

ARTICLES

IMPROVING HUMAN RIGHTS PROTECTIONS: RECOMMENDATIONS FOR ENHANCING THE EFFECTIVENESS OF THE INTER-AMERICAN COMMISSION AND INTER-AMERICAN COURT OF HUMAN RIGHTS

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INTRODUCTION

Since 1948, the Inter-American human rights system¹ has evolved into the most ambitious institutional framework in the world for promoting and protecting human rights. The basic legal documents of the system,² drafted within the context of the Organization of American

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1. Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2416, T.I.A.S. No. 2361, 119 U.N.T.S. 3, protocol of Amend. Feb. 23, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 [hereinafter OAS Charter]; HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/ser. L./V/II.65, doc. 6 (1985) [hereinafter HANDBOOK]. The Inter-American system has two legal sources, one of which is the OAS Charter. *Id.* Thirty-two states of the Western Hemisphere are members of the OAS and are subject to its human rights program. *Id.* at inside back cover. The other source is in the American Convention on Human Rights. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, OEA/ser. L./V/II.23, doc. 2 rev. 6, 1, O.A.S.O.R. OEA/ser. K./XVI/1.1, doc. 65 rev. 1 corr. 2 (1970), reprinted in 9 I.L.M. 673 (1970) [hereinafter American Convention]; HANDBOOK at 11. The nineteen OAS states that have ratified the Convention include: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela. *Id.* at 63. The non-ratifying OAS member states are Antigua and Barbuda, Bahamas, Brazil, Chile, Cuba, Dominica, Paraguay, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Surinam, Trinidad and Tobago, and the United States. *Id.*

2. OAS Charter, *supra* note 1; Convention, *supra* note 1; American Declaration of the Rights and Duties of Man, adopted May 2, 1948, by the Ninth International Conference of American States, Bogota, Colombia, reprinted in HANDBOOK, *supra* note 1, at 17-25 [hereinafter American Declaration]; the Statute of the Inter-American Commission on Human Rights, reprinted in HANDBOOK, *supra* note 1 at 103-13 [hereinafter Commission Statute]; Regulations of the Inter-American Commission on Human Rights, reprinted in HANDBOOK, *supra* note 1, at 115-42 [hereinafter Commission

States (OAS), recognize civil, political, economic, social, and cultural rights.³ These OAS documents established the Inter-American Commission on Human Rights⁴ and the Inter-American Court of Human Rights.⁵ These legal instruments grant to the Commission the authority to review complaints from individuals and groups or to initiate its own proceedings concerning human rights violations by any OAS member state.⁶ The Commission has the authority to undertake country-wide studies of human rights practices, including on-site investigations.⁷ The Commission also has the right to take urgent, interim measures where necessary to avoid irreparable harm,⁸ and the authority to make recom-

Regulations]; Statute of the Inter-American Court of Human Rights, *reprinted in* HANDBOOK, *supra* note 1, at 143-54 [hereinafter Court Statute]; Rules of Procedure of the Inter-American Court of Human Rights, *reprinted in* HANDBOOK, *supra* note 1, at 155-74 [hereinafter Court Rules].

3. American Declaration, *supra* note 2. The Declaration protects basic rights, including: life, liberty, personal security, equality before the law, religious freedom, freedom of expression and opinion, privacy and family life, residence and movement, health and well-being, education, work, social security, civil rights, fair trial, nationality, vote, assembly, association, property, petition, due process, and asylum. *Id.* American Convention, *supra* note 1. The Convention contains 22 broad categories of guaranteed rights. *Id.* A broad non-discrimination clause and an obligation on the part of all states to respect and ensure the rights and freedoms reinforce these provisions. *Id.* art. I. *See* INTER-AM. C.H.R., 1985-86 ANNUAL REPORT 22, OEA/ser. L./V/11.68, doc. 8 rev. 1 (1986) [hereinafter IACHR ANNUAL REPORT] (inviting member states to present specific proposals for the draft of the Additional Protocol to the American Convention).

