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# Aportes DPLF

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An illustration of a person in a green suit and red pants, seen from behind, using a large blue wrench to turn a globe. The globe is mounted on a circular metal frame with several bolts. The background is a textured blue and purple wash. The person's hands are on the wrench, which is positioned over the globe. The globe shows continents in brown and blue oceans. The person is standing on a green and yellow textured surface.

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

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The Inter-American Commission on Human Rights (IACHR) is a cornerstone of the human rights advocacy and protection system we have in the region. Over the past two years, the Commission has undergone a process—officially called “strengthening,” but which at times seemed to be “challenging”—that ultimately achieved a semblance of reform. All indications are that the changes adopted as a result of this process will improve the Commission’s performance and its ability to meet the current needs of the region. In spite of all the back-and-forth debate that took place, everyone involved in the discussions underscored the importance of the work carried out by the Commission. Nearly all of the voices demanded that it do more and better work in its area of responsibility, although the arguments of the different actors—governments and civil society—were sometimes diametrically opposed. Undoubtedly, many lessons can be drawn from the broad, sustained discussion.

This edition of *AportesDPLF* examines this process as it has unfolded over the past two years. To begin this review, we have the contributions of three authors who have served as senior officials within their institutions. J. Jesús Orozco, who was President of the IACHR during the two years in question, is the first to speak, followed by Hugo de Zela, chief of staff of the OAS Secretary General,

and Emilio Rabasa, Permanent Representative of Mexico to the OAS. In their writings, they describe the process from the perspective of those who have been, and continue to be, directly exposed to the discussions concerning the improvement of the IACHR.<sup>1</sup>

Next, we present six viewpoints that highlight the most critical aspects of the process and of the political context surrounding the IACHR. Douglass Cassel’s thorough account focuses on significant events and results of the process to date and looks toward the future. David Lovatón addresses the attempt to keep the IACHR reform process open and the possible significance of this effort. Ernesto de la Jara takes stock of the new realities facing the inter-American system, which he sees as an impetus for reforms that will result in a different and better Commission. Camilo Sánchez offers a realistic yet somewhat skeptical perspective on the process, its outcomes, and likely developments going forward. Viviana Krsticevic and Alejandra Vicente make a number of proposals and anticipate that the Commission, as a result of the recent process, will improve the quality of its work. This section begins with my own contribution, which narrates the most important moments of the process and gives a behind-the-scenes glimpse of the discussions and competing agendas.

With regard to precautionary measures—one of the recurring themes in the debates during the strengthening process—Diego Rodríguez-Pinzón offers a technical analysis that provides a greater understanding of both the challenges raised and the reforms introduced.

The analysis pays special attention to two key country actors. Jamil Dakwar addresses the crucial role of the United States in the system, critically examining its legitimacy and credibility with respect to human rights. Juana Kweitel and Raísa Cetra reflect on the “many faces of Brazil” that appeared at different times during the two-year process.

In the final section of the journal, authors delve more deeply into certain crucial aspects of the past and future of the inter-American human rights system. Judge Diego García-Sayán of the Inter-American Court of Human Rights, who served as its President until December 2013, takes stock of the Court’s work, highlighting its most salient achievements. Gabriela Kletzel suggests looking at the Commission and the system pertaining to the OAS in the context of a new regional institutional framework for human rights, in which new organizations and initiatives are bringing countries together with both economic and political objectives. Daniel Cerqueira considers the Conferences of States Parties to the American Convention on Human Rights and their role as an alternative arena for debate, albeit one that has raised some troubling issues.

The journal concludes with an interview with Paulo Vannuchi, a new IACHR Commissioner, who responds clearly to questions about the challenges facing the Commission. He speaks to some of the lines of work that civil society would like to see undertaken in the near future by a Commission that, given greater resources, performs its work more expeditiously and efficiently. This should be the outcome of the efforts of the past two years, which despite difficult moments and some unpleasantness, can ultimately move us closer to the full realization of human rights in the region.

**Katya Salazar**

Executive Director

Due Process of Law Foundation

<sup>1</sup> Given the role that Ecuador played during the reform process, we would have liked to include its input in this edition of the magazine. Unfortunately, and in spite of our repeated requests, the response of the Ecuadoran mission to the OAS was that it had not received the necessary authorization from Quito.

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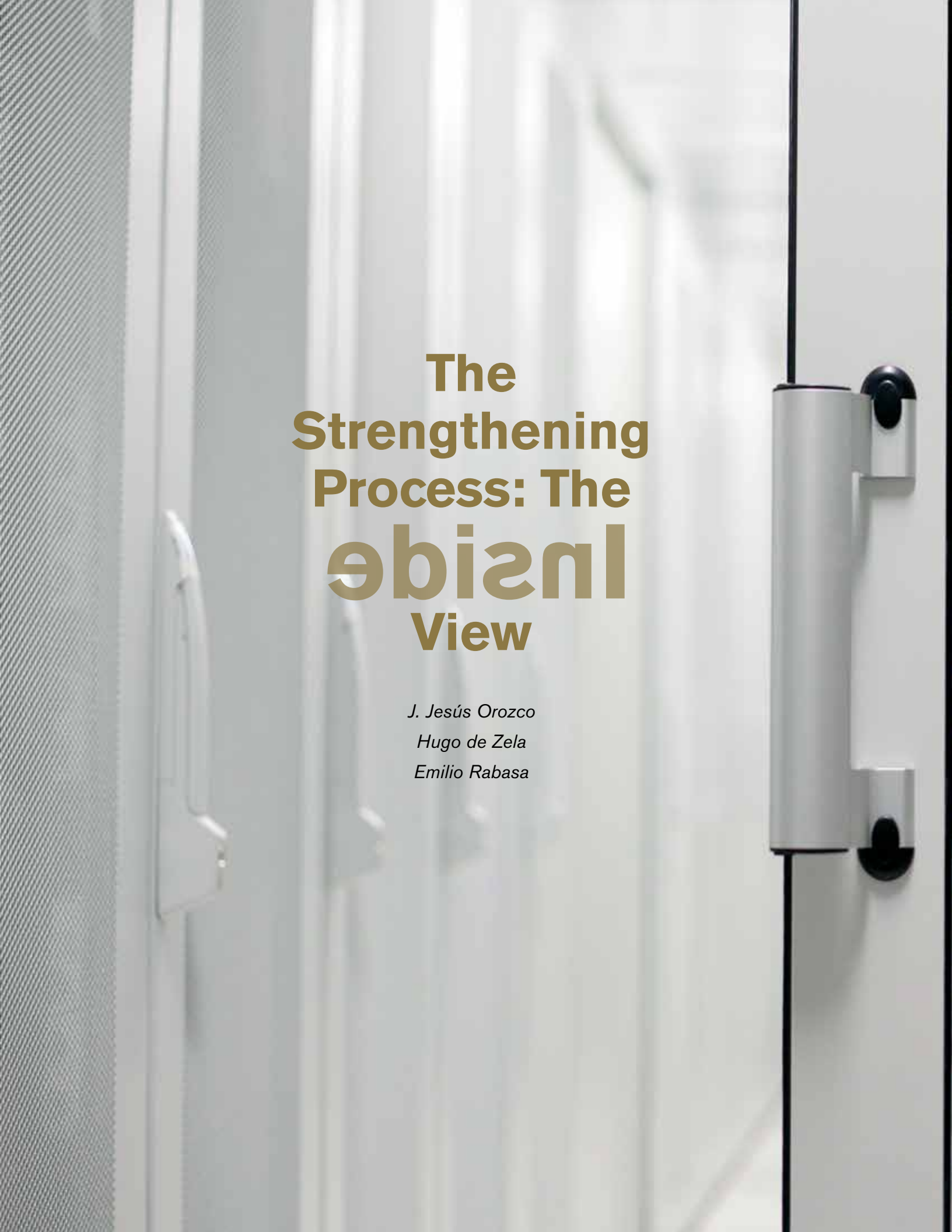
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# The Strengthening Process: The ebianl View

*J. Jesús Orozco*

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## J. Jesús Orozco

Commissioner and former president of the Inter-American Commission on Human Rights and head researcher at the Instituto de Investigaciones Jurídicas (Legal Research Institute) of the National Autonomous University of Mexico (UNAM).



On August 1, 2013, the amendments to the Rules of Procedure of the Inter-American Commission on Human Rights (IACHR), as well as to its policies and practices, entered into force pursuant to Resolution 1/2013 of March 18, 2013. The Commission itself thus moved its strengthening process

forward after a period of broad and participatory consultation with the users of the inter-American human rights system, preserving, in the process, its powers.

On June 29, 2011, the Permanent Council of the Organization of American States (OAS) created 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. Some months later, on January 25, 2012, the Permanent Council adopted the Special Working Group's report. The document contained 53 recommendations addressed to the Commission, as well as others addressed to the Member States and to the General Secretariat of the OAS.

A significant number of civil society organizations weighed in to express their opinions on the recommendations. For example, on January 27, 2012, more than 90 human rights organizations signed a statement expressing their views on the recommendations and suggesting the need to open up a dialogue on the subject. In addition, on March 28, 2012, in a public hearing held by the IACHR, the International Coalition of Human Rights Organizations in the Americas presented its views regarding some of the recommendations made.

At its March–April 2012 session, the Commission decided to initiate a broad process of consultation with the system's users, including victims, States, human rights defense organizations, academics, experts, and other sectors of civil society. After holding a preliminary seminar in May in Washington, we Commissioners traveled throughout the Americas soliciting comments, ideas, and constructive criticism for strengthening the system. In our travels we held different forums that traced the history of the inter-American human rights system, beginning in Bogotá, cradle of the American Declaration of the Rights and Duties of Man. In Santiago, Chile, the creation of the Inter-American Commission was recalled, and in San

José, Costa Rica, the adoption of the American Convention on Human Rights was commemorated. The meeting held in Mexico brought together the core areas responsible for shaping the agenda of the inter-American system in 21 States, together with dozens of civil society organizations, for a frank and substantive dialogue. In Port of Spain the emphasis was on the importance of redoubling efforts to bolster the relevance and impact of the system in the Caribbean.

A look at the numbers gives us an idea of the impressive scope and complexity of the strengthening process. Starting in 2011, it included:

- 51 government position papers expressing the points of view of all the Member States;
- 98 position papers expressing the points of view of more than a thousand organizations, individuals, academic organizations, and other nongovernmental entities;
- A hemispheric seminar;
- Five regional forums (Bogotá, Santiago, San José, Mexico, and Port of Spain), in which more than 150 speakers from civil society and representatives from 32 States took part;
- Three public hemispheric hearings of the Commission, in which the OAS Member States and more than 70 civil society organizations participated;
- Opinions from both the Inter-American Juridical Committee and the Inter-American Institute of Human Rights;
- 29 meetings of the Special Working Group of the Permanent Council;
- 15 regular and special sessions of the Permanent Council;
- 37 sessions of deliberation by the Commission, including an extraordinary meeting in San José;
- A meeting to exchange opinions with the Inter-American Court of Human Rights;
- Two public hemispheric consultations, and
- An Extraordinary General Assembly of the OAS, which produced the Declaration of March 22, 2013.

The investment in this process made by the permanent representatives to the OAS, as well as by broad sectors of civil society, was extraordinary. Thanks to the professionalism and seriousness of these contributions, the Commission had valuable inputs with which to develop its work.

## The reform program

The content of the reform program adhered to three main principles. The first was the principle of comprehensiveness: the reform program included the consideration of each and every one of the hundreds of recommendations and observations presented to the Commission by victims, civil society, and States.

The second principle was the preservation of the core purpose of the Commission. All the recommendations were examined and scrutinized according to a single criterion whereby the Commission considered, carefully and in detail, what would be the likely result of their implementation. When this objective, technical, and independent analysis led the Commission to conclude that the recommended measure would strengthen the promotion and protection of human rights, the Commission included the measure in its reform process and planned for its full implementation.

Finally, this process has been guided by the principle of transparency. The Commission has made all relevant information available to all of the parties in a timely manner, including through its website, where the documents are accessible to any interested person.

The reform program comprises three instruments: a draft reform of the Commission's Rules of Procedure, a plan for possible reforms to the Strategic Plan of the Commission, and a program of changes in practices. Through these instruments, the Commission intends to carry out its reform program in a technically appropriate manner.

The purpose of the reform is to improve the mechanisms available to the Commission as it fulfills its mandate of promoting and defending human rights in the Americas. This reform encompasses different aspects related to (a) precautionary measures and requests for provisional measures from the Inter-American Court; (b) the petition and case system; (c) monitoring the human rights situation in the region; (d) promotion; and (e) universality.

## Precautionary measures

The reforms are designed to increase the public exposure and dissemination of the criteria for the granting, extension, modification, and lifting of precautionary measures. These must be issued through reasoned decisions that include a record of the votes of the Commission's members, and this information must be available on its website. In addition, the Commission will periodically evaluate precautionary measures currently in effect, on its own initiative or at the request of a party, for the purpose of maintaining, modifying, or lifting them, as well as to individually identify the beneficiaries. Before the reforms

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took effect, the IACHR's Protection Group conducted an exhaustive review of all the active precautionary measures. In order for this type of review to be performed with greater frequency, the Protection Group must be provided with the necessary resources.

The amended Rules of Procedure detail the parameters used by the IACHR in determining the requirements of seriousness, urgency, and irreparability for the granting of precautionary measures, as well as the circumstances under which provisional measures are requested of the Inter-American Court. The essential purpose of the reform is to promote legal certainty and predictability, as well as to make the Commission's reasoning in such matters transparent. Our task will be to ensure that such certainty is consistent with the purpose of the protection procedure, that is, to be an effective mechanism for preventing irreparable harm to individuals.

## Petition system

With respect to the petition and case system, the reforms seek to provide greater predictability and efficiency in decisions on the following: prioritization in the initial study and admissibility of petitions; criteria for archiving petitions and cases; granting extensions for compliance with the recommendations issued in final merits reports; extension of deadlines for the parties to submit observations; and consolidation of the admissibility and merits phases.

## Annual Report of the Commission

As for the monitoring of country situations, promotion, and universality, the reforms to the Rules of Procedure seek to improve the content of every chapter of the Commission's Annual Report. Starting in 2013, the report will list the ratification status of the inter-American human rights instruments and will report on the activities conducted by each rapporteurship and thematic unit.

