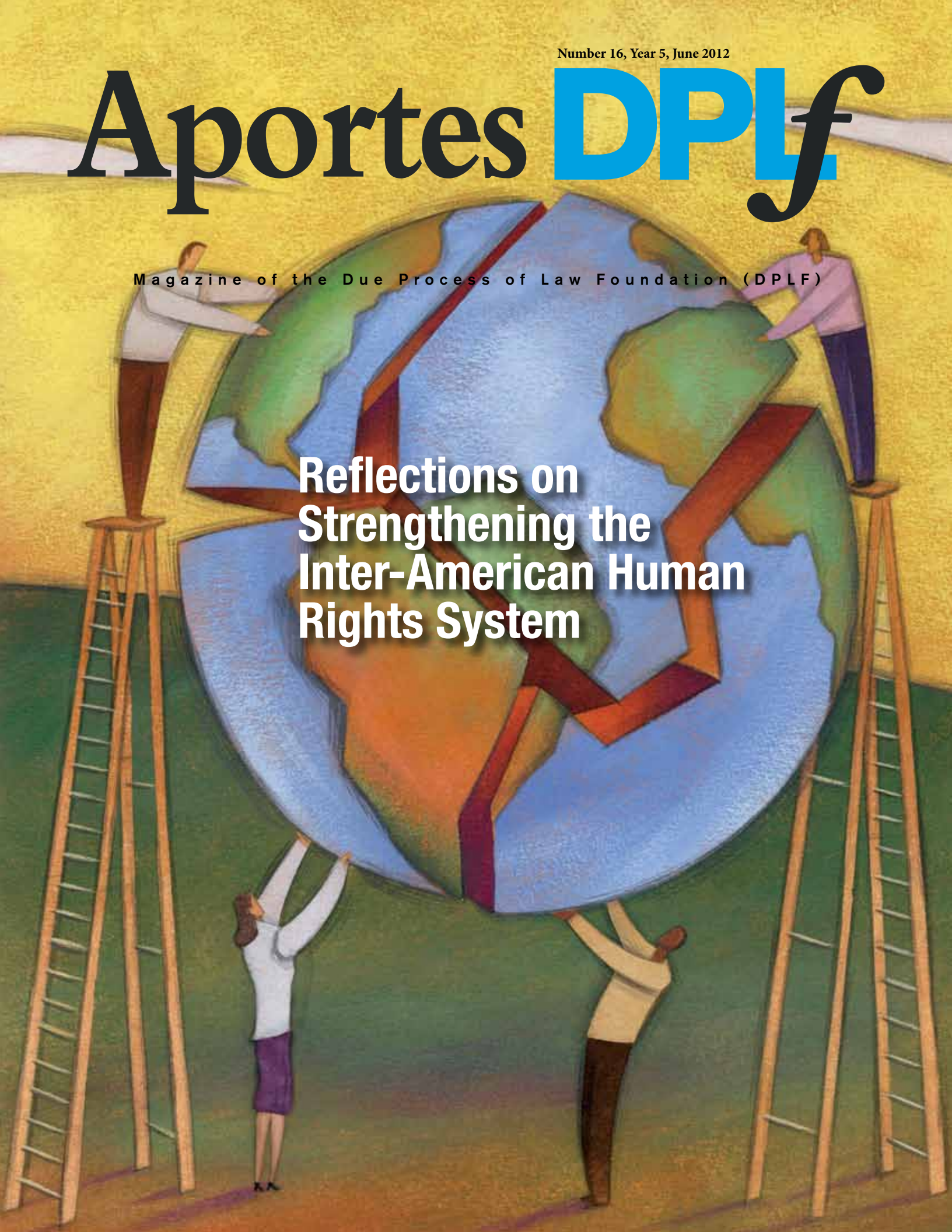


Number 16, Year 5, June 2012

Aportes **DPLF**

Magazine of the Due Process of Law Foundation (DPLF)

Reflections on Strengthening the Inter-American Human Rights System



Reflections on Strengthening the *Inter-American Human Rights System*



Dear Colleagues,

In June 2011, the Member States of the Organization of American States (OAS), gathered at the General Assembly in San Salvador, decided to form a 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. The Working Group was charged with preparing a set of recommendations to be submitted to the Permanent Council of the OAS by the end of the year. While this is not the first time that the states had promoted an initiative to examine the inter-American system, it was the first time that such an initiative had been taken in such a strained atmosphere. One key factor was Brazil's overreaction to the precautionary measures granted by the Inter-American Commission on Human Rights (IACHR) to indigenous communities in the Río Xingu Basin in Pará and the Commission's request that the Brazilian state suspend construction of the Belo Monte dam. Another was the OAS Secretary General's public statement that the precautionary measures issued by the IACHR were not compulsory. These unprecedented occurrences and the subsequent creation of the Working Group marked the start of a series of public and private discussions that culminated in the Working Group's final report and recommendations for the IACHR and for states, which were submitted to the Permanent Council in December 2011 and approved in January 2012.

This issue of *Aportes* frames this process in a broader context: the need to strengthen the inter-American human rights system and adapt it to the new realities and new challenges facing the hemisphere. While any institution is subject to improvement, it is widely recognized in the Americas and beyond that the inter-American system

in general, and the IACHR in particular, has played a crucial role in protecting human rights and democracy in the region, especially in the darkest moments of the past several decades. Does its work sometimes make certain states uncomfortable? Definitely, and that is precisely the point: to reveal areas of weaknesses in the defense and protection of human rights in the hemisphere and show us the avenues for tackling and overcoming those shortcomings. The day that OAS Member States are completely pleased with the work of the IACHR and have nothing to say about it is the day we will start to worry.

The contributors to this journal approach the reflection on the strengthening of the inter-American system from several different perspectives. The issue begins with an article that outlines the Working Group's reflection process over the past year, followed by a several articles on general and specific topics that should guide reflections on the system's workings in order to genuinely strengthen it. Subsequent articles explore some of the specific issues raised in the course of the reflection, including precautionary measures, the IACHR's role in promoting human rights, Chapter IV of its annual report, and its budget. Other articles comment on the role and perspectives of civil society in this process.

Although the final report of the Working Group was completed and approved this year, the reflection process is far from over. Much work lies ahead to genuinely strengthen the inter-American human rights system, and its many stakeholders have a role to play in this process. We hope that this publication contributes to the debate. As always, we look forward to your comments.

Katya Salazar
Executive Director
Due Process of Law Foundation

In this issue

- 1 Editorial**
Katya Salazar
- 4 Taking Stock of the Reflection on the Workings of the Inter-American Commission on Human Rights**
Victoria Amato

The debate over strengthening the inter-American human rights system

- 11 Twenty Reflections on the Process of Reflection**
Ariel E. Dulitzky
- 15 Three Key Aspects of Strengthening the Inter-American Human Rights System**
Felipe González
- 18 The Inter-American Commission on Human Rights: Balancing Its Political and Quasi-jurisdictional Roles**
Gastón Chillier, Gabriela Kletzel, and Lourdes Bascary
- 20 The Political Benefits of Institutional Reforms Supported by the Inter-American System**
Andrea Pochak



Thematic agenda of the inter-American human rights system in the 21st century

- 24 From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System**
Víctor Abramovich

Selected issues in the current debate over strengthening the inter-American human rights system

Precautionary measures

- 31 Overview of the Precautionary Measures Mechanism in Brazil**
Cristina Timponi
- 33 Precautionary Measures: Reflections on the Debate**
Luz Marina Monzón



Cover illustration: © Jupiterimages

Editor	<i>Katya Salazar</i>
Managing editor	<i>María Clara Galvis</i>
Coordination and editing	<i>Victoria Amato</i>
Spanish-language copyeditor	<i>María Clara Galvis</i>
English-language copyeditor	<i>Cathy Sunshine</i>
Translation	<i>Gretta Siebentritt</i>
Design	<i>Miki Fernández</i>

- 36** The Binding Nature of Precautionary Measures under Colombian Law
Carolina Restrepo

Promotion of human rights

- 39** Setting Sound Priorities: Reflections on the Discussion of the Workings of the Inter-American Commission on Human Rights
Yukyan Lam

Election of members of the inter-American organs for the protection of human rights

- 42** Election Nears for Members of the Inter-American Court of Human Rights
María Clara Galvis

States requiring special attention from the Inter-American Commission on Human Rights

- 43** Monitoring States with Problems: Chapter IV of the Annual Report of the Inter-American Commission on Human Rights
Lilia Ramírez

The voice of civil society

- 48** The OAS and Human Rights: The Role of Civil Society Organizations
Hugo de Zela
- 50** Selection of the Next Executive Secretary of the Inter-American Commission on Human Rights: A Civil Society Perspective
DPLF Staff
- 51** Civil Society Participation in the Reflection Process to Strengthen the Inter-American Commission on Human Rights: A Brief Commentary
DPLF Staff
- 54** Position of Civil Society Organizations of the Americas on the Final 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

The budget of the Inter-American Commission on Human Rights

- 59** Budgetary and Financial Challenges Facing the Inter-American Commission on Human Rights of the OAS
María Claudia Pulido

Taking Stock of the Reflection on the Workings of the Inter-American Commission on Human Rights

Victoria Amato

Victoria Amato is advocacy coordinator at the Due Process of Law Foundation.¹

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, set up by the Permanent Council of the Organization of American States, wrapped up its work in January of this year. This article first offers a brief account of the Working Group's process from July 2011 to January 2012. This is followed by a discussion of its final report and recommendations for the Inter-American Commission on Human Rights (IACHR) and for states, and their implications for the future of the inter-American human rights system (IAHRS).

Background

The Permanent Council created the Working Group in June 2011 in response to a mandate from the 2011 Organization of American States (OAS) General Assembly in El Salvador to deepen the reflection on the workings of the IACHR and produce a report with recommenda-

tions.² These recommendations were to be presented at the Permanent Council's first regular session in December 2011. The Working Group's functions, agenda, timetable, meeting summaries, and other documents have been published on the Permanent Council's website.³ Hugo de Zela, then permanent representative of Peru to the OAS,

² See *Record of the meeting of July 14, 2011*, Doc. GT/SIDH/SA.1/11 rev.1, July 18, 2011. It states: "This Working Group of the Permanent Council was created at the regular meeting of the Permanent Council of the OAS Permanent Council of June 29, 2011, based on the following 'Statement made by Hugo Martínez, Minister of Foreign Affairs of El Salvador and President of the forty-first regular session of the General Assembly, at its fourth plenary session, following the presentation by Dr. José de Jesús Orozco, First Vice President of the Inter-American Commission on Human Rights': 'The President suggests . . . that it instruct the Permanent Council to deepen the process of reflection on the workings of the Inter-American Commission on Human Rights (IACHR) in the framework of the American Convention on Human Rights and the Statute of the IACHR, with the aim of strengthening the inter-American human rights system, and to present its recommendations to the member states as soon as possible' (AG/INF.478/11)." Available under Summaries, 14 July 2011, on the web page of the Working Group, <http://www.oas.org/consejo/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>.

³ The Working Group web page is at <http://www.oas.org/consejo/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>.

¹ The author is grateful to María Clara Galvis for her valuable input during the drafting of this article.



chaired the Working Group and presided at its meetings until November 2011, when he stepped down in order to assume the post of chief of staff of the Secretary General of the OAS. His replacement as chair, Joel Hernández, deserves credit for his outstanding work as a mediator and consensus builder during the most intense and heated discussions among the states.

Before delving into any critique, it is important to clarify that as a regional organization composed of states, the OAS has the power to undertake any discussion it deems relevant on issues concerning the purpose for which it was established. It is also useful to recall the four principles that guide the OAS as a hemispheric forum for political dialogue and cooperation among states: democracy, human rights, security, and development.⁴

In light of the objectives of the OAS, it is worth asking whether the process undertaken during the second half of 2011 was indeed a priority on the organization's regional thematic agenda. The IACHR is the most prestigious organ of the OAS, and its defense of human rights is undisputed in the region and around the world. Why would the OAS need to review the workings of its most effective entity?⁵ In this regard, it should be noted that the Working Group

was not the fruit of a profound debate or reflection on the tasks before the Inter-American Commission, but rather stemmed from a controversy that arose in April 2011, when the IACHR issued precautionary measures in favor of indigenous communities in Brazil and ordered the immediate suspension of the construction of a hydroelectric power station.⁶ Rio de Janeiro overreacted, withdrawing its ambassador to the OAS, along with its candidate for a position on the Inter-American Commission; it also withheld its annual dues until January 2012, when it finally paid the US\$6 million it owed by then. Brazil also pressed for the Working Group's agenda to prioritize a review of precautionary measures. This proposal resonated in the Working Group, since by that time a number of states had clashed with the IACHR over the criteria for granting those measures, particularly to protect collective or community rights.

The atmosphere became more strained when José Miguel Insulza, Secretary General of the OAS, received the draft amendment of Article 11 of the IACHR's Rules of Procedure proposed for the election of the next Executive Secretary, who would replace Santiago Canton in December 2012. According to Insulza, the text "ignored" his role in the final selection of the person who would lead the Executive Secretariat. Specifically, it omitted reference to the IACHR's Statute, which clearly stipulates that the Secretary General appoints the Executive Secretary in consultation with the IACHR.⁷ He therefore requested

4 See Organization of American States, "About the OAS/Who We Are," http://www.oas.org/en/about/who_we_are.asp.

5 The IACHR has garnered national and international prestige as the "crown jewel" within the OAS. It has earned this reputation over 50 years of exceptional work in the defense, protection, and promotion of human rights in the Americas. This is reflected in the standards the Commission has developed on the most varied human rights issues in the region and its critical role in the protection of human rights in the darkest moments of Latin American history, when it condemned the atrocities committed by authoritarian and dictatorial regimes and focused international attention on them.

6 See Organization of American States, Inter-American Commission on Human Rights, MC 382/10, "Indigenous Communities of the Xingu River Basin, Pará, Brazil," <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>.

7 Statute of the Inter-American Commission on Human Rights, Article 21.3: "The Executive Secretary shall be appointed by the Secretary General of the Organization, in consultation with the



that the IACHR modify the draft amendment. While several states supported Insulza's position, more than a few interpreted it as a bid on his part to unilaterally select the next Executive Secretary. The question was finally resolved for the good of all concerned when the IACHR submitted a new version of the text that placated the Secretary General.⁸ The conflict could have been avoided, however, if both parties had chosen to act more sensibly: the IACHR, by including the Statute's language from the outset, and the Secretary General, by initially stating what he only voiced at the end of the negotiation—that he would respect the proposal, provided he was certain that the procedure was in accordance with the OAS Charter and the American Convention on Human Rights.⁹

Setting the agenda: Were users of the inter-American system consulted?

From the outset, many stakeholders in civil society, academia, and even the IACHR itself suspected—and some were certain—that the true purpose of the Working Group was to weaken rather than strengthen the Inter-American Commission. Leaving aside these speculations, which persisted throughout the six months of the reflection process, it was striking that the agenda, as crafted, only included the issues that were troubling the states. It failed to address other priorities for strengthening the IACHR, such as compliance with and implementation of its decisions, the selection of the authorities and members of the Inter-American Commission and the Inter-American Court, and victims' access to the system, to give a few examples. The final agenda included the following topics: appointment of the Executive Secretary of the IACHR; medium- and long-term challenges and goals; precautionary measures; procedural matters in

processing individual cases and petitions; friendly settlements; criteria for preparing Chapter IV of the IACHR annual report; promotion of human rights; and financially strengthening the inter-American human rights system.¹⁰

Much has been said, written, and recognized in a number of different forums about the importance of civil society participation in the activities of the OAS. In practice, however, states have a tendency—a less than democratic one, to be sure—to forget that the system is not their exclusive property, even though they clearly are among its most important stakeholders. In the process of setting the agenda for the Working Group, this attitude was in evidence yet again as the states proceeded to decide—without consulting other stakeholders, such as the victims and civil society organizations—which essential aspects of the IACHR and the inter-American human rights system would be discussed. Although, as already noted, states have the power to debate any matter of their choosing within their sphere of competence, the way in which the agenda was set has important implications for the analysis to follow. It clearly had, and will continue to have, an impact on the topics being discussed—as well as those not discussed—in this reflection process.

Six months of discussion

Over several months, 20 long, often heated discussions took place in the meeting rooms on the first floor of OAS headquarters. The states presented proposals and vigorously negotiated them before agreeing to the draft report with recommendations that was submitted to the Permanent Council in December 2011 and finally approved in January 2012. The following is a summary of the report's positive and not so positive contributions. In our view, all of the stakeholders interested in strengthening the inter-American human rights system should carefully study the report and use its recommendations, and the reactions to them, as an opportunity to reinforce the channels for dialogue between the states and the IACHR.

On the positive side, the report recommends making a commitment to allocate the resources necessary for the proper functioning of the organs of the inter-American

Commission. Furthermore, for the Secretary General to be able to remove the Executive Secretary, he shall consult with the Commission and inform its members of the reasons for his decision.”

8 See Organization of American States, Inter-American Commission on Human Rights, “New Text of Article 11 of the IACHR Rules of Procedure,” press release, http://www.oas.org/en/iachr/media_center/Alerts/002.asp.

9 Remarks by the Secretary General of the Organization of American States, José Miguel Insulza, at the meeting of the Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the IACHR, held on July 19, 2011, in the Simón Bolívar Room of the Organization of American States. *Summary of the Meeting of July 19, 2011*, GT/SIDH/SA.3/11, August 2, 2011, available on the Working Group web page (see note 3 above).

10 *Schedule of Activities of the Working Group*, GT/SIDH 7/11 rev. 3, November 16, 2011, available on the Working Group web page (see note 3 above).

system. Recognizing the system's current financial straits, the Working Group recommended that states "gradually increase the resources allocated to the IAHRs organs from the Regular Fund of the OAS."¹¹ The states also pledged to take concrete steps in this direction during the first half of 2012. While these statements are welcome, they will remain at the level of good intentions unless they are accompanied by the necessary political will to make good on this commitment in the short term.

One of the first concerns about the report is the marked imbalance between the recommendations directed to the IACHR and those directed to states. For example, the section on precautionary measures includes more than 12 recommendations for the IACHR compared to just two for states. The sections on individual cases and petitions and on friendly settlements offer no recommendations whatsoever for states. While the states noted that some of the recommendations were intended to equip the IACHR with new tools to enhance procedural aspects of its work and to boost efficiency and speed in the processing of cases and petitions, it should be recalled that states bear the primary responsibility for taking actions to facilitate the effective performance of the IACHR.

Another concern about the recommendations—and one that members of the IACHR pointed out numerous times in their interactions with the Working Group—is that many of the recommendations, especially those relating to precautionary measures, call for the IACHR to do things that it is already doing. For example, the Working Group recommends that the Commission "define objective criteria or parameters for determining 'serious and urgent situations' and the imminence of the harm, taking into account the different risk levels" and "clearly establish, in consultation with the parties, a work plan for the periodic review of precautionary measures with its corresponding schedule."¹² The IACHR has already defined those criteria and also periodically reviews the precautionary measures in effect. In the former case, the IACHR discusses the criteria for identifying serious and urgent situations in its *Report on the Situation of Human Rights Defenders in the Americas*; in the latter,

its Rules of Procedure (Article 25(6)) and practice include periodic review of precautionary measures.

The same can be said of the section on procedural aspects of the petitions and case system. The Working Group requested that prior to admitting a case, the IACHR verify the exhaustion of domestic remedies more thoroughly.¹³ According to observers familiar with the work of the IACHR in this area, the Commission has consistently improved and fine-tuned its analysis of the exhaustion of domestic remedies and has become increasingly strict in enforcing compliance with the admissibility requirements for petitions. In any event, the ideal time for discussing the exhaustion of domestic remedies is during the admissibility stage of the petitions and case process. For various reasons, however, states frequently do not avail themselves of the opportunity to submit specific arguments to the IACHR concerning the failure to exhaust domestic remedies in a particular case.

In light of these observations, states should reflect on the utility of an exercise that, at least with respect to these agenda items, ultimately recommended that the IACHR—in the words of many observers—"do what it has already been doing." While this interpretation might be open to debate, if this is the perception of the IACHR itself—as the Commission's president, Dinah Shelton, said before the Working Group—then it is truly cause for concern, given that the OAS, on the brink of economic collapse, spent over \$130,000 on this reflection process.¹⁴

Moreover, although states acknowledge that precautionary measures play a critical role in saving lives, they said nothing about their own duty to adhere to them and to comply with the IACHR's recommendations. The report presents compliance with decisions as a challenge, rather than as what it really is: an obligation of states under the American Convention on Human Rights. The recommendation to states is limited to calling on them to "exchange best practices in implementation of recommendations and decisions of the IAHRs organs." It is telling that the discussions within the Working Group of the states' duty to comply with recommendations issued by the IACHR should have been so conspicuously vague.

The preparation of Chapter IV of the annual report of the IACHR is an issue that has been debated for many years—the number of years roughly equaling the number of clashes

11 *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 on December 13, 2011, GT/SIDH 13/11 rev. 2, available on the Working Group web page (see note 3 above).

12 *Ibid.*, p. 11.

13 *Ibid.*, p. 12.

14 OAS sources speaking off the record indicated that this was the approximate sum invested.

between the states and the IACHR over this matter. No state likes to find itself featured in this chapter, which calls attention to countries of particular concern to the IACHR on account of the number or severity of their human rights violations. Venezuela and Colombia largely dominated the debate on this matter. Both countries requested the IACHR to review the methodology and criteria for developing Chapter IV and to reflect on the need for and effectiveness of including such a chapter in its report. Venezuela requested that the IACHR prepare a report on the human rights situation in every country in the region.¹⁵ This criticism of the effectiveness of Chapter IV must be seen as symptomatic of the discomfort that this chapter provokes among states. It confirms that the Working Group's agenda was not confined to areas where the IACHR most requires strengthening, but focused instead on matters that cause annoyance to states. States do not want to see themselves in this chapter, and they fear that they will be included in it if their human rights records do not improve.

The most unfortunate event of all occurred toward the end of the process, when Ecuador arrived at one of the final meetings with a packet of controversial recommendations. The country recommended that the IACHR introduce a code of conduct to govern the management of the rapporteurships,¹⁶ incorporate all rapporteur reports in a single chapter of its annual report,¹⁷ and allocate the funding it receives in a balanced way to all its rapporteurships. Ecuador further requested that states, observers, and other donors make voluntary contributions without specifying their purpose. Ecuador's recommendations were trained on a single target: the Special Rapporteurship for Freedom of Expression, which has vigorously condemned serious attacks on freedom of expression in that Andean country. In short, Ecuador's proposals were intended to weaken the rapporteurship and strip it of the functions it has carried out for over 10 years. The all-night work marathons that preceded the final drafting of the report ultimately did little good. Despite certain adjustments that toned down the language somewhat, Ecuador's controversial recommendations made it into the final report. And toned down or not, these proposals remain problematic. This means that in the future, it will fall to the IACHR and the states to interpret them in such a way as to

strengthen the inter-American human rights system.¹⁸

The completed report was initially presented in December, but official approval was scheduled for the first regular session of the Permanent Council in January 2012. Thanks to the efforts of civil society and the press, as well as the support of the vast majority of states, which made clear their opposition to the proposal by Ecuador, there were firm declarations of confidence in the work of the Special Rapporteurship for Freedom of Expression. The majority of the OAS Member States declared in no uncertain terms that none of the recommendations could be interpreted in such a way as to strip the IACHR of its independence and autonomy. For her part, the ambassador of Ecuador took a less confrontational tone and expressed her willingness to build consensus. She did not insist on creating a monitoring mechanism, taking the issue to the next General Assembly, or convening a special assembly for this purpose, although all of those actions had been proposed in the final meetings of the Working Group before the final draft of the report was prepared, with some support from states such as Brazil and Colombia, which later held their silence.

The IACHR, through its representatives, had the opportunity to respond to the concerns broached by the states and to present its own. President Dinah Shelton began by expressing her gratitude for the recommendations. She noted that the IACHR was already doing many of the things recommended in the report and said that implementing the rest was simply a matter of more funding. The members of the Commission and officials from the Executive Secretariat participated in five discussions with the states. At one of them, the IACHR offered a detailed account of the historical practice of precautionary measures and of the criteria for including a country in Chapter IV, explaining how these criteria had evolved. The Commission also made itself available to respond to the concerns of states in its deliberations. A member of the Executive Secretariat attended all Working Group meetings and helped clarify procedural questions in the formulation of the recommendations. The permanent observers of Spain and France also monitored the process.

15 *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*, p. 15.

16 *Ibid.*, p. 16.

17 *Ibid.*, p. 10.

18 See, in this journal, "Position of Civil Society Organizations of the Americas on the Final 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."

As next steps in the process, the IACHR will have to prepare and publish a response to the Working Group's report. The Secretary General will then prepare a follow-up report documenting the ways in which the recommendations have been implemented for presentation the next time the OAS takes up this issue.