4. OAS Charter, *supra* note 1, arts. 51(e), 112, 150; Convention, *supra* note 1, arts. 33-34. The OAS General Assembly elects the seven members of the Commission in an individual capacity to a term of four years. OAS Charter, *supra* note 1, art. 51(e); American Convention, *supra* note 1, arts. 33, 35. The Commission represents all member states of the OAS as both an organ of the OAS and of the Convention. OAS Charter, *supra* note 1, art. 112. Its principal function as an OAS organ is to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. *Id.* American Convention, *supra* note 1, art. 41. The Convention sets out in greater detail the functions of the Commission, the central one of which is the promotion and defense of human rights. *Id.*

5. American Convention, *supra* note 1, art. 33. The Court consists of seven judges nominated from among nationals of the member states of the OAS. *Id.* art. 52. Judges are elected to the Court in an individual capacity by a vote of the state parties to the Convention. *Id.* art. 52. The Judges of the Court are to be of the highest moral authority, of recognized competence in the field of human rights, and must possess the qualifications required for the exercise of the highest judicial functions in the state of nationality or of the state which nominates them. *Id.* The judges are elected for a term of six years and may be reelected only once. *Id.* art. 54. *See* Court Statute, *supra* note 2, arts. 18-20 (describing the duties and responsibilities of Inter-American Court judges).

6. American Convention, *supra* note 1, arts. 44-45. Unlike other human rights institutions, the right of individual petition is automatic in the Inter-American system; the ability of one state to file a complaint against another is optional. *Id.*; Commission Statute, *supra* note 2, arts. 18-20; Commission Regulations, *supra* note 2, art. 26.

7. Commission Statute, *supra* note 2, arts. 18(c), 18(g); Commission Regulations, *supra* note 2, art. 62.

8. Commission Statute, *supra* note 2, art. 19(c); Commission Regulations, *supra* note 2, art. 29.

mentations to states regarding the promotion and protection of human rights.⁹

The Court, on the other hand, may hear cases between states that are parties to the Convention or against a state at the request of the Commission, if the state has so declared.¹⁰ Where appropriate, the Court may award compensation to victims of human rights violations¹¹ or may take provisional measures in cases of extreme gravity.¹² The Court also has the most extensive advisory jurisdiction of any international juridical body.¹³

The lengthy catalogue of human rights and the extensive enforcement powers of Inter-American institutions create the potential for an extremely effective human rights system for the Western Hemisphere. The system, however, does not entirely live up to its potential. While there are certainly responsibilities that the institutions perform well, other activities operate less successfully. Moreover, the Commission and Court cannot fulfill some functions due to legal or practical reasons. An evaluation of these activities and functions demonstrates which aspects of the Inter-American system need improvement and where improvements can in fact be implemented.

I. INSTITUTIONAL POWERS AND FUNCTIONS

The principal functions of the Commission include promoting the observance and protection of human rights and serving as a consultative organ of the OAS in human rights matters.¹⁴ In exercising these functions, the Commission has been granted specific powers,¹⁵ including:

- (1) making recommendations to member states on progressive measures of implementation and observance of human rights;
- (2) preparing studies or reports;
- (3) requesting information on human rights from governments of member states;
- (4) responding to inquiries from member states and providing advisory services;

9. Commission Statute, *supra* note 2, arts. 18(b), 20(b).

10. American Convention, *supra* note 1, art. 62.

11. *Id.* art. 63(1).

12. *Id.* art. 63(2).

13. Shelton, *Implementation Procedures of the American Convention on Human Rights*, 26 GERM. Y.B. INT'L L. 238, 251-61 (1983). See Convention, *supra* note 1, art. 64 (defining the advisory power of the Inter-American Court); Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court* 79 AM. J. INT'L L. 1, 2-5 (1985) (describing the advisory and jurisdictional capacity of the Inter-American Court).

14. Commission Statute, *supra* note 2, art. 1(2).

15. American Convention, *supra* note 1, arts. 41-42. The OAS Charter specifies that the Convention determines the structure, competence, and procedures of the Commission. OAS Charter, *supra* note 1, art. 112.

and

(5) acting on petitions and communications.¹⁶

The Statute of the Commission further implements and clarifies these powers in relation to OAS member states that have not ratified the Convention, as well as those that are parties to the Convention. The most significant difference concerns the substantive rights protected: State Parties to the Convention must implement the guarantees of the American Convention, while other OAS member states must grant the rights set forth in the American Declaration of the Rights and Duties of Man.¹⁷

Any OAS state may be the object of a country study for which the Commission may request permission to conduct on-site observations.¹⁸ Country reports need not arise within the context of individual or inter-state petitions. Rather, they may proceed on the basis of a request by the OAS General Assembly,¹⁹ on the Commission's own motion,²⁰ or at the request of the government involved.²¹

In most cases, the Commission undertakes such studies whenever it receives reliable evidence of widespread human rights violations within a country. To date the Commission has put forth country reports on nearly half of the OAS member states.²² These include both states that have ratified the Convention and those that have not.