The report will additionally include an evaluation of the human rights situation in the hemisphere and the main advances, trends, problems, and challenges to the attainment of

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the full enjoyment of civil, political, economic, social, and cultural rights in the Americas. The amended Rules of Procedure contain a detailed explanation of the procedure and sources to be used in drafting Chapter IV of the Annual Report, which addresses the development of human rights in the region. The main objective of this reform is to improve transparency by providing information that is more useful and accessible, in order to ensure that there is a practical mechanism for prevention, alerts, follow-up, and advising the States, in the interest of the human rights of their inhabitants.

## Rules of Procedure and strategic plan

Various practices already in use—for example, with respect to precautionary measures or the prioritization criteria for handling petitions and cases—have been included in the Commission's Rules of Procedure. This will contribute to legal certainty, transparency, and the predictability of the Commission's actions, as well as to accountability, and will thus bolster the system's legitimacy in the eyes of its users.

At the ordinary sessions held in July and October 2013, the Commission placed greater emphasis on the performance of its substantive functions of human rights protection and promotion. However, it also identified 43 commitments made for the full execution of the reforms (pertaining to programs, changes in practices, new policies, the drafting of guides and reports, the application of new regulatory provisions, etc.). More than 80 percent of those commitments have been completely fulfilled or are more than halfway fulfilled. It is expected that all of them will be fulfilled during 2014, although some depend on the securing of resources, as the Commission itself warned early in the process.

One of the most relevant commitments is the review and modification of our Strategic Plan, which the Commission has decided will include a program to reduce the procedural backlog. This will be addressed by the plenary of the IACHR at its next regular session in March 2014. Toward this end, the Commission will hold meetings with States and representatives of civil society.

This program is being designed with the committed and unwavering support of the Executive Secretariat. It will include a new review of the internal work organization and of alternative procedural mechanisms, such as the consolidation of petitions (as was done in a pilot program during the July 2013 session) or pilot reports. Also provided is an expansion of the intern program under the supervision of the Commission's professional staff.

Another priority program is friendly settlements. The Commission is reviewing what is currently established in the Strategic Plan with respect to friendly settlements with the aim of reflecting the new level of priority, concepts, and methodology of the Commission in this area of its work.

## Challenges facing the inter-American system

We must confront and tackle some fundamental challenges. It is a priority to advance universalization and succeed in getting all 35 Member States of the Organization to ratify or accede to the American Convention on Human Rights, rather than just the 23 that are currently States Parties, bearing in mind that the withdrawal of one of them recently took effect. We also aim to increase the number of States that have recognized the jurisdiction of the Inter-American Court, in addition to the 20 that currently do, so that all of the members of the OAS will be subject to the Court's jurisdiction. In general, we must promote the ratification or accession of all the States to each and every one of the inter-American human rights instruments, thereby changing the situation of incomplete ratification or accession that existed at the time the reforms were approved.

Our individual petition system must maintain its relevance, given the very real risk of decline in view of the significant increase in the number of people who turn to the Commission in search of protection. This is happening not necessarily because there has been an increase in human rights violations compared to what took place under authoritarian regimes, but rather because of the higher profile and accessibility achieved by the inter-American system. Because of this, in addition to our reform of the Rules of Procedure and the aforementioned program to reduce procedural backlog, the relevance of the system—and particularly the beneficial effects of nonrepetition—depends exclusively on the resolute and complete implementation of the Commission's recommendations to the States. These implementation actions are what lead to legislative reform and to the adoption of public policies, including judicial policies, through which the States comply with their international human rights commitments. It is imperative that the States responsibly undertake full compliance with the decisions of the inter-American bodies.



The Commission also faces the ongoing challenge of maintaining delicate balances and upholding values that at first glance might appear to contradict one another. For example, the Commission recognizes its duty to apply the existing procedures rigorously in order to ensure not only legal certainty but also equality of arms and due process. At the same time, the situation of many of the victims who avail themselves of the system requires us to maintain a reasonable degree of flexibility, given that, in most cases, the parties that come before the Commission are not in an equal position vis-à-vis the States to defend their rights.

In this regard, it is important to correct some erroneous perceptions about the inter-American system with specific data. About one-third of the individual petitions submitted to the Commission receive support from civil society organizations—some of them with sufficient resources and expertise, and others with fewer resources and less experience relating to the system. Another third of the individual petitions have some level of professional legal support, again with enormous variations in the level of proficiency in dealing with the inter-American system. The remaining thousands of petitions arrive in the handwriting of some of the poorest, most excluded, forgotten, and dispossessed people in the region, who do not have access to any assistance from lawyers at the initial study phase.

The Commission must maintain an individual petition system that recognizes these asymmetries through the flexibility and informality of its proceedings. It must strive to guarantee—as it attempts to do through the victim assistance fund—an equality of arms throughout the proceedings. A fair and equitable contest depends on keeping the obstacles to access to justice that unfortunately are prevalent in some countries of our region from extending to the inter-American sphere.

## Available resources and the demands on the system

An ever-present concern is the funding available to the Commission as it carries out its mandate. Considerations regarding the efficiency of the system cannot be viewed only from the perspective of the desired outcomes; we must also pay attention to the means required to attain these outcomes. More and better promotion, advancements, and efficiency in the processing of petitions and cases and in the adoption of precautionary measures are fundamental objectives that we can all agree on. However, in order to meet the ambitious objectives that have been laid out, the system must be provided with the necessary resources.

Some indicators help illustrate the magnitude and variety of demands faced in operating the system.<sup>1</sup> In December

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2012, shortly before it approved the reforms, the Commission was responsible for performing the initial study of more than 7,200 petitions (by the beginning of 2014 there were already more than 8,000); issuing admissibility decisions in 1,150 and merits decisions in 550; as well as monitoring both the recommendations contained in nearly 200 merits reports and the agreements signed between States and petitioners in 100 friendly settlement reports. Each year we receive and adjudicate 470 requests for precautionary measures while conducting follow-up on another 750 active measures, requests for information from the States, and requests for information from the petitioners. In short, at the start of 2014, the IACHR had to handle, with diligence, professionalism, and efficiency, more than 10,000 petitions and cases, as well as requests for precautionary measures.

In addition, we monitor the human rights situation in 35 States in the hemisphere, issuing hundreds of press releases each year. We monitor the situation of women, children, and adolescents, people of African descent, indigenous peoples, human rights defenders, migrants and their families, persons deprived of liberty, lesbians, gays, bisexuals, and transsexuals, as well as the status of freedom of expression. We published 11 thematic reports on these topics in 2012, as well as a country report based on a prior *in loco* visit. In addition, in 2012 and 2013 we held three regular sessions each year, around 100 public hearings, and more than 50 work meetings. We conducted an *in loco* visit with the Plenary; more than 30 working and promotional visits led by Commissioners in their capacities as country or thematic rapporteurs; multiple seminars and educational courses; and a wide range of promotional activities. All of this reflects the distinct ways in which the Commission protects and promotes human rights in the hemisphere and the challenges it faces.

In handling this broad range of matters, the IACHR relies on the work of seven dedicated members of the Commission, even as we simultaneously do our respective jobs in our home countries. We also have the painstaking and committed support of an Executive Secretariat that was provided with funds by the OAS to hire—in December 2012, before we approved

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our reforms—17 lawyers and an additional 15 people, including professionals, administrative personnel, and support staff. The regular OAS budget at the time allowed us to have just 32 professionals and administrative personnel—that is, fewer than the number of countries in the Organization. Thanks to the Commission's own efforts to raise external funds, we were able to hire another 15 lawyers in December 2012. However, because they were hired with outside funding, they were not guaranteed a permanent position and had to be responsible for specific projects that did not always coincide with the regular workload.

According to this breakdown, every lawyer at the Inter-American Commission—whether covered by the OAS or by extraordinary specific funds—would be responsible for more than 300 case files, each one of which warrants attentive, careful, and efficient professional action. In addition to this work, the same staff members must support, with a significant portion of their time, the monitoring and supervision of more than one country in the region, the drafting of thematic reports, and the promotional activities in which the Commission is engaged. Moreover, each of the draft agreements, measures, press releases, and reports put out by the Commission must be prepared by the same personnel in both English and Spanish for the consideration of the Plenary, given the current composition of the Commission.

The excessive amount of time that it frequently takes to attend to and follow up on the various mechanisms under the responsibility of the Commission is a continuing source

of deep concern for the Commission's members and staff, as well as an unfortunate and unfair cause of anxiety among the victims and other users of the system. We are aware of the constant challenge to be more effective and efficient. Nevertheless, if we compare the scarce public resources allocated to the Commission to the significant regional impact of its human rights protection and promotion work—including the recurring regulatory reforms and improved public policies in different States that result from its decisions—we can say that it is one of the most productive and necessary institutions in our American hemisphere.

Given these indicators, it is reasonable to think that if we want to improve the system, it is not enough merely to suggest better outcomes. The outcomes must be in line with the means, and it is therefore essential to strengthen those means. In other words, in addition to the important reform program undertaken by the Commission, a key component of this overall process is an increase in permanent funds earmarked for the Commission to allow it to perform the work, assigned to it by the States of the region, of ensuring the promotion and protection of the human rights of the people of the Americas.

## Conclusion

The Commission has been receptive to the recommendations and observations of the users of the system and has moved ahead with the reforms to its Rules of Procedure, policies, and practices, which will help make the protection of human rights in the region more effective and efficient. Nevertheless, the authentic strengthening of the inter-American system turns on three aspects that the Commission has consistently underscored in every one of its messages to the OAS General Assembly upon the presentation of the Annual Report by the IACHR's President for more than 10 years now. These three factors are (a) the universalization and subsequent adoption of all of the inter-American instruments by all of the OAS Member States; (b) an increase in regular OAS funding to enable the inter-American bodies to fulfill the lofty mission entrusted to them in a more timely fashion; and (c) the full implementation, by the States, of each and every one of the decisions made by the inter-American bodies. ■



Please send comments and possible contributions for this publication to [info@dplf.org](mailto:info@dplf.org).

## Hugo de Zela

Chief of Staff of the General Secretariat of the Organization of American States



I had the privilege of taking part in the process of reflection on the workings of the Inter-American Commission on Human Rights with a view to strengthening the inter-American human rights system at two different times: initially, as president of the Working Group set up by the Permanent Council of

the Organization of American States (OAS),<sup>1</sup> where this important issue was negotiated, and later as cabinet chief of the OAS General Secretariat. This allowed me to be both a party and an eyewitness to this important process. As a result, this article is a personal testimonial of how it unfolded and its main conclusions and lessons.

In over 50 years of existence, the inter-American human rights protection system has undergone transformations of considerable scope. Its origins are interwoven with those of the OAS, dating back to 1948, when the OAS Charter and the American Declaration of the Rights and Duties of Man were adopted in Bogotá, Colombia. The Inter-American Commission on Human Rights (IACHR) was created 11 years later at the Fifth Meeting of Consultation of the Ministers of Foreign Affairs held in Santiago, Chile, in 1960. The Commission began operating that same year. For almost 20 years it functioned as the only human rights protection mechanism in the region, until the Inter-American Court of Human Rights came into operation in 1979.

From its beginnings, the system has evolved in a highly polarized context. The gradual consolidation of an inter-American system began, little by little, to have effects inside the Member States; this provoked reactions that aimed to limit the system's ability to take action, especially at the outset, in the 1970s. These circumstances external to the Commission

have created an ongoing historical tension between the Commission, which has wanted to diversify and expand its sphere of action and the scope of the concept of "human rights," and the Member States, always alert to any "foreign" challenges that could be seen as interference in their domestic affairs.

This unresolved tension translated over time into a decreasing level of dialogue between the Commission and the countries. Although routine meetings were officially held each year, at which the IACHR would present its Annual Reports to be collectively "evaluated" by the States, this process generally failed to produce a careful analysis of the system's progress with a mid- and long-term vision. This situation resulted in a significant degree of misunderstanding on both sides, frequently marked by mistrust and misconceptions of the reasons behind some actions.

In this context, two political developments at the beginning of 2011 had direct repercussions at the outset of the reflection process discussed in this article. The first was the need to appoint a new Executive Secretary of the Commission and the resulting discussion on what the procedure for doing so should be. The second was the IACHR's granting of a precautionary measure entitled "Indigenous Communities of the Xingu River Basin, Pará, Brazil."<sup>2</sup> Both developments highlighted the divergent viewpoints between the Commission and the Member States.

This situation was debated extensively, both officially and in private meetings, by the foreign ministers of the OAS Member States at the 41st General Assembly in San Salvador, in June 2011, and as a result they decided to confront the issue. This was expressed in the statement of the General Assembly president, ratified by the plenary session, which instructed "the Permanent Council to deepen the process of reflection on the workings of the Inter-American Commission on Human Rights (IACHR) against the backdrop of the American Convention on Human Rights and its Statute, with a view to strengthening the inter-American human rights system and submitting its recommendations to the member states as soon as possible."<sup>3</sup>

<sup>1</sup> On June 29, 2011, the Permanent Council of the Organization of American States created 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 OAS Permanent Council, "Working Group to Reflect on the Strengthening of the Inter-American Human Rights System," Doc. GT/SISTEMA/SA.1/11 rev.1, July 18, 2011, third unnumbered paragraph.

<sup>2</sup> PM 382/10, April 1, 2011, <http://www.oas.org/en/iachr/decisions/precautionary.asp>.

<sup>3</sup> OAS General Assembly, 41st Regular Session, June 5–7, 2011, San Salvador, El Salvador, Doc. OEA/Ser.P, AG/INF. 478/11, June 29, 2011.

*The Secretary General of the OAS, José Miguel Insulza, tried from the beginning to advance the final objective of the process, that is, the strengthening of the system, although that stated intention was distorted at the outset.*

Shortly thereafter, on June 29, 2011, 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 within the Permanent Council. The group began working in an environment of mistrust between the Member States and the Commission. This situation was fueled by multiple statements in the regional press from institutions, individuals, and non-governmental organizations engaged in the defense and promotion of human rights, which characterized the process as an attempt to “destroy” or at least “weaken” the system.

In this less than constructive environment, the work done during the first phase of the Working Group’s efforts initially focused on resolving the issue of appointing a new Executive Secretary. Finally, after multiple negotiations marked by intransigence on all sides, the parties were able to come up with a formula to resolve this specific problem. In so doing, they demonstrated that with good faith it was possible to reach substantive agreements addressing the legitimate aspirations of the Member States while still respecting the autonomy and independence of the Commission.