Final reflections

In the words of a high-level OAS official who participated in the discussions on behalf of his country, the reflection process was "positive because it allowed some states to engage in a cathartic exercise with the IACHR" about aspects of the Commission's work which make them uncomfortable. Since the IACHR has always left its door open for dialogue, and it has usually been the states that have sought to close it, the question becomes: Was it really necessary to form the Working Group in order to experience this "catharsis"?

In any event, this cathartic process has clearly produced some worrisome results as well as some hopeful ones. For instance, Brazil's overreaction to the precautionary measures ordered in the Belo Monte case paved the way for other states to bring to the table proposals like the one from Ecuador, which was intended to weaken rather than strengthen the system and which created a new and unnecessary point of conflict. If the intention was to strengthen the system, that discussion certainly did not reflect it.

Another outcome of this process was that additional mandates were assigned to the IACHR,¹⁹ creating a need for more funding. This reflects the states' complete disregard for the IACHR's financial constraints and an unwarranted involvement in its internal and procedural affairs. Simply put, and in keeping with many of the criti-

cisms heard in the halls of the OAS, it is not the states' place to tell the IACHR how to write its reports or manage its resources. Their duty is to provide it with the resources it needs to operate effectively and to fulfill the mandates that they, as states, have assigned it.

During the long hours of discussion in the Working Group, little was said about the fact that the best things states could do to strengthen the inter-American human rights system would be to ensure its sustainability with sufficient funds and adhere to its decisions. It was clear that very few representatives from the missions to the OAS had even read the IACHR's Strategic Plan for 2011–2015. Had they done so, it would have greatly enriched some of the discussions. The document identifies the challenges facing the IACHR and outlines a plan of action with strategies to reinforce the IACHR's work for the next five years.

The "cathartic exercise" also failed to put another crucial issue on the table: the responsibility of states to present qualified candidates for positions on the Inter-American Commission and the Court. At minimum, this means that the individuals proposed for those positions should be human rights experts who know and understand the system and are capable of navigating sensitive political issues. We should not forget that in the end, the decisions issued by the IACHR and the Court are no more and no less than the product of decision making by those who make up these organs.

Imperfect as it may have been, the first stage of the reflection process is over. It is now time to wait while the IACHR evaluates the content of the recommendations it has received and has the opportunity to pursue its own catharsis.

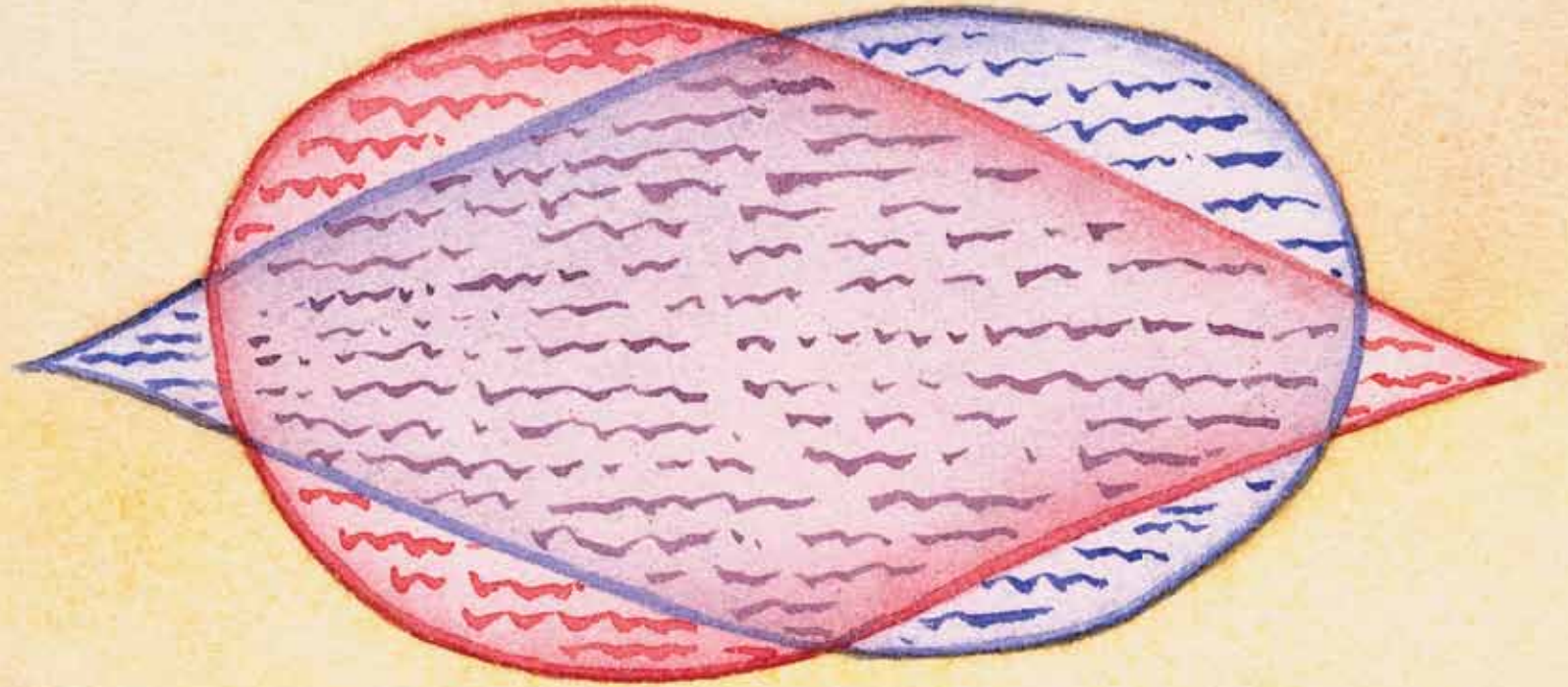
In sum, there is no question that this process was a valid if flawed exercise that should serve as a springboard for more profound and structured discussions, informed by a better understanding on the part of states about what the Commission does and does not do and aimed at securing the future of the inter-American human rights system. ■

¹⁹ These recommendations included, for example, "Prepare a report on the impact of the non-universality of the American Convention on Human Rights and inter-American human rights instruments, as well as of the recognition of the contentious jurisdiction of the Inter-American Court of Human Rights, on protection and promotion of human rights in the region" and "Prepare a practical guide or manual on friendly settlements to include, inter alia, the status of their regulation in the IAHRs, a compendium of successful experiences and best practices in their use, a list of possible reparation measures, etc." *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*, pp. 9 and 14.



Please send comments and possible contributions for this publication to aportes@dplf.org.

The debate over strengthening the inter-American human rights system



Twenty Reflections on the Process of Reflection

Ariel E. Dulitzky

Ariel E. Dulitzky is professor and director of the Human Rights Clinic at the University of Texas School of Law in Austin.

1 The inter-American human rights system has conferred prestige and relevance on the Organization of American States (OAS). In the era of dictatorships and civil wars, as well as in modern times, when democracies are called upon to address structural human rights issues, the Inter-American Commission on Human Rights and Inter-American Court of Human Rights have consistently served as the conscience of the hemisphere by supporting states (conditions permitting) and their inhabitants in the effective protection of human rights. Through individual case judgments, in loco visits, thematic rapporteurships, advisory opinions, precautionary and provisional measures, and thematic and country-specific reports, the system plays a pivotal role of condemnation and early warning in response to situations that undermine the consolidation of democracy and the rule of law. It serves to protect the rights of individuals when they are not duly guaranteed at the domestic level. The Commission and the Court have saved lives, and they continue to do so. The two bodies helped open up democratic spaces in the past, and today they are helping to consolidate democracies. They have struggled and continue to struggle against impunity, and they help ensure truth, justice, and reparations for victims.

Strengthening the inter-American system as a strategic objective of the reflection process

2 The process of reflection on the inter-American system should aim to strengthen it by identifying measures that will boost the effectiveness of its promotion and protection role and increase its capacity to adapt to hemispheric circumstances and respond to the requirements of each historical moment. Deliberations on reforms and strengthening of the system should seek to further states' compliance with their obligations and improve human rights promotion and protection on the ground. The process should focus on ensuring more and better individual and collective enjoyment of human rights and on supporting states in fulfilling their duties. Each proposal should be evaluated and scrutinized in light of these principles. The reforms should scrupulously avoid any initiative whose purpose or effect is to weaken the system's effectiveness.

3 The outcome of reflection should reinforce promotion and protection mechanisms that are working efficiently and enjoy broad support from the system's main stakeholders; consolidate areas in which the Commission and the Court have been successful; identify situations or groups that have not been accorded sufficient attention; and, finally, eliminate, modify, or overcome dysfunctional aspects that undermine the core objective of protecting human rights.

The actors of the inter-American system and their role and responsibility in the reflection process

4 The inter-American human rights system should be conceived as encompassing much more than the Commission and the Court. States create the system, assume the primary responsibilities, and are the object of the decisions of both bodies. States, however, should be regarded as multifaceted rather than monolithic, comprising myriad actors with different agendas, responsibilities, and visions. All of these actors, including foreign affairs ministries, judiciaries and legislatures, ombudsman offices, prosecutors and public defenders, and national, provincial, and municipal governments, have responsibilities for human rights in their respective jurisdictions. The OAS and its organs, in particular the General Assembly, the Permanent Council, and the Committee on Juridical and Political Affairs, have important duties with respect to the Commission and the Court, such as electing their members, discussing their annual reports, approving their budgets, adopting new human rights instruments, and acting as collective guarantors of the system. The secretary general, too, has important powers within the system: he can influence the Organization's agenda, has the final word in the appointment of Commission officials, and is able to interact politically with states and with the human rights bodies themselves.

As the system's main users, civil society organizations—understood in the broadest sense, and not confined to nongovernmental human rights organizations (NGOs)—play a pivotal role in the network of relationships that makes up the inter-American system. They submit complaints, provide information to the official bodies and to societies, assist and counsel victims, and train local actors. Lastly and most importantly, the system

includes the entire societies, in particular the victims of human rights abuses who turn to the system seeking the justice that has eluded them in their own countries. The inherent purpose of the inter-American system is to protect their rights. Rather than focusing exclusively on the Commission and the Court, any reflection on the system must take all of these actors into account and examine and evaluate the roles they play in the promotion and protection of rights throughout the Americas.

5 This means that states should facilitate broad and robust NGO participation and interaction as a contribution to constructive dialogue and to a deeper understanding of the human rights situation. The process must ensure the full and timely participation and inclusion of NGOs representing diverse sectors of society, particularly local and national organizations and other social movements that interact with the system.

A serious and informed reflection process

6 Discussions about the evaluation, reform, improvement, or strengthening of the inter-American human rights system do not typically start from the region's historical context, human rights needs, or pressing challenges. And while the terms "evaluation," "reform," "improvement," and "strengthening" tend to be used interchangeably, they actually have very different meanings and purposes and reflect divergent positions concerning the current and future value of the inter-American human rights system.

7 In general, references to evaluation and reform are tied to assumptions that the inter-American system is not doing a satisfactory job, that its *modus operandi* is one of confrontation with states (a throwback to the era of dictatorships), or that it fails to properly uphold the "rights" of states that appear before the Commission and the Court. As a result, "evaluation" and "reform" of the system usually are taken to mean placing limitations on the Commission's powers. The terms "improvement" and "strengthening," in contrast, tend to communicate that the system is legitimate and effective and that measures should be adopted to ensure that states comply with the decisions of the inter-American bodies, incorporate inter-American standards into domestic law, broaden victims' access and participation, and increase the system's operating budget.

8 Over the past 20 years, states consistently have expressed their proposals in a volatile and contingent manner, usually in the form of individual reactions by state representatives, rather than as coherently articulated policies. Such proposals often surface in response to a particular

decision or report by the Inter-American Court of Human Rights, or, more recently, to a particular Court judgment. Rarely are they based on a detailed examination of the actual situation and human rights needs of the countries.

The point of departure for the reflection process: The human rights situation in the countries

9 All OAS processes and initiatives must take into account the changing context and structural challenges of protecting human rights to which the system will have to respond. The reflection process is misguided to the extent that it confines itself to proposals to reform the Commission's or the Court's rules of procedure or to a discussion of admissibility procedures, hearings, precautionary measures, the Commission's role vis-à-vis the Court, and so forth. In other words, it is a mistake to focus on individual petition procedures instead of examining the human rights problems and needs of each country and of the region as a whole and offering a profound reflection on whether states are complying with their inter-American human rights obligations.

10 A serious reflection process should begin with an assessment of the human rights situation in the countries and in the region. Only after obtaining such a clear picture is it reasonable to ask what type of system is required and necessary for the present time and for the next 50 years. The reflection process should also be based on knowledge, data, and careful observation of the full range of human rights needs in the region and the circumstances of each country. Statistical data on the work of the Commission and the Court and the application of their decisions by Member States should be generated in order to obtain a clear assessment of the system.

11 The reflection process should not take an exclusively procedural approach, concentrating on the rules of procedure or case-processing procedures of the system's bodies. Rather, it should adopt a primarily *substantive* approach that focuses on the human rights demands in the region and the system's response to them. This requires an examination of the inter-American system's role on a regional political stage characterized by flawed democracies, serious problems of social exclusion, and institutional deterioration.

Strengthening the inter-American system requires national reform

12 States must institute national reforms that include ratifying inter-American treaties and fulfilling their

fundamental duty to apply them, accepting the Court's jurisdiction, withdrawing reservations, incorporating inter-American treaties into domestic law, strengthening the capacity of national human rights entities, providing education and training on the way in which the inter-American system operates, and complying with the decisions issued by its bodies.

13 States must revalidate the Inter-American Commission and Court as the authorized interpreters of inter-American instruments. They must reaffirm that rejecting or failing to give effect to their decisions is incompatible with the essence of the inter-American system and weakens states' commitment to human rights. States must also confirm that their obligations with respect to inter-American instruments and the decisions of the Commission and the Court extend to all branches and levels of government.

Strengthening the inter-American system requires reforms within the OAS

14 States should act multilaterally at the level of the OAS to improve the way in which the Commission's reports and the Court's judgments are received and examined by its political bodies.

15 The OAS must guarantee sufficient funding for the Commission and the Court to perform all of their functions. At least 25 percent of the Organization's budget should be allocated to the two bodies.

16 States should consider adopting measures to improve the procedures for appointing and electing the members of the Commission and the Court, to ensure their independence and technical qualifications. To this end, states should widely publicize vacancies at the Commission and the Court and appoint the best-qualified individuals after exhaustive national consultations. The OAS should establish a transparent process for electing members of the Commission and the Court.

17 The OAS should centralize its human rights work. Article 2 of the OAS Charter should be amended to include the promotion and protection of human rights as one of the Organization's essential purposes. Moreover, to rectify an important shortcoming, the Court should be incorporated into the Charter, which currently recognizes only the Commission. The Charter should accord normative protection and recognition to the principles at the heart of the system's effectiveness, legitimacy, and credibility, that is, the independence and autonomy of the Commission, the Court, and their respective executive secretariats, and the

binding nature of the decisions of both bodies.

18 The OAS should advocate and, ideally, require that all Member States become parties to the American Convention on Human Rights and accept the jurisdiction of the Court. To this end, sufficient incentives should be established so that all Member States attain this goal within a reasonable period of time. The year 2019, for example, which is the 50th anniversary of the adoption of the American Convention, might be an appropriate target date for achieving universal adhesion to the Convention and the jurisdiction of the Court. At the end of the proposed time frame, the OAS should consider whether those states that have not adhered to this core human rights treaty can continue to be part of the Organization or enjoy the same rights as the states that participate fully in the inter-American system.

19 Each state should set up a national mechanism to coordinate, promote, and implement inter-American decisions as a means of facilitating compliance and following up on recommendations. The mechanism would necessarily involve the most relevant government agencies and ministries as well as civil society representatives. The Commission should be a permanent member of this body and should participate periodically in its meetings to provide technical advisory services, share its regional and historic experience, and spotlight best practices. This national mechanism, and the Commission itself, should report to the OAS every six months. Victims should be invited to participate in the meetings convened by this mechanism when their cases are being analyzed and to submit their observations to the OAS.

20 The Inter-American Democratic Charter should be amended to link the Organization's response mechanisms to crises of democratic governance with the goal of ensuring full enjoyment of human rights. It should identify serious, systematic human rights abuses and repeated and consistent failures to comply with the decisions of the human rights bodies as factors that trigger the mechanisms to safeguard democracy included in the Democratic Charter. In order to avoid intensifying a crisis, which often leads to institutional breakdown or political violence, the Democratic Charter should set up some type of preventive reaction mechanism for response to reports or early warnings issued by the Commission. The Court should have the capacity to generate and trigger the mechanisms for safeguarding democratic institutions set out in the Democratic Charter (Articles 18 and 20). ■

Panel on Freedom of Expression in Ecuador



Human rights defenders and journalists described attacks on freedom of expression in Ecuador before the international community. From left: Katya Salazar, DPLF; César Ricaurte, Fundamedios; Mónica Almeida, journalist for *El Universo*; and Christian Zurita, co-author of *El Gran Hermano*.

At a hearing on October 25, 2011, during the 143rd regular session of the Inter-American Commission on Human Rights (IACHR), panelists aired serious threats to freedom of expression in Ecuador and the use of state power to take legal action against journalists, media outlets, and human rights defenders critical of the Ecuadorian government. The following organizations and individuals participated in the hearing: Fundamedios (Andean Foundation for Media Observation and Study), the National Union of Journalists of Ecuador (UNP), journalist Mónica Almeida of *El Universo* newspaper, and Christian Zurita and Juan Carlos Calderón, journalists and co-authors of *El Gran Hermano*. Concerned by the weakening of judicial independence reflected in these cases, the Due Process of Law Foundation joined the hearing as a petitioner. The hearing was also attended by a delegation from the Ecuadorian state, led by its minister of foreign affairs.

At the hearing, petitioners testified before the IACHR about the serious constraints imposed on journalists and media outlets that appear critical of the government in carrying out their public information function. They noted current laws and draft legislation that contravene international standards related to freedom of expression. The panelists condemned the climate of hostility and intolerance toward the press that has been encouraged by President Rafael Correa, noting that the state apparatus had been deployed to impose enormous fines on anyone who openly criticizes the current administration. The petitioners showed a video

documenting some of the president's most recent efforts to discredit the press. Afterward, journalists Calderón and Zurita testified about the lawsuit that the president brought against them for "moral damage" stemming from publication of the book *El Gran Hermano*, which implicates the president's brother in acts of corruption.

In its response, the Ecuadorian state denied all of the accusations. It used more than half of its presentation to delegitimize and discredit the information presented, the work of the journalists present at the hearing, and the work of the independent press in Ecuador more broadly. The state's delegation did not respond to any of the questions put to it by members of the Commission.

The next day, DPLF organized a public event on the issues raised at the hearing. Held before a large audience interested in the situation of the Ecuadorian press, the panel included César Ricaurte, director of Fundamedios, along with journalists Christian Zurita and Mónica Almeida, and was moderated by Katya Salazar, executive director of DPLF. Early this year, a first instance court sentenced Zurita and Calderón to pay \$2 million in fines for the alleged moral damage the publication of their book had caused to President Correa. Four executives from *El Universo* were also sentenced for defamation. In a national address on February 27, President Correa stated that he had "decided to pardon the accused and rescind the sentences that had rightfully been imposed on them."

Three Key Aspects of Strengthening the Inter-American Human Rights System

Felipe González

Felipe González is commissioner and former president of the Inter-American Commission on Human Rights.¹

The inter-American system for the protection of human rights has undergone significant changes over its 50-year history, an evolution that has accelerated in the past two decades in tandem with democratization processes in Member States of the Organization of American States (OAS). At its inception, the system consisted only of the Inter-American Commission on Human Rights (IACHR), established at an *ad hoc* meeting—the Meeting of Ministers of Foreign Affairs—and without a treaty behind it; yet it has managed to progressively consolidate its juridical and political structure, create the Inter-American Court of Human Rights, and adopt a range of human rights treaties. As democratization processes have taken hold on the American continent, the Commission and the Court have become increasingly effective, notwithstanding marked unevenness among OAS Member States and severe budgetary constraints. Despite the progress made, however, the inter-American human rights system still has serious shortcomings.

The American Convention on Human Rights and the inter-American human rights system in general were designed to operate optimally in democratic contexts rather than as a fairly limited means of dealing with authoritarian regimes. History, however, dictated a different path, given that the inter-American system emerged against the backdrop of brutal dictatorships in the region. As OAS Member States transitioned toward democratic systems, the Commission and the Court were able to fully assume their mission. These important shifts in the work of the inter-American system have triggered tensions—sometimes powerful ones—with states.

An interesting aspect of the evolving relationship between OAS Member States and the inter-American human rights bodies during these democratization processes is the increasingly diverse range of government institutions that are involved. As most countries have

made progress in strengthening the separation of powers and judicial independence and have created or empowered specialized human rights entities at the national level—ombuds offices, defenders of the people, and the like—their relationship with the Commission and the Court has become more dynamic. Similarly, a number of initiatives in recent years have sought to diversify state participation in the inter-American human rights system. All of these factors have strengthened the adaptation of domestic law and practice according to inter-American standards.

Civil society organizations have also played a highly relevant role in the development and strengthening of the inter-American human rights system. These organizations have supported the work of the IACHR since the beginning by providing it with information, calling attention to a range of human rights problems through complaints and at hearings, and participating actively in country visits. They also are responsible for a significant percentage of the petitions lodged before the IACHR. Similarly, civil society organizations have gradually expanded their role vis-à-vis the Inter-American Court insofar as the latter has provided opportunities for them to do so. Finally, they have been instrumental in persuading the human rights bodies of the inter-American system to continue to expand and diversify their thematic agenda.

As a result of all of these processes, the inter-American human rights system has proved capable of changing and adapting to new contexts and exigencies. It has accomplished this by strengthening its management and by enacting successive reforms of the rules of procedure of the Commission and the Court, the most recent of which featured unprecedented levels of participation. Still, the inter-American system, and the Commission in particular, is ill-equipped to take up and expeditiously resolve the volume of complaints received. Over the past 20 years, the inter-American human rights system has issued numerous

¹ The opinions expressed herein are the author's and do not necessarily represent the views of the IACHR.

landmark decisions in different thematic areas that have influenced states at the domestic level; yet this alone is not sufficient if the system is not equipped to satisfy the demands for justice in each individual case. Three inter-related areas of concern are the system's funding base, its effectiveness, and its autonomy.

No matter how much the Commission and the Court continue to streamline their management in order to improve their performance to the level expected of these two bodies, it is absolutely imperative to strengthen their funding. The inter-American system's work is severely affected by chronic shortfalls in funding that render its two main bodies incapable of fully carrying out their assigned mandates. This has a particularly detrimental effect on the case system, which cannot possibly process the enormous volume of complaints it receives every year in a timely manner. In recent years, states have offered expressions of support for the Commission and the Court in presentations to the political organs of the OAS, but this has not translated into any significant increase in their financial contributions to the two bodies. In 2011, the Commission submitted its Strategic Plan 2011–2015 to the Member States of the OAS, setting out the degree to which the fulfillment of its various mandates would be strengthened by greater resource availability. Nonetheless, the Permanent Council has paid scant attention to the strategic plan in its internal discussions.

Another important concern is the limited effectiveness of the decisions and reports issued by the inter-American human rights bodies, despite some improvements in this regard in the context of democratization processes in OAS Member States. On the positive side, states are increasingly complying with decisions that grant compensation to victims or include other forms of symbolic reparation. However, they remain reluctant to implement measures such as legislative or other types of reforms. Despite a trend toward such reforms, as I noted earlier, they tend to take a lot of time and are frequently unrelated to a specific case. There is particular concern with lack of effectiveness in the area of investigations on the merits and punishment of the perpetrators of human rights violations. This is evident in the large percentage of cases that the Inter-American Commission is still following up, long after having issued its decision, and the significant volume of cases that the Court has kept open after having handed down its judgment.

Part of the problem is the failure of the political organs of the OAS to act as collective guarantors of the inter-American human rights system. Although in recent years the General Assembly has adopted resolutions calling on states to abide by the decisions of the Commission and the Court, the political organs of the OAS seldom go any further than that. They do not take responsibility for following up on specific cases or on a state's chronic failure to comply with the orders of the two bodies.

Finally, it is also important to preserve the Commission's autonomy. The IACHR is a hybrid in the sense that commissioners are elected in their individual capacity while the staff is administratively attached to the General Secretariat of the OAS. A positive practice that has emerged in the past 15 years is that the Secretary General of the OAS ratifies the individuals selected by the Commission, usually through a competitive public search. While this has clearly boosted the level of expertise on the Commission, it is still only an informal practice that is subject to change until such time as it is legally instituted.

Over the past 20 years, the Permanent Council of the OAS has created a number of working groups, under different names, to look at the activities of the inter-American human rights system. Nonetheless, the three key aspects I have described—the Commission's funding base, the effectiveness of its decisions, and its autonomy—have not been a priority on their agendas. What has occurred instead is that other issues have been examined time and again, even though many of them are, in fact, contingent on those same three aspects.