16. American Convention, *supra* note 1, art. 41.

17. Commission Statute, *supra* note 2, art. 1(2).

18. *Id.* art. 18(c), (g).

19. INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN BOLIVIA 1, 1, OEA/ser. L./V/II.53, doc. 6 rev. 2 (1981). In the case of Bolivia, the Permanent Council of the OAS and the General Assembly requested that the Commission undertake the study after a 1980 military coup. *Id.*

20. INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN GUATEMALA, 7, OEA/ser. L./V/II.53, doc. 21 rev. 2 (1981). The Guatemala report was issued on the initiative of the Commission because of continued generalized violence within the country. *Id.*

21. INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN PANAMA 1, OEA/ser. L./V/II.44, doc. 38 rev. 1 (1978). General Omar Torrijos, the former Panamanian head of State, requested the 1977 on-site observation and report on Panama. *Id.* See INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN EL SALVADOR 11, OEA/ser. L./V/II.46, doc. 23 rev. 1 (1978) (inviting the Commission to visit through a request of the government); INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN HAITI 2-3, OEA/ser. L./V/II.46, doc. 66 rev. 1 (1979) (same); INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN NICARAGUA 11, OEA/ser. L./V/II.53, doc. 25 (1981) (same).

22. See HANDBOOK, *supra* note 1, at 192-94 (listing the published country reports through 1984: Cuba (1962, 1963, 1967, 1970, 1977, 1979, 1983), Dominican Republic (1965, 1966), Haiti (1969, 1979), Honduras (1970), Chile (1974, 1976, 1977, 1985), Paraguay (1978), Uruguay (1978), Panama (1978), Nicaragua (1978, 1981, 1984 [Miskito Population]), El Salvador (1978), Argentina (1980), Colombia (1981), Guatemala (1981, 1983, 1985), Bolivia (1981), Suriname (1983, 1985)).

Most of the significant successes of the Commission stem from the publication of country reports based upon on-site observations. In the course of making its reports, the Commission has discovered torture chambers²³ and disappeared persons.²⁴ The Commission has also succeeded in obtaining the repeal of objectionable laws through its reports.²⁵ In one instance, the strength of the Commission report resulted in a resolution of the OAS calling for the overthrow of the country's government.²⁶ As characterized by the Commission, this resolution, for the first time in OAS history, deprived an incumbent government of a member state of legitimacy based on that government's human rights violations committed against its own population.²⁷

In contrast to country studies, no cases concerning private individuals have led to any OAS action. Unlike others, this human rights system guarantees the right of petition as against all states members of the OAS, while inter-state complaints remain merely optional for states parties to the Convention.²⁸ The provisions governing private access to the Inter-American system afford greater possibility for filing petitions than in any other international human rights system²⁹ and give the Commission great flexibility in implementing its procedures. Thus, the description of the individual petition machinery as a complete failure is ironic given the accessibility of the Commission to private individuals.³⁰

Individual cases can become lost in a system better designed to deal

23. INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN EL SALVADOR 97, OEA/ser. L./V/II.46, doc. 23 rev. 1 (1978).

24. T. BUERGENTHAL, R. NORRIS, AND D. SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS 171-81 (2d ed. 1986) [hereinafter PROTECTING HUMAN RIGHTS].

25. INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN PANAMA 50-51, OEA/ser. L./V/II.44, doc. 38 rev. 1 (1978). In Panama, government decree No. 342, affecting the right of fair trial, was repealed during the visit of the Commission. *Id.*

26. 17th Mtg. of Consultation of Ministers of Foreign Affairs (Washington, D.C.), OEA ser. F/II.17, doc. 40, rev. 2 (1979). The 1979 resolution on Nicaragua found that the inhumane conduct of the dictatorial regime governing the country, as evidenced by the report of the Inter-American Commission on Human Rights, was the fundamental cause of the dramatic situation facing the Nicaraguan people. *Id.* The resolution declared that the solution to problems of Nicaragua should be based upon immediate and definitive replacement of the Somoza regime. *Id.*

27. INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN NICARAGUA, 2, OEA/ser. L./V/II.53, doc. 25 (1981) at 2.

28. American Convention, *supra* note 1, arts. 44-45; Commission Statute, *supra* note 2, art. 20.

29. Commission Regulations, *supra* note 2, art. 26. Unlike the European system, access is not restricted to victims of violations. *Id.*

30. Buergenthal, *Implementation in the Inter-American Human Rights System*, in INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS 75 (R. Berhardt & J. Jolowicz, eds. 1987).

with wide-spread violations.³¹ The Commission has applied its procedural rules inconsistently on individual cases, and its legal analysis is not always convincing.³² These factors may affect the willingness of states to cooperate in the petition procedures. Moreover, far less serious consequences result from the decision in an individual case than from a country study because the OAS General Assembly has never acted on Commission findings in an individual case.

