number of provisions whose content would later be included in the IACHR's Rules of Procedure and Statute, last amended in October 1979.¹⁵ Article 41 of

13 See, e.g., IACHR, Case No. 1683, *Olavo Hansen v. Brazil*, OEA/Ser. L/V/II, 28, doc. 15, May 3, 1972, operative paragraph 2; Case No. 1716 *v. Haiti*, OEA/Ser.L/V/II.30, doc. 9, rev. 1, April 24, 1973, operative paragraph 3; Cases No. 1702, 1748, and 1755 *v. Guatemala*, OEA/Ser.L/V/II.32, doc. 21, rev. 1, April 17, 1974, operative paragraph 3; Case No. 1757 *v. Bolivia*, OEA/Ser.L/V/II.32, doc. 34, April 10, 1974, operative paragraph 2; Case No. 2271, *Nélida Azucena Sosa de Forti v. Argentina*, November 18, 1978, operative paragraph 3; Case No. 2126, *Carlos Humberto Contreras Maluje v. Chile*, June 21, 1978, operative paragraph 3; Resolution 33/81, Case No. 7403 *v. Guatemala*, June 25, 1981, operative paragraph 3; Resolution 2/86, Case No. 9144 *v. Nicaragua*, April 16, 1986, operative paragraph 3.

14 With respect to the specification of the purpose of the litigation, up until the first half of the 1990s the IACHR typically issued a single report on the admissibility of the petition and the merits of the alleged violations. Since then, the Commission has maintained the practice of issuing one report on admissibility and another on the merits. Although the possibility of consolidating those procedural steps is still provided for in Article 36(3) of its Rules of Procedure, in practice it has been quite unusual.

15 See the IACHR Statute, approved in Resolution 447, adopted by the OAS General Assembly in October 1979, La Paz, Bolivia, <http://www.oas.org/en/iachr/mandate/Basics/statuteiachr.asp>. In the words of the IACHR, the Statute adopted in 1979, "reflects the major innovations introduced by the American Convention in relation

the Convention established the general framework of the powers of the IACHR in the following terms:

The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- a) to develop an awareness of human rights among the peoples of America;*
- b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;*
- c) to prepare such studies or reports as it considers advisable in the performance of its duties;*
- d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;*
- e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;*
- f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention;*
and
- g) to submit an annual report to the General Assembly of the Organization of American States.*

to the Commission. Accordingly, it is the Inter-American Commission—and not the Commissioners—that represents all OAS Member States. The institutional hierarchy of its members corresponds currently to that accorded to the Commission (Article 53 of the Charter). The seven members who make up the Commission are elected by the General Assembly for a period of four years (Article 3) and not by the Council of the Organization, as was provided for in the previous Statute.” IACHR, *Basic Documents in the Inter-American System*, Introduction, p. 10, <http://www.oas.org/en/iachr/mandate/Basics/intro.asp>

The American Convention has eight provisions on the individual petition system whose regulatory content would be complemented by the successive regulations adopted by the Commission.¹⁶ Article 63(2)¹⁷ of the Convention establishes the jurisdiction of the Inter-American Court to issue provisional measures in a way that is unique in international law. While the urgent measures (typically called provisional or interim measures) available in other human rights courts and inter-State dispute settlement bodies are limited to the preservation of rights in the context of a lawsuit, the measures provided for in the above-cited provision of the Convention seek to prevent irreparable harm to persons, even in the absence of an individual petition or complaint.¹⁸

16 See, e.g., Article 32(2) of the IACHR's Rules of Procedure, which broadens the regulatory content of Article 46(1)(b) of the American Convention as follows: "In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case." Similarly, see Articles 31(3) and 33(2) of the Rules of Procedure, which broaden the regulatory content of Articles 46(1)(a) and 46(1)(c) of the American Convention, respectively.

17 That provision establishes that: "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."

18 Article 41(1) of the Statute of the International Court of Justice (ICJ) states that: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." The rules of procedure of the United Nations committees and the European Court of Human Rights provide for the power to issue interim measures in language that is very similar. Accordingly, the only supranational dispute resolution or human rights bodies authorized to issue urgent measures outside the framework of an individual petition are the Inter-American Court and the Inter-American Commission. We will not discuss this issue at length, but we think it is important to make clear that the similarity between the wording of Article 41(1) of the ICJ Statute, the rules of procedure of the UN treaty committees, and the rules of procedure of the European Court must be qualified by the purpose of the urgent measures for inter-State dispute resolution courts and for supranational human rights bodies. In this regard, Rieter observes that: "In general international law, the purpose of provisional measures relates to preserving the rights of the parties, preserving the procedure and preventing irreparable harm. In human rights adjudication preventing irreparable harm is the main purpose. This has taken a specific meaning relating primarily to harm to persons and secondarily to harm to the claim or the procedure. Risk of irreparable harm to persons should normally be established by a two-prong test of (1) irreparable harm to persons and (2) irreparable harm to the rights claimed, including the possibility of reparation." See Eva Rieter (2010: 1088).

In addition to the individual petition system and provisional measures, precautionary measures are the other tool of the inter-American human rights system that is part of the protection pillar, and the authority to issue them was included in the IACHR's Rules of Procedure in 1980.¹⁹ In view of that regulatory change, the Commission began to request urgent measures on behalf of persons in whose name individual petitions were filed, especially in situations involving the unlawful deprivation of liberty that could result in forced disappearances or extrajudicial executions (González 2010: 52). Although in 1980 the power to issue precautionary measures was provided for in the chapter pertaining to the individual petition system, in the 1996 Rules of Procedure²⁰ they were given their own paragraph, reflecting the IACHR's practice of issuing them autonomously in the context of a petition.

The consolidation of thematic areas and the prioritization of the protection pillar beginning in the 1990s

As mentioned earlier, from the time of its creation in 1959 through the 1980s, the IACHR played a fundamental role in the region's democratic transition processes, especially through the monitoring pillar. Between the 1990s and the first decade of the 2000s the Permanent Council and the General Assembly of the OAS, as well as the *ad hoc* Meetings of Foreign Ministers,²¹ followed the practice of requiring in loco visits

19 Article 26 of the IACHR's Rules of Procedure of 1980 established, in pertinent part:

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.

[...]

4. The request for such measures and their adoption shall not prejudice the final decision.

20 *Rules of Procedure of the IACHR*, OEA/SER.L/V/II.93, doc. 8, October 1, 1996, para. 29.

21 On June 5, 1991, the OAS General Assembly passed Resolution 1080 (1991), regulating the convening of the so-called *ad hoc* Meetings of Foreign Ministers. Article 1 of that resolution "[instructed] the Secretary General to call for the immediate convocation of a meeting of the Permanent Council in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's Member States, in order, within the framework of the Charter, to examine the situation, decide on and convene an *ad hoc* meeting of

or other forms of monitoring by the IACHR in situations of national institutional crises. This was the case in the escalation of violence in Haiti at the beginning of 1990²² and the subsequent coup d'état in Haiti in September 1991,²³ and as a result of the coups d'état in Peru²⁴ and 2009 in Honduras.²⁵

the Ministers of Foreign Affairs, or a special session of the General Assembly, all of which must take place within a ten-day period." After Resolution 1080 was passed, that mechanism was applied in Haiti in 1991, Peru in 1992, Guatemala in 1993, and Paraguay in 1996. See OAS, AG/RES. 1080 (XXI-O/91), June 5, 1991, <http://www.oas.org/juridico/english/agres1080.htm>. The Inter-American Democratic Charter, adopted in 2001, also established a mechanism for convening meetings of foreign ministers in view of situations involving the breakdown of democratic institutions. Article 20 of the Charter states, in pertinent part, that:

"In the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, any member state or the Secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.

The Permanent Council, depending on the situation, may undertake the necessary diplomatic initiatives, including good offices, to foster the restoration of democracy.

If such diplomatic initiatives prove unsuccessful, or if the urgency of the situation so warrants, the Permanent Council shall immediately convene a special session of the General Assembly. The General Assembly will adopt the decisions it deems appropriate, including the undertaking of diplomatic initiatives, in accordance with the Charter of the Organization, international law, and the provisions of this Democratic Charter."

22 See, OAS Permanent Council, CP/RES. 537/90 of February 23, 1990, cited in IACHR, *Annual Report 1991*, Chapter IV, Situation of Human Rights in Several States, Haiti, Introduction, OEA/Ser.L/V/II.81, doc. 6, rev. 1, February 14, 1992, <https://www.cidh.oas.org/annualrep/91eng/chap.4.htm>

23 OAS, *Ad hoc Meeting of Foreign Ministers*, October 2, 1991, Washington DC, resolution entitled "Support for the Democratic Government in Haiti," MRE/RES.1/91. In this resolution, it was decided: "To urge the Inter-American Commission on Human Rights, in response to President Jean-Bertrand Aristide's request, to take immediately all measures within its competence to protect and defend human rights in Haiti and to report thereon to the Permanent Council of the Organization." See IACHR, *Report on the Situation of Human Rights in Haiti*, para. 20, OEA/Ser.L/V/II.85, doc. 9 rev., February 11, 1994, <http://www.cidh.oas.org/countryrep/enha94/enha94c1.htm#Background>

24 IACHR, *Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.83, doc. 31, March 12, 1993, para. 44, <http://www.cidh.org/countryrep/Peru93eng/background.htm>. This report notes that: "In operative paragraph 5 of that resolution, the ad hoc Meeting of Ministers of Foreign Affairs urged the Peruvian Government 'to make formal its invitation to the Inter-American Commission on Human Rights to investigate the human rights situation in Peru so that it may report thereon to the Permanent Council.' At that same ad hoc Meeting, the Government of Peru, through its Minister of Foreign Affairs, invited the Commission to visit Peru 'as soon as possible.'"

25 OAS, Special Session of the General Assembly, Resolution AG/RES. 2 (XXXVII-E/09) of July 4, 2009, operative paragraphs 1 & 2, <http://www.oas.org/>

Throughout the 1990s and the first decade of the 2000s, the Commission sought to improve the efficiency of its monitoring and promotion pillars through the creation of thematic rapporteurships and units. It bears mentioning here that the espousal of specialized areas was part of a broader trend that was consolidated by the United Nations. This trend was influenced by the demands of social movements from the 1980s, culminating with the position established at the 1993 World Conference on Human Rights in Vienna. While the ideological orientation of that forum was the indivisibility of human rights, its operational aspect was characterized by a specialized approach, through the expansion of the Working Groups and the creation of Special Rapporteurships and thematic committees within the sphere of the United Nations, and the coordination of their work through a High Commissioner for Human Rights, whose office began operations in 1994 (Gordon 2003: 265).

In the context of the inter-American human rights system, this trend was evident in the broadening of the regulatory framework through the adoption of several protocols to the American Convention and treaties on specific issues. As of 1989, there were four human rights instruments in the region;²⁶ this number grew to ten in 2013,²⁷ in addition to a 2001 Declaration of Principles on Freedom of Expression²⁸ and a set of Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, adopted in 2008.²⁹ In terms of operational aspects, the trend toward specialization in the monitoring and promotion

CONSEJO/GENERAL%20ASSEMBLY/37SGA.asp

26 Those instruments are the American Declaration of the Rights and Duties of Man, the American Convention, the Inter-American Convention to Prevent and Punish Torture, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador.”

27 Since 1990, the Member States have adopted the following additional instruments: the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belem do Pará;” the Inter-American Convention on Forced Disappearance of Persons; the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities; the Inter-American Convention Against All Forms of Discrimination and Intolerance, and the Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance.

28 IACHR, *Declaration of Principles on Freedom of Expression*, adopted at the 108th regular session held from October 2-20, 2000, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26>

29 IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, adopted at the 131st regular session held from March 3-14, 2008, <http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>

functions inspired the creation of the Rapporteurship on the Rights of Indigenous Peoples in 1990, and eight other rapporteurships and one thematic unit that have been created since then.³⁰ In the words of the IACHR, the purpose of creating rapporteurships is “to devote attention to certain groups, communities, and peoples that are particularly at risk of human rights violations due to their state of vulnerability and the discrimination they have faced historically.”³¹

The concentration on specialized areas has enabled the IACHR to identify, study, and issue recommendations on the main issues that make up the regional human rights agenda. The thematic areas of its rapporteurships have also been significant in promoting issues that may have fallen under the radar in the public policies of the region’s countries, but have affected the fundamental rights of millions of inhabitants of the Americas. Such is the case of the LGBTI community, whose demands gained a higher profile in the hemisphere because of the work of the respective thematic unit, which was created in November 2011 and became a rapporteurship in February 2014.

With regard to the specialized areas of the IACHR, it is important to underscore the special status that the IACHR conferred upon the Special Rapporteurship for Freedom of Expression. While the other thematic rapporteurships and units are under the charge of the Commissioners themselves, the Office of the Special Rapporteur is the only one that has been headed, since its creation in 1997, by a full-time independent expert. As explained below, some governments strongly criticized the IACHR during the strengthening process because they believed there was differential treatment to the detriment of other rapporteurships and, in general, to the monitoring of other fundamental rights besides freedom of expression.

One of the most important decisions regarding the IACHR’s monitoring pillar was the mention, in its 1996 and 1997 Annual Reports,

30 Those rapporteurships are: Rapporteurship on the Rights of Women (1994); Rapporteurship on the Rights of Migrants (1996); Special Rapporteurship for Freedom of Expression (1997); Rapporteurship on the Rights of the Child (1998); Rapporteurship on Human Rights Defenders (created in 2001 as a Thematic Unit and converted into a Rapporteurship in 2011); Rapporteurship on the Rights of Persons Deprived of Liberty (2004); Rapporteurship on the Rights of Afro-Descendants and against Racial Discrimination (2005); and Rapporteurship on the Rights of Lesbian, Gay, Trans, Bisexual, and Intersex Persons (created in 2011 as a Thematic Unit and converted into a Rapporteurship in 2014). In 2012, the IACHR also created the Unit on Economic, Social and Cultural Rights, which will become a Special Rapporteurship in 2015.

31 IACHR website, section on Thematic Rapporteurships and Units, <http://www.oas.org/en/iachr/mandate/rappoteurships.asp>

of the criteria for the identification of the States whose domestic human rights situation or practices warrant special attention and, therefore, are examined in Chapter IV of the Annual Report.³² In the 2011 Annual Report, the Commission specified the methodology used in drafting it.³³ As we will see below, during the strengthening process several governments criticized the way in which the IACHR selects the countries to be included in Chapter IV, as well as the approach used in the selection of issues and rights analyzed.

Starting in the 1990s, the IACHR began to exercise all of its powers in its approach to the democratic transition processes in Central America and the Southern Cone. Several of its statements declaring the incompatibility of amnesty laws with the obligation to investigate and

32 Those criteria are as follows: (i) cases of States ruled by governments which have not been chosen by secret ballot in honest, periodic, and free popular elections, in accordance with internationally accepted standards and principles; (ii) States where the free exercise of rights contained in the American Convention or Declaration have been effectively suspended, in whole or part, by virtue of the imposition of exceptional measures, such as a state of emergency, state of siege, exceptional security measures, and the like; (iii) where there are serious accusations that a State is engaging in mass and gross violations of the human rights guaranteed in the inter-American instruments; (iv) States that are in a process of transition from any of the above three situations; and (v) structural or temporary situations that may arise in member states confronted, for various reasons, with situations that seriously affect the enjoyment of fundamental rights enshrined in the American Convention or the American Declaration. See IACHR, *Annual Report 1997*, OEA/Ser.L/V/II.98, doc. 6, February 17, 1998, Chapter V, Human Rights Developments in the Region, <http://www.cidh.org/annualrep/97eng/chap.5.htm>

33 In its 2011 Annual Report, the Commission underscored that it uses the following sources to conduct the evaluation contained in Chapter IV:

1. Official governmental acts, at any level and in any branch of government, including Constitutional amendments, legislation, decrees, judicial decisions, statements of policy, official submissions to the Commission and other human rights bodies, and any other statement or action attributable to the government.
2. Information available in cases, petitions and precautionary/provisional measures in the inter-American system, as well as information about state compliance with recommendations of the Commission and judgments of the Inter-American Court.
3. Information gathered through in loco visits by the Commission, its rapporteurs, and its staff.
4. Information obtained through public hearings held by the Commission during its sessions.
5. Findings of other international human rights bodies, including UN treaty bodies, UN rapporteurs and working groups, the Human Rights Council, other UN organs and specialized agencies.
6. Information from human rights reports of governments and regional bodies.
7. Reports of civil society organizations and reliable, credible information submitted by them and by individuals.
8. Public information widely disseminated in the media.

punish crimes of the State and other serious human rights violations are included in the final reports on cases,³⁴ with increasing frequency regarding to the use of the other powers that fall under the monitoring and promotion pillars, such as the annual reports,³⁵ country reports,³⁶ and press releases.³⁷ In time, this trend toward strengthening the protection pillar went beyond addressing the transition processes and was reflected in the exercise of the Commission's mandate as a whole.

In the latter half of the 1990s, the IACHR began to use a significant part of its human and material resources to issue decisions related to the petition system and the precautionary measure mechanism. According to the information available on its website, 27 country reports were issued between 1970 and 1989, and the same number were issued between 1990 and 2000.³⁸ While seven countries were examined per year in Chapter IV of the IACHR's Annual Reports in the 1980s, this decreased to an average of four during the decade from 2000-2009. This variation appears to have been influenced more by the end of the armed conflicts and dictatorships than by a decision by the IACHR to assign priorities, but for purposes of this article we would note that the period from 1990 to 2011 saw a significant upswing in the number of decisions related to the protection pillar, without this same trend being replicated with respect to the other pillars. In a sampling of admissibility³⁹ and merits reports compared to country and thematic reports,⁴⁰ there has

34 See, e.g., IACHR, cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311 *v. Argentina*, Report 28/92 of October 2, 1992; cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375 *v. Uruguay*, Report 29/92 of October 2, 1992; case of the *Las Hojas Massacre v. El Salvador*, Report 26/92 of September 24, 1992; and Report 34/96, cases 11.228, 11.229, 11.231, and 11282 *v. Chile*, October 15, 1996, pp. 162, 203.

35 IACHR, *Annual Report 1996*, Chapter V, Human Rights Developments in the Region, section on Guatemala, <http://www.cidh.org/annualrep/96eng/chap.5.htm>

36 See IACHR, *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.85, doc. 28 rev., February 11, 1994, paras. 80-83.

37 See IACHR Press Release 6/98, April 24, 1998, <http://www.cidh.org/Comunicados/English/1998/Press3-9.htm#6>

38 See IACHR, Country Reports, <http://www.oas.org/en/iachr/reports/country.asp>

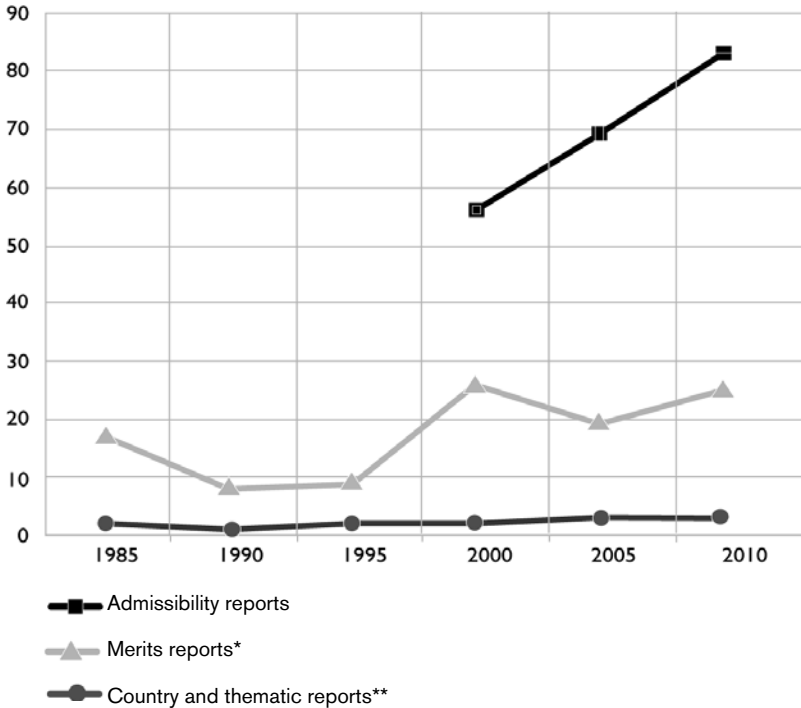
39 As mentioned earlier, the IACHR only began to issue reports on the admissibility of petitions in the second half of the 1990s, and therefore the table shows only merits reports between 1985 and 1995.

40 Although the IACHR's website does not show that there were any thematic reports prior to 1996, a manual search found at least one such report, published in 1995, detailed as follows: IACHR, *Report on the Compatibility of Desacato Laws with the American Convention on Human Rights*, OEA/Ser. L/V/II.88, doc. 9 rev., February 17,

been an increase in the number of the first two, while the number of the latter two has remained the same (Graph 1).

GRAPH 1

Reports on petitions and cases, country and thematic reports adopted by the IACHR between 1985 and 2010



SOURCE: Annual Reports of the IACHR from 1985, 1990, 1995, 2000, 2005, and 2010

* This figure corresponds only to approved merits reports.

** This figure corresponds to the total number of country and thematic reports.

From a qualitative point of view, while the IACHR maintained a more abbreviated format in its reports on petitions during the 1980s, the following decades saw more extensive documents, stricter criteria in the determination of the facts and the identification of individual victims,

1995. On this point, see the official web page of the IACHR, Thematic Rapporteurships and Units, Office of the Special Rapporteur for Freedom of Expression, Chapter VI, *Desacato Laws and Criminal Defamation*, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=310&IID=1>. The above-cited report has been accounted for in the table indicated in the body of the text.

and a more detailed explanation of the attribution of international responsibility. On this point, it is important to underscore that the evolution of the case law of the Inter-American Court has been critical to the “juridification” trend of the protection pillar. A prime example of this is the change in its stance with regard to the time during the proceedings at which the IACHR must identify the victims. From the very first cases submitted to the Inter-American Court, the Commission had requested to add victims of human rights violations subsequent to the issuance of the final report on the merits, a practice to which the Inter-American Court did not object. However, with the November 2007 judgment in the case of *García Prieto v. El Salvador*, the Inter-American Court began to hold that only persons identified by the IACHR in its final report on the merits could be considered victims.⁴¹

In addition to the analysis of the merits of the alleged human rights violations, the decision of the Inter-American Court regarding the admissibility requirements provided for in Articles 46 and 47 of the Convention have similarly been characterized by an “over-juridification” trend in recent years. Historically, the Court was deferential to the IACHR’s conclusions with respect to the aforementioned Convention requirements, but that position shifted diametrically with the judgments in the case of *Grande v. Argentina*, in August 2011, and especially with the case of *Díaz Peña v. Venezuela*, in June 2012. In both decisions, the Inter-American Court reviewed the Commission’s assessment in its admissibility report of the requirements pertaining to the exhaustion of domestic remedies and the filing deadline for the complaint, provided for in Articles 46(1)(a) and (b) of the American Convention, respectively.⁴² In the second judgment the Court held that, in that specific case, the suitable remedy for meeting the requirement provided in Article 46(1) (a) of the Convention with respect to the pretrial detention of Raúl Díaz Peña was an appeal, rather than the requests for release and writs of *habeas corpus* filed by the victim’s attorneys.⁴³ This reasoning contradicts the Court’s own case law and the historical doctrine of the Commission, which holds that it is sufficient to file requests for release from custody or writs of *habeas corpus* in order to exhaust domestic remedies in cases of alleged unlawful or arbitrary pretrial detention.

41 I/A Court H.R., *Case of García Prieto et al. v. El Salvador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 20, 2007, Series C No. 168, paras. 67-70.

42 See I/A Court H.R., *Case of Grande v. Argentina*, Preliminary Objections and Merits, Judgment of August 31, 2011, Series C No. 231, paras. 60 & 61.

43 I/A Court H.R., *Case of Díaz-Peña v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of June 26, 2012, Series C No. 244, paras. 124-125.

The same juridification trend can be seen in relation to the provisional measure mechanism. There are several recent examples in which the Inter-American Court has used very strict criteria for the identification of proposed beneficiaries, and required that the Commission provide additional support to meet the requirements set forth in Article 63(2) of the American Convention. Because this article is focused on the analysis of the way in which the IACHR has exercised its powers, we will limit ourselves to mentioning two Inter-American Court decisions that are emblematic of this trend. In its denial of the request for provisional measures in the *Matter of Ngöbe v. Panama*, the Court stated that:

“The responses and information presented by the State challenge to a high degree certain elements of the initial request presented by the Commission [and] the Commission, by not presenting arguments relating to certain claims of the State, failed] to demonstrate prima facie the situation of extreme gravity and urgency of preventing irreparable damage.”⁴⁴

Later, in its decision of the *Matter of Danilo Rueda* with respect to Colombia, the Court held that:

...the facts and arguments of the Commission related to the alleged risk to human rights defenders in Colombia, as well as the alleged lack of specific results from the investigations related to alleged attacks against Mr. Danilo Rueda, pertains to considerations that must be made within the context of a possible contentious case in the event that there is one. The Court has already held that a ruling on the merits must be made in a judgment within the process of a contentious case before the Court and not within the processing of provisional measures. Accordingly, the aforementioned arguments will not be taken into account.⁴⁵

The reasoning cited in both cases differs from the *prima facie* standard of proof that the Court has traditionally used in its decisions, as does the probative value of the context in the Court’s formation of its opinion regarding the extreme seriousness and urgency of a situation alleged by the applicants for provisional measures.

Given the objective of this article, we will not delve any further into the debate surrounding the origin of the “juridification” of the protection pillar; suffice it to say that until 2012 the variance in the case law of

44 I/A Court H.R., *Matter of Four Ngöbe Indigenous Communities and its members regarding Panama*, Request for Provisional Measures, May 28, 2010, para. 12.

45 I/A Court H.R., *Matter of Danilo Rueda regarding Colombia*, Request for Provisional Measures, May 28, 2014, operative paragraph 8.

the Inter-American Court had been the main reason for it. With the strengthening process, the IACHR made a number of amendments to its Rules of Procedure, policies, and institutional practices, many of which encompassed the petition system and the mechanism of precautionary measures. This was done not as a response to the changes in the Inter-American Court's case law, but rather because of political pressures from various governments. Again, it is beyond the scope of this article to discuss the political background of the process,⁴⁶ and we will therefore place emphasis on how the priority assigned to the protection pillar and some specific decisions in the exercise of that power gave rise to a series of challenges to the way in which the IACHR was carrying out its mandate.

As stated previously, in the second half of the 1990s the IACHR began issuing an increasing number of decisions related to the protection pillar. That increase became more apparent starting in 2008, which is explained—among other reasons—by an internal reorganization process in the Executive Secretariat of the Commission undertaken between 2005 and 2008. Pursuant to that process, the Secretariat's attorneys found themselves in charge of portfolios of countries, having to perform countless activities in connection with all of the IACHR's pillars of work. This included the initial evaluation of petitions and requests for precautionary measures, the processing of correspondence regarding precautionary measures, petitions, and cases,⁴⁷ the writing of draft reports and abstracts of the annual reports, the drafting of press releases, studies, and other activities related to monitoring country situations, as well as promotion activities. Between 2005 and 2008, specialized groups were created for activities linked to one or more pillars of work, as well as offices dedicated to certain specialized tasks, such as the Press Office. According to the IACHR, the current structure of its Executive Secretariat rests on the following premises:

The consolidation of specialized functional units; equitable distribution of the workload by combining geographical and procedural criteria; and the strengthening of middle management, responsible for the juridical,

46 For a detailed explanation of the political context in which the strengthening process took place, see Due Process of Law Foundation. 2012. *Reflections on Strengthening the Inter-American Human Rights System*. Aportes-DPLF, 16 (5), http://dplf.org/sites/default/files/aportes_16_english_webfinal_0.pdf

47 Under the instruments governing the IACHR's mandate, petitions are understood as the complaints filed pursuant to Article 44 of the American Convention that have not yet reached a procedural stage subsequent to admissibility. In turn, cases are those complaints that have been the subject of an admissibility report.

*procedural, and administrative aspects of management. The idea underlying the consolidation of functional units is that specialization makes it possible to maximize output of admissibility reports and reports on the merits by assigning those functions to teams (Sections), established according to geographical criteria, without thereby detracting from the special attention required by other areas.*⁴⁸

The principal groups and sections of the Executive Secretariat created during the aforementioned period are as follows:

- a) **Office of the Executive Secretary:** tends to all Commission members and manages executive affairs.
- b) **Registry Group:** in charge of receiving, processing, and performing an initial evaluation of the individual petitions submitted pursuant to Articles 28 and 29 of the IACHR's Rules of Procedure.
- c) **Regional Sections:** responsible for petitions during the admissibility phase and cases in the merits stage, follow-up to recommendations, and monitoring of the human rights situation in the 35 Member States.
- d) **Court Group:** responsible for advising the Commissioners in the cases, provisional measures, and other matters submitted to the Inter-American Court, and the drafting of final reports on cases.
- e) **Protection Group:** responsible for evaluating and following up on requests for precautionary measures and other urgent measures, such as requests for provisional measures and intervention in accordance with Article XIV of the Inter-American Convention on Forced Disappearance of Persons.⁴⁹
- f) **Friendly Settlements Group:** responsible for providing technical support to the IACHR with respect to conflict

48 IACHR, Reply of the Inter-American Commission on Human Rights to the Permanent Council of the Organization of American States regarding the recommendations contained in the *Report of the Special Working Group to Reflect on the Workings of the IACHR with a View to Strengthening the Inter-American Human Rights System*, para. 55, <http://scm.oas.org/pdfs/2012/CP29546E.pdf>

49 That article establishes that "Without prejudice to the provisions of the preceding article, when the Inter-American Commission on Human Rights receives a petition or communication regarding an alleged forced disappearance, its Executive Secretariat shall urgently and confidentially address the respective government, and shall request that government to provide as soon as possible information as to the whereabouts of the allegedly disappeared person together with any other information it considers pertinent, and such request shall be without prejudice as to the admissibility of the petition."

resolution, drafting friendly settlement reports, and compiling best practices on this issue.

- g) **Thematic Rapporteurships and Units:** responsible for monitoring and promotion activities with a view to advising each thematic rapporteur. Except in the case of the Office of the Special Rapporteur for Freedom of Expression, whose personnel reports directly to the Rapporteur, the support team for the other rapporteurships reports directly to the Executive Secretariat.
- h) **Administrative and Financial Services Section:** responsible for carrying out logistical, financial, systems, fundraising, and accounting activities.⁵⁰

An examination of the IACHR's budget before and after the redesign of its Executive Secretariat shows a 25.4% increase in funding between 2006 and 2010.⁵¹ Nevertheless, the information published by the IACHR indicates that it has been able to significantly increase the number of decisions under the protection pillar, attaining peak effectiveness in 2011, the year in which the strengthening process began. A comparison of the IACHR's efficiency based on the number of decisions issued under the petition system yields the following figures:

- a) Petitions evaluated: 1187 in 2005 and 1676 in 2010 (41.2% increase).
- b) Decisions to archive petitions: 12 in 2005 and 55 in 2010 (358% increase).
- c) Admissibility reports: 53 in 2005 and 73 in 2010 (37.7% increase).
- d) Merits reports: 19 in 2005 and 25 in 2010 (31.6% increase).
- e) Friendly settlement reports: 8 in 2005 and 11 in 2010 (37.5% increase).⁵²

50 IACHR, *Reply of the Inter-American Commission on Human Rights to the Permanent Council of the Organization of American States*, *supra* note 48 See also the organizational chart of the Executive Secretariat, current as of October 2014, published on the IACHR's website, http://www.oas.org/en/iachr/docs/pdf/EngCIDH_Org_10Oct2012%20v4.pdf

51 There is no information on the IACHR's website about its financial resources prior to 2006. Accordingly, we have taken account of the comparison of that year to 2010: US \$5.9 million in the first period, and US \$7.4 million in the second period. See the official IACHR website, section on Financial Resources, http://www.oas.org/en/iachr/mandate/financial_resources.asp

52 Information obtained from the 2005 and 2010 Annual Reports of the IACHR, <http://www.oas.org/en/iachr/reports/annual.asp>

Although the IACHR had been garnering criticism in particular because of specific decisions made at the end of the first decade of the 2000s,⁵³ prior to the strengthening process there had not been such a pronounced collective stance against the concentration of its resources on the protection pillar. That position may be symptomatic of a regional trend of intolerance for the consolidation of supranational human rights systems that give substantial authority to their protection pillars.

The human rights promotion/protection dilemma during the strengthening process

In addition to specific decisions that provoked virulent reactions from some governments, a more general flashpoint in the strengthening process had to do with the IACHR's purported emphasis on the protection pillar to the detriment of the others. At one of the first sessions of the Special Working Group, an ambassador paraphrased that position by stating that the OAS was suffering from a kind of macromegaly, which in medical terms refers to the uncontrolled enlargement of the members or extremities of a person's body. The allusion to this pathology reflects the opinion that the Commission had acquired an institutional strength that went beyond what was expected by the States that created it, thus jeopardizing the harmony of the OAS. Although the IACHR had already undergone other so-called "strengthening" processes, the impetus between 2011 and 2013 to promote structural changes in its actions and the force of the criticism leveled by governments with different ideological tendencies signaled a watershed in the way in which the Commission would exercise its powers.

53 Some of the most notable decisions that provoked critical reactions from the States concerned included: the granting of precautionary measures recommending the suspension of the Belo Monte hydroelectric project in Brazil in April 2011; the granting of precautionary measures on behalf of the executives and a former editor of the newspaper *El Universo* in Ecuador, in February 2012; the repeated decisions to keep Colombia and Venezuela in Chapter IV of the IACHR's Annual Report; the submission of cases considered politically sensitive in relation to Peru (e. g. Eduardo Nicolás Cruz Sánchez et al., Chavín de Huántar Operation, and Case of J), Colombia [e.g. Case of Rodríguez Vera et al. (Persons Disappeared from the Palace of Justice)] and Venezuela. Another critique, coming especially from the ALBA [Bolivarian Alliance for the Peoples of Our America] bloc, alleged the preferential treatment of the issue of freedom of expression and the over-funding of the respective Office of the Special Rapporteur, to the detriment of the other rights protected in the inter-American treaties. These criticisms were accompanied by objections to press releases and decisions on precautionary measures, petitions, and to cases alleging the violation of the right of freedom of expression in Ecuador and Venezuela.

Another more general criticism leveled at the IACHR concerned its alleged resistance to engage in dialogue with the governments, some of which accused it of ignoring the opportunities that the consolidation of democratic regimes in the region presented for public policy advisory initiatives and the enactment of legislative frameworks consistent with inter-American standards. There was additional criticism regarding a purported resistance to mechanisms for consulting with the States and other users of the inter-American human rights system on setting priorities, and even on the amendment of its Rules of Procedure. Along these lines, while the Special Working Group was still drafting the recommendations contained in its report of December 21, 2011, the IACHR was admonished for the way in which it amended Article 11 of its Rules of Procedure with respect to the election and term of office of its Executive Secretary. Prior to the initiation of the strengthening process, some governments had criticized the manner in which the Commission had adopted its Strategic Plan for the 2011-2015 period, stressing that the document had not been preceded by any kind of consultation with the users of the inter-American human rights system, and that it exclusively reflected how the IACHR and its Executive Secretariat thought its resources should be prioritized.⁵⁴

Upon presenting its reply document to the Permanent Council on October 23, 2012, the IACHR stated in response to these criticisms that “The IACHR will request the funds needed to hold an annual meeting with the participation of representatives of civil society, delegations from the States, and independent experts with a view to discussing ways to improve its mechanisms, policies, and practices.”⁵⁵ In addition, Article 79 of its Rules of Procedure, amended in March 2013, established that any amendment of its text would be preceded by public consultation with the users of the inter-American human rights system.

While the Special Working Group’s recommendations relating to the pillars of promotion and monitoring were couched in more constructive language, several recommendations relating to the protection pillar were based on the assumption that the States were being harmed by the alleged ambiguity and unpredictability of the Commission’s decisions. Terms such as “legal uncertainty” and “need to attain procedural

54 The report of December 21, 2011 stated this criticism in the form of the following recommendation to the IACHR: “Strengthen its mechanisms for consultation with all users of the system.”

55 IACHR, *Reply of the Inter-American Commission on Human Rights to the Permanent Council of the Organization of American States*, *supra* note 48, para. 47, <http://scm.oas.org/pdfs/2012/CP29546E.pdf>

equality between the parties” were used frequently in the December 21, 2011 report. This position was reflected in recommendations that, in the long run, demanded the increased juridification of the petition system and, above all, of the precautionary measure mechanism. With respect to the latter mechanism, the Special Working Group recommended that the IACHR:

- a) Define and disseminate more precise objective criteria for granting, reviewing, and, as applicable, extending or lifting precautionary measures.
- b) Confine the assessment for granting precautionary measures to the “seriousness” and “urgency” of situations, and avoid considerations on the merits of the matter.
- c) Define objective criteria or parameters for determining “serious and urgent situations” and the imminence of the harm, taking into account the different risk levels.
[...]
- g) State and give reasons for the legal and factual elements considered for granting, reviewing, and, as appropriate, extending or lifting precautionary measures.
[...]
- h) Improve the mechanisms for determining and individually identifying beneficiaries of precautionary measures.⁵⁶

As for the petition system, the recommendations of the Special Working Group that point to the alleged absence of legal rigor and precision on the part of the IACHR are the following:

- a) Rigorously apply criteria for admissibility of petitions, including thorough verification of the exhaustion of local remedies to avoid parallel proceedings in domestic instances and the IACHR.
- b) Develop and broaden the criteria or parameters for setting aside petitions and cases, including, in particular, those in which there has been a protracted period of procedural inactivity.