The changes in the inter-American human rights system in the course of democratization processes on the American continent have largely been the result of a combination of initiatives by the Commission and the Court, the changing role of OAS Member States vis-à-vis the two bodies, and the work of civil society organizations. The Commission and the Court—which have been given only general norms for exercising their respective mandates under the OAS Charter, the American Convention, and their statutes—have developed their own specific norms through successive iterations of their rules of procedure. In recent years these regulatory reforms have been undertaken with broad participation from states and civil society, although the human rights bodies themselves reserve the right to decide on any changes to be made. The Commission has, at its own initiative, undertaken a series

of management-level reforms that are mainly, although not exclusively, related to strengthening the case system. More active engagement on the part of states, coupled with the more active role that civil society has played in the inter-American human rights system, has galvanized a series of procedural reforms, changed the thematic agenda of the human rights bodies, and improved the effectiveness (although clearly not enough) of the decisions issued by those bodies.

The Inter-American Commission and the Court are engaged in an ongoing evaluation of their own practices

and rules of procedure. While they are in a position to continue to strengthen the inter-American human rights system, they must be granted the autonomy they need to bring about reforms. Given the current state of affairs in the system, however, qualitative improvements to the work of the Commission and the Court will only be possible to the extent that states, through the political organs of the OAS as well as on their individual initiative, provide sufficient resources in keeping with the magnitude of the tasks entrusted to these two bodies, ensuring the effectiveness of their decisions and guaranteeing their autonomy. ■

Hearing on Judicial Independence in Panama



Participants at the hearing on judicial independence in Panama. From left: Miguel Antonio Bernal, Magaly Castillo, and Carlos Lee of the Alianza Ciudadana Pro Justicia, and Mirte Postema of DPLF.

On October 28, 2011, DPLF, together with the Alianza Ciudadana Pro Justicia (Citizens' Alliance for Justice), based in Panama, participated in a thematic hearing before the Inter-American Commission on Human Rights on the functioning of the justice and human rights system in that country. Speaking on behalf of the Citizens' Alliance were its president, Carlos Lee, its executive director Magaly Castillo, and Miguel Antonio Bernal, a journalist and member of the organization. Mirte Postema, senior officer of the Judicial Independence Program, spoke on behalf of DPLF.

The hearing touched on several problems that have had an extremely detrimental effect on human rights and judicial independence in Panama. The petitioners described executive branch interference in the judiciary—for example, in the

selection of Supreme Court justices; ineffectiveness and state manipulation of the justice system; and the current administration's hostility toward monitoring efforts on the part of civil society. The information they presented to the Commission exposed the deplorable state of the justice system in Panama and the impact of documented violations on the rule of law in that country. The Commission paid close attention to the information given and asked the petitioners and the state a number of questions in order to obtain a clearer picture of the irregularities reported. The day before the hearing, DPLF organized a public event on these issues, which was attended by several Washington-based institutions including the US Department of State, the Inter-American Development Bank, and the American Bar Association.

The Inter-American Commission on Human Rights: Balancing Its Political and Quasi-judicial Roles

Gastón Chillier, Gabriela Kletzel and Lourdes Bascary

Gastón Chillier is executive director of the Centro de Estudios Legales y Sociales (CELS, Center for Legal and Social Studies), in Buenos Aires, Argentina. Gabriela Kletzel and Lourdes Bascary are members of the CELS International Work Team.

The Inter-American Commission on Human Rights (IACHR) was originally conceived as a political body for the promotion of human rights in the region.¹ The subsequent adoption of the American Convention on Human Rights entrusted the IACHR with a protection function as well. This created a complex synergy between the IACHR's role of monitoring and political interaction with states and its petition system for human rights violations that have not been properly remedied at the domestic level.² Balancing those two functions remains a challenge today.

Now more than ever, the demands on the IACHR to exercise its protective function have kept the Commission from fully realizing its potential as a political force. Notwithstanding the merits of the petition system, the problems of access to justice and effective protection of rights in the hemisphere require a comprehensive approach that transcends the particular remedies that may be established in individual cases. The view that the inter-American human rights system should move toward an exclusively jurisdictional focus—as the European human rights system did by adopting Protocol 11 of the European Convention on Human Rights³—fails to consider that litigation is just one tool in a complex framework for the effective protection of human rights.

Latin American democracies in the twenty-first century must deal with the legacy of years of dictatorships and internal armed conflicts in the region, as well as with the impact that the neoliberal policies of the 1990s have had on people's rights. In order to genuinely uphold the rule of law, contemporary states must reverse the structural inequalities that stand as obstacles on the long road toward consolidating effective democracies. They must

make efforts to remedy and resolve the specific needs presented by certain sectors of society, such as women and indigenous peoples.

In this context, government institutions must overcome the difficulties they face in fulfilling their basic duty to respect, protect, and ensure full enjoyment of the human rights of all people subject to their jurisdiction. At the same time, they need to deal with the obvious pressures that economic development decisions are placing on human rights in the region.

In order for the IACHR to capably guide states along this path, the Commission must strike a constructive balance between its political and quasi-judicial roles. The stakeholders of the human rights system—primarily states parties and user organizations—should be involved in defining the nature of this work. This means that states should reaffirm and update some of the system's foundational agreements, while civil society should explore the potential that political tools offer for the protection and promotion of human rights.

A subsidiary system for the defense of human rights should appropriately combine the tasks of protection and promotion. Individual case litigation can result in measures to ensure non-repetition that require structural change. One of the challenges inherent in public policy advocacy around a particular case, however, is that working with and for the victims of human rights violations sometimes involves the quite valid decision to place their interests above efforts to bring about long-term institutional change.

The spectrum of actions available to the IACHR in its political role should be strengthened to complement its aim of protecting rights through the petition system. In loco visits, thematic and country reports, and hearings on the general situation are all useful tools for assessing the main human rights concerns in the region and designing and implementing appropriate strategies to address them. Thematic rapporteurships, for example, offer a useful framework for identifying the problems facing particular groups whose

1 See, for example, the Declaration of the Fifth Consultation Meeting of Ministers of Foreign Affairs held in Santiago, Chile, on August 12–18, 1959, Final Act, Document OEA/Ser. C/II.5, pp. 4–6.

2 See, in this regard, Articles 41 and 44–51 of the American Convention.

3 Protocol 11 of the European Convention on Human Rights entered into force in November 1998.

rights have been historically and systematically violated.

All stakeholders of the inter-American human rights system face the challenge of assessing the degree to which individual states have assimilated into domestic law and practice the principles, rules, and standards that embody their human rights obligations. It is imperative to move beyond the status quo, in which the decision in a particular case appears to provide the only basis for engaging states in an effective dialogue about the incorporation of specific standards into their public policies. There are at least two prerequisites for encouraging greater receptivity. First, states must be committed to creating institutional frameworks capable of absorbing the results generated by these political mechanisms at the local level. At the same time, the IACHR must strategically plan and coordinate its activities based on the assessment described above in order to optimize the protection of human rights. It must also conduct periodic evaluations of the receptivity of states to the standards articulated in individual cases and in thematic and country reports.

As respect for human rights standards at the domestic level is improved—for example, by optimizing the accessibility and performance of justice systems—the torrent of individual cases flowing into the system will start to subside. This will also be the case if violations can be prevented through the adaptation of legislation or institutional practices to bring them into line with the inter-American system. An example of this would be the adoption by states of guidelines consistent with inter-American standards on the prior consultation of indigenous peoples.

Of course, these ideas will amount to no more than good intentions unless they are accompanied by the allocation of sufficient resources, both material and professional—mainly on the part of the Member States of the Organization of American States (OAS)—to bring about a virtuous circle that encompasses the IACHR's different competencies.

These proposals are necessary steps for enabling the protection system to fulfill its basic aims. To the extent that states incorporate human rights standards into their policies and broadly uphold the rights of their populations, it will become possible to limit the individual petition system to identifying and addressing structural barriers or emblematic violations that absolutely require the IACHR to exercise its quasi-jurisdictional mandate.

International human rights law is constantly evolving,

and the protection system must therefore be able to adapt to emerging needs in the region. Toward this end, it is essential that the system's stakeholders be able to assess the capacity of the system, as originally designed, to respond to contemporary demands. Dialogue and collaboration are critical for strengthening the subsidiary role of the protection system, but it only makes sense to explore this possibility if it is premised on a firm and sincere commitment on the part of OAS Member States.

To conclude, the quasi-jurisdictional and political roles of the IACHR cannot be seen as mutually exclusive. The human rights system would collapse if its gateway institution, the IACHR, were to attempt to process the innumerable human rights violations in the region on a case-by-case basis. On the other hand, the system would forfeit an essential tool, namely the ability to sanction a state for a human rights crime and require it to make reparations, if the IACHR were to focus solely on its political role of promoting respectful policies and strengthening internal mechanisms for human rights protection. The relationship between the two roles that have been entrusted to the IACHR must be governed by a constructive tension in which individual cases serve not only to obtain a remedy for the victim, but also to identify structural problems. This in turn would strengthen the capacity of states to prevent massive violations. For this to occur, however, states must have a genuine commitment to the system, the system's organs must have a clear understanding of their role, and user organizations must be able to use these functions strategically.

These reflections are intended as a contribution to the discussions about strengthening the system, and specifically as a follow-up to the discussions during the latter half of 2011 in the framework of the Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the Inter-American Human Rights System, which centered on the apparent tension between the political competencies and quasi-jurisdictional functions of the IACHR.⁴ ■

4 See, for example, "Presentation by the Delegation of Mexico on the Topics 'Challenges and Medium- and Long-Term Objectives of the IAHRs' and 'Precautionary Measures,'" working group meeting of September 12, 2011, and "Remarks by the OAS Secretary General, José Miguel Insulza at the meeting on July 14, 2011." Both are available on the Web page of the Special Working Group, <http://www.oas.org/consejo/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>.

The Political Benefits of Institutional Reforms Supported by the Inter-American System

Andrea Pochak

Andrea Pochak is a member of the Mercosur Instituto de Políticas Públicas sobre Derechos Humanos (IPPDH, Human Rights Public Policy Institute) and former deputy director of the Centro de Estudios Legales y Sociales (CELS, Center for Legal and Social Studies), both in Buenos Aires, Argentina.¹

It is widely accepted that the purpose of the inter-American system for the protection of human rights is to strengthen democratic states so that they can improve the quality of life of the region's inhabitants. Accordingly, discussions about the system's workings and any reform proposals should be focused on this overarching goal and based on the most objective assessment possible of the extent to which the inter-American system has been effective in accomplishing it up to now. Nonetheless, these days very few voices can be heard raising this issue at the meetings and in the hallways of the Organization of American States (OAS).

Many of us share the conviction that the inter-American human rights system has supported and contributed to the historic political and social changes of recent decades, although with different nuances in each country.² Through its organs and resolutions, the system has played a critical role in strengthening democratic institutions, setting national and multilateral agendas, and developing public policies that prioritize respect for human rights in the countries of the region.³ Despite a less forceful presence in some countries and considerable resistance from others, the inter-American system has been the last resort for thousands of victims seeking

protection. And, as the primary source of the principles and standards that define a common, minimum set of rights for all countries, it has prompted and shaped institutional, political, and social reforms. Because of this, the system has acquired an unprecedented level of influence over the agendas of the governments and societies of the Americas.

The inter-American system is by no means perfect. It cannot afford to turn a blind eye to criticism and reform initiatives. Its flaws include the failure to achieve universality: it is unacceptable that just 25 of 34 states have ratified the American Convention on Human Rights since its entry into force 30 years ago, and only 22 have recognized the contentious jurisdiction of the Inter-American Court of Human Rights. The system is also frustratingly slow and its case selection criteria are vague and sometimes inconsistent with the priorities on the human rights agenda when particular cases or situations are being processed. In addition, the procedures for appointing members to the Inter-American Commission on Human Rights (IACHR) and the Court should be amended to ensure that the individuals selected are the most highly qualified and committed, skilled in dialogue and political negotiation and capable of resisting improper influences. Several of the system's procedures and tools—such as friendly settlements, for example—should be improved, since they could have a more forceful, comprehensive, and far-reaching impact if the IACHR were to be more proactive. The system has also fallen short in its efforts to promote the incorporation of international human rights law into domestic law. While countries are doing a better job of protecting human rights, this area remains a work in progress, and some countries are lagging behind as far as ranking international instruments and incorporating these international standards into their laws and jurisprudence. Most countries do not have the proper mecha-

1 The opinions expressed herein are the author's and do not necessarily reflect those of the IPPDH.

2 While I am aware of the variations among countries with respect to their human rights situations and the relationship of their political and judicial authorities to the bodies of the inter-American system, I believe the experiences of Argentina, which is the principal country discussed in this article, reflect the potential of the system throughout the region.

3 See Victor Abramovich, "From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System," *Sur: International Journal on Human Rights*, no. 11, http://www.surjournal.org/eng/conteudos/getArtigo11.php?artigo=11,artigo_01.htm. Originally published in Spanish in *Derecho PUCP: Revista de la Facultad de Derecho de la Pontificia Universidad Católica del Perú*, no. 63 (2009).

nisms in place to carry out international judgments, and the IACHR and the Court have yet to articulate original and serious responses to address this problem.⁴

The human rights situation in our countries is an ongoing concern and requires more effective prevention and protection measures on the part of states and international supervisory bodies. Deeply rooted patterns of serious human rights violations including torture, murder, forced disappearance, and forced displacement—which mostly affect specific groups such as the poor, indigenous peoples, rural farmers, Afro-descendants, immigrants, and women—are compounded by extreme social exclusion and poverty, as well as by new and increasingly complex conflicts and problems.

Despite this, many of the governments that are promoting processes to discuss and reform the powers and duties of the Inter-American Commission and Court (or have done so in the past) are guided by their own biases. They react out of concern over a particular resolution or thematic position that has been issued, or in response to a specific case or circumstance. They often resort to the political argument of an infringement of state sovereignty or its legal equivalent, the supposed supremacy of domestic law.

Such assertions fail to take into account the extremely important contribution that the inter-American bodies have made, particularly through their resolutions, to the increasingly fair, egalitarian, and inclusive institutional models that our countries have developed or are in the process of developing. These have strengthened a culture of respect for human rights in our societies. It is ironic that while several of these governments describe themselves as defenders of these very principles, they distrust the Inter-American Commission and the Court, viewing them as political adversaries rather than as complementary entities or strategic partners. Clearly, both sides bear some of the responsibility for this bias and distrust.

If the inter-American system has acquired a more prominent role in societies and garnered recognition from diverse groups and movements as a necessary forum and a complement to historic struggles, it is because it

has used its tools to advance the protection of suppressed rights and to improve the lives of many vulnerable people and sectors.

But the system has also earned respect by contributing to institutional reforms and to the fulfillment of previously unheard-of social entitlements that have brought significant political benefits to the authorities involved. I am referring, for example, to the inter-American system's support for efforts to achieve broader political consensus, confront powerfully entrenched economic, media, and religious forces, institute new forms of institutional and political coordination, forge strategic partnerships, and foster more sustainable progress in regional integration processes. Let us examine this more closely.

In recent years, various countries have enacted laws and even constitutional reforms as a result of international decisions. Governing and opposition parties have formed legislative majorities, and political groups have come to agreements with their rivals or with civil society in unprecedented displays of political consensus—sometimes in extremely polarized situations—that rarely occur with other types of initiatives.⁵

⁴ In light of the growing number of decisions and the complex types of reparations they require for the violations that have occurred, states parties and the Inter-American Commission and Court will have to come up with new initiatives to meet the challenges posed by implementation.

⁵ One example of this is the reform to the Criminal Code of Argentina that eliminated criminal sanctions for libel in cases of statements related to the public interest, which was approved by a broad majority in the Chamber of Deputies and unanimously in the Senate. Law 26.551 was the result of a May 2, 2008, Inter-American Court judgment in the case of journalist Eduardo Kimel. For more information on this case and its impact on legal reforms, see CELS, ed., *Derechos Humanos en Argentina: Informe Anual 2010* (Buenos Aires: Siglo XXI, 2010), www.cels.org.ar. Another paradigmatic example is the derogation of the Military Code of Justice and the approval of a new military justice system that respects due process and affords other protections for members of the armed forces. Law 26.394, which was ratified by comfortable legislative majorities, used as a precedent the commitments undertaken by the Argentine state in the friendly settlement agreements signed in IACHR cases no. 11.758 (Rodolfo Correa Belisle) and no. 12.167 (Argüelles et al.). For more information on the characteristics of the new military justice system, see Leonardo Filippini and Karina Tchrian, "El nuevo sistema de justicia militar argentino: Comentario a la ley 26.394," *Revista de Derecho Penal y Procesal Penal* (Buenos Aires: Abeledo Perrot, 2009), p. 1191. A third example is the derogation of the migration law in force since the last military dictatorship (the "Videla Law") and the adoption, in 2003, of Law 25.871, which adheres to human rights standards and has become a model for other countries in the region. For more information on the impact of the IACHR's De la Torre case on this legal reform, see FIDH and CELS, *Avances y asignaturas pendientes en la consolidación de una política migratoria basada en los derechos humanos* (2011), <http://www.cels.org.ar/common/documentos/CELS.FIDH.Migrantes.pdf>. To mention a few examples from

Moreover, certain democratic governments have invoked their human rights commitments in confronting powerful social and political forces at odds with the will of the people. Take, for instance, the influence that the Court's jurisprudence and the IACHR's positions have had, and still have, on efforts to reopen truth and justice processes in the Southern Cone and to democratize the armed forces. In Argentina, furthermore, international human rights standards have informed the debate over efforts to address media monopolies and to establish legal safeguards for the rights of sexual minorities, despite resistance from the Catholic Church.⁶ In sum, the introduction of international

other countries, both the groundbreaking constitutional reforms in Bolivia and Ecuador in 2008 and the law on prior consultation of indigenous peoples in Peru in 2011 invoked international standards in enshrining the rights of indigenous peoples and strengthening historically marginalized groups in their role as political interlocutors. For information on the relevant provisions of the Bolivian and Ecuadorian constitutions, see Bartolomé Clavero, "Ecuador y Bolivia: Nuevas constituciones y derecho internacional de derechos indígenas" (2008), <http://clavero.derechosindigenas.org/?p=750>.

6 The Law on Audiovisual Communication Services was drafted and adopted in 2009 in Argentina in an unprecedented process that involved substantial technical and professional expertise from the public. The law invoked international human rights standards as the basis for derogating a norm dating back to the military dictatorship in order to ensure a plurality and diversity of voices and deconcentrate the media market to avoid monopolies. The United Nations special rapporteur on freedom of expression recognized Law 26.522 as a "positive model" due to its content and the level of social participation in the debate (Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Doc. A/HRC/14/23, April 20, 2010, para. 71). The law was also praised as a huge step forward by the special rapporteur for freedom of expression of the OAS (IACHR, *Report of the Office of the Special Rapporteur for Freedom of Expression*, 2009). The Argentine law enshrining equal rights to contract marriage was premised on international human rights law standards regarding nondiscrimination in access to rights. Law 26.618 "made more than thirty changes to the Civil Code. The terms 'man' and 'woman' were replaced with the 'contracting parties'. This meant that the same rights and duties were established for heterosexuals and for couples made up of gays, lesbians, and transgender individuals. These changes completely overhauled family law. Since then, these marriages are subject to patrimonial and hereditary rights and duties, social benefits, medical and assistential coverage, medical decision rights, and so forth. Specific amendments were also included for the legal registration and recognition of co-maternal families, in other words, families made up of two lesbian mothers and their children." Florencia Gemetro, "Reconocimiento igualitario," in *Derechos Humanos en Argentina: Informe Anual 2010*, ed. CELS (Buenos Aires: Siglo XXI, 2010), p. 319, www.cels.org.ar.

human rights standards has contributed to policies that are less conservative and more just.

Other cases in the region have led to new forms of dialogue and coordination between political and judicial authorities. There have also been many instances in which local officials succeeded in attracting the central government's attention after a situation had been taken to the international level, and, conversely, incidents in which central governments were able to intervene in cases that traditionally fell outside their jurisdiction.

Social movements and groups earned the recognition of public authorities as interlocutors and even strategic partners after they began to make themselves heard by pursuing cases before the inter-American system.⁷ At the same time, political sectors found in these social movements and human rights standards a source of support for launching unparalleled institutional, political, social, and cultural reforms.

Lastly, the inter-American system has contributed to the integration of our countries—an objective that the majority of Latin American governments have espoused—by promoting the consolidation of a common regional identity in the area of human rights, which is reflected in the impact of the decisions issued by the Commission and the Court on national public policy.

The time has come, then, to dispense with positions shaped by bias and distrust. States are at once responsible for human rights violations and in the best position to protect and safeguard them. It is therefore necessary to avoid suggestions that anything that comes from the state is suspect. Several governments have brought about vital changes in the lives of their people in recent years. Using the various tools at their disposal, the Commission and the Court have supported and encouraged many of these advances and have enriched the political agenda of our democracies. Discussions and reforms that consolidate the road traveled are welcome, while those seeking to retrace it are not. ■

7 In the case of the marriage equality law, "after thirty years of political organizing, the Lesbian, Gay, Transgender and Bisexual (LGBT) movement succeeded in establishing itself as a relevant player on the national agenda and a political agent with tremendous influence in the organization of social relations and demands." Gemetro, "Reconocimiento igualitario," p. 315.

Thematic agenda of the inter-American human rights system in the 21st century



From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System*

Víctor Abramovich

Victor Abramovich is professor of human rights at the University of Buenos Aires and National University of Lanús law schools. He served as commissioner of the Inter-American Commission on Human Rights from 2006 to 2009 and is a former executive director of the Centro de Estudios Legales y Sociales (CELS, Center for Legal and Social Studies) in Buenos Aires, Argentina.

Introduction

Over the past decade the inter-American human rights system has influenced the internationalization of legal systems in several Latin American countries. Countries such as Brazil and Mexico accepted the jurisdiction of the Inter-American Court of Human Rights during this period, while others assigned constitutional or supra-legal rank to the American Convention on Human Rights. Attorneys, judges, legal practitioners, government officials, and social activists have become increasingly familiar with the workings of the system. They are using it in a manner that is no longer extraordinary or selective, and they are increasingly citing its decisions and precedents in the context of domestic court proceedings and public policy debates. As a result, domestic constitutional and supreme courts are gradually applying international jurisprudence in their decisions, and its influence is beginning to make its way into the realm of policy making, although to a lesser degree. The incorporation of international human rights law into domestic legal systems has brought about significant institutional changes.

This has not been a linear process, however, but one that has encountered problems and obstacles and experienced certain setbacks along the way. Today the inter-American human rights system is in the throes of intense debates aimed at defining its thematic priorities and the rationale for its involvement in a new regional political scene characterized by deficient and exclusionary democracies. This is very unlike the context in which the system was created and took its first steps, a context marked by the South American dictatorships of the 1970s and the Central American armed conflicts of the 1980s.

This article presents an overview of some of the strategic

discussions taking place inside the inter-American bodies and within the human rights community on the system's role in the regional political landscape of today.

Changing roles in a new political context

At its inception, the inter-American human rights system confronted massive and systematic human rights violations perpetrated under systems of state terror or in the context of violent internal armed conflicts. Its role was essentially to serve as a last resort for victims of these violations, who could not look to domestic justice systems compromised by a lack of independence. During this period, the country reports produced by the Inter-American Commission on Human Rights (IACHR) served to document situations with technical precision, legitimize complaints by victims and their organizations, and erode the image of the dictators at home and abroad.

Later, during the post-dictatorial transitions of the 1980s and early 1990s, the inter-American human rights system found a broader purpose, namely to support political processes aimed at addressing the legacy of the authoritarian past and its impact on democratic institutions. During this period, the system began to frame core principles concerning the right to justice, truth, and reparations for gross, massive, and systematic human rights violations. It set limits on amnesty laws and laid the foundations for strict protection of freedom of expression and for prohibitions on prior censorship. It forbade military tribunals from trying civilians or taking up cases of human rights violations, and it protected habeas corpus, procedural due process, the democratic constitutional order, and the separation of powers in order to forestall any latent possibility of regression into

* An earlier version of this article was published under the same title in *Sur: International Journal on Human Rights* 6, no. 11 (December 2009): 7–39. The article was adapted for *Aportes DPLF* by María Clara Galvis and Victoria Amato.

authoritarianism or the misuse of states of emergency.¹ It interpreted the scope of the limitations imposed by the American Convention on the application of the death penalty, prohibiting its use for minors and mentally ill persons, as well as its use as the only applicable penalty for a particular offense. The inter-American system also weighed in on social discrimination in the region, for example, by upholding equal opportunity before the law for women asserting their family and marriage rights or the hereditary rights of children born out of wedlock, whom the civil codes of some countries still regarded as “illegitimate.”

In the 1990s, the system stood up to terrorist governments such as the Alberto Fujimori administration in Peru, documenting and condemning systematic disappearance and torture and the impunity that enshrouded state crimes. It also played an important role in responding to serious violations of human rights and international humanitarian law perpetrated in the context of the internal armed conflict in Colombia, and continues to do so today. The present regional landscape is unquestionably more complex. Many countries in the region have moved beyond their transition processes without having truly consolidated their democratic systems. Representative democracies today exhibit serious shortcomings such as ineffective judiciaries and violent police and prison systems, which, coupled with alarming levels of inequality and exclusion, create a perpetually unstable political climate.