Governments usually fail to respond to Commission requests for information in individual cases, resulting in a presumption of the truth of the allegations. In only two of the first twenty-four individual cases considered after the Convention came into force did the government in question respond fully to the Commission's inquiries.³³ The allegations included torture, kidnappings, involuntary disappearances, arbitrary arrests, and murder. With even minimal cooperation lacking and no political will in the OAS General Assembly to pressure governments, individual remedies failed to materialize. The Commission subsequently prepared country studies on the countries involved.

Unlike the Commission, the Court derives its powers from the Convention rather than from the OAS Charter. The Court only has jurisdiction over contentious cases involving states parties to the Convention.³⁴ The Court's advisory jurisdiction, however, extends to all OAS member states and all OAS organs.³⁵ The jurisdiction of the Court applies to the interpretation of the Convention and other treaties concerning the protection of human rights in the American States, as well as to the compatibility of any domestic law in a member state with international human rights agreements.³⁶

Most of the work of the Court to date has been advisory.³⁷ Both the

31. *Id.*

32. See Shelton, *Abortion and the Right to Life in the Inter-American System: The Case of Baby Boy*, 2 HUM. RTS. L.J. 309, 309-10 (1981) [hereinafter *Baby Boy*] (noting that the Commission reached conclusions in the *Baby Boy* case with questionable reasoning, faulty analysis, and with little attention to canons of construction of international documents); Case 9647, INTER-AM. C.H.R. 147, 164-183, OEA/ser. L./V/II.69, doc. 17 rev. 3 (1987) (citing the opinion of the Commission and the dissent of Dr. Marco Gerardo Monroy Cabra); see also *infra* notes 58-62 (discussing the reasoning of the Commission in case 9647).

33. INTER-AM. C.H.R., ANNUAL REPORT 1970, OEA/ser. L./V/II.25, doc. 9. The cases concerned three countries: Bolivia (9 cases), Guatemala (13 cases), and Jamaica (2 cases). *Id.* Only Jamaica responded fully. *Id.* See IACHR ANNUAL REPORT, *supra* note 3, at 37-127 (citing more recent examples of governments that failed to cooperate with Commission inquiries).

34. American Convention, *supra* note 1, art. 61.

35. *Id.* art. 64.

36. *Id.*

37. See, e.g., *Judicial Guarantees in States of Emergency* (American Convention

Commission and state governments have seemed unwilling in the past to utilize the Court as a means to decide individual human rights cases. Recently, however, the Commission has referred some matters to the Court for decision.³⁸

II. EVALUATION

An effective international system requires certain elements to remedy and to prevent recurrences of human rights violations. These elements include responding quickly to communications, obtaining credible evi-