56 See the *Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System for Consideration by the Permanent Council*, OEA/Ser.G, GT/IAHRS-13/11 rev. 2, Section 2. Precautionary measures, December 13, 2011, https://www.oas.org/en/ser/dia/civil_society/docs/PC7dec/Informe%20del%20Grupo%20de%20Trabajo%20-%20English.pdf

- c) Put into effect deadlines (at least on an indicative basis) for each procedural stage.
- d) Define objective criteria or parameters and provide cause and grounds for applying the exceptional mechanism of joining the admissibility and merits stages.⁵⁷

Several of these recommendations were addressed by the IACHR in the amendments to its Rules of Procedure. In the August 1, 2013 press release announcing the entry into force of its new Rules of Procedure, the IACHR underscored that:

The reforms related to precautionary measures seek to increase publicity and dissemination of the criteria for granting, extending, modifying and lifting them, as well as to improve on the mechanisms used by the IACHR to follow-up on measures in force and individualize the respective beneficiaries. The amended Rules set forth in detail the parameters used by the IACHR in the determination of the requisites of urgency, seriousness and irreparable nature, as well as the circumstances in which this organ will request provisional measures to the Inter-American Court.

With respect to the petition and case system, the reforms have the purpose of providing greater predictability and efficacy in the establishment of priorities for the study and admissibility of petitions; criteria for archiving petitions or cases; granting of extensions for compliance with recommendations issued in final merits reports; extension of deadlines for the presentation of observations by parties; and [consolidation] of the admissibility and merits stages.⁵⁸

It follows from a reading of Article 25 of the new Rules of Procedure of the IACHR that there has been a considerable juridification of the precautionary measure mechanism, as the decisions to grant or extend them now require reasoned resolutions (art. 25.7). An additional change in this respect has to do with the periodic review of the decisions to grant precautionary measures (art. 25.9) and the general rule of requesting information from the States prior to the issuance of such a decision (art.

57 Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System for Consideration by the Permanent Council, OEA/Ser.G, GT/IAHRS-13/11 rev. 2, Section 3, "Procedural matters in processing cases and individual petitions," December 13, 2011, https://www.oas.org/en/ser/dia/civil_society/docs/PC7dec/Informe%20del%20Grupo%20de%20Trabajo%20-%20English.pdf

58 IACHR Press Release 57/13, August 1, 2013, http://www.oas.org/en/iachr/media_center/PReleases/2013/057.asp

25.5). With respect to the petition system, the current Rules of Procedure require resolutions approved by the majority of the full Commission for certain decisions, such as the consolidation of the procedural stages of admissibility and merits (art. 36.3); they established that decisions to archive petitions and cases are final, subject to certain exceptions (art. 42.3); and they incorporated more lenient grounds for granting extensions for the States to comply with recommendations contained in merits reports, as well as for the suspension of the time limit for the referral of cases to the Inter-American Court (art. 46.2).

It is important to stress that the requirement of greater precision in the decisions issued under the protection pillar is not *per se* a detriment to their effectiveness. In our opinion, increased legal rigor and the establishment of clearer criteria tend to benefit both the States and the victims and organizations that avail themselves of the inter-American human rights system through the protection pillar. Nevertheless, we underscore that these changes to the rules, policies, and institutional practices began to require internal consultation, the translation of memoranda, and the drafting of resolutions by the respective sections of the Executive Secretariat of the Commission, without any additional financial contributions to cover the costs of this additional work. The information available on the IACHR's website indicates, for example, that in spite of the numerous, stricter obligations and procedures applicable to the precautionary measure mechanism since August 2013, the section of the Executive Secretariat responsible for evaluating and following up on requests for urgent measures—the Protection Group—still had the same number of staff members.

During the strengthening process, the reaction to the increased efficiency of the protection pillar attained by the IACHR between 2006 and 2011 and the alleged absence of proper theory of the case in some specific decisions were compounded by a more general criticism that the Commission was supposedly failing to attend to its promotion pillar. While the Special Working Group made a general recommendation for the IACHR “to achieve a better balance between promotion and protection of all human rights,” other more specific recommendations urged the Commission to draft thematic reports and practical guides on different issues, agree to provide advisory services to the States and their national human rights institutions, and to redouble its efforts to achieve the universal ratification of the inter-American human rights instruments. Once again, most of these recommendations were followed by the IACHR, which agreed to draft a countless number of thematic reports, pursue new lines of work in connection with the pillar of

promotion and, in general, strengthen its activities in that sphere.⁵⁹

In both the reply document sent to the Permanent Council on October 23, 2012 and its Resolution 1/13 instituting its new Rules of Procedure and stating its institutional policies and practices, the IACHR assumed more than 40 specific commitments, most of which have to do with promotion activities and the redesign of the way in which it was conducting its monitoring activities. In view of the criticism from some governments regarding the country selection criteria and methodology of Chapter IV, the IACHR comprehensively amended Article 59 of its Rules of Procedure and provided for a new format for its Annual Report, including the aforementioned chapter. The most significant change is probably the creation of a new section in Chapter IV that describes the “overview of the human rights situation in the hemisphere.” In the first Annual Report adopted subsequent to the August 2013 changes to the Rules, the IACHR included the following sections in that chapter: (1) a list of press releases and requests for information from the States in the exercise of its monitoring capacity; (2) a description of the enjoyment of certain rights in Ecuador (freedom of expression and judicial independence), the United States (personal liberty), and the Dominican Republic (right to nationality and nondiscrimination); and (3) an analysis of regional patterns of universal ratification of the inter-American treaties, the incorporation of standards, conventionality control, and compliance with its recommendations and decisions.

After describing the nature of the commitments assumed by the IACHR during the strengthening process and some aspects of the amendments to its Rules of Procedure, policies, and institutional practices, the next section examines the legacy of this scenario as it pertains to the fulfillment of the IACHR’s mandate. The proposed analysis is based on the statistics published by the Commission and on some examples of decisions that are emblematic of the current trend toward broadening its promotion and monitoring activities, without the same consideration being paid to the protection pillar.

59 In its reply to the Permanent Council the IACHR stated that, “Along with other initiatives, the IACHR will seek to boost dialogue with the member states, and others, in order to forge public policies designed to strengthen the observance of human rights as a key ingredient in government reform processes; to provide ongoing opportunities for civil society organizations to play an active part in formulating public policies; to undertake comprehensive reform of national systems for ensuring and administering justice; to bring legislation into line with international human rights instruments; and to establish courses on human rights in all educational institutions.”

The functions of the IACHR after the strengthening process

By establishing an extensive consultation process with the users of the inter-American human rights system aimed at reviewing its institutional policies and practices, and by agreeing to undertake a number of activities related to the recommendations of the Special Working Group,⁶⁰ the IACHR managed to survive the most politically strained period of its history without its autonomy and independence being completely undermined. During most of the strengthening process, there were attempts to modify some of the instruments governing its mandate from the top down. Several States asserted the need to amend the Statute of the Commission to recognize the binding nature of precautionary measures in an inter-State instrument. Technical bodies of OAS, such as the Inter-American Juridical Committee, and then-Secretary General José Miguel Insulza issued opinions in support of that position, disregarding the fact that the general rule in supranational human rights commissions is to establish interim or provisional measures in their rules of procedure. The European Court of Human Rights itself has the authority to issue interim measures through a provision of its rules (art. 39), rather than under the Statute or the Convention, which shows that the opinions issued by the then-Secretary General and the Inter-American Juridical Committee during the strengthening process were more politically than legally motivated.

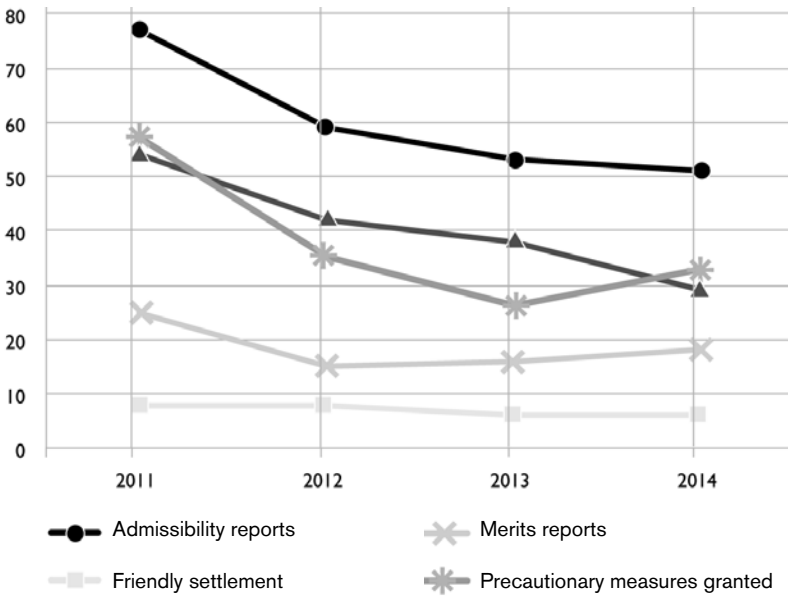
We have explained in the previous sections that from the time of the IACHR's creation as a body engaged mainly in promotion and monitoring, the functions covered by the protection pillar have undergone a process of gradual consolidation, culminating in 2011. As shown in Figures 2 and 3, this trend seems to have reached a limit that would be difficult to surmount because of both the Commission's current level of funding⁶¹ and the "sword of Damocles" that some States have hanging over their heads, even though the strengthening process has officially concluded.

60 Regarding the consultations conducted by the IACHR in 2012 and for the main documents produced during the strengthening process, see <http://www.oas.org/en/iachr/mandate/strengthening.asp>

61 See Cetra & Nascimento, Chapter 2 "Counting Coins: Funding the Inter-American Human Rights System," p. 53.

GRAPH 2

Reports on petitions and cases approved by the IACHR between 2011 and 2014



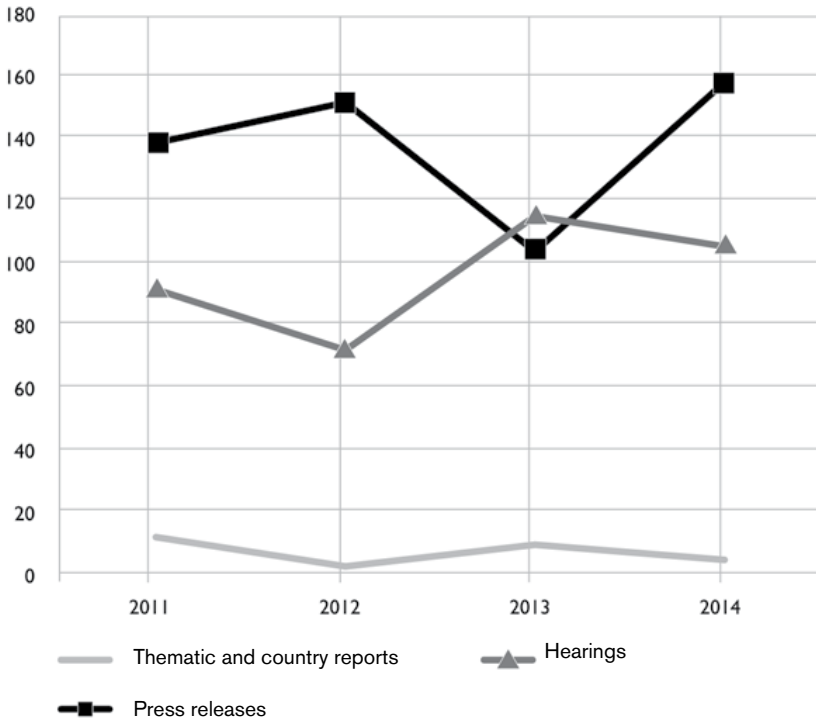
SOURCE: 2011-2013 Annual Reports of the IACHR and press releases issued in 2014.

The trend relating to the protection pillar reflected in Graph 2 are contrasted with the stabilization in the number of activities under the monitoring and promotion pillars, which even show an increase in certain activities, such as hearings.⁶²

62 The numbers shown in Figure 3 refer to both case hearings and thematic hearings. Although in principle the former fall within the protection pillar, the information published by the Commission indicates that since 2012 the number of thematic hearings has increased in a higher proportion than case hearings.

GRAPH 3

Main decisions related to the monitoring and promotion pillars between 2011 and 2014



160
Katy Salazar, Daniel Cerqueira

SOURCE: Chapter 3 of the 2009-2013 Annual Reports of the IACHR and press releases from 2014

A more qualitative reading of the way in which the IACHR has been performing the functions connected to the protection pillar indicates unprecedented juridification, reflected in the rules changes discussed in the previous section, as well as in the application of stricter legal standards. With respect to precautionary measures, for example, the decrease in the number of decisions granting such measures—from 57 in 2011 to 26 in 2013 and 34 in 2014—is indicative of this restrictive trend. Although the requirement of reasoned resolutions set forth in Article 25(7) of the new Rules of Procedure has placed an additional workload on the Commission without a corresponding financial contribution from the Member States, this does not appear to explain such an abrupt decrease in the number of favorable decisions. It is beside the point to debate potential technical inconsistencies in the decisions made by the

IACHR during the strengthening process that provoked attacks from some governments—most notably Brazil in relation to the precautionary measures concerning the Belo Monte hydroelectric project, and Ecuador with regard to the suspension of the criminal conviction of the executives of the newspaper *El Universo*;⁶³ rather, we are interested in underscoring the effects of the critical reactions of governments such as those of Brazil and Ecuador to the criteria that the IACHR has been using in the adoption of precautionary measures. We recognize that the IACHR has shown signs of autonomy in the face of some governments' criticism of its decisions on precautionary measures, the ones issued on March 18, 2014 in the Gustavo Petro matter with respect to Colombia being a clear example.⁶⁴ Nevertheless, the 40% decrease in the number of decisions

63 With respect to the Belo Monte matter, prior to April 1, 2011, all of the precautionary measures issued by the IACHR for purposes of suspending the potential effects of the development project on indigenous territorial rights fall within the scope of so-called "injunctions." In other words, the IACHR asked the States to set aside the respective concession decision or continued execution of the project until a decision on the merits was issued in the petition or case alleging the breach of the obligation to consult with the affected communities. This occurred, for example, with the precautionary measures adopted on behalf of the Maya de Toledo communities in Belize, the five Pehuenche communities in Chile, the Triunfo de la Cruz Garifuna community in Honduras, the Ngöbe communities in Panama, and the 18 Maya communities in the municipalities of Sipacapa and San Miguel Ixtahuacán in Guatemala. In the matter of Belo Monte, one of the components of the precautionary measures granted on April 1 by the IACHR consisted of a request that the Brazilian State suspend execution of the hydroelectric project until it could show that it had carried out a prior consultation process in accordance with the international standards. It bears noting that that request was made without any petition having been filed to allege the breach of prior consultation. The IACHR acknowledged that variation in its background to some degree in the July 29, 2011 resolution, in which it concluded that "the debate between the parties on prior consultation and informed consent with regard to the Belo Monte project has turned into a discussion on the merits of the matter, which goes beyond the scope of precautionary measures." See IACHR website, section on precautionary measures, 2011, PM 382/10, *Indigenous Communities of the Xingu River Basin, Pará, Brazil*, <http://www.oas.org/en/iachr/decisions/precautionary.asp>. It is interesting to note that in the April 1, 2011 opinion, the IACHR abruptly changed its long-standing position by adopting injunctive measures only when there was a petition or case pending. In addition, in its July 29, 2011 Resolution, the IACHR retreated even more radically from its standards, establishing that the prevention of the violation of territorial rights related to prior consultation goes beyond the mechanism of precautionary measures. In the four previously cited precedents, the IACHR had issued injunctions in the context of petitions or cases that specifically alleged the lack of prior consultation.

64 Through those precautionary measures, the IACHR asked the Colombian State to set aside a decision of the Office of the Attorney General to remove Bogotá Mayor Gustavo Petro from office without any type of judicial proceeding, thus disregarding the inter-American case law on limitations to political rights. In spite of the fact that the Colombian government and the Colombian high courts had affirmed the decision of the Office of the Attorney General, the IACHR kept the precautionary measures in effect until a domestic judicial authority declared them binding and called upon the

granting precautionary measures from 2011 to 2014 appears to stem from a sort of reverential fear of the reactions of several governments during the strengthening process.

In spite of the downward trend in the number of decisions pertaining to the protection pillar, a broader examination of the IACHR's work since the end of the strengthening process could disprove fatalistic conclusions, for at least three reasons. First, for a number of years now one of the main concerns of the users of the inter-American human rights system has been the low rate of implementation of decisions on petitions, cases, and urgent measures (precautionary and provisional).⁶⁵ Although the responsibility for this situation lies almost exclusively with the Member States, they were unwilling to acknowledge it or discuss potential solutions during the strengthening process.⁶⁶ In view of the consolidation of a petition system characterized by decades of waiting, the absence of a response for most of the victims who use it,⁶⁷ and the extremely low rate of compliance with the final decisions issued by the IACHR and the Inter-American Court, we have few options other than to find a way for the protection pillar to operate in a manner that goes beyond justice in specific cases. One such way, and perhaps the most important, is the potential for the decisions of the bodies of the inter-American human rights system to guide the actions of national authorities, thereby promoting structural changes and measures for the non-repetition of human rights violations.

Although that objective might also be satisfied through functions connected to the promotion and monitoring pillars, it is our opinion that the individual petition system has the comparative advantage of

Juan Manuel Santos administration to observe them. See IACHR website, Section on Precautionary measures, 2014, MC 374/13, Gustavo Francisco Petro Urrego, Colombia, <http://www.oas.org/en/iachr/decisions/precautionary.asp>

65 Among the various studies that address this concern, we recommend those of Fernando Basch (2010), and the Open Society Justice Initiative (2013).

66 An example of that omission is the absence of recommendations by the Special Working Group to the member states or OAS political organs concerning the high degree of noncompliance with the decisions of the bodies of the inter-American human rights system. Indeed, in the above-cited report, the member states expressed difficulty in complying with certain recommendations made in final merits reports and requested that the Commission provide advising services to address that situation. In light of this recommendation, the IACHR agreed to seek the necessary resources to draft a study on the status of compliance with its decisions, highlighting trends and best practices in the region.

67 See Camilo Sánchez & Laura Lyons, Chapter 6: "The Elephant in the Room: The Procedural Delay in the Individual Petition System in the Inter-American System," p. 207.

embodying a narrative that is closer to that of domestic judicial authorities, in particular those that hear and decide constitutional matters. Along these lines, the dissemination of so-called “conventionality control”⁶⁸ among the courts and other authorities of the States is fundamental to the task of preserving the efficacy of the protection pillar. On this point, the IACHR has taken significant steps by signing cooperation and training agreements with high-ranking judicial authorities in Member States. An assessment of the way in which inter-American standards are being incorporated by the States domestically is a pending task that could mitigate the impression that the protection pillar—at least according to a quantitative reading—has ended up weakening the strengthening process, oxymoron that it is. In Chapter IV(a) of its 2013 Annual Report, the IACHR sketched an initial outline of aspects of compliance with its decisions, the incorporation of inter-American standards, and conventionality control.⁶⁹ Nevertheless, that study did not identify an opening for the regular application of the case law of the inter-American human rights system by judges in the region. We are of the opinion that that is a task of utmost importance and one that should be undertaken by the users of the inter-American system interested in improving the efficacy of the protection pillar.

The second reason why the reduced number of decisions on petitions, cases, and precautionary measures should not be viewed with too much alarmism has to do with the political context in which the IACHR has been acting since the strengthening process. In recent years, the legislative branch of Guatemala has expressly refused to recognize the binding nature of the judgments of the Inter-American Court;⁷⁰ the government of Venezuela has denounced the American Convention;⁷¹ and the heads of State of countries such as Ecuador and Bolivia have expressed their intent to follow suit. The most recent example of an affront to the decisions of the inter-American human rights system

68 Although this expression was used for the first time in the inter-American human rights system in the judgment in the case of *Almonacid Arellano et al. v. Chile*, its meaning was already apparent in earlier opinions of the Inter-American Court and the IACHR concluding that provisions of national law contrary to the American Convention have no legal effect.

69 See *IACHR Annual Report 2013*, Chapter IV(a), paras. 72-86, <http://www.oas.org/en/iachr/docs/annual/2013/docs-en/AnnualReport-Chap4-Intro-A.pdf>

70 See IACHR Press Release 58/14 of May 16, 2014, http://www.oas.org/en/iachr/media_center/PReleases/2014/058.asp

71 Regarding Venezuela’s denunciation of the American Convention, see IACHR Press Release 64/13 of September 10, 2013, http://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp

bodies was the November 4, 2014 decision of the Constitutional Court of the Dominican Republic, which set aside the instrument accepting the contentious jurisdiction of the Inter-American Court, deposited in March 1999 by then-President Leonel Fernández.⁷² In addition to these confrontational stances, there are more specific criticisms from countries such as Peru, whose government has insisted that the IACHR has referred an excessively high number of cases against it to the Inter-American Court, and Costa Rica, whose government has criticized the initial processing of several petitions alleging the State's failure to observe the guarantee enshrined in Article 8(2)(h) of the Convention as it relates to the country's criminal procedure reforms. Other countries in the region have been echoing these criticisms based on the opinion that some of the Commission's decisions on petitions, cases, and precautionary measures have been impertinent, whether because of their content or because of a supposed excessive number of decisions.

Although this hypersensitivity to decisions that fall within the scope of the protection pillar is one of the trends most harmful to the integrity of the inter-American human rights system, we must not lose sight of the political difficulties that the IACHR faces. In this respect, it seems to us that breaking this trend requires the efforts of the governments that sponsor it, and not the placement of demands on the IACHR that could return it to the perilous situation it navigated between 2011 and 2013. Part of the work that could be undertaken by the interested parties to improve the protection pillar is to highlight the contradictions in the position of certain governments. It is surprising, for example, that member states have failed to provide the necessary funding for the IACHR to carry out the agreements and properly implement the changes to its rules, policies, and institutional practices broadly addressed in the March 23, 2013 resolution of the Special Session of the General Assembly. There are various contradictions between the demands of the States and the absence of funding,⁷³ but for purposes of this essay we will limit

72 That decision was in apparent retaliation for decisions of the Inter-American Court that declared null and void certain decisions of the Dominican Constitutional Court that violated the fundamental rights of Dominican citizens of Haitian descent. See IACHR Press Release 130/14 of November 6, 2014, http://www.oas.org/en/iachr/media_center/PReleases/2014/130.asp

73 One example of this contradiction has to do with the creation of a special fund by the IACHR at the end of 2013, earmarked for the establishment of a Special Rapporteurship on Economic, Social, and Cultural Rights. To date, none of the countries that demanded additional activities, special reports, and more effective monitoring of the situation of ESCR by the IACHR have agreed to contribute to this special fund. Once again, it would appear that the demanding rhetoric does not reflect a genuine interest

ourselves to underscoring that reality and urging the implementation of the commitments assumed by the IACHR during the strengthening process through the attainment of additional financial resources, and not with funds that might normally be used in the management of the petition system and the precautionary measures mechanism.

The third reason why the decrease in the number of decisions linked to the protection pillar should not be taken as a sign of its demise is the consolidation of a new trend in the IACHR's approach to structural human rights violations. A conclusion regarding the success or failure of this trend is not scientific in nature and requires a more careful examination that goes beyond the purpose of this article. What can be said with some certainty is that the IACHR has been utilizing more human and material resources for initiatives that could prevent patterns of human rights violations. In the case, for example, of the *in loco* visit to the Dominican Republic conducted in December 2013, just a few weeks after a troublesome decision of the Constitutional Court of the Dominican Republic (TC-0168-13) that, *grosso modo*, deprives hundreds of thousands of Dominicans of Haitian descent of their nationality and other basic civil, economic, and social rights.⁷⁴ That visit included the entire Commission and a significant number of members of the Executive Secretariat, who worked extensively to gather information and publicize the situation in the media.

Eight months after that visit, the Inter-American Court handed down a judgment in the *Case of Expelled Dominicans and Haitians, declaring inter alia*, that Judgment TC-0168-13 was incompatible with the Convention. While the Dominican State leveled harsh criticism against the IACHR's preliminary conclusions following its *in loco* visit, the reaction to the judgment of the Inter-American Court was much more virulent—to the point where the State declared null and void its acceptance of the adjudicatory jurisdiction of the Court. This is indicative of the fact that the approach to certain issues through the monitoring and promotion pillars is always complementary to the interests of the victims, particularly in relation to structural impediments to the enjoyment of human rights. In some cases, that approach can even be more advantageous, insofar as it establishes a framework for dialogue between the IACHR and the national authorities that is less adversarial than the one provided

in improving the IACHR's work and more likely arises from an intolerance of effective international scrutiny.

74 IACHR Press Release 97/13 of December 6, 2013, http://www.oas.org/en/iachr/media_center/PReleases/2013/097.asp

by the individual petition system. This assertion may be confirmed or revised depending on the reaction of the government of the Dominican Republic to the final report that the IACHR is about to issue regarding the December 2013 *in loco* visit.

In contrast to the reduction in the number of decisions issued under the protection pillar, Figure 3 shows a stabilization trend in the activities derived from the promotion and monitoring pillars, with a slight increase in some of them. This numerical trend is complemented by more qualitative evidence, such as the production of information on the impact of the friendly settlement mechanism;⁷⁵ the increased dissemination of thematic and country reports; the more intensive use of communication tools and a more active social media presence; actions pertaining to new thematic areas;⁷⁶ the holding of sessions in the member states since 2014, with a number of promotion activities and meetings with petitioner organizations and State institutions; and the online broadcasting of the hearings held during each period of sessions. Figure 4 shows the progression in the number of activities connected to the promotion pillar between 2009 and 2014.⁷⁷

Although these numbers illustrate a fluctuation among activities, it is evident that there has been an upward trend in the efforts dedicated to promotion activities in the past three years.

Given the current contraction—at least numerically—of the activities related to the protection pillar and the increase in activities linked to the promotion and monitoring pillars, it is important to observe the internal redesign process of the IACHR's Executive Secretariat that was announced in April 2014. The IACHR has not publicly disclosed the main objective of this redesign; nevertheless, judging by the way in which it has prioritized its resources in recent years and by the statements of its members in different forums, we can foresee the strengthening of working groups engaged in promotion and monitoring activities, as well as the creation of a team dedicated to advising the States on public

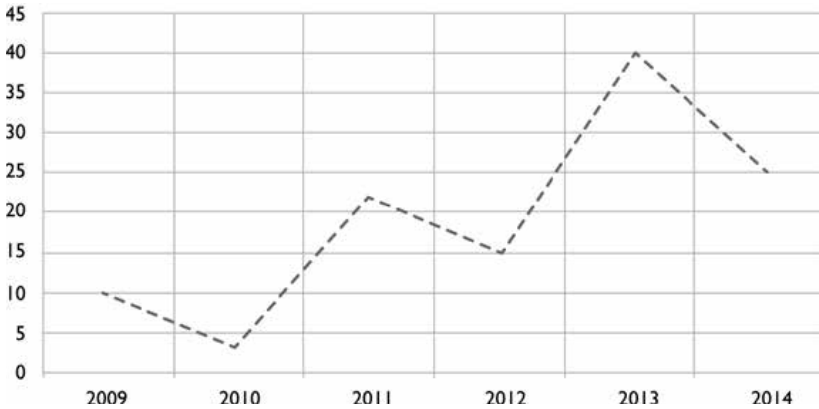
75 IACHR, *Report on the Impact of the Friendly Settlement Procedure*, OEA/Ser.L/V/II, doc. 45/13, December 18, 2013, http://www.oas.org/en/iachr/friendly_settlements/docs/Report-Friendly-Settlement.pdf

76 By way of example, in September 2014 the IACHR hired an expert to address the topic of corporations and human rights through the team that supports the ESCR Unit in the Executive Secretariat.

77 While Graph 3 includes only decisions under the promotion and monitoring pillars, the activities contained in Graph 4 include academic forums, training workshops, conferences for the presentation of reports, and meetings with rapporteurs, committees, and other entities of supranational human rights bodies.

GRAPH 4

Promotion activities of the IACHR and its Executive Secretariat between 2009 and 2014



SOURCE: IACHR website, section on promotion activities.

policy. In terms of the political situation, it seems that this shift in the IACHR is inevitable, as it will serve as a counterbalance to the resistance that various governments showed during the strengthening process to the enhancement of the protection pillar. From a financial standpoint, the historical omission of the member states remains, as they have failed to contribute the necessary funds for the IACHR to redesign the working groups of its Executive Secretariat in order to attend to the countless demands of governments during the aforementioned process. Accordingly, no matter how sophisticated the new organizational structure of its Executive Secretariat may be, the IACHR will not be able to implement an efficient work plan so long as it cannot hire the necessary staff members with the technical skills required to perform the new functions. Such is the case, for example, of providing public policy advising to the States and other functions that the IACHR had not previously been carrying out and for which the Executive Secretariat would need personnel with the respective professional and academic expertise.

Finally, from the managerial perspective, questions remain about the way in which the new internal structure of the IACHR's Executive Secretariat will seek to meet the expectations of the users of the inter-American system, both States and petitioner organizations. It is essential that future programming decisions affecting the use of their material and human resources—such as the adoption of its 2016-2020 Strategic Plan—

take account of the demands of the users and engage in consultation with them. This is not only a matter of principle, insofar as the inter-American system bodies are entrusted with a mandate that seeks to serve the demands and expectations of its users; it is also a way for the IACHR to shield itself from the criticism leveled by some governments during the strengthening process, to the effect that it and the Executive Secretariat were plagued by a kind of institutional solipsism.

Final considerations

If the transformation that the IACHR has undergone since 1959 were the subject of one of the chapters of Julio Cortázar's classic *Bestiary*, it might be akin to the fate of a butterfly that, when faced with a swarm of insects trying to forcibly turn it into a caterpillar, transforms itself into a chrysalis, thus convincing most of the insects to give up their design. The strengthening process was, in the final analysis, a turn in the expansion of the established capacity of the IACHR's protection pillar, bringing it back to the tendency to focus on the monitoring and promotion pillars that it spearheaded until the 1980s. Although the reduction in the number of decisions issued within the individual petition system is of concern, a strictly numerical reading tends to be superficial, as it conceals a number of political contingencies on which the IACHR must act.

One potential takeaway from the strengthening process carried out between 2011 and 2013 is that the enjoyment of human rights in the region cannot be reduced to subjecting the States to measures of reparation ordered in final merits reports or in judgments of the Inter-American Court. Before the strengthening process, the degree of compliance with these decisions was already minimal; after 2013, not only was there no progress but various governments also showed their aversion to a regional system based on a vigorous protection pillar. It goes without saying that this type of aversion is profoundly detrimental to the full enjoyment of human rights in the region, but as activists and students of the inter-American human rights system, we would be doing a disservice to ignore the possibility that the governments that maintain the system could manage to tip the diplomatic scale toward new amendments to the inter-American instruments or to the overlapping of the IACHR's functions with other subregional systems. We do not discount the fact that those subregional systems can complement the work of the inter-American system, taking up lines of work and areas

that are absent from the inter-American system.⁷⁸ Nevertheless, there are countless examples of initiatives by some governments that, rather than serving to enhance the international scrutiny of human rights, act as a counteroffensive to the decisions of the IACHR and the Inter-American Court. There have been some discussions, with little transparency and without the effective participation of civil society, making express mention of the need to create subregional mechanisms respectful of the political autonomy and sovereignty of the States. In our opinion, there is an enormous risk that such mechanisms would serve the interests of the governments that promote them much more than the interests of their citizens and, in general, all people in the Americas.

Finally, far from proposing definitive answers to the overall value of the protection pillar, in spite of the downward trend in the number of decisions issued by the IACHR, this article invites a more critical analysis of the political situation in which the IACHR must make decisions concerning its institutional and even managerial policies. One exercise that we consider extremely important is to monitor the internal redesign of the working groups of the Executive Secretariat, which was announced in April 2014, although its architecture was not made public until June 2015. The outcome of that process could be one of the most significant initial responses by the IACHR since the end of the strengthening process, in which the expectations of the users of the inter-American human rights system could be taken into account without losing sight of the current political pressures and contingencies.

78 See Kletzel & Barretto, Chapter 1 “The Challenge of Complementarity in Latin America’s New Institutional Architecture for Human Rights,” p. (17).

References

Basch, Fernando et al. 2010. "La efectividad del sistema interamericano de protección de derechos humanos: un enfoque cuantitativo sobre su funcionamiento y sobre el cumplimiento de sus decisiones." *Conectas, Sur-Revista Internacional de Derechos Humanos*, 7 (12). <http://www.conectas.org/Arquivos/edicao/publicacoes/publicacao-201424165630161-76428001.pdf>

Due Process of Law Foundation. 2012. *Reflections on Strengthening the Inter-American Human Rights System*. *Aportes-DPLF* 16(5). http://dplf.org/sites/default/files/aportes_16_english_webfinal_0.pdf

González, Felipe. 2010. "Las medidas urgentes en el sistema interamericano de derechos humanos." *Conectas, Sur-Revista Internacional de Derechos Humanos* 7(3): 52. <http://www.surjournal.org/esp/conteudos/pdf/13/03.pdf>

Gordon Lauren, Paul. 2003. *The Evolution of International Human Rights*, 2nd ed. Philadelphia: University of Pennsylvania Press.

Open Society Justice Initiative. 2013. "The Inter-American Human Rights System." *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*. <http://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf>

Rieter, Eva. 2010. "Preventing Irreparable Harm— provisional measures in international human rights adjudication," *Intersentia School of Human Rights Research Series* 37: 1088.

Chapter 5

Democracy and Subsidiarity

*Gabriela Kletzel, Pétalla Timo, Edurne Cárdenas,
Gastón Chillier*

Center for Legal and Social Studies (CELS)

Summary

173

Democracy and Subsidiarity

In view of the reform process that the Inter-American Commission on Human Rights (IACHR) has undergone in recent years, this chapter provides context on Latin America today and revisits interpretations of the principle of subsidiarity in international law in an effort to reflect on the IACHR's role and work given the region's current reality. We start by describing the regional context of democracies to highlight the importance of giving broad scope to the principle of subsidiarity. To this end, essential positive obligations are required, which States must ensure to be able to move toward substantive democracy. The current scenario in the region demands that the Commission's channels of action be renovated and diversified so it can adequately respond to today's rights violations. In this framework, we then propose that the Commission take a proactive approach based on its modalities of intervention, its thematic agenda, and the forging of a new social platform that contributes to neutralizing new risks to its invaluable human rights work.

Introduction

During the “strengthening process” that the Inter-American Commission on Human Rights (IACHR) went through in recent years, a number of States posed a reassessment of the work it does in light of current reality in the region.¹ A key issue in the debate was the scope of the principle of subsidiarity used by international protection mechanisms as a way of safeguarding the sovereign decisions of governments when it comes to IACHR action. For that reason, this chapter revisits the traditional interpretations of this principle in an effort to approach it from a perspective that not only encompasses its procedural dimension but also, and above all, its substantive one.

The chapter is divided into two sections. The first describes the regional context of constitutional democracies in order to highlight an important—albeit largely overlooked—dimension of discussions regarding the Inter-American human rights system (the Inter-American system): the importance of giving sufficiently broad scope to the principle of subsidiarity. We draw attention to the pertinent consequences of this principle in light of the arguments that, considering the sustained prevalence of democracies in the region, advocate for greater safeguarding of national sovereignty in the face of external intervention. To this end, we identify fundamental positive obligations that States must fulfill to be able to consider themselves not just formal democracies but as at least aspiring toward substantive democracy.

The current political-institutional framework in the region requires that the Commission use more diversified and complex channels of action to adequately respond to the human rights violations that occur in the hemisphere. Therefore, in the second section we suggest that the Commission develop a proactive strategy built around its thematic agenda, its modes of intervention, and the forging of a new social support base to counteract risk scenarios for its valuable human rights work.

1 For more on the development and evolution of the process, see the Introduction to this book.

The era of Latin American democracies

During the second half of the 20th century, the region suffered the impact of armed conflicts and civil-military dictatorships that altered the constitutional order and held on to power through gross human rights violations. Numerous States gradually acceded to the Inter-American system's basic instruments and framework based on the need to provide protection from these attacks and threats (Taiana 2013: 42-45). Most Latin American countries ratified human rights instruments and adhered to the Inter-American system during the period of transition to democracy for different purposes and reasons but, in many cases, as "a sort of antidote to counteract the risk of a return to authoritarianism" (Abramovich 2011: 217). Similar processes have been verified in other regions.²

The bodies of the Inter-American system were able to tackle the important challenges that the times demanded of them. The Commission played a fundamental role in making visible the claims of crimes against humanity and in strengthening the work done by human rights organizations that, at the time, were working in near isolation. The Inter-American Court of Human Rights (the Court), for its part, created and consolidated standards over time on issues of memory, truth, and justice that later provided the legal grounds for action by national courts to end impunity, which occurred in Peru, Chile, and Argentina.³

As Jorge Taiana suggests, three distinct periods can be identified in the wake of the Latin American dictatorships. A first period during much of the 1980s and 90s was characterized by what can be described as moderate democracies with liberal tendencies and particularly on economic matters, marked by the mandates of the Washington Consensus. A second period in the following decade brought moments of intense institutional and economic crisis.⁴ And finally, the third period can be characterized by strong political leadership and an extended period of economic recovery. In various Latin American countries, at least in the last decade, power shifted into the hands of left or center-left governments, which has bred a new geopolitical configuration. It was in this context that the Union of South American Nations (UNASUR)

2 These reflections on the motives behind State decisions to accede to a regional system of human rights protection are in line with the assessment of the reasons that led European States to adhere to their own system of human rights protection in response to the threat of a return to totalitarianism in Europe. See Moravcsik (2000: 217).