In this context, the Secretary General of the OAS, José Miguel Insulza, tried from the beginning to advance the final objective of the process, that is, the strengthening of the system, although that stated intention was distorted at the outset. He reaffirmed this on several occasions, including at the Permanent Council meeting in July 2011, when he said, “There is no intention of amending the former [the American Convention] or of depriving the Commission of autonomy, or of establishing other bodies that could restrict it.”<sup>4</sup> One year later, at the Inter-American Institute of Human Rights in Costa Rica, he reiterated that “this process on which we have

embarked is so important; it allows us to bring the countries closer to the inter-American human rights system, allowing us to strengthen it, to identify necessary or desirable measures for it to better fulfill its role in the promotion and protection of human rights; it allows us to suggest to countries steps needed to streamline the system.”<sup>5</sup>

Additionally—and acknowledging that it is an aspect that still must be improved—the Working Group designed a negotiation plan to ensure the participation of all of the actors in the system, that is, the Member States, the Inter-American Commission, and the system’s users. This mechanism made it possible to gradually create an inclusive climate more conducive to strengthening the system. As a result, on December 13, 2011, the Working Group adopted its final report to be submitted to the Permanent Council for its consideration.<sup>6</sup> The Permanent Council in turn approved the document on January 25, 2012. Its main content was focused on the Commission: of the 67 recommendations, 53 were addressed to the IACHR.

It bears noting that, as evidence of the new climate that had been created, the Commission received these recommendations, in its own words, “in an open and constructive frame of mind.”<sup>7</sup> On April 9, it forwarded the “Position Document on the Process of Strengthening of the Inter-American System for the Protection of Human Rights” to the Permanent Council.<sup>8</sup> On October 23, 2012, following an internal study and evaluation process, the Commission submitted its answer to the Permanent Council, in which it responded positively, in large measure, to the Working Group’s recommendations.<sup>9</sup>

<sup>4</sup> OAS Permanent Council, Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the IAHRS, “Remarks by the OAS Secretary General, José Miguel Insulza, at the Meeting on July 14, 2011,” OEA/Ser.G GT/SIDH/INF-1/11, scm.oas.org/doc\_public/ENGLISH/HIST\_11/CP26761E06.doc.

<sup>5</sup> Speech of the Secretary General of the OAS at the XXX Interdisciplinary Human Rights Course, organized by the Inter-American Institute of Human Rights, San José, Costa Rica, September 12, 2012, [http://www.oas.org/en/about/speech\\_secretary\\_general.asp?sCodigo=12-0081](http://www.oas.org/en/about/speech_secretary_general.asp?sCodigo=12-0081).

<sup>6</sup> “Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System for consideration by the Permanent Council,” OEA/Ser.G/GT/SIDH-13/11 rev. 2, December 13, 2011, available on the Working Group’s Web page, <http://www.oas.org/consejo/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>.

<sup>7</sup> IACHR Resolution 1/2013, “Reform of the Rules of Procedure, Policies and Practices,” March 18, 2013, para. 4, <https://www.oas.org/en/iachr/decisions/pdf/Resolution1-2013eng.pdf>.

<sup>8</sup> IACHR, “Position Document on the Process of Strengthening of the Inter-American System for the Protection of Human Rights,” Doc. OEA/Ser.L/V/II, Doc. 68, April 8, 2012, <http://www.oas.org/en/iachr/docs/pdf/PosicionFortalecimientoENG.pdf>.

<sup>9</sup> IACHR, “Reply of the Inter-American Commission of Human Rights to the Permanent Council of the Organization of American States regarding the recommendations contained in the Report of the Special Working Group to Reflect on the Workings of the IACHR with a View to Strengthening the Inter-American Human Rights System,” October 23, 2012, <http://www.oas.org/en/iachr/strengthening/docs/RespCPEn.pdf>.

At its 42nd Regular Session, held in Cochabamba, Bolivia, in June 2012, the OAS General Assembly received the report of the Working Group and instructed the Permanent Council, on the basis of that document, “to draw up proposals for its application in dialogue with all the parties involved.”<sup>10</sup>

The Permanent Council put a work plan in place with a view to completing the task assigned by the General Assembly.<sup>11</sup> The process was not easy, since the order contained in point 2 of the resolution, to “instruct the Permanent Council, on the basis of the report, to draw up proposals for its application in dialogue with all the parties involved,” was subject to various interpretations.

Nevertheless, the main virtue of this General Assembly decision was to place a specific limit on what was collectively understood as the outcome of the process. After a lengthy negotiation period, all of the actors involved—mainly the countries that unanimously approved the recommendations, and the Commission, which responded to them—were in tacit agreement that these and no others were the final conclusions of this long and difficult journey. Thus, to use a sports metaphor, the field of play was clearly marked. This is particularly important in order to understand the subsequent stages of the process.

When the negotiations began for the drafting of the proposals requested by the General Assembly, this was put forward as the initial issue for debate. Some countries wanted to revise the recommendations of the General Assembly, in order to delete from or add to them, while others refused to discuss what was excluded from them. This debate only reflected the divergent points of view that exist in the region, and, in particular, within the OAS, regarding what the system’s role, scope, and sphere of action should be.

The continuation of the negotiations also created a parallel process, as a group of States decided to convene “meetings of the States Parties to the American Convention on Human Rights.” They argued that this process should be led by the States that are truly committed to the inter-American system,

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as evidenced—they assert—by their status as States Parties to the Convention. It was learned that two official meetings were held, in Guayaquil, Ecuador, on March 11, 2013<sup>12</sup> and in Cochabamba, Bolivia, on May 14, 2013.<sup>13</sup> The participants’ stated intention was to achieve consensus positions and express themselves jointly within the framework of the OAS. In practice, this occurred on only some occasions.

Finally, on March 22, 2013, the 41st Regular Session of the General Assembly was held at OAS headquarters and passed a resolution titled “Results of the Process of Reflection on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System.”<sup>14</sup>

Seen in retrospect, the process was a milestone in the evolution of the system. More than six months after its conclusion, there are several aspects, both procedural and substantive, that warrant mention. First, I think one can say that there has been a paradigmatic shift in the relationships between the States and the Commission. There is now an effective dialogue, within a framework of greater respect, in which efforts are made to gain a better understanding of differing viewpoints. Second, there is also, as a result of the lengthy and profound discussions of recent years, a more complete understanding of the richness and complexity of our system and of the role of the OAS in strengthening it. Indeed, over the course of the process

<sup>10</sup> OAS General Assembly, “Follow-Up on the Recommendations Contained in the Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System,” adopted at the fourth plenary session, June 5, 2012, doc. AG/RES. 2761 (XLII-O/12), <http://www.oas.org/consejo/reflexion.asp#follow%20up>.

<sup>11</sup> OAS Permanent Council, “Work Plan for Implementation of Resolution AG/RES 2761 (XLII-O/12), ‘Follow-up on the recommendations contained in the report of the special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System,’” adopted by the Permanent Council at the meeting held on September 10, 2012, Doc. OEA/Ser G CP/doc. 4787/12 rev. 4 corr. 1, September 19, 2012, <http://www.oas.org/consejo/reflexion.asp#Establishment>.

<sup>12</sup> Conference of States Parties to the American Convention on Human Rights, “Declaration of Guayaquil,” March 11, 2013, <http://scm.oas.org/pdfs/2013/CP30466S.pdf>.

<sup>13</sup> Second Conference of States Parties to the American Convention on Human Rights, “Declaration of Cochabamba,” May 14, 2013, [http://www.cancilleria.gov.ar/userfiles/14-05-13\\_delcaracion\\_cochabamba.pdf](http://www.cancilleria.gov.ar/userfiles/14-05-13_delcaracion_cochabamba.pdf).

<sup>14</sup> OAS General Assembly, 41st Regular Session, “Results of the Process of Reflection on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System,” adopted at the plenary session held on March 22, 2013, and subject to revision by the Style Committee, Doc. OEA/Ser.P AG/RES. 1 (XLIV-E/13) corr. 1, July 23, 2013, <http://www.oas.org/consejo/reflexion.asp#follow%20up>.

*Human rights protection needs of the region's citizens have evolved and have come to include new issues that go beyond the traditional historical context of human rights protection in Latin America.*

it became clear that the human rights protection needs of the region's citizens have evolved and have come to include new issues that go beyond the traditional historical context of human rights protection in Latin America. Taking this last factor into account, there is, third, a widespread conviction that the effort to maintain and expand the channels of dialogue must be permanent and that this dialogue must take place even—and especially—in regard to the most controversial issues.

It also bears mentioning that the duration of the process—more than two years—allowed the parties to approach each of the items on the agenda with special dedication, which in turn made it possible to clarify the different positions and bring them closer together. The breadth of the process was particularly important, with the participation of all of the parties, actors, and users of the system. These inputs from diverse sources and viewpoints contributed greatly to the enrichment of the process.

It is important to underscore that as the negotiations went forward, the mood gradually became noticeably more constructive. Each of the parties involved was able to take a flexible stance, as there was a collective conviction that the aim was in fact to strengthen the system, an objective that could only be accomplished with contributions from everyone. This conviction produced a willingness to compromise that had tangible outcomes, aimed at identifying weaknesses and improving the processes and mechanisms of the system with a view to promoting and defending human rights in the hemisphere.

It also bears noting that the decisions that came out of the process were adopted through resolutions of the IACHR itself, with the support of the Member States, as a demonstration of respect for the autonomy and independence of the Commission and as evidence that the dialogue had produced changes.

This was all taken into account in the decisions of the Extraordinary General Assembly of March 2013, which was generally seen as the culmination of the reform process and the gateway to the next phase. The emphasis is now on implementation by the Commission of the reforms adopted by consensus, along with work by the Member States to secure full funding of the system through the Regular Fund of the OAS.

Finally, we can affirm that the evolving nature of human rights and the changing political and economic realities in the region will make it necessary to conduct periodic evaluations of the workings of the system. What is most important, based on the lessons learned in the process just completed, is that open and inclusive dialogue and the willingness to find broad consensus are indispensable tools for enabling the citizens of the region to have an effective human rights protection mechanism. ■



Please send comments and possible contributions for this publication to [info@dplf.org](mailto:info@dplf.org).

## Emilio Rabasa

Permanent representative of Mexico to the Organization of American States



The reflection process that took place within the Organization of American States (OAS) from 2011 to 2013 marked a new milestone in the ongoing efforts to strengthen the inter-American human rights system. It had important, specific results—some more tangible than others—for the system itself and for its users. The most valuable part of the process was that it highlighted, from a political perspective, the validity and relevance that the hemisphere continues to attribute to the inter-American system and the bodies that run it.<sup>1</sup>

Over the course of more than 21 months, and through different exercises and stages, the OAS was deeply involved in discussions that, although centered mainly on exploring and recommending measures to improve the workings of the Inter-American Commission on Human Rights (IACHR), also covered broader issues relating to the considerable challenges the system faces in capably performing the work for which it is responsible. After dozens of successive sessions of the OAS political bodies and a similar number at the IACHR, numerous events and forums in cities throughout the hemisphere, and the submission of official documents, statements, and written contributions by Member States, the bodies of the system, civil society, and the system's users, the process officially concluded on March 22, 2013. On that date, Resolution AG/Res. 1 (XLIV-E/13), "Results of the Process of Reflection on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System," was passed by consensus at an Extraordinary General Assembly of the OAS.<sup>2</sup>

Without attempting to describe all the agreements adopted at that time, and without going into details that any observer of the system could obtain from numerous sources, we may ask: What were the specific outcomes of the process? This article examines two that have particular relevance to the future of the system.

### Legal certainty in proceedings

The first very tangible outcome lies in the spirit and content of the amendments approved by the IACHR to its institutional Rules of Procedure, policies, and practices. These amendments were designed to comply with the recommendations made by the OAS Member States, and noted by the General Assembly, after the opinions of all the system's users were received and given equal consideration.

Beginning with the initial discussions that took place in 2011, while the membership was evaluating different aspects of the workings of the IACHR, one of the main concerns of the majority of the countries was the need for the IACHR's work methods and procedures to provide greater legal certainty to users. The bulk of the recommendations on the issues of precautionary measures, procedural issues in the petition system, and even Chapter IV of the IACHR's Annual Report coincided in demanding that the inter-American body (a) explain clearly and objectively the criteria that guide its decisions; (b) establish and disclose the grounds and rationale for its decisions—that is, share the legal opinions derived from the factual background; and (iii) in general, subject its powers and mechanisms to rules and standards known to the users. This would help prevent situations and issues in case processing that have often led to breakdowns between the States and the Commission, and would also facilitate the acceptance of and compliance with the recommendations and decisions of the IACHR.

Sensitive to these concerns, the IACHR, beginning with its initial reply to the report containing the recommendations of the Member States, announced the steps it would take to improve and adjust its framework of action, as well as the scope and particularities of its mechanisms, so as to guarantee greater predictability for all users. Many of the reforms to

on October 23, 2012; (c) the IACHR resolution approving amendments to its Rules of Procedure, policies, and practices (Resolution 1/2013 of March 18, 2013); and (d) the above-cited resolution passed at the 44th Extraordinary Session of the OAS General Assembly.

<sup>1</sup> This article was written with the assistance of Pablo Monroy Conesa, head of legal affairs and human rights at the Mexican Mission to the OAS.

<sup>2</sup> Most of the documents and written submissions related to the reflection process can be consulted at the following official OAS and IACHR Web portals: OAS Permanent Council, "Process of Reflection on the Workings of the IACHR with a view to Strengthening the IAHR," <http://www.oas.org/consejo/Reflexion.asp>; IACHR, "Process for Strengthening the IACHR: Methodology," <http://www.oas.org/en/iachr/mandate/strengthening.asp>. At least four essential documents are worth noting: (a) the final report with recommendations from the ad hoc Working Group of the Permanent Council, adopted by consensus on January 25, 2012; (b) the reply of the IACHR regarding the recommendations made in that report, circulated

*The adoption of these amendments was a very significant first step. Nevertheless, it will be necessary to observe how they are implemented and developed in practice in order to determine their suitability and capacity to resolve the concerns that gave rise to them.*

the Rules of Procedure, policies, and practices approved by the IACHR in March 2013 aimed to define concepts, establish criteria and parameters to be considered by the IACHR and its rapporteurships and entities, modify mechanisms, and conduct studies and activities that disseminate and provide a better understanding of the Commission's work methods and procedures, including their rationale and objectives. A clear example of this was the amendment of Article 25 of the IACHR's Rules of Procedure and the related policies and practices, which attempted to describe the mechanism of precautionary measures in greater detail. Although the measures have proved to be an expeditious and valuable tool for protecting individuals and rights in situations of risk, States have also had difficulties implementing them.