In response, the organs of the inter-American human rights system have sought not only to compensate the victims in individual cases, but also to establish a corpus of principles and standards designed to influence the quality of democratic processes and strengthen domestic mechanisms to protect rights. At this stage, the system faces the challenge of improving the structural conditions that ensure the enjoyment of rights at the domestic level.

The agenda of the inter-American human rights system is shifting perceptibly in this regional context. The functioning of justice systems has become a focal point that entails not only due process guarantees for the accused in criminal proceedings, but also respect for the rights

of certain victims who have been denied equal access to justice and harmed by structural patterns of impunity surrounding crimes perpetrated by the state. At the same time, the system is addressing another set of institutional issues associated with the preservation of the democratic public sphere, namely freedom of expression and the press, access to public information, the right to assembly and association, the right to protest, and issues associated with equality and legal due process in electoral processes. A priority of this emerging agenda is to respond to the renewed demands for equality coming from various groups and associations and to the situation of excluded sectors that have been denied their rights to participation and expression and have experienced patterns of institutional or social violence or barriers to access to the public sphere, the political system, or social or legal protection.

The jurisprudence of the IACHR, and especially of the Inter-American Court, has influenced changes in domestic jurisprudence in the region. Examples include the decriminalization of *desacato* (criticism of public officials) and press criticism, broadening of access to public information, and limits on the criminal prosecution of peaceful public demonstrations. Inter-American jurisprudence has also set limits and objective conditions for the use of pretrial detention, the detention powers of the police, and the use of public force. Still another important avenue for strengthening democratic institutions stems from the system’s ability to influence the general thrust of certain public policies, as well as their design, implementation, evaluation, and oversight.

The IACHR also issues thematic reports on topics of regional interest or of concern to several countries. These reports have enormous potential to set standards, enunciate principles, and address structural problems that may not be adequately reflected in individual cases. They have a more clearly defined promotional value than country reports, which are usually seen as a vehicle for exposing states before the international community. Finally, the Inter-American Court can issue advisory opinions, which are used to examine specific problems that go beyond a particular case and establish the scope of state obligations under the American Convention and other relevant human rights treaties.

A broader agenda: Exclusion and institutional degradation

The gradual shift in the role of the inter-American

1 Inter-Am. Court H.R., *The Word “Laws” in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, May 9, 1986; *Judicial Guarantees in States of Emergency (American Convention on Human Rights Arts. 27.2, 25.1, and 7.6)*, Advisory Opinion OC-8/87, January 30, 1987; *Judicial Guarantees in States of Emergency (American Convention on Human Rights Arts. 27.2, 25 y 8)*, Advisory Opinion OC-9/87, October 6, 1987.

human rights system in the new political environment was accompanied by an analogous shift in its agenda as new issues were introduced alongside the traditional ones. The agenda that has taken shape in recent years is tied to problems of inequality and social exclusion, as the deteriorating institutional practices and ineffectiveness of democratic states have given rise to new forms of rights violations. It is not that states set out to systematically violate rights, but rather that their legitimately elected officials are incapable of preventing the arbitrary practices of state agents, while precariously functioning judicial systems do not provide effective mechanisms to hold those agents accountable for their actions.² Population groups living in conditions of structural inequality and exclusion are the main victims of this institutional deficit, as illustrated by some of the conflicts on the docket of the inter-American human rights system.³ One of the system's main contributions with regard to regional problems rooted in institutional exclusion and deterioration lies in its capacity to set standards and principles to guide the actions of democratic states. This is also one of its overarching challenges.

When dealing with these types of situations, the Inter-American Commission and the Court have examined not only specific cases or conflicts but also the broad institutional and social contexts in which they occur. In many contemporary situations, the inter-American system has expanded its scope in order to frame specific circumstances in the context of structural patterns of discrimination and violence against certain social groups. It has done so based on a reinterpretation of the principle of equal opportunity with respect to the civil and political rights enshrined in the American Convention that enables it to take up social issues.

2 Paulo Sérgio Pinheiro, "La efectividad de la ley y los desfavorecidos en América Latina," in *La (in)efectividad de la ley y la exclusión en América Latina*, ed. Juan E. Méndez, Guillermo O'Donnell, and Paulo Sérgio Pinheiro (Buenos Aires: Paidós, 2002), pp. 15–31.

3 Issues include police violence marked by social or racial bias, along with overpopulation and torture in prisons, violations that mainly affect young people from the lower socioeconomic strata; a generalized practice of domestic violence against women, which is tolerated by state authorities; the denial of land and political participation to indigenous peoples and communities; discrimination against the Afro-descendent population in access to education and justice; the bureaucratic abuse of undocumented immigrants; and the massive displacement of the rural population in the context of social and political violence.

Rights in a context of structural inequality

A reading of the evolution of jurisprudence on the subject confirms that the inter-American human rights system is demanding that states play a more active role in ensuring the recognition of rights and the real possibility of exercising them. The system's jurisprudence has evolved from a concept of formal equality toward one of substantive equality that began to take shape toward the end of the democratic transitions. The notion of equality as nondiscrimination has progressed to an understanding of equality as the protection of subordinated groups. This means that states must play a more proactive role in achieving structural equality. That is, states not only have the duty not to discriminate: when faced with situations of structural inequality, they must also take positive action to ensure that certain groups are able to exercise their rights. Moreover, the state's duty to protect extends to the actions of nonstate actors, as in cases of gender-based violence. Here, the IACHR has imposed special duties on states to protect the right to life and physical integrity based on its interpretation of the principle of equality. Under the Convention of Belém do Pará and the American Convention, states are required to take preventive action and to exercise due diligence to deter violence against women, even where nonstate actors are involved. Among the populations that the IACHR has identified as requiring special protection or treatment are indigenous peoples,⁴ Afro-descendants,⁵ and

4 See the following Inter-American Court cases for information on the obligations of states to guarantee the civil, political, and social rights of members of indigenous communities: *Case of the Plan de Sánchez Massacre v. Guatemala*, Merits, Judgment of April 29, 2004, Series C, No. 105; *Moiwana Community v. Suriname*, Preliminary Exceptions, Merits and Reparations, Judgment of June 15, 2005, Series C, No. 124; and *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment of June 17, 2005, Series C, No. 125. The principle of equality led the Court to reinterpret state obligations in regard to the right to life as including the duty to ensure certain vital minimums in terms of health, water, and education, linked to the right to a dignified life of an indigenous community expelled from its collective lands, in *Sawhoyamaxa Community v. Paraguay*, Merits, Reparations and Costs, Judgment of March 29, 2006, Series C, No. 146, and subsequent decisions of supervision of compliance with the judgment.

5 O. Arias, G. Yamada, and L. Tejerina, "Earnings and Color in Brazil: A Mixed Tale," in *Social Inclusion and Economic Development in Latin America*, ed. M. Buvinić, J. Mazza, and R. Deutsch (Washington, DC: Inter-American Development Bank, 2004), pp. 201–20. See also IACHR, *Case of Simone André Diniz v. Brazil*, Petition 12.001, Admissibility, Report 37/02, October 9, 2002, alleging the state's failure to fulfill its duty to protect individuals from

women⁶; the Commission has also given special importance to political participation.⁷ In addition, the organs of the inter-American system have reiterated the duty of states to protect certain vulnerable groups such as children living on the streets or in detention centers, the institutionalized mentally ill, undocumented immigrants, displaced rural populations, and people living with HIV/AIDS.

As this brief overview indicates, the system is no longer confining itself to a formal notion of equality but is moving in the direction of a concept of structural equality. It recognizes that certain sectors of the population face legal or de facto obstacles to exercising their rights and that special measures are therefore required to achieve parity. Differential treatment may be required when, due to the circumstances affecting a disadvantaged group, identical treatment would mean restricting the exercise of a right or access to a good or service. It is also necessary to take into consideration the social profile of the victim, the social context in which the norms and policies are applied, and the degree of subordination of the social group in question.⁸

This concept of equality thus implies a proactive role for the state as a guarantor of rights in social contexts of inequality. It is also a useful lens through which to examine laws, public policies, and state practices. The imposition of positive obligations, making it incumbent on states to design policies to prevent and redress human rights viola-

tions affecting certain disadvantaged groups, has very important consequences for the political or promotional role of the inter-American human rights system.

States also have positive obligations with respect to the participation rights of indigenous peoples. They are bound to uphold indigenous peoples' right to free, prior, and informed consent regarding policies that might affect their communal lands—such as exploitation of economic and natural resources—and their right to enter into dialogue with government bodies and other stakeholders through their own representative political structures.⁹ These obligations are a reflection of the direct link between the exercise of social and cultural rights and of civil and political rights. They are premised on the special ties that indigenous peoples have to their lands and resources, which means that not only their economic interests but the preservation of their cultural identity is at stake.¹⁰ These rights of indigenous peoples, which are enshrined in international instruments such as International Labour Organization Convention 169, are also recognized as deriving directly from the American Convention based on a rereading of Article 21, which enshrines the right to property. The Inter-American Court has handed down a series of decisions affirming that these groups are entitled to participate in shaping the public policies of the state. Inherent in this is the recognition of a “special group right” to preserve areas of self-government or autonomy in matters that may be affected by state policy. The Court has also established the duty of states to provide adequate mechanisms for participation, for the production of information on social and environmental impacts, and for consultation with indigenous peoples to seek their consent to decisions that might affect the use of their natural resources or alter their lands. While the jurisprudence of the inter-American system clearly does not confer veto power on indigenous peoples, this is undoubtedly one of the most contentious issues in the current debate, as there is an obvious tension between the

discrimination based on their color or race.

6 On the obligation to adopt positive policies and measures to prevent, punish, and eradicate violence against women, see IACHR, *María da Penha Maia Fernandes v. Brasil*, Case 12.051, Report 54/01, April 16, 2001.

7 On the issue of candidacy in Argentina's electoral system, see IACHR, *María Merciadri de Morini v. Argentina*, Case 11.307, Report 103/01, October 11, 2001.

8 For a discussion of these notions of equality and legal philosophy and constitutional law, see I. M. Young, “Vida política y diferencia de grupo,” in *Perspectivas feministas en teoría política*, ed. Carme Castells (Barcelona: Editorial Paidós, 1996), p. 120; L. Ferrajoli, “Igualdad y diferencia,” in *Derechos y garantías: La ley del más débil*, ed. L. Ferrajoli (Madrid: Editorial Trotta, 1999), pp. 73–96; J. García Añón, “Current Problems of Legal Dogmatics in European Regulation: The Principle of Equality and the Policies of Affirmative Action,” in *Discriminación, derecho antidiscriminatorio y acción positiva a favor de las mujeres*, ed. M. A. Barrère Unzueta (Madrid: Editorial Civitas, 1997); O. Fiss, “Groups and the Equal Protection Clause,” *Philosophy and Public Affairs* 5 (1976): 107–77; R. Gargarella, “Justicia penal internacional y violaciones masivas de derechos humanos,” in *De la injusticia penal a la justicia social* (Bogotá: Universidad de los Andes/Siglo del Hombre Editores, 2008); and Roberto Pablo Saba, “(Des)igualdad estructural,” in *Visiones de la constitución 1853–2004*, ed. Jorge Amaya (Buenos Aires: Universidad de Ciencias Empresariales y Sociales, 2004), pp. 479–514.

9 José Aylwin, “Derechos humanos y derechos indígenas en América del Sur: Antecedentes, movimientos y desafíos,” in *Temas de derechos humanos en debate*, ed. José Zalaquett (Lima: Instituto de Defensa Legal/Centro de Derechos Humanos de la Facultad de Derecho de la Universidad de Chile, 2004), pp. 153–222.

10 Regarding collective rights for the preservation of a culture and the neutrality of the liberal state, see the classic essay by Charles Taylor, *Multiculturalism and “The Politics of Recognition”* (Princeton, NJ: Princeton University Press, 1992). See also J. S. Anaya, *Los pueblos indígenas en el derecho internacional* (Madrid: Editorial Trotta/International University of Andalucía, 2005).

recognition of a favorable group right and certain national economic development strategies meant to promote the broader public interest.¹¹

Objections to broadening the agenda and the margins of international protection

The political debate taking place within the Organization of American States (OAS) is about broadening the agenda of the inter-American human rights system. One aspect of the debate concerns not the system's role in particular, but the wider issue of what is meant by human rights and what should be the priorities of states in protecting them. Some states have taken a classic liberal position, arguing against broadening the agenda to include substantive equality and collective rights, positive obligations, and especially any treatment of economic, social, and cultural rights, even indirectly.

According to the more conservative of these positions, human rights should be confined conceptually to civil rights, defined as individual (rather than collective) rights that give rise to negative obligations of respect and nonintervention by the state. In this view, the goal is to make sure that the recognition of positive rights does not lead to further treatment of social policy issues and divert the focus from preserving civil liberties. More pragmatic exponents of this position are not necessarily critical of developments in the jurisprudence of the human rights system, but they caution against continuing down that path in the future and sacrificing the operational capacity to monitor the classic civil rights problems that persist in the region.

In some of the discussions taking place within the OAS, this stance on human rights tends to conflict with that of governments that espouse, with different ideological nuances, the interdependence of civil and social rights, or that argue directly that the defense of social rights should take priority over civil rights.

The question at the heart of the debate over broadening the agenda of the inter-American human rights system, however, is not how broadly human rights are

conceived or whether civil or social rights take priority. Rather, it is the degree to which the system infringes on state autonomy. A wider agenda inherently expands the range of matters under the system's purview, about which it will eventually make decisions that might have a domestic impact on countries.

Many governments contend that in the current regional landscape it is necessary to reexamine the degree to which the human rights system may intervene in local matters which, in their view, could be resolved at the domestic level. They also oppose protections for collective rights that conflict with their economic development strategies, such as the protection of indigenous lands and the right to prior consultation. Moreover, some of the governments advocating recognition of these collective rights as a matter of human rights also believe that these issues should be aired and resolved mainly in the domestic political sphere.

The main political tensions surrounding the activities of the Inter-American Commission and the Court are not triggered by their inroads into "new" social or institutional arenas, but rather by the reaction of certain governments to the system's scrutiny of the "traditional" civil rights violations that unfortunately are still very much in evidence today: extrajudicial murders, paramilitarism, militarization and military criminal justice, limitations on political dissent and press freedoms, and the like. That said, even though issues concerning equality and social rights are not usually the ones that provoke the most vehement reactions from states, they do tend to create controversy.

With respect to specific criticisms about broadening the system's agenda, it should be noted that this process was not triggered by an arbitrary decision; rather, it was set in motion by a gradual shift in priorities in response to the changing demands coming from citizens. These demands are by no means extravagant. They are efforts to claim rights that the OAS recognized in 1948, such as access to the courts and political rights. In response to the argument that the integrity of the inter-American human rights system must be preserved unchanged, it is worth asking just how relevant that system would be today had it not evolved in response to these social dynamics, but had clung instead to the traditional human rights issues and failed to react to the new situations raised by petitioners and victims. Who would be the system's users today, and what type of legitimacy would it have in our societies? In this sense, it is helpful to recall that the system is not sustained exclusively by the political commitment of governments: one of its pillars is the legitimacy it has

¹¹ In one of its last decisions on these matters, the Inter-American Court established the obligation of states to take positive measures to ensure that indigenous peoples and communities can participate, in conditions of equality, in decision-making about matters and policies that affect, or could affect, their rights and their development as communities. They should do so in such a way that they are integrated into state institutions and organs and participate directly and in proportion to their population in steering public affairs, as well as acting through their own political institutions and in keeping with their values, practices, customs, and forms of organization.

earned in the eyes of a broad spectrum of organizations, communities, and social movements.

Nonetheless, there are several important considerations related to these “communitarian” contentions. The inter-American human rights system must be cognizant of the evolving regional political landscape and cannot intervene in national processes as it did in the past, when it challenged and pressured dictatorships. This shift in focus does not mean that the system must confine itself to certain issues within the set of human rights specifically recognized in the American Convention and in other inter-American instruments. To the contrary, the system sets its own limits by defining its sphere of action diligently and consistently in light of its *subsidiary role* relative to domestic protection mechanisms, in such a way that it preserves the thresholds and priorities for intervening in domestic justice systems while recognizing that there are sensitive aspects within certain conflicts that, because of their complexity, are better examined and resolved in the local sphere.

The argument of autonomy and the principle of subsidiarity acquire special connotations when we refer to conflicts involving violations of rights due to patterns of inequality. As we have seen, these cases are not limited to economic, cultural, or social rights, but rather are presented before the system as violations of civil and political rights. This is not a formal claim of new rights but rather another dimension of the classic problems of violence and discrimination. It is true that these cases impose heavy burdens on states by compelling them to take positive actions of a collective nature and by holding them indirectly accountable for the actions of nonstate actors. But the additional burden on states is related to the magnitude of the social imbalances for which redress is being sought. Here the inter-American human rights system is playing a crucial role—reminiscent of its role in the times of state terrorism in Latin America—in which the subsidiary nature of its intervention must be carefully weighed against the limited capacity of the affected groups to take collective action and defend their own rights. In such cases the system gives voice to the weakest sectors, to those excluded from the system of social or political representation, who are unable to exert a powerful presence in the political sphere, who are beyond the reach of social and legal protection systems, and who feel that the rules of the political game reproduce social injustices rather than remedying them. The structural subordination of certain social sectors, then, resembles the political suffocation that ensues when authoritarian states clamp down on the public sphere. These are extreme situations in which the political space of the national state

operates like a prison. As such, they point to the limits of state sovereignty as a mechanism of exclusion from protection of rights and justify a stronger intervention on the part of the international community. If the state is unable to reverse structural patterns of inequality, it cannot convincingly invoke its autonomy in order to block international scrutiny of human rights. We therefore argue that it is precisely these types of matters that justify greater international involvement in domestic processes.

The protection of basic rights in situations of structural inequality defines the priority and political meaning of the inter-American human rights system in the post-transition period, in a landscape of constitutional democracies characterized by weak institutions and vast social inequalities. Far from undermining the system or distorting the notion of human rights, attending to these issues helps define a solid core of priority issues that imbue the system with new validity in the regional context.

The criticisms levied against the inter-American system for addressing the topics on this new agenda often reflect not only a narrow view of the process of internationalization of local legal systems, but also the limitations and shortcomings of the public policies of many Latin American governments. Even those governments that have vigorously addressed the legacy of the dictatorships have failed to make the connection between other types of urgent problems, such as prison violence and social inequality, and human rights policies.

Conclusion

The inter-American human rights system clearly enjoys considerable legitimacy, which originated in its efforts to destabilize the dictatorships and increased as it supported the transitions to democracy. In the current political landscape in Latin America, the strategic value of the system lies in its contribution to strengthening democratic institutions, especially justice systems, and national efforts to overcome pervasive exclusion and inequality. In light of this, the human rights system should consider, in addition to the efficacy of its jurisprudence and the development of its individual petitions system, its political role, focusing closely on the structural patterns that affect the effective exercise of rights by disadvantaged sectors of the population. Toward this end, the system should safeguard its subsidiary role in relation to national justice systems and ensure that its principles and standards are integrated not only into court doctrine but also into the general thrust of official laws and policy. ■

**Selected issues
in the current debate
over strengthening
the inter-American human
rights system**

Precautionary measures

Promotion of human rights

Election of members of the inter-American organs
for the protection of human rights

States requiring special attention from the
Inter-American Commission on Human Rights

Overview of the Precautionary Measures Mechanism in Brazil

Cristina Timponi

Cristina Timponi, an attorney, is former chief of international advisory services in the Human Rights Secretariat of the Office of the President of Brazil and currently serves as international affairs advisor in the Fundação Nacional do Índio (National Indigenous Foundation) of the Ministry of Justice of Brazil.

The inter-American human rights system (IAHRS) that emerged in tandem with the universal human rights protection system in the context of the post-World War II evolution of international law was a reawakening and a reaction to the horrors of the Holocaust and its staggering toll in human lives.

The IAHRS joined the ranks of regional protection systems as a progressive and innovative force. It helped further the notion that the state is not the only subject of international law and that individuals can assert their rights on the world stage. This movement became the springboard for a rethinking of traditional views of state sovereignty and for the eventual acceptance of a certain degree of international intervention in domestic affairs to protect and uphold human rights.

Through an effective monitoring mechanism made up of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights, the IAHRS plays a critical role in the consolidation of democracy on the American continent. It functions as a complementary avenue for the resolution of violations committed in the territories of states that are parties to the system in cases where victims have been unable to obtain satisfaction through domestic remedies.

As far as Brazil's evolution in this regard, the adoption of the 1988 Constitution, also known as the "Citizens' Constitution," consolidated guarantees of basic citizens' rights. While Brazil was one of the last countries to ratify the American Convention on Human Rights (1992) and to accept the contentious jurisdiction of the Inter-American Court (1998), since then it has moved rapidly to incorporate the rights envisaged in the American Convention into its domestic law.

Notwithstanding this domestic progress, certain factors that impeded the effective implementation of decisions emanating from the inter-American system during the 1990s remain in evidence today. For example, Brazil still lacks domestic regulations for the immediate execution of judgments handed down by the Inter-American Court, as well as domestic laws that distribute

responsibilities between the Union and the federative entities. This has been a persistent stumbling block when it comes to identifying those responsible for compliance, especially with the decisions of the IACHR.

While the Brazilian state has generally shown good faith with respect to compliance with the decisions issued by the organs of the IAHRS, some sectors of the federative structure are still unwilling to accept an international protection entity, which they regard as a threat to national sovereignty. The rulings of the Federal Supreme Court, for example, rarely mention the provisions found in international human rights instruments.

In addition to the lack of domestic regulation requiring compliance with international human rights treaty obligations, unfamiliarity with the IAHRS on the part of justice officials and decision makers may foster resistance. At the same time, some sectors have also sought to cast doubts on the system's credibility, particularly with respect to the work of the IACHR.

In this sense, the reflection process on the strengthening of the IACHR will help improve it and address circumstances that many observers have criticized. These include:

- A rapidly growing caseload that has in some ways created a bottleneck in the promotion of justice and that mirrors, at the regional level, the countless difficulties that countries are experiencing internally, such as protracted delays in legal proceedings.
- The lack of clear, objective criteria for admitting petitions and adopting precautionary measures. The indiscriminate admission of cases detracts from the system's credibility and performance and undermines its ability to promote human rights effectively and efficiently across the American continent.

The precautionary measures mechanism set out in Article 25 of the IACHR's Rules of Procedure clearly plays a critical role in the effective protection of rights in cases involving extreme gravity and urgency. When states comply with the

orders issued, the mechanism can provide genuine assistance in preventing human rights violations and addressing situations involving an imminent risk of their occurrence.

While Article 63(2) of the American Convention provides that the Court may order provisional measures, it says nothing about the Commission's powers to issue precautionary measures. More conservative sectors have questioned the legitimacy of the latter mechanism because it is set out in the IACHR's Rules of Procedure (Article 25) rather than in the Convention.

According to Articles 25(1) and (2) of the IACHR's Rules of Procedure, the Commission may, on its own initiative or at the request of a party, request that a state adopt precautionary measures. The IACHR's discretionary powers to initiate *motu proprio* the processing of precautionary measures should also apply to its ability to terminate those proceedings independently of any intervention by the state in question, once the elements of gravity and urgency have ceased to exist.

At this time, several precautionary procedures appear to be paralyzed—due to inertia on the part of the IACHR, the state, or the interested party—and are not fulfilling their role of protecting rights in situations of gravity and urgency. It would be useful to establish a procedure for the expiration of measures when the interested parties have not pursued them within a certain period of time. No one benefits from a glut of measures that are no longer serving their original purpose of emergency response.

In some case, requests for precautionary measures have not confined themselves to the facts but instead have strayed into the merits of the matter, which should be taken up as part of a case opened in response to a petition. This confusion weakens the procedure's effectiveness and credibility.

It would be more productive, perhaps, for the IACHR to confine itself to a rigorous evaluation of the requests for provisional measures before the Court so as not to create an excess of overlapping measures that ultimately undermines their effectiveness. The Court, in turn, should monitor the duration of emergency measures without losing sight of the option of initiating a regular proceeding before the IACHR. It is important to bear in mind that extending provisional measures over a prolonged period is inherently contradictory, since they should only be used in situations of extreme gravity and urgency.

While Brazil recognizes that compliance with the precautionary measures ordered by the IACHR and the provisional measures ordered by the Court is mandatory, in practice it pays more attention to the latter because

of their legal and conventional nature. In other words, by tacit agreement, the domestic entities responsible for coordinating the execution of decisions emanating from the IAHRs clearly pay more attention to the procedure set out in the American Convention than to the procedure found in an internal set of rules created without state participation or acquiescence.