3 See in this regard CELS (2013).

4 In reference to this point, Diamint and Tedesco (2013) recently published an interesting in-depth study of political leaderships in our region.

and the Community of Latin American and Caribbean States (CELAC) came into being, and the pillars of the MERCOSUR regional bloc were reappraised.⁵

An overview of the hemisphere reveals a period marked by long-standing stability in democratic regimes. Of course we cannot ignore the coup d'états that took place in Venezuela (2002)⁶ or Honduras (2009),⁷ nor can we forget the clear threats to the institution of democracy in Bolivia (2008)⁸ and Ecuador (2010),⁹ or the more recent institutional disruption in Paraguay (2012).¹⁰ Even so, compared with other moments in history, democracy has gained ground in Latin America. The case of Argentina is emblematic, with 30 years of uninterrupted democracy.

The region is going through what could be considered a period of democratic consolidation. Free elections are held, electoral systems and guarantees have been strengthened institutionally, legal frameworks have been modernized and political violence has declined. In this scenario, the dynamics that used to define the interaction between Latin American States and the Inter-American system, and in particular with the IACHR, have changed dramatically. For several decades after the Commission was first created, it confronted authoritarian regimes or States in the process of transition; however, its principal interlocutors today are democracies, consolidated at least in the formal sense.¹¹

5 Presentation by Jorge Taiana at the First Development Forum "Challenges and new alternatives in the global space", Universidad Nacional de San Martín, October 29, 2013.

6 In 2002, President Hugo Chávez Frías was the target of a failed coup d'état led by military commanders.

7 On June 28, 2009, the President of Honduras was overthrown, disrupting the democratic and constitutional order. See the report by the IACHR following its visit after the coup, "Honduras: Human Rights and the *Coup D'État*," <http://www.cidh.org/pdf%20files/HONDURAS2009ENG.pdf>. Since then, the IACHR has included an analysis of the situation in Honduras in Chapter IV of its Annual Report, in which it assesses human rights violations that merit special attention.

8 See the Declaration of human rights organizations in the region for the situation of Bolivia. Available at <http://www.cels.org.ar/documentos/?info=detalleDoc&ids=3&lang=es&ss=&idc=1045>

9 See "CELS condemns the attempted coup d'état in Ecuador and recognizes the timely reaction of the international community". <http://www.cels.org.ar/documentos/?info=detalleDoc&ids=3&lang=es&ss=&idc=1319>

10 In June 2012, President Fernando Lugo was removed from power in Paraguay by means of an expedited impeachment trial, the validity and legitimacy of which was deeply questioned. See in this regard CELS (2013).

11 For purposes of comparison, it may also be interesting to analyze the process of adaptation that the European human rights system is experiencing due to the expansion

In some States, these elements converged to create a new perception of the forms of interaction and relationships between the bodies of the Inter-American system and their sovereign governments. The current phase of the region's democracies thus entails new challenges for the system and, in particular, for the Commission, whereby it must adapt its methods of work and intervention to fit the new logic in a region far removed from the one of dictatorial regimes or enduring armed conflicts.

The current human rights advocacy and protection agenda

An adequate characterization of the region's present reality requires distinguishing between the stages of democratic *transition* (O'Donnell, Schmitter, and Whitehead 1986) and *consolidation*, as well as the notions of *formal* or *procedural*, and *substantive* democracy. The most classical concept of democratic consolidation is linked to the purely formal notion that none of the principal political actors (parties, forces, or institutions) considers there to be any alternative to democratic procedures, and that no institution or political group assumes it has a right to veto the actions of those who govern by right of popular vote. This is upheld despite the ongoing existence of minority groups ready to defy and question the legitimacy of these governments by non-democratic means (Linz and González 1990: 27).

The notion of democratic consolidation can also be applied to highlight the characteristics of a substantive democracy, which seeks to go beyond merely formal aspects. A robust democracy surpasses electoral requirements and is rooted in the recognition, safeguarding, and protection of human rights by ensuring not only a sphere of liberties but also, and above all, a heavy dose of real equality (Carbonell 2013).

Even when the region might seem to have completed the so-called transition to democracy in the formal sense and there is clear progress on the recognition of rights and liberties, as well as improved socioeconomic

of members of the European Council, which has incorporated several Eastern European countries whose social and political-institutional realities are very different from the more homogenous conditions seen in the western countries that formed the founding core of that system. The different degrees of democratic consolidation among these countries significantly complicate the role of the European system when it comes to responding to diverse needs regarding the human rights situation in each of these countries.

indicators, significant inequality and social exclusion persist.¹² For this reason, along with the catalogue of violations that stand out for being systematic and massive in nature, there are other categories of infringements with different causes and enabling conditions. Thus, new problems have been incorporated into the traditional core issues on the human rights advocacy and protection agenda.

While there continue to be many challenges in the field of human rights, they have become more diverse. For example, the enforced disappearances that take place in Mexico show that massive and systematic violations are still occurring in some places.¹³ Then too, countries like Guatemala or Uruguay still face serious obstacles when it comes to moving forward with proceedings referred to as transitional justice.¹⁴ It is still possible to identify scenarios of structural discrimination with regard to access to rights, even based on nationality, as can be seen in the Dominican Republic¹⁵ or in the ongoing human rights offenses committed against migrants in the name of US policies,¹⁶ among many

12 According to data from the Economic Commission for Latin America and the Caribbean (ECLAC), our region shows sustained growth that has led to 15.7% reduction in poverty and 8.0 % reduction in indigence since 2002. This data notwithstanding, the region still faces persistent levels of inequality, as well as a widespread informal labor market and unequal access by different social groups to infrastructure and public goods and services. In this regard, see "Social Overview 2013," <http://www.cepal.org/cgi-bin/getProd.asp?xml=/publicaciones/xml/9/51769/P51769.xml&base=/tpl/top-bottom.xml>

13 According to the records of Mexico's Ministry of the Interior and Attorney General, during the period spanning 2006-2012, 26,121 people disappeared. See in this regard, "Annex to the Press Release Issued at the Close of the 149th Session," http://www.oas.org/en/iachr/media_center/PReleases/2013/083A.asp. See also CELS, "One month since the disappearance of 43 Mexican students" <http://www.cels.org.ar/comunicacion/index.php?info=detalleDoc&ids=4&lang=es&ss=46&idc=1852>

14 See CELS, "Uruguay: organizations of the region reject judgment of the Court that annuls the trials against repressors" <http://cels.org.ar/documentos/?info=detalleDoc&ids=3&lang=es&ss=&idc=1597>. See also, CELS, "Latin American judicial authorities will observe the trial against Ríos Montt" <http://cels.org.ar/comunicacion/index.php?info=detalleDoc&ids=4&lang=es&ss=46&idc=1612>

15 December 2-5, 2013, the IACHR conducted an in loco visit to the Dominican Republic. "The purpose (of the visit) was to observe the situation related to the rights to nationality, identity, and equal protection without discrimination, along with other related rights and issues." See "Preliminary Observations from the IACHR's Visit to the Dominican Republic," http://www.oas.org/en/iachr/media_center/PReleases/2013/097A.asp. See also, CELS, "Human rights organizations present an *amicus brief* in case regarding the expulsion of Haitians from the Dominican Republic." <http://cels.org.ar/comunicacion/index.php?info=detalleDoc&ids=4&lang=es&ss=46&idc=1700>

16 See IACHR, *Report on Immigration in the United States: Detention and Due Process*,

other possible examples. To this panorama we must also add the numerous problems stemming from inequality and social exclusion, due to entrenched social disparities and the exclusion of vast sectors of the population from their political systems and the benefits of social and economic development. Structural restrictions are still imposed on the exercise of social, political, cultural, and civil rights, only this time, at the hands of democratic governments (Abramovich 2009).

Rights are not being trampled on by States organized to systematically violate them. Their principal actors and, above all, their framework of legitimacy based on the mandate of popular elections, are by nature different from those of the authoritarian governments of the past that were capable of devising regimes of state terrorism. Nevertheless, democratic governments are still responsible for fundamental human rights violations which, if they could not be prevented, warrant at the very least adequate reparation.

The advent of democracy in the region has not made States more capable of eliminating or preventing arbitrary practices by their own agents, and the repetition and enabling conditions of these practices may lead to structural patterns of rights violations. Also, due to the precarious functioning of judicial systems in the region, effective mechanisms have not been put into place to hold these actors of the institutional machinery accountable and punish them. The main victims in this scenario are usually people who belong to social sectors that suffer from structural inequality and exclusion.

This situation is reflected in some of the issues that the Inter-American system is addressing today, such as:

... police violence marked by social or racial bias; overcrowding and torture within prison systems, the victims of which are usually young people from working class sectors; the generalized practice of domestic violence against women, tolerated by state authorities; the deprivation of land and political participation in the case of indigenous peoples and communities; discrimination against people of African descent in accessing education and justice; bureaucracies' abuse of undocumented immigrants (Abramovich 2009: 17).

Confronted with these problems, both the Commission and Court have made it their business to review not only isolated cases or conflicts, but also the social and institutional contexts in which they come about.

Just as the Inter-American system monitored the situation of specific victims and the execution and disappearance of people in the context of gross and systematic human rights violations during the period of dictatorships and state terrorism, today it aims to broaden its focus, using the principle of equality to frame particular occurrences within structural patterns of discrimination and violence against certain groups or social sectors (Abramovich 2009: 18-19).

The human rights agenda outlined here has for the most part been given visibility thanks to the actions of the Inter-American system. A historical review of the system's case law shows that its work has evolved and become more complex by gradually shifting its emphasis to structural problems, public policies, and far-reaching solutions that are available within national settings (Abramovich 2011: 223).

The basic guarantee of rights in situations of structural inequality is a clear priority and is the Inter-American system's political thrust at this stage, in which gaping social disparities and major institutional weaknesses continue to exist. Given the reality of the hemisphere, it is clear that significant work must still be done by the human rights bodies of the regional protection system:

... criticism aimed at the Inter-American system's involvement in these new agendas not only reflects a limited view of the process of internationalization of local legal systems, but also the limitations and public policy failings of many Latin American governments that, while they have been vigorous and exemplary with regard to the legacy left by the dictatorships, have not managed to bring on board other types of urgent problems, like prison violence and social inequality, with human rights policies (Abramovich 2011: 223).

Indeed, the kinds and categories of violations that currently occur in the region underscore the important role that the regional protection entities warrant to effectively enforce peoples' rights in the hemisphere. Furthermore, these dynamics and characteristics call for a revision of the traditional concept of the principle of subsidiarity of international protection in order to put on center stage the qualified obligations of any State, and therefore any government, that aims to achieve robust forms of democracy.

If the ultimate goal is to move toward substantive democracy, it is indispensable that the role of the IACHR be expanded, not only in addressing individual and collective cases when procedural conditions allow, but also to establish an ongoing working agenda to help strengthen States' institutional foundations.

Scope and implications of the principle of subsidiarity

Subsidiarity is one of the structural principles underlying international law, in that it explains the logic of linkages between different legal-institutional orders. Outwardly, it seems to present a paradox, because it both limits and requires the intervention of international mechanisms. Its application relies primarily on local bodies to interpret and apply law, and also grants authority to supranational organizations to intervene, if necessary, in order to enhance and support the implementation of law.

The logic of subsidiarity works as a mediating concept between the supranational entity and local pluralism,¹⁷ which provides a certain degree of discretion when it comes to the interpretation and implementation of law by States but, at the same time, requires harmonization with international jurisprudence. The main benefit of subsidiarity as a pillar of international human rights law is that it allows for integration between the international, national, and subnational levels, based on a universal vision of human dignity and liberty, while encouraging and protecting pluralism, in keeping with a logic of assistance and cooperation (Carozza 2003: 38).

In the arena of international human rights law, the principle of subsidiarity provides that it is the responsibility of States in the first instance to respect, protect and guarantee the enjoyment and exercise of rights in their jurisdiction. It thus recognizes that States are in a better position to prevent and properly respond appropriately to human rights violations. It is only when States have not provided adequate or effective protection that recourse to the international sphere may be in order. In this way, the principle is an essential parameter for defining the boundaries of international jurisdiction. The international protection mechanisms are subsidiary to the extent that their application depends upon and can only take place if there is insufficient or ineffective action by the State.

In general, attention is only paid to one of the dimensions of this principle—its procedural aspect—which requires above all the effective exhaustion of all domestic remedies, in order to gain access to a response or to judicial intervention by international protection

17 An operational definition of the principle is set forth, for example, in Article 5 of the Treaty on European Union: “In settings that are not of its exclusive jurisdiction, the Community shall intervene, in accordance with the principle of subsidiarity, only to the extent that the objectives of the action intended cannot be achieved sufficiently by the member States, and, subsequently, can be better achieved, due to the dimension or the effects of the action intended, at the Community level.”

mechanisms.¹⁸ The focus on this dimension of subsidiarity has led to the notion of the “fourth instance,” which, in the case of the Inter-American system, means abstaining from reviewing if the decisions made by national courts are correct or not on matters not directly governed by the American Convention on Human Rights (the Convention), provided that the procedural guarantees have been observed.¹⁹ Thus, national legal systems are granted a broad degree of autonomy to interpret and implement their obligations, with the sole condition of safeguarding the procedural guarantees established under the Convention.

The exclusive focus on the procedural aspect of subsidiarity limits appreciation of its scope. This view seems to be especially limited in scenarios like the one we describe, in which violations stemming from major institutional weaknesses and structural patterns of inequality are added to the traditional catalogue of infringements. In this context, it is necessary to point out other significant consequences of subsidiarity as regards to arguments that, considering the sustained prevalence of democracies, call for greater safeguarding of national sovereignty in the face of foreign intervention.

States should not only apply the principle of subsidiarity defensively to stop international intervention from subrogating their national administrative, legislative, and judicial processes. It should also be a source of reflection and democratic deliberation within States on how to institutionalize a real protection framework for internationally recognized human rights (Melish 2009: 389).

The positive obligations of States²⁰ are key to gaining a full understanding of the scope of this principle, which provides for a

18 See Articles 46 and 47 of the American Convention on Human Rights.

19 Helfer likewise describes the principle of subsidiarity in the European human rights system, starting with the premise that authorities have “primary responsibility” for ensuring rights. The entities in Strasbourg act when domestic remedies have been exhausted and no effective national remedy is guaranteed. The limits are set by the doctrine of the margin of appreciation and the refusal to act as a fourth instance of appeal for domestic court judgments. See Helfer (2008).

20 The effective enforcement of rights involves positive and negative obligations at four levels. The obligation to respect is defined as the State’s duty not to interfere with, hinder, or bar access to the enjoyment of the resources that are the object of the right. The obligation to protect is the duty to prevent third parties from interfering with, hindering, or barring access to those resources. The obligation to ensure means guaranteeing that the right-holder is able to gain access to the enjoyment of the right, when he or she is unable to do so for him or herself. The obligation to promote is the duty to develop conditions so that the right-holder can have access to the enjoyment of the right. See, for example, IACHR, *Report on Citizen Security and Human Rights*, 2009, paragraph 35, <https://www.cidh.oas.org/pdf%20files/SEGURIDAD%20CIUDADANA%202009%20ENG.pdf>

richer and more active relationship between States and the bodies of the Inter-American system. For example, Article 2 of the Convention provides that it is the duty of States to give effect to the rights set forth in the framework treaty for the regional protection system. This means that they are obligated to abide by and apply the provisions of the Convention in their domestic laws, as well as any subsequent standards stemming from their interpretation by the system's bodies, thereby adopting all necessary measures to enable the full enjoyment of human rights (Medina 2003: 21). This obligation translates into the necessary materialization in each of the States of political-institutional guarantees and mechanisms for access and effective enjoyment of human rights.

In a regional context of greater political stability, in which massive violations under authoritarian governments are no longer front and center in the human rights agenda, the Inter-American system plays an important role in contributing to the process of consolidation of substantive democracies. The bodies of the system—particularly the Commission, due to the heterogeneity of its mandate and the tools available to it—can and must play a relevant role in supporting States when it comes to the coordination and implementation of adequate political-institutional mechanisms for the prevention and reparation of human rights violations.²¹

The description of the current panorama, centered on ongoing, significant social disparities, requires that we emphasize the substantive side of the principle of subsidiarity. The restrictive view of whether international intervention is merited or not must be expanded to focus on the existence, or absence, of institutional channels States must create and consolidate to be able to legitimately invoke the preeminence of domestic remedies over international protection. In this manner, States' concrete commitment to their positive obligations can be verified. As Víctor Abramovich points out:

... the increase in State responsibilities is related to the magnitude of the social imbalances they seek to repair. In regard to the tension between autonomy vs. subsidiarity [...] the Inter-American system is playing an essential role closely related to the one it had during [the era of] State terrorism in Latin America, in which the subsidiary

21 Helfer points out that the European human rights system now faces human rights problems that differ from those that brought about its establishment after the Second World War; therefore, the actors who control its future (the member states, the Council of Europe's political bodies and experts, and the judges of the European Court of Human Rights) must come up with new structural solutions to these problems (Helfer 2008: 129).

nature of its intervention must be carefully evaluated and in terms of the restrictions on the capacity of the affected groups to take “collective action” and for “self-defense” of their rights. This function of the Inter-American system precisely entails giving a greater voice to the weakest sectors of the population, those who are outside the system of social or political representation, who do not manage to gain significant access to the public sphere, who are beyond the reach of the State systems of social and legal protection, and who feel that the rules of the political game of national States do not offer a way out and lead to the recurrence of social injustices (2011: 222).

Given this outlook, it is imperative to strengthen the Commission’s thematic agenda, relationships, and priorities so it can play an even more predominant role in the oversight of public policies, structural problems, and the availability of effective solutions in the domestic sphere, and thus contribute to making the “available national political-institutional and social guarantees” more robust (Abramovich 2011: 223).

To provide an account of the implications of the substantive side of the principle of subsidiarity with regard to the positive obligations of States on a domestic level—by no means exhaustive—below we refer to some of the possible areas of institutional response in which the States of the region still have a long way to go. In this sense we will mention challenges within the national judicial systems, as well as other political-institutional mechanisms that require joint efforts by different branches of government.

Positive obligations and political-institutional mechanisms

In recent years, most countries in the region have carried out major policy reforms to their justice systems that, in many cases, have involved bigger budgets for this branch of the State (Pásara 2010). However, the results have not been significant in any of the countries of Latin America.²² To the contrary, the systems for the administration of justice continue to be, for the most part, inaccessible, ineffective, cumbersome, slow, and corrupt. There is a persistent “lack of communication between social conflicts that require such a public service and the legal world”

22 In this sense, Víctor Abramovich contends: “precisely one of the huge shortfalls of Latin American democracies is the inefficiency and inequity of their judicial systems, which do not manage to remedy the impairment of fundamental rights and may even become a factor in the violation of rights” (2011: 226).

(Pásara 2010). This situation explains why most of the cases that get to the Inter-American system are related to violations of Articles 8 and 25 of the Convention, which have to do with the safeguarding due process, judicial guarantees and effective judicial protection. The existence of strong national systems of justice, i.e., accessible, independent, and efficient, is essential to be able to offer adequate responses and solutions at the domestic level to the different types and cases of human rights violations, and to prevent an increasing number of petitions from being submitted to the Inter-American system.

It is imperative that greater attention be given to the substantive pillar of the principle of subsidiarity and, in turn, the positive obligations of States to provide and ensure channels of access to justice and to implement the standards that the bodies of the Inter-American system have developed in their interpretation of the so-called obligation to investigate—which is commonly seen nowadays even with respect to cases of gross human rights violations.²³

With regard to access to justice, there is a vast array of standards by the Commission and the Court on the right to judicial remedies that are both appropriate and effective. The State's obligation entails more than just not hindering access to these resources, but also organizing the institutional mechanisms so that all individuals can have access to them. They must remove any economic, social, or regulatory obstacles that impede or restrict such access, and establish adequate channels for claims.²⁴ As Hampson explains,

... the provision of effective domestic remedies is also a prerequisite to ensuring the subsidiarity of international scrutiny. As such, this right, in it and of itself, should be seen as having a much more importance than it is usually given and should be addressed systematically by any mechanism addressing human rights violations.²⁵

23 Throughout its case law, the Inter-American Court has created a category of cases that it has defined as “gross violations of human rights” that give rise to specific legal consequences. These consist of conducts that, due to their significance and severity, require that the scope of the duty to investigate and punish be maximized to avoid any repetition, such as in the case of enforced disappearance of persons, extrajudicial executions, and torture. See in this regard, for example, I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 3, 2012, Series C, No. 248, para. 283.

24 See IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, 2007.

25 Hampson, Françoise, *Working paper on the implementation in domestic law of the right to an effective remedy*, Commission on Human Rights, Sub-Commission on the Promotion

This point has been the focus of the bodies of the Inter-American system vis-à-vis their decisions on specific cases, and has even been the subject of diverse thematic reports put out by the Commission.²⁶ Even so, these bodies have not developed a substantive strategy for working with national branches of government to ramp up the development and implementation of the types of resources that could offer greater guarantees of access to justice for the most disadvantaged sectors. It is imperative that national States commit to the promotion and implementation of these guarantees. Only then will they have the full legitimacy to dispute the degree of intervention that the international human rights protection mechanisms should have.

The case law of the Court is firm here:

... part of the general obligation to guarantee the rights recognized in the Convention is the specific duty to investigate cases in which such violations are alleged; i.e., said duty arises from Article 1.1 of the Convention in relation to the right that must be safeguarded, protected, or guaranteed.²⁷

This obligation must be carried out “as an inherent legal duty and not simply as a formality, preordained to be fruitless”²⁸ and must be aimed at finding out the truth and at the pursuit, capture, prosecution, and eventual punishment of those responsible. Furthermore, “due diligence requires the investigating body to carry out all measures and investigations necessary to try and obtain the required result. Otherwise, the investigation is not effective in the terms of the Convention.”²⁹

Among many possible examples, human rights violations perpetrated by security forces constitute one of the most serious

and Protection of Human Rights, 57th Session, UN DOC E/CN.4/Sub.2/2005/15, <http://www2.ohchr.org/english/bodies/subcom/57/aevdoc.htm>

26 See IACHR, *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, 2011; IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights*, *supra* note 24; IACHR, *Access to Justice for Women Victims of Violence in the Americas*, 2007.

27 See *Case of Velásquez Rodríguez*. Merits, Judgment of July 29, 1988, Series C, No. 4, para.162, and *Palma Mendoza et al. v. Ecuador*, Preliminary Objection and Merits, Judgment of September 3, 2012, Series C, No. 247, paras. 81-84.

28 I/A Court H.R., *Bulacio v. Argentina*, Merits, Reparations and Costs, para. 112.

29 See I/A Court H.R., *Serrano-Cruz Sisters v. El Salvador*, Merits, Reparations and Costs, Judgment of March 1, 2005. Series C, No. 120, para. 83, and *Case of Albán-Cornejo et al. v. Ecuador*, Merits, Reparations and Costs, Judgment of November 22, 2007, Series C, No. 171, para. 62.

institutional weaknesses of the region's democratic States. The problem is often twofold in these democracies because not only have the executive and legislative branches failed to create the oversight structures and systems needed to prevent and eradicate these practices of institutional violence, but in many cases their judicial systems end up further trampling on these rights by carrying out merely formal investigations that do not manage to vanquish impunity or punish the perpetrators.

A series of cases of Argentina demonstrates that significant challenges still exist for national judicial powers to take seriously the obligation to investigate human rights violations involving security forces. The recent decision by the Court in the case of *Jorge Omar Gutiérrez v. Argentina*³⁰ does nothing but ratify this assessment. In this case, the serious irregularities in the investigation of the killing of a Buenos Aires provincial deputy police commissioner³¹ and the absolute lack of due diligence during the course of the investigation make it impossible to conceive that the proceedings against the federal policeman who was accused of the crime, and later acquitted, were conducted in accordance with the requirements of due process pursuant to Article 8 of the Convention. According to the Court, the decision arrived at in these domestic proceedings cannot be qualified as a "final judgment," but rather should be overturned as part of the Argentine State's obligation to eliminate *de facto* and *de jure* obstacles to discovering the truth and punishing the perpetrators and masterminds of the crime against Gutiérrez.³² It would be illustrative to observe how the Argentine State manages to effectively comply with this mandate by the Inter-American Court and thus, finally, allow justice to prevail.

30 I/A Court H.R., Case of Gutiérrez and Family v. Argentina, Judgment of November 25, 2013, http://www.corteidh.or.cr/docs/casos/articulos/seriec_271_ing.pdf

31 Buenos Aires Provincial Deputy Police Commissioner, Jorge Omar Gutiérrez, was killed on August 29, 1994 by a federal police agent and another man posing as a police officer. This is the case of a cover-up, orchestrated by the Federal Police in collaboration with the Buenos Aires Police and the justice system, which ensured impunity for 19 years. It is a paradigmatic example of human rights violations that are committed to cover up illegal conspiracies, which include the participation of both security forces and political groups, as well as structural shortcomings of the justice system and governments which fail to stop these kinds of networks from becoming entrenched in the State. It also reflects the absence of institutional means capable of penetrating networks that forge pacts of impunity through abhorrent acts. Nevertheless, these cover-up practices are not exclusive to the Argentine federal police or the Buenos Aires provincial police.

32 See I/A Court H.R., Case of Gutiérrez and Family v. Argentina, Judgment of November 25, 2013.

There are even some cases in which the violation is aggravated when investigations have already passed through the filter of the Inter-American system and must be reopened or completed after a decision by one of its bodies. By the time this finally occurs, the original shortcomings and, above all, the lack of true commitment by local actors when it comes to the obligations under the Convention, make it impossible to achieve justice. The case of *Juan Ángel Greco v. Argentina* is an emblematic example in this sense.³³ It took 21 years after his death for the trial to get underway to determine the responsibility of the police officers implicated. And that was only possible because, in 2003, the Argentine State arrived at a friendly settlement agreement with Greco's family before the Inter-American Commission, whereby, among other measures, it agreed to proceed with the judicial investigation.³⁴ However, neither the initial hearings nor the subsequent appeals were able to shed light on the events behind Greco's death or to punish those responsible for it. The judicial branch did not support the reopening of the criminal case with measures aimed at remedying the irregularities that initially led the case to be closed and caused the Commission to intervene. Holding a trial so long after the events took place entails a certain degree of complexity, and even more so when the original investigation was fraught with all sorts of flaws. The Public Prosecutor's Office and the judicial branch of the province of Chaco proved to be inefficient when it came to devising a strategy to overcome these complications and put an end to the impunity. Despite the mandate for justice that clearly came out of the terms of the friendly settlement agreement approved by the Commission,³⁵ during the hearings serious problems were revealed that made it impossible for what happened to Juan Ángel Greco to be explained with the certainty required in a criminal trial. In addition to the lack of real willingness apparent in the actions of the provincial

33 In June 1990, Greco was illegally detained and mistreated while trying to obtain police assistance to report an assault. While held at a police station in the province of Chaco, there was a fire in his cell that burnt him severely. There is reasonable suspicion to support the allegation that the police were responsible for setting the fire and delaying for several hours his transfer to a hospital, where he finally died. The State did not conduct a proper investigation to shed light on the facts alleged, thereby denying the family its right to see justice prevail.

34 Case 11.804, Report 91/03, *Juan Ángel Greco (Argentina)*, approved October 22, 2003.

35 Other points provided for in the context of the friendly settlement agreement, such as the creation and implementation of a local mechanism for the prevention of torture in Chaco, were effectively complied with. Although its implementation did experience some delays, it is currently under way.

judicial authorities, the national State, which should have been an ally in the process and monitored the proceedings in its role as guarantor, was also absent.

The purpose of the appeal to international protection entities in cases in which the obligation to investigate human rights violations has not been fulfilled, is to create the conditions for material justice to be achieved. Cases like Greco's attest to the exasperating path that victims must traverse under Argentine justice just to achieve compliance with minimum standards of due diligence. This calls for an important working agenda: the possibility of proposing, in conjunction with the Commission, better oversight mechanisms in cases where judicial investigations of human rights violations must be reopened.

This proposed panorama is completed by referring to political-institutional mechanisms that require joint efforts by public authorities to create systems to comply with their positive obligations regarding human rights. Among several possible examples, one that stands out is the institutional initiative to implement mechanisms of prior consultation with indigenous communities in the case of economic development projects.

The Commission has underscored the State's duty to guarantee

... participation by indigenous peoples and communities affected by projects for the exploration and exploitation of natural resources by means of prior and informed consultation aimed at garnering their voluntary consent to the design, implementation, and evaluation of such projects, as well as to the determination of benefits and indemnization for damages according to their own development priorities.³⁶

This is, without a doubt, one of the most significant outstanding obligations of the current democracies of the region that has posed a challenge to the Commission itself.³⁷

36 The IACHR thus recommended "implement(ing) participatory mechanisms to assess the extent of environmental damage caused and the impact on basic subsistence activities among indigenous peoples and agricultural communities living where such projects unfold." IACHR, Democracy and Human Rights in Venezuela, Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1137, Recommendation 5. See also, IACHR, Access to Justice and Social Inclusion: The Road toward Strengthening Democracy in Bolivia, Doc. OEA/Ser.L/V/II, doc. 34, June 28, 2007, paras. 137 and 297, Recommendation 5 and 6.

37 As mentioned in the introduction to this book, in April 2011, the IACHR granted precautionary measures whereby it requested that Brazil immediately suspend the licensing process for the Belo Monte Hydroelectric Power Plant project and stop any

There are many political-institutional guarantees that today's democracies must forge and put into practice to erect barriers against structural patterns of rights violations, mainly in the case of those groups that are the most exposed to serious offenses.³⁸ In the current phase of democratic consolidation, it is contradictory for States to endorse, even by omission, the structural subordination of certain social sectors.

It is therefore fundamental that the Commission, at this stage, work with States to strengthen the design and implementation of public policies in compliance with their obligation to adopt measures aimed at bringing about conditions for real equality. The greater the development of domestic institutional frameworks consistent with the terms of the Inter-American system's instruments and standards, the greater the autonomy afforded to States, and hence, the less the intervention of the regional protection system. (Abramovich 2011: 226).

The IACHR and the change of era

As noted in this book's introduction, once the latest debate process got underway, the Commission occupied a central role in the discussion and gained leadership in the exchanges that led to a reform of its "Rules of Procedure, Policies and Practices," with the consensus of even several of the States that had raised the initial objections. The possibility of staving off future waves of criticism that could endanger its legitimacy, political capital, and tools will depend on the Commission's ability to take a leadership role in the analysis of its own work vis-à-vis the current conditions in the States of the region, which rightly proclaim their differences as compared to dictatorships of the past or the fragile transitions that followed. Rising to the challenge and substantiating

material work for its execution until certain consultation processes were carried out with the indigenous populations potentially affected by it. The Brazilian government responded harshly to this decision, characterizing the measures as "hasty and unwarranted." The Brazilian government's reaction was a strong motivator for the initial call for "the strengthening process" of the IACHR in mid-2011. See in this respect, Human Rights in Argentina: Report of 2013, CELS, 2013, "Current debates on the regional institutionality in human rights. The future of the inter-American system and the new dynamics of integration in Latin America", in particular, Section 3, "The New Process of "strengthening" of the Inter-American Commission."

38 Among the political-institutional guarantees still pending are the structures that make up the so-called "National Preventive Mechanisms of Torture," pursuant to the obligations arising from the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In 2012, with the enactment of Law 26827, the Argentine State met its obligation to create the Mechanism, but its implementation is still pending.

reflection on the way the Commission functions will be a precondition for discussing with other actors in the Inter-American system—States, victims and social organizations—the measures that will contribute to further strengthening its approach to the numerous human rights problems afflicting the region today.

For some time now, the IACHR has been adapting its areas of work and the use of its tools to fit the changing times. The fact that, in full exercise of its autonomy and independence, it would propose evaluating its priority agenda, work methods, and main alliances—taking into account the different nature of violations affecting the region today—can contribute to bolstering its capacity. And not only when it comes to making reparations for violations already committed, but, principally, to preventing new ones.

In order to contribute to this process of reflection, below we suggest some potential core concepts for a proactive strategy by the Commission aimed at avoiding new risk scenarios with regard to its authority. We raise several issues, addressing not only how the Commission can improve its response to the characteristic violations in the hemisphere today, but also the need to emphasize States' obligations.

First, we outline the methods and means available for assessing key problems and defining the priority agenda and strategic planning. We also sketch out how to rethink the presumed tension between the IACHR's political and quasi-jurisdictional roles. Then we discuss some possible reinforcements to the Commission's thematic agenda. Finally, we draw attention to the urgent and necessary implementation of a new strategy for alliances by the regional protection body.

It would be naïve to think that this route will do away with confrontations between the Inter-American system and States. Even so, it may contribute to creating conditions to distinguish genuine criticism and suggestions regarding the Commission's agenda, work methods, and key relationships, from those that seek to debilitate its potential for intervention with the intention of obscuring human rights violations. The ideas put forth in the debate reflected both rationales. If the Commission moves forward and takes the lead in critically reflecting upon its agenda, methodology, and relationships, it will be in a better position in the future to prevent the latter type of ideas from being presented under the pretext of "strengthening" the Inter-American system.

Some proposals for rethinking the IACHR's work

The reality of the hemisphere poses dissimilar situations for the IACHR. On the one hand, massive and systematic human rights violations persist and their backdrops have gotten more complex: gross violations involve more than one State, such as when migrant persons' rights are violated at borders, and the chains of responsibility have been extended to often include non-State actors, among other phenomena. On the other hand, in scenarios of *structural patterns of rights violations*, the IACHR may well need to reevaluate its current toolbox.

The coexistence of violations warranting different approaches calls for the Commission to refine its assessments and its agenda, and to introduce a strategic element into its planning and, consequently, its actions and responses. A reflection that seeks to truly strengthen its capabilities to act in response to diverse realities will require effective questioning of States with regard to their unerring compliance with the "obligation to adopt measures," provided for in Article 2 of the American Convention. To have an impact on structural patterns of human rights violations in the context of Latin American democracies, the IACHR must bolster its assessment of the core weaknesses in public policy that lead to the violation of fundamental rights.

The Commission has a significant flow of information on some aspects of the main problems afflicting the region. What is not clear, however, is whether it makes the best possible use of this data today in terms of its diverse tools. Therefore, part of this reflection could lead to a rethinking of how the Commission might improve the way it obtains, systematizes, and analyzes information on key points related to structural patterns, in order to then devise the most effective actions for response.

In loco visits, thematic and country reports, as well as hearings on general situations are some tools that may allow for improved assessment when it comes to key human rights problems in the region, and for the design and execution of a proper strategy to deal with them. In addition, thematic rapporteurships can provide frameworks for identifying the issues that characterize the situation of certain groups whose rights have been historically and systematically infringed. Currently, the IACHR already makes valuable use of the information it gathers through its different working tools. Nonetheless, it is valid to ask whether these devices and channels might be further strengthened and coordinated to

obtain and periodically update and enhance information to enable more accurate assessments of the principal violations occurring in the region, and thus devise adequate responses based on the different regional realities.

The IACHR has had to go through strategic planning processes in the past. The last one established lines of work through 2015.³⁹ In this new stage, and having overcome the risk scenario posed by the “strengthening process”, it may be important for the Commission to review the bases, sources, and methodology used to design its last strategic plan and develop a new type of process that, through dialogue with different actors in the Inter-American system, will allow it to identify the key problems and propose new ways of addressing them. Sparking a new discussion dynamic regarding the Commission’s agenda and priorities that makes way for other voices but still safeguards the Commission’s final say by virtue of its autonomy and independence, may be a useful step on the path toward renewed legitimization.

At this moment in history, a key issue is how to assist States in the task of preventing new violations. Shaping a strong strategy in this sense would finally honor the logic behind the notion of *guarantees of non-repetition* that the Inter-American Court has forged and which should be taken more seriously by the democratic States.

For the IACHR’s daily work, an important item on the agenda would be a new dynamic for ongoing data compilation and processing to use in the execution of its new strategic plan. This type of measure could give rise to the need to rethink its current work distribution systems in the Executive Secretariat, and also reevaluate the relevance and use given presently to several of its tools. For example, it could consider how to increase the impact and value-added of the general hearings it holds during its periods of sessions. The hearings provide undeniable exposure through media attention when it comes to the visibility of certain problems and, as a result, contribute to putting issues on their agenda for a certain time. However, the Commission can and must contemplate how to coordinate this tool with others it has at its disposal, so as to refine its assessment of the specific characteristics of violations that, for example, affect certain groups in different countries, while also insisting and working with States to procure ever more adequate responses.

39 See IACHR, Strategic Plan 2011-2015. <https://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf>

Achieving better use of these forums demands in turn more of the organizations that use the Inter-American system, which must also reflect upon how to best take advantage of them by upholding working agendas that encourage regular dialogue on a given theme with the IACHR, and thus avoid the impact of its intervention being limited to one or two moments per year.

Despite the enormous importance that the Office of the Special Rapporteur for Freedom of Expression has in the hemisphere when it comes to defending the right to freedom of thought and expression, and the fundamental role it plays in the consolidation and development of the democratic system, the issues addressed by the other rapporteurships also merit significant attention from the IACHR. For this reason, it would be recommendable for the Commission to undertake strategic planning for each one of the issues deemed sufficiently worthy of special attention to merit having a unit or thematic rapporteurship, and therefore identify the material and professional resources needed to carry out their work with the same degree of quality that the Office of the Special Rapporteur for Freedom of Expression can today. It is important for the Commission to establish, for example, the conditions that would allow for all the rapporteurships to write and publish an annual report like the one the Special Rapporteurship issues currently, which has proven to be an effective and useful tool. In order for these new efforts to materialize, it is vital that States undertake the responsibility of providing the necessary funds for all the rapporteurships, working groups, and units to be able to operate in a high-quality manner.

This process of reflection must also pose to the Commission the challenge of assessing how to make better use of the materials it currently has at its disposal. Over the years, the Commission has written and published thematic reports in which it develops and systematizes elaborate standards that, in many cases, have only ended up gracing bookshelves. It is important to come up with a strategy for working with States to tailor to each specific reality the application of the generic standards it has mapped out, as well as the issues that will be the subject of new reports.