The adoption of these amendments was a very significant first step. Nevertheless, it will be necessary to observe how they are implemented and developed in practice in order to determine their suitability and capacity to resolve the concerns that gave rise to them. What is certain is that, nearly six months after the reforms entered into force, we are starting to see changes in the IACHR's procedures that point in the right direction. For example, since August 2013 the States have been receiving reasoned, well-founded decisions that set forth the legal grounds for the granting of precautionary measures in situations of seriousness, urgency, and danger of irreparable harm. In those decisions, the factual information provided by the parties is weighed against the pertinent legal provisions, criteria, and standards, among other factors. Thanks to resolutions of this kind, the States will be better equipped to understand specific decisions and address the identified reasons for the risk while also better protecting the beneficiaries of the measures.

Another step forward was the official creation of the Working Group on Friendly Settlements within the Executive Secretariat of the IACHR, and the holding, during the second quarter of 2013, of two seminars on the friendly settlement mechanism.<sup>3</sup>

These were designed to increase awareness of this valuable concept, clearly explain its nature and scope, and promote its more frequent use by virtue of the numerous advantages it provides, clearing up doubts and dispelling misconceptions about its use to resolve conflicts.<sup>4</sup>

## More dialogue

The second outcome of the process is probably not as evident or perceptible as the first one, but it also has extremely positive repercussions. Thanks to the ongoing interaction between the Member States and the IACHR over the past two years, and the goodwill demonstrated by all, it was possible to reestablish a frank, open, and above all fluid dialogue between both sides. It would not be fair to say that communication was previously nonexistent or had broken down completely. However, prior to the beginning of the discussions, and for different reasons, communication was too infrequent and not very effective—insofar as it brought about little understanding—and took place in a context of precarious mutual trust.

As the process moved forward and the dialogue intensified, these situation began to change. Strained communication gave way to vigorous explanations and arguments, whether about the rationale for certain mechanisms or about the difficulties created by issues related to those mechanisms. Prior to the Extraordinary General Assembly of March 2013, and even during it, the dialogue was dominated by differences of opinion regarding the stance that the OAS political bodies should take with respect to the amendments approved by the IACHR, and regarding the conclusion of the process in general. This was the case even though at the time there were already numerous points of agreement between the Member States and the IACHR regarding some measures that should be taken to optimize the workings of the system, and also about the most pressing challenges still facing it. From Mexico's point of view, the necessary dialogue has been renewed, has kept the same tone up to the present, and promises to continue in this mode.

As noted earlier, these were not the only outcomes of the 2011–2013 reflection process. Progress was also made on other issues important to the system, at least insofar as they were considered and discussed. However, the two abovementioned out-

Settlements, Antigua, Guatemala, June 7–8, 2013, and First National Seminar on the Friendly Settlement Mechanism, Mexico City, October 14–15, 2013.

<sup>4</sup> The friendly settlement mechanism in no way involves ceding rights, nor does it entail the capitulation of either party. It is an effective tool for dialogue aimed at clarifying the positions of adversaries—what Octavio Paz called “otherness”—and seeking a mutually satisfactory solution that includes changing the status quo that gave rise to the human rights violation. The scope of its significance must be appreciated.

<sup>3</sup> First Inter-American Conference on Exchange of Best Practices in Friendly



comes are particularly important for the new task that the OAS has undertaken, and in which it is already immersed: defining a strategic vision for its work with a view to the future.

## Human rights in the new strategic vision of the OAS

In September 2013, the Permanent Council decided to create a Working Group within the OAS with the objective of proposing a path for the Organization to follow in the short, medium, and long terms—in other words, setting the direction of the work of the OAS in the twenty-first century. During the last quarter of 2013 the Working Group, of which I am honored to be the chairman, undertook and completed the initial phase of its assignment. This consisted of examining the status of each one of the “pillars” and fundamental areas of the work of the OAS<sup>5</sup> and of facilitating an exchange between the States and the respective OAS bodies to identify future work.

Based on this review, a document was drafted that contains a brief assessment of each pillar, as well as a matrix identifying their strengths, weaknesses, threats, and opportunities.<sup>6</sup> On this basis, and during a new phase that is currently underway, the Working Group will undertake to define the strategic vision of the Organization that will be proposed to its political bodies, as well as the specific objectives to be pursued in implementation of this vision.

As far as the strategic vision for the “Promotion and Protection of Human Rights” pillar, the reflection process and its outcomes will undoubtedly be essential. Given the adjustments that have been made to the operational workings of the IACHR, as well as the mutual learning and reestablishment of effective dialogue among the actors who form part of and benefit from the system, an excellent opportunity has arisen to explore measures aimed at overcoming the main structural challenges facing the system: (a) attaining the universality of the inter-American human rights instruments and of the contentious jurisdiction of

*The mutual learning and reestablishment of effective dialogue among the actors who form part of and benefit from the system, an excellent opportunity has arisen to explore measures aimed at overcoming the main structural challenges facing the system.*

the Inter-American Court of Human Rights; (b) ensuring compliance with the recommendations and decisions of the system’s bodies; and (c) ensuring the adequate funding of the bodies by the Member States.

There are many advantages to addressing these issues through solutions that are realistic in the short, medium, and long terms. Such solutions can contribute to the improved functioning and work methods of the bodies (and, therefore, to the implementation of the recent amendments). Ultimately, they will allow the organs of the system to provide more active support for the States in our efforts to strengthen our national justice systems and mechanisms for the promotion and protection of human rights.

For Mexico, there can be no doubt that the OAS—mainly through the work of the Commission and the Court—currently protects and promotes human rights in every region of the hemisphere. Nevertheless, we are convinced of the need to further strengthen this fundamental mission in order to address current conditions and circumstances that have a negative impact on the rights of our peoples.

This is our aim, and we will work hand in hand with all the system’s actors so that the definition of a strategic vision in this area undergirds a system for the promotion and protection of rights that is universal in scope; that is more effective and efficient; that has sufficient financial capacity; that is sustainable and organized programmatically; that provides subsidiary and complementary aid to the Member States in strengthening their national capabilities with respect to human rights; and whose action is coordinated with the other bodies of the OAS in their respective fields of action. ■

<sup>5</sup> The main pillars of action of the OAS are human rights, democracy, multi-dimensional security, and comprehensive development.

<sup>6</sup> All of the documents and inputs relating to the process of defining the strategic vision of the OAS can be consulted at the Web page of the Working Group of the Permanent Council on the Strategic Vision of the OAS, <http://www.oas.org/consejo/workgroups/GTVEOEA.asp>.



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# To Strengthen or Not to Strengthen: Six Views of the Process

## Between Reality and Appearances

**Katya Salazar**

Executive director of the Due Process of Law Foundation

At the height of summer vacations in South America, on January 21 and 22, 2014, the Third Conference of States Parties to the American Convention on Human Rights was convened by Ecuador and Uruguay in the city of Montevideo. The main topics at the meeting included, among others, relocating the headquarters of the Inter-American Commission on Human Rights (IACHR) and the offices of its special rapporteurs. Although the larger process to reform the Commission officially concluded in 2013, it is clear that ideological differences persist among the States of the hemisphere, as does the discourse of those who hold that democratically elected and progressive governments should not be monitored by the IACHR using the same criteria that were used to monitor the dictatorships of the past.

During the two years of the reform process, a period fraught with tension, the discussions and decisions essentially reflected these important differences as well as profound political changes in the region. Certain countries have seen their leadership diminished (United States) while others have gained strength (Brazil, Mexico). Alliances have arisen and become stronger (such as ALBA, CELAC, UNASUR, and MERCOSUR) even as others have weakened, notably the Organization of American States (OAS). Antagonisms have intensified, with some members of the ALBA bloc of countries highly critical of the United States.<sup>1</sup> And in the midst of it all, buffeted by these changes and conflicts, there is the IACHR. This article does not



purport to answer all of the questions that are still pending; rather, it briefly reviews the fundamental events during this period that give us a better understanding of what happened and, above all, an idea of what the future might hold.

### Actions that speak

During the OAS General Assembly held in San Salvador in June 2011, and at the request of several Member States, a process was begun to reflect

upon and reform the IACHR. This process kept civil society, and all those concerned about maintaining a fundamental human rights protection authority in the Americas, on tenterhooks for nearly two years. Other initiatives for examining the workings of the inter-American human rights system (IAHRS) had been proposed in the past, but this time the process centered on the Commission and came at a time of particular hostility toward its work. There were clear differences between the IACHR and the OAS General Secretariat, and some Member States publicly expressed their disagreement with some of the Commission's decisions.

Countries such as Peru and Brazil, irritated by recent decisions of the IACHR, joined forces with others like Colombia, Venezuela, and Ecuador, which had long-standing disagreements with the decisions and practices of the Commission, in order to push through the reform initiative. Argentina, Ecuador, Bolivia, Venezuela, and Nicaragua, acting as a bloc, accused the IACHR of ignoring the democratization process underway in their countries and of being biased toward the United States because of the financial support that country provides to the IACHR and the fact that IACHR headquarters are located in Washington. The fact that the United States and Canada have not ratified the American Convention, thus gaining an “advantage” over the rest of the OAS Member States, was used to limit

<sup>1</sup> The Bolivarian Alliance for the Peoples of Our America (ALBA), formally founded in Cuba in 2004, currently has nine members: four in Central and South America and five in the Caribbean. In the context of this article, however, references to the ALBA bloc refer to the four countries in Central/South America, namely Ecuador, Bolivia, Venezuela, and Nicaragua, as the Caribbean ALBA countries did not take a strong position in the debate.

their relevance in the debate and caused the two North American countries to keep a low profile during the discussions.

In this scenario of antagonism toward the IACHR, the OAS Permanent Council created 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. This marked the beginning of a period of discussion and debate, both public and private, in national capitals and foreign ministries. The initial outcome of this phase, in January 2012, was the adoption by the Permanent Council of a report containing 53 recommendations addressed to the IACHR.<sup>2</sup> Three months after this report was approved, the IACHR presented its initial reactions to the Permanent Council, indicating that it had begun both an internal process of reflection on its procedures and mechanisms and a process of consultation with the system's users and other stakeholders.<sup>3</sup> The adoption of this report and the Commission's positive reaction might have been sufficient to conclude the reform process. However, several States continued pushing for formal and informal debates on matters that had already been addressed in the Working Group's report, as well as on new issues.

In June 2012, six months after the approval of the report drafted by the Working Group, the 42nd OAS General Assembly was held in Cochabamba, Bolivia. There, the Member States decided to keep the reform process open. In addition to the harsh criticism of the Commission leveled by the President of the host country, Evo Morales, the unexpected presence of President Rafael Correa of Ecuador—who called the IACHR a “tool of North American imperialism”—complicated matters even further.<sup>4</sup> After intense debates and negotiations, the General Assembly in Cochabamba passed a resolution accepting the report prepared by the Working Group, but instructed the Permanent Council “on the basis of the report, to draw up proposals for its application in dialogue with all the parties involved.” It was further agreed that an Extraordinary General Assembly would be held in the first quarter of 2013 to evaluate the implementation of the recommendations that were made to the IACHR. Although the worst-case scenario—including the reopening of the IACHR Statute or the withdrawal of some States from the American Convention—did

not occur, the debate remained open. This prolonged the pressure on the IACHR, which had to allocate a substantial part of its human and financial resources to responding to the different demands arising in the context of this process.

Following the General Assembly in Cochabamba, the IACHR continued its internal process of reflection and consultation with the system's users in order to respond definitively to the 53 recommendations of the Member States set forth in the Working Group's final report. To this end, Commission members traveled to Member States, where they met publicly and privately with different actors and held public consultations, forums, and hearings to receive comments and share experiences with all of the parties involved. This process of reflection and consultation led to IACHR Resolution 1/2013, passed in March 2013, which included changes to the Commission's Rules of Procedure and to its policies and practices.<sup>5</sup>

This important step forward seems to have helped change the position of some of the States that had been most critical during the process. Diplomatic representatives from Brazil, Peru, Chile, and Colombia publicly expressed their satisfaction with the IACHR's response as well as their willingness to consider the process concluded. Nevertheless, the criticism from the ALBA bloc—especially Ecuador—continued, and the outlook with respect to the Extraordinary General Assembly became very pessimistic.

Days before that assembly, the First Conference of States Parties to the American Convention on Human Rights was held in Guayaquil at the request of Ecuador.<sup>6</sup> The gathering pointedly excluded those OAS Member States that have not ratified the American Convention, namely the United States and Canada. This unprecedented initiative, which was symbolic but had no official significance within the framework of OAS, added confusion and uncertainty to the overall reform process.

The Extraordinary General Assembly was held in Washington, DC, in March 2013. In spite of the fears, the tense discussions held at that meeting, and the veiled threat of the four ALBA nations to withdraw from the OAS, the assembly formally concluded the reform process without yielding to the demands of those States. The main points of contention related to the funding of the IACHR and the functions of the rapporteurs. The funding issue mainly involved objections to the voluntary contributions from donors or countries that are earmarked for specific issues or activities, which would define the IACHR's “agenda.” With regard to the second issue, the ALBA States maintained that some rapporteurs—specifically the

<sup>2</sup> To consult the “Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System for consideration by the Permanent Council” and other pertinent documents, visit the official Web page of the Working Group at <http://www.oas.org/council/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>.

<sup>3</sup> The IACHR published a portal on its website containing a summary of the main activities undertaken during its reflection and reform process, available at <http://www.oas.org/en/iachr/mandate/strengthening.asp>.

<sup>4</sup> Excerpts from the speeches by President Correa (<http://www.youtube.com/watch?v=NhU-EuNfKyE>) and President Morales (<http://www.youtube.com/watch?v=4-6rTofw0-o>) at the assembly in Cochabamba are available online in Spanish.

<sup>5</sup> IACHR Resolution 1/2013, <https://www.oas.org/en/iachr/decisions/pdf/Resolution1-2013eng.pdf>.

<sup>6</sup> The opening address of President Rafael Correa at the First Conference of States Parties to the American Convention on Human Rights is available online in Spanish at <http://www.youtube.com/watch?v=-ibxw5vclqo>.

Special Rapporteurship for Freedom of Expression, which has a full-time rapporteur—were favored over others.<sup>7</sup>

Although both points were certainly debatable, it was clear during this assembly that the real objective of the States raising these concerns was not to strengthen the IACHR and its rapporteurships, but rather to weaken the Special Rapporteurship for Freedom of Expression, which had been highly critical of those States in its reports. In their speeches, the representatives of those States maintained that the disparate treatment to which they were subjected reflected the control exerted by the United States over the Special Rapporteurship through the funds that Washington provides for cooperation projects. It became clear that the ideological differences between the United States and those countries that considered themselves “victims” of the Special Rapporteurship for Freedom of Expression were the underlying reason for the discussion, and that the IACHR reform simply offered an opportunity for confrontation. Against all predictions, however, the speeches of Brazil and Argentina, delivered after midnight on the last day of the assembly, made it possible for the ALBA countries to yield and accept a resolution that was not in fact consistent with their objectives.