Another equally controversial issue dividing signatory countries and the system's users has to do with the IACHR's obligation to specifically identify the beneficiaries of the collective precautionary measures envisaged in Article 25(8) of the IACHR's Rules of Procedure. While I understand the argument of some countries that the beneficiaries of collective measures should be clearly identified so that they can carry out the IACHR's decision, I disagree with that requirement. The great advantage of collective measures is that they protect the life and physical integrity of a group that has come under threat for a particular reason. It would therefore be unreasonable to try to identify each and every individual, since this would make protection impossible.

In cases of collective protection, however, I do believe that the IACHR must be cognizant of the fact that protecting a group is not the same as protecting an individual, and that this distinction must inform the measures to be imposed on the state. One example of this is the case of 300 inmates of a prison who were granted precautionary measures. After the prison closed and the inmates were transferred to other facilities, the state was required to keep reporting to the IACHR for years on the health status of each individual prisoner in the detention centers to which they had been assigned. This measure was hardly reasonable, given that the 300 individuals had been sent to different prisons throughout the federative state in question.

While the Commission and the Court enjoy autonomy in adopting and modifying their rules of procedure so long as they adhere to the provisions of the Convention and the Statutes, it would be useful to encourage greater dialogue and state participation in the process. In this way, states would be more inclined to support the reforms and, ultimately, to comply with them.

It is also normal for these types of procedures to undergo reformulations associated with the political dynamics of states and the social interactions of their citizens. It is extremely important to reflect on strengthening the inter-American system for the protection of human rights in ways that are inclusive of all of its stakeholders: the system's beneficiaries, the states, the Commission, and the Court. ■

Precautionary Measures: Reflections on the Debate

Luz Marina Monzón

Luz Marina Monzón is an attorney and human rights defender.

The legal character and scope of precautionary measures has been widely debated within the framework of domestic legal systems, focusing particularly on the question of their binding nature.¹ Since 2008, the Member States and political bodies of the Organization of American States (OAS) have made this issue a priority in the context of the dialogue on strengthening the inter-American human rights system.² In my view, it was this dialogue that triggered the 2009 reforms of the Rules of Procedure of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights. The reform included precautionary measures in the former case, and the changes made were based largely on the observations offered by states during the dialogue. To cite just one example, the provisions of Article 25 of the IACHR Rules of Procedure now include more detailed procedures for granting precautionary measures. Just as the states requested, this article provides that “prior to the adoption of precautionary measures, the Commission shall request relevant information to the State concerned, unless the urgency of the situation warrants the immediate granting of the measures.”

The debate has revolved around whether precautionary measures are obligatory, that is, binding on states, under the provisions of the American Convention on Human Rights. Some states and other political actors have argued that this instrument does not empower

the IACHR to grant precautionary measures and that therefore such measures are not binding on states. At the same time, some have criticized the procedure established for granting precautionary measures, demanding more precise criteria and stronger guarantees of states’ “right to a defense” and expressing opposition to collective measures, among other things.

Challenging the legally binding character of a protection mechanism—and ultimately the legitimacy of the IACHR’s powers—while at the same time bringing criticisms of a procedural nature is a mistake that makes it impossible to address the origins of the states’ quarrels with precautionary measures. One either accepts that the American Convention empowers the IACHR to grant precautionary measures, in which case they are binding, or else one rejects the notion that the treaty provides legal grounds for granting such measures, in which case they are not binding. If states advance the latter argument, then there is no sense engaging in protracted procedural debates, since the objecting states are not going to be satisfied no matter what the procedure.

Based on my experience, and having followed the discussions in the context of the activities of the IACHR and the political bodies, I believe that this debate faces a stumbling block from the very start. States do not really recognize the obligatory nature of precautionary measures or, ultimately, the IACHR’s powers to grant them under the provisions of the American Convention.

Public statements issued by one of the highest authorities of the OAS, the Secretary General, shed light on the reasoning behind this debate. Some of his statements, which no state has seen fit to contradict, include those issued when the IACHR granted precautionary measures in relation to the construction of the Belo Monte hydroelectric plant in Brazil.³ The Secretary General has also

1 Precautionary measures are a protection mechanism that can help prevent human rights abuses. According to Article 25(1) of the IACHR Rules of Procedure, “In serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case.” While discussions about the binding nature of precautionary measures are also taking place among scholars and experts, that discourse is beyond the scope of this article.

2 See Permanent Council of the Organization of American States, 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)*, CP/CAJP-2665/08 rev. 8 corr. 3, and *Note from the Permanent Mission of Mexico Requesting Inclusion of a Topic on the Agenda of the Next Regular Meeting of the Permanent Council*, CP/doc.4329/08 corr. 1.

3 IACHR, *Precautionary Measures: Indigenous Communities of the Xingu River Basin, Pará, Brazil*, PM 382/10. The International Coalition of Human Rights Organizations of the Americas sent a letter to the Secretary General dated May 9, 2011, which cites fragments of his declarations: “the Inter-American Commission on Human Rights makes recommendations. They are never orders that are obligatory for countries.” The Secretary General

made explicit statements in the framework of the Special Working Group to Reflect on the Workings of the IACHR, established by the Permanent Council.⁴ In a document circulated within the working group, the Secretary General stated that precautionary measures “are not included in the provisions of the American Convention or the Statute of the IACHR.”⁵ This opinion, along with others to the effect that states would not violate any treaty by failing to abide by precautionary measures, is a direct and specific assertion that precautionary measures are not obligatory, since they are not set out in the treaty governing the inter-American human rights system. While some states allude in their discourse to the importance of the IACHR’s work and, specifically, the importance of precautionary measures, the fact is that most statements of this type are intended to suggest some sort of voluntary concession to the mechanism—in other words, an ad hoc recognition of the American Convention.⁶ This interpretation of the relationship of states to the protection mechanism makes the latter contingent on the specific circumstance and serves as an excuse to interfere in the independence and autonomy of the IACHR. This emerged clearly in the debate that surrounded the granting of the aforementioned measures related to the Belo Monte plant in Brazil.

A number of legal arguments have been developed on the binding nature of precautionary measures, which might lead one to conclude that this particular issue has been resolved. In my opinion, however, we need

then concludes that “neither Brazil nor any other country would be violating any international treaty by failing to obey such recommendations” (translation by DPLF). The Secretary General’s statements to the BBC regarding the Belo Monte decision are available (in Portuguese) at http://www.bbc.co.uk/portuguese/noticias/2011/05/110502_insulza_jc.shtml.

4 The Permanent Council created the group on June 29, 2011, and its members named it 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. See OEA/Ser.G GT/SIDH/SA.5/11, August 12, 2011, and OEA/Ser.G GT/SIDH/SA.1/11 rev.1, July 18, 2011.

5 *Opinion on the Application of Various Legal Instruments of the Inter-American System for the Protection of Human Rights with Regard to Certain Specific Topics*, OEA/Ser. G GT/SIDH-2/11, July 15, 2011. Translation of quote by DPLF.

6 *Presentation by the Delegation of Mexico on the Topics “Challenges and Medium- and Long-Term Objectives of the IAHRs” and “Precautionary Measures,”* OEA/Ser.G GT/SIDH/INF.4/11, September 14, 2011. In this document, the Mexican delegation explicitly recognizes the basis for precautionary measures in Article 41(b) of the American Convention.

to revisit these arguments in order to openly address the disagreement over the principles underlying this mechanism in the context of the Special Working Group to Reflect on the Workings of the IACHR.

The Secretary General has asserted that the American Convention contains no specific or explicit provision regarding the IACHR’s powers to request that states implement precautionary or urgent measures to protect the rights of individuals subject to their jurisdiction. At the same time, there is nothing in the treaty that denies the Commission that authority. Several axiological and legal arguments converge to substantiate the claim that precautionary measures are an individual protection mechanism that is binding on states because their legal basis is found in the American Convention itself.

The *pro homine* principle that guides interpretation of the Convention’s norms (Article 29) offers perhaps the best explanation of the meaning and essential purpose of human rights protection and, accordingly, the meaning and purpose of domestic and international legal protection systems. From its inception, the Inter-American Court emphasized the meaning and purpose of human rights treaties, indicating that “their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.”⁷

According to the American Convention, the main function of the IACHR is “to promote the observance and defense of human rights” (Article 41). As inferred from the powers set out therein, this function entails two types of actions: one is promotion, in the sense of generally developing awareness of human rights, and the other is the active defense of human rights. The latter encompasses appropriate actions for the effective and timely protection of individual rights and freedoms and is undertaken by states. Precautionary measures, like provisional measures, help achieve one of the primary objectives of protection, which is to prevent human rights abuses.

7 Inter-American Court of Human Rights, *Advisory Opinion O.C. 2* (September 24, 1982, para. 29).

In light of its main function under the Convention, as well as the powers conferred by its Statute (Article 22), the IACHR has adopted its own rules of procedure, which include precautionary measures as a mechanism for the protection and defense of human rights.⁸ Victims, states, and the political bodies of the OAS themselves have recognized this mechanism as an effective means of protection in the face of serious and imminent risks to individual rights and freedoms.⁹

From this standpoint, precautionary measures are a protection mechanism in the sense described by Luigi Ferrajoli: they are “methods envisaged under the law to reduce the structural distance between the law and its effect and, therefore, to optimize the effectiveness of fundamental rights as they are stipulated in constitutional [Conventional] provisions.”¹⁰

In brief, the power to request precautionary measures derives not only from the American Convention itself. In practice, it has been acknowledged, adopted, accepted, and upheld by states, and ultimately this provides a legal basis for the interpretation that precautionary measures are indeed among the powers that the Convention confers on the IACHR.¹¹

Having clarified that precautionary measures are legally binding on states, the discussion now turns to the procedures for granting them. In my opinion, beyond the specific issues that may arise (terms, deadlines, criteria, extensions, and so forth), the main issue here is the states’ opposition to collective measures and their comprehension of the concept of risk. This too must be tackled head on. On various occasions, states have expressed their dissent when the IACHR, and sometimes the Court itself, has granted protection measures to communities, even

when the criteria for identifying the beneficiaries of such measures have been applied. States have indicated that they cannot possibly comply with the required protection when the beneficiaries are not identified individually.

States are reluctant to accept that just as treaty provisions must be interpreted in a dynamic and evolving manner, protection also poses new challenges today insofar as the risks do not manifest themselves in the same way as in the past. Nowadays, risks are associated with state or non-state actions targeting entire communities. This is true of actions associated with natural resource exploitation in the territories of indigenous or Afro-descendent communities, or the actions of armed groups toward those populations or rural communities, or the risks faced by incarcerated populations.

In this respect, states that profess interest in strengthening the inter-American human rights system, and human rights promotion in particular, should back up their statements by helping to strengthen one of the most important mechanisms for preventing human rights abuses. They should understand that, similar to the promotion reports issued by the IACHR under Article 41 of the American Convention, precautionary measures present opportunities to act in an effective and timely manner to prevent human rights violations. They are an early warning system to keep human rights violations from becoming entrenched. The argument concerning the difficulty of providing protection is facile and ineffectual. Should the IACHR be compelled to grant individual precautionary measures in contexts involving a group of people, it would have to issue one such measure after the other, with the potential that human rights violations would materialize in cases before the inter-American human rights system. This is contrary to the preventive nature of this protection mechanism and to the purpose of the protection system itself. ■

8 Permanent Council of the Organization of American States, Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the IAHRs, *Presentations by the Delegation of Argentina on “Procedural Matters in Processing Cases and Individual Petitions before the IACHR” and “Precautionary Measures,”* OEA/Ser.G GT/SIDH/INF.6/11, September 26, 2011. In the framework of the aforementioned working group, the Argentine delegation stated that precautionary measures have been included in the IACHR’s Rules of Procedure since 1980 and that this mechanism has been “generally accepted by the States of the region.”

9 IACHR, *Strategic Plan 2011–2015, Part I, 50 Years Defending Human Rights: Results and Challenges*, p. 14.

10 Luigi Ferrajoli, *Derechos y Garantías: La ley del más débil* (Madrid: Editorial Trotta, 2004), p. 25. Translation of quote by DPLF.

11 Vienna Convention on the Law of Treaties, Article 31(3)(b) in accordance with Article 31(1).



Please send comments and possible contributions for this publication to aportes@dplf.org.

The Binding Nature of Precautionary Measures under Colombian Law

Carolina Restrepo

Carolina Restrepo is an attorney at the Pontificia Universidad Javeriana in Bogotá, Colombia. She is a former intern at the Inter-American Court of Human Rights and currently serves as a court assistant at the Constitutional Court of Colombia.¹

Precautionary measures are enshrined in Article 25 of the Rules of Procedure of the Inter-American Commission on Human Rights (IACHR). These are preventive, expedited, and summary procedures that are not only precautionary “in the sense of preserving a juridical situation,” but are also “safeguards inasmuch as they protect human rights . . . when necessary to prevent irreparable harm to persons.”² Because of this, there is no need to meet the admissibility requirements under Articles 46 and 47 of the American Convention on Human Rights in order to access these protection measures. It suffices to show proof of the gravity and urgency of the situation, and the existence of an imminent and irreparable harm.

Differences over compliance stem from the fact that, in contrast to provisional measures, the precautionary measures ordered by the IACHR are not mandated by treaty. In other words, because precautionary measures are established in the IACHR’s Rules of Procedure rather than explicitly enshrined in the American Convention, some states parties have contended that they are merely recommendations and that, as their name implies, compliance is left to the discretion of states.

In contrast to other states parties to the American Convention, which invoke the reasoning outlined above to argue that precautionary measures are not binding, Colombia has not made this a matter of debate. Indeed,

the Colombian Constitutional Court—the tribunal responsible for upholding the supremacy of the Constitution and basic rights under domestic law—has held that precautionary measures ordered by the IACHR are definitely mandatory and binding on the state and that the jurisdictional entities responsible for carrying them out under domestic law must adhere to them.³

The Colombian Constitutional Court ruled on this issue for the first time in its review of a tutela action (writ of protection or *amparo* in Colombia) in 2003.⁴ With regard to the nature of these measures, the Constitutional Court held that “this is a judicial act adopted by an international body for the protection of fundamental rights, which enjoins the respondent state to take, in the shortest time frame possible, such judicial or administrative measures as may be necessary to put an end to the threat against a particular human right.” On these grounds, the Court affirmed that precautionary measures adopted by the IACHR automati-

1 The opinions expressed herein are the author’s and under no circumstances may be attributed to the Constitutional Court of Colombia.

2 Inter-American Court of Human Rights, 19 Merchants Case, Provisional Measures regarding the Republic of Colombia, Order of the Court of August 7, 2010, fourth consideration; “La Nación” Newspaper Case, Provisional Measures regarding Costa Rica, Order of the Court of September 7, 2001, fourth consideration; Provisional Measures regarding the Estados Unidos Mexicanos, Matter of Alvarado Reyes and others, Order of the Court of May 26, 2010, fourth consideration; and Provisional Measures regarding the República de Guatemala, Matter of the Forensic Anthropology Foundation, Order of the Court of February 22, 2011, fifth consideration.

3 The Constitutional Court’s jurisprudence supersedes debates at other levels of government and makes any precautionary measures ordered binding under domestic law.

4 Colombian Constitutional Court, Judgment T-558 of 2003, Magistrate Clara Inés Vargas Hernández writing for the Court. In this ruling, the Court had taken up the case of a citizen whose son had been the victim of a forced disappearance carried out by state forces. The petitioner took the case to the Inter-American Commission on Human Rights to request protection for her life and physical integrity and that of her family. The IACHR had ordered the Colombian state to take the measures necessary to protect the physical integrity and life of the family. After the precautionary measures were ordered, members of the Colombian government forces entered the petitioner’s home and tortured one of her family members. The tutela action was therefore intended to ensure that the state would effectively carry out the precautionary measures ordered by the IACHR. In its deliberations on the matter, the Ninth Review Chamber held that the measures taken by state authorities had been insufficient to fulfill the objective for which they had been ordered, namely, to put an end to the threat against the physical integrity and life of the family members of the disappeared citizen. In view of the foregoing, the Court granted tutela protection and enjoined the authorities of jurisdiction to take all action necessary to institute the protection to which the family was entitled, as prescribed by the IACHR.

cally become part of domestic law. Moreover, because the Colombian state is party to the Pact of San José, Costa Rica, the “precautionary measure [should have been] examined in good faith by the domestic authorities,” and, in this sense, its binding force under domestic law is on a par with the fulfillment of the constitutional duties set out in Article 2 of the Political Constitution, which the government authorities are called upon to uphold.⁵

Later, in a ruling handed down by the Sixth Review Chamber⁶ in another tutela action, the Constitutional Court affirmed in even more explicit terms that the precautionary measures issued by the IACHR were binding. In the Court’s words, “[i]f precautionary measures are envisaged as one of the powers that the Inter-American Commission may exercise for the effective protection of the human rights enshrined in the Convention and are a development of the American Convention on Human Rights, then they are binding under domestic law inasmuch as the latter is part of the bloc of constitutionality.” With this, the Court determined that compliance with the precautionary measures ordered by the IACHR in specific cases could not be considered discretionary.

In addition to reiterating the thrust of its first ruling on the issue, the Constitutional Court added that failure to comply with the contents of the order of precautionary measures would amount to a disregard for the international obligations to respect and ensure enshrined in Articles 1 and 2 of the American Convention. The Court further stated that as a state party to the treaty, Colombia had accepted and recognized the right of all citizens to lodge individual petitions before the IACHR for the protection of their human rights, as stipulated in Article 44. It follows, therefore, that national authorities may not refuse to comply with the Commission’s orders in regard to a certain case, since “refusal to comply

would be a denial of the Commission’s competence and therefore a violation of the Convention.”

In the rulings described, and in subsequent decisions reiterating the same points,⁷ the Colombian Constitutional Court has made clear that precautionary measures issued by the IACHR are binding under domestic law. What is more, the Court has pointed out that the beneficiaries of such measures may submit a tutela action to demand compliance with the orders issued by that international body. This will be discussed further below.

The Constitutional Court provided the following grounds for its conclusion that precautionary measures are binding under domestic law:⁸

1. Colombia is a member of the Organization of American States and a state party to the American Convention on Human Rights (approved by Law 16 of 1972 and ratified on July 31, 1973). As a result, the Colombian state does not have the discretion to choose whether or not to abide by a protection measure ordered by a body upon which it has conferred and recognized competency by means of its recognition of the Charter of the Organization of American States and ratification of the American Convention (Judgments T-786 of 2003 and T-524 of 2005);
2. Article 44 of the American Convention on Human Rights establishes a procedure that recognizes the right of all persons to lodge petitions containing reports or complaints of violations of the treaty, and, to that extent, the state party accepts the competence of the Commission with respect to the orders issued in precautionary measures (Judgment T-786 of 2003);

5 According to Article 2 of the Political Constitution of Colombia: “The essential purposes of the State are to serve the community, promote overall prosperity, and guarantee the effective exercise of the principles, rights, and duties enshrined in the Constitution; to facilitate the participation of all people in decisions that affect them and in the economic, political, administrative, and cultural life of the nation; to defend national independence, maintain territorial integrity, and ensure peaceful coexistence and the enforcement of a just order. [. . .] *The authorities of the Republic are appointed to protect the life, dignity, property, beliefs, and other rights and freedoms of residents in Colombia and to ensure fulfillment of the social duties of the state and of individuals*” (emphasis added).

6 Colombian Constitutional Court, Judgment T-786 of 2003, Magistrate Marco Gerardo Monroy Cabra writing for the Court.

7 Colombian Constitutional Court, Judgments T-327 of 2004, Magistrate Alfredo Beltrán Sierra writing for the Court; T-385 of 2005, Magistrate Rodrigo Escobar Gil writing for the Court; T-524 of 2005, Magistrate Humberto Antonio Sierra Porto writing for the Court; T-435 of 2009, Magistrate Jorge Ignacio Pretelt Chaljub writing for the Court; and T-367 of 2010, Magistrate María Victoria Calle Correa writing for the Court.

8 The Seventh Review Chamber of the Constitutional Court, in Judgment T-524 of 2005, with magistrate Humberto Antonio Sierra Porto writing for the Court, listed each of the criteria and arguments in the Court’s jurisprudence that uphold the binding nature of precautionary measures issued by the IACHR. In addition, several points not found in a particular judgment have been added or expanded for the purposes of this article. At the end of each criterion, the judgment where it was first formulated is mentioned. These judgments are cited in the previous footnotes.

3. As a human rights treaty, the Convention is incorporated into domestic law and is part of the bloc of constitutionality in accordance with Article 93 of the Constitution, paragraph one (Judgments T-786 of 2003 and T-524 of 2005);
4. In accordance with general principles of public international law, precautionary measures are automatically incorporated into domestic law (Judgments T-558 of 2003 and T-524 of 2005);
5. According to the provisions of Articles 1 and 2 of the American Convention, states parties undertake to “respect the rights and freedoms recognized herein and to guarantee to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms” and to “adopt such legislative or other measures as may be necessary to give effect to those rights or freedoms” (Judgments T-786 of 2003 and T-524 of 2005); and
6. The national authorities must examine each precautionary measure in good faith, since its procedural characteristics and the object it seeks to achieve, as well as its binding force under domestic law, are on a par with compliance with the constitutional duties that the Colombian public authorities are called upon to fulfill in accordance with Article 2 of the Political Constitution (Judgments T-558 of 2003 and T-786 of 2003).

An important consequence of these deliberations is that it is possible to proceed to a tutela action to request compliance with precautionary measures when the responsible state entities have been negligent in their duties and the conventional rights of beneficiaries are endangered. This means that Colombia provides an effective internal remedy to ensure compliance with orders issued by an international entity that are deemed compulsory.

Based on the criteria outlined earlier, the Constitutional Court has indicated that the tutela action, “while not conceived to guarantee domestic compliance with the precautionary measures ordered by the IACHR, could become a suitable mechanism for effectively ensuring compliance with them, since those measures, like the tutela procedure, are primarily intended to prevent an irreparable harm in relation to the violation of a right inherent to the human being.”⁹ The tutela judge, then, may specifi-

cally order the authorities of jurisdiction to take measures to protect a basic right that is at risk of being violated and that was the justification for the precautionary measure ordered by the international body.

The Court has also held that a state’s failure to comply with precautionary measures amounts to a violation of the basic right to due process on the domestic and international planes. The Court’s rationale in reaching this conclusion is transcribed below:¹⁰

7. “Due process is applicable to a person who, in the exercise of his/her right to lodge individual petitions under the Convention, submits said petition for alleged human rights violations by the State, and, also, the State against which the complaint is lodged”;
8. “Full compliance with due process for the individual requesting protection from international entities must be developed at the domestic level when the State complies with the orders issued by the Commission”; and
9. “In the event of failure to fully comply with due process requirements, a tutela action may be lodged to demand such compliance. This mechanism is applicable inasmuch as no other legal protection is available at the domestic level to require compliance with the precautionary measures decreed by the Commission.”

This discussion supports the conclusion that, based on Colombia’s constitutional jurisprudence, the precautionary measures issued by the IACHR are binding on the state in general and on the authorities of the jurisdiction responsible for carrying them out in particular, since those measures automatically become part of domestic law. One immediate consequence of this conclusion is that citizens who are beneficiaries of measures issued by an international entity may pursue a tutela action as a suitable mechanism for enjoining the government authorities to comply with the orders contained in those measures, when the latter fail to discharge their constitutional duties in a particular matter, resulting in a violation of the basic right to domestic and international due process. ■

of 2003, Magistrate Rodrigo Escobar Gil writing for the Court; and T-435 of 2009, Magistrate Jorge Ignacio Pretelt Chaljub writing for the Court.

10 Colombian Constitutional Court, Judgment T-524 of 2005, Magistrate Humberto Antonio Sierra Porto writing for the Court. Translation by DPLF.

9 Colombian Constitutional Court, Judgments T-558 of 2003, Magistrate Clara Inés Vargas Hernández writing for the Court; T-385

Setting Sound Priorities: Reflections on the Discussion of the Workings of the Inter-American Commission on Human Rights

Yukyan Lam

Yukyan Lam is a researcher at Dejusticia (Centro de Estudios de Derecho, Justicia y Sociedad / Center for the Study of Law, Justice, and Society) in Bogotá, Colombia.

It is too soon to predict whether the most recent reflection on strengthening the inter-American human rights system will succeed in doing just that. Clearly, however, an intense and perhaps unprecedented discussion is taking place concerning specific aspects of the system, particularly the workings of the Inter-American Commission on Human Rights (IACHR).¹ Sooner or later, this process is likely to yield important recommendations and proposals, and the system's users therefore should continue to pay close attention to the issues involved.

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 has identified the IACHR's work in the area of human rights promotion as a priority. Some Member States of the Organization of American States (OAS) have asserted that the IACHR should spend more time on human rights promotion,² and particularly on providing

advisory services to states.