One example is the experience of the Report on Citizen Security and Human Rights⁴⁰ of 2009. The document was the result of coordinated work between the IACHR and diverse organizations from throughout

40 IACHR, Report on Citizen Security and Human Rights, OEA/Ser.L/V/II, doc. 57, December 31, 2009, <https://www.cidh.oas.org/pdf%20files/SEGURIDAD%20CIUDADANA%202009%20ENG.pdf>

the region on an issue that is extremely timely and relevant. However, after its publication, no strategy was developed to promote visibility and discussion with States and the political bodies of the Organization of American States (OAS) so as to achieve the consensus and commitments necessary for the standards developed in the report to be incorporated into national measures and policies. This type of assessment shows the need for any new planning to consider the importance of getting States to commit to the development and implementation of its thematic reports and thereby outline an advocacy roadmap on the different issues that the IACHR has decided to focus its efforts on. Therefore, States themselves must be willing to enter into serious dialogue in this sense. The impact of this work will ultimately depend on whether local conditions allow for the Commission to contribute. The democracies of the region should be up to this opportunity, as long as they see it as a contribution and not a threat.

Another task that demands greater attention from the IACHR is the development and effective implementation of tools for attaining justice at the national level. While the Inter-American system has diverse and well-established standards on the matter of effective judicial protection, we suggest a study to compile available information and ascertain what is lacking in terms of the existence and efficacy of domestic judicial remedies. Given the problems the Commission currently faces in processing all the petitions it receives in a reasonable amount of time, it would be useful to concentrate some efforts on more accurate and frequent verifications of domestic mechanisms. In the medium to long term, this could mean that many of these cases, which reach the Inter-American system today due to the inexistence or inefficacy of this type of domestic legal action, finally manage to get a response within their own States.

Some of the considerations we have put forth so far might give the impression that we seek to encourage the IACHR's role of *promotion* over that of *protection*. As explained below, that is not what we are advocating for. We are rather stressing the need for both tasks to be coordinated by way of a more sophisticated interpretation of their meaning and implications in light of the region's current situation.

The false dichotomy between the political and quasi-jurisdictional roles⁴¹

Originally, the Commission was conceived as a political body devoted to the promotion of human rights in the region.⁴² With the adoption of the American Convention on Human Rights, its function as a protector of rights was secured, and an interesting synergy was established between its role of monitoring and political interaction with States, and its action on petitions in cases that did not receive an adequate response locally.⁴³ These functions should not be considered as exclusive or contradictory, but rather as complementary. The challenge of balancing them both continues to have relevance today.

Particularly in recent times, the demands placed on the Commission's protection role has meant that sufficient effort is not being put into making proper use of the potential of the entity's political function. Beyond the virtues of the petition system, the problems regarding access to justice and effective protection of rights in the States of the hemisphere demand an approach that goes beyond solutions made to fit specific cases. For this reason, views contending that the Inter-American system must move toward an exclusively judicial logic⁴⁴ lose sight of the fact that the litigation of cases is just one tool in a much richer and more complex toolbox that may be used for effective enforcement of human rights.

The democracies of Latin America have to grapple with the legacy left by the dictatorships and domestic armed conflicts that characterized long periods of their history, but they must also address the effects of the neoliberal policies of the 1990s on the observance of rights. Today, for States governed by the rule of law to remain such, they must eliminate situations of structural inequality that show that there is still a long road to travel toward establishing substantive democracies, and devote efforts to remedying and resolving the particular needs of part of their population, such as women or indigenous groups. Public institutions

41 A previous version of the considerations included in this section were studied by Bascary, Kletzel, and Chillier (2012).

42 See the Declaration of Santiago, Chile, Fifth Meeting of Consultation of Ministers of Foreign Affairs held in Santiago, Chile, August 12-18, 1959, Final Act, OEA/Ser.C/II.5, pp 4-6.

43 See Articles 41 and 44-51 of the American Convention on Human Rights.

44 As it occurred with the European human rights system when it adopted Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms that entered into force in November 1998.

must overcome limitations to fulfill their basic function to ensure respect, protection, and enjoyment of the human rights of all people under their jurisdiction. Furthermore, they must still resolve the increasingly evident tensions caused by certain decisions regarding economic development that hinder the full enjoyment of human rights in the region.

In order for the IACHR to become an entity capable of guiding States on this path, it will have to strike a virtuous and complementary balance between its political and quasi-jurisdictional roles. It is vital that the Inter-American system's different actors share and support the importance of these complementary work dynamics. States must revalidate and update the scope of some of the system's foundational agreements. Social organizations should focus on and provide forums to reflect on the potential of political tools to protect and promote human rights, and outline their strategies consequently.

A subsidiary system of human rights protection must adequately combine its tasks of protection and promotion. Much work has been done through litigation on individual cases so that non-repetition measures are adopted that enable structural changes. However, one of the problematic aspects of using an individual case as a way to influence public policy lies in the dynamic inherent to work done with and for victims of human rights violations, which can validly necessitate the prioritization of their individual interests over the drive for more long-term institutional change. In this sense, the array of actions that the Commission's political role provides must be strengthened so as to complement the protection of rights sought through its petition system. It is imperative to move beyond the current situation, in which it seems that resolving a specific case is the only pathway to effective dialogue with States, toward the incorporation of certain standards into public policy.

A pending challenge for all actors involved in the Inter-American system is to assess the way in which each State incorporates into its laws and practices the principles, rules, and standards that provide greater clarity regarding human right obligations. On the one hand, States must commit to creating the institutional frameworks needed to locally process the results that emerge from the use of political tools. On the other hand, the IACHR must orient these actions through strategic planning that takes these limitations into account and provides specific mechanisms to address them. It must also make efforts to regularly assess the degree of States' receptiveness to the standards it sets, both via concrete cases, as well as in its thematic and country reports.

These ideas will remain in the realm of wishful thinking if OAS

Member States do not provide sufficient resources to put into motion this virtuous cycle between the Commission's distinct faculties.

To the extent that public policies gradually incorporate human rights standards and improve the general population's enjoyment of rights, the use of the individual petition system will remain circumscribed to identifying and addressing the structural barriers or emblematic types of abuse for which it is imperative that the IACHR make use of its quasi-jurisdictional mandate.

International human rights law is characterized by its dynamism, which means that the protection system must have the ability to adapt to the new needs of the region. It is therefore essential that the different actors be capable of exploring the potential provided by the original structure to respond to current demands. In this framework, dialogue and joint work are central to strengthening the subsidiarity of the protection system. But exploring this possibility only makes sense if it is based on a firm and genuine commitment by the OAS Member States.

On one hand, it is infeasible to think that the IACHR, as the gateway to the Inter-American system, can address the massive human rights violations in the region by dealing with individual cases. On the other hand, if the Commission were only to concentrate on its political role to promote respectful policies and strengthen domestic human rights protection mechanisms, the system would end up without an essential tool, which is its ability to sanction a State for the violation of a right and order reparation. Therefore, the relationship between the political and quasi-jurisdictional functions of the IACHR must be governed by a virtuous tension in which individual cases, in addition to providing reparation to victims, serve to identify structural problems and thus fortify the political role of building State capacity to prevent violations.⁴⁵

Some challenges for the thematic agenda⁴⁶

During the recent debate process regarding the Inter-American system, some States criticized the Commission's thematic agenda because they believed it emphasizes analysis and discussion of civil and political rights violations at the expense of economic, social, and cultural rights. The Commission quickly responded to this objection by creating and putting into operation a new Unit on Economic, Social, and Cultural

45 For references to various emblematic cases that managed to address this tension, see *Human Rights in Argentina: Report 2013*, CELS, 2013, Chapter VI.

46 An earlier version of this section's contents can be found in Kletzel (2013).

Rights (ESCR Unit), and later announced it would eventually be classified as a Special Rapporteurship.⁴⁷ The prioritization of this Unit and, subsequently, the impact it could have, does not necessarily relieve the tension in the relationship between the Commission and the States that leveled this criticism. It remains to be seen how those States will handle the criticism that may be garnered by their social policies once they have been analyzed from a human rights perspective.

Any proposed reflection regarding the Commission's thematic agenda cannot ignore the fact that its work on economic, social, and cultural rights occupied a central role in the origin and evolution of the discussions in recent years, nor that this happened in a way that may be considered paradoxical. Therefore, we present below some thoughts on the importance of maximizing the strategic opportunity that the ESCR Unit represents for strengthening the Commission's thematic agenda.

While the start of the reform process can be traced back to the Commission's decisions that questioned development megaprojects promoted by southern States in terms of their implications for the observance of fundamental social rights,⁴⁸ the States that spearheaded the harshest criticism of the Commission's work highlighted time and again the fact that the mechanism did not pay sufficient attention to promoting and protecting economic, social, and cultural rights. This objection led the Commission to create the Unit in late 2012. Regardless of the political motivations that could explain this demand by some States, after the Commission's own decision to set in motion and institutionalize this theme, a strategic opportunity has arisen to develop economic, social, and cultural rights in the regional system.

In the first place, it is important for the Commission to capitalize on this situation to establish better and more frequent channels of dialogue with these States regarding economic development models and programs and their impact on the respect, protection, and safeguarding

47 The creation of the Special Rapporteurship was announced by the Commission on April 3, 2014. Its creation is subject to the Commission raising enough funds to put it into operation. If this came about, the Commission would have two special rapporteurships—i.e., headed up by experts selected through a competitive process, rather than by one of its members, which is the case with the other thematic rapporteurships. http://www.oas.org/en/iachr/media_center/PReleases/2014/034.asp

48 Particularly, the Commission's decision to grant precautionary measures requesting that Brazil immediately suspend the Belo Monte hydroelectric plant licensing process and block any material construction work until certain consultation processes were undertaken with the indigenous populations that could be affected. See PM 382/10 – Indigenous Communities of the Xingu River Basin, Pará, Brazil, <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>

of human rights. This will, of course, be essential to its coordination with and support for the Working Group in charge of analyzing the periodic reports called for by Article 19 of the Protocol of San Salvador.⁴⁹

This area of work will, in turn, allow for deeper consideration of and capacity for response by the Commission regarding the realities and rights of certain sectors that have thus far not received special consideration by the bodies of the system, such as, for example, peasant communities.⁵⁰ Paying special attention to these particular realities can open a space for the Commission to successfully establish new alliances with social actors and movements that are indispensable for expanding its sources of support and legitimacy. The need to broaden its contacts regarding this issue goes beyond social actors. It is also essential to diversify relations with agencies responsible for designing and implementing social policies within each State.

It is probable that the analysis of development and human rights will lead to the consideration of very timely themes that still warrant intense scrutiny as regards the enjoyment and exercise of these rights, such as the role of companies in the violation of economic, social, and cultural rights and States' extraterritorial obligations regarding this matter.

49 The Working Group to Examine the National Reports Envisioned in the Protocol of San Salvador was created in June 2010. It is responsible for analyzing the periodic reports that must be presented by the States Parties regarding progressive measures that have been adopted to ensure due respect for the rights guaranteed by the Protocol in accordance with Article 19 and the "Guidelines for Preparation of Reports" approved by the OAS General Assembly. In accordance with the decision of the Assembly in Resolution AG/RES. 2262 (XXXVII-O/07), the Working Group is made up of an independent expert, a member of the Commission designated to that effect, and three governmental experts with equitable geographical distribution. The Working Group created the document "Progress Indicators for Measuring Rights under the Protocol of San Salvador" (OEA/Ser.L/XXV.2.1, December 2011), based on the standards and guidelines presented by the Commission, which was submitted in two groupings of rights to the States and civil society for consultation. The process concluded in December 2013, when the Permanent Council approved the resolution relative to the second grouping of rights. http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-489/13

50 In its October 2013 session, the Commission held a hearing on the economic, social and cultural rights of peasants in Latin America. The hearing was granted at the request of the organization *Coordinadora Latinoamericana de Organizaciones del Campo (CLOC-Vía Campesina, Latin American Coordinator of Rural Organizations)* and CELS. See the annex of the final press release of the session, which includes the Commission's considerations on the hearing, http://www.oas.org/en/iachr/media_center/PReleases/2013/083A.asp. A video recording of the hearing is available at: <http://www.oas.org/es/cidh/multimedia/sesiones/149/2martes29b.asp>. See also CELS, "Situation of ESCR of the peasants in Latin American" <http://cels.org.ar/comunicacion/index.php?info=detalleDoc&ids=4&lang=es&ss=46&idc=1701>

In parallel, the work of the Unit could be vital to settling a historic debt the Inter-American system has with regard to international protection of economic, social, and cultural rights. Despite the gallons of ink spilled in academic legal analysis of the scope of Article 26 of the American Convention⁵¹ and its Additional Protocol regarding economic, social, and cultural rights, the case law of the system's bodies has not managed to settle its interpretative debates. In fact, the Inter-American Court still seems to be far from the possibility of weighing autonomous violations of this Article or of specific provisions of the Protocol of San Salvador.

The lessons on the justiciability of economic, social, and cultural rights learned in different national judicial platforms in the hemisphere, as well as the steps that have been taken in the universal system which after decades of discussion has finally included a valid mechanism for individual petitions regarding social rights, show that the Inter-American system is due for a profound consideration of this matter. The establishment of the Unit/Rapporteurship on economic, social and cultural rights creates the necessary conditions for this to take place.

The Inter-American Commission has relatively recent thematic reports⁵² that show its interest in this topic and could constitute a basis for deepening the analysis of States' obligations regarding social rights, the notion of progressive development and non-regression, and the relevance and effectiveness of the Inter-American system's current tools to address and respond to economic, social, and cultural rights violations. In this framework, it will be important to observe how the Commission incorporates and processes the assessments and challenges that came to light during the Regional Consultations of the Unit on Economic, Social and Cultural Rights carried out in 2013 in Buenos Aires and in 2014 in Bogota.⁵³

51 The sole provision that refers to economic, social, and cultural rights in the Convention is found in Chapter III, Article 26.

52 Of note among these are the reports entitled, "Access to Justice as a Guarantee of Economic, Social, and Cultural Rights", www.cidh.oas.org/countryrep/AccessoDESC07eng/Accessodesci-ii.eng.htm, and "Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights", <http://www.cidh.org/countryrep/IndicadoresDESC08eng/Indicadoresindice.eng.htm>

53 The first consultation was made on May 9, 2013. CELS and Dejusticia worked together with the Inter-American Commission to draft the agenda and identify relevant actors on the subject. During the session, discussions were held regarding the challenges faced by the region, the substantive topics on which the Unit should focus its work, the relationship with civil society and social movements, current work methodologies, and the approach to substantive matters regarding economic, social,

Working more in-depth on this topic will not only be a challenge for the Inter-American Commission, but also for the system's actors in general. The civil society organizations and social movements that present their cases to the Inter-American system also have a key role to play in designing strategies that can give rise to profound debates with States regarding the scope of enjoyment and exercise of economic, social, and cultural rights in the region. In turn, the States that have worked so hard for the regional mechanism's bodies to give special consideration to social rights will need to rise to the occasion and show whether in their criticism of the Commission's agenda there was the real intention of bolstering observance of economic, social, and cultural rights in the region.

A strategy for diversifying relations

Another legitimate question at the center of the recent debates that merits the Commission's attention is: who are the social actors that manage to reach and maintain a constant dialogue with the mechanism? Raising this issue is important for allowing the Commission to establish

and cultural rights. The consultation revealed the need for the Unit to take on themes such as the relationship between development projects and human rights, the protection of defenders of economic, social, and cultural rights, States' extraterritorial obligations regarding transnational companies' actions in other countries, access to land, and the need for regional work to be done via networks that would allow for responses to the complexity of economic, social, and cultural rights violations. Strategic challenges that the new Unit will have to address included were underscored, such as: the need to broaden the group of actors with which it establishes alliances and dialogues, in particular social movements; the need to include the agencies responsible for social policies in dialogues with States; the relationship with the Working Group overseeing the reporting mechanism set forth in the Protocol of San Salvador; and synergies between the Unit and the other IACHR thematic rapporteurs, among others.

In follow-up to this activity in 2014, the Unit decided to organize a Second Regional Consultation in order to help deepen its strategic agenda decisions. Again, the Commission chose to entrust the event's co-organization to CELS and Dejusticia. Thus, on 25 April, 2014, the Second Regional Consultation organized by the Economic, Social and Cultural Rights Unit of the Inter-American Commission was held, this time under the direction of Commissioner Paulo Vannuchi, at the Universidad de los Andes in Bogotá. The meeting included the participation of representatives from social movements, unions, Afro-descendent groups, indigenous groups, peasant communities, human rights groups, and academics. The consultation's most substantive themes were related to public policy and economic, social, and cultural rights, as well as the relationship between development and social inclusion from a human rights perspective. This forum was important for updating the issues considered top priorities in the Unit's work and for moving forward to define the profile of the future Office of the Special Rapporteur for Economic, Social and Cultural Rights. In August 2014, with the support of Fundar, the Commission held a third consultation, this time aimed at social organizations in Mexico.

alliances that lead to assessments that are closer to the main impacts on different groups and, thereby, to better methods for addressing and monitoring them and guaranteeing their non-repetition.

The changes that have taken place in recent years in Latin America have not only involved transformations such as the transition from authoritarian to democratic governments with differing nuances, but also the consolidation and greater prominence of social movements that have led demands for obtaining and strengthening widely varied fundamental rights. The renewed legitimization of the Commission can only come from strengthening new alliances with these other actors that have had unequal standing among the contacts and actors in the Inter-American system.

Of course, achieving greater prominence and involvement of these actors with regard to the Commission requires those sectors of civil society that have traditionally had fluid channels of dialogue with the IACHR to give up some of their space and even help the Inter-American Commission conceive and adopt an active strategy to diversify and strengthen relations beyond its known territory. At the same time, consolidating these relationships might call for an adjustment in the work methodologies of the Commission and its Executive Secretariat. The current leadership's characteristics in this area make it possible to believe that this is a good time to move down this path.

By way of conclusion

Latin America is going through a period of consolidation of its democracies and of increasing attention to the socio-economic problems of its popular majorities. Nonetheless, there is still much to be done so that States today can overcome structural situations of exclusion and inequality.

At this stage, the role of regional protection bodies is no longer the same, but this does not mean that their work on human rights problems should wane; on the contrary, it should be diversified. Paying greater attention to the substantive aspect of the principle of subsidiarity must underscore the positive obligations of States and produce a working strategy in which great effort is invested in developing political-institutional guarantees to safeguard fundamental rights.

It is paramount that the Commission propose a proactive agenda in this sense in order to strengthen its mission. This will be essential in view of the enormous value that the Commission's past and present work has had in protecting and guaranteeing the rights of the peoples of this hemisphere.

References

Abramovich, Víctor. 2009. "De las violaciones masivas a los patrones estructurales: nuevos enfoques y clásicas tensiones en el sistema interamericano de derechos humanos." *Revista Sur* 11.

Abramovich, Víctor. 2011. "Autonomía y subsidiariedad: el Sistema Interamericano de Derechos Humanos frente a los sistemas de justicia nacionales." *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI*, coordinator, Rodríguez Garavito. CIUDAD: Siglo XXI editores.

Bascary, Lourdes, Gabriela Kletzel and Gastón Chillier. 2012. "La Comisión Interamericana de Derechos Humanos: entre el rol político y el cuasi jurisdiccional." *Reflexiones para el Fortalecimiento del Sistema Interamericano de Derechos Humanos. Aportes DPLF*. Available at: <http://www.dplf.org/uploads/1332509827.pdf>

Carbonell, M. 2013. *Derechos fundamentales y democracia*. México: Instituto Federal Electoral.

Carozza, P. 2003. Subsidiarity as a structural principle of international human rights law. *The American Law Journal* 97: 38.

CELS. 2013. "Debates actuales sobre la institucionalidad regional en derechos humanos. El futuro del Sistema Interamericano y las nuevas dinámicas de integración en América Latina." *Derechos Humanos en Argentina. Informe 2013*. Buenos Aires: Siglo XXI.

CELS. 2013. *Derechos humanos en Argentina. Informe 2013*. Buenos Aires: Siglo XXI.

Diamint, Rut and Laura Tedesco (coordinators). 2013. *Democratizar a los políticos. Un estudio sobre líderes latinoamericanos*. Madrid: Catarata.

Helfer, Laurence. 2008. "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime." *The European Journal of International Law* 19(1).

Kletzel, Gabriela. 2013. "La Unidad DESC: una oportunidad estratégica para la CIDH." *Ideele* 232. <http://www.revistaideele.com/ideele/revista/232>

Linz, J. and T. González. 1990. "Transiciones a la democracia." *Revista Española de Investigaciones Sociológicas* 51: 7-33

Medina Quiroga, Cecilia. 2003. *La Convención Americana: teoría y jurisprudencia. Vida, integridad personal, libertad personal, debido proceso y recurso judicial*. Santiago de Chile: Universidad de Chile.

Melish, Tara. 2009. "From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies." *The Yale Journal of International Law* 34: 389.

Moravcsik, Andrew. 2000. "The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe." *International Organizations* 54: 217.

O'Donnell, G., P. Schmitter y L. Whitehead (eds.). 1986. *Transitions from Authoritarian Rule: Latin America*. Baltimore: Johns Hopkins University Press.

Pásara, L. 2010. "Reformas del sistema de justicia en América Latina: cuenta y balance." *Sociología del derecho. Culturas y sistemas jurídicos comparados (I)*. Universidad Nacional Autónoma de México: 371-419

Taiana, Jorge. 2013. "The Legacy and Current Challenges of the Inter-American Commission on Human Rights." *Human Rights Brief* 20 (2): 42-45. <http://digitalcommons.wcl.american.edu/hrbrief/vol20/iss2/8/>

Chapter 6

The Elephant in the Room: The Procedural Delay in the Individual Petitions System of the Inter-American System

*Nelson Camilo Sánchez, Laura Lyons Cerón**
Center for Studies of Law, Justice, and Society
(Dejusticia)

* We would like to express our gratitude for the generous methodological guidance that we received from Miguel La Rota and Carolina Villadiego, of the Judicial System Area of Dejusticia, in order to further this investigation, as well as their feedback on preliminary drafts of this text.

Summary

209

In recent years, the number of petitions submitted to the inter-American human rights system has increased significantly. The protective bodies of the system have not been able to handle this increase in demand, as their ability to accept petitions received has not grown proportionally. Consequently, the current caseload in the system of individual petitions and cases is so heavy that petitioners have to wait more than ten years before receiving a decision from the Inter-American Commission on Human Rights. This chapter addresses this issue, first presenting the current state of the petition and case system. This chapter describes the flow of petitions and cases received between 2002 and 2013, from the time they enter the system until they receive a decision from the Commission or the Court. Additionally, this chapter covers the average wait time between each procedural step for each petition, for the petitions received each year, and for each petition received between 2002 and 2013. Second, this chapter evaluates the past strategies implemented to counteract this procedural delay, focusing primarily on the evaluation of the goals and projections contained in the Inter-American Commission on Human Rights 2011-2015 Strategic Plan. Based on these results, this chapter offers a series of conclusions and recommendations for possible methods for correcting this procedural backlog.

Introduction

Historically, the inter-American human rights system has been considered the “last recourse for justice” for the victims of human rights violations in the Americas (Abramovich 2008: 9). There have been numerous mechanisms through which human rights bodies have accomplished this justice work; they have evolved greatly over time in procedural terms, such as their enforcement strategy. As part of this evolution, the individual case and petitions system has become a focal point of the activities of the Inter-American Commission on Human Rights (IACHR, the Commission) and the Inter-American Court of Human Rights (I/A Court HR, Inter-American Court).¹ Today, the individual petition system is one of the primary pillars of the work of the IACHR (CIDH 2013a: 1).

Furthermore, the processing of the cases in the inter-American system has had a profound impact on establishing the national democracies of today. The cases and disputes have not only served as mechanisms for providing the victims of the cases resolution, but they have also been key for setting regulatory standards on state behavior in diverse matters. Thanks to these varied developments, some experts are talking about a common inter-American legal system based on the standards of the Commission and the Court, that has not only contributed to strengthening the concept of international human rights, but also that has its own regional characteristics, which in some cases are more advanced than universal rights.

At the same time, the evolution and success of the petition and case system has given rise to increased demand that seems to have overloaded the institutional capacity to respond. Year after year, the number of complaints grows at an exponential rate, while the bodies of the inter-American system either maintain the same capacity or, worse, they shrink in their capacities. There is currently a contradictory process that creates enormous tension: there are greater demands for justice on the system and fewer resources to meet this demand. Not surprisingly, this has given rise to severe procedural delays in the system’s capacity to respond to the petitions it receives.

1 For the IACHR, the *individual petitions system* encompasses all of the procedures created for the inter-American instruments to defend human rights: petitions and cases, protective measures, requests for information about Article 41 of the American Convention, and procedures from Article XIV of the Inter-American Convention on Forced Disappearance of Persons. The *petitions procedure* is related to petitions and cases, which is divided in four stages: initial review, admissibility, merits, and monitoring of compliance (CIDH 2011: 5). In this chapter we will use the term “individual petitions system” based on this restricted meaning.

A general overview of the petition system

How does the petition and case system function?

The IACHR has divided the procedure for addressing the individual petitions system into four stages: initial review, admissibility, merits, and monitoring of compliance with recommendations.

Initial review: through the initial review, the IACHR determines if the petition meets all of the elements required by Article 28 of the Commission's Rules of Procedure. That is to say, if there are elements that could characterize a potential human rights violation, if domestic remedies have been exhausted, and if all of the expected formal requirements of the Rules of Procedure have been fulfilled. This stage, which begins with the Commission receiving the petitions, is carried out before the Registry Group, a section of the Committee's Executive Secretary created in 2007.² Supervisors from the Executive Secretary and the Commission also participate in the process through memorandums of consultation, oversight, and general evaluation of the petitions received. It is important to note that while the Registry Group is charged with carrying out the review, a working group on admissibility (the GRAP, by its acronym in Spanish) composed of senior counsel headed by the Assistant Executive Secretariat, decides whether or not to accept the petition for processing. Essentially, the Registry Group proposes a decision, but does not adopt it. The petition is only accepted after the GRAP approves it.

Admissibility: after a petition has been accepted for processing, the pertinent parts of the petition are sent to the State so that it may respond to the petition within three months. After the State responds, the parties may submit additional observations in writing or during a hearing. After this, the Commission makes a decision on the admissibility of the petition and prepares the corresponding report. The admissibility stage is conducted with the participation of officials from the Regional Sections,³ supporting officials of the Rapporteurship, and supervisors from the Executive Secretariat.

2 According to IACHR information, the Registry Group is comprised of: 1 official PO1; 1 consultant; 1 fellow; 2 administrative assistants GO5; and 20 interns.

3 The regional sections are: (1) Andean Region I: Colombia, Ecuador, and Venezuela; (2) Andean Region II: Peru and Bolivia; (3) Southern Cone Region: Argentina, Chile, Paraguay, and Uruguay; (4) Mesoamerica: Mexico, Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, Panama, Dominican Republic, and Cuba; (5) English, French, and Portuguese Speaking Region: Canada, United States, Brazil, Antigua and Barbuda, Barbados, Bahamas, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

From the opening of the case, a Commissioner of the corresponding rapporteurship oversees the matters of the case, with the support of the five regional sections of the Executive Secretariat.⁴ The regional sections are responsible for petitions in the admissibility phase, evaluation of the merits, compliance with recommendations, and the general human rights situation in their respective geographic areas.

According to the IACHR, the consideration and deliberation of the reports on admissibility require a substantial amount of work from the commissioners, either in person or by email. To this end, the Commission can create a working group on admissibility, composed of three or more commissioners, in order to review admissibility between sessions and formulate recommendations for the entire Commission.

Merits: after its admission, the petition is registered as a case and the procedural stage of evaluating the merits begins. From that point, the petitioners have four months to submit their observations on the merits of the case. After this period ends, the State has four months to submit its observations. If the Commission deems it necessary, it may hold a hearing on the merits of the case. After this, the IACHR deliberates and votes on the merits and issues a report.

Officials from the regional sections (representing the regions, as indicated in the previous section), support staff of the rapporteurships, and supervisors from the Executive Secretariat's Office participate in preparing the merits reports of the case.

Friendly settlement: the Rules of Procedure establish that the IACHR may, at any time, allow for the parties to reach a friendly settlement on the matter. Before starting the merits procedure, the Commission establishes a deadline for the parties to express whether they have an interest in initiating the friendly settlement procedure. The IACHR carries out this procedure through the Friendly Settlement Group,⁵ which is charged with ensuring compliance and facilitating and supporting the commissioners regarding the petitions and cases in which the parties involved have decided to adopt this type of procedure.

Monitoring of compliance with recommendations: this stage begins with sending the merits report or issuing a friendly settlement report to the parties. The objective of this process is to inform the

4 These sections have, according to information from the IACHR, 13 officials: 1 official ranked P3; 5 P2 officials; 2 full-time P1 officials; 1 P5 official; 2 P4 officials; and 2 part-time P3 officials. The information available does not state how many and what type of staff are assigned to each section.

5 This group is made up of: 1 part-time P04 human rights specialist and 2 P01 human rights specialists.

political bodies about the level of compliance with the Commission's recommendations. Legal staff and supervisors from the Executive Secretariat's Office participate in this stage, which also demands substantial dedication from the commissioners in various meetings and in ensuring compliance.

Disputes before the Inter-American Court of Human Rights: despite the fact that the amendment to the Court's Rules of Procedure in 2009 modified the role of the IACHR in contentious procedures, the Commission continues carrying out activities in the area. Commissioners and the Executive Secretary participate through their function as delegates to the court, as well as officials of the Court Group⁶ and supervisors from the Executive Secretariat.

The reality of the petition and case system: a known and diagnosed problem

The collapse of the petition and case system is a topic that has been identified and addressed by users of the system, as well by academic studies. General problems and challenges of the system are intermixed in its diagnosis and causes, including the lack of resources (Goldman 2009; Filippini 2008; Cavallaro and Brewer 2008), lack of transparency within the bodies related to publishing contrastable information (Centro de Derechos Humanos U. de Chile 2012), problems regarding victims' access to the system (Sánchez 2009; Cejil 2008), technological limitations (Human Rights Clinic 2011), problems of administrative inefficiency (Human Rights Clinic 2011; Dulitzky 2010), and problems with the enforcement of decisions (Krsticevic 2007; Cejil 2008; Rodríguez y Kauffman 2014).⁷

The majority of references to the topic of the procedural delay have been, nevertheless, partial accounts concerning the facts published in the annual reports of the IACHR. In the great majority of cases, deficient information has been an insurmountable obstacle for establishing consolidated series of data and showing trends, demonstrating the real problem, or indicating where procedural bottlenecking exists.

The study that tackled the issue in the most detailed fashion (and

6 The Court Group is made up of: 1 P03 group coordinator; 2 P02 human rights specialists; and 1 G05 administrative assistant.

7 These problems were the subject of ample discussion during the so-called "Process for Strengthening the IACHR" and are the subject of specific chapters of this publication. For that reason, they are not detailed in this section. Later, we will address these issues in relation to the case and petition system.

the one in which the most information has been obtained from the IACHR) was published in 2011 by the University of Texas Human Rights Clinic. This investigation conducted an exhaustive statistical analysis that measured the backlog and procedural delay over the course of approximately a decade. In addition, the research took into account the IACHR's human and technological resources, its regulatory frameworks, and the changes to its Rules of Procedure and its practices and internal institutional organization. Finally, the study compared the IACHR's procedures with other international and local experiences with the goal of identifying possible parallels to identify best practices.

The report places emphasis on three issues. First, the Commission's lack of financing and its impact on the case system. Second, the division into stages of the procedures and the structural organization of the IACHR's Executive Secretariat. Finally, the Commission's internal processes in its handling of petitions and cases.

The investigation underscored various substantial organizational advances, such as increased efficiency and the streamlining of processes. Despite this progress, the investigation's evaluation was less than optimistic. First, an annual growth in the number of petitions received is not being met with a growth in IACHR capacity to process such petitions, which results in a mounting procedural backlog. At the cutoff date of the study (August 2011) there were 5,213 petitions awaiting an initial review, 1,137 petitions awaiting a decision on admissibility, and 515 awaiting a decision on the merits of the case (Human Rights Clinic 2011:27). Based on the number of petitions received and the IACHR's capacity to process them in 2011, the report concluded, among other things, that "the total percentage of fully decided cases and petitions or those eliminated from the Commission's docket [in 2011] is less than it was in 1996" (p. 30). Consequently, in 2011 the Commission was deciding approximately 20% fewer cases and petitions than what it had done 15 years prior.

The direct consequence of this backlog is procedural delay. The study found that, for that period of time, it took "on average over four years for a petition to receive a decision on admissibility and almost two and half more years for a merits decision, leaving petitioners with an average wait time of six and half years for a merits decision" (Human Rights Clinic 2011: 31). By conducting a review of the petitions received and processed between 1996 and 2010, the report concluded that the average procedural delay for each type of decision (admissibility and merits) had progressively increased during the last fifteen years (p. 33). In fact, the report mentioned information received from the IACHR that projected a procedural delay even longer than what was calculated

by the study. In accordance with this information, in 2011 the average processing time for cases that had reached the admissibility stage and that awaited a decision (which includes the time of the initial review and admissibility) was 70 months. The average length for cases that had reached evaluation of the merits (which includes the time of the initial review, admissibility, and evaluation of the merits) and awaited a decision was 86 months.

Based on these facts and an analysis of the processes and objectives of the IACHR, the report came up with a series of multisectoral recommendations that included aspects related to: (1) increasing financial resources; (2) internal changes regarding management of results: integration of the registry group with the rest of the Commission, technology, and modifications to the petition intake system; (3) changes to the Rules of Procedure, to include combined decisions on admissibility and merits; consistent application of the Rules to speed up the process; adoption of decisions of admissibility and preliminary revision of merits reports by a working group; use of *per curiam* decisions and abbreviated report formats; (4) treatment of other structural issues related to the receipt of information and documents, friendly settlements, transparency and criteria for decisions, and follow-up measures.

That same year, the IACHR made substantial advances in the management of its processes by agreeing upon and publishing, for the first time in its history, a Strategic Plan. The Commission divided its plan into three parts. The first part consisted of developing strategic objectives for the 2011-2015 period. In this section, the Commission established three pillars of work, with the “petitions system” being the first of these pillars.⁸ These objectives are carried out through eight programs, which are outlined in the second part of the Strategic Plan.

Specifically, as regards the individual petitions system, the IACHR identified a two-fold general purpose for the period of 2011-2015. On one hand, the IACHR proposed “to ensure maximum consistency in the carrying out and management of processes” and, on the other hand, “to ensure consistency in the draft reports and statements under consideration by the IACHR.” The concrete goals were divided by the procedural stage (initial review, admissibility, merits, and monitoring of compliance with recommendations).

Regarding the “initial review,” the IACHR outlined four goals: (1) to conduct, by 2015, an initial review of each petition received within

8 The others two parts were: monitoring of the human rights situation in countries and thematic areas.

in a maximum period of 15 days; (2) to conduct the initial review of prioritized petitions (the petitions to which *per saltum* handling is applied) within in a maximum period of 30 days, i.e., the petition is reviewed and receives a decision on whether it will be referred to the next stage; (3) to process correspondence received within a period of five business days of receipt thereof; (4) by 2015, to ensure that all petitions receive an answer regarding their processing within three months following their receipt. The Commission estimated that, to accomplish this goal, it would be necessary to complete the initial review of 9,750 petitions in the 2011-2015 period, which translates to approximately 16,250 legal reviews. In addition, to ensure that by December 31, 2013 there were no petitions pending review that had been submitted prior to December 31, 2010, the IACHR needed to conduct 10,000 legal reviews between January 1, 2011 and December 31, 2013 (CIDH 2011:6). The annual goals in respect to this task were as follows:

	2011	2012	2013	2014	2015
Reviews	2,933	5,867	5,867	5,867	4,025

In regards to the admissibility stage, the plan laid out two prioritized activities: (1) to develop methodological reforms that enable enhanced productivity in terms of reports and increase this productivity in 2011 and 2012 and (2) to intensely develop the program to eliminate delays during the 2013-2015 period, for which the sections need to quadruple their production capacity. Based on these strategies, the annual production goals for admissibility reports were as follows:

	2011	2012	2013	2014	2015
Admissibility reports	220	220	440	880	704

The estimates for the merits stage were based on the projected increase in admissibility reports. Based on the assumption that a single lawyer can produce up to 12 merits reports each year, the annual goals for this stage were as follows:

	2011	2012	2013	2014	2015
Merits reports	55	165	330	330	330

Finally, the IACHR established goals for promoting friendly settlement reports based on its newly created “Friendly Settlements Group,” and also projected out the preparation of archived case reports. These goals were as follows:

	2011	2012	2013	2014	2015
Friendly settlements or archived cases	22	55	176	176	176

These goals were complemented by projections and goals relating to other matters, such as the holding of hearings and work meetings, compliance with recommendations, litigation of cases before the Court, processing precautionary measures, and other projects.

The current state of the petition system

In order to evaluate the current state of the petition and case system, we have created a database using the Annual Reports published by the IACHR between 2002 and 2013, as well as the Inter-American Court reports for the 2006-2013 period. With this database, we hope to consolidate information regarding two aspects of the system: (1) the flow of cases and petitions and (2) the length of the process.

Regarding the flow of cases, the data compiled was organized in the database according to year and type of decision. Using this information, we calculated the percentage of petitions or cases that received a decision. This calculation was based on the total number of petitions received during this period, and from this number the other percentage rates were calculated. Additionally, based on the description of the procedure carried out in these protection bodies, which can be found in their respective rules of procedure, we created the corresponding figures to demonstrate the flow of individual petitions and cases in recent years.