All of this led up to the 43rd General Assembly, held in Guatemala in June 2013, where the States’ positions on reform of the system had to be reviewed yet again—after two intense years of debate, proposals, reforms, and an Extraordinary General Assembly that had formally ended the process. Ecuador attended the meeting with a candidate for one of the three vacancies for IACHR Commissioner (to be elected during the General Assembly) and a draft resolution that insisted on continuing the debate on reforms. Ecuador’s candidate was not elected, nor was its proposal accepted. The refusal of the OAS Member States to pass the resolution proposed by Ecuador sent an unmistakable message: the process to reform the IACHR had come to an end.

Notwithstanding this clear position adopted by the OAS, there are continuing initiatives aimed at prolonging the reform process. The convening of the First Conference of States Parties to the American Convention was called into serious question because such a group has no formal status in the OAS and encourages division among Member States. Nevertheless, three

such meetings have been organized to date, and a fourth one will be held in Haiti in mid-2014. Ecuador is a key figure in these meetings and actively works to achieve broad outreach, ensuring that the meetings bring together foreign ministers and not just lower-level functionaries. Although it is difficult to assess the real effect of these meetings, they clearly reflect the serious weaknesses that exist within the OAS and the passive attitude of the majority of States that, while not convinced that the reform discussion should continue, fail to respond forcefully to those who continue to prolong it.

The role played by various subregional bodies during the reform process also bears noting. There was a general climate of questioning the relevance of the OAS, and both MERCOSUR and UNASUR—each in its own way—backed the initiatives of those States that were advocating radical changes in the mandate and role of the IACHR. This was expressed in several ways, including the joint convening of meetings of States Parties<sup>8</sup> and official statements relating to the reform process.<sup>9</sup> Although in the months leading up to the Extraordinary General Assembly, key countries in the process—such as Brazil—publicly stated that they were “satisfied” with the Commission’s response and willing to consider the process concluded, they took a slightly different stance at the meetings organized within the framework of MERCOSUR.<sup>10</sup>

## Implementation of the recommendations to the IACHR: Was this the real objective of the reform process?

While these political discussions preoccupied all those following the process, the IACHR continued its work. As previously indicated, the IACHR amended its Rules of Procedure in March

<sup>7</sup> With respect to the first issue, the proposal was that the voluntary contributions of the States to the system should not have “specific objectives.” This would have entailed serious financial difficulties for the IACHR, since its work is financed in large measure by funds earmarked for specific issues (women’s rights, indigenous peoples’ rights, freedom of expression, etc.) or specific activities (reports, meetings, etc.). In addition, that requirement could have meant closing the Special Rapporteurship for Freedom of Expression, given that it is supported mainly by funds specifically earmarked for issues related to its specialty. The second proposal was for all rapporteurships of the IACHR to be granted “special status” similar to that of the Special Rapporteurship for Freedom of Expression, giving them a permanent, full-time rapporteur based in Washington, DC.

<sup>8</sup> See Ecuadorian Ministry of Foreign Affairs, “UNASUR apoya a Ecuador para convocar a Conferencia de Estados parte de la Convención Americana de Derechos Humanos,” <http://cancilleria.gob.ec/unasur-apoya-a-ecuador-para-convocar-a-conferencia-de-estados-parte-de-la-convencion-americana-de-derechos-humanos/>.

<sup>9</sup> On March 14, 2013, an Extraordinary Session of the Meeting of Senior Officials on Human Rights and Foreign Ministries of MERCOSUR and Associated States (RAADDHH) was held in Montevideo to debate the IAHR strengthening process. At the end of the meeting, an agreement was approved that fully supports “the commitments undertaken in the Declaration of Guayaquil of March 11, 2013 [ . . . ]. In this respect, the parties agreed to work jointly to promote the consensus reached in Guayaquil in preparation for the Extraordinary General Assembly of the OAS next March 22, and to guide the handling of the Working Group’s recommendations adopted by the Permanent Council.” See the agreement at <http://dplfblog.files.wordpress.com/2013/03/acuerdo-mercosur-14-de-marzo-2013.pdf>.

<sup>10</sup> Halfway through the process, the events underway in Washington, DC, began to be discussed within the framework of Meeting of Senior Officials on Human Rights and Foreign Ministries of MERCOSUR, and an extraordinary meeting was even organized to discuss this point exclusively. It was interesting to observe how the positions of the States varied according to the context in which they were speaking (OAS or MERCOSUR).

2013 in order to improve the use of its mechanisms, in line with the States' recommendations. The reform addressed different issues relating to precautionary measures and the individual complaint mechanism, as well as monitoring, promotion, and the universality of human rights treaties.

The reforms to precautionary measures were aimed at increasing the transparency of the criteria used to grant them and to identify beneficiaries, and also sought to improve the follow-up to such measures. With respect to the individual complaint mechanism, the reform offered predictability in the determination of priorities for the examination and admission of petitions. In situations where the admissibility and merits phases could be consolidated, it clarified the criteria for archiving petitions and cases and extended the time period for the submission of observations by the parties. In terms of the monitoring of country situations, promotion, and universality, the reforms were intended to improve the content of each of the chapters of the IACHR's Annual Report.

It is still too soon to know whether the reforms that entered into force on August 1, 2013, have improved the IACHR's capacity to carry out its mandate. Nevertheless, there is some information to indicate that progress has been made in certain aspects of its activities. First, the Commission seems to be giving greater importance to dialogue with the States, which could create an important space for implementing preventive mechanisms. Second, the Commission has significantly expanded its promotion activities, such as the publication of thematic reports and participation in training sessions for civil servants, academics, and nongovernmental organizations. The Commission also seems to have expanded its monitoring capacity; the last *in loco* visit to the Dominican Republic, at the end of 2013, provides an example of an initiative to reverse national decisions that are contrary to inter-American standards. The number of thematic hearings, country reports, and press releases has also been on the upswing since the beginning of the reform process. Third, in recent months there has been a significant improvement in the material circumstances of the Commission, although the funds available to it are still far from what is needed for the effective fulfillment of its mandate. The IACHR's funding increased from 5 percent to 6 percent of the regular fund of the OAS budget in 2012.<sup>11</sup> The available information indicates that 2013 saw an increase in the sources of funding from specific funds, that is, voluntary donations generally made by countries that are not OAS members.

## Has the discussion ended?

As mentioned earlier, the reform process was carried out in a context in which ideological differences have deepened among

the States of the region and in which certain actors—countries, alliances, and institutions—have gained influence. In this scenario, on one hand, the discussion on “the workings of the IACHR” was mainly a debate about whether, and to what extent, there is still a role for a supranational body with the authority to publicly remind States of their shortcomings in the area of human rights—although that discussion was buried in technical arguments.

The process also made clear that if there is a real desire to strengthen the system, fundamental issues must be resolved. These include the question of adequate funding for the Commission, a matter that was addressed with clarity but on which the States did not reach any specific agreements. Another key issue is universality, that is, the ratification of the American Convention by all of the OAS Member States. This last point is fundamental, as it relates to the basic principle that all OAS Member States should have the same rights and the same obligations. Accordingly, it is unacceptable for some countries not to have ratified the Convention or submitted to the jurisdiction of the Inter-American Court of Human Rights. This issue served as a framework for all of the discussions held and was clearly invoked to diminish the relevance of the United States and Canada in the debates.

Although the universality argument is a solid one, the system's staunchest critics used it in a way that was questionable at the very least: they threatened (and continue to threaten) to withdraw from the OAS if their proposals were not accepted. As far as funding is concerned, a genuine commitment on the part of the States to the work of the IACHR should be reflected in a significant increase in the resources allocated to this body. Most of the recommendations that the States made to the IACHR required it to undertake new activities and initiatives, which were reflected in the changes to its Rules of Procedure, policies, and practices. The “pending” recommendations—including the proposal to relocate the headquarters, which has gained strength in recent months—also entail additional expenses. Nevertheless, to date, the States have not adopted any specific measure or made any agreement to increase funding for the IACHR.

Finally, the process put a spotlight on the numerous weak points and limitations of the OAS, highlighting the possibility that other subregional forums and spaces may emerge as relevant and interested actors in the human rights sphere. Certainly, this could be a step forward in achieving the full enjoyment of human rights in the region. However, it is important to bear in mind that the objective must clearly be to complement existing forums, not to duplicate them.

In conclusion, it is still too soon to fully evaluate the impact of the reform process on the IACHR's ability to defend and promote human rights in the region. But there are reasons to be hopeful—while remaining vigilant—as the critical implementation process continues to unfold. ■

<sup>11</sup> See the IACHR Web page on financial resources, [http://www.oas.org/en/iachr/mandate/financial\\_resources.asp](http://www.oas.org/en/iachr/mandate/financial_resources.asp).

# The Perfect Storm: Count and Balance

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From 2011 to 2013, a perfect diplomatic storm swept the Inter-American Commission of Human Rights (IACHR) to the brink of a decisive institutional setback. Ideological currents and geopolitical shifts challenged the legitimacy of the Commission and also of its parent institution, the Organization of American States (OAS). In this context repressive States were emboldened to escalate their resistance to the Commission. The Commission added self-inflicted wounds caused by missteps that offended even democratic States. In short, under the banner of purportedly “strengthening” the Commission, a severe weakening of the inter-American human rights system was threatened.



The Commission and the Court have achieved all this despite insufficient OAS budgetary and diplomatic support. The Commissioners and judges work part-time and are paid only expenses and modest honoraria. In 2012 the Commission met three times for a total of only five weeks,<sup>3</sup> while the Court met six times for a total of only nine weeks.<sup>4</sup> In 2012 the OAS regular budgetary contribution covered only 55 percent of the Commission’s expenditures of US\$8.8 million<sup>5</sup> and 58 percent of the Court’s expenditures of US\$3.6 million.<sup>6</sup> By comparison,

the annual budget of the European Court of Human Rights is nearly US\$87 million.<sup>7</sup>

Diplomatic support for the IAHRs is also inadequate. About 80 percent of the OAS budget is supplied by the United States and Canada, yet neither is a Party to the American Convention or the Court. This opens the door to claims that the hemispheric “superpower” dominates the IAHRs in order to use it against other States while refusing to submit to the same level of scrutiny. And, in fact, the United States almost never complies with the recommendations of the Commission in cases against it.

## Development and weaknesses of the system

The inter-American human rights system (IAHRS) has compiled an impressive record of achievement. States now universally participate in proceedings before the Commission, with the exception of Cuba. All Latin American States have ratified the American Convention on Human Rights and accepted the jurisdiction of the Inter-American Court of Human Rights, except Cuba and, recently, Venezuela.<sup>2</sup> The Court’s jurisprudence is increasingly respected by national courts. Its reparations orders are sweeping, and they result in a respectable, albeit far from adequate, degree of compliance by States.

<sup>1</sup> A longer version of this article was published as “Regional Human Rights Regimes and State Push Back: The Case of the Inter-American Human Rights System (2011–2013),” *Human Rights Law Journal* 33, no. 1–6 (2013): 1–9.

<sup>2</sup> IACHR Press Release 117/12, “IACHR Regrets Decision of Venezuela to Denounce the American Convention on Human Rights,” September 12, 2012, [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/117.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/117.asp). The notice of withdrawal took effect one year later, as provided in Article 78 of the American Convention.

<sup>3</sup> IACHR, *Annual Report 2012*, OEA/Ser.L/V/II. 147, Doc. 1, March 5, 2013, Chapter II.B, para. 9, <http://www.oas.org/en/iachr/docs/annual/2012/TOC.asp>.

<sup>4</sup> I/A Court H.R., *Annual Report 2012*, Chapter III, [http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng\\_2012.pdf](http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf).

<sup>5</sup> IACHR, “IACHR—Source of Financing and Execution of Resources 2012,” [http://www.oas.org/en/iachr/mandate/finances/Informe%20CIDH%202012\\_web\\_Eng\\_final.pdf](http://www.oas.org/en/iachr/mandate/finances/Informe%20CIDH%202012_web_Eng_final.pdf).

<sup>6</sup> I/A Court H.R., *Annual Report 2012*, *supra* note 4, p. 86.

<sup>7</sup> The European Court’s 2013 budget was 66.8 million euros. At the June 24, 2013, exchange rate (1 euro = US\$1.31), this amounts to US\$86.7 million. See “How the Court Works,” [http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent\\_134615778000\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_134615778000_pointer).

## Recent challenges to the system

Beginning in 2011, a combination of factors threatened to downgrade the already weak OAS diplomatic support for the Commission, a change seen as likely to bring about a dramatic diminution of the Commission's capacity to protect human rights.

Superficially, the crisis was triggered by the question of who effectively appoints the IACHR Executive Secretary—the Commission, or the OAS Secretary General? This, in turn, was an instance of a broader question: Is the Commission truly an independent human rights body, or is it subject to political manipulation?

The Commission's independence would not have been a pressing issue if not for underlying ideological, geopolitical, and institutional issues. The so-called Bolivarian States have championed various attempts to establish organizational rivals to the OAS, such as the Bolivarian Alliance for the Peoples of Our America (ALBA), the Union of South American Nations (UNASUR), the Community of Latin American and Caribbean States (CELAC), the Southern Cone Common Market (MERCOSUR), and most recently, meetings of States Parties to the American Convention.

There is reason to believe, however, that these States' ideological opposition to the IACHR stems in part from their domestic repression. Cuba perennially earns special mention in the Commission's Annual Reports as a problem country, while Venezuela was listed in nine of the last 10 years; Ecuador has been listed once. Venezuela and Bolivia have been the subject of special reports. Ecuador was incensed when the Commission issued precautionary measures over a US\$40 million libel judgment secured by Ecuadorian President Rafael Correa against the newspaper *El Universo*.<sup>8</sup> Serious violations of freedom of the press<sup>9</sup> and independence of the judiciary<sup>10</sup> are also evident in a series of Inter-American Court judgments against Venezuela.