In its presentation to the Working Group, for example, the state of Brazil raised the importance of discussing ways of “guaranteeing that the Commission’s examination of individual cases does not compromise its technical assistance and capacity-building activities . . . It is important that the IACHR be capable of providing technical cooperation adequate to the specific needs of each State, offering services that involve . . . the identification and dissemination of information on good practices.”³ For its part, Colombia asserted that “the Commission’s role in promoting human rights . . . can take the form of advisory services, cooperation, and technical assistance to states to strengthen their internal capacity to meet their obligations—for example, strengthening national judicial institutions.”⁴ Similarly, the Dominican Republic stressed the need for “technical advice” from the IACHR, and especially for the Commission’s assistance in adapting domestic legal provisions and training public officials.⁵

These positions raise several concerns. First, it is important to bear in mind that at the conventional level, the IACHR has the dual function of promoting and protecting human rights. Pursuant to the American Convention on Human Rights, in addition to developing awareness about human rights in the hemisphere, the IACHR must take up specific complaints of human rights abuses. Indeed, the same article that provides for promotion and advisory services, Article 41(f), stipulates that the IACHR must “take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention.” According to these articles, upon receiving allegations and complaints, the IACHR must

1 The agenda 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, and the position papers and presentations submitted by civil society organizations and Member States of the Organization of American States, are available at <http://www.oas.org/consejo/work-groups/Reflect%20on%20Ways%20to%20Strengthen.asp>.

2 For example, at the September 12, 2011, meeting of the Working Group, the Mexican state described “the need to step up promotion” as one of the “challenges to competence” of the IACHR. *Presentation by the Delegation of Mexico on the Topics “Challenges and Medium- and Long-Term Objectives of the IAHRs” and “Precautionary Measures,”* September 12, 2011, OEA/Ser.G GT/SIDH/INF.4/11. The Brazilian state, for its part, noted that “the increased emphasis on studying the merits of individual petitions and the broadening of scope of IAHRs topics pose challenges to the Commission’s effective operation, mostly in terms of its original function of promoting observance and defense of human rights.” *Compilation of Presentations by Member States on the Topics of the Working Group: Texts sent to the Secretariat of the Working Group by Argentina, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, United States, and Uruguay as of November 4, 2011, November 7, 2011, GT/SIDH/INF.17/11 rev. 1* (hereafter, *Compilation of Presentations by Member States on the Topics of the Working Group*).

3 Text sent by the state of Brazil, *Compilation of Presentations by Member States on the Topics of the Working Group*.

4 Text sent by the state of Colombia, *Compilation of Presentations by Member States on the Topics of the Working Group*.

5 Text sent by the state of the Dominican Republic, *Compilation of Presentations by Member States on the Topics of the Working Group*.

carry out functions that include *examining* the alleged violation of the Convention, *corroborating* the facts, and, where necessary, *conducting an investigation* in serious and urgent cases (Article 48). In addition to verifying the facts, the IACHR issues recommendations and conducts follow-up in order to decide whether or not the state has taken adequate measures to resolve the situation (Article 51) and whether the Inter-American Court should take up the case (Article 61). The Convention clearly states that the IACHR shall act as a supervisory body and guarantor of the human rights set out in that treaty and that it is bound to fulfill this conventional duty.

Given that the IACHR's responsibilities to promote and protect derive from the Convention, it is useful to keep two circumstances in mind. The first is the funding shortfall facing the IACHR in absolute as well as relative terms (the latter refers to the percentage of the budget allocated to the IACHR as compared to other areas of the OAS).⁶ The second is that the IACHR is in the best position to decide how to distribute its limited resources among its obligatory functions. The IACHR enjoys absolute *autonomy* and *independence* in carrying out its functions. These principles apply equally to its task of setting priorities to fulfill the purposes of the inter-American human rights system. All of this runs counter to the Dominican Republic's contention, for example, that promotion is the "principal function" of the IACHR and that the Commission should prioritize those types of activities over human rights protection.⁷

A brief glance at the IACHR's track record confirms that it has fulfilled its responsibilities in both areas with its current distribution of resources. It has responded to specific cases, as it must, while pursuing countless activities for the promotion of human rights. The latter include thematic reports offering general and specific recommendations on issues such as juvenile justice, the situation of human rights defenders, women's political participation, the rights of indigenous peoples and Afro-descendants, and access to justice for the most vulnerable groups. Moreover, as documented in the IACHR's annual reports, the secretariat, the commissioners, and the rapporteurs

participate in trainings, workshops, seminars, publicity efforts, and other events across the region. Similarly, the IACHR devotes a substantial portion of each of its regular sessions to thematic hearings, which afford it the opportunity to address cross-cutting issues that have emerged in certain countries or subregions and could potentially emerge in others. The thematic hearings pursue a corrective and preventive objective in spotlighting and generating recommendations on specific issues, and ultimately serve the purpose of promotion. It is therefore patently untrue that the IACHR has "neglected"⁸ its responsibilities in this area.

It is important to keep in mind that protection is also a form of promotion insofar as it contributes to the dissemination and enforcement of the norms, standards, and jurisprudence of the inter-American system. As the state of Panama noted, "protection [of human rights] performs the dual role of protection and promotion. The system of individual petitions and cases must be above all other activities since, in our opinion, a ruling that creates case law is worth more in terms of the protection and promotion that the system provides than two, four, or even ten seminars."⁹

Some states have called on the IACHR to focus more on advisory services to states in the context of promotion, and less on contentious case work. This posture warrants further examination, and several observations immediately come to mind. First, advisory services are clearly made contingent on the IACHR's capacity and its other responsibilities. According to the American Convention, Article 41(e), the IACHR shall provide such services "within the limits of its possibilities." In other words, the IACHR shall only provide advisory services if it deems it possible to do so based on the resources required and available for this, among other factors.

Second, according to the states, they are mainly seeking advisory services and technical assistance in the following areas: training for civil servants, strengthening national institutions (the justice system in particular), the appropriate adaptation of domestic law, and the identification and dissemination of best practices. It therefore makes sense to reflect on how the IACHR might effectively complement the work of other entities whose mandates and missions specifically include such activities and to consider

6 The Human Rights Programmatic Area, comprising the Inter-American Court and the Commission, will receive approximately US\$10.8 million in 2011, equivalent to just 6.4 percent of the OAS budget for this year. See "Program-Budget of the OAS 2010-2011," <http://scm.oas.org/pdfs/2010/CP24882S.ppt>.

7 Text sent by the state of the Dominican Republic, *Compilation of Presentations by Member States on the Topics of the Working Group*.

8 Text sent by the state of Brazil, *Compilation of Presentations by Member States on the Topics of the Working Group*.

9 Text sent by the state of Panama, *Compilation of Presentations by Member States on the Topics of the Working Group*.

the extent to which the IACHR is already contributing to these very objectives. A survey of the regional panorama shows, for example, that the Inter-American Institute of Human Rights (Instituto Interamericano de Derechos Humanos, IIDH) contributes to compliance with the norms of the American Convention through “education, research, political mediation, training programs, technical assistance, and the dissemination of knowledge.”¹⁰ Similarly, pursuant to the American Convention, Article 64(2), the Inter-American Court of Human Rights, “at the request of a Member State of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.” Yet another agency within the inter-American system is the Justice Studies Center of the Americas (Centro de Estudios de Justicia de las Américas, CEJA), which supports the institutional development of the region’s justice systems through cooperation, research, exchange of experiences, information dissemination, and training.¹¹

Returning to the second point, the work of the IACHR is already contributing in significant ways to the objectives of advisory services and assistance. Assuming that states are genuinely interested in benefiting from the IACHR’s guidance and support in adapting their domestic institutions and laws, it is telling, to say the least, if they fail to take into account the numerous specific recommendations that the IACHR has issued in the past and continues to issue on a daily basis. Ultimately, what better parameters could there be than the structural recommendations that the IACHR has set out in its thematic and annual reports, at its hearings, in its reports on the merits of individual cases, and in the other forums available to it? States seeking support from regional entities such as JSCA and the IIDH in order to adapt their policies and laws should regard the IACHR’s recommendations as critical inputs that go beyond advice to guide and even define internal reforms. It is therefore incongruous for certain states to complain that the IACHR is failing to provide advisory services.

In closing, we should reflect on the specific contention of the state of Colombia that “the one specific action that can best reduce the high degree of impunity in the region and guarantee non-repetition is to strengthen justice

operators to enable them to act in a timely, universal, and fair manner.”¹² According to this argument, strengthening national justice systems will have the effect of reducing the IACHR’s caseload and the latter should therefore focus on this objective. The reflection is as follows: while strengthening national justice systems may well be a useful measure, several issues should be born in mind. The first is to acknowledge the progress that the inter-American human rights system—and the IACHR in particular—has already made in this regard. As former IACHR commissioner Víctor Abramovich asserts, the system “has taken important steps on this path by setting clear principles on what constitutes independent and impartial courts, a reasonable length of trial, the exceptional use of precautionary imprisonment, the reach of *res judicata*, and judicial review of administrative decisions, amongst others . . . The monitoring of national judicial systems is a priority on the IACHR’s agenda, which can be concluded from the themes of its recent reports and documents.”¹³

Second, it is important to evaluate just how far the IACHR should go in assigning more resources to advisory services in this particular area, given that other entities such as the JSCA are working specifically to advance this very objective. In this sense, while Abramovich acknowledges that it is strategic for the inter-American system to promote legal mechanisms to litigate human rights cases domestically, he also urges other sectors of society—especially academia—to contribute to this effort:

An important factor in increasing the application of international law by national justice systems is the presence of a strong academic community that critically discusses the international system’s decisions and provides input as to how judges and legal practitioners can make use of this jurisprudence. This local and regional academic community is not only indispensable in ensuring the application of Inter-American standards at the domestic level, but also to hold the [inter-American human rights] organs themselves accountable and exert pressure for an improvement in the quality, con-

10 Inter-American Institute of Human Rights, “Mission and Strategy,” www.iidh.ed.cr/default_eng.htm.

11 Justice Studies Center of the Americas, “About JSCA,” <http://www.cejamerica.org/portal/index.php/en/aboutjsca/jsca-and-the-inter-american-system>.

12 Text sent by the state of Colombia, *Compilation of Presentations by Member States on the Topics of the Working Group*.

13 Víctor Abramovich, “From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System,” *Sur: Revista Internacional de Derechos Humanos* 6, no. 11 (2009): 6–39. English translation available at http://www.scielo.br/scielo.php?pid=S1806-64452009000200002&script=sci_arttext&tlng=en.

sistence and technical rigor of their decisions. While recently there have been clear signs of progress, it is still not possible to verify the existence of this community at the regional level.¹⁴

Lastly, no judicial or supervisory system, no matter how protective, can improve the human rights situation in practice if states fail to comply with the decisions issued. As they reflect on the workings of the inter-American system, states should exhibit a genuine willingness to comply with the decisions of the IACHR and the Court. The supervisory

¹⁴ Ibid.

bodies charged with upholding the law, whether at the national or the regional level, are only effective to the extent that states respect them and adhere to their decisions.

These reflections are intended to stimulate and contribute to a frank debate on the weaknesses and the potential of the inter-American human rights system. Ultimately, it falls to the IACHR to strike a prudent and effective balance in allocating its resources for promotion and protection. We can only hope that the final outcome of this reflection will not only uphold the mandate of the American Convention, but will be consistent with the IACHR's strengths and capabilities and sensitive to the needs of the region. ■

Election Nears for Members of the Inter-American Court of Human Rights

María Clara Galvis

María Clara Galvis is a Colombian attorney and legal advisor to the Due Process of Law Foundation.

In June, the Member States of the Organization of American States (OAS), gathered at the 42nd General Assembly in Cochabamba, Bolivia, will elect three individuals to the Inter-American Court of Human Rights. Five people have presented their candidacies for the three posts. Two of them, Margarette May Macaulay of Jamaica and Rhadys Abreu Blondet of the Dominican Republic, are sitting judges on the Court whose terms expire on December 31, 2012, and who have been nominated for reelection by their countries. The other three candidates are Roberto de Figueiredo Caldas (Brazil), Humberto Sierra Porto (Colombia), and Eduardo Ferrer MacGregor Poisot (Mexico).

The two sitting judges can best be appraised on the basis of their respective track records since they joined the Court. As far as the other three nominees, the Mexican candidate has a strong background in academia; the Colombian in academia as well as the judiciary, civil service, and professional practice; and the Brazilian in civil service and private practice. In addition, the Brazilian and Mexican candidates have served as ad hoc judges on the Court.

Brazil's nomination to the Court is particularly welcome in the aftermath of its overreaction to the precautionary measures granted by the Inter-American Commission on Human Rights (IACHR) in the Belo Monte case, when the Commission ordered suspension of a hydroelectric project that would have jeopardized indigenous communities. Brazil showed its displeasure through criticism of and noncompliance with the measures, the withdrawal of its candidate for the Commission shortly after the measures were issued, and its months-long refusal to pay its dues to the OAS. The nomination of a candidate to the Court can be interpreted as a step toward repairing Brazil's relations with the OAS and the inter-American human rights system.

Colombia is sending a message of seriousness and responsibility in its relations with the inter-American human rights system by nominating Sierra Porto, one of the country's most experienced and respected magistrates and the former president of its Constitutional Court. The Colombian Constitutional Court is one of the most highly regarded on the continent.

Mexico sent a similar message by nominating an individual with a strong academic track record. This nomination, coming on the heels of the election of José de Jesús Orozco Henríquez as vice president of the IACHR, suggests Mexico's recognition of the work of the inter-American system.

As the process 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 draws to a close, the upcoming election to the Inter-American Court offers an excellent opportunity for states to fully grasp the importance of these types of elections. The decisions of the Commission and the Court, which make so many states uncomfortable, are in fact made by individuals chosen by these same states. The states therefore have a duty to approach these elections responsibly, by selecting highly qualified candidates who will bring legitimacy to the future decisions of these bodies. In taking stock of the five candidates' qualifications, the states can consider, among other sources of information, the recorded votes and judicial reasoning of the Jamaican and Dominican judges, as well as of the Brazilian and Mexican candidates, who have served as ad hoc judges on the Court, and the judgments and dissenting opinions of the Colombian magistrate. We hope that the states will cast their votes with full awareness of the candidates' track records and commitment to the defense of the principles underlying the American Convention on Human Rights. ■

Monitoring States with Problems: Chapter IV of the Annual Report of the Inter-American Commission on Human Rights

Lilia Ramírez

Lilia Ramírez is a researcher at the Instituto de Defensa Legal (IDL, Legal Defense Institute) in Lima, Peru.¹

The Inter-American Commission on Human Rights (IACHR) uses various means to carry out its mandate to develop awareness of, promote, and make recommendations on human rights issues, including *in loco* visits, regular and special sessions, thematic hearings, and special reports on particular countries or issues. It also includes a section in its obligatory annual reports to the Organization of American States (OAS) on the situation in specific OAS Member States that merit special attention due to their highly questionable human rights performance.

What follows is a brief explanation of the way in which this section, Chapter IV of the Commission's annual report, evolved, and of why it remains both important and controversial.

History of monitoring problematic states

From its inception, the Commission instituted the practice of calling attention to states with troublesome human rights situations. This was an aspect of its work to promote and protect human rights, which in turn constituted “the political dimension of the Commission's functions and powers,” according to legal scholar Diego Rodríguez-Pinzón. “From the 1960s to the 1980s, the Commission relied mainly on its political tools and mechanisms to tackle massive and systematic human rights abuses.”² Meanwhile, the legal dimension of its work—the ability

to take up petitions and precautionary measures and to bring cases before the Inter-American Court of Human Rights—was just starting to gain traction.

In its first annual report, issued in 1970, the IACHR chose to spotlight the situation in countries that were prompting the most serious human rights concerns. Throughout that decade, the IACHR sometimes included discussions of the situation in certain countries in its annual report, even though it did not yet have a separate chapter devoted to the subject. In addition to the country information included in the annual reports, the Commission periodically published “special reports,” each one dealing with the human rights situation, or sometimes with a specific human rights issue, in a particular country.

In 1975, the annual report of the IACHR introduced a separate chapter on the situation in Cuba. It stated, “Since 1970, when the ‘Second Report on the Situation of Political Prisoners and Their Relatives in Cuba’ was published, the Commission has continued to receive communications or complaints from individuals and entities alleging serious violations of fundamental human rights in that country.”³

Subsequent annual reports also typically followed up on special reports issued previously on specific countries. The 1985 annual report discussed the Commission's monitoring of certain states: “Over the last twelve years, the Commission has prepared 22 [special] reports on fourteen States. As a general rule, the Commission's annual reports to the General Assembly have contained a follow-up, whenever there were reasons for the Commission to continue to monitor the human rights observance of a particular state.”⁴

Therefore, while the content of the annual reports was not yet standardized, the Commission considered several

1 This article summarizes opinions presented by IDL for the report titled *Contributions to a Comprehensive Agenda for Strengthening the Inter-American System of Human Rights*, prepared by CELS, Conectas, DeJuSticia, DPLF, Fundación Construir, and IDL for the Committee on Juridical and Political Affairs of the Permanent Council of the OAS.

2 Diego Rodríguez-Pinzón, “La Comisión Interamericana de Derechos Humanos,” in *Derecho Internacional de los Derechos Humanos*, ed. Claudia Martín, Diego Rodríguez-Pinzón, and José A. Guevara B. (Mexico City: Universidad Iberoamericana; Washington, DC: Academy on Human Rights and Humanitarian Law, Washington College of Law, American University; Mexico City: Distribuciones Fontamara, 2004), pp. 177–78. Translation of quote by DPLF.

3 *Informe Anual de la Comisión Interamericana de Derechos Humanos 1975*, sec. 3, III, “Informe sobre la Situación de los Derechos Humanos en Cuba.” Translation of quote by DPLF.

4 *Annual Report of the Inter-American Commission on Human Rights 1985–1986*, Chapter IV.

countries a priority because of their special circumstances. It consistently monitored these countries—primarily Paraguay, Uruguay, Cuba, and Chile—throughout the 1970s, as indicated in this excerpt from the 1979–1980 annual report:

The purpose of this section is to analyze the situation of human rights in a number of countries, both in fulfillment of the work of the Commission and in compliance with specific mandates in this regard, as contained in the corresponding resolutions approved by the General Assembly of the Organization of American States at its ninth regular session, held in La Paz, Bolivia, October 22 through 31, 1979.

General Assembly Resolution 443, approved on October 31, 1979, requests the Inter-American Commission on Human Rights “to continue to monitor the exercise of human rights in Chile, Paraguay and Uruguay and report thereon to the tenth regular session of the General Assembly.” General Assembly Resolution 446, of that same date, resolves to request the Inter-American Commission on Human Rights “to continue monitoring the situation of human rights in El Salvador, and to include its conclusions in its report to the tenth regular session of the General Assembly [...]”

In fulfillment of those mandates, the following is an analysis of the situation of human rights in Chile, Paraguay, Uruguay and El Salvador.⁵

The IACHR finally stipulated the content of its annual report in Article 59(h) of its Rules of Procedure of 1980. With certain exceptions, the annual reports from 1983 and later include Chapter IV as an important feature, as this is where the IACHR calls attention to countries that fail to comply with their duties as OAS Member States.⁶

More than a few states brought complaints about their inclusion in the dreaded Chapter IV. In response, the Commission in 1995 evaluated its procedures for determining which states in the region were of concern. The 1996 annual report set forth four criteria for identifying OAS Member States whose human rights practices deserved special attention and inclusion in the annual report:

1. The first criterion encompasses those states ruled by governments that have not come to power through popular elections, by secret, genuine, periodic, and free suffrage, according to internationally accepted standards and principles. The Commission has repeatedly pointed out that representative democracy and its mechanisms are essential for achieving the rule of law and respect for human rights. As for those states that do not observe the political rights enshrined in the American Declaration and the American Convention, the Commission fulfills its duty to inform the other OAS Member States as to the human rights situation of the population.
2. The second criterion concerns states where the free exercise of the rights set forth in the American Convention or American Declaration have been, in effect, suspended totally or in part, by virtue of the imposition of exceptional measures, such as state of emergency, state of siege, suspension of guarantees, or exceptional security measures, and the like.
3. The third criterion to justify the inclusion in this chapter of a particular state is when there is clear and convincing evidence that a state commits massive and grave violations of the human rights guaranteed in the American Convention, the American Declaration, and all other applicable human rights instruments. In so doing, the Commission highlights the fundamental rights that cannot be suspended; thus it is especially concerned about violations such as extrajudicial executions, torture, and forced disappearances. Thus, when the Commission receives credible communications denouncing such violations by a particular state which are attested to or corroborated by the reports or findings of other governmental or intergovernmental bodies and/or of respected national and international human rights organizations, the Commis-

5 *Annual Report of the Inter-American Commission on Human Rights 1979–1980*, Chapter V. This was the last annual report to be published before the reform of the IACHR’s Rules of Procedure.

6 The IACHR began to issue annual reports in 1971. A section on problematic states, Chapter V, “The Situation of Human Rights in Various Countries,” first appeared in the annual report of 1979–1980 and was also included in the annual report of 1981–1982. Since 1983, the IACHR has consistently included a section that examines the situation in countries with the most serious human rights problems as Chapter IV of its annual report. The only exceptions to this were the 1995 report, which did not include this analysis, and the 1996 and 1997 reports, where it was included as Chapter V.

sion believes that it has a duty to bring such situations to the attention of the Organization and its Member States.

4. The fourth criterion concerns those states that are in a process of transition from any of the above three situations.⁷

In 1997 the IACHR introduced a fifth criterion:

5. The fifth criterion regards temporary or structural situations that may appear 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. This criterion includes, for example: grave situations of violations that prevent the proper application of the rule of law; serious institutional crises; processes of institutional change which have negative consequences for human rights; or grave omissions in the adoption of the provisions necessary for the effective exercise of fundamental rights.⁸

The establishment of these objective criteria strengthened the Commission's ability to monitor and call attention to conditions in OAS Member States. They were intended to make it politically untenable to object to the IACHR's monitoring of governments. The fifth criterion, however—the examination of a government's temporary or structural situations—allows the IACHR considerable scope for interpretation in selecting states of concern. As a result, it has drawn criticism from states.⁹

7 *Annual Report of the Inter-American Commission on Human Rights 1996*, Chapter V.

8 *Annual Report of the Inter-American Commission on Human Rights 1997*, Chapter V.

9 Venezuela, for example, expressed disagreement with the criteria in 2008: "The Bolivarian Government of Venezuela is very concerned that the IACHR includes in the annual reports on the human rights situation a special chapter 4, which has no foundation in law, according to our legal opinion, since that chapter is not provided for either in the Statutes or the Rules of Procedure of the Commission. Article 56 [*sic*: 57] of the Rules of Procedure, which in fact is in Chapter 4 [*sic*: 5] of the Rules, regulates preparation of the annual reports and what should be included in them. Here it is important to reiterate the position of the Venezuelan government given yesterday on presentation of the IACHR annual report, in which it rejected the inclusion of Venezuela in this chapter, which we consider to be discriminatory and without legal foundation. Regardless of whether or not these criteria are legal, however, this delegation would like to make it very clear that these criteria do

When the Inter-American Commission issued its new Rules of Procedure in 2000,¹⁰ the intention was to consolidate the legal framework for supervising compliance with the recommendations set out in its annual reports and in special reports on the human rights situation in OAS Member States. The language was modified as indicated below and did not change with the release of the latest Rules of Procedure in November 2009:

Article 59.

1. The Annual Report presented by the Commission to the General Assembly of the OAS shall include the following:

[...]

- h. any general or special report the Commission considers necessary with regard to the situation of human rights in Member States, and, as the case may be, follow-up reports noting the progress achieved and the difficulties that have existed with respect to the effective observance of human rights.

[...]

2. For the preparation and adoption of the reports provided for in paragraph 1.h of this article, the Commission shall gather information from all the sources it deems necessary for the protection of human rights. **Prior to its publication in the Annual Report, the Commission shall provide a copy of said report to the respective State. That State may send the Commission the views it deems pertinent within a maximum time period of one month from the date of transmission. The contents of the report and the decision to publish it shall be within the exclusive discretion of the Commission** [emphasis added].

not pertain to Venezuela, specifically criterion 5, the one that has been applied to my country." Permanent Council of the Organization of American States, Committee on Political and Juridical Affairs, *Presentations by States at the Dialogue on the Workings of the Inter-American Human Rights System Among Member States, Members of the Inter-American Commission on Human Rights, and the Judges of the Inter-American Court of Human Rights*, presentation of the Bolivarian Republic of Venezuela, 4 April 2008, Doc. OEA/Ser G, CP/CAJP-2615/08 add 1, 1 May 2008, available at scm.oas.org/doc_public/ENGLISH/HIST_08/CP20291E13.doc.

10 The IACHR partially amended the Rules of Procedure of 2000 four times, in October 2002, October 2003, October 2006, and July 2008.

The amendment in point 2 was introduced at the request of several countries to signal the transparency and openness of the Commission's work vis-à-vis states. It stipulates that a state that is to be included in Chapter IV should be notified in advance of the reasons for its inclusion and receive a copy of the report. This gives the government an opportunity to submit its opinions concerning the report's content.