Then, to measure the average wait time for each of the decisions made throughout the process, we established the date of each public decision on admissibility, inadmissibility, merits, friendly settlements, archived cases, and cases sent to the Court between 2002 and 2013.⁹ We then complemented this database by documenting the decision date on merits, reparations, and costs issued by the Court with respect to petitions received by the Commission between 2002 and 2013.

The data collected was used to calculate the time that transpired between each procedural stage for each individual petition, the average time between each of these stages each year and over the entire period of our investigation (2002-2013). Similarly, the information collected

⁹ In terms of the date the cases were sent to the Court, it was only possible to include information regarding cases that had been subject to a Court judgment, because this information is only known by means of a judgment on the merits.

allowed us to calculate the average length of the entire process, both for each of the years studied and for the entirety of the years covered by the research.

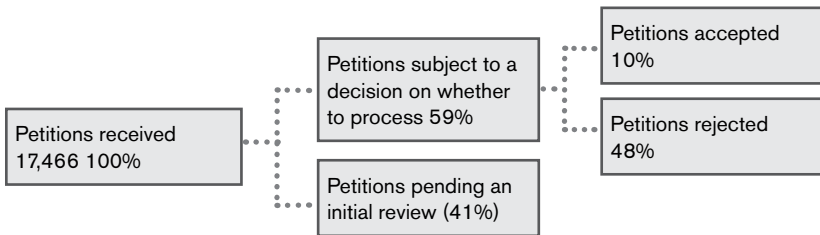
Flow of petitions and cases

This section describes the flow of petitions and cases in the inter-American system from the moment that they are submitted to the IACHR until they receive a decision, whether that is received from the Commission in the form of a merits report or approval of a friendly settlement, or from the Court with the issuance of a judgment on the merits.

To reproduce the flow of petitions and cases, we drew information equally from the Annual Reports of the Commission from 2002 to 2013 and the Annual Reports of the Court from 2006 to 2013. The Annual Reports of the Commission contain information on the number of decisions on admissibility, inadmissibility, merits, friendly settlement, and cases archived each year by the Commission between 2002 and 2013. The Annual Reports of the Court contain information on the number of cases submitted to it by the Commission as well as the number of cases decided by the Court each year.

In the processing of individual cases and petitions, there are different filters in the various stages of the process through which the petitions pass; the number of petitions that make it through these filters is significantly less than the number of petitions that make it to the previous procedural stage.

FIGURE 1



The information compiled through our research shows that between 2002 and 2013 the IACHR received a total of 17,466 petitions. This number represents 100% of the petitions¹⁰ taken into account when

10 This figure excludes the 3,783 complaints received in 2002, which refer to the banking situation in Argentina, referred to as “Corralito,” and the complaints received in 2009 in relation to the coup d’état in Honduras.

looking at the flow of cases, and is the figure used to calculate the percentage represented by each of the other numbers.

According to Figure 1, in the processing of the individual cases and petitions before the inter-American system, the first filter is enacted by the Executive Secretariat. This filter consists of an initial decision whether to process each petition after an initial review of each one. During this process, the IACHR evaluates whether the petitions meet the prerequisites established in the Rules of Procedure, specifically Article 28.

As deduced from Figure 1, of the 17,466 petitions¹¹ received by the Commission, 8,450 were rejected, i.e. the Commission did not process 48% of the petitions received. Of the remaining petitions, only 1,818 (10% of the total number of petitions received) were accepted—a figure that does not even represent one-fifth of the number of decisions to process made in this period (10,294). At this point, it bears noting that only 59% of the total petitions received have been subject to an initial decision to process, which means that annually about 600 petitions are sent to the wait list, taking into account that the Commission receives on average 1,455 petitions and makes on average 858 decisions to process each year.

In its Annual Report from 2013, the IACHR reported that at the end of that year 8,548 petitions awaited initial review. However, due to the lack of public information, it is not possible to determine the year in which the Commission received these petitions. As such, the related percentage contained in Figure 1 (41%) corresponds to the figure obtained by subtracting the number decisions to process made between 2002 and 2013 from the total number of petitions received during this period.

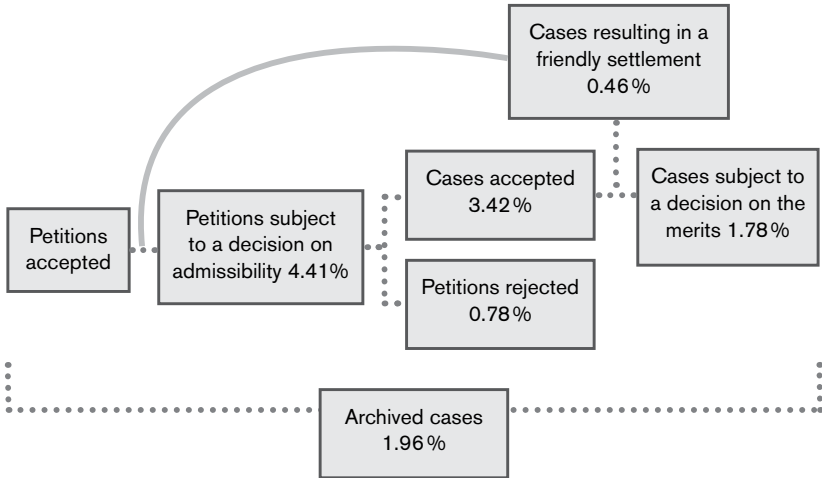
Finally, it is necessary to note that the IACHR Annual Reports published between 2002 and 2010 do not contain information about the number of rejected petitions¹² for these years, and, as a result, it was

11 The Commission's annual reports do not specify, when determining the number of admissibility and merits reports published, the handling of backlogged petitions; for this reason, it is not possible to determine whether the Commission accounts for the backlogged petitions in two different groups, which would affect the figure referring to petitions received.

12 Keeping in mind that, according to the Rules of Procedure of the Commission, in cases in which the IACHR decides not to accept the petitions, after the lapse of a reasonable amount of time, the Commission can decide to archive the cases. It is, therefore, possible to confirm that the figure relating to the petitions that are not accepted by the Commission (8,450) refers to the cases about which the Commission has not made a decision whether or not to archive. For this reason, it is not possible to determine what percentage of each of these petitions may continue to be processed by the Commission, should the necessary errors in the case be corrected.

necessary to obtain this data by subtracting the number of petitions accepted from the number of decisions to process made.

FIGURE 2



220

Nelson Camilo Sánchez, Laura Lyons Cerón

Figure 2 describes what happens to petitions after being accepted, submitted to the State, and following consideration of the position of the parties. Petitions accepted by the Executive Secretariat are subject to a decision on their admissibility. This decision by the Commission constitutes the second filter through which petitions must pass to obtain a resolution.

According to the data on the flow of petitions, the IACHR made 733 decisions of admissibility between 2002 and 2013. This figure represents a scarce 4.2% of petitions received and 40% of the 1,818 petitions accepted. Due to the lack of public information, it is not possible to determine if the difference between the number of petitions accepted (1,818) and the decisions on admissibility (733), which represent 60% of petitions accepted, corresponds to the number of petitions awaiting a decision on admissibility. Nevertheless, it is important to emphasize that the Commission, in its 2013 Annual Report, confirmed that, at the end of that year, 1,753 petitions were being processed, but refrained from specifying the number of petitions pending a decision on admissibility and those that were awaiting a decision on the merits. Without being able to establish the date on which these petitions in processing were received, it is possible that within this group of petitions some had been received prior to 2002, the year in which our research begins.

Of the 1,818 petitions accepted after initial review, 136 were not admitted by the Commission, or 0.78% of the total number of petitions received. Of the remaining petitions, 597 were admitted, which accounts for 3.42% of the total number of petitions received and 32.84% of petitions accepted after initial review; these admitted petitions continued in processing before the Commission.

After being admitted, the Commission then makes a decision on the merits of the petition. The approval or publication of a merits report, together with friendly settlement agreements, is one way of deciding cases processed by the IACHR, which declare the existence or not of a violation of the rights contained in the American Convention on Human Rights (ACHR) and result in recommendations to the States in question.

According to this data, of the 597 cases admitted by the Commission, 312 were subject to a merits report. This figure accounts for 52% of the cases that have been admitted and 1.79% of petitions received. As in the case of decisions on admissibility, it is not possible to know if the difference between the number of admitted petitions and merits reports is due to a backlog in this stage, given that we were only able to find the abovementioned figure that represents the total number of petitions and cases (without specifying the number of petitions being processed in each stage) that were being studied for admissibility and merits at the end of 2013.

It should be noted that the Commission, at any stage of the process, can decide to archive the petition or case. This decision can be made if there is insufficient information to make a decision about the petition, if the petitioner decides to withdraw his petition, or if unjustifiable inactivity by the petitioner occurs that serves as a strong indicator of his disinterest in processing the petition. Although the IACHR can archive a petition if it does not receive some sort of answer from the petitioners upon request following the initial review, the majority of these decisions to archive have been made by the Commission between the decision to process and the evaluation of admissibility of those cases. These decisions are another way in which cases are dismissed from proceedings before the inter-American human rights system, and in this manner, of the 17,466 petitions received, the Commission archived 343 (1.96%) petitions.

However, in accordance with Article 40(1) of its Rules of Procedure, the Commission shall be available to the parties at any time during the review of petitions for the purpose of reaching a friendly settlement in the case. The majority of these agreements are presented after the

Commission has admitted the petitions. Of the 17,466 petitions received, only 80 (0.46%) have been subject to a friendly settlement report.¹³

FIGURE 3

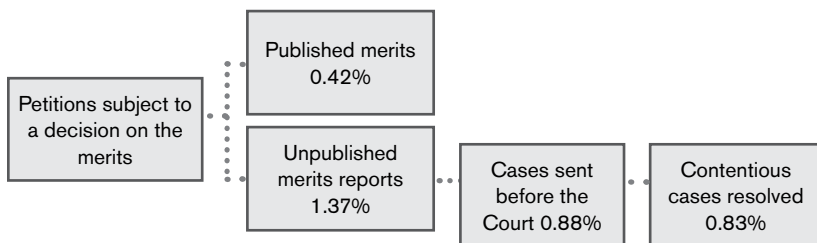


Figure 3 describes the path of petitions after the approval or publication of the merits reports.

At this point, it bears underscoring the difference between approved merits reports (unpublished), and the published merits reports. The merits reports that are not published by the Commission refer to those cases that are later sent to the Inter-American Court of Human Rights, and the published merits reports refer to both the cases of countries that have not recognized the jurisdiction of the Court and the petitions in which the Commission did not find a human rights violation.

The Commission has published 73 merits reports, a figure that accounts for 23% of the total number of merits reports and 0.42% of the total number of petitions. Similarly, 239 merits reports have been approved, which accounts for 76.6% of the total number of merits reports and 1.36% of the reports received by the Commission.

A little more than half the cases that are subject to a decision on the merits approved by the Commission (239) are sent to the Court, i.e. 154 cases were sent, which accounts for 0.88% of the total number of petitions received and 64% of the cases that have a merits report approved. With this, we can confirm that 36% of the remaining cases (85 cases) await a decision.

Finally, only 145 petitions have reached the point of becoming contentious cases settled before the Court, which, despite accounting for 94% of the cases sent to it, represents a mere 0.83% of the total number of petitions received by the Commission.

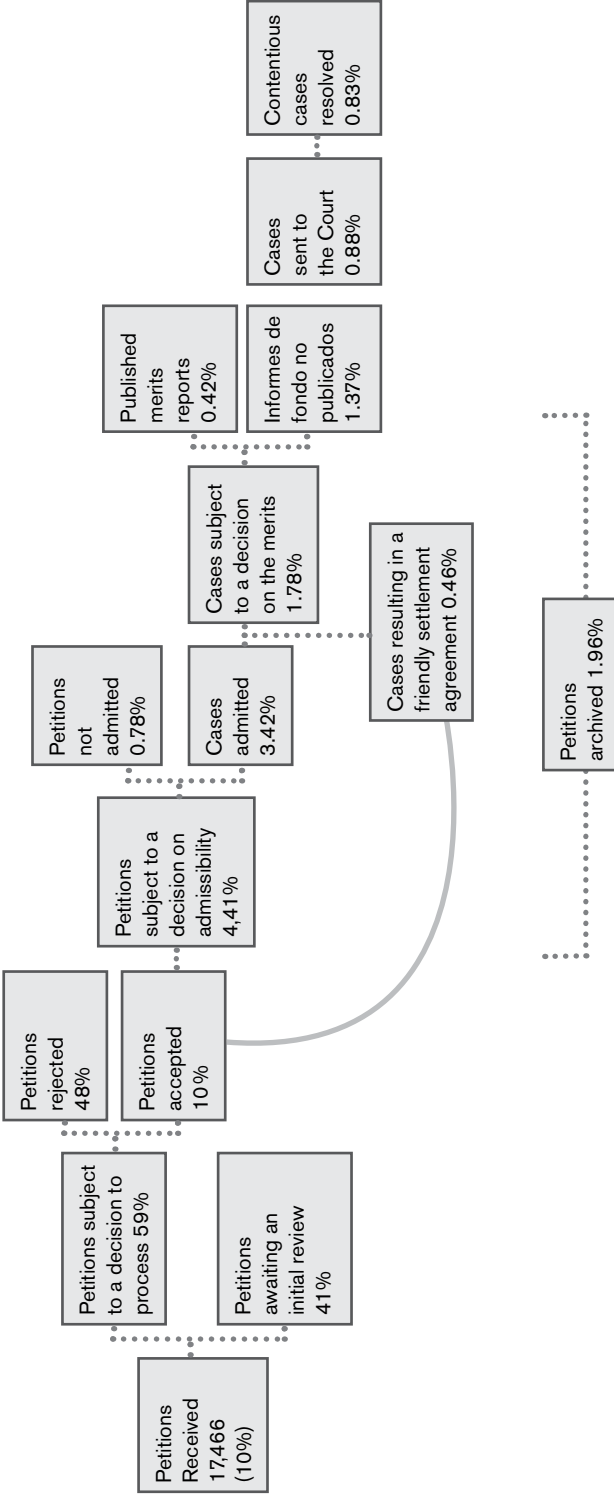
13 In its annual reports, the Commission does not specify if the friendly settlement reports issued approve the agreements reached between the petitioners and the States, or if they evaluate compliance with these agreements.

In conclusion, despite the different possibilities for granting a decision on individual cases and petitions throughout the proceedings in the inter-American system, only 2.24% of petitions (392) managed to obtain a decision based on their merits. Of these petitions, 312 were resolved by means of merits reports and the other 80 were resolved through friendly settlements.¹⁴

Although many of these petitions are not resolved by the human rights protection bodies for reasons unrelated to the shortcomings of these bodies, in many other cases the disparity presented between the number of petitions received by the Commission and the number of petitions or cases resolved, is in fact caused by the high level of procedural backlog currently faced by the IACHR and the Court. Consequently, human rights protection bodies cannot keep up with petition demand, and for that reason many petitions are stalled awaiting a decision in one stage or another of the process.

14 The decisions to archive a case were not included as part of this percentage of petitions settled by the Commission, keeping in mind that these types of decisions do not entail any sort of reparation for the petitioner, nor do they touch upon the merits of the case.

FIGURE 4



Processing time for individual cases and petitions before the inter-American system

This study is based on information about the processing of individual petitions received by the IACHR between 2002 and 2013. Using the previously explained methodology, this section seeks to measure how long it takes to process petitions and cases. This section of our report can be compared with the University of Texas Human Rights Clinic report and the information provided by the IACHR in their Strategic Plan.

Before presenting the results obtained, it is necessary to clarify some points regarding the methodology. First, the information compiled and contained in the database does not allow for exact measurement of the procedural delay that currently exists in the inter-American system, especially in the Commission, bearing in mind that not all decisions made by these bodies are public, and that the information corresponding to the petitions that are currently on the Commission's wait list was not included in the database, since this information is not public.

Similarly, it was also not possible to include in the database the total number of approved and unpublished merits reports, since the Commission does not release this information, and the date of their approval is only disclosed in merits reports corresponding to cases that have been subject to a judgment by the Inter-American Court, which is why we only include in the database information corresponding to cases decided by the Court.

The database does not include cases that have a friendly settlement agreement that has not been certified by the Commission. This is due to the fact that only after their approval are the agreements released, since friendly settlement proceedings are not public.

In some rulings, the date of approval and publication of an admissibility report is not specified and in other cases the date is incomplete, lacking the day or even the month the report was approved. In these cases, June 15 was used as a default date in the manual count and then to obtain the average amount of time passed. These cases have been flagged in our database.

In some cases, the IACHR reports referred to the receipt of various petitions within a certain time range without specifying the number of petitions received or the exact date on which they each were received. In these cases, we opted to use as the date of receipt of these petitions the date corresponding to the average between the two dates that make up the time range given by the Commission, or the date in which the Commission confirmed having received the petitions.

In cases where an addition or supplement was filed in conjunction with a petition at a later date, we opted to use the average date between the two dates.

Finally, the petitions that were backlogged in the admissibility report or in the merits report were considered to be different petitions at the time of the manual count. Keeping these points in mind, we present the data that we obtained, dividing its analysis by procedural stage.

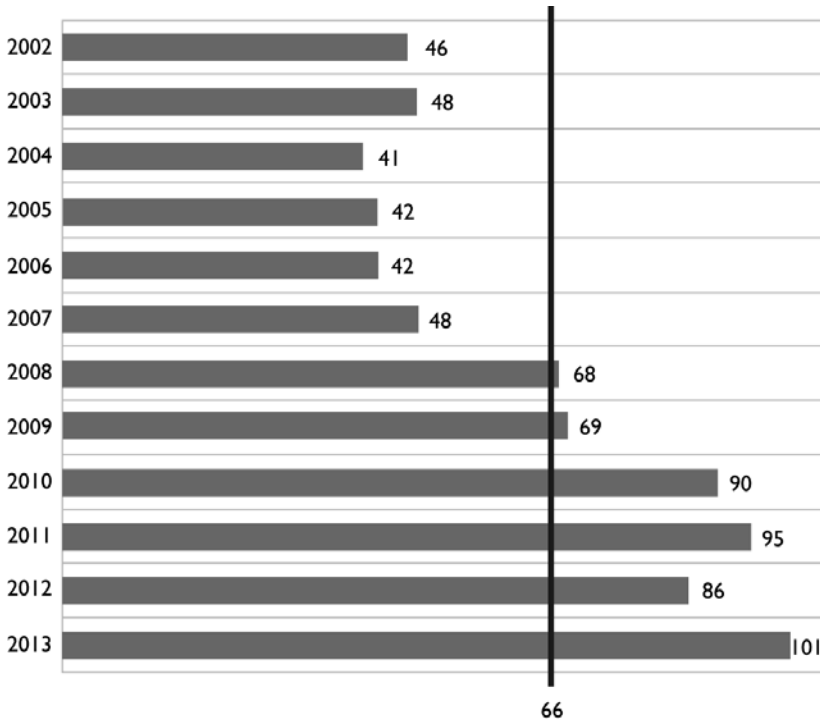
Admissibility

GRAPH 1

Decisions on admissibility

226

Nelson Camilo Sánchez, Laura Lyons Cerón



The average number of months between the receipt of petitions and the report on decisions of admissibility made between 2002 and 2013 was 66 months. This has increased significantly since 2002, when the average wait time for a decision on admissibility was four and a half years fewer than in 2013. That is to say that from 2002 to 2013 the average wait time to obtain a decision on admissibility increased by 116%.

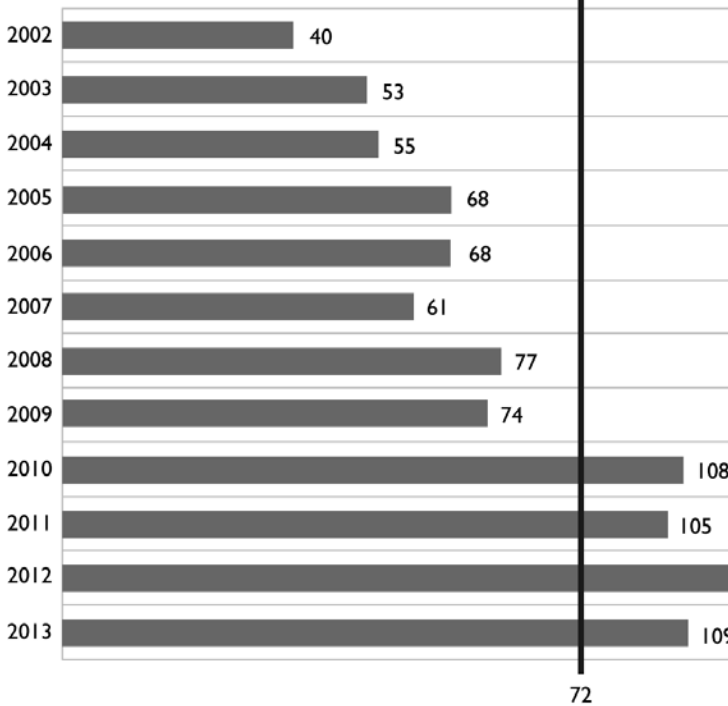
As one can observe, there was a significant increase in the wait time for a decision on admissibility after the reform to the Commission's

Rules of Procedure in 2009. While in 2009 the wait time was 69 months, in 2010 the IACHR took on average 90 months to make a decision on admissibility, meaning an average of 21 months longer to admit cases. Similarly, after the 2009 Rules of Procedure entered into force, the Commission took on average 42 months more to admit petitions in comparison to the average time taken during previous years; between 2002 and 2009 the average wait time was 51 months, while between 2010 and 2013 this time was 93 months.

Inadmissibility

GRAPH 2

Decisions on inadmissibility



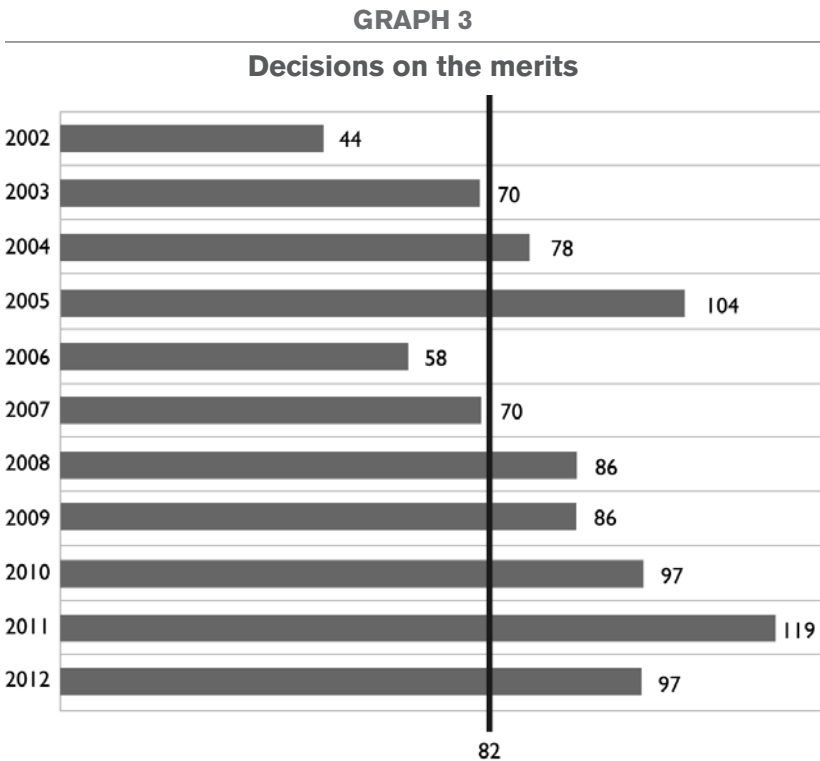
The information in the database shows that the IACHR takes on average a little over a year to determine the inadmissibility of petitions, as compared to determining their admissibility.

The wait time to obtain a decision on inadmissibility, as in the case of admitted petitions, has increased significantly since 2002, when petitioners had to wait almost three times less than in 2013 to obtain a decision of this type from the Commission.

As deduced from Graph 2, the average wait time for a decision on inadmissibility was 79 months between 2002 and 2013. The same phenomenon plagued these decisions as those for admitted petitions. That is to say, after the reform of the Commission's Rules of Procedure in 2009, the wait time to obtain a decision on inadmissibility increased significantly – while the wait time between 2002 and 2009 was 62 months, between 2010 and 2013 the Commission took an average of 111 months to make a decision on inadmissibility, or approximately 48 months more than during the first time range.

Merits

Between 2002 and 2012, the average time between the receipt of petitions and the approval of merits reports was 82 months.¹⁵



¹⁵ Between approval and publication of the merits reports, a substantial amount of time passes due to the fact that the Commission gives the States a time to comply with the merits report before its final adoption, and then another period of time to decide on its publication. In this case, we took note of the date of approval of the preliminary merits reports. Although, due to the lack of public information, it was not possible to include all of the merits reports approved by the Commission, only those that had been published and had been subject to a ruling from the I/A Court HR were included.

As can be deduced from Graph 3, between 2002 and 2005 there was gradual increase in the adjudication time for issues on the merits of cases; this could be due in part to the increased number of petitions received in these years, taking into account that in 2005 the Commission received 351 more petitions than it did in 2002.¹⁶

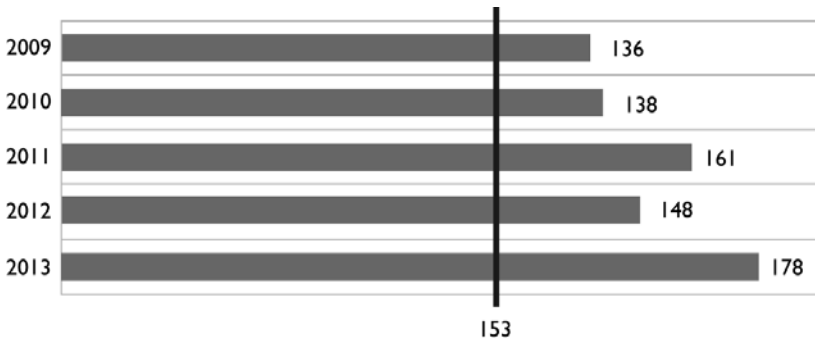
Nevertheless, the gradual increase in the length of time for adjudicating on the merits reached a breaking point in 2006, a year in which the wait time between the receipt of petitions and the approval of merits reports decreased significantly. In that year, the Commission took on average 46 months fewer to approve merits reports with respect to the average time taken the previous year.

Despite this, the time taken to adjudicate matters of merit has continued to grow since 2007, with the exception of 2012, when there was a decrease in the time taken to adjudicate on the merits.

Archiving cases

GRAPH 4

Decisions to archive cases

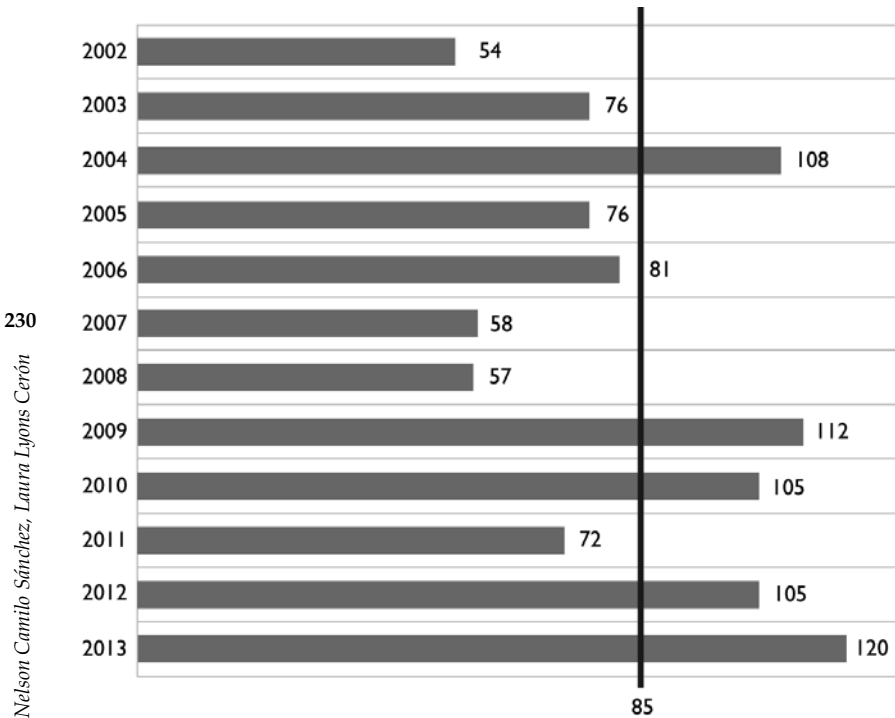


According to Graph 4, between 2009 and 2013, the average number of months between the receipt of a petition and the archiving of the case was 153 months. It is important to note that, even though the IACHR made decisions to archive cases prior to 2009, they only began to publish information regarding these decisions in 2009. Therefore, of the 343 decisions to archive cases made by the Commission between 2002 and 2013, according to the information provided in its annual reports, only 198 decisions corresponding to this timeframe were included in our research.

¹⁶ IACHR Annual Reports.

GRAPH 5

Ratification of friendly settlement agreements



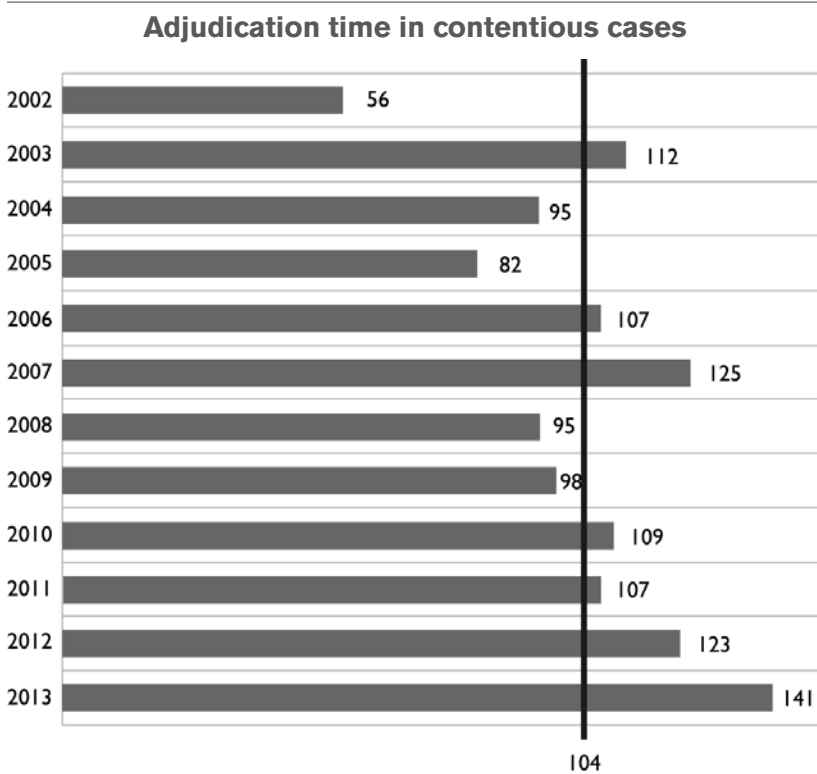
230
Nelson Camilo Sánchez, Laura Lyons Cerón

According to Graph 5, between 2002 and 2013, the average time between the receipt of petitions and the ratification of friendly settlement agreements by the Commission was 85 months. Although in 2013 the wait time for ratification of a friendly settlement exceeded the wait time recorded in 2002 by 66 months, the average time for this type of processing has increased and decreased indiscriminately over the past 11 years, bearing in mind that reaching a friendly settlement depends completely on the willingness of the parties involved.

It should be noted that, on average, it takes less than a year between the signing of a friendly settlement and its ratification by the Commission, which allows us to conclude that the delay that occurs in the ratification of these agreements is largely due to the delay generated by the processes through which the parties involved reach these agreements.

Resolution of contentious cases

GRAPH 6



231

According to the information contained in Graph 6, in the last 11 years, the average total of months that petitioners had to wait to obtain a judgment by the Court on the merits of their case was 104 months. This time has increased gradually in the past few years due to the increased wait time in processing petitions before the Commission. According to the data obtained after the creation of the database, in the last few years the Court has actually decreased the amount of time it takes to adjudicate cases.

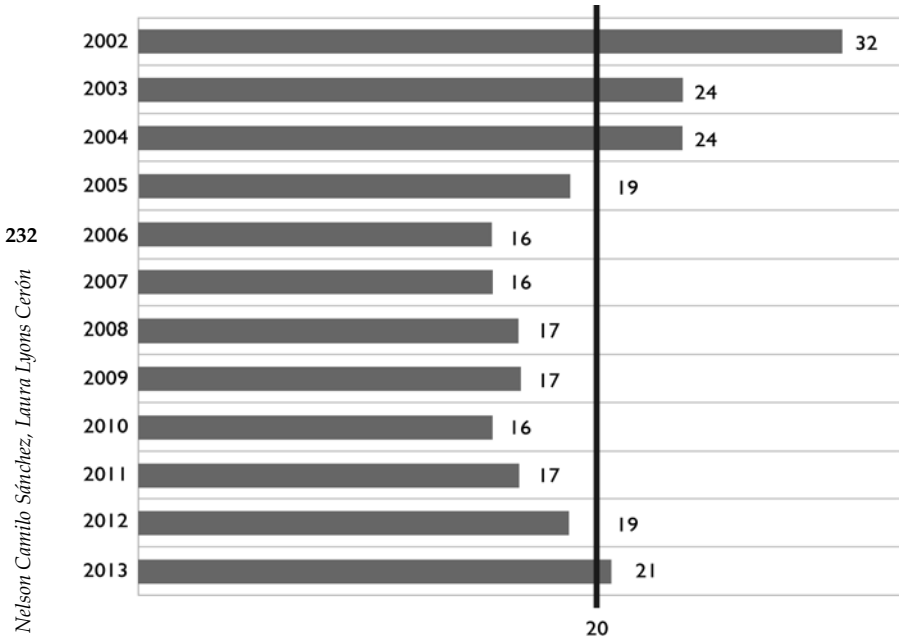
Thus, although the IACHR took much more time between 2008 and 2013 to make various decisions in comparison to the period from 2002 to 2007, the average wait time for a resolution of cases before the Court grew by only 18 months between 2008 and 2013 in comparison to the wait time between 2002 and 2007.

In the past two years, the average time taken by the bodies of the system to issue a decision was significantly higher when compared to almost all previous years, with the exception of 2007; in those years there

was even a slight increase in the amount of time taken by the Court to process cases.

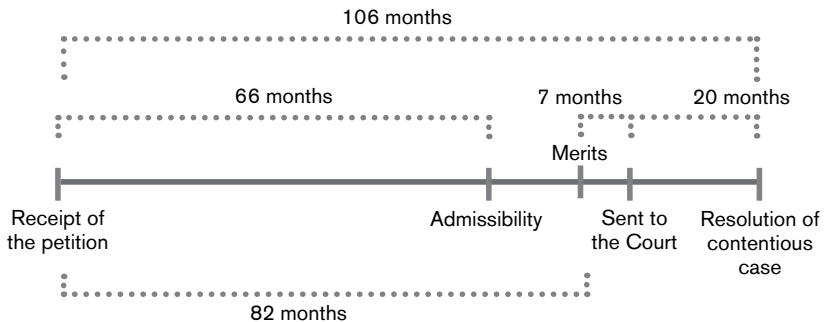
GRAPH 7

Time between when the case is sent to the Court and the handing down of a judgment



232 Nelson Camilo Sánchez, Laura Lyons Cerón

Furthermore, the data contained in Graph 7 indicates that between 2002 and 2013, the Court took an average of 20 months in resolving contentious cases that had been sent to the Court by the Commission. During that same time period, the processing of petitions and cases by the Commission took an average of 86 months.



Lastly, the data contained in Graph 7 demonstrates the reduced time in the Court's processing of cases: between 2008 and 2013, the Court took an average of four months fewer to decide contentious cases, even though in previous years (2002 to 2007) the Court resolved on average 14 fewer cases than between 2008 and 2013.

Total Duration of Procedure

The information indicates that, despite the different reforms to the Commission's Rules of Procedure, the level of procedural delay continues to grow over time. This is due to the increased number of petitions received and the backlog present within the protection bodies. Thus, it is likely that in the next few years the wait time for receiving some sort of decision from the Commission or Court will be greater than ten years.

While the reform to the IACHR's Rules of Procedure approved in March of 2013 follows many of the recommendations made to the Commission about the specification of criteria used to make certain decisions (such as in the case of the criteria to be met by petitions to defer the decision of admissibility to the merits stage), the increase in the length of several stages, for example in the period of time given to States to submit additional observations on the merits, and the lack of changes in the Rules of Procedure designed to combat procedural backlog, in the long term will negatively impact the time taken to adjudicate individual petitions and cases.

Advances in compliance with the Strategic Plan

As previously indicated, in 2011 the IACHR advanced notably in planning its work on the case system, introducing elements of results-based management through the Strategic Plan of 2011-2014. To this end, the starting point for evaluating the progress of the IACHR regarding the case and petitions system is its own goals and projections. Although at the time of the publication of this text, the period comprising the Strategic Plan had not concluded, sufficient information exists to evaluate some of the proposed goals, based on the information provided by the Commission in the 2011 to 2013 annual reports. In this section, we will evaluate these results, distinguishing among each stage of the procedure.

Before starting this task, it bears noting three points. First, it is important to acknowledge that it was very difficult to conduct follow-up

and a complete evaluation of the Strategic Plan, since the Commission has not made all of the information needed public. Despite improvement in the annual reports, there is still no timely, comparable source of information created by the IACHR. In many cases, the Strategic Plan makes use of distinct categories, while the annual reports use others or do not publish information addressing the categories listed in the Strategic Plan. Second, it is worth mentioning that during the execution of this stage of the Plan, the IACHR underwent a strengthening process, something that without a doubt presented a robust, unplanned deviation from its agenda and that surely had an effect on meeting the goals created in 2011. Lastly, it is necessary to clarify that many of the goals were established according to projections based on the IACHR's experience. However, not having met said projections obviously impacted the goals set. For example, on the subject of preliminary review of petitions, based on its experience, the IACHR projected that 10% of the petitions subject to initial review would be considered fit for processing. However, between 2011 and 2013, this projection was surpassed in practice, and of the 2,642 petitions submitted for an initial decision, 522 were accepted, that is to say 20% of the petitions submitted.