on Human Rights arts. 8, 25, 27(2)) (Inter-Am. Ct. H.R.) (Advisory Opinion No. OC-9/87 of Oct. 6), ser. A: Judgments and Opinions No. 9 (1987) (finding that essential judicial guarantees include judicial procedures inherent in the representative democracy as a form of government); Habeas Corpus in Emergency Situations (American Convention on Human Rights arts. 27(2), 25(1), 7(6)) (Inter-Am. Ct. H.R.) (Advisory Opinion No. OC-8/87 of Jan. 30), ser. A: Judgments and Opinions No. 8 (1987) (stating that the writs of habeas corpus and of "amparo" are among the judicial remedies which may not be suspended under article 27(2)); Enforceability of the Right to Reply or Correction (American Convention on Human Rights arts. 14(1), 1(1), 2) (Inter-Am. Ct. H.R.) (Advisory Opinion No. OC-7/86 of Aug. 29), ser. A: Judgments and Opinions No. 7 (1986) (clarifying the obligations of states parties to ensure enjoyment of the right to reply or correction to anyone subject to their jurisdiction); The Word "Laws" in Article 30 of the American Convention on Human Rights (Inter-Am. Ct. H.R.) (Advisory Opinion No. OC-6/86 of May 9), ser. A: Judgments and Opinions No. 6 (1986) (interpreting the word "laws" as a general legal norm tied to the general welfare passed by legislative bodies of democratic governments); Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (American Convention on Human Rights, arts. 13, 29) (Inter-Am. Ct. H.R.) (Advisory Opinion No. OC-5/85 of Nov. 13), ser. A: Judgments and Opinions No. 5 (1985) (voting unanimously that compulsory licensing of journalists as incompatible with article 13 of the Convention); Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (Inter-Am. Ct. H.R.) (Advisory Opinion No. OC-4/84 of Jan. 19), ser. A: Judgments and Opinions, No. 4 (1984) (finding a proposed amendment to the constitution of Costa Rica in part permissible and in part contrary to the American Convention); Restrictions to the Death Penalty (American Convention on Human Rights arts. 4(2), 4(4)) (Inter-Am. Ct. H.R.) (Advisory Opinion No. OC-3/83 of Sept. 8), ser. A: Judgments and Opinions, No. 3 (1983) (stating that the Convention restricts the death penalty and does not allow states parties to extend application of the death penalty to post-ratification legislation unless they reserve the right to do so); The Effect of Reservations on the Entry into Force of the American Convention (arts. 74, 75) (Inter-Am. Ct. H.R.) (Advisory Opinion No. OC-2/82 of Sept. 24), ser. A: Judgments and Opinions, No. 2 (1982), *reprinted in* 22 I.L.M. 37 (1983) (stating when the Convention enters into force for states that ratified or adhered to it with reservation); Other Treaties Subject to the Consultative Jurisdiction of the Court, (American Convention art. 64) (Inter-Am. Ct. H.R.) (Advisory Opinion No. OC-1/82 of Sept. 24), ser. A: Judgments and Opinions, No. 1 (1982), *reprinted in* 22 I.L.M. 51 (1983) (clarifying the position of the Court in interpreting article 64 when issuing an advisory opinion on a particular topic).

38. See IACHR ANNUAL REPORT, *supra* note 3, at 40-51 (referring the Commission resolutions of petitions filed regarding human rights violations in Honduras to the Inter-American Court of Human Rights for a determination whether Honduras violated rights guaranteed in the American Convention).

dence, issuing well-reasoned, authoritative legal opinions on the findings, and widely publicizing the results. A need for improvement in the Inter-American system can be cited for all these above.

A. SPEED OF RESPONSE

Both the Inter-American Commission and the Inter-American Court are able to take immediate measures and sometimes do so with speed unparalleled in other human rights institutions. In the case of Chile, for example, the Executive Secretary of the Inter-American Commission arrived in Santiago within three and a half weeks after the coup d'état in 1973.³⁹ In contrast, the United Nations' on-site visit occurred five years later.⁴⁰ Similarly, in the 1965 Dominican Republic crisis, the Commission received a cable from the new government of the Dominican Republic on May 25, 1965, requesting an on-site visit.⁴¹ After consultations, the Commission responded by sending a representative on June 1, 1965.⁴²

This type of quick action is important when responding to crises that threaten human rights. The ability of the system to respond quickly is one of its strengths and should be applied wherever possible. Unfortunately, the record for responses to individual cases is less positive than that for country studies. In some relatively recent cases, the Commission has taken up to five years to conclude its review of an individual petition.⁴³

Speed is particularly important where serious and permanent injury may occur. For example, in a death penalty case, United States officials refused requests from the Commission to stay the executions of two juvenile offenders pending decisions on their petitions.⁴⁴ The Commis-

39. See Shelton, *Utilization of Fact-Finding Missions to Promote and Protect Human Rights: The Chile Case*, 2 HUM. RTS. L.J. 1, 25, (1981) (stating that reports of reduced killings and torture occurred after the initial visit of the Executive Secretary of the Commission).

40. See *id.* at 12 (stating that on September 26, 1973, the Inter-American Commission requested, and ten days later received, permission to send its Secretary to Chile); see also U.N. GAOR, *Protection of Human Rights in Chile: Report of the Economic and Social Council*, Annex VII, U.N. Doc. A/33/331 (1978) (incorporating the text of the agreement permitting the visit into the on-site visit report).

41. INTER-AM. C.H.R., *Report on the Activities of the Inter-American Charter of Human Rights in the Dominican Republic*, OEA/ser. L./V/II.13, doc. 14 rev. 2 (1965).