*Independence would not have been a pressing issue if not for underlying ideological, geopolitical, and institutional issues.*

These divides have been aggravated by contemporaneous shifts in regional power alignments. Most important, Brazil has become a global power. In 2012 Brazil surpassed Britain to become the world's sixth-largest economy.<sup>11</sup> A nation of such stature is no longer content to play ball in the US court; hence Brazil's active membership in UNASUR and CELAC. Fortunately, Brazil generally respects a free press and an independent judiciary. When Ecuador tried to rally the States Parties to the American Convention to approve a declaration that would weaken the Commission, Brazil joined other States Parties to block the most extreme proposals.<sup>12</sup>

Brazil is also relevant to the Commission's most consequential misstep in recent years. During 2011–2012, a consensus emerged among not only States but also human rights NGOs that the Commission's high-level communications with States were at times inept. As a result, when the Bolivarian States launched their attack, even the Commission's friends among hemispheric States were slow and half-hearted in defending it. No case was more serious than that of Brazil. Its top infrastructure project under the government of President Dilma Rousseff is the Belo Monte hydroelectric dam, designed to become the world's third-largest hydroelectric generator. The dam was contracted in 2010 and partially licensed for construction in January 2011. However, the project was certain to have dramatic impacts on local indigenous groups.<sup>13</sup>

In April 2011, apparently without prior consultation with Brazil, the Commission issued precautionary measures asking Brazil immediately to halt licensing and construction of the dam, pending consultation processes with all the affected indigenous

<sup>8</sup> PM 406/11 of February 21, 2012. See IACHR, *Annual Report 2012*, *supra* note 3, paras. 22–23.

<sup>9</sup> See, for example, I/A Court H.R., *Case of Ríos v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of January 28, 2009, Series C, No. 194; *Case of Perozo v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of January 28, 2009, Series C, No. 195.

<sup>10</sup> See, for example, I/A Court H.R., *Case of Chocrón Chocrón v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of July 1, 2011, Series C, No. 227; *Case of Reverón Trujillo v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of June 30, 2009, Series C, No. 197; *Case of Apitz Barbera et al. v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 5, 2008, Series C, No. 182; I/A Court H.R., *Order of the Inter-American Court of Human Rights of March 2, 2011, Provisional Measures regarding Venezuela*, Matter of María Lourdes Afiuni, March 2, 2011.

<sup>11</sup> BBC News Business, "Brazil 'Overtakes UK's Economy,'" March 6, 2012, <http://www.bbc.co.uk/news/business-17272716>.

<sup>12</sup> *El Universo*, "Cita de Cochabamba emite declaración final de 6 puntos," May 14, 2013, <http://www.eluniverso.com/noticias/2013/05/14/nota/924241/cita-cochabamba-emite-declaracion-final-6-puntos>.

<sup>13</sup> See Inter-American Association for Environmental Defense, "Belo Monte Hydroelectric Dam," [http://www.aida-americas.org/node/1542?gclid=C-J6ow4GF\\_7cCFQpnOgodTyYafw](http://www.aida-americas.org/node/1542?gclid=C-J6ow4GF_7cCFQpnOgodTyYafw).

communities and measures to protect their lives and health.<sup>14</sup> As a matter of textbook international human rights law, the Commission's request was impeccable, as the likely human rights impacts of the dam on local indigenous communities appeared to be grave. But as a matter of diplomacy, it was an awkward blunder. President Rousseff was furious, and Brazil proceeded to grant a full construction license for the dam.<sup>15</sup> In addition, Brazil recalled its ambassador from the OAS, withdrew its candidate for the Inter-American Commission, and reportedly withheld its financial contribution to the OAS.<sup>16</sup>

This was a threat not only to the Commission, but to the OAS itself. The Commission backed down. A few months later, having received information from the State, the Commission modified its decision and asked Brazil to implement measures to protect the health, cultural integrity, land, and environment of the affected indigenous communities. The Commission no longer requested a halt to licensing or construction of the dam, and rather than insisting on requiring prior consultation as a precautionary measure, it deferred review of that issue to the merits.<sup>17</sup>

But the damage was done. The Commission's diplomatic overreach achieved no benefit for the indigenous communities that could not have been obtained by more judicious means; the Commission itself was discredited, first for overreaching and then for backing down; and the OAS was institutionally wounded. The fiasco shaped diplomatic perceptions in 2011, just as the OAS process to evaluate the Commission was getting underway. More than a year would pass before Brazil—a democratic country—would lend any support to the Commission in the face of the assaults to which that body was subjected.

## The campaign to weaken the system under the banner of strengthening it

In June 2011 the OAS Permanent Council created 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. In December 2011 the Working Group produced its report.<sup>18</sup> The report raised so many potential threats to the effectiveness of the IAHRs that in January 2012 some 90 civil society organizations from throughout the hemisphere expressed their skepticism of the OAS process.<sup>19</sup>

Nonetheless, the OAS Permanent Council adopted the Working Group's report.<sup>20</sup> There followed more than a year of diplomatic maneuvering, culminating in an Extraordinary OAS General Assembly meeting in March 2013.<sup>21</sup> One strategic dilemma overshadowed the entire process: whether to reopen the Commission's Statute—putting the Commission's future up for political grabs at an unpropitious time—or instead to let the Commission make whatever reforms might be advisable by amending its own Rules of Procedure.

The future of the Commission appeared to be endangered, and there was no guarantee that the Extraordinary General Assembly would have a successful outcome. However, the Commission passed the test. It conducted broad consultations with all stakeholders in the system. It produced a lengthy analysis and constructive response to the recommendations of the Working Group,<sup>22</sup> and accepted all recommendations that could reasonably be adopted. While firmly maintaining its independence, it

<sup>14</sup> IACHR, *Annual Report 2011*, OEA/Ser.L/V/II, Doc. 69, December 30, 2011, Chapter III.c.1, para. 32.

<sup>15</sup> Bradley Brooks, "Brazil Grants Building License for Amazon Dam," Associated Press, June 1, 2011, <http://www.businessweek.com/ap/financialnews/D9NJ88RG2.htm>.

<sup>16</sup> Joint submission to Office of the United Nations High Commissioner for Human Rights from Coalition of Non-Governmental Organizations Concerned about Large Dams in the Brazilian Amazon, "Universal Periodic Review (UPR) Civil Society Submission for Brazil, Universal Periodic Review (UPR) civil society submission for Brazil, 2nd Cycle, 13th Session – Human Rights Violations caused by Large Hydropower," November 28, 2011, [http://www.aida-americas.org/sites/default/files/refDocuments/LargeDams\\_UPRJointSub\\_Brazil\\_2nd\\_Cycle.pdf](http://www.aida-americas.org/sites/default/files/refDocuments/LargeDams_UPRJointSub_Brazil_2nd_Cycle.pdf).

<sup>17</sup> IACHR, *Annual Report 2011*, *supra* note 14, para. 33. In 2012 a federal court in Brazil ordered the construction suspended because of the lack of adequate consultation. Nevertheless, the Chief Justice of the Supreme Court of Brazil authorized the resumption of the work, even though a potential review of the case was pending. Solange Garrido, "Corte Suprema de Brasil autoriza reanudar obras de represa Belo Monte," BioBioChile, August 27, 2012, <http://rbb.cl/3g6v>.

<sup>18</sup> "Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System for consideration by the Permanent Council," OEA/Ser.G/GT/SIDH-13/11 rev. 2, December 13, 2011, available on the Working Group's Web page, <http://www.oas.org/consejo/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>.

<sup>19</sup> CEJIL, et al., "Observations on the Process of Reflection on the Workings of the Inter-American Commission with a View to Strengthening the Inter-American Human Rights Protection System," joint statement signed by over 90 organizations, January 27, 2012, <http://cejil.org/en/comunicados/civil-society-observations-strengthening-inter-american-system>.

<sup>20</sup> OAS Press Release C-018/12, "OAS Permanent Council Approved the Report of the Working Group on the Strengthening of the Inter-American Human Rights System," January 25, 2012, [http://www.oas.org/es/centro\\_noticias/comunicado\\_prensa.asp?sCodigo=C-018/12](http://www.oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=C-018/12).

<sup>21</sup> See OAS General Assembly, "Results of the Process of Reflection on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System," AG/RES. 1 (XLIV-E/13) rev., 44th Special Session, March 22, 2013.

<sup>22</sup> See IACHR, "Reply of the Inter-American Commission of Human Rights to the Permanent Council of the Organization of American States regarding the recommendations contained in the Report of the Special Working Group to Reflect on the Workings of the IACHR with a View to Strengthening the Inter-American Human Rights System," October 23, 2012, <http://www.oas.org/en/iachr/strengthening/docs/RespCPEn.pdf>.



engaged tactfully and diplomatically with OAS Member States.

In the end the Commission prevailed, in the process winning a victory for human rights in the hemisphere. The IACHR Statute was not reopened, and the reforms of the Commission's rules actually strengthened its effectiveness and credibility.<sup>23</sup> It regained broad diplomatic support, while its most strident opponent—Ecuador—was eventually marginalized. The March 2013 Extraordinary General Assembly adopted none of the proposals designed to hamper the work of the Commission.<sup>24</sup> Although its resolution included a face-saving clause for Ecuador instructing the OAS Permanent Council to “continue the dialogue,”<sup>25</sup> efforts by Ecuador and its ALBA allies to reopen the debate at the June 2013 regular General Assembly were unsuccessful.<sup>26</sup>

The victory was by no means entirely due to adroit Commission diplomacy. Civil society spoke up effectively in the Commission's defense.<sup>27</sup> Key diplomats were also supportive, including the chair of the Working Group, Ambassador Joel Hernández of Mexico.

Meanwhile, the leaders of the attack on the Commission, Venezuela and Ecuador, were weakened. As President Hugo Chávez became gravely ill and then died in early 2013, Venezuela's diplomatic clout plummeted. And Ecuador was saddled with a strident foreign minister whose discourteous style and extreme positions eventually wore thin with his OAS counterparts.

Nothing about this happy ending, however, was predictable in December 2011 when, after several months of work, the Working Group made 67 recommendations—53 to the Commission and only 13 to OAS Member States.<sup>28</sup>

## Results of the reform process

Although many elements of the Working Group's report made sense and were accepted by the Commission, other proposals were designed to appear to strengthen the Commission while in fact weakening it. The following briefly summarizes the main conclusions of the process.

*The future of the Commission appeared to be endangered, and there was no guarantee that the Extraordinary General Assembly would have a successful outcome. However, the Commission passed the test.*

*Executive Secretary:* In 2011 the Commission amended its Rules of Procedure to provide for an open, merit-based competition process for selecting the nominee it forwards to the Secretary General. The Working Group acquiesced to the new procedure.<sup>29</sup> In 2012 the Secretary General appointed the candidate put forward by the Commission, Emilio Álvarez Icaza of Mexico.

*Promotion vs. protection:* The Commission neatly side-stepped this debate. It pledged to strengthen its promotional activities but pointed out that many of its protective activities, such as recommendations of guarantees of nonrepetition, also serve a promotional function.<sup>30</sup>

*Country reports:* While agreeing to refine the criteria and modalities for its annual country reports, the Commission declined to eliminate them.<sup>31</sup> It also declined to undertake the mission impossible of drafting an annual report on every OAS Member State every year. The Commission pointed out that it does in fact report on all OAS countries through its petition system and thematic rapporteurships.<sup>32</sup>

*Thematic rapporteurs:* The Commission found a way to be evenhanded among the rapporteurs without diminishing the impact of the Special Rapporteurship for Freedom of Expression, which challengers had hoped to weaken. It agreed to incorporate brief summaries of all rapporteur reports in its Annual Report and to send to the OAS General Assembly not only the annual report of the Special Rapporteur for Freedom of Expression, but also all reports produced during the year by any thematic rapporteur.<sup>33</sup>

*Voluntary contributions of funds:* The Commission, like the Court, currently receives nearly half (46 percent) of its budget not from the OAS regular budget but from voluntary contributions by States, as well as by international and nongovernmental organizations.<sup>34</sup> Many of these contributions are made

<sup>23</sup> The Commission amended certain rules in March 2013. See IACHR Resolution 1/2013, “Reform of the Rules of Procedure, Policies and Practices,” March 18, 2013.

<sup>24</sup> See OAS General Assembly, “Results of the Process of Reflection,” *supra* note 20.

<sup>25</sup> *Ibid.*, para. 2.

<sup>26</sup> See CEJIL, *Newsletter*, 43rd OAS General Assembly, June 26, 2013; OAS General Assembly, Draft Resolution presented by Ecuador, Follow-Up on Resolution AG/RES. 1 (XLIV-E/13) corr. 1, AG/doc.5399/13, June 5, 2013; OAS General Assembly, AG/RES. 2796 (XLIII-O/13), June 5, 2013.

<sup>27</sup> See, for example, the civil society joint statement of January 27, 2012, *supra* note 19.

<sup>28</sup> IACHR, “Reply of the Inter-American Commission of Human Rights,” *supra* note 22, paras. 2 and 18. One recommendation was directed to the OAS Secretary General.

<sup>29</sup> “Report of the Special Working Group,” *supra* note 18, Chapter VII.

<sup>30</sup> IACHR, “Reply of the Inter-American Commission of Human Rights,” *supra* note 22, paras. 36–39.

<sup>31</sup> *Ibid.*, paras. 146–48, 151–53.

<sup>32</sup> *Ibid.*, paras. 149–50.

<sup>33</sup> *Ibid.*, para. 58.

<sup>34</sup> *Ibid.*, para. 194.

for particular purposes, that is, earmarked. The Working Group Report opposed both voluntary contributions and their limitation to specific purposes.<sup>35</sup> Accepting this objection would have resulted in even less funding for the Commission. The Commission decided that it would seek voluntary contributions for general support and continue to accept earmarked contributions so long as they are for activities included in its Strategic Plan.<sup>36</sup>

*Delays and deadlines:* The Commission underscored that its managerial improvements since 2007 had reduced the median time for the initial evaluation of cases from 50 months to 27 months.<sup>37</sup> But it also stressed that continued progress would require additional resources.<sup>38</sup> As for delays in its final decisions, the Commission was candid: cases should not be dismissed because of delays caused by the lack of resources made available to the Commission by the OAS. This would in effect transfer the burden of the States' shortcomings to victims.<sup>39</sup>

*Universality:* Twenty-three OAS Member States—not including the United States and Canada—have joined the American Convention on Human Rights, but only 20 have made the additional declaration required to accept the contentious jurisdiction of the Court.<sup>40</sup> Universality remains a favorite topic for Ecuador and other repressive States Parties to the Convention, which use it to goad the United States. The Commission committed to do a study on the effects of the lack of universal ratification of the inter-American treaties.<sup>41</sup> It also agreed to continue promoting universal ratification.<sup>42</sup> In any event, it is worth recalling the observation of civil society that mere ratification can be hollow.<sup>43</sup>

*Precautionary measures:* Most of the Working Group's recommendations on precautionary measures were useful<sup>44</sup> and were adopted by the Commission.<sup>45</sup>

*Other issues:* The civil society observations also properly highlighted issues that were omitted from the Working Group report, including merit-based criteria and transparent proce-

dures for electing members of the Commission and Court;<sup>46</sup> the need for States to adopt domestic laws and mechanisms to meet their human rights responsibilities;<sup>47</sup> the need for a mechanism to facilitate execution of judgments of the Court;<sup>48</sup> and the need for an open OAS debate to consider the most pressing human rights issues facing the hemisphere.<sup>49</sup>

## A look ahead

The process that unfolded between 2011 and 2013 preserved the inter-American human rights system and in the end served to strengthen it. But debate continues, and the conflict is by no means over.