Preliminary review

The principal goal of the IACHR regarding the stage of preliminary review of petitions was to cut the time taken to receive an answer regarding the processing of petitions, to the point that the maximum wait time would be three months. With this in mind, the IACHR created the goal of completing 16,250 legal reviews for the period and 10,000 between January 2011 and December 31, 2013.

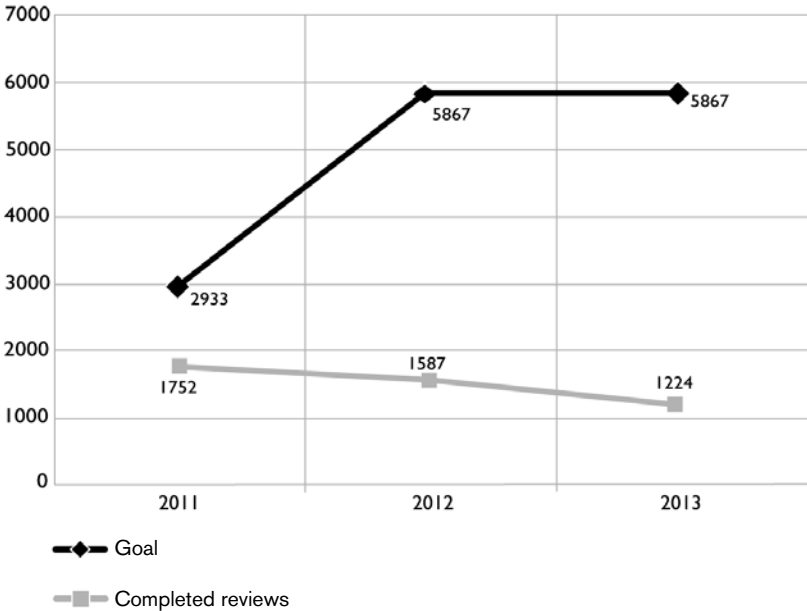
The degree to which this goal is met is practically impossible to measure since the IACHR has not been consistent in presenting the information necessary to monitor its progress. A complete evaluation could be made knowing the number of petitions reviewed and the period of time in which the review was conducted (to hold them to the three-month goal). However, neither of these facts has been published in the annual reports.

With regard to the first goal, for the purposes of this evaluation, we contacted staff members of the Executive Secretariat, who referred us to the unconsolidated data, which indicated that between 2011 and 2013 the Commission had completed 4,463 legal reviews. This number corresponds to less than half of the goal set. However, in the year-by-year breakdown presented in the same document, the goal was even

more ambitious, with the sum of the first three years projected to be 14,667 reviews. Considering this goal, the level of compliance is even poorer: the overall fulfillment of the goal would be 30% of what was projected. Graph 8 shows the year-by-year fulfillment.

GRAPH 8

Number of legal reviews planned as a goal and the number of decisions to process actually made between 2011 and 2013



As noted, the goal of the Strategic Plan is contradictory; the total estimated number of completed legal reviews is 16,250, but when the year-by-year goals are added up, the total goal should be 24,559 reviews. Under the former situation, between 2014 and 2015, in order to meet the goal, the Registry Group would have to review 13,626 petitions. For that to occur, they would need to complete 6,813 legal reviews each year, or the productivity would have to increase by more than 500% with respect to over 2013. Nonetheless, Graph 8 shows us that instead of increasing, productivity in this stage has slightly decreased over the past three years.

However, the legal reviews do not necessarily conclude with a recommendation to accept or reject a petition. In many cases, after concluding the review of the petition, there is insufficient information and information is requested from petitioner. Therefore, the relevant

data needed to measure the progress of a petition is the initial decision or the rejection of the petition.

The data presented in the annual reports indicate that between 2011 and 2013, the Commission made 2,624 decisions to process (this includes 522 decisions to accept and 2,102 to reject). As a result of the increase in the number of petitions received and the less-than-expected review productivity, the number of pending petitions has grown from 6,134 in 2011 to 8,548 in 2013.

Admissibility

Of all the petitions that made it through the first filter of processing, the IACHR estimated in its Strategic Plan that 80% of these petitions would require an admissibility report, 10% would enter the friendly settlement process, and the Commission would archive the remaining 10%. Despite the lack of correlation between cases,¹⁷ in the period researched, 522 petitions were accepted for processing, while during the same period the IACHR adopted 185 admissibility or inadmissibility reports (that would correspond to 35% of open petitions), 22 friendly settlement reports (4% of petitions opened for processing), and 134 archived cases (accounting for 26% of petitions opened for processing).

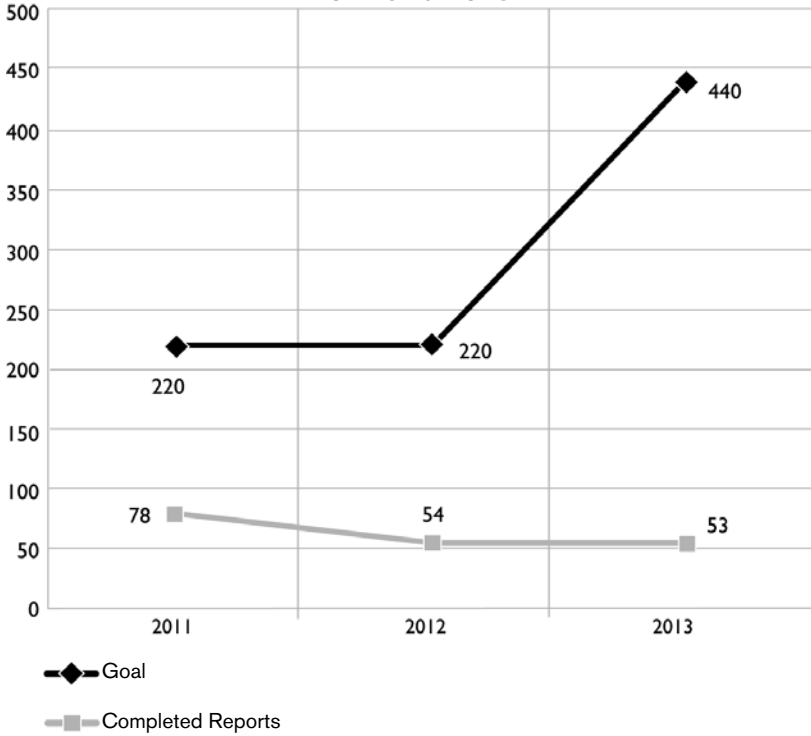
Specifically, the results are very poor for the goals regarding admissibility reports. For 2011—the first year of the Plan—the goal was to process 220 admissibility reports. This goal was not met, with only 78 reports being processed, or 35% of the goal. In 2012, the IACHR established a similar goal and completed only 54 reports, or 24% of the planned goal. For the third year, the situation was even more dramatic: the Strategic Plan doubled the goal to 440 reports per year and IACHR production decreased to 53 admissibility reports, or 12% of the goal (Graph 9).

In the future, the issue of reaching these goals will become even more complicated as the Strategic Plan projected that in 2014 the Commission would issue 880 decisions on admissibility and 704 in 2015. As it is, the total number of reports the Commission aimed to complete by 2015 was 2,646, of which they have completed 185. This means that the Commission has achieved only 21% of the goal laid out through December 2013 and 7.5% of the goal for the whole period, with only two years left before the Plan expires. Even if the Commission maintains the same speed of

17 There is no correlation, given that the petitions that have received a decision are not necessarily those that were opened for processing during this time period, but rather they correspond to petitions that were already awaiting a decision by the Commission.

GRAPH 9

Number of admissibility decisions set as a goal and the number of reports actually completed between 2011 and 2013



237

The Elephant in the Room: The Procedural Delay in the Individual Petitions System of the IAHRS

producing reports as in 2013 (53), it would take 43 years to complete the goal laid out through 2015. If the Commission wanted to achieve the goal for 2014, where each lawyer was to complete 44 admissibility reports each year, the Commission could meet this goal only if it assigns 20 lawyers to work strictly on admissibility report.¹⁸ This hypothetical situation, however, only takes into consideration the preparation of the draft reports by the Executive Secretariat; it does not take into account the capacity of the commissioners to discuss and decide cases. The seven commissioners have never come close to deciding a number of cases even remotely close to the figures projected here in any given year.

18 By the end of 2013, according to the information contained in the Annual Report, the IACHR had 16 staff in each of the regional sections (5 in total), that were responsible for the petitions in the stages of admissibility, evaluation of the merits, and compliance with the recommendations, and the human rights system in the specific area.

Merits

The principal goal proposed by the Commission in the Strategic Plan is to achieve an average processing time of 12 months between declaring admissibility and issuing a merits report. This goal was not met in 2011 or 2012,¹⁹ since the Commission took on average 40 months (28 months more than planned in the Strategic Plan) between the decision on admissibility and issuing a merits report during those years.

The failure to achieve this goal is due to the scarce production of merits reports when compared to the projections set forth in the Strategic Plan. For 2011, the goal was to produce 55 reports, of which only 30 were completed, or 54% of the goal. For 2012, this goal increased substantially to 165 merits reports. However, the Commission only completed 10%, or 16 reports, of the initial goal. The trend worsened in 2013 when the goal was even greater (330 merits reports) and the production was proportionally less, with only 19 completed reports (Graph 10).

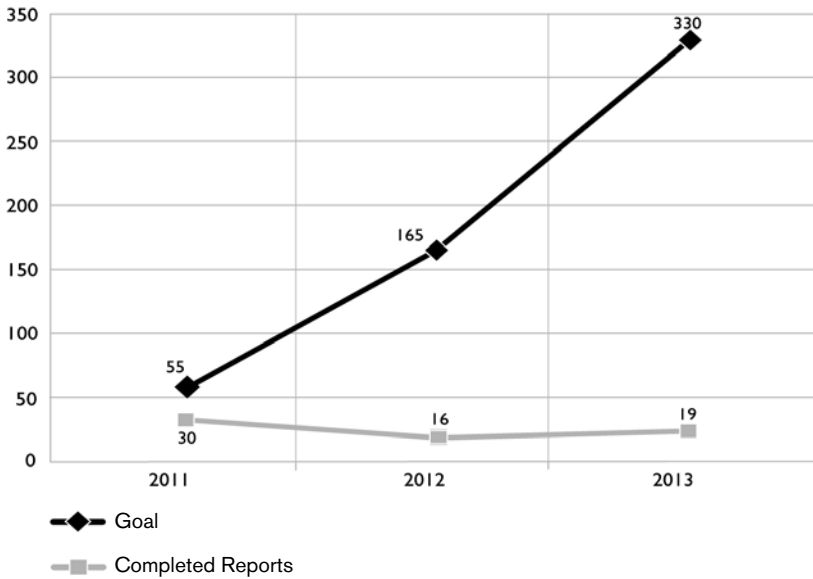
The productivity goal for 2014 and 2015 is similar to 2013: 330 merits reports per year. As of December 31, 2013, the IACHR had produced 65 of the 550 planned reports, which equates to 11.8% of the goal and 5.3% of the goal for the four-year period (1,210 reports).

According to what was outlined in the Strategic Plan, which estimates that a lawyer who works exclusively on the task can complete 12 merits reports per year, just to meet the following year's goal, the Commission should hire 27 full-time attorneys and one part-time attorney assigned to the task. This production plan does not cover the deficit that already exists from the 2011-2013 period, nor does it cover the capacity of the IACHR to discuss, debate, and adopt the drafted reports submitted by the Executive Secretariat.

19 Unlike other decisions made by the IACHR, at the time this document was published, there were no preliminary merits reports in 2013, since these have still not been published.

GRAPH 10

Number of merits reports set as a goal and the number of reports actually completed between 2011 and 2013



239

The Elephant in the Room: The Procedural Delay in the Individual Petitions System of the IAHRS

Conclusions and recommendations

Procedural delay is a constant and growing problem. All measurements and evaluations made during the past decade show this. The results of the research presented in this chapter lead to two strong conclusions. The procedural delay of the case and petition system has grown over the past decade, despite measures adopted to control and reduce this delay. Today, the situation is as problematic as it was in 2011 when the last statistical analysis was published and when the IACHR presented its strategy to combat the problems at hand.

Thus, the research conducted by the University of Texas Human Rights Clinic in 2011 estimated that, for that time period, it took on average at least four years to obtain a decision on admissibility and two and a half years to receive a decision on the merits. For the same time period, the IACHR estimated that the average wait time for a petition in the initial stage and the admissibility stage was 70 months, and when added to the estimated wait time for a decision on the merits, the total wait time equated to 86 months. The facts stemming from this research,

with a cutoff date of December 2013, indicate that the average wait time for a petition to receive a decision from the Inter-American Court of Human Rights is 106 months. Of these 106 months, at least 82 correspond to processing by the Commission and the other 24 account for the wait time of the Court procedure. In other words, a victim's average wait time to receive a resolution for a petition is six years and 8 months in the IACHR and an additional two years if the case is submitted to the Court (this is without taking into account the time spent waiting for the decision to be enforced).

These facts seem to demonstrate that, although there have not been substantive advances, at least the situation has not worsened over the past two years. However, this research presents data that makes us rethink this assertion. In recent years, the number of petitions that enter the system has increased, while the production, both of admissibility and merits reports, reached a low in 2012 and 2013. At the same time, during these same years the number of petitions awaiting initial review increased to more than 2,400.

Second, the results of this research demonstrate that the expectations of the Strategic Plan of 2011-2015 were incredibly exaggerated. Even in the areas where the Commission performed at its best, no more than 30% of any goal was met. Thus, despite the discrepancies in the presentation of information in the Strategic Plan, the comparison between the goals and the results published in the annual reports show that, in the initial stage of processing, only 30% of the goal was met and the overall goal of reviewing all petitions received before 2010 by 2013 was not met.²⁰ Regarding the matter of admissibility, the results show that only 21% of the goal through 2013 was met and that only 11% of the goal regarding the production of merits reports was met.

Reforms to case management have produced important but insufficient advances. A procedural case system of the magnitude of that of the inter-American human rights system requires a model of administration and management, such as those that are being put into practice in the judicial systems of the region. While in recent years the IACHR has taken steps to incorporate management techniques that maximize the quantity of cases processed and the highest levels of accuracy and completeness in decision-making, there is still a long way to go before it can be said that a true case management model exists within the system.

20 According to the information provided by the IACHR, at the time this chapter was written (September 2014), the Registry Group was evaluating petitions submitted in 2009.

The creation of the goals in the 2011-2015 Strategic Plan is the most tangible example of this. As emphasized in the University of Texas Legal Clinic report, the adoption of a model for measuring and managing results in the IACHR through the Strategic Plan was a positive step. However, the goals created had enormous shortcomings. First, the goals were extremely ambitious and unrealistic in terms of the specific conditions of the IACHR, and of its capabilities, resources, and tools to meet them. The quantitative jumps in production were based on unrealistic projections of an increase in additional resources for compliance, which doomed the Commission to fail. Second, the goals were not checked or created by the personnel responsible for achieving what was being measured and projected. There was no internal mechanism that allowed for discussion of the goals, feedback on the ability to meet them, or the ability to engage the people responsible for their fulfillment.²¹

The experiences of other modern judicial management models could enormously benefit the process of restructuring the Executive Secretariat and the role that the IACHR decides to take with respect to the case system. The IACHR should start a meaningful dialogue with the judiciary administrations²² of the region, especially those that are distinguished for their progress in management matters. Moreover, this dialogue should be geared towards strategies for creating objective tools for measuring results and production of the public information needed to for compliance monitoring.

A starting point for this debate, which comes from the management approach established for judicial systems, involves differentiating between the levels of government, management, and operation for processing specific cases. Professionals with the appropriate profiles should manage each of these levels (for example, lawyers do not have the ideal profile for management). What experience has shown is that when lawyers have been privileged with the ability to make strategic and managerial decisions without first consulting other professions that are knowledgeable on management, the results have been poor. For this reason, it would be worthwhile to consider whether the commissioners

21 An additional factor that could have substantively influenced this great disparity between what was projected and what was achieved, but which is more difficult to measure, is the impact of the strengthening process that required the Commission to focus on other topics. Without a doubt, this impacted the Commission's production during the timeframe in question. However, even without this process, the initial errors in the design of the Strategic Plan probably would have caused similar results.

22 Judicial administrators are not necessarily the high courts. What is proposed is a discussion of management of the system and not a dialogue on jurisprudence or law.

and the Secretary, who are elected based on their experience in human rights, are the best fit to autonomously make decisions regarding management of the IACHR.

Access to important information needed to monitor progress is still weak and incomplete. In the past, studies that have tried to monitor the progress of the petition and case system have, to a greater or lesser extent, encountered limitations on access to the information identified in the course of this research. The limited public information published by the IACHR is inconsistent and generally not useful for carrying out an adequate evaluation of the system. For example, as regards processing, the IACHR uses various phrases, such as accepted petitions, reviewed petitions, and decisions to process, but none is clearly defined. The goals are based on one set of terminology, while the available information in the annual reports corresponds to another.

As things are, with the lack of access to this information, all evaluations of the case system (including the one presented in this chapter) are incomplete. In other words, there are many evaluations, but not one is truly reliable. In order to advance towards completion of this task, it is necessary for the IACHR to permit public access to relevant information. A first step in identifying this information would be to start a dialogue with researchers to determine what type of information is useful and necessary, and thus identify if said information is produced but not published or if it is still necessary to produce it and what it would take to do so.

Reforms to the Rules of Procedure have not been effective in reducing the problem. One of the most debated issues when discussing how to confront the backlog of the IACHR's case and petition system (or any of its processes) is to carry out another reform of the Rules of Procedure. One of the main consequences of the strengthening process was the partial modification of the IACHR Rules of Procedure. This reform included an extension in the time allowed for States to respond during the processing of petitions and cases. However, the evidence indicates that there is no positive impact or direct correlation between reforms to the Rules of Procedure and cutting down on the case backlog. On the contrary, as seen in other research, after the adoption of the 2011 reform, the processing time increased exponentially after dividing the admissibility and merits stages.

It is true that reforming the Rules of Procedures can create situations that impact the processing of cases and even the role of bodies in the

performance of their duties.²³ However, it is evident that the changes to the rules are not enough to fix a problem as significant as the IACHR's procedural delay. The notion of using reform to the rules is worn out and will only be helpful in refining more profound procedural changes that originate elsewhere.

The case system requires substantive reforms that cannot be delayed. The most obvious conclusion is that the measures taken so far to reverse the problem have not made a significant contribution to reducing it. The problem continues to grow, and the situation is quite dramatic. It is necessary to make sustainable changes to the case system, which should include meaningful reforms to the protection bodies (the IACHR and the Inter-American Court of Human Rights).

Despite the fact that for years many voices have defended these proposals, politically they have had many detractors. Those who defend the system have been fearful of implementing radical changes to the individual petitions system for multiple good reasons. On one hand, there is unease about changing the system because of the difficulty in finding a model that guarantees an adequate balance between the efficient processing of cases, but that also serves the general purposes of the system, including the recognition of victims. Not all of the models that have been examined have been attractive—like the current model adopted by the European system—on the grounds that, in order to avoid backlog, access to the system for victims has been limited.

On the other hand, planning systematic reforms in an adverse political context can cause more delay than progress. The strengthening process showed that there are diverse interests that bet on a weakening of the system and that have a considerable power in regional decision making. In this context, the reforms should remain in settings where the outcomes of these discussions can be controlled.

These discussions should be given great consideration. However, given the current state of the system, the worst decision appears to be leaving things as they are. Left as is, the promise of the system to be a victim's last recourse for justice is that much further away, and serves the victims and the commitment to subsidiarity in the system less and less.

23 The reform to the Court's Rules of Procedures, introduced in 2009, is an example of this; its intention is to give a distinct role to the IACHR within procedures before the Court. With this modification to its role, the Commission could readjust its functions and the distribution of its resources to give lesser weight to its job of intervening before the Court. Nevertheless, the IACHR still does not seem to have adjusted to this new role.

Victims should not have to wait for years to obtain decisions on their situations. Moreover, the redundancy in procedures and changes in criteria from one body to the next cause victims' petitions to be dismissed based on conflicting interpretations. The process that most exemplifies this situation is the different admissibility criteria applied by the Commission and in the Court (one of the multiple cases that demonstrates unnecessarily redundant processes). An example of this situation is the current debate between judges of the Court in cases like *Díaz López v. Venezuela*, *Liakat Ali Alibux v. Suriname*, and *Brewer Carías v. Venezuela* about the significance of the requirement to exhaust all domestic remedies. Unless the inter-American human rights system functions as a true system, any proposed solution will not have a real impact. The case and petition system should be seen as a whole that involves all actors in the system, starting with the main human rights bodies of the Organization of American States (OAS).

Keeping in mind the significance of the problem, what is at stake when reforms are proposed, and what little information is available to make concrete proposals, one way to advance this task is promoting an informed discussion based on key aspects for creating alternative solutions. Today, proceeding with one specific proposal does not seem to be the most prudent option for two reasons. First, because no one seems to know what is functioning poorly. Second, because of the degree of political polarization that any proposal would cause at this time.

Because of this, the first step should be a call for an in-depth discussion based on concrete information. First, the recommendations for managing the processing of cases should be specific when the characteristics of the processes are known. Only in this manner is it possible to analyze the type of process, its nature and problems, and any possible solutions. Second, in order to make adequate recommendations regarding management, identify problems, and come up with concrete solutions, it is necessary to collect specific information in conjunction with those who carries out the processes.

A starting point for this dialogue should be an evaluation of why the goals established in the Strategic Plan were not met. For example, issues such as: is the failure to achieve goals due exclusively to the lack of additional funding? Were the goals created with the participation of expert management professionals or did lawyers create them? Did the process to create the goals involve those responsible for the fulfillment of said goals?

Similarly, this discussion should involve questions about the type of de-backlogging strategies that the IACHR could explore. For example,

for years, various countries in the region have made plans regarding eliminating judicial bottlenecks that consist exclusively of putting in place more judges and courts, and this has not gotten rid of the backlog. There are many reasons for this (increase in the responsibility of the judicial branch due to the passing of laws in Congress; lack of understanding about the backlog itself, and specifically, that it varies between jurisdictions, matters, and the stages of a specific process, among other reasons). Because of this, a point to consider is whether the solution is simply hiring more lawyers or if the increase in personnel should be accompanied by other strategies.

A second point of discussion could focus on the evaluation and analysis of recommendations to the IACHR that have been made in previous research projects. For example, the cited report from the University of Texas Clinic had a series of concrete proposals, but how well they were received by the IACHR is unknown. Were they considered? Were they implemented? What led them to be dismissed?

A third topic of analysis should focus on differentiated (but connected) management models regarding administrative processing and decisions based on the merits of a case. This involves identifying the actions involved in different categories and then redesigning processes once it is clear which actions fall into which category.

Finally, although this list is not exhaustive, a starting point could be to specifically analyze the characteristics of the cases that are processed in the system to understand which are the best management options. Thus, the discussion could analyze the relevance and feasibility of various tools that have been debated for different models for processing cases in judicial systems and prosecutor's offices, such as the following: (1) processing of cases as a case portfolio (in order, deciding one case at a time); (2) the possibility of creating criteria for prioritizing and grouping cases; (3) better strategies for dividing work up internally for processing cases; (4) leveraging economies of scale (for example, grouping the data collection on each of the States to sort through various cases at the same time); (5) specializing in different knowledge areas for cases from start to finish; (6) possibility of incorporating criteria like the "theory of the case" used in criminal matters to serve as a guide to processing a case; (7) separation between administrative functions (in the processing of cases) and analysis of the merits in the processing of cases; (8) oversight system regarding matters of administration and merits (Is it too centralized? Is the responsibility diluted?); (9) Is there a culture that fosters processing the cases? How do we encourage this?; (10) Which processing features used by the Commission should be taken into account in the case

management model?; and (11) How can we improve transparency and accountability for case processing?

The problems of the case and petition system are latent and, regrettably, there are no silver bullets to resolve them. With any type of reform, there will be diverse political and technical challenges. However, these difficulties cannot continue delaying urgently needed intervention. Technical dialogue can help in advancing this task. To deny that the problem exists or simply lament its presence is not a sustainable option.

References

Abramovich, V. 2009. "De las violaciones masivas a los patrones estructurales: nuevos enfoques y clásicas tensiones en el sistema interamericano de derechos humanos". *Revista Sur* 6 (11): 7-39.

Cavallaro, J. L. and S. Brewer. 2008. "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court." *The American Journal of International Law* 102 (09-31): 768-827. http://www.eschr-net.org/usr_doc/Cavallero_and_Brewer_Reevaluating_HR_Litigation_in_21st_Century_in_the_IACHR.pdf

Centro de Derechos Humanos. 2012. *Acceso a la justicia en el sistema interamericano de derechos humanos: transparencia y representación legal*. Santiago de Chile: Facultad de Derecho. Universidad de Chile. <http://www.cdh.uchile.cl/media/publicaciones/pdf/92.pdf>

Center for Justice and International Law (CEJIL). 2008. *Aportes para la reflexión sobre posibles reformas al funcionamiento de la Comisión Interamericana y la Corte Interamericana de Derechos Humanos*. https://www.cejil.org/sites/default/files/legacy_files/Documento_5_sp_0.pdf

Dulitzky, A. 2010. "Las peticiones individuales ante la Comisión Interamericana de Derechos Humanos o el Amparo Interamericano en Contexto" (pp. 667-715). In *Tratado de Derecho Procesal Constitucional argentino, comparado y transnacional* (Vol. III). Pablo Luis Manili, Director. La Ley. <http://www.utexas.edu/law/faculty/adulitzky/52-Las-Peticiones-Ante-La-Comision-Interamerican.pdf>

Filippini, L. G. 2008. "El fortalecimiento de la Corte Interamericana de Derechos Humanos. Documento de discusión - ADC." Buenos Aires: Asociación por los Derechos Civiles. Buenos Aires. <http://www.adc-sidh.org.ar/images/files/elfortalecimientodelacorteinteramericanadederechoshumanos1.pdf>

Goldman, R. 2009. "History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights." *Human Rights Quarterly* 31: 856. http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1027&context=facsch_lawrev

Human Rights Clinic. 2011. *Maximizing Justice, Minimizing Delay. Streamlining Procedures of the Inter-American Commission on Human Rights*. The University of Texas School of Law. http://www.utexas.edu/law/clinics/humanrights/work/Maximizing_Justice_Minimizing_Delay_at_the_IACHR.pdf

Inter-American Commission on Human Rights. 2011. *Strategic Plan 2011-2015: Part I: 50 Years Defending Human Rights: Results and Challenges*. <https://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf>

Inter-American Commission on Human Rights (IACHR). 2011. *Strategic Plan 2011-2015: Part II: Programs and Action Plans*. <http://scm.oas.org/pdfs/2011/CP26757E-3.pdf>

Krsticevic, V. 2007. *Reflexiones sobre la ejecución de sentencias de las decisiones del sistema interamericano de protección de derechos humanos. Implementación de las decisiones del Sistema Interamericano de Derechos Humanos. Jurisprudencia, Normativa y Experiencias Nacionales*. Washington D.C: CEJIL.

Rodríguez, C. and C. Kauffman. 2014. *Guía para implementar decisiones sobre derechos sociales. Estrategias para jueces, funcionarios y activistas*. Bogotá: Dejusticia.

Sánchez, N. C. 2009. "Acceso a la justicia en el ámbito interamericano. Análisis crítico y perspectivas futuras." *Revista IIDH/Inter-American Institute of Human Rights* 50: 105-130. http://www.iidh.ed.cr/BibliotecaWeb/Varios/Documentos/BD_1772120041/REVISTA-IIDH-50%20baja.pdf

Chapter 7

From Orders to Practice: Analysis and Strategies for Implementing Decisions of the Inter-American Human Rights System

César Rodríguez Garavito

Celeste Kauffman

Center for Studies of Law, Justice, and Society
(Dejusticia)

While the positive impact of the inter-American human rights system on the development and protection of human rights in the region is undeniable,¹ it is equally evident that the implementation of reparation and non-repetition measures ordered by the Commission and the Court is scant. This effectiveness gap has grown as the system has devoted itself to tackling generalized rights violations that stem from structural injustices of an economic, social, or cultural nature.

This chapter attempts to synthesize research regarding the implementation of decisions of the Inter-American system and, based on this diagnosis of State implementation, provide strategies for its strengthening. In addition to a brief description of different theories, practices, and challenges regarding implementation, this chapter contains an empirical analysis of cases involving structural violations of rights, especially economic, social, and cultural rights (ESCR).

To this end, we have divided the chapter into six sections. The first provides a brief overview of the inter-American system. The second section focuses on the problems and complexities of Court and Commission decisions.² The third addresses reparations ordered in

1 For information regarding the system's impact, see González (2009: 103-126).

2 In this section in particular, as well as in the rest of the document, it is important to highlight that in the Inter-American system, and in this document, compliance of orders given to the State is understood in a strict sense. Thus, the State may comply with the orders of the Court, but the victim may consider that he has not been compensated in an appropriate manner or that the State has not adequately addressed the violation of rights or harm caused as a result of the violation. In this sense, implementation or compliance does not necessary mean the violation of rights has been adequately addressed or resolved.

cases of ESCR violations and their implementation. The fourth section outlines the main implementation procedures and mechanisms of the inter-American system. The fifth discusses the importance and array of domestic implementation mechanisms, and the final section closes with strategies for improvement for the Court and Commission, States, and civil society.

Mechanisms of oversight and implementation in the Inter-American system

The Inter-American Commission on Human Rights

The Commission has the authority to review individual petitions against any of the 35 member States of the OAS. The procedure the American Convention on Human Rights (the American Convention) and the Commission's Rules of Procedure establish for individual cases and petitions has two main stages: an admissibility stage and a merits stage. At any point while the proceeding is before the Commission, and at the request of the parties, the Commission can assist them in reaching a friendly settlement. Should such a settlement fail, the Commission will continue to process the case or the petition. If the Commission finds there have been violations, it will prepare a preliminary report explaining the violations and enumerating recommendations that the State should implement to repair or compensate the harm inflicted by the violations. Subsequently, the State is given three months to comply with the Commission's recommendations. If the State fails to comply, the Commission has two options: (1) issue a final, public decision or (2) submit the case to the Court, provided that the State involved has accepted the Court's adjudicatory jurisdiction (Baluarte, 2012: 270).

Beyond its ability to refer cases to the Court, the Convention does not expressly state the Commission's power to monitor compliance with its recommendations. The Commission carries out its functions based a theory of implied power, as a necessary condition for the Commission to adequately fulfill its duties. The Commission acted under this implied monitoring power when it adopted the 2001 reform of its Rules of Procedure. The most relevant reform to its authority to monitor implementation is found in article 48 of those Rules, which provides that:

“Once the Commission has published a report on a friendly settlement or on the merits in which it has made recommendations, it may adopt the follow-up measures it deems appropriate, such as

requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations.”

In addition to the officially recognized oversight mechanisms, the Commission holds compliance meetings, although this power is not expressly provided for in its foundational documents or its Rules of Procedure. Nevertheless, States have no obligation to comply with these follow-up measures, and the Commission has rarely made use of them. The Commission also includes data about the implementation of its recommendations in its annual reports.³ Publishing reports aimed at shaming States that have failed to comply with the Commission’s recommendations is one of the basic tools that the Commission uses to induce compliance with its recommendations, but to date it has not been terribly effective. Additionally, our interviews with NGO representatives that use the system show that they are skeptical about the usefulness of these reports, given that the data on implementation they contain are generally copies of reports from previous years, with few changes to include new cases.

253

From Orders to Practice: Analysis and Strategies for Implementing Decisions of the IAHRS

The Inter-American Court of Human Rights

The American Convention and the OAS Charter have vague provisions regarding how the Court’s judgments should be enforced. The only oversight mechanism that the Convention and the Court’s Statute include is the Court’s submission of annual reports to the OAS General Assembly. Despite the lack of clearly established implementation procedures, the Court has used various articles of the American Convention, its Statute, and its Rules of Procedure to develop its own dynamic approach to compliance monitoring. (Shaver, 2010: 664). Monitoring compliance with its judgments has become one of the most demanding activities of the Court, as the number of active cases increases significantly each year, and the Court periodically monitors in-depth each measure ordered (Antônio Cançado Trindade, in Ventura, 2006: para. 23).

When the Court issued its first reparations orders in 1989, it outlined a framework for monitoring the implementation of decisions, stating that the Court would supervise the orders and close the case only when the State had fully complied with its orders. The Court issued its first compliance orders in 2001 in two cases against Peru: *Barrio Altos v. Peru* (para. 50) and *Durand and Uguarte v. Peru* (para. 45). The procedures

3 See, for example, IACHR, *2013 Annual Report*, Chapter II, OEA/Ser.L/V/II. Doc.50 Corr.1., December 31, 2013.

became standard practice for all the Court's decisions. By 2002, the Court was including compliance orders for each aspect of its reparations orders. These orders helped clarify the Court's expectations, as well as provided a basis for the Court's annual reports to the General Assembly (Baluarte, 2012: 277).

In 2005, the Court modified its compliance monitoring procedures. Currently, the Court asks the State to report the steps it has taken to implement a decision after the deadline given for implementation has passed (Krsticevic, 2007). Once the Court receives this information, it forwards the report to the Commission and the victims or their representatives so that they may comment (Krsticevic, 2007). After considering the information from all three parties (the State, the Commission, and the victims or their representatives), the Court determines the State's level of implementation (Krsticevic, 2007: 33). If the Court determines that the State has fully implemented its decision, it will close the case (Krsticevic, 2007: 33). Otherwise, the Court lists the case as non-compliant, and includes that status in its annual report to the OAS (Krsticevic, 2007: 33).

Weak oversight by the Organization of American States

As is well known, the Inter-American human rights system is part of the OAS, the main political, juridical, and social governmental forum in the hemisphere. The General Assembly (GA), comprised of all member State delegations, is the supreme organ of the OAS. Both the Commission and the Court report annually to the GA.

The OAS GA plays two important roles in the implementation of Court decisions and Commission recommendations. The first is to include in the Assembly's activities cases of State non-compliance, and the second is its power to issue recommendations and impose economic sanctions on non-compliant States (Article 65 of the American Convention). The reports the Court drafts are sent to the chair of the OAS Permanent Council and the Secretary General, and then forwarded to the GA, in accordance with article 91(f) of the OAS Charter (Shaver, 2010: 664). The GA rarely uses its power to sanction non-compliant States. One exception to the foregoing occurred when the GA imposed economic sanctions on Haiti in the 1990s after the military junta took over the government and expelled the democratically elected President, Jean-Bertrand Aristide.⁴

⁴ Inter-American Commission on Human Rights, 1995, *Report on the Situation of Human Rights in Haiti*, OEA/Ser.L/v/IL.88, doc. 10 rev.

In sum, although limited and partial, the Court, Commission, and OAS have developed some oversight and implementation mechanisms. What has been their application and effectiveness in practice? Our next section will be devoted to this question.

Enforcement of Court and Commission orders in practice

The lack of implementation of reparation orders from the Court and the Commission is a common concern among both those within the System as well as regional advocates who use the system to protect human rights in their countries (Dulitzky, 2011: 138). Indeed, the OAS Secretary General, José Miguel Insulza, has noted that “non-compliance of the resolutions of the System... gravely damages it.”

However, while this widespread perception of non-implementation point to a real problem, it obscures nuances and differences that depend on several variables. Actual implementation levels of reparation orders vary based on various factors related to the internal functioning of domestic political and legal systems as well as those related to the structure, strengths, and limitations of the system itself. Additionally, compliance within the system depends on whether the reparation order is from the Court or the Commission, the type of measure ordered, the State in question, and the state entities involved in implementation. Let us look that these factors in greater detail.

Partial and selective compliance

There is a growing body of scholarship analyzing implementation of the decisions of the Inter-American bodies and attempting to identify the factors that contribute to implementation.⁵ Such studies demonstrate

5 For example, a 2010 study by González-Salzberg looked at compliance rates with the Court's decisions regarding pecuniary compensation, costs and expenses, publication of the judgment, public acknowledgement of international responsibility, obligation to prosecute and punish the individual perpetrators of the human rights violations, and amendments to domestic legislation. González-Salzberg's results were similar to those of other studies: pecuniary and compensation measures and payment of costs and expenses are fully or partially complied with in 92% and 86% of cases, respectively; publication of judgment was complied with in 60% of cases; public acknowledgement of international responsibility in 70% of cases; orders to amend legislation were complied with in 46% of cases, while orders to conduct investigations and punish violators had the lowest compliance rates, at 26%. His study noted that all states under study had taken some steps to comply with the Court's orders. (González-Salzberg, 2010, 128-29).

that partial compliance with Court decisions is more common than full-compliance or total non-compliance. They further demonstrate that as a whole, implementation often depends on what is ordered, as well as to whom the order is directed.