42. *Id.*

43. Case 7920, INTER-AM. C.H.R. 40, OEA/ser. L./V/II.68, doc. 8 rev. 1 (1986). In this case the Commission received the petition on October 7, 1981 and adopted the resolution on April 18, 1986. *Id.*

44. Case 9647, INTER-AM. C.H.R. 147, 150, OEA/ser. L./V/II.69, doc. 17 rev. 3 (1987).

sion subsequently concluded, five votes to one, that in carrying out the executions the United States government violated article I (right to life) and article II (equality of treatment and equality before the law) of the American Declaration of the Rights and Duties of Man (American Declaration).⁴⁵

B. FACT-FINDING

Of the necessary requirements for an effective international human rights system, the Commission performs fact-finding best. The Commission's country reports have no parallel in other human rights institutions, and, as noted above, the results have been dramatic in some cases. Amendments to the rules of procedure have cured some of the early problems, such as apparent conflicts of interest of study team members.⁴⁶ The Regulations also guarantee access to persons and documentation important for fact-finding.⁴⁷ Implementing standards for the collection of evidence might strengthen the procedure; enhancing the credibility of findings is important to promote the appearance of fairness in the proceedings.⁴⁸

Moreover, in the areas of speed of response and fact-finding, the Commission could contribute further to improving human rights in the hemisphere if it adopted a "medical" model for promoting human rights that would look to prevent human rights violations rather than to attempt to cure already disastrous situations. Monetary compensation is far inferior to the prevention of torture and disappearances. Thus, the Commission should adopt as a major function the use of advisory services, a trend that is growing in the United Nations.⁴⁹ With the return to democracy in many countries in the hemisphere, the time is ideal for participation in restoring and protecting human rights through military and police training programs, educational programs on human rights obligations for public servants and political leaders, and the

45. *Id.* at 150-51.

46. See Commission Regulations, *supra* note 2, art. 56 (stating that a Commission member who is a national of or who resides in the State in which the on-site observation is to be carried out shall be disqualified from participating in the on-site observation).

47. *Id.* art. 59.

48. See International Law Association "Draft Minimal Rules of Procedure for International Human Rights Fact-Finding Missions," Belgrade Conference (1980), reprinted in *PROTECTING HUMAN RIGHTS*, *supra* note 24, at 163-64 (outlining possible procedures for gathering evidence).

49. See American Convention, *supra* note 1, art. 41 (providing in the enumeration of functions and powers of the Commission, particularly paragraphs (b) and (e), that the Commission can provide advisory services).

availability of expert legal consultants on drafting and implementing laws for the protection of human rights. In addition, where the threat of violations exist, as in Haiti, a permanent or long-term visible presence may be necessary to avoid irreparable harm.

C. LEGAL ANALYSIS

The dual role of the Commission as fact-finder and decision-maker undercuts the authority of its legal analysis even when well done, which is not always the case. Some Commission decisions are poorly reasoned and confusing insofar as they fail to apply controlling procedural rules and ignore accepted international canons of interpretation.⁵⁰ The recent opinion concerning execution of juvenile offenders in the United States is one example of problematic analysis.⁵¹ Read broadly, the Commission's opinion can be interpreted as stating that the United States federal system of criminal justice violates international human rights law. Read more narrowly, the opinion prohibits varying punishment when that punishment touches upon a fundamental right such as the right to life.

In its analysis, the Commission reaffirms the binding juridical character of the American Declaration.⁵² The Commission fails, however, to articulate rules of interpretation for the Declaration. The dissent states that the Commission mistakenly relied on the Vienna Convention on the Law of Treaties⁵³ since the Declaration is not a public treaty.⁵⁴ The dissent analyzes the Declaration on the basis of the *travaux préparatoires*.⁵⁵ If the Declaration has binding force as a statement of

50. See *Baby Boy*, *supra* note 32, at 310 (concluding that the Commission employed faulty analysis and gave minimal attention to accepted interpretations of international documents in deciding a case).

51. Case 9647, INTER-AM. C.H.R. 147, 164-73, OEA/ser. L./V/II.69, doc. 17 rev. 3 (1987).

52. *Id.* para. 48. The Commission first held the Declaration binding on member states of the OAS in case 2141. Case 2141, INTER-AM. C.H.R. 25, 38-39, OEA/ser. L./V/II.52, doc. 48 rev. 52 (1981).

53. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF 39/27 *reprinted in* 8 I.L.M. 679 (1969) (entered into force on Jan. 27, 1980) [hereinafter Vienna Convention].

54. Case 9647, INTER-AM. C.H.R. 150, 173-83, OEA/ser. L./V/II.69, doc. 17 rev. 3 (1987) (dissenting opinion of Dr. Marco Gerardo Monroy Cabra) (stating that the treaty is not enforceable because necessary steps were not followed for its adoption, authentication, and manifestation).