This measure has been insufficient, however, and the dissension persists, with diverse positions in evidence during recent dialogues on the inter-American human rights system at the OAS. On the one hand, Venezuela and Nicaragua propose that the IACHR should "establish reliable, trustworthy, and verifiable methods to facilitate and improve interpretation of the criteria and information sources used for inclusion of states in Chapter IV of [the] annual report of the IACHR."¹¹ Argentina objects to this position, pointing out that

from the standpoint of the Argentine state, the Commission has full authority, within the framework of its usual regulatory functions, to autonomously and independently determine what criteria and legal

11 *Results of the Process of Reflection on the Inter-American System for the Promotion and Protection of Human Rights (2008–2009)*, CP/CAJP- 2665/08 rev. 8 corr. 3, March 18, 2009, <http://www.oas.org/consejo/CAJP/human%20rights.asp>.

grounds to take into consideration for the purpose of deciding whether to include a state in the above-mentioned special chapter. Otherwise, it would constitute undue interference by states with the role conferred on the Commission by the American Convention on Human Rights and the Commission's Statute and Rules of Procedure.¹²

The tensions surrounding this chapter clearly have not subsided.

Conclusion

While the content of the IACHR's annual reports does not have the same binding force as a judgment, we can see from the thrust of the state positions on Chapter IV, and the history of reforms to this section, that it is a crucial aspect of the annual report because of the international political pressure it brings to bear on certain countries.

It should be recalled that the president of the IACHR presents the annual report to the OAS General Assembly every year. The famous Chapter IV of the annual report is unquestionably an important political tool that the IACHR uses to carry out its mandate of promoting and monitoring the defense of human rights in the region. ■

12 *Ibid.*

Panel on Access to Public Information in Latin America



Participants in the event on access to public information in Latin America, jointly organized by the Regional Alliance for Freedom of Expression and Information and DPLF. From left: Guillermo Medrano, Fundación Violeta Barrios de Chamorro; Mercedes de Freitas, Transparencia Venezuela; Mirte Postema, DPLF; Edison Lanza, CAInfo; Ramiro Álvarez Ugarte, ADC; and Moisés Sánchez, Fundación Pro Acceso.

In coordination with the Regional Alliance for Freedom of Expression and Information (Alianza Regional para la Libertad de Expresión e Información), DPLF organized a panel of regional experts to discuss current challenges and obstacles to freedom of expression and access to information in Latin America. The event was held in October 2011 in Washington, DC, following the thematic hearing on this topic convened by the Inter-American Commission on Human Rights, in which the Alliance participated. Mirte Postema of DPLF moderated the panel discussion, which included presentations by Moisés Sánchez of Fundación Pro Acceso (Chile); Mercedes de Freitas of Transparencia Venezuela;

Edison Lanza of Centro de Archivos y Acceso a la Información Pública (CAInfo, Uruguay); Ramiro Álvarez Ugarte of the Asociación de los Derechos Civiles (ADC, Argentina); and Guillermo Medrano of the Fundación Violeta Barrios de Chamorro (Nicaragua). The panelists discussed existing laws on access to public information in their countries and the restrictions and barriers that citizens face when attempting to exercise this right, which is a vital aspect of democratic strengthening. The Alliance is a regional coalition of 22 civil society organizations from 18 countries that monitors progress and setbacks in access to public information and promotes respect for this right in Latin America.

An illustration of a man in a dark suit standing on a green, conical hill. He is holding a large, dark, triangular megaphone to his mouth, as if shouting. The background is a textured, light blue and white sky. In the upper right, a white speech bubble with a black border contains the text "The voice of civil society".

**The voice
of civil society**

The OAS and Human Rights: The Role of Civil Society Organizations

Hugo de Zela

Hugo de Zela is chief of staff of the Secretary General of the Organization of American States and former permanent representative of Peru to the OAS.¹

Since its inception, the mission of the Organization of American States (OAS) has been to serve as the principal political forum of our hemisphere. As such, it pursues an agenda of inter-American issues ranging from the strengthening and defense of democracy—most importantly, through the Inter-American Democratic Charter—to cooperation for integral development. Integral development in turn includes the promotion and protection of both regional security and human rights.

This agenda, which has evolved over a long period of time, remains a work in progress. On the matter of democracy, for example, Member States are currently engaged in a dialogue on the effectiveness of the application of the Inter-American Democratic Charter as it nears its 10th anniversary. The same is true of regional security, where the Organization has added to its agenda, alongside traditional issues such as terrorism, drug trafficking, and organized crime, the growing concern of many states with public security. The latter topic was very much in evidence at two of the organization's last three general assemblies.

OAS Member States are unanimous in recognizing the inter-American human rights system as a cornerstone of the inter-American architecture and a distinguishing feature of the hemispheric body. The advances made by the system's two main bodies, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (IACHR), have brought it regional and international prestige. The Commission's recommendations and the Court's judgments are widely recognized for their contribution to the setting of international standards for human rights protection.

Despite this, budgetary constraints are increasingly hampering the regular activities of the Commission and

the Court. Unfortunately, the limited regular budget of the OAS—which must cover an ever-growing number and broader range of hemispheric mandates and responsibilities without a concomitant increase in resources—does not cover the funding requirements of the two bodies. Because of this, both the Commission and the Court have sought voluntary contributions from Member States and permanent observers.

Even with these contributions, however, the inter-American human rights system is far from securing the resources it needs to operate efficiently. In late 2010, therefore, both the IACHR and the Court began to draft strategic plans to ensure their ability to carry out their regular responsibilities by bringing funding into line with costs. In their reports, entitled “Guidelines 2011–2015” (the Court) and “Strategic Plan 2011–2015” (the Commission), these bodies submitted and substantiated their funding needs in the short, medium, and long terms, with a view to producing efficient results in the areas under their purview.

In light of these concerns, and pursuant to an explicit mandate from the General Assembly in San Salvador, in July 2011 the Permanent Council of the OAS established a 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. I was appointed chair in my capacity as permanent representative of Peru to the OAS. The Working Group's mandate, as a contribution to strengthening the inter-American human rights system, is to submit recommendations on the workings of the IACHR to the Permanent Council of the OAS in December 2011.

The group began by drafting an agenda containing the issues that Member States felt warranted examination. The Member States also decided to include an initial information-gathering stage on the issues identified. They decided that in order to fulfill the group's mandate, its agenda should include a finite number of issues that

¹ In his capacity as permanent representative of Peru to the OAS, the author served as chair of the Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the IAHRS from July 13 to October 26, 2011, when he was replaced by the permanent representative of Mexico to the OAS.

would be addressed by obtaining the opinions of the principal stakeholders of the inter-American human rights system. The group has already taken up each of these issues. It began with a discussion of the challenges facing the IACHR in the medium and long terms and went on to consider specific matters such as the appointment of the executive secretary of the IACHR, precautionary measures, human rights promotion, friendly settlements, concerns about the individual case and petitions system, and financial strengthening of the inter-American human rights system.

Aware of the importance of gathering all relevant information, and in order to enable the group to draft its recommendations to the Permanent Council in the shortest time possible, I proposed an interactive work methodology aimed at strengthening the dialogue with key stakeholders in the inter-American human rights system. This proposal was very well received by the delegations.

The Working Group held three conversations with IACHR commissioners. Two of those meetings were devoted almost exclusively to a discussion of the reform of Article 11 of the IACHR's Rules of Procedure. The third, held after the 143rd regular session of the IACHR (October 19–November 4, 2011), offered an opportunity to hear the commissioners' views on the other agenda items. All were very productive sessions. The first two helped reconcile positions in order to resolve a specific matter; the last one was an opportunity to share opinions about items on the Working Group's agenda as well as several other issues, such as the universalization of inter-American human rights instruments and compliance with Court judgments and IACHR recommendations.

The group also accepted my proposal to solicit broader input from civil society organizations. A system was set up for requesting written opinions on agenda items, and plans were made for a meeting at OAS headquarters that would give the delegations of Member States an opportunity to engage in dialogue with those organizations.

This dialogue is taking place in the context of a longstanding process of civil society participation in OAS activities. The "Guidelines for the Participation of Civil Society Organizations in OAS Activities," which the Permanent Council adopted in 1999, specify the ways in which nongovernmental organizations may interact with the Organization, its committees, and subsidiary groups.

Similarly, the OAS Charter sets out the way in which civil society organizations may participate in the general assemblies of the Organization.

Civil society organizations devoted to the protection, defense, and promotion of human rights play an extremely important role in the Working Group's activities by bringing to the discussion the perspective of petitioners before the Commission and the Court. They give voice to the victims, the very individuals for whom the inter-American system was created in the first place—in other words, the citizens of the Americas. I believe it is crucial to listen to the firsthand experiences of the users of the inter-American human rights system and, in particular, to benefit from their assistance in identifying deficiencies in its workings. The specialized experiences and technical capacities of civil society organizations are a clear contribution to the tasks before the group. Their activities as defenders, petitioners, and regular users of the system offer a needed perspective that can help us arrive at a balanced assessment.

For this reason, and taking into account time and budgetary constraints, a method was designed to ensure the broadest possible participation of civil society organizations, including social and academic actors. The first dialogue was held October 28, 2011, with Ambassador Joel Hernández, permanent representative of Mexico and current chair of the Working Group, presiding. At the session, representatives from a range of civil society organizations had the opportunity to present their opinions and proposals concerning the issues before the group and other issues they felt should be addressed during the discussion. These contributions, arising from the day-to-day experiences and expertise of civil society organizations, are an invaluable asset that will be taken into account as the Working Group drafts its recommendations for the Permanent Council.

I am convinced that the process of strengthening the inter-American human rights system requires fostering the most fluid dialogue possible among all of the relevant stakeholders. The conflicting views that tend to surface are attributable, in some measure, to the previous absence or infrequency of this type of dialogue. It is therefore necessary to undertake a joint effort to improve and strengthen mechanisms to facilitate more regular communication.

I am hopeful that the Working Group's labors will lead to a mechanism for changes and adjustments to the inter-

American human rights system that will steer it toward greater efficiency. Not only will clearer, pre-established rules bolster the states' commitment to the system, but the system's bodies will have had the opportunity to listen to the various stakeholders, which will surely spur them to adjust their procedures.

Meanwhile, I believe that the interactive process has already begun to bear fruit. Indeed, the process has made

it possible to explicitly articulate different positions, and this has helped chip away at the differences and disagreements that have arisen in part because of the lack of frank dialogue in the past. While strengthening the inter-American system certainly requires shoring it up financially, the most important task is to strengthen belief in and adherence to its principles and boost confidence in its capacity to enhance the quality of life of our peoples. ■

Selection of the Next Executive Secretary of the Inter-American Commission on Human Rights: A Civil Society Perspective



© Stockbyte

The Inter-American Commission on Human Rights (IACHR) announced a competition for the post of its next Executive Secretary on its website in November 2011. The closing date for submission of applications from candidates was May 1, 2012. The IACHR will select three to five finalists and post their names and profiles on its website in order to obtain feedback from civil society and from states.¹ After interviewing the finalists, the IACHR will choose the most qualified person by absolute majority and will present that candidate to the Secretary General of the OAS for his or her appointment. The appointee will take over the post in January 2013 for a four-year term, which may be renewed once.

In August 2011, the Center for Legal and Social Studies (CELS), Dejusticia, Conectas, the Legal Defense Institute (IDL), the Construir Foundation, and the Due Process of Law Foundation (DPLF) submitted a document to the IACHR with their observations and suggestions concerning the Commission's proposed amendment to Article 11 of its Rules of Procedure. This amendment, which establishes the internal procedure for selecting the Executive Secretary, was finally adopted in September 2011.

In this document, the six organizations noted the importance

of ensuring a public selection process with civil society participation at all levels. They emphasized that although the Secretary General of the OAS is responsible, under the IACHR Statute, for appointing the Executive Secretary, he or she must respect the IACHR's internal procedure in doing so. Should the Secretary General oppose the Commission's candidate, he or she must explain the grounds for that objection publicly and in a timely manner. The organizations requested the IACHR to require that candidates include in their applications a proposed work plan with an assessment of the human rights situation in the region. They also requested that the IACHR consider the possibility of holding public hearings with the finalists.² They reiterated that the IACHR's final decision must be well-founded, reasonable, and based on objective information about the candidates' credentials. In the view of the organizations, these proposals contribute to transparency in the selection process, and the Inter-American Commission should take them into account and implement them in the selection process currently underway.

Now that the applications have been submitted, civil society organizations should keep a close eye on the selection process, given the importance of this decision for the future work of the Executive Secretariat. Civil society has promoted the presentation of highly qualified, independent candidates who possess moral authority and unimpeachable backgrounds in the human rights arena. Civil society should now help publicize and promote the transparency of the process by widely disseminating the finalists' profiles and track records, presenting well-founded observations based on solid, reliable information, and encouraging public debate with those selected as finalists. Ultimately, civil society organizations will need to remain attentive and vigilant so that the new Executive Secretary fulfills his or her mandate in a way that ensures the autonomy and independence of the Inter-American Commission, enabling it to continue its role of promoting and protecting human rights. ■

1 At the time this journal went to press in May 2012, the IACHR was in the process of reviewing candidacies and selecting the three to five finalists whose names would be posted on the IACHR website.

2 At the time this journal went to press, the IACHR had not made any announcement regarding the public hearing requested by the organizations.

Civil Society Participation in the Reflection Process to Strengthen the Inter-American Commission on Human Rights: A Brief Commentary

DPLF Staff

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 was created in July 2011. Six civil society organizations in the region immediately set up a coordinated monitoring effort, mindful that dissatisfaction with the inter-American system on the part of several states could contribute to weakening the mechanisms available to the Commission for its work. The six organizations—the Center for Legal and Social Studies (CELS) of Argentina, the Legal Defense Institute (IDL) of Peru, the Center for the Study of Law, Justice, and Society (Dejusticia) of Colombia, the Construir Foundation of Bolivia, Conectas Human Rights of Brazil, and the Due Process of Law Foundation (DPLF) of the United States—followed the Working Group’s discussions throughout the process, which ended in December 2011. Their efforts complemented similar work being done by other national and regional civil society organizations, such as the Center for Justice and International Law (CEJIL) and the International Coalition of Human Rights Organizations in the Americas.

During the first months of the process, representatives from the six organizations held a number of meetings with representatives and officials from various states’ missions to the Organization of American States (OAS) and from foreign affairs ministries. They requested that civil society organizations have broad access to the Working Group’s discussions at every stage in order to ensure their genuine participation. The organizations also saw these meetings as opportunities to influence the Working Group with respect to specific aspects of the workings of the Inter-American Commission on Human Rights (IACHR) that arose in the course of the discussions. From the outset, they urged the OAS to create a formal, institutional opportunity for civil society stakeholders to present their views and recommendations about the issues on the Working Group’s agenda.

The six organizations sent a clear message to the states from the start: the recommendations of the Working Group should not undermine the IACHR’s independence or autonomy or the important work that it does, through its different mechanisms, to protect human rights in the region.

In one of their earliest actions, the six organizations prepared and submitted their observations on the proposed reform of Article 11 of the IACHR’s Rules of Procedure, which deals with the selection process for a new Executive Secretary (see box). Amid the controversy that erupted over this article,¹ the six organizations submitted a paper to the Working Group setting forth their expert opinion, grounded in their experiences as users of the system, on the procedures proposed by the IACHR to regulate the election of the new Executive Secretary.² The paper was published on the official Web page of the Working Group and forwarded to all of the missions to the OAS, to the members of the IACHR, and to its Executive Secretariat.

Opportunities for participation

The chair of the Working Group at that time was the Peruvian ambassador to the OAS, Hugo de Zela. He

1 See, in this journal, Victoria Amato, “Taking Stock of the Reflection on the Workings of the Inter-American Commission on Human Rights.”

2 *Contributions to a Comprehensive Agenda for Strengthening the Inter-American System of Human Rights*. The executive summary is available on the Web page of the Working Group, <http://www.oas.org/consejo/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>, under the following title: *Recommendations from the Civil Society Organizations—Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia), Conectas Direitos Humanos, Centro de Estudios Legales y Sociales (CELS), Instituto de Defensa Legal (IDL), Due Process of Law Foundation (DPLF) and Fundación Construir*, GT/SIDH/INF. 22/11 add. 1, November 9, 2011. In addition to the six principal authors, the recommendations were endorsed by six additional organizations: Asociación Interamericana para la Defensa del Ambiente, Asociación por los Derechos Civiles (ADC), Centro de Derechos Humanos Miguel Agustín Pro Juárez, Corporación Humanas, Coordinadora Nacional de Derechos Humanos, and Justicia Global.

asked the states to consider holding a meeting at OAS headquarters to allow civil society organizations with relevant expertise the opportunity to share their views on the topics being discussed by the Working Group. The chair's request initially met with resistance from certain states. In response, several civil society organizations contacted various missions and OAS officials to persuade the states of the importance of hearing from civil society. They requested a formal meeting to be scheduled during the IACHR's regular session in October 2011—timing that was intended to take advantage of the presence of numerous organizations, users of the system, which would be in Washington, DC, for the public hearings. "This will end up creating a chance for them to come have their mini-hearings with us," grumbled one high-level OAS official, seeking to justify his refusal to hold the requested discussion.

Thanks to the efforts of several civil society organizations monitoring the process, however, as well as the support of the Working Group's chair and several states, the proposal was ultimately accepted. Civil society was officially invited to participate in a formal discussion with the Working Group in late October, the week before the hearings. The meeting was open to organizations authorized to participate in OAS activities as well as those not authorized, subject to the approval of the states. The registration and approval process took place without any major problems, except that one Panamanian organization, for reasons that remain unclear, was not approved by that country and therefore could not participate.

The meeting format called for civil society representatives to give an oral presentation on each of the topics on the Working Group's agenda. Each organization, or several organizations writing jointly, could also submit a written document of up to 2,000 words (though longer submissions were also accepted). Organizations unable to travel to Washington sent in their written observations and recommendations. They were not, however, able to participate in the discussion through video conferencing, since the OAS, citing cost constraints, chose not to make the required technology available. Organizations not physically present at the meeting were able to follow the discussions online but could not join them.

Katya Salazar, executive director of DPLF, gave a presentation on the IACHR's practice with respect to precautionary measures as a life-saving mechanism. New

patterns of human rights violations in the region today, she explained, pose new challenges to the functioning of this mechanism. Representatives of CELS and Dejusticia also gave presentations on the IACHR's role in the promotion of human rights, another topic on the Working Group's agenda. As noted above, the six organizations submitted a written report to the states with an expert opinion on certain of the agenda items, such as the IACHR's power to grant precautionary measures, its human rights promotion and protection functions, the role of Chapter IV of its annual report, and effective compliance with the decisions of the organs of the inter-American human rights system.³ The report's analysis and recommendations were compiled with those of other civil society organizations and submitted to each member of the Working Group for their consideration in future discussions.⁴

The October 2011 meeting was the only opportunity during the entire reflection process for civil society to engage in a formal dialogue with the 35 OAS Member States and present recommendations on the workings of the IACHR. Unfortunately, very few states attended the meeting, and the absence of most of the ambassadors sent a signal that few states were actually interested in hearing the proposals from civil society. As a result, there was virtually no exchange of opinions between civil society and the OAS Member States. Indeed, throughout the daylong meeting, the states had very little to say in response to the presentations by representatives of the civil society organizations.

There were, however, other informal opportunities for participation and advocacy. DPLF, acting on behalf of the six organizations, met on several occasions with OAS ambassadors, high-level OAS officials, and officials of the Commission and its Executive Secretariat in order to share information on the reflection process in general and some of the more sensitive agenda items in particular. DPLF also proposed solutions to some of the problems and challenges that arose during the discussions.

3 *Contributions to a Comprehensive Agenda for Strengthening the Inter-American System of Human Rights* (see note 2).

4 *Compilación de las recomendaciones de las Organizaciones de la Sociedad Civil sobre los temas del Grupo de Trabajo*, GT/SIDH 11/11 rev. 1, November 21, 2011, available on the Web page of the Working Group, <http://www.oas.org/consejo/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>.

DPLF's efforts to monitor the Working Group's discussions, in coordination with other civil society organizations in the region, contributed to a constant flow of information on progress and setbacks concerning the most important topics under study. This helped spur debate over certain sensitive topics and helped the groups unable to travel to Washington design and fine-tune their own advocacy efforts targeting their governments, the press, and other audiences.

After reaching consensus on content and on its recommendations for the IACHR, the Working Group submitted its report to the Permanent Council in December 2011. Just days before, the six organizations had published a position paper commenting on the report's content and main recommendations.⁵ Endorsed by more than 20 civil society organizations in the region, the paper was sent to the OAS Member States, the Secretary General of the Organization, and the members of the IACHR, among other recipients. While acknowledging the positive outcomes of the reflection process, especially the states' commitments to increase funding for the IACHR, the organizations expressed their concern over certain recommendations that could weaken the Commission's work. Some of those recommendations—those that triggered perhaps the most heated debates in the days leading up to the presentation of the report—stemmed from Ecuador's proposals aimed at weakening the Special Rapporteurship on Freedom of Expression and the IACHR in general. As a result of the coordinated national and regional response from civil society, pressure from the national and international press, and the involvement of other stakeholders concerned by the tenor of those particular proposals, during the Permanent Council meeting to approve the final report, the majority of states declared their unqualified support for the important work of the Rapporteurship and for the independence and autonomy of the IACHR.

Conclusions

As noted at the beginning of this article, given the importance of the topics on the Working Group's agenda, it quickly became clear that civil society would have to mount a coordinated effort to monitor the process and seek opportunities for participation, dialogue, and consultation on the most controversial issues.

Several conclusions can be drawn from this reflection process. First of all, the Working Group developed its thematic agenda without the benefit of input from civil society. By unilaterally defining the topics that would be discussed, the states lost an important opportunity to follow a democratic and participatory process from the outset, informed by the expert opinions of important stakeholders, namely the system's users, whose contributions to the agenda would have greatly enriched the discussions. As far as the subsequent opportunities for formal participation, as noted, the enthusiasm and interest expressed by civil society organizations stood in stark contrast to the states' evident lack of interest in hearing their views. The OAS has a long way to go in ensuring that formal opportunities for civil society participation foster a genuine exchange of opinions.

Finally, and despite the shortcomings described here, observation of the process and its final outcomes confirms that public scrutiny is essential when such critical issues concerning the inter-American human rights system, and the actions of the Organization of American States in general, are being discussed. During the Working Group's meetings, the states were aware that they were being observed. That clearly contributed to ensuring that the Working Group's internal discussions and, ultimately, its recommendations were framed by respect for the independence and autonomy of the IACHR. It is therefore critical that civil society organizations become increasingly involved in the work of the OAS, monitor its discussions, and remain vigilant as to the course of future discussions on the workings of the IACHR. ■

⁵ Instituto de Defensa Legal (IDL), Centro de Estudios Sociales y Legales (CELS), Fundación Para el Debido Proceso (DPLF), Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia), Conectas Direitos Humanos, and Fundación Construir, *Organizaciones de sociedad civil de las Américas presentan su posición sobre el informe final elaborado por el Grupo de Trabajo Especial de Reflexión sobre el Funcionamiento de la Comisión Interamericana de Derechos Humanos para el Fortalecimiento del Sistema Interamericano de Derechos Humanos*, available on the IDL website at <http://www.idl.org.pe/notihome/notihome01.php?noti=248>.



Please send comments and possible contributions for this publication to aportes@dplf.org.

Position of Civil Society Organizations of the Americas on the Final 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

**Instituto de Defensa Legal (IDL), Centro de Estudios Legales y Sociales (CELS),
Due Process of Law Foundation (DPLF), Centro de Estudios de Derecho, Justicia y
Sociedad (Dejusticia), Conectas Direitos Humanos, Fundación Construir**

We, the signatory civil society organizations, have prepared this statement in response to the final 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, released to the public on December 14, 2011.

We recognize and value the report's contributions to the actions that the states deem necessary to improve the workings of the Inter-American Commission on Human Rights (IACHR). We are very concerned, however, that several of the report's recommendations could trigger a process of weakening the inter-American human rights system (IAHRS). In expressing their concerns about the workings of the IACHR, some states publicly criticized aspects related to the forwarding of cases to the Court and other types of resolutions that the IACHR has adopted in carrying out its protective role. We believe that a discussion in these terms could lead to a process that diminishes or limits the IACHR's capacity for protection, to the detriment of the inter-American human rights system as a whole.

Moreover, bearing in mind that the final report of the Working Group includes positions that several states introduced toward the end of the reflection process, leaving civil society organizations with no opportunity to discuss them, we take this opportunity to present our observations with respect to those final positions, following a brief reference to the context in which this reflection process took place.

1. Context

While not discounting the sincerity of the states' viewpoints on matters of concern, we nonetheless cannot ignore positions that appear worrisome to us. The signatory human rights organizations therefore affirm that the states' positions must be consistent with their stated objective: to strengthen the IAHRS and reinforce the work that the IACHR has carried out up to now.¹ Toward this end, the states, having expressed their intentions to improve the system, must turn these intentions into actions. Above all, this means that they must commit to ensuring additional and improved compliance with the recommendations of the IACHR, whether in regard to individual petitions or general recommendations.