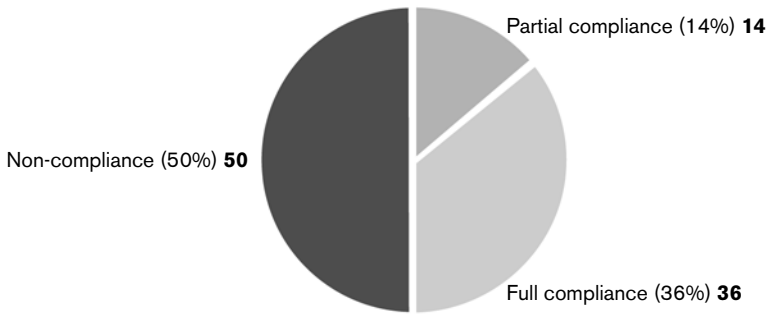
The Association for Civil Rights (ADC, Asociación por los Derechos Civiles) (Basch *et al.* 2010) undertook, one of the most significant quantitative studies, which analyzes the implementation of the 462 reparation measures that were recommended in all of the final merits decisions and friendly settlement agreements of the Inter-American Commission and ordered in reparations decisions of the Inter-American Court between 2001 and 2006. This study provides important insight into the complexities of compliance with the decisions in the human rights bodies of the Inter-American system.

One of the first conclusions of this study is that compliance is not a black and white question, but rather, most States take actions to comply with some of the measures these bodies order. Graph 1 below demonstrates the level of compliance (full, partial, none) with the 462 measures the Court and Commission ordered during the period under study, leading to the conclusion that such orders are at least partially effective 50 percent of the time.

A 2012 analysis by Baluarte identified two tiers of reparations, separated by the frequency with which they are ordered. The first tier includes money damages and costs, symbolic recognition of responsibility and apologies, legislative and administrative measures to guarantee non-repetition, and investigation and punishment of those responsible. The second tier is composed of measures ordered less frequently: human rights training for public officials; annulling or otherwise revising national, judicial, or administrative decisions; provision of medical and psychological care to survivors; return of victims' remains; reinstatement to prior employment; scholarships or educational benefits for affected persons; protection of persons at risk; amendment of public records, the establishment of development funds. The results of this study demonstrated that 161 out of 208 pecuniary measures were complied with (60%); symbolic admissions of responsibility were complied with in 84 out of 131 cases (64%); legislative and administrative changes were complied with in 15 out of 77 cases (19%); States complied with 9 out of 24 orders requiring training programs for public officials (38%); none of the 30 orders regarding medical and psychological care were complied with; none of the 7 orders to ensure the safety and security of expatriate victims were complied with; orders for reinstatement of employment were complied with in 2 of 7 cases (29%); orders to create scholarships and educational benefits were complied with in 1 one of 12 (8%); orders to return the bodily remains of victims were complied with in 2 of 23 cases (9%); development funds and community support projects were complied with in just 1 of 9 orders (11%) (Baluarte, 288-305).

GRAPH 1

Level of compliance with decisions of the Inter-American human rights system's bodies

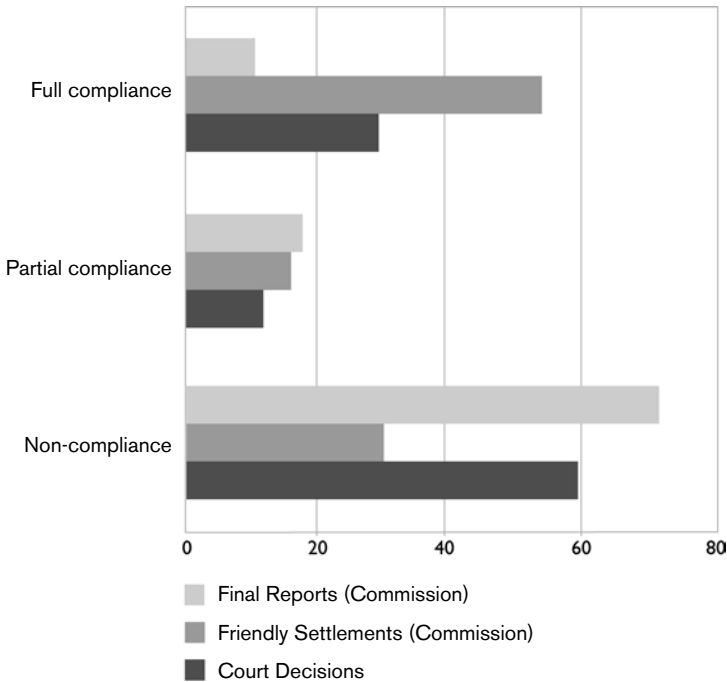


SOURCE: Adapted from Basch *et al.* (2010: 19).

Levels of implementation vary depending on the body (the Court or the Commission) and the kind of procedure under which the reparation was ordered (friendly settlements or merits reports of the Commission). With respect to the Court, the study found 29% of measures were fully implemented, 12% were partially implemented, and a 59% were not implemented. Furthermore, the study found that the Commission's merits decisions enjoyed full compliance in 11% of the cases, 18% of the cases had partial compliance, and in 71% of the cases there was no compliance. The rates of implementation for measures resulting from friendly settlement agreements surpass even those of the Court's decisions: 54% were fully implemented, 16% were partially implemented, and 30% were not implemented at all. (Basch, *et al.*, 2010: Sect. III.3) Percentages of compliance are illustrated visually in Graph 2.

GRAPH 2

Rates of compliance with orders by decision-making body



SOURCE: Adapted from Basch, *et al.*, (2010: 21).

A closer look at the implementation rates of different types of Court-ordered reparation measures⁶ reveals different levels of implementation of reparation orders.⁷ The Basch study divided the Court ordered reparations into eleven different categories based on their contents:

6 For more detailed information regarding implementation of the Commission's decisions and friendly settlements by type of order, see, Basch *et al.*, (2010: Section III).

7 When discussing reparation measures, it is important to highlight that all orders of the Inter-American Court of Human Rights are considered reparation, so these decisions do not order reparations in the strict sense. For example, many of the cases involve indigenous petitioners, as in the *Case of the Sawhoyamaya Indigenous Community v. Paraguay* (which is discussed in greater detail subsequently), in which the Court ordered Paraguay to provide the indigenous community potable water and other sanitary measures, ordering the State to comply with existing obligations to the Sawhoyamaya community, instead of actually instituting reparation measures for human rights violations. In any case, when we refer to "reparation measures" or "reparation orders" in this chapter we mean all orders of the Court, whether their nature is reparative or not.

pecuniary reparations, non-pecuniary reparations, symbolic measures, restitution, preventive measures, awareness-raising, legislative measures, measures of institutional strengthening, investigation of facts with legal reform, investigation of facts without legal reform, protection of victims and witness, and others. His results generally confirm the findings of other studies, in that measures with the highest implementation rates include symbolic reparations (49%), pecuniary measures (48%), and training programs (43%). At the other end of the spectrum, measures that suffer from the lowest implementation rates include legislative measures (92% rate of non-implementation), investigation of facts leading to the violation and the pursuit of those responsible (89%), and measures of institutional strengthening (84%). The results of his analysis are summarized in Table 1 (Basch, et al, 2010: Sect. III.3).⁸

Other analyses of the Inter-American human rights system have confirmed the results of these studies. Thus, studies by González-Salzberg, Krsticevic, the Open Society Justice Initiative, and Acosta Lopez and Bravio Rubio reach similar conclusions regarding which types of reparations by the Inter-American Court States implement with greater and lesser frequency.

Another relevant study takes a different approach to analyzing compliance and looks at another key variable: the influence of local officials and institutions on implementation of the Court's decisions. The 2011 Huneeus study disaggregated the Court's reparation orders according to the institution or official they address. From this perspective, the rates of compliance with the Court's decisions reveal a strikingly pronounced trend: the more state branches or institutions a reparation order involves, the less likely it is that the State will implement it. Thus, orders that include only executive action result in an implementation rate of 44%. However, when reparation orders require action by the executive and some other state actor, the level of implementation diminishes.

Thus, Huneeus found that for reparation orders calling for action of the executive and the judicial institutions, implementation rates were 36%. For orders that mandate action by the executive and the public ministry, which Huneeus defines as any public entity charged

⁸ The results of this research are confirmed by other studies on the Inter-American human rights system. Indeed, research by González-Salzburg (2010), Krsticevic (2007), Open Society Justice Initiative (2010), and Acosta López and Bravo Rubio (2008) draw similar conclusions on the extent to which decisions are implemented, depending on the kind of reparation ordered.

TABLE 1
Level of Compliance by Type of Measure

Level of compliance	Type of measure											
	pecuniary economic reparations	non-pecuniary economic reparations	symbolic reparations	restitutions	preventive measures: training	preventive measures: conscious building	legislative measures	institutional strengthening measures	investigation and legal reform	investigation without legal reform	protection of victims and witnesses	other
Total compliance	48	5	49	31	43	25	41	0	16	0	17	50
Partial compliance	21	21	11	4	0	25	4	16	17	11	0	0
Non-compliance	31	74	40	65	57	50	92	84	67	89	83	50

SOURCE: Adapted from Basch, *et al.*, (2010: 21).

with prosecution that is formally independent from the executive and judicial branch, compliance is 21.1%. Orders that require action by the legislature and the executive fare only slightly better, with compliance rates of 22%. Finally, and more importantly for orders regarding complex cases, which often involve coordinated action by various government actors, orders requiring action by three autonomous State institutions—the executive, the public ministry, and the judicial branch have a 2% implementation rate. Thus, Huneus demonstrates that “with each new actor that is called upon to exercise discretion, the prospect of compliance fades” (Huneus, 2011: 123). Huneus notes one interesting, perhaps foreseeable exception to this trend: orders that require action by only the legislature have very low compliance rates, most likely because getting different actors from competing parties to agree to a given legislative change is quite challenging (Huneus, 2011: 125).

Huneus attempts to explain these findings from various perspectives, noting and discarding the “difficulty theory.” Thus, she notes that while some have proposed that those orders involving more actors are more difficult or costly to carry out, this degree of difficulty only partially explains why such orders are not fulfilled. A comparison of orders addressed primarily to the executive and orders addressed to the executive and one other actor does not clearly demonstrate that the latter are necessarily more difficult, complex, or costly (Huneus, 2011: 125). Rather, Huneus proposes an alternative theory, based on the institutional positions, pressures, and expectations of the executive and other branches of the government (in particular the judicial branch) *vis a vis* compliance with the Inter-American Court. In keeping with this theory, the executive, as the international face of a State, feels greater pressure to comply with international decisions than other branches of government that have a lower profile internationally (Huneus, 2011: 125).

Accounting for differences in compliance rates with the Commission’s recommendations and the Court’s orders

Several authors and activists have offered several explanations for the different rates of implementation of the decisions of these two bodies. Perhaps the most obvious is the common perception that the Commission issues non-binding recommendations, while the Court’s judgments are legally binding. Additionally, some of the differences in implementation levels may be due to the way in which the Court

and Commission address reparations measures in their decisions. As Baluarte (2012) notes, there is a substantial difference between the levels of detail and specificity with which the Court and Commission approach reparations.

Although currently the Court often issues its reparations decisions at the same time that it issues its merits decision, the reparations portion of the case is a separate process, involving arguments on the topic from all the parties involved. The Commission moves more quickly between finding a violation and determining what measures of reparation the State should adopt. Additionally, throughout the years, Court orders have become highly specific, while the recommendations of the Commission tend to be more vague. Undoubtedly, this level of specificity creates clarity both with respect to implementation as well as monitoring compliance. Finally, the Court has undertaken steps to develop stronger monitoring mechanisms for its decisions, while the Commission either refers non-compliant cases to the Court or relies on annual reporting for compliance monitoring (Baluarte, 2012: 274).

Creative responses and poor implementation in ESCR cases

As many advocates and scholars have noted, the cases currently before the Court tend to involve less “traditional” human rights violations that characterized the early years of the system, and have begun more frequently to address ESCR cases, involving collective rights, indigenous people’s rights, the right to prior consultation, and health and social security rights (Rodríguez Garavito 2011a). Such violations require new and creative reparations measures, rather than the traditional pecuniary reparations that marked the Court’s early years (Rodríguez Garavito 2011b). The implementation of such measures involves unique obstacles and challenges that do not arise with the implementation of the Court’s more traditional reparation measures. Because of their recent development, there is little scholarly research regarding the specific challenges facing the implementation of such measures, as well as the Court’s responses to these challenges.

In general, the Court and Commission have responded to systematic ESCR violations by including orders for legislative and policy reform, training and education programs for state officials, and communitywide reparation measures, which may include providing housing, access to

water, health care, and education, among others.⁹ However, as reflected in the disappointing compliance rates discussed above, the most common State response to such measures is inaction (Open Society, 2010: 69)

One of the Court's earliest forays into the use of generalized reparations orders to address systematic violations or rights were orders for human rights training of State officials, when such violations stemmed from abuse of power. The Basch study discussed above found that orders to train State personnel currently represent 3% of all reparations orders, and have been fully implemented 42% of the time (Basch, 2010: 6).

The implementation record for *Tibi v. Ecuador* represents one of the 58% of the cases in which orders for training were not effectively implemented. In *Tibi v. Ecuador* the Court ordered Ecuador to "establish a training and education program for all staff of the judicial branch, the public prosecutor's office, the police, and penitentiaries, including the medical, psychiatric, and psychological staff, on the principles and provisions regarding protection of human rights in the treatment of inmates."¹⁰ In an attempt to increase the clarity and specificity of the orders, as well as to induce Ecuador to develop an adequate program, the Court's order was quite detailed regarding the funding and content. Thus, the Court ordered Ecuador to include information in its compliance report regarding the "allocation of specific resources to attain its goals," and required that the training be conducted with civil society participation.¹¹ When Ecuador failed to implement this order, the Court issued an even more detailed compliance order, which ordered Ecuador to "establish an inter-institutional committee to define and execute the training programs on human rights and treatment of inmates." Unfortunately, the Court's attempts to actively guide the implementation process have not been sufficient, as Ecuador has yet to implement the Court's decision (Inter-American Court of Human Rights, *Tibi v. Ecuador*, Monitoring Compliance with Judgment, July 1, 2009, in Open Society, 2010: 71).

By contrast, other States have effectively implemented Court orders to implement human rights training for State actors. For example, in the *Case of the Mapiripán Massacre v. Colombia*, the Court ordered the State to

9 For example, see the *Case of the Kichwa Indigenous Community of Sarayaku v. Ecuador* and the *Case of the Xáknok Kásek Indigenous Community v. Paraguay*.

10 I/A Court H.R., *Case of Tibi v. Ecuador*, September 7, 2004, Series C, No. 114, para. 13.

11 Ibid.

“implement, within a reasonable term, permanent education programs on human rights and international humanitarian law within the Colombian Armed Forces, at all levels of its hierarchy,” along the lines specified by the Court in its reparations decision.¹² As a result, in 2008, the government created a permanent human rights training program for its armed forces as well as a human rights directorate within the army, both of which formed part of a Comprehensive Policy on Human Rights and International Humanitarian Law. The Policy also included a cooperation agreement with the Inter-American Institute of Human Rights, which agreed to supervise the implementation of the training program. This program satisfied Court orders against Colombia in four separate cases (Baluarte, 2012: 287).

Other creative general measures ordered by the Court include those that address human rights violations suffered by certain communities. For example, in the *Case of the Pueblo Bello Massacre*, the Court ordered the State to build housing for the surviving victims of a massacre. However, because the Court ordered the houses to be built in the community of Pueblo Bello, the State used the unwillingness of the victims to return to the community (out of well-placed fear for their safety) as an excuse to refuse housing for the victims in any other community. In a later case, the *Case of the Ituango Massacres v. Colombia*, the Court attempted to resolve non-compliance due to erroneous misinterpretation of the *Pueblo Bello* decision, ordering that housing be provided where the victims chose to live. Nonetheless, the government of Colombia chose to offer housing subsidies for the purchase of housing, rather than provide the physical house, which resulted in many victims remaining homeless. Similarly, orders to provide psychological care to victims of human rights violations, a staple reparation order in the Court’s repertoire addressing the victim’s right to health, have led to protracted discussions between the State and the victims’ representatives regarding the quality and manner of providing such care. Such stalling often compromises or prevents the implementation of the measure (Acosta López and Bravo Rubio, 2008: 209).

In the *Case of Plan de Sanchez v. Guatemala*, the Court ordered the State to implement a comprehensive set of programs in 13 different indigenous communities, including: (1) the commission of a study of the Maya-Achí culture by the Guatemalan Academy of Mayan Languages or a similar organization; (2) the initiation of public works such as road construction

12 I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia*, Merits, Reparations, and Costs, September 15, 2005, Series C, No. 134, para. 13.

and the development of a sewage system and potable water supply; (3) the provision of intercultural and bilingual training to teachers in the communities; and (4) the establishment of a health center with adequate conditions to provide medical and psychological care to some victims of human rights abuse (Open Society, 2010: 71). Such measures based on the needs of the community with respect to their ESCR are both innovative and laudable. However, while Guatemala paid a portion of the material damages, and complied with some of the symbolic measures, it failed to implement the majority of the social and cultural programs the Court ordered. Indeed, the only “creative” measure with which Guatemala took steps to comply was the establishment of a health care center in the village of Plan de Sanchez.¹³

The Court has developed a similar community-centered reparations framework in many of the cases involving indigenous peoples that it faces, including *Moiwana v. Surinam*, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *Indigenous Community Sawhoyamaya v. Paraguay*, and *Kichwa Indigenous People of Sarayaku v. Ecuador* cases. In the past decade, cases regarding indigenous rights have begun to make up a larger percentage of the Commission and the Court’s docket. These cases provide examples of the Court’s most innovative and creative reparations measures, as it often orders measures to address the socioeconomic exclusion and discrimination faced by indigenous communities, a situation which causes the violation of their most basic ESCR. Unfortunately, adequate implementation of such reparations orders is the exception, and the Court’s attempts to address implementation problems have not been entirely effective.

Existing Implementation Mechanisms: the use of compliance orders and compliance hearings

Despite the paucity of clearly established mechanisms and procedures for the implementation of the Court’s decisions, the Court has used its authority under various articles of the American Convention on Human Rights (the American Convention), its Statute, and the its Rules of Procedure to develop its own dynamic approach to compliance monitoring. Thus, the Court has assumed responsibility for monitoring the domestic enforcement of its decisions, which consumes

13 I/A Court H.R., *Case of the Plan de Sánchez Massacre v. Guatemala*, Monitoring Compliance with Judgment, July 1, 2009.

a considerable amount of its attention and resources (Shaver, 2010: 664). Monitoring compliance with its judgments has become one of the most demanding activities of the Court, as the number of active cases increases significantly each year, and the Court periodically monitors the details of each measure ordered in each case (see the chapter by Sánchez and Lyons in this book). As of 2012, the Court was supervising the implementation of its orders in 138 cases.¹⁴

Since 1989, when the Court emitted its first decision, until 2008, the Court had declared complete compliance and closed the files in only two cases, *The Last Temptation of Christ v. Chile* and *Acosta Calderon v. Ecuador*. In 2012, three cases were concluded: *Escher v. Brazil*, *Lori Berenson Mejía v. Peru* and *Mejía Idrovo v. Ecuador*, thus bringing the total of cases of full compliance to five. At the same time, the Court is exercising its monitoring functions in 148 cases.¹⁵

Compliance orders

The Court issued its first ever compliance orders in a case against Peru in 2001, in the cases *Barrios Altos v. Peru* (para. 50) and *Durand and Uguarte v. Peru*, (para. 45). They soon became standard practice for all the Court's decisions, and to date the Court has issued compliance orders in roughly 75% percent of the cases in which it has issued reparations decisions. In addition to setting more stringent implementation requirements, compliance orders provide insight into the implementation process of the case in question, as well as the reasons for which States justify their failure to comply with the Court's orders (Open Society, 2010: 78).

On some occasions, the Court uses compliance orders to set deadlines for State actions, focus on cases of particular concern, and bring more pressure to bear on a State by increasing its reporting requirements. For example, in the concluding paragraphs of the *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, the Court initially ordered that, as long as the members of the Sawhoyamaxa Indigenous Community remain landless, the State shall deliver to them the basic supplies and services necessary for their survival. Despite this, the State failed to implement this order, and members of the Sawhoyamaxa community

14 I/A Court H.R., 2012 Annual Report, OEA/Ser.L/V/II.147, doc. 1, 2013, p. 17, http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf

15 I/A Court H.R., 2012 Annual Report, OEA/Ser.L/V/II.147, doc. 1, 2013, p. 13, http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf; IACHR, 2013 Annual Report, 2013, p. 72, <http://www.OEA.org/es/cidh/docs/anual/2013/docs-es/InformeAnual-Cap2-D.pdf>

died, which led the Court to issue a decision monitoring compliance with the judgment, ordering Paraguay to provide more regular and explicit reports, including, information that will allow the Court to differentiate the goods and services supplied to the members of the Sawhoyamaxa Community from those supplied to other communities.¹⁶

In addition to setting reporting deadlines, the Court has used compliance orders to undertake other actions that it deems necessary for a State to implement a decision. For example, the Court used a compliance order to require Guatemala to identify agents responsible for carrying out the implementation of decisions at the national level. The state agency that represents Guatemala before the Inter-American human rights bodies, the Presidential Commission for Coordinating Executive Policy on Human Rights, informed the Court that it was unable to implement certain aspects of a Court decision because the state entities necessary for those aspects refused to respond to the Presidential Commission's requests. In response, the Court used the compliance order to order Guatemala to name state agents as interlocutors for implementation of the orders at issue. Specifically, the Court ordered the State to designate an agent from the National Commission to Monitor and Support the Strengthening of Justice, as well as members of the legislative branch, to work with the Presidential Commission (*Case of Molina Theissen v. Guatemala, Monitoring Compliance with Judgment*, operative paragraphs 3-5). As advocates and scholars have noted, efforts by the Court to develop more specific reporting may encourage State accountability and help overcome bureaucratic bottlenecks that create obstacles for implementation (Open Society, 2010: 84).

Compliance hearings: private negotiation and public shaming

In 2008, the Court convened its first compliance hearings to provide parties with the opportunity to present oral arguments and evidence.¹⁷ While such hearings soon became standard Court practice, its monitoring mechanisms continued to evolve around such hearings, the first of which was held in July 2009 with regard to the *Case of the Sawhoyamaxa*

16 Interview with leaders of the Sawhoyamaxa community in the territory finally provided by the government in 2014, in compliance with the judgment. Sawhoyamaxa Territory, Paraguay, December 6, 2014.

17 I/A Court H.R., 2009, 2010 *Annual Report*, p.6, http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2009.pdf

Indigenous Community v. Paraguay.¹⁸ Hearings are a good method to promote implementation by holding the State publicly accountable for its failure to comply with Court decisions. Furthermore, they embody the kind of dialogic judicial interventions that increase the likelihood of compliance and impact, to the extent that they publicly involve stakeholders and spark deliberative and collaborative implementation processes.

Around the same time, the Court began to hold hearings that address multiple cases from the same country with similar reparations orders, an innovation that was consecrated in article 30(5) of the Court's Rules of Procedure during the 2010 reform. The Court recently held such a compliance hearing regarding eight Colombian cases in order to discuss the State's implementation of the Court's orders to provide medical and psychological treatment.¹⁹

Regardless of the structure, in each type of hearing, the Court seeks to establish agreements between the parties, suggesting alternatives for problem resolution, urging compliance, and calling attention to incidents of non-compliance. The Court encourages the State and the petitioners to work together to establish timetables for implementation.²⁰

Domestic Implementation Provisions and Mechanisms

The Court's case law establishes the immediate implementation of its decisions, which means that they are directly implemented at a national level, while the Convention stipulates that enforcement of decisions are to be carried out through domestic legal orders of the countries in question.²¹ Thus, developments in the State's internal bureaucracy are a much more important determinant of the likely success of implementation than other regional efforts to encourage implementation.

Nonetheless, a model that designates such responsibility to individual States can be problematic, given that very few States that have accepted the Court's adjudicatory jurisdiction have also adopted

18 I/A Court H.R., 2009, *2010 Annual Report*, p.65, http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2009.pdf

19 I/A Court H.R., Resolution of April 29, 2010.

20 I/A Court H.R., *2012 Annual Report*, OEA/Ser.L/V/II.147, doc. 1, 2013, p. 25, http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf

21 Inter-American Court of Human Rights, *Advisory Opinion OC-5/85*, Series A, No. 5, 1985, para. 22.

domestic provisions that provide for special procedures to enforce reparation measures ordered by the Court (Acosta López and Bravo Rubio, 2008: 192). Thus, even if a State is willing to implement a decision by the Court, obstacles abound at a practical level, since it is often unclear who is responsible for what, who has authority to implement decisions, and, of particular relevance in cases involving ESCR, how to manage coordination among the many agencies to ensure compliance. Indeed, even the OAS Permanent Council has recommended the adoption of specific measures in order to ensure that national legal systems incorporate the Court's case law in order to overcome these issues.²²

Of the States that do have such provisions, the overwhelming majority solely establish pecuniary measures, which is particularly problematic in cases regarding violations of ESCR, given that the implementation of such decisions often requires legislative developments, changes to public policies, and doctrinal developments regarding domestic practices (Krsticevic, 2007: 44). In any event, the most difficult cases involve those States that lack any type of domestic law to regulate enforcement of decisions, in which case procedural law regarding enforcement of decisions against the State applies.

Comprehensive domestic implementation provisions: Colombia

The most comprehensive domestic implementation provisions and mechanisms have been established by Colombia and Peru, and in both cases have played an important role in implementing decisions of the Inter-American Court and Commission.²³

Colombia has one of the most comprehensive legal frameworks on implementing decisions of international human rights protection bodies, including those of the Inter-American system. Nonetheless, the procedure that works the best is the payment of pecuniary reparations to victims of human rights violations, while procedures for implementing non-pecuniary measures are less formalized and determined on a more *ad hoc* basis. This lack of established channels to implement non-pecuniary measures is particularly problematic in the context of

22 OAS General Assembly, Thirty-Seventh Regular Session, *Observations and Recommendations of the Permanent Council on the Annual Report of the Inter-American Court of Human Rights* AG/doc.4761/07, OEA/Ser., June 2, 2007, AG/doc.4761/07.

23 A more detailed discussion of these systems and others can be found in Krsticevic (2007) and Open Society (2010).

reparations for ESCR violations, given that the most effective of such reparations are non-pecuniary in nature.

On July 5, 1996, Colombia published Law 288 in the Official Gazette. This Law establishes procedures for implementing pecuniary reparations to victims of human rights violations, once Colombia's responsibility for such violations has been established by certain international bodies, such as the Inter-American Commission on Human Rights (Corasaniti, 2009: 22). Under the procedures set forth in this law, upon the communication of a judgment against the State, a committee comprised of representatives of the Ministries of the Interior, Foreign Affairs, Justice, and Defense will consider whether to implement the reparations of the international body (this step is not applicable to the binding orders of the Inter-American Court) and provide the process for such payment, including determining which ministries must pay the damages and how much. Under this process, monetary compensation has become less controversial in Colombia, as evidenced by the fact that the Ministry of Defense has a line item in its annual budget for the payment of international human rights decisions (Open Society, 2010: 87).

Implementation procedures for non-pecuniary measures ordered by the Inter-American Court are less systematized. However, the Ministry of Foreign Affairs has assumed an informal coordinating role in this process. Upon receipt of a judgment against Colombia, this ministry will convene a compliance meeting, inviting representatives from other ministries relevant for implementation. Nonetheless, because the process is not formalized under the law, the success of the meeting depends on the influence that the Ministry of Foreign Affairs can exercise over the other ministries.

Despite the procedure's informal nature, Colombia has managed to develop positive *ad hoc* implementation mechanisms in certain cases. For example, in order to facilitate the implementation of the Inter-American Court's decision in the *Case of the Mapiripán Massacre v. Colombia*, the State established a special coordinating and monitoring mechanism: the Official Monitoring Mechanism of the Mapiripán Decision (MOS, Mecanismo Oficial de Seguimiento de la Sentencia de Mapiripán). This Mechanism includes representative of nine state agencies, including the Presidential Program for Human Rights and International Humanitarian Law, the Public Prosecutor, and the Ministry of Defense. Family members of the victims and their representatives and the Inter-American Commission also participate (Krsticevic, 2007: 87). The expansion of such mechanisms to other decisions of the Inter-American

Commission and the Court would be particularly useful as arenas for coordination and dialogue in cases regarding ESCR.

Additionally, the Constitutional Court of Colombia has played a role in the implementation of Inter-American Court decisions.²⁴ In instances where the above procedures and other international human rights bodies have failed, the Constitutional Court has accepted individual constitutional actions (*tutelas*) to enforce the reparation measures ordered at the international level (Uprimny, 2007: 139).

Inter-institutional implementation mechanisms: Guatemala

As mentioned above, not all States in the region have enacted legislation regulating how decisions of the Court and the Commission should be implemented. However, this does not always mean that there is no implementation mechanism in place. The executive branches of some States, such as Guatemala and Paraguay, have used executive decrees to establish inter-institutional commissions or mechanisms devoted to these tasks. Such mechanisms may be structurally weak, and their relevance and effectiveness depends on the willingness of successive presidential administrations to devote resources and political capital to the commissions (Open Society, 2013: 36).

Despite lacking any legislation regarding the implementation of Commission and Court decisions, the former president of Guatemala used an executive decree to establish the Presidential Commission to Coordinate Executive Policy on Human Rights (COPREDEH, Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos), which is responsible for representing the State before the Inter-American and UN human rights bodies. Its membership includes the ministers of foreign affairs, government, defense, the attorney general, and the chief of the public ministry (Open Society, 2013: 48).

COPREDEH has been instrumental in implementing decisions of the Inter-American Commission and Court. For example, in cases in which individuals and communities have been unprepared to receive large financial settlements stemming from the decisions, COPREDEH has offered victims training in financial management. Additionally, the presence of COPREDEH has facilitated the Court's monitoring role.

24 See Colombian Constitutional Court, Decisions T-568 of 1999, T-603 of 2003, T-786 of 2003, and T-558 of 2003.

For example, in *Molina Theissen v. Guatemala*, COPREDEH informed the Court during the monitoring compliance phase that the relevant state institutions refused to respond to its request for assistance in implementation. In response, the Inter-American Court ordered the State to designate an agent from the National Commission to Monitor and Support the Strengthening of Justice (Comisión Nacional para el Seguimiento y Apoyo al Fortalecimiento de la Justicia) to work with COPREDEH, as well as to identify members of the legislative branch with whom COPREDEH could develop a comprehensive plan for implementing the necessary administrative and legislative procedures (Open Society, 2013: 48). Thus, the Court was able to take advantage of COPREDEH's knowledge regarding internal needs and obstacles to compliance in order to develop more effective and specific orders, while COPREDEH used its privileged access the Court to pressure the State into compliance.

Fall back options when implementing legislation does not exist

In cases where the State has not approved mechanisms or provisions to implement the Court's decisions, States may either choose to apply domestic laws regarding the enforcement of decisions against the State, or, as often occurs, go to the national courts for guidance. This often leads to situations in which implementation of decisions is stalled, as the uncertainty, the status of the Court's decision in domestic law, and debates on national institutions' authority to take action hinder effective implementation. In response to this confusion, advocates or state actors attempting to implement a Court decision will approach domestic courts for clarification or assistance. The effectiveness of this *ad hoc* judicial approach depends on many factors, including the domestic court's knowledge and acceptance of international law, the willingness of the judicial branch to get involved in such issues, and the court's attitude toward rulings from a "foreign" tribunal whose decisions may run counter to domestic case law. Thus, this strategy may be risky for advocates. To illustrate potential pros and cons of resorting to domestic courts to implement the Inter-American Court's decisions, we look at how this strategy has been used in Argentina.

By mid-2013, the Inter-American Court of Human Rights had issued 12 decisions against Argentina.²⁵ Among them, only one—*Kimel v.*

25 *Case of Garrido Baigorria v. Argentina*, 1996; *Case of Cantos v. Argentina*, 2002; *Case of*

Argentina—had been fully complied with and was officially closed in 2013 (González-Salzberg 2011: 119-120). Nevertheless, despite *Argentina*'s poor track record of compliance in other cases, in all those cases in which the Court had held compliance hearings, the country had taken measures to comply with its orders (pp. 119-20). *Argentina*'s Supreme Court of Justice has handed down important, albeit contradictory, judgments on the obligation to implement the Court's decisions.

In *Cantos*, the first of these cases the Supreme Court of Justice considered, the Solicitor's Office of the National Treasury (Procuración del Tesoro de la Nación) requested that the high court implement the Inter-American Court's decision. Despite this, the Supreme Court asserted that their intervention was not necessary for compliance with the decision and that the State should not comply with some aspects of the judgment (Argentine Supreme Court of Justice, *Cantos*, José María, 2003, in González-Salzberg 2011: 127).

However, in the next case submitted to the Supreme Court, it ordered compliance with the Inter-American Court's order to nullify the lapsing of criminal action, despite its disagreement with the decision itself and the grounds justifying it (Argentine Supreme Court of Justice, Espósito, Miguel Angel, 2004, in González-Salzberg 2011: 128).

Unfortunately, three years later, the Supreme Court changed course and refused to comply with the Inter-American court's decision in the *Case of Bueno Alves v. Argentina*, and ruled that the criminal action against those responsible for torturing Buenos Alves had lapsed, which was the basis for the case (González-Salzberg 2011: 129). The Argentine high court made no reference to the Inter-American Court's decision in its respective ruling (González-Salzberg 2011: 129). Thus, the contradictory decisions of the Supreme Court of Argentina show some of the risks of resorting to the national court as a mechanism for implementing judgments of the Inter-American Court of Human Rights.

Strategies for Improved Implementation

Based on the considerations above, this final section examines various strategies for improving implementation of Commission and Court decisions regarding ESCR violations, within the existing framework of

Bulacio v. Argentina, 2003; *Case of Bueno Alves v. Argentina*, 2007; *Case of Kimel v. Argentina*, 2008; *Case of Bayarri v. Argentina*, 2008; *Case of Torres Millacora et al. v. Argentina*, 2011; *Case of Fonevecchia and D'Amico v. Argentina*, 2011; *Case of Grande v. Argentina*, 2011; *Case of Mohamed v. Argentina*, 2012; *Case of Furlan and Family v. Argentina*, 2012; *Case of Formerón and Daughter v. Argentina*, 2012.

the Inter-American system. These strategies and recommendations are aimed at: (1) the Inter-American Commission and Court, (2) States, and (3) civil society actors. It is important to note that while we have divided strategies by the actors we consider best placed to undertake such action, most strategies can be successfully employed by all three actors.

Strategies for the Commission and Court

Budget Analysis

Budget analysis is a strategy to ensure ESCR fulfillment. Such analyses allow researchers to identify and quantify the steps a State is taking to fulfill a right or implement a decision (Amnesty International, 2014: 141). Budget analysis is a useful way to combat arguments that there are simply not enough resources to implement a decision or fulfill a right. Specifically, such analysis may serve to:

- identify ESCR violations through the implementation of regressive measures;
- provide strong evidence for human rights advocacy through objective data;
- demonstrate problems with current resource allocation and provide solutions or alternatives that protect rights (ESCR-Net).

Initiatives and institutions such as the International Budget Project, Fundar, and ESCR-Net are already undertaking budget analysis for human rights protection throughout the region. Such initiatives are useful sources of information and training for human rights advocates.

The Use of Indicators

Over the last several decades, the use of indicators, both qualitative and quantitative, in monitoring the implementation of human rights has grown substantially. Researchers and attorneys view indicators as useful tools for linking and furthering claims about a State's fulfillment of its regional or international human rights treaty obligations, particularly regarding ESCR. Indicators help States evaluate their progress, and they also provide accurate, relevant information to policy and decision-

makers²⁶ (OHCHR, 2012). Courts²⁷ have begun to use indicators as important information upon which to base their decisions and draft reparation measures, as well as a reliable method for measuring State compliance with their decisions. In the Inter-American system, the Working Group to Examine the Periodic Reports of the States Parties to the Protocol of San Salvador has developed a set of progress indicators for measuring rights under the Protocol.²⁸

The OHCHR has defined human rights indicators as “specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that addresses and reflects the human rights concerns and principles; and that can be used to assess and monitor the promotion and protection of human rights” (OHCHR, 2007: 24). In human rights litigation, these measures try to capture how well the parties have complied with orders and have met human rights standards defined by the Court.

Quantitative and qualitative indicators. Indicators are generally divided into two categories: quantitative and qualitative. Similar to their use in social sciences, quantitative indicators are numerical or statistical, while qualitative indicators cover a broad range of non-numerical information that helps reveal the level of enjoyment of a certain right (OHCHR, 2012). Examples of qualitative indicators include narrative information regarding a situation relevant to a specific human right, checklists, questions, and other forms of information gathering that can add more depth to the information provided by quantitative analyses (OHCHR, 2007: 24-25). Quantitative and qualitative indicators and methods of analysis provide complementary information, given that each type compensates for biases and lacunae inherent in the other (OHCHR, 2012).

Benchmarks. In addition to quantitative and qualitative analysis, benchmarks are another indicator used to measure States’ fulfillment of their human rights obligations. According to the OHCHR, benchmarks are indicators “constrained by normative or empirical considerations

26 For an in-depth analysis of the use of indicators to measure compliance with obligations contained in international human rights instruments and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), in particular, see Rosga and Satterthwaite (2009). See also United Nations Office of the High Commissioner on Human Rights (OHCHR 2012).

27 For a discussion of the Colombian Constitutional Court’s use of indicators to address the humanitarian crisis facing internally displaced peoples, see Rodríguez Garavito and Rodríguez Franco (2010) and Uprimny and Sánchez (2010).

28 OAS/Ser.L/XXV.2.1, December 2001.

to have a pre-determined value” (OHCHR, 2007: 26). Such normative considerations may be based on legal standards, political aspirations of the State, or, in the case of litigation, the standards set by the court (OHCHR, 2012). Using a benchmark as an indicator may mean deciding that the indicator should reach a certain level—for example, increasing it to 80% or improving current access levels by 20% (OHCHR, 2007: 26). Benchmarks can become tangible goals and projections for state actors charged with implementing court decisions regarding ESCR.