55. *Id.* The vote and filing of the dissent raises an ambiguous procedural question not addressed in the Regulations. *Id.* As noted in the Commission's opinion, the Commission executed and adopted its final decision on March 27, 1987, and the dissenting member, Dr. Marco Gerardo Monroy Cabra, was not present at the meeting for the discussion and vote. *Id.* para. 20. A note at the conclusion of the opinion states that Dr. Marco Gerardo Monroy Cabra reserved the right to present an explanation of his vote

international human rights norms, then it seems entirely appropriate that the customary rules of interpretation of treaties codified in the Vienna Convention should apply to it.⁵⁶ Finding the Declaration silent on the issue of capital punishment, the Commission sought to interpret its provisions by determination and application of rules of customary international law. This approach is consistent with the interpretive rules of the Vienna Convention.⁵⁷

The Commission found no norm of customary international law prohibiting execution of those under the age of eighteen, although it did find such a norm to be emerging.⁵⁸ It then unnecessarily decided that even were such a norm proven it would not bind the United States because it had protested the norm through proposed reservations to article 4 of the American Convention.⁵⁹ This did not end the matter, however, because the Commission found that a customary norm that has acquired the status of *jus cogens* will bind a state even without its consent. Without discussing the validity, authority, or content of the concept of *jus cogens*, the Commission concluded that a recognized norm of *jus cogens* exists in the member states of the OAS that prohibits the execution of children.⁶⁰ This finding was not dispositive, because the Commission found no agreement on the age to which the norm applies.⁶¹ Ultimately, the Commission based its decision that the United States violated the American Declaration on differing state practices in applying the death penalty.⁶²

The Commission's decision contains several problems in addition to its holding questioning the legality of a federal criminal justice system. For the Commission to find an emerging but not yet existing customary

in this case. *Id.* para. 65. Meanwhile, the Commission Regulations imply that members will be present during discussions and votes on decisions. Commission Regulations, *supra* note 2, arts. 19-21.

56. See Vienna Convention, *supra* note 52, art. 31(1) (providing that a treaty must be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of the treaty's object and purpose). Article 32 of the Convention permits recourse to the *travaux préparatoires* of an agreement only to confirm the meaning revealed by application of article 31 or to determine the meaning of the text if application of article 31 leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result. *Id.* art. 32.

57. See *id.* art. 31(3)(c) (requiring that relevant rules of international law applicable to the parties be considered in interpreting international documents).

58. Case 9647, INTER-AM. C.H.R. 147, 172, para 60, OEA/ser. L./V/II.69, doc. 17 rev. 3 (1987).

59. *Id.* paras. 53-54.

60. *Id.* paras. 54-56.

61. *Id.* para. 57.

62. *Id.* para. 62 (mentioning that if a child commits murder in one state, the child may be subject to the death penalty, whereas if the same individual commits the same offense in another state, the child is not subject to the death penalty).

norm prohibiting the execution of juvenile offenders while at the same time finding a recognized norm of *jus cogens* prohibiting the execution of children is confusing and somewhat contradictory. The lack of cited authority or support for its findings exacerbates the confusion. In addition, the Commission's discussion of United States objections to a customary norm misstates international law and overlooks relevant evidence on this point. For a customary international norm to not bind a state, that state must persistently object, not merely occasionally protest.⁶³ The Commission noted United States proposed reservations to the American Convention but ignored United States ratification of the Fourth Geneva Convention⁶⁴ and its signature without reservation of other human rights treaties barring execution of those under the age of eighteen.⁶⁵

The problems with this opinion suggest that the Commission, in its requests for advisory opinions, should refer difficult interpretive legal questions to the Court. The Court's strength lies in its legal ability as a juridical body. It has the ability to shape the interpretation and application of the Convention, Declaration, and other human rights instruments through its opinions and decisions. Advisory opinions in particular are well-suited to the enunciation of general legal principles which may contribute to the development of human rights law in the Western Hemisphere.

D. PUBLICITY

In the long-term, the hiring of a good press officer would vastly improve the Inter-American system. The mobilization of public opinion remains the major avenue for improving the behavior of states in the human rights field. A disturbing amount of ignorance about the Inter-American system persists in the United States, even in cases to which the United States is a party. Several possibilities exist to remedy this lack of information.

First, there should be a consistent Commission policy of publishing all decisions in individual cases as well as all country studies. An an-

63. See *Fisheries Case*, (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Judgment of Dec. 18) (finding a rule of international law inapplicable to Norway because of the persistent objections of Norway to the rule).

64. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 3560 T.I.A.S. No. 3365, at 3408, 75 U.N.T.S. 287, 330.