In January 2014, the Third Conference of States Parties to the American Convention adopted a declaration that resolved to analyze a “possible change of venue” of the Commission's headquarters, with a view to moving its offices from Washington, DC, to one of the States Parties to the Convention.<sup>50</sup> This could marginalize the Commission, distancing its diplomatic work from the States' missions to the OAS and making it impossible for NGOs to conduct proceedings before the Commission and the OAS during the same visit. The States also decided to study “a new institutional framework for the current scheme for the IACHR Rapporteurs.”<sup>51</sup> Nevertheless, four States—Mexico, Costa Rica, Panama, and Paraguay—reserved their positions pending an analysis by the competent OAS bodies, especially regarding the budgetary aspects.<sup>52</sup> ■

<sup>35</sup> “Report of the Special Working Group,” *supra* note 18, part VIII.ii.7.A.

<sup>36</sup> IACHR, “Reply of the Inter-American Commission of Human Rights,” *supra* note 22, paras. 195–96.

<sup>37</sup> *Ibid.*, para. 106.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, para. 107.

<sup>40</sup> The list of signatory countries and those that have recognized the jurisdiction of the Court is available on the OAS website, <http://www.oas.org/en/iachr/mandate/Basics/4.RATIFICATIONS%20AMERICAN%20CONVENTION.pdf>.

<sup>41</sup> IACHR, “Reply of the Inter-American Commission of Human Rights,” *supra* note 22, para. 30.

<sup>42</sup> *Ibid.*, paras. 34–35.

<sup>43</sup> CEJIL, et al., civil society joint statement, *supra* note 19, para. 5(a).

<sup>44</sup> “Report of the Special Working Group,” *supra* note 18, part VII.ii.2.

<sup>45</sup> See amended Rule 25 in IACHR Resolution 1/2013, *supra* note 23, operative paragraph 1.

<sup>46</sup> CEJIL, et al., civil society joint statement, *supra* note 19, para. 6(a).

<sup>47</sup> *Ibid.*, para. 6(b).

<sup>48</sup> *Ibid.*, para. 6(c).

<sup>49</sup> *Ibid.*, para. 6(d).

<sup>50</sup> Tercera Conferencia de Estados Partes de la Convención Americana sobre Derechos Humanos, “Declaración de Montevideo,” January 22, 2014, points 1 and 2, [http://medios.presidencia.gub.uy/jm\\_portal/2014/noticias/NO\\_M078/DeclaracionMontevideo.pdf](http://medios.presidencia.gub.uy/jm_portal/2014/noticias/NO_M078/DeclaracionMontevideo.pdf).

<sup>51</sup> *Ibid.*, point 10.

<sup>52</sup> *Ibid.*

# Reform of the Inter-American Commission on Human Rights: An Endless Process?

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The recent lengthy process to reform the Inter-American Commission on Human Rights (IACHR) culminated, nearly two years after it began, in amendments to the Rules of Procedure approved by the Commission itself on March 18, 2013, by means of Resolution 1/2013. An Extraordinary General Assembly of the Organization of American States (OAS), held in Washington, DC, on March 22, 2013, approved Resolution AG/RES. 1 (XLIV-E/13), which backed the Commission's regulatory reform.

Throughout the process, different reports, resolutions, and opinions from all the actors of the inter-American human rights system fed into an intense debate on the need to reform the Commission in order to strengthen it. Along the way, however, it became clear that the intent of certain States—a minority—was not actually focused on strengthening.

This article aims to extract some lessons for the future of the inter-American system from this IACHR reform process. The starting point is the assumption that both the Commission and the Inter-American Court of Human Rights must indeed continue to be strengthened and that authentic strengthening takes place when, among other things, these bodies are not subjected to an endless reform process.

## Budgetary demagoguery of the States

The latest attempts at reform have demonstrated, once again, that the inter-American system's weaknesses are in large part tied to the paucity of financial resources that affects both the



Commission and the Court. This situation falls within the exclusive responsibility of the Member States of the OAS, which have promised repeatedly to resolve it.

There is an obvious gap between talk and action on the part of the States, specifically in terms of the budget needed by the bodies of the inter-American system. A sort of budgetary demagoguery has been established, which is certainly prejudicial not only for the operation but also for the legitimacy of the entire system. It is paradoxical that the States that still have not ratified the American Convention on Human Rights—the United States and Canada—

are the ones that make the largest contributions to funding the system, while those that have ratified the Convention—and demand that others do so as well—either fail to contribute or contribute meager amounts.

## The strategy of some States for an “eternal reform”

Various indications and events over the course of the most recent reform process made clear the intention of some States to weaken the IACHR. This intention stood in contrast to the genuine willingness of other States and civil society organizations to strengthen the Commission. In spite of the objective defeat of the attempts to undermine the system, a small bloc of States still aims to keep the reform process open and to continue debating such reform *ad eternum*; toward this end, they cite the language in paragraph 2 of the aforementioned resolution passed by the Extraordinary General Assembly of the OAS in March 2013.<sup>2</sup> Although the Commission will continue to need further

<sup>1</sup> A longer version of this article was published as “Último proceso de reforma de la Comisión Interamericana de Derechos Humanos (2011–2013): Reflexiones y perspectivas,” Cuaderno de Trabajo No. 22, Departamento Académico de Derecho de la Pontificia Universidad Católica del Perú, Lima, 2013, <http://departamento.pucp.edu.pe/derecho/images/documentos/versión%20digital-REFORMA%20CIDH%20VERSION%20FINAL.pdf>.

<sup>2</sup> “To instruct the Permanent Council to continue the dialogue on the core aspects for strengthening the IAHRs, bearing in mind all the contributions made by the Member states, the bodies of the IAHRs and civil society throughout the process of reflection...” OAS General Assembly, “Results of the Process of Reflection on the Workings of the Inter-American Commis-

*It is unacceptable that the United States and Canada, more than 50 years after the creation of the inter-American system, have not yet signed the American Convention on Human Rights or accepted the jurisdiction of the Inter-American Court*

improvements and adjustments in the future, these should be exceptional and not an ongoing process. Otherwise, the risk is that the IACHR will be distracted from its main purpose of promoting and defending human rights.

We must take heed of the new strategy that these States were poised to implement after the failure of their challenges in the latest reform process. This consisted of continuing to push reform proposals with the aim of distracting and exhausting the Commission and indirectly keeping it from concentrating on its principal mission—the defense of human rights in the region. Such a strategy, if pursued, would force the Commission to spend its ever-scarce resources on constantly defending against new challenges to its autonomy. The majority of States would do well to make it clear that the time for reform has ended—at least for a good while—and that it is now time to implement the changes adopted.

## **Excessive delay in the processing of petitions and the possibility of consolidating admissibility and merits**

Although civil society organizations defended the IACHR from the challenges raised by some States in this latest reform process, these organizations and the victims have the right to continue to demand greater speed in the processing of individual petitions. This is undoubtedly one of the most serious weaknesses that persists in the inter-American system.

The regulatory reform approved in March 2013 broadened the circumstances—still exceptional—under which it is appropriate to consolidate decisions on the admissibility and merits in order to speed up the processing of certain petitions. Along these lines, in view of the Commission's growing caseload, consideration should be given to the possibility of making a rule of what, for now, remains an exception: that is, allowing the IACHR to decide the admissibility and the merits of a case in a single report.

sion on Human Rights with a View to Strengthening the Inter-American Human Rights System,” OEA/Ser.P, AG/RES. 1 (XLIV-E/13) rev. 1, July 23, 2013, para. 2.

It would be sufficient for the Commission to “begin processing” the petition and give notice to the State, following a preliminary examination of whether a petition meets the formal admissibility requirements. In this way, the IACHR could expedite the processing of individual petitions.

## **Noncompliance with the decisions of the Commission and the Court**

Another weakness of the inter-American system is the high degree of total or partial noncompliance with its judgments and reports on the part of the States. Although the Commission could strengthen its function of human rights promotion—as requested by the States, precisely to reduce the level of noncompliance—it must do so without sacrificing its function of protection, which is reflected in the individual petition system.

Certainly, the solution to this obvious weakness with respect to compliance is up to the States themselves, which voluntarily ratified the inter-American instruments. In any case, the Commission can reinforce its role of promoting, advising, and supporting the States without in any way sacrificing its protection role.

## **Necessary universalization of the inter-American system**

It is unacceptable that the United States and Canada, more than 50 years after the creation of the inter-American system, have not yet signed the American Convention on Human Rights or accepted the jurisdiction of the Inter-American Court. It is unacceptable for the system to continue to exhibit different levels of legal obligation on the part of the States. By the same token, it is regrettable that Venezuela followed through on its threat to withdraw from the American Convention, an act that has undoubtedly been a step backwards in the consolidation and universalization of the system.

Paragraph 8 of the resolution adopted by the Extraordinary General Assembly of the OAS on March 22, 2013, resolved to “urge OAS member states to ratify or accede to, as appropriate, all inter-American human rights instruments, especially the American Convention on Human Rights, and to accept, where applicable, the contentious jurisdiction of the Inter-American Court of Human Rights.”

Nevertheless, it is essential to bear in mind that this situation relates only to the Court and does not affect the jurisdiction of the Commission with respect to each and every one of the Member States of the OAS, including the United States and Canada. This is evidenced by the reports, the public hearings, and the press releases pertaining to human rights violations committed in those countries.

## The more precarious the national justice system, the greater the involvement of the inter-American system

All of the actors have affirmed the subsidiary status of the inter-American system in relation to national justice systems—that is, that the system's bodies intervene only in the event that the victims' rights are not protected at the national level. Nevertheless, this affirmation must be tempered by recognition of a very real fact: the weakness and precariousness of our national justice systems. They often fail—at times not out of lack of political will, but rather because of structural weaknesses—to investigate, prosecute, and convict the perpetrators of serious human rights violations within a reasonable time period. This ultimately makes it necessary for a subsidiary justice system such as the inter-American system to intervene actively in order to protect the human rights enshrined in the American Convention.

There is a proportional relationship between national justice systems and the inter-American system: the weaker and more precarious the former, the greater the need for intervention by the latter. Conversely, as national justice systems are consolidated and legitimized in their respective societies, the intervention of the inter-American system will tend to diminish and it will assume its true subsidiary role.

## The organic design of the IACHR must be adapted to current challenges

Although the organic design of the Commission was not a central part of the debate in the latest reform process, it was decided that the regulatory reform approved by the IACHR would include “the permanent presidency as an institutional priority” in its strategic plan. This is a measure that goes against the current “nonpermanent” and “*ad honorem*” character of the Commissioners and judges of the bodies of the inter-American system, which is part of an institutional design created for a different moment in the system's evolution and for a social reality that no longer exists.

We now have a greater awareness of rights, and there are new petitioners on the inter-American stage (such as indigenous peoples, sexual minorities, etc.). There are also new human rights violations linked to structural problems that persist in our imperfect democracies: punitive demagoguery with regard to security; discrimination against or exclusion of broad sectors of society such as women who are victims of violence; social conflicts related to the environment and sustainable use of natural resources; collapsed penitentiary systems, and others.

In order to respond efficiently to these new hemispheric challenges pertaining to democracy and human rights, the inter-American system must evolve in a gradual but sustained manner until it has permanent, exclusively dedicated Commissioners and judges. This will certainly require greater efforts in terms of budget, but it is central to the consolidation of the system.

## Promotion and protection: A difficult balance

Looking to the future of the inter-American system, it is important to reflect on the balance between the two roles assigned to the IACHR by the American Convention: promotion and protection. Certain States, particularly in relation to the Special Rapporteurship for Freedom of Expression, aim to use that balance between the dual roles to achieve a downward leveling: to have the Commission do less of what it now does most. By this strategy, they seek to weaken the inconvenient rapporteurships in particular and the petition system in general.

Beyond these intentions, it is true that two different, albeit complementary, roles have been assigned to the IACHR, and their articulation could be improved. For example, a State's compliance with the decisions of the system could be improved through *ex ante* or *ex post* consultation or responses to queries that the Commission could provide to the public servants in charge of their implementation. Certainly, a clear boundary should be maintained within the Executive Secretariat between the staff in charge of the role of promotion (possible advising of some States) and those in charge of the individual petitions.

Former Commissioner Víctor Abramovich maintains that nowadays, with its case decisions, the IACHR not only aims to adjudicate an individual petition but also seeks to influence the public policies of a country on a specific issue, and that this indeed requires better coordination between the roles of promotion and protection.<sup>3</sup> ■



Please send comments and possible contributions for this publication to [info@dplf.org](mailto:info@dplf.org).

<sup>3</sup> “It is common to observe that the individual decisions made in a case tend to impose obligations on the State to formulate policies to redress the situation that gave rise to the petition, and even establish the duty to address the structural problems that are at the root of the conflict examined.” Víctor Abramovich, “De las violaciones masivas a los patrones estructurales: Nuevos enfoques y clásicas tensiones en el Sistema Interamericano de Derechos Humanos,” *Derecho PUCP: Revista de la Facultad de Derecho de la Pontificia Universidad Católica del Perú*, No. 63 (2009): 100.

## A New IACHR for a New Context

Ernesto de la Jara

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The paramount task at the moment is to consider the future of the Inter-American Commission on Human Rights (IACHR) in terms of challenges. Nevertheless, it is also critical that we continue to exchange ideas on the significance of what has happened over the past two years, as this can help us understand the current situation and the different scenarios that might arise.

I am one of those who believe that the true aim was not to strengthen the IACHR, but rather to weaken it, when the General Assembly of the Organization of American States (OAS) held in El Salvador in June 2011 decided to create the Special Working Group and tasked it with drafting a final report setting forth recommendations and changes.