Identification of indicators and data collection. In practical terms, in order to use indicators, a right must be translated into a small number of characteristics or attributes that can then become indicators. For example, the right to housing may be broken down into “adequate space,” “appropriate materials,” “safety of housing’s location,” and “access to subsidized housing” to help translate that right into tangible characteristics and components that could be measured. By identifying a right’s major attributes and characteristics, the link between the indicators and the corresponding human rights standards becomes more explicit (OHCHR, 2007: 26).

Once these attributes are identified, the next step is for state actors to identify a set of structural, process, and outcome indicators that allow for the measurement of those attributes (OHCHR, 2007: 26). An example of a process indicator for the right to education could be the proportion of children enrolled in school. Process indicators help define a relationship of cause and effect between a policy or program and any changes in the fulfillment of the right in question (OHCHR, 2007: 29). Outcome indicators reflect achievements that measure the fulfillment of human rights. Outcome indicators consolidate the long-term impacts of many underlying causes and processes (OHCHR, 2007: 29).

Indicators are a useful strategy for the Commission and Court to request specific, relevant, and clear information regarding a State’s level of compliance with orders. These bodies may either develop their own indicators for use in ESCR cases, request States do so, or enlist the assistance of civil society organizations in preparing them.

Strategies for States: define responsibilities for implementation

As mentioned above, the fact that States often separate their foreign policy from their domestic policy complicates the implementation of regional or international court orders. The state agents who appear

before or work with regional or international bodies often represent ministries of foreign relations, which are usually part of the executive branch. These agents have little contact or communication with the agencies responsible for national public policy and [whose officials are often] responsible for the violations of international human rights law. Therefore, when the Commission or the Court orders the State to change domestic policy, the agents who appear before these bodies often have little or no capacity to enact such changes. It is crucial for States to have mechanisms to link the officials representing the State before regional or international courts and the national officials who have the authority to make the necessary domestic policy changes to implement the decisions. These mechanisms can take various forms and can differ in their level of comprehensiveness and permanency.

Laws and executive decrees. Peruvian law requires the Ministry of Foreign Affairs to communicate all recommendations of the Inter-American Court and Commission to the Secretariat of the National Human Rights Council (CNDH, Consejo Nacional de Derechos Humanos) along with its observations, and charges the Ministry of Justice with following up on all such decisions (Corasaniti, 2009). Upon receipt of the recommendations and the Ministry of Foreign Affairs' observations, the Secretariat of the CNDH must communicate them to the full Council (Corasaniti, 2009). The president of the CNDH is then responsible for determining which actions corresponded to different executive offices. Additionally, the Special Commission to Follow-Up on International Procedures (CESAPI, Comisión Especial de Seguimiento y Atención de Procedimientos Internacionales) is responsible for receiving and responding to all correspondence from international human rights bodies established under the auspices of the OAS, (Open Society, 2010: 86). The Commission is comprised of the president of the CNDH, a representative from the Ministry of Foreign Affairs, and an expert in international law appointed by the Ministry of Justice, as well as a technical committee (Open Society, 2010: 86). The Commission is responsible for overseeing implementation of decisions and recommendations of international human rights bodies, which involves leading compliance activities, coordinating relations with NGOs, and recommending compliance measures to the CNDH (Open Society, 2010: 86).

As discussed above, Colombia also has comprehensive domestic provisions regarding the implementation of decisions of the Inter-American Commission and Court. Such provisions furnish a framework to assign responsibilities and respond to international decisions, ensuring

that implementation is not hindered due to confusion regarding the duty to take certain actions. States should consider adopting such provisions, while the Commission should consider recommending that States do so.

Increased coordination among government actors The United Kingdom has adopted a coordinated approach for implementing the European Court's decisions that involve all three government branches. The Ministry of Justice has taken a lead role in enforcing judgments, and is responsible for coordinating information between relevant departments and then transmitting this information to the Foreign and Commonwealth Office and to the State's delegates to the Council of Europe (Open Society, 2013: 44). As part of this coordinated approach, the UK has developed an implementation form advising key departments on how complete the action plan, in addition to ensuring that the COM and Foreign and Commonwealth Offices have the necessary information (Open Society, 2013). The form also contains information on how to communicate with the Ministry of Justice and other relevant ministries. The form requires the identification of a lead department, lead minister, lead department lawyer, and lead policy official (Open Society, 2013: 44, appendix 158). Poland and the Netherlands have similar forms called the "algorithm" and the "blue letter," respectively (Open Society, 2013: 44).

The approach the UK, Poland, and the Netherlands have adopted to improve coordination between different branches, although not a normative obligation, is an excellent option for States in which it would be difficult to pass a law facilitating coordination. Additionally, the Commission and Court could develop its own forms and require States to fill them out during the beginning stages of implementation.

Ad hoc Inter-ministerial committees. *Ad hoc* inter-ministerial committees are useful in bringing together state officials from various agencies that need to be involved with the case to provide an effective remedy to ESCR violations. These committees can help resolve a specific case or may become a permanent forum to help address various cases. In 2010, Romania established a working group to develop a policy response to over 700 petitions filed at the European Court involving property that had been nationalized during the communist period (Open Society, 2013: 50). While this was a committee working to resolve a specific case, other committees were able to undertake work on an ongoing basis to resolve cases over a longer period. For example, in 2006, Poland established an inter-ministerial task force made up of experts from 14 ministries, including finance, economy, labor and social security, justice, interior, foreign affairs, transport, and health (Open Society, 2013: 46-47). In 2007, the task force submitted an action plan to

improve the implementation of European Court judgments and prevent new violations (Open Society, 2013: 46-47).

National Governmental Human Rights Institutions. Governmental human rights institutions can contribute unique insights to the implementation process, for, as part of the State, they are insiders to the process. They may have contacts with other relevant government agencies, which they can use to press for implementation.

Thus, a useful role for governmental human rights institutions is to liaise formally and informally with regional and international bodies. These governmental human rights institutions should stay abreast of new regional or international decisions and inform the relevant domestic actors of their responsibilities regarding the implementation of these decisions. They can also provide regional or international bodies with roadmaps to ensure that recommendations or orders identify the correct agency or actor. Guatemala's case before the Court, mentioned above, is a good example of such a strategy. It was only after Guatemala's Presidential Commission for Coordinating Executive Policy on Human Rights informed the Court that the State was refusing to respond to the Presidential Commission's requests that the Court was able to direct its orders to the relevant actor. Had the Court known which entity was responsible for which aspects of its orders, it could have included this information in initial orders before non-compliance became an issue.

Strategies for civil society (NGOs)

Civil society mobilization. Perhaps the most obvious role for NGOs is in ensuring civil society mobilization around the implementation of favorable ESCR decisions. Mobilization can take many forms. It may consist of conducting a "know your rights" campaign to create public awareness around ESCR cases; participating in media campaigns to ensure that underlying social issues are included in the public discourse; or organizing protests and marches. The pressure brought to bear by civil society can help ensure that States cannot simply "forget" about their duty to implement decisions from the Court or Commission.

Become experts for the Court. Many of the strategies outlined previously involve the use of indicators and budget analysis. As the Court and Commission have limited time and resources to undertake such analyses in all cases, an important role for think tanks and NGOs is to become a source of expert support for these bodies and provide them with information gleaned from human rights indicators and budget analyses.

This kind of support has shown its effectiveness in several jurisdictions. For example, in Colombia groups of scholars and human rights advocates have been fundamental in monitoring compliance with the Constitutional Court's most ambitious judgments regarding the rights of the internally displaced and to the health system (Rodríguez Garavito and Rodríguez Franco 2010). Meanwhile, the Supreme court of India has availed itself of an institutional innovation—the post of Commissioner of the Court—in order to appoint experts who work as a kind of special rapporteur for important cases. Thus, for example, the two Commissioners for the Indian Court's ruling on the right to food have been very active in promoting its implementation through information requests, progress measurements, and public discussions on the pending challenges to ensure this right (Rodríguez Garavito and Rodríguez Franco 2010).

Raise the profile of the Inter-American system. Recently, the legitimacy and importance of the Inter-American human rights system has been called into question, as has been critically documented in this book. The most glaring evidence of this are perhaps the decision of Venezuela to reject the case law of the Inter-American Court of Human Rights in 2013 and the ruling of the Dominican Republic's Constitutional Court in 2014, providing that the jurisdiction of the Inter-American Court is unconstitutional. The most significant reasons that States have for complying with the rulings of the Court are two: (1) they accept that rulings of the Court are legally binding, and (2) awareness that the system only works if all States, or the majority, comply with the rulings. With each State that openly refuses to comply with the decisions of the Court or rejects its jurisdiction, the Court loses some of its legitimacy and relevance. Thus, if civil society wants its governments to take the Court's rulings seriously, it must begin with strategies to recall and defend the importance of the system and demand the commitment of the State to this end.

References

Acosta López, J. I., & Bravo Rubio, D. 2008. "El cumplimiento de los fines de reparación integral de las medidas ordenadas por la Corte Interamericana de Derechos Humanos: énfasis en la experiencia colombiana." *Revista Colombiana de Derecho Internacional* 13: 183-212.

Amnesty International. 2014. *Human Rights for Human Dignity: A primer on economic, social, and cultural rights* 2nd ed. London: Amnesty International.

Baluarte, D.C. 2012. "Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives." *American University of International Law Review* 27 (2): 263-321.

Basch, F., et al. 2010. "La efectividad del sistema interamericano de protección de derechos humanos: un enfoque cuantitativo sobre su funcionamiento y sobre el cumplimiento de sus decisiones." *Sur* 7 (12): 9-35.

Birchfield, L. & Corsi, J. 2010. "Between Starvation and Globalization: Realizing the Right to Food in India." *Michigan Journal of International Law* 31: 691-764.

COPREDEH. n.d. *Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos (COPREDEH)*. <http://www.copredeh.gov.gt/index.php?showPage=80>

Corasaniti, V. 2009. "Implementación de las sentencias y resoluciones de la Corte Interamericana de Derechos Humanos: un debate necesario." *Revista IIDH* 49: 13-28.

Dulitzky, A. 2011. "The Inter-American Human Rights System Fifty Years Later: Time for Changes." *Quebec Journal of International Law*. 129-164.

González-Salzberg, D. 2010. "The Effectiveness of the Inter-American Human Rights System: A study of the American States' compliance with the judgments of the Inter-American Court of Human Rights." *International Law, Revista Colombiana de Derecho Internacional*. 115-142.

Huneus, A. 2011. "Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights." *Cornell International Law Journal* 44 (3): 101-155.

Insulza, J.M. 2006. "Sistema Interamericano de Derechos Humanos: presente y future." *Anuario de Derechos Humanos* 2006.

Krsticevic, V. 2007. "Reflexiones sobre la ejecución de sentencias de las decisiones del sistema interamericano de protección de derechos humanos." In Krsticevic, V. and L Tojo, *Implementación de las decisiones del sistema interamericano de derechos humanos: jurisprudencia, normativa y experiencias nacionales*. Buenos Aires: Centro por la Justicia y el Derecho Internacional (CEJIL),

Open Society Justice Initiative. 2010. *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*. New York: Open Society Foundations.

Open Society Justice Initiative. 2013. *From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions*. New York: Open Society Foundations.

Shaver, L. 2010. "The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?" *Washington University Global Studies Law Review* 9 (4): 639-676.

Rodríguez Garavito, C. 2011a. *Etnicidad.gov: los recursos naturales, los pueblos indígenas y el derecho a la consulta previa en los campos sociales minados*. Bogotá: Dejusticia.

Rodríguez-Garavito, C. 2011b. "Beyond the Courtroom: The Impact of Judicial Activism on Socio-Economic Rights in Latin America." *Texas Law Review* 89 (7): 1669-1698.

Rodríguez Garavito, C. and D. Rodríguez Franco. 2010. *Cortes y cambio social: cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia*. Bogotá: Dejusticia.

Rodríguez-Garavito, C. and D. Rodríguez-Franco. 2015. *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South*. Cambridge: Cambridge University Press.

Rosga, A. and M.L. Satterthwaite. 2009. "The Trust in Indicators: Measuring Human Rights." *Berkeley Journal of International Law* 27: 253.

United Nations Office of the High Commissioner on Human Rights (OHCHR). 2012. *Human Rights Indicators: A Guide to Measurement*. http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf

United Nations Office of the High Commissioner on Human Rights (OHCHR). *Using Indicators to Promote and Monitor the Implementation of Human rights: Some Questions and Answers. Background Material, Asian Sub-regional Workshop*, New Delhi: July 26-28, 2007.

Uprimny, R. 2007. "La fuerza vinculante de las decisiones de los organismos internacionales de derechos humanos en Colombia: un examen de la evolución de la jurisprudencia constitucional." In *CEJIL Implementación de las Decisiones del Sistema Interamericano de Derechos Humanos: Jurisprudencia, Normativa y Experiencias Nacionales*. Buenos Aires: Centro por la Justicia y el Derecho Internacional (CEJIL).

Uprimny R. y Sánchez, N.C. 2010. "Juzgar y medir. El uso de indicadores de derechos humanos por la Corte Constitucional de Colombia." In *La medición de derechos en las políticas sociales*, edited by Victor Abramovich and Laura Pautassi. Buenos Aires, Editores del Puerto, 2010.

Ventura Robles, M.E. 2006. "La supervisión del cumplimiento de sentencias en el sistema interamericano de protección de los derechos humanos." *Procedimientos del XXIV Congreso, Granada, España, septiembre 11-16, 2006*. Madrid: Secretaría General.

Documents

ESCR-Net, *Budget Analysis and ESCR*. <http://www.DESC-net.org/docs/i/430934>

IACHR. 2002. *2001 Annual Report*. OEA/Ser./L/V/II.114 Doc. 5 <http://www.cidh.oas.org/annualrep/2001eng/TOC.htm>

IACHR. 2003. *2002 Annual Report*. OEA/Ser.L/V/II.117 Doc. 1 <http://www.cidh.org/annualrep/2002eng/toc.htm>

IACHR. 2011. *2010 Annual Report*. OEA/Ser.L/V/II. Doc. 5 <http://www.cidh.oas.org/annualrep/2010eng/TOC.htm>

IACHR. 2013. *2013 Annual Report*. <http://www.oas.org/en/iachr/docs/annual/2013/TOC.asp>

IACHR. 2009 "Observations and Recommendations on the 2009 Annual Report of the Inter-American Court of Human Rights." AG/RES.2500 (XXXIX-0/09).

IACHR. 1995. *Report on the Situation of Human Rights in Haiti*, OEA/Ser.L./v/II.88 doc. 10 rev.

IACHR. Working Group to Examine the Periodic Reports of the States Parties to the Protocol of San Salvador. 2011. *Progress Indicators for Measuring Rights under the Protocol of San Salvador*. OEA/Ser.L/XXV.2.1.

Inter-American Court of Human Rights. 1985. *Advisory Opinion OC-5/85*, Series A No. 5.

Inter-American Court of Human Rights. 2010. *2009 Annual Report*. http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2009.pdf

Inter-American Court of Human Rights. 2013. *2012 Annual Report*. OEA/Ser.L/V/II.147 Doc. 1. http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf

Inter-American Court of Human Rights. 2014. *2013 Annual Report*. http://www.corteidh.or.cr/sitios/informes/docs/SPA/spa_2013.pdf

Inter-American Court of Human Rights. February 7, 2008. *Case of Acosta Calderón v. Ecuador. Monitoring Compliance with Judgment*.

Inter-American Court of Human Rights. November 30, 2001. *Case of Barrio Altos v. Peru, Reparations and Costs*. Series C, No. 87.

Inter-American Court of Human Rights. November 27, 1998. *Case of Castillo Páez v. Peru. Reparations and Costs*. Series C, No. 43.

Inter-American Court of Human Rights. December 3, 2001. *Case of Durand and Ugarte v. Peru, Reparations and Costs*. Series C., No. 89.

Inter-American Court of Human Rights. June 27, 2012. *Case of the Kichwa*

Indigenous Community of Sarayaku v. Ecuador. Merits and Reparations. Series C, No. 245.

Inter-American Court of Human Rights. September 17, 1997. *Case of Loayza Tamayo v. Peru, Merits.* Series C, No. 33.

Inter-American Court of Human Rights. September 15, 2005. *Case of Mapiripán Massacre v. Colombia, Merits, Reparations and Costs.* Series C No. 134.

Inter-American Court of Human Rights. June 15, 2005. *Case of Moiwana Community v. Suriname, Merits, Reparations and Costs.* Series C No. 124.

Inter-American Court of Human Rights. *Case of Molina Theissen v. Guatemala, Monitoring Compliance with Judgment, Order of November 16, 2009*

Inter-American Court of Human Rights. July 1, 2009. *Case of Plan de Sánchez Massacre v. Guatemala, Monitoring Compliance with Judgment.*

284 Inter-American Court of Human Rights. November 28, 2003. *Case of the Last Temptation of Christ, Monitoring Compliance with Judgment.*

Inter-American Court of Human Rights. March 29, 2006. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations, and Costs.* Series C No. 146.

Inter-American Court of Human Rights. February 8, 2008. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Monitoring Compliance with Judgment.*

Inter-American Court of Human Rights, September 7, 2004. *Case of Tibi v. Ecuador,* Series C, No. 114.

Inter-American Court of Human Rights. August 24, 2010. *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations, and Costs.* Series C, No. 214.

Inter-American Court of Human Rights. Resolution of April 29, 2010. www.corteidh.or.cr/docs/asuntos/8casos_29_04_10.pdf

Organization of American States. American Convention on Human Rights. November 22, 1969. O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [ACHR]

OAS General Assembly, Thirty-Seventh Regular Session. June 2, 2007. *Observations and Recommendations of the Permanent Council to the Annual Report of the Inter-American Court of Human Rights.* OEA/Ser.P. AG/Doc.4761/07.

Rules of Procedure of the Inter-American Commission on Human Rights, *approved* November 13, 2009

Rules of Procedure of the Inter-American Court of Human Rights, *approved* November 28, 2009

Statute of the Inter-American Court of Human rights, *approved* October 1979 pursuant to Resolution 448 of the General Assembly of the Organization of American States. <http://www.cidh.org/basicos/english/basic17.statute%20of%20the%20commission.htm>

Conclusions

Much has changed in the region since that August in 1959 when the Organization of American States (OAS) decided at the Fifth Meeting of Consultation of Ministers of Foreign Affairs to create an “Inter-American Commission on Human Rights [...] charged with promoting respect for such rights.” To begin with, the regional and global political landscape is not the same. The specter of a bipolar world associated with the power struggle between two major world powers is a thing of the past.

Likewise, throughout practically the entire region political problems have evolved, as have challenges to human rights. Armed conflicts and autocratic governments have given way to broader and more participatory political systems, which are nonetheless imperfect and which continue to grapple with historic representation gaps. Nevertheless, it is undeniable that the mass atrocities and authoritarianism that darkened the history of many places in the Americas is now an issue more tied to the past than to present challenges.

Processes of democratic inclusion and constitutional developments in the countries of the region have strengthened national institutions, giving greater voice to populations who have traditionally been excluded and discriminated against. Despite this strengthening—and indeed, as a result thereof—States have seen citizens’ demands grow and new rights-based agendas proliferate. At the same time, new challenges have emerged in all societies of the hemisphere. Some of these challenges stem from longstanding debts States have yet to settle, while others correspond to the demands of new times and realities.

Just as states and societies in the region have changed, so has the inter-American protection system, especially its human rights bodies. The vague mandate initially conferred on the Inter-American

Commission on Human Rights (IACHR) has been buttressed after decades of its work, with both the consent of governments, as well as the unflagging and ongoing support of social actors of the Americas. The American Convention on Human Rights not only reaffirmed legal commitments, but also created the foundation for a judicially-based system that monitors state obligations. Both the IACHR and the Inter-American Court of Human Rights (the Inter-American Court) have, with the passage of time, become touchstones for democracy, the consolidation of the rule of law, and the promotion and protection of human rights in the region.

In this context, we also have the discussion on the present and future of human rights in the Americas, which includes, but is not limited to, the issue of the future of the inter-American human rights system. The ultimate goal is to consolidate pluralistic societies which, based on a culture of rights and respect for differences, have institutional, national, and international mechanisms that protect their rights and peacefully and fairly settle disputes.

Multiple actors and institutional designs must be involved to further this goal. Among them, the inter-American system's mechanisms, which have enormous potential to contribute to this end. The regional experience, as well as the developments outlined in the studies that were the basis of the chapters in this book, show that the inter-American system is a crucial part of the human rights apparatus that spans an entire region inhabited by nearly one billion people.

Thus, one of the findings of this book is that while the political reality of the hemisphere has changed, so has the inter-American system. Thus, it concludes that it would be rash to suggest we live in a totally outdated or gridlocked system that is completely irrelevant for tackling the challenges the region faces. At the same time, however, the reflections in the book confirm that it is a system capable of improving and, like any international structure, depends on a confluence of actors and allies.

Several chapters of the book reach the conclusion that the foundation of the international human rights system, which the inter-American system is a part of, rests on the principles of subsidiarity and complementarity of efforts of the States that comprise it. Human rights bodies by themselves do not have the capacity to implement the transformations needed to fully guarantee rights. However, without them, national authorities would have no external technical reference for guidance and oversight. This underscores one of the essential conclusions of this book: the co-dependency that is demanded by

complementarity—one of the original principles of the international human rights system—has gained renewed validity in the current context.

Indeed, the reflections developed throughout this book fall in line under this premise. The conclusions and the recommendations provided for in the thematic chapters aim to present formulas that allow for serious consideration of the human rights challenges in our region and to contribute proactively to enhancing the role the inter-American human rights system can play in solving them.

Those of us in organizations that participated in the political strengthening process and conducted the research presented in this book understand that the issues the inter-American system faces require a three-pronged strategy. First, it must be based on an honest assessment of the human rights challenges in the region. Second, there must be an assessment of the capacity of national and international mechanisms to contribute to their solution. And third, the goals and commitments, both regional and individual, of the States of the Americas must be clearly established in order to overcome these problems and challenges.

In the book we conclude that the strengthening process, to a large extent, was focused solely on one of these areas: the legitimacy, capacity, and efficiency of the regional system, especially the IACHR, one of the main human rights bodies of the OAS. Sorely missing in these lengthy and intense discussions were deeper reflections on the human rights challenges we face and that the inter-American system is called upon to tackle, and what the specific commitments of leaders and political systems will be necessary in order to rectify them.

While the chapters in this book focused on technical discussions about the system, they did so from a broad perspective that considered three issues. First, they left behind the idea that discussions on the future of the inter-American system refer only to the types of mechanisms and tools that their bodies have. Second, they moved the discussion away from the polarizing logic that to defend the system you must recognize its strengths while overlooking its weaknesses. This, obviously, based on an objective and thorough analysis of criticism to prevent political interests contrary to the welfare of the system and the realization of rights from leading the discussion. Finally, they posited the idea that the future of both human rights and their protection mechanisms entails coordinated efforts, dialogue, and exchange of views between state actors, the bodies of the system, and social and academic organizations in the region. Thus, it is from this three-fold perspective that we invite you to read the conclusions of the book.

To this end, reflections on the role of the system were addressed from the very relationship that exists between systems: national, subregional, regional, and—to add here—universal. In that order of ideas, we conclude that while the creation of forums for addressing human rights in MERCOSUR and UNASUR has been largely linked to the idea that “human rights problems of Latin America must be resolved in Latin America,” a region that has its own historical and political identity, it is possible to find formulas of complementarity between these mechanisms and the inter-American human rights system.

Indeed, the emergence and swift rise of these forums can be seen in two ways. On the one hand, the negative view is that the new integration forums can be seen as entities for discrediting, duplicating, or contradicting what the mechanisms of the inter-American system do. On the other hand, the proactive view is that it is possible to build bridges that, in a positive manner, link the political discussion forums—in many cases at a very high level—that are provided for in these integration organizations, to the normative standards and technical guidelines that human rights bodies develop. That is why it is not bad news that governments discuss human rights issues in political integration organizations; quite the opposite. But nevertheless, discussions will be more useful if they include not only the authoritative opinion of technical experts from Commission and the Court, but also input from social actors of the Americas. Indeed, therein lies an important recommendation for the human rights bodies.

Nonetheless, for this complementarity to exist, two actions are required: first, refining the institutional design of some of these forums, seeking to eliminate duplications and allowing greater access and transparency; and second, ensuring political will and consistency in government action.

On this issue, we propose taking another look at the principle of subsidiarity in the international system and giving greater weight to its substantive aspect. The role of regional protection bodies is no longer the same, but that is no reason for its work on human rights issues to diminish, rather, to the contrary, its work should diversify.

One of the issues in the relationship between international protection bodies’ capacity and States’ positive obligations is precisely that of funding these bodies. Funding shortfalls essentially require a political response from States. There is a glaring gap between the political rhetoric of States and their pocketbooks. After analyzing the current funding system, there are some clear avenues for making headway if States have the political will. The combination of mandatory and voluntary

contributions is the right way to effectively strengthen the system, because neither one by itself can ensure the financial sustainability, predictability, and independence of the inter-American human rights system. This should go hand in hand with a redistribution of resources from the OAS Regular Fund with a larger allocation to the bodies of the inter-American human rights system, as well as preparation of a clear and exact action plan for this increased allocation.

In order to obtain greater funding for the inter-American human rights system, there must be an increase in the OAS budget through larger assessed quotas from member states. Additionally, countries like Brazil, Venezuela, Peru, Uruguay, and Ecuador, must resume their voluntary contributions to the bodies of the inter-American system, with allocations that are in line with their financial capacity; and countries like the United States, Canada, Mexico, Colombia, Chile, Argentina, and Costa Rica need to increase their voluntary contributions. This, obviously, with the understanding that donations from member states should not to be earmarked, especially not for thematic issues.

Along the same lines, the discussion on funding has two sides: where the money comes from and how the money is spent. Access to information and transparency are two essential pillars of democracy, and as principles undergirding the system, there must be strict compliance both domestically and internationally.

Paradoxically, while the IACHR Office of the Special Rapporteur for Freedom of Expression has vigorously advocated for a high standard in terms of access to information, the inter-American system's bodies are not up to par with such a standard. The public nature of the inter-American system's bodies and the notion of the public interest mean that the bodies must have a system for accessing the information they hold that operates under the principle of maximum disclosure. It is not only in this area, however, where improvements can be made in terms of transparency. Another area of paramount importance is related to procedures for designating or appointing authorities of the system.

Indeed, through the prism of a vision that has drilled down on the functioning of the IACHR and the impacts of strengthening its capacities and practices, based on available information and interpretation of figures from the short period that has followed the formal conclusion of the strengthening process, it is necessary to assess what has occurred to strike a balance between what is referred to as the IACHR's protection functions and those conventionally defined as promotion and monitoring. In this endeavor, a simplistic reading of available data would suggest that the profile of the Commission has been diminished

due potentially to a “reverential fear” of States’ reaction during the strengthening process. However, with a broader view, we can surmise that it is premature to arrive at fatalistic conclusions, although it is necessary to underscore some factors that should be taken into account to prevent this multiplicity of mandates from asphyxiating the Commission and its Executive Secretariat due to lack of resources.

Therefore, to avoid such distortions, first of all, the commitments undertaken with regard to promotional activities during the strengthening process must be implemented after obtaining additional financial resources, and not with funds that could ordinarily be used in managing the petitions system and the precautionary measures mechanism. In the second place, it is urgent that an assessment be conducted on domestic judiciaries’ incorporation of inter-American standards. And, in line with the call of other chapters, in the Commission’s future programming decisions that impact the use of material and human resources—such as the adoption of the five-year Strategic Plan for 2016-2020—it should be mindful of users’ demands and engage in consultation processes that include them.

In fact, this recommendation is in line with the evaluation of the current 2011-2015 strategic plan with regard to the petitions and case system. In recent years the number of petitions submitted to the system has risen significantly, an increase that the protection bodies have been unable to address as their capacity to respond to petitions received has not increased in hand. Specifically as concerns case management and procedural backlog, the efforts made to date to overcome the backlog have not achieved their goal and have had multiple shortcomings. This conclusion is principally based on the evaluation of partial fulfilment of the goals and projections contained in the Commission’s 2011-2015 Strategic Plan, whose expectations were exaggerated and unrealistic. Such expectations depended almost entirely on an increase in the Commission’s annual budget and the staff charged with the processes projected were not worked with or consulted. These are important points to keep in mind during the new process that Commission should be geared to start with its new 2015-2020 Strategic Plan.

A final issue that touches on both the effectiveness of the protection bodies to make decisions, as well as the political responsibility of the States to fulfill their part of the principle of complementarity, is that of the challenges to implementing the system’s decisions. There has been an increasing failure to implement reparation and non-repetition measures ordered by the Commission and the Court in recent years since

the system began to tackle structural problems underlying generalized violations of rights, especially economic, social and cultural rights.

This is concerning for many reasons, but in the context of strengthening particularly it is elucidative in order to channel the rhetoric of some State Parties that advocate for the need for the system to focus more on ESCR issues. It is urgent that there be a technical discussion on how to determine whether a decision has effectively been implemented. Currently there are many criteria to ascertain the level of compliance with decisions and this array of indicators means that disparate conclusions are drawn about the system's effectiveness.

Here again, dialogue and the exchange of ideas are called for as a starting point to build consensus that supports a real strengthening of the system. Indeed, this is precisely one of the overall lessons that can be drawn from these chapters and which those organizations that have worked on both political dialogue and policy proposals would like to emphasize. The problems and challenges for effective promotion and protection of human rights found in the region at all levels are enormous and demand a response based on participatory, constructive, and coordinated work. Improvements to the regional human rights system have been made thanks to the contribution of multiple visions, offered from all angles. In this book we seek to provide input to further this task. We hope that with this input we can go forward in building a consensus that facilitates victims' access to a system that protects their rights and that belongs to the peoples of the Americas.

Authors

Camila Barretto Maia

A member of the International Work Team at CELS, Camila holds a Bachelor's Degree in International Relations from the University of Brasilia, and is currently working toward a Master's Degree in International Human Rights Law at the University of Buenos Aires. She was with the International Work Team in Buenos Aires for three years, and has been working in the organization's São Paulo, Brazil office since March.

Eduarne Cárdenas

Eduarne is a member of the International Work Team at CELS. She has a law degree from the National University of Tucumán, and undertook graduate studies in human rights in Argentina and abroad. She has worked as an advisor, consultant, and researcher at different public agencies, universities, and non-governmental organizations, particularly on issues of gender, sexual and reproductive rights, and the human rights of migrants.

Daniel Cerqueira

Daniel has been a Senior Program Officer at the Due Process of Law Foundation (DPLF) since January 2014. From 2006 to 2014, he worked as an attorney and specialist at the Inter-American Commission on Human Rights. He earned his law degree from the Federal University of Minas Gerais and a Bachelor's Degree in International Relations from the Pontifical Catholic University of Minas Gerais in Brazil. He holds Master's Degrees in International Legal Studies from Georgetown University and from the Global Rights and Constitutional Democracy Program at the Università degli Studi di Genova in Italy.

Raísa Cetra

A member of the Foreign Policy and Human Rights Team at the Brazilian organization Conectas Direitos Humanos, Raísa holds a Bachelor's Degree in International Relations from the University of São Paulo. Her work deals with the international human rights systems, as well as issues pertaining to the human rights of migrants. She is currently working toward a specialization in Human Rights, Migration, and Asylum at the National University of Lanús.

Gastón Chillier

Gastón has been the Executive Director of the Center for Legal and Social Studies (CELS, Argentina) since 2006. He obtained his law degree from the University of Buenos Aires and holds an LLM in International Law and Human Rights from the University of Notre Dame Law School in the United States.

Mariana González Armijo

A transparency and accountability researcher at Fundar – Center for Research and Analysis, Mariana has a Master’s Degree in Sustainability Science from the University of Lund in Sweden and a Bachelor’s Degree in Industrial Engineering from the Iberoamerican University. She works in the area of development and human rights. At Fundar, she heads the project on international financial institutions.

Celeste Kauffman

Celeste holds a law degree from the University of California, Berkeley, where she specialized in International Law, and she has a degree in sociology from Aquinas College. Her work focuses on economic, social, and cultural rights (ESCR), ethnic rights, and socio-environmental conflicts in Colombia and around the world.

Gabriela Kletzel

Gabriela is the Director of the International Work Team at CELS, where she has worked since 2002. She graduated summa cum laude from the Law School of the University of Buenos Aires and holds an LLM from New York University. Gabriela has extensive experience in national and international impact litigation, as well as in advocacy actions before sub-regional, regional, and universal human rights bodies. She has received various academic distinctions and has published numerous works in the field of international human rights law.

Laura Lyons Cerón

Laura holds a law degree from the National University of Colombia, and spent an exchange semester at the University of Buenos Aires. Her professional experience includes working as an ad honorem assistant in the Chamber of Cassation of the Supreme Court, and as a researcher on the Inter-American Human Rights System at the Center for the Study of Law, Justice, and Society (Dejusticia).

Jefferson Nascimento

A member of the Foreign Policy and Human Rights team at the Brazilian organization Conectas Direitos Humanos, Jefferson has a law degree from the University of São Paulo and works on issues concerning the use of force as it relates to the protection of human rights. He is currently pursuing a doctorate in international law at the University of São Paulo.

Miguel Pulido Jiménez

Miguel was the Executive Director of Fundar – Center for Research and Analysis from 2010-2014, and a Global Fellow at Yale University in 2014. He earned his law degree from the Technological Institute of Advanced Studies in Monterrey and holds a Master's Degree in Democracy and Human Rights from the Latin American Social Sciences Institute (Flacso).

Silvia Ruiz Cervantes

A human rights researcher at Fundar – Center for Research and Analysis, Silvia holds a law degree from the Law School of the National Autonomous University of Mexico. Her work focuses on the areas of social rights, gender, indigenous peoples, and migration.

César Rodríguez Garavito

César is the International Director and a founding member of Dejusticia, as well as a professor and the director of the Global Justice and Human Rights Program at the University of los Andes. He has been a visiting professor at Stanford University, Brown University, the Getulio Vargas Foundation (Brazil), the University of Pretoria (South Africa), the Central European University (Budapest), the Åbo Center for Human Rights (Finland), and the Andean University of Quito. César is also a columnist for the newspaper *El Espectador*. He serves on the editorial boards of the *Annual Review of Law and Social Science* and *Open Global Rights*, and on the Board of Directors of Fundar Mexico.

Jaqueline Sáenz Andujo

Jaqueline served as the Human Rights Department Coordinator at Fundar – Center for Research and Analysis from 2012-2015. She is a graduate of the Law School of the Autonomous University of Chihuahua, and holds a master's degree in Fundamental Rights from the Carlos III University of Madrid. She was a litigation attorney at the Miguel Agustín Pro Juárez Human Rights Center from 2008 to 2012. She is currently an advisor to Justice Arturo Zaldívar of the Mexican Supreme Court.

Katya Salazar

Katya studied law at the Catholic University of Peru and has a Master's Degree in German Law and International Public Law from the University of Heidelberg, Germany. She was the Adjunct Coordinator of the Special Investigations Unit of the Truth and Reconciliation Commission of Peru, a Latin American Legal Fellow for the International Human Rights Law Group, and a member of the legal team of the Coalition Against Impunity (Nuremberg, Germany). She joined the Due Process of Law Foundation (DPLF) in 2004, and has been the organization's executive director since 2009.

María Sánchez de Tagle

A graduate of the Iberoamerican University, María served as the Impact Litigation Coordinator of Fundar – Center for Research and Analysis from 2012 to 2014. She participated in the visiting professionals program of the Inter-American Court of Human Rights in San José, Costa Rica, and has experience handling matters before the Inter-American Human Rights System.

Nelson Camilo Sánchez

Nelson is the Transitional Justice Research Coordinator at the Center for the Study of Law, Justice, and Society (Dejusticia), and an associate professor at the National University of Colombia. He obtained his law degree from the National University of Colombia and an LL.M. in International Law from Harvard University. He has been a Rómulo Gallegos Fellow at the Inter-American Commission on Human Rights (Washington DC) and a researcher with the Colombian Commission of Jurists (CCJ).

Pétalla Timo

Pétalla is a member of the International Work Team at the Center for Legal and Social Studies (CELS, Argentina). She graduated from the University of Brasilia with a Bachelor's Degree in International Relations, and earned a Master's Degree in International Law from the Graduate Institute of International and Development Studies in Geneva, Switzerland.

The Inter-American Human Rights System

**Changing times,
ongoing challenges**

The Inter-American Commission on Human Rights (IACHR) has in recent years undergone an intense debate process concerning its role and powers. Different States suggested the need to reevaluate the organization's work in light of the current reality of the region. In addition to the discussions surrounding its apparatus, its strategic agenda and thematic priorities were also called into question. It was a complex process, given the diversity of stakeholders and interests at issue, in which some legitimate critiques of the IACHR's work were intermingled with proposals that jeopardized a number of its essential powers, as well as its very autonomy and independence.

This book is the result of the collected experiences of a group of human rights organizations deeply involved in the issues on the ground, joined in an informal partnership in view of the need to develop new strategies to support this so-called "strengthening process" of the IACHR. The initiative was undertaken by the Center for Legal and Social Studies (CELS) of Argentina, the Legal Defense Institute (IDL) of Peru, the Due Process of Law Foundation (DPLF – regional), Conectas Direitos Humanos of Brazil, the Center for the Study of Law, Justice, and Society (Dejusticia) of Colombia, and Fundar - Center for Research and Analysis of Mexico.

The articles prepared by the organizations in this group cover diverse issues related to the operation, work themes, strategies, and potentialities of the IACHR at this time in the region. Accordingly, the articles include analyses of its workings and structure, addressing the financial status of the Inter-American System and taking account of the disparity between the discourse of the States and the budgetary reality of the Inter-American System. The current levels of transparency in the IACHR are also examined in relation, for instance, to the admission and processing of cases.

The organizations that have worked on this book hope that it will be a constructive contribution to the debates on the present and future of the Inter-American System, as well as a proactive tool to strengthen the institutional culture of human rights in the region.