Our initial examination of the recommendations, and the parties to whom they are directed, suggests that the Working Group was mainly concerned with how to improve the work of the IACHR, rather than with assessing how states have performed their role in the protection system. This is inconsistent with what the states themselves have acknowledged as their role in the promotion and protection of human rights. In our view, this position can be interpreted, in the context just described, as the states questioning the IACHR.

¹ Whether spoken or unspoken, there is a subtext of conflict between certain states and the IACHR. In particular, in the last two months, the presidents and or other high-level officials of countries of the region have made public statements against the Special Rapporteurship for Freedom of Expression, personalizing their criticisms rather than confining them to the level of institutions, as would be appropriate.

In light of this, should the discussion process continue, we urge Member States of the Organization of American States (OAS) to address, of their own accord, those areas of strengthening the IAHRs that depend mainly on them. These actions include fully incorporating the protection system into domestic law through the ratification of the American Convention on Human Rights, accepting the jurisdiction of the Inter-American Court of Human Rights, increasing the budget of the Commission and the Court, and implementing mechanisms to comply with and follow up on the recommendations of both organs, to give just a few examples.

The Working Group's report covers issues that we consider to be of vital importance. The present document is confined to some general observations, since it is accompanied by a table that addresses each of the recommendations specifically and in detail.

2. On the recommendations of the final report

Among the recommendations we welcome is one directed at financially strengthening the Inter-American Commission and the Court; we hope that this will be put into practice. This would have a positive impact on the work of both bodies, particularly in relation to delays in the notification, evaluation, and resolution of petitions. These delays are associated with a lack of resources to hire additional staff, carry out more in loco visits, produce more country and thematic reports, and hold more public hearings.

We also concur that moving toward a permanent president is appropriate, since the challenges currently facing the IAHRs clearly indicate the need to transition to permanent, full-time commissioners and judges. Similarly, we understand the call to universalize the inter-American human rights system.

We also welcome the fact that states specifically acknowledged the importance of a protection system having autonomous and independent bodies, as well as its subsidiary nature, since the Member States of the OAS have the main responsibility for upholding human rights in each and every country of the Americas.

Nonetheless, we must signal our concern about the obvious imbalance between the number of recommendations directed toward the states and the number directed

toward the IACHR in the report's section on precautionary measures. We are especially concerned that none of the recommendations to states calls their attention to the compulsory nature of compliance. This concern is based on the high level of noncompliance with the decisions of the IACHR, but also on recent interpretations by state actors that are intended to refute their compulsory nature.

In relation to precautionary measures, we also wish to point out that, while we concur with the need to specify or better define the objective criteria or parameters for granting, reviewing, extending, or lifting these measures, the report contains recommendations that are liable to weaken their use, thereby depriving people of a mechanism that has proven effective in saving lives. One example of this is the recommendation to "refrain from adopting or maintaining precautionary measures when the Inter-American Court has refused an application for provisional measures for the same situation." This confuses precautionary with provisional measures by erroneously assigning the same burden of proof to both.

We are also concerned about the language used in the recommendation to "strike a better balance between the functions of promotion and protection of all human rights." While no one argues against having the IACHR play a more proactive role in the promotion of human rights, we should not forget that this "balance" must be achieved in a situation of funding shortfalls. In this regard, the signatory organizations take the view that the IACHR has the prerogative to decide how to allocate its scarce resources.

We are also concerned by the recommendation that the IACHR should "incorporate all rapporteurs' reports under a single chapter of its annual report." It is common knowledge that for over twelve years, the IACHR's Special Rapporteurship for Freedom of Expression has been the only rapporteurship that autonomously prepares and disseminates an annual report on the state of this right in the hemisphere. This report, precisely because of its level of detail and depth, is a very important tool for understanding the situation of freedom of expression in the hemisphere, identifying the main problems, and improving standards related to this right. If the intention is to achieve parity among the reports of all the rapporteurships, then it would be more appropriate to have each one prepare and publish a report, rather than to discourage production of an extremely effective and useful

instrument. The suggestion to include the report of the Special Rapporteurship for Freedom of Expression in the annual report of the IACHR could lead to a setback in the work of this rapporteurship. The signatory organizations take the view that this recommendation runs counter to a genuine process of strengthening the IAHRs, and we hope that the IACHR will disregard it.

Moreover, in our opinion, the recommendation that the IACHR “assign adequate, sufficient, and balanced resources to all its rapporteurships, working groups, and units” must be understood in its proper context. While the Commission has many different rapporteurships, working groups, and units, only one is permanent, has its own operational structure and functional independence, and operates in the legal framework of the IACHR, pursuant to a decision by the IACHR and with the unanimous backing of the Member States.² In our view, therefore, this recommendation should be interpreted as emphasizing the need for all rapporteurships, working groups, and units of the IACHR to have adequate and sufficient resources to carry out their work; under no circumstances should it be regarded as a call to cut, limit, or reduce the resources of one rapporteurship, working group, or unit to benefit another.

We also wish to comment on the recommendation to “introduce a code of conduct to govern the management of IACHR rapporteurships in order to ensure the requisite coordination between those mechanisms and states.” The signatory organizations regard this recommendation as unnecessary inasmuch as the work of the rapporteur-

ships is regulated by the Rules of Procedure, Statute, and practices of the IACHR.

While certain other recommendations address critical issues—such as delays in processing individual petitions or the importance of friendly settlement processes—they are flawed in that they are directed solely to the IACHR and not to the states, thus overlooking the states’ responsibility for weaknesses in these mechanisms. It is alarming, too, that not a single recommendation calls on states to ensure effective compliance with and implementation of the decisions of the bodies of the inter-American human rights system; nor are states encouraged to be more disposed toward, and build political will for, resolving cases through friendly settlements. As we have already mentioned in the document previously sent to the Working Group, compliance with the decisions of the IAHRs is an enormous challenge and one that is mainly incumbent on states. At stake in this matter are not only the rights of the victims that have been violated in each case, but also the legitimacy of the protection bodies themselves.

Finally, in relation to the recommendations on Chapter IV of the IACHR’s annual report, in our view this chapter is currently a very useful tool for exposing the situation in those Member States that are experiencing the greatest difficulty in upholding and protecting human rights and democracy in the hemisphere.

3. Conclusion

This statement is intended to convey to the states our observations and recommendations with respect to the report presented, which will be taken up again at the next session of the Permanent Council to be held on January 25 of this year. A copy of this report will also be provided to the members of the IACHR. As organizations that use the inter-American system and that provide representation to the victims, and understanding too that the IACHR is an autonomous and independent body of the OAS, we feel obligated to urge the IACHR to make its position clear on the final report of the Working Group.

We hope that our analysis of the recommendations made will be taken into account in future discussions about the IAHRs. We also urge the states, in further discussions about the workings of the inter-American system, to include adequate opportunities for consultation with civil society organizations and other users of the system. ■

2 The IACHR’s initiative in creating a permanent Special Rapporteurship for Freedom of Expression was fully endorsed by the Member States of the OAS. At the Second Summit of the Americas, the Heads of State and Government recognized the crucial importance of freedom of thought and expression and expressed their satisfaction at the creation of the Special Rapporteurship. In the Declaration of Santiago, adopted in April 1998, the Heads of State and Government declared, “We agree that a free press plays a fundamental role in this area and we reaffirm the importance of guaranteeing freedom of expression, information, and opinion. We commend the recent appointment of a Special Rapporteur for Freedom of Expression, within the framework of the Organization of American States.” They also developed a plan of action to promote this commitment. See “Declaration and Plan of Action of Santiago,” Second Summit of the Americas, April 18–19, 1998, Santiago, Chile, in *Official Documents of the Process of the Summits from Miami to Santiago*, vol. 1, Office of the Summit Follow-up, Organization of American States. For more information, go to <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=192&IID=1>.

International Course on Mechanisms for Reporting Human Rights Violations by Transnational Companies in Latin America



The second virtual course on *Reporting Mechanisms 2011: Transnational Companies and Human Rights* concluded with a face-to-face event held in Lima on October 10–13, 2011. Misereor, a development cooperation program of the German Catholic Church, funded and organized the event. The Due Process of Law Foundation (DPLF) assisted in developing the thematic agenda and presenting some of the topics addressed.

The course was intended to enhance the participants' ability to use legal and institutional mechanisms, both domestic and international, to report human rights violations allegedly committed by transnational corporations in the course of infrastructure projects or natural resource extraction in the territories of indigenous, Afro-descendant, or peasant communities. The participants were human rights defenders—many of them specialists in environmental issues and the rights of indigenous peoples—from Argentina, Bolivia, Brazil, Colombia, Ecuador, Guatemala, Honduras, Mexico, and Peru.

Experts were invited to deliver presentations on the structure, workings, and use of the human rights mechanisms available through the United Nations and inter-American systems to deal with such situations. They also covered the role of international financial institutions (the World Bank and Inter-American Development Bank) and their mechanisms for receiving complaints of this nature. Finally, they examined the role of the Organisation for Economic Co-operation and Development (OECD) and its complaints procedure for alleged abuses committed by companies from its Member Countries. The speakers included Claudia Müller-Hoff of the European Center for Constitutional and Human Rights (Germany), Carlos López of

the International Commission of Jurists (Switzerland), Elizabeth Salmón of the Pontifical Catholic University of Peru, and María Clara Galvis of DPLF (Washington, DC).

The course was an opportunity to examine the impact of natural resource extraction in countries where the law is strong in terms of promoting private investment and economic development, but very weak when it comes to protecting the environment and the rights of the most vulnerable groups likely to be affected by such activities. The meeting also provided a forum for exchange of information about significant advances in international human rights law geared toward establishing the liability of corporations—rather than just states—for human rights abuses. Since this is a relatively new topic in the public debate, these opportunities for reflection and information sharing are extremely important.



**The budget of the
Inter-American
Commission on
Human Rights**



Budgetary and Financial Challenges Facing the Inter-American Commission on Human Rights of the OAS

María Claudia Pulido

María Claudia Pulido, a Colombian attorney, is a senior specialist at the Inter-American Commission on Human Rights.¹

The Organization of American States (OAS) created the Inter-American Commission on Human Rights (IACHR) in 1959 with the mission of promoting and protecting human rights in the region.² The IACHR's primary mandates are to supervise the general human rights situation in OAS Member States, respond to complaints lodged by persons or groups alleging the responsibility of states for violations of their human rights through the individual case system, and promote awareness about human rights through various means, including thematic approaches.³ The IACHR is also charged with providing specialized assistance to OAS Member States on these matters. The Statute of the IACHR stipulated the creation of a functional unit or secretariat that would be equipped with the resources necessary to carry out its mandates.⁴

A few key indicators from the individual case system suffice to give an idea of the Executive Secretariat's workload arising from these mandates. Roughly 7,500

matters are currently pending before the IACHR: 6,000 petitions are in the initial review stage, 1,000 are in the admissibility stage, and 500 are in the merits stage. The IACHR received an average of 1,500 petitions in each of the past five years. During that same period, the IACHR also received 320 requests for precautionary measures, which must be evaluated and resolved as quickly as possible because they deal with serious and urgent situations. Meanwhile, the IACHR must monitor the human rights situation in the 35 countries of the region, as well as issues related to its priority thematic areas and other issues stemming from the mandates of the political organs of the OAS and the Summits of the Americas.

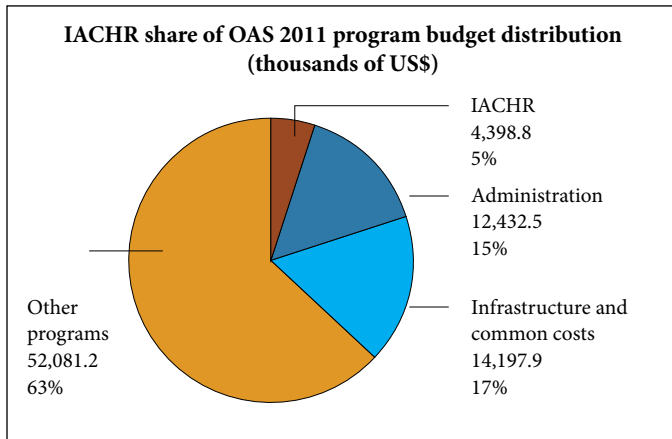
In 2011 the OAS General Assembly allocated \$4,329,800, or 5 percent of its overall budget, to the IACHR to enable it to carry out its mandates. This allocation includes two main categories: staff expenses and operating expenses. In relation to the former, the General Assembly approved 32 posts for the IACHR for 2012, 17 of which must be filled by attorneys. Were it not for external resources, this team would be in charge of carrying out the IACHR's mandate in its entirety. The General Assembly allocated an additional \$946,000 for operating expenses.

In its financial reports to the political organs of the OAS, the IACHR has repeatedly warned that regular fund allocations for operating expenses are altogether insufficient. In practice, those resources barely cover certain basic expenditures, such as two of the IACHR's three regular sessions, the Rómulo Gallegos Fellowship, communications services, office supplies, and some publication costs. Some of the critical activities within the IACHR's mandate that are *not* covered by the regular allocation are the preparation of special studies requested by the General Assembly; on-site visits; other promotional activities such as workshops, seminars, and courses; participation in the hearings and other relevant activities of the Inter-American Court of Human Rights; the IACHR's third regular session; and operations of the thematic rapporteurships.

The IACHR's efforts to obtain the resources it needs to

- 1 The opinions expressed herein are the author's and do not necessarily reflect those of the General Secretariat of the OAS, the OAS, or OAS Member States.
- 2 Article 106 of the OAS Charter of 1948 provided for the creation of an Inter-American Commission on Human Rights with the main functions of promoting respect for and defense of human rights and serving as an advisory body to the Organization in this area. It further stipulated that the Commission's structure, functions, and procedures would be set out in an inter-American convention on human rights. The IACHR was created pursuant to a resolution adopted at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in Santiago, Chile, in 1959, and began its work in 1960.
- 3 The IACHR has established thematic rapporteurships on the rights of women, children, persons deprived of liberty, Afro-descendants, indigenous peoples, migrant workers and their families, and human rights defenders. It also has a special rapporteurship on freedom of expression and recently established a unit on the rights of members of the LGBTI (lesbian, gay, transgender, bisexual, and intersex) community within the Executive Secretariat.
- 4 Article 21 of the IACHR Statute, approved through Resolution No. 447 and adopted by the OAS General Assembly on October 31, 1961, establishes that a specialized administrative unit shall be responsible for providing secretariat services to the IACHR and shall be equipped with the necessary resources and staff to carry out the tasks entrusted to it.

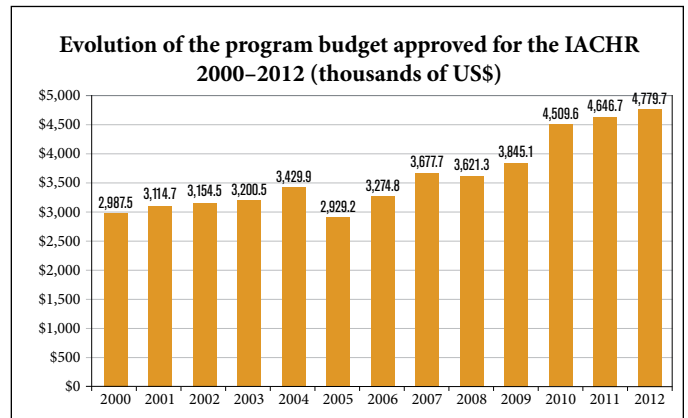
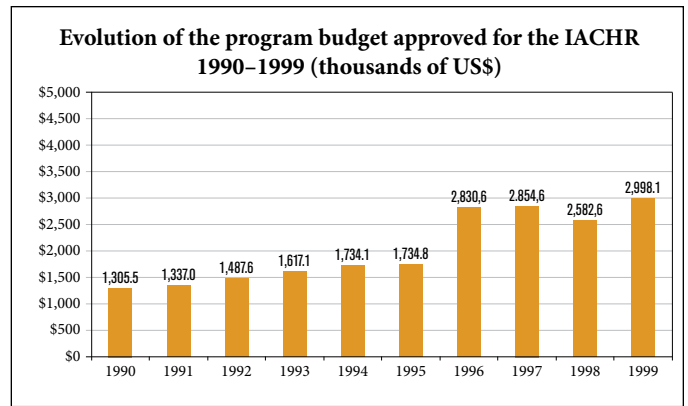
fully carry out its mandates have focused on increasing its regular fund allocation and obtaining external resources.



In the political sphere, human rights protection and promotion in the region has been defined as one of the four pillars of the OAS. Despite this—and despite successive General Assembly resolutions since 1999, affirming that strengthening the inter-American human rights system is a priority—this political will is not reflected in the distribution of the Organization’s budget.

While an increase equivalent to 63 percent of the IACHR’s regular budget was approved in 1995, the annual rate of increase declined over the first four years of the next decade, and the 2005 budget was 15 percent lower than that of the preceding year. The budget gradually recovered from 2006 to 2009, with the most significant increase in a decade coming in 2010. While there have been slight increases in the past three years, allocations for operating costs have remained static.

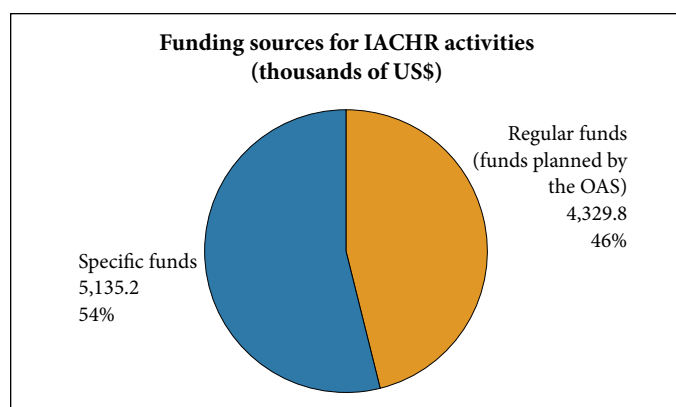
In 1990 the IACHR faced a shortfall in regular funding, increasing demand for protection coming from victims and petitioners, an alarming backlog in the examination and resolution of pending matters, and new mandates from the General Assembly. Accordingly, the Commission decided to broaden its external funding base, which up until then had consisted exclusively of voluntary contributions from countries of the region (most notably from the United States, the IACHR’s main contributor for many years). At first the IACHR submitted thematic projects, for which it was able to obtain funds from some of the OAS observer countries. Later, deploying a fundraising strategy intended to strengthen its capacity for promotion and protection, the IACHR expanded its pool of potential donors. The resources generated through this strategy enabled the IACHR to (a) tackle its backlog,



particularly cases in the initial stages, (b) make progress in strengthening its institutional capacity by developing electronic formats to digitize the proceedings before the IACHR, and (c) reorganize the Executive Secretariat. In the context of this reorganization, the IACHR created a middle management level, standardized its work methods, and formed management units. It also distributed tasks based on geographic, procedural, and thematic criteria by creating five regional sections and specialized working groups, in addition to the existing teams for the thematic rapporteurships.

At present, 50 percent of the IACHR’s budget of approximately \$10 million comes from external sources, through both voluntary contributions and specific project funding. This means that half of the IACHR’s staff and half of its activities in the area of human rights monitoring, protection, and promotion are funded through these types of resources.

The expansion of external funding has enabled the IACHR to boost its production levels in all areas. The lag in examining petitions was reduced from just over 50 months in 2007 to 27 months at the end of 2011. At the same time, the number of petitioners before the inter-American system increased: 275 petitions were accepted for processing in



2010, compared to 83 in 2002. Similarly, the number of cases submitted to the Inter-American Court rose from 7 in 2002 to 16 in 2010. There was also an increase in the number of reports containing standards and recommendations to protect groups historically subject to discrimination: for example the preparation, publication, and distribution of 22 thematic reports approved by the IACHR in the last five years was financed through specific grants.⁵

By its nature, however, this type of funding does not allow the IACHR to engage in medium- and long-term planning. Therefore, in the context of the severe financial crisis gripping the OAS, and the evident rigidity of its budget, the most pressing challenge facing the IACHR is to sustain the capacity it has acquired. In an effort to ensure transparency concerning its requirements for fully carrying out its mandates, the IACHR adopted a five-year Strategic Plan for 2011–2015.⁶ This reflects a shift from a project-centered focus to a results-based, multiyear, multidonor approach.

The three-part Strategic Plan addresses key planning issues. The first part deals with strategic questions concerning the IACHR's mission as defined in the OAS Charter, the American Convention on Human Rights, and other regional instruments. How has the IACHR accomplished its mission over the past 50 years? What impact has it had on human rights protection and promotion in

the region—in general, through legislative reform and the adoption of public policies on human rights, and in specific cases, through reparations made to victims of violations of rights enshrined in regional instruments? What is its vision for the next five years? The second part organizes the Plan's programmatic content into eight programs, each with a specific plan of action.⁷ Here, the IACHR sets out the goals it intends to achieve based on its past experience. The third part defines how it will measure the results in terms of impact, products, and outcomes. The Plan adopted a results-based management model for this purpose that includes a battery of indicators related to programs, action plans, activities, and budget. It also proposes an evaluation system based on a single assumption: that successful accomplishment of the objectives will be contingent on the resources secured.

In laying the groundwork for a medium-term funding model based on a transparent system of accountability, the IACHR is seeking to convey its needs and challenges to states and to civil society. It now falls to the states, with the assistance of the General Secretariat of the OAS, to take measures to grant the IACHR the resources it requires to achieve the goals set out in its Strategic Plan. As of December 31, 2011, Chile, Ecuador, Denmark, France, Ireland, the Netherlands, and the United States had made contributions to the Strategic Plan. This will enable the IACHR to continue to cover its main activities, particularly with regard to the individual case system, at least through the first half of 2012 and part of the second.

As long as OAS regular fund distributions remain inconsistent with the political definition of the pillars of the Organization, and as long as the OAS fails to considerably boost the operating budgets of the organs of the human rights system—to at least \$10 million annually, in the case of the Inter-American Commission—the IACHR's main challenge in practice will be to increase, or at least maintain, a level of external funding that enables it to operate at the level it achieved this past year. If it is unable to do so, the progress made will be lost, and the inter-American human rights system will be left on the verge of collapse. ■

5 Statistical information on the individual petitions and case system is found in Chapter III, Section B, of the IACHR Annual Report. See Organization of American States, Inter-American Commission on Human Rights, Annual Reports, <http://www.oas.org/en/iachr/reports/annual.asp>.

6 The IACHR Strategic Plan was presented at a technical donors' meeting held March 1–2, 2011, in Ottawa, Canada, as part of the process to ensure the strengthening of the inter-American human rights system in a more coordinated and predictable manner. The Plan was presented to the Permanent Council of the OAS on October 19, 2011.

7 The IACHR Strategic Plan includes the following programs: (1) Policy and Legal Direction, (2) Individual Petition System, (3) Monitoring of Country Situations, (4) Thematic Areas, (5) Special Thematic Area: Freedom of Expression, (6) Other Activities to Promote Human Rights, (7) Public Information, and (8) Institutional Development. See Organization of American States, Inter-American Commission on Human Rights, *Strategic Plan 2011–2015*, <http://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf>.

Board of Directors

Alejandro Garro
President of the Board

Christopher Jochnick
Vice President of the Board

Susan Popkin
Treasurer

Douglass Cassel
Ariel Dulitzky
Margaret Roggensack
Ronald Scheman

Staff

Katya Salazar
Executive Director

Laura Park
Director of Finance and
Institutional Development

Mirte Postema
Senior Program Officer
Judicial Independence

Leonor Arteaga
Program Officer
Judicial Independence

Carla García-Zendejas
Senior Program Officer
Human Rights and Extractive
Industries

Stephanie Luckam
Operations Manager

Victoria Amato
Advocacy Coordinator

Maria Clara Galvis
Senior Legal Advisor

*DPLF notes with great sadness the passing of
Dr. Jorge Carpizo,
a member of our board of directors since 1998.*



Fundación para el Debido Proceso Due Process of Law Foundation

1779 Massachusetts Ave., NW
Suite 710
Washington, D.C. 20036
Tel.: (202) 462.7701 – Fax: (202) 462.7703
E-mail: info@dplf.org Web site: www.dplf.org

The Due Process of Law Foundation (DPLF), a nonprofit, nongovernmental organization based in Washington, DC, was founded in 1996 by Thomas Buergenthal, former judge of the International Court of Justice and of the Inter-American Court on Human Rights, and his colleagues from the United Nations Truth Commission for El Salvador. DPLF works to strengthen the rule of law and promote respect for human rights in Latin America through applied research, strategic alliances, outreach, and advocacy. Our vision is a Latin America in which civil society, using national and international legal instruments, participates fully in consolidation of the rule of law, and in which judicial institutions are independent, transparent, accessible, and able to fulfill their role in strengthening democracy.

This publication was made possible thanks to the generous support of:

FOUNDATION OPEN SOCIETY INSTITUTE
& Soros Foundations Network



**National Endowment
for Democracy**
Supporting freedom around the world



FORD FOUNDATION