65. See, e.g. International Covenant on Civil and Political Rights, art. 6(5), *opened for signature*, Dec. 16, 1966 G.A. Res. 220A, 21 U.N. GAOR Supp. (no. 16) at 53, U.N. Doc. A/6316, 993 U.N.T.S. 3 (1966), *reprinted in* 6 I.L.M. 360 (1967) (prohibiting execution of pregnant women and any person under the age of eighteen).

nual statistical analysis, like those in the annual reports of the Human Rights Committee to the United Nations General Assembly, would assist in evaluating the system. An annual report would state how many petitions were received, how many were handled without opening a file, how many were forwarded to governments for their response, how many were decided on the merits, and how many resulted in remedies for the individuals involved.

The current publications policy of the Commission remains unclear. Under the Convention, if a case is not referred to the Court or settled, the Commission may, by majority vote, issue an opinion and conclusions concerning the issue.⁶⁶ If the Commission adopts a report, the report must include recommendations and a prescribed period within which the state must take remedial measures.⁶⁷ After the expiration of the specified time period, another Commission vote decides whether the state has taken adequate measures and whether to publish the report.⁶⁸

For non-states parties to the Convention, the Regulations provide that the Commission may publish the final decision on a petition after issuing it to the state with any recommendations and a deadline for their implementation,⁶⁹ if the state does not adopt the recommendations of the Commission within the deadline referred to.⁷⁰ The policy seems to indicate that the Commission should publish only failures to respond to or adopt Commission recommendations; if so, the Commission has not followed this policy.⁷¹ Commission policy requires clarification, if necessary by an amendment to the Regulations specifying a general policy in favor of publication. As the policy is currently implemented, no one reading the Regulations and reports of the Commission can be certain what the Commission will publish and what it will not.

Once there is a general publication policy, there should be an order form for publications included at the back of every publication the Commission and the Court issue. In addition, there should be an annual listing of all documents, reports, and decisions the Commission and the Court issue.

Moreover, use of the findings of the Commission and the Court in individual cases and country studies should be improved. Evidence

66. American Convention, *supra*, note 1, art. 51.

67. *Id.*

68. *Id.*

69. Commission Regulations, *supra* note 2, art. 53.

70. *Id.*

71. See, e.g., Case 2141, INTER-AM. C.H.R. 25, 43, OEA/ser. L./V/II.54, doc. 9 rev. (1981) (illustrating a case, popularly called the Baby Boy Case, where the Commission found the United States not in violation of human rights, but published the decision in its 1979-80 Annual Report).

could be presented in domestic cases where the human rights situation in a particular country is in question, as in the *Haitian Refugee Case*⁷² or *Filartiga*.⁷³ Amicus briefs also could be filed or expert testimony could be given in court cases where the issue involves a human rights matter. Finally, presentations could be made to Congress during hearings on foreign assistance and human rights.⁷⁴

E. OTHER PROPOSALS

Other possible improvements exist for human rights procedures in the Inter-American system. First, the system would benefit from regular self-analysis. Every four to five years the Commission should hold a general meeting to evaluate its laws and procedures, to examine how the institutions function, and to discuss how the members might improve the system. This would ensure regular consideration of the effectiveness of the system.

In addition, the Commission should consider appointing counsel to those victims of human rights violations who need legal assistance but cannot afford it. The members could perhaps establish a fund for victims that would provide legal aid. As an alternative or supplement, the Commission should recognize the successful petitioner's right to request costs of proceedings from the state.

To support human rights teaching institutions the Commission could provide grants and scholarships. This would facilitate further training of professionals, including teachers. This would also facilitate the dissemination of human rights texts and materials.

Finally, if the Commission would promote hemispheric unity, it would enhance the potential of the system. The membership of Canada in the OAS, with its laudable record in human rights, would be a great asset to the system. Members should use all institutional efforts to encourage Canada to join the OAS or at least to ratify the American Convention.

CONCLUSION

The Inter-American system constitutes an ambitious compilation of laws and procedures for the promotion and protection of human rights.

72. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980).

73. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

74. See Foreign Assistance Act of 1961, § 502B, 22 U.S.C. § 2304 (1983) (describing the policy of the United States as incorporated in this act, as one that does not give security assistance to governments that engage in gross violations of internationally recognized human rights).

Like all other human rights systems, it is of recent origin and development. Because of its youth, the system has yet to live up to its potential as an effective recourse for victims of human rights violations. Emphasizing the strengths of each institution in the system will assist this process. In addition, devoting more time and attention to promotional activities may prevent the creation of new victims. The Inter-American system has succeeded in halting many human rights violations; its work, however, has just begun.