It must be admitted, as many have acknowledged, including the commissioners themselves, that it was indeed time to make various changes to the IACHR's Rules of Procedure, taking into account its actions in recent years (strengths, weaknesses, and deficiencies) and the changing social and political context in the region. But the attempt at transformation undertaken in 2011 was not essentially oriented along these lines. The legitimate need for change was a mere pretext, concealing the true intentions of at least some States.

Several factors support this thesis. The first is that it was strange to propose a reflection process concerning only the IACHR, leaving aside the Inter-American Court of Human Rights, when both bodies are tightly connected in vital aspects of the workings of the inter-American human rights system. It was thus clear that the problem identified pertained specifically to the IACHR.

Even stranger was that the initiative came from the OAS bodies (the General Secretariat, the General Assembly, and the Permanent Council), whose workings have been, and continue to be, called into question much more than the Commission's. Would it not have been more logical to propose an overall re-



flection on the OAS, beginning with a serious self-examination?

Second, one must look at the context in which the reform process was proposed and developed. As many observers have noted, it is no accident that it came at a time when several States were bristling with anger at the IACHR. Venezuela, Ecuador, and Bolivia had for a long time been indignant at the challenges to them by the IACHR, especially by its Special Rapporteurship for Freedom of Expression. Those countries defended themselves by asserting that the IACHR's criticism was explained by United States influence on the Com-

mission, which had become subject to manipulation and ideology. Why, then, would they want to maintain and strengthen it?

Brazil had also expressed outrage when the IACHR issued a precautionary measure to halt the construction of the Belo Monte dam. The reaction by Brazil, now the most powerful country in South America, led to a debate—a valid one—as to whether the Commission's decision had been correct or whether it had been abusive or precipitous. Critics asserted that the Belo Monte issue required an analysis based on technical assessments that the IACHR could not easily perform with the necessary rigor, given its lack of human and financial resources.

As if all the above were not enough, with the reform process already underway, the IACHR submitted to the Inter-American Court the case of the extrajudicial executions allegedly committed in 1997 during the operation to rescue 72 people kidnapped by the Túpac Amaru Revolutionary Movement at the Japanese ambassador's residence in Peru. This led to the rejection of the Commission by broad sectors of the Peruvian public. Moreover, the Peruvian authorities felt that they had been duped, since, it was made known, the then-President of the IACHR, Dinah Shelton, had reportedly told them that the case had not yet been submitted to the Court.

At the same time, several States were questioning the IACHR for pursuing a type of action that, they insisted, was ap-

propriate to a past era of dictatorships and not to the current democratic era.

In casting doubt on the true intention of strengthening the Commission, we must also ask who were the first people to promote this reform process. One of them was Hugo de Zela, then the permanent representative of Peru before the OAS, who was elected to be the first Chairman of the Special Working Group. This is a person who for nearly a decade had close ties to the Fujimori administration, a political regime totally opposed to the inter-American system, which even tried to leave the system by withdrawing its recognition of the contentious jurisdiction of the Inter-American Court—a move declared inadmissible by the Court itself. Why, then, would de Zela's priorities include the strengthening of the Inter-American Commission?

The Secretary General of the OAS himself, Miguel Insulza, under whom de Zela became cabinet chief, cannot by any measure be considered a defender of the Commission. Let us recall that at the same time the reforms were being discussed, he declared that the precautionary measures granted by the IACHR were nonbinding. Therefore, it is not plausible that a process aimed at strengthening the IACHR would be promoted by his administration.

Another telling fact is that the reform advocates never sufficiently addressed the positive balance of the IACHR's operations. This is not a matter of idealizing the IACHR or defending it unconditionally, much less of denying its errors and shortcomings; but taking account of all the pluses and minuses, the outcome is objectively positive. Although the Commission was commended throughout the reflection process, it was always in a formalistic way, like saluting the flag. If this positive balance had been the starting point, it would have been impossible for the reform agenda not to address key bottlenecks that keep the Commission's good performance from improving. For example, more emphasis would have had to be given to problems like the backlog of cases, or the States' failure to comply with the decisions.

Indeed, there were many institutions and individuals who saw this process as a threat to the Commission: national, regional, and international nongovernmental organizations (NGOs), journalists and media outlets, staff of international cooperation agencies, academics, representatives of States, former commissioners, and—significantly—several active commissioners, as well as other IACHR officials. There were nuances, to be sure, but many expressed concern about the potential for disastrous results. It is hard to believe that so many people with specialized knowledge of the inter-American system would be imagining things.

Undoubtedly, not all of the States had the same restrictive intentions. This was made abundantly clear when the maximum agenda of the most hardline sector against the IACHR, the four

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South American members of the ALBA alliance, was set. It included proposals such as barring the Commission from issuing precautionary measures, or subjecting them to such strict requirements that it would become impossible to grant them; rendering the Special Rapporteurship for Freedom of Expression ineffectual by finding a way to reduce its funding and lower its profile; having the IACHR engage fundamentally in the promotion of human rights, to the detriment of the petition system; and, finally, having the financial resources of the Commission come exclusively from the Member States of the OAS—a restriction that could both reduce the scale of its activities and undermine its independence.

In terms of the results obtained, it appears that this attempt to weaken the IACHR was a failure. Precautionary measures are now more limited and regulated—which is not a bad thing, unless an absolutely restrictive interpretation is made at a later time—but the IACHR retains its power to grant them. The attempt also failed to weaken the Commission's role in the processing of cases. The Special Rapporteurship for Freedom of Expression kept its special character and will be entitled to the same financial resources as before, although they could become more difficult to obtain because one of the final recommendations was for financial contributions to the IACHR to go preferentially into a common fund.

## A not so happy ending?

Some have argued that this outcome is proof that those who warned that the reform could do more harm than good were alarmist or misguided, but this is a debatable assertion. First of all, we have to look at the circumstances that prevented some States from being able to strike the blows they wanted to deliver to the IACHR. Second, it would be absurd to believe that there has been a happy ending and that the IACHR has indeed come out of the process stronger than before.

The moves that were decisive in curbing the ill intent against the IACHR include the positions that were adopted by some States in the end. Brazil, for various reasons that would require a lengthy explanation, ceased to be part of the radical core of countries opposed to the IACHR. Mexico, another State

*The Commission knows that several States have it in their sights, even after all the changes that have been made; therefore, it feels threatened—perhaps as never before, not even during the era of the dictatorships.*

that carries significant weight in the region, decided to lead the defense of the IACHR and did so using very effective and professional strategies. Countries such as Argentina and Peru agreed with some of the criticisms of the Commission, in addition to having good reasons to prefer not to confront the ALBA nations; but at the same time, they could not be the ones to tip the scales against the IACHR, considering that it has come resolutely to their aid in their democratic transition processes.

The strategies adopted by the IACHR commissioners were also decisive. They promptly made proposals that included changes that were objectively necessary and could not be put off, but also others designed to make concessions so they could remain firm on nonnegotiable points. This was all done without drama, making good use of every forum of participation.

Civil society played an extremely important role in the discussions. A broad and diverse movement arose, allowing for different and complementary initiatives to come together.

The Inter-American Court could have helped avoid certain risks but decided not to intervene—whether because it considered the matter to be someone else's battle, or because it thought it had no reason to be concerned, as expressed on repeated occasions by Diego García Sayán, its President until the end of 2013.

Regarding the belief that there was a happy ending or that the dangers have subsided, several elements must be considered. The most negative result of the process was not, as we have seen, the content of the changes made to the Rules of Procedure, but rather what could be called collateral effects. We will mention just a few. The Commission was made to sit at the defense table for two years while different authorities passed judgment on it. This kept it from being fully engaged in its work and also allowed its usual enemies to take advantage of the situation to gin up suspicions and challenges.

As a result, new spheres have been created in which the Commission can be challenged, directly or indirectly, by the group consisting only of those countries that recognize the Court, as well as by UNASUR and MERCOSUR, spaces in which those States can begin to create forums parallel to the IACHR. None of this is necessarily bad, but it poses risks.

At this point it is clear that the countries that sought to weaken the IACHR aim to provoke continuous questioning of

the Commission. This situation could permanently hobble the Commission in carrying out its functions. It also means that the changes proposed from the outside are likely to reflect the mood of the governments, provoked by whatever measures the IACHR takes with regard to them, rather than following a comprehensive reform plan.

While it is true that a majority of States restrained the group that wanted the final resolution to provide explicitly for the continuation of the reform process, that same majority was close to allowing a candidate put forward by the Ecuadorean government to become a member of the IACHR. That would have been interpreted as rewarding the bloc of countries most critical of the IACHR and, indeed, would have let in a Trojan horse.

The interpretation of the resolutions and changes approved to date makes it possible to assert that the outcome of the process, at least so far, is much better than expected. Nevertheless, given the diplomatic ambiguity of many of the terms, nothing prevents the States from putting forth restrictive interpretations in the future.

There is one last collateral effect that warrants concern. The Commission knows that several States have it in their sights, even after all the changes that have been made; therefore, it feels threatened—perhaps as never before, not even during the era of the dictatorships. The question, then, is: How much will the Commission have to restrain itself, or even retreat, to keep the sword of Damocles from falling?

Going forward, the situation of the IACHR will continue to depend on what the different actors do. The IACHR must act in an extremely rigorous and painstaking manner, not because it can be accused of not doing so in the past—beyond the errors and shortcomings inherent in every organization—but rather because the cases and situations it deals with now are more complex and ambiguous than the human rights violations linked to dictatorships or armed conflicts.

Without giving up its *raison d'être*, the IACHR must pursue a rapprochement with the States, encouraging friendly settlements or helping to improve domestic legal systems, among other efforts. Although they may be controversial and not easy to put into practice, I am thinking of proposals that seek, for example, to have the IACHR help those democracies that are committed to redressing the abuses that took place under the dictatorships of the past, as well as efforts to get certain States to persuade others of the need to accept the consequences of the inter-American system's decisions.

It is also crucial to join forces to meet the enormous demand in relation to individual cases, which keeps increasing in spite of already being unmanageable. At a meeting held in Lima in September 2013, various important regional institutions debated whether it was appropriate to establish criteria for the prioritization or consolidation of cases. It was also sug-



gested that NGOs must not only avail themselves of litigation but must also use other instruments that are part of the inter-American system.

The role played by the new commissioners, together with the incumbents, will be decisive. At this stage, considerable negotiating skill and flexibility are required, as well as courage and the ability to confront any attempts to make the IACHR a body that has no real power to oversee the States.

Finally, a way must be found to confront an issue that undermines the legitimacy of the IACHR: the role of the United States and Canada. Notwithstanding the ideological approach to this issue during the reform process, the objective point is that those countries are at fault for still not having ratified the Amer-

ican Convention. Their failure to do so is cited as a basis for questioning the legitimacy of the Commission and the Court, and for proposals such as moving the IACHR's headquarters to a State that has in fact ratified the Convention. It is very important that the IACHR increasingly use its authority to hold the United States accountable; accordingly, the Commission made some very pertinent decisions during 2013 on matters including Guantánamo, drones, surveillance of communications, and migrants.

The conclusion could be that, just as the IACHR was able to survive and become stronger during times of dictatorships and armed conflicts, it must learn to do the same in dealing with the imperfect democracies of the twenty-first century. ■

## Discussion with President Carter on the Reform of the Inter-American System



**Left to right: President Jimmy Carter, Jennifer McCoy from The Carter Center, Katya Salazar from DPLF and Marcelo Varela from the Carter Center.**

de Jesús Orozco, and IACHR Executive Secretary Emilio Alvarez Icaza also took part.

Before opening the discussion, President Carter recognized the important role of the IACHR in the region. He recalled that although the inter-American human rights system was created during a period marked by military dictatorships in the hemisphere, democracies are also imperfect and require a system that supports their own efforts to ensure the protection of human rights. He later asked the representative of Mexico—a former Chairman of the OAS Permanent Council—to offer an analysis of the reform process.

As part of this very respectful dialogue, Carter also wanted to understand the criticism that some States had expressed regarding the IACHR document. Accordingly, he addressed the representatives of Ecuador, Venezuela, and Bolivia, who outlined their disagreements with certain aspects of the reform proposal but clarified that they were not interested in diminishing the work of the IACHR. In general, the participants affirmed their commitment to strengthening the inter-American system and dismissed the notion of undermining its credibility and effectiveness.

The meeting provided an opportunity for the exchange of opinions among senior OAS officials and President Carter, who expressed to the representatives of the OAS Member States, to the Secretary General, and to the IACHR authorities his interest in participating in another debate on the IACHR in the near future.

**O**n March 5, 2013, a private meeting was held between former US President Jimmy Carter and several representatives of Organization of American States (OAS) Member States regarding the reform of the Inter-American Commission on Human Rights (IACHR). The meeting was hosted by Katya Salazar, Executive Director of the Due Process of Law Foundation, and Dean Claudio Grossman of American University, in view of President Carter's interest in deepening his knowledge of the arguments surrounding the document drafted by the OAS Working Group. The meeting was attended by the representatives of Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, Haiti, Jamaica, Mexico, Paraguay, the United States, Uruguay, and Venezuela, among others. OAS Secretary General José Miguel Insulza, IACHR President José

# The OAS and Human Rights after the Strengthening Process

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“Nothing is going to happen, because nothing ever happens at the OAS.” Colombian foreign minister María Ángela Holguín’s ironic response barely veiled her skepticism when she was asked, over a year ago, how she viewed the process of strengthening the inter-American human rights system then underway. Today, the foreign minister would most likely say that her prediction was right: in the end, the strengthening process did not go anywhere. There was a big fuss and a great deal of drama, but everything stayed the same in the end.

However, an evaluation of how far the process went, and the effects it had and will have, must go beyond simply confirming whether the instruments of the system were altered. The American Convention on Human Rights was not amended; the Statute of the Inter-American Commission on Human Rights (IACHR) did not change; and only certain articles of the Commission’s Rules of Procedure were amended. But the inter-American human rights system is not the same, and the greatest repercussions of this process will be seen with the passage of time.

Monitoring the issue will be vital in setting the new course that will guide the protection of rights in the Americas. The likely impacts will be evident in three contexts: in the internal work of the protection bodies, in the political decision-making bodies of the States, and in the Organization of American States (OAS) as an institution.

## The risk of ending up “more Catholic than the Pope”

Fueling the drive for reform was the notion that the bodies of the inter-American system—and particularly the Inter-American Commission—were obsolete and had been co-opted by certain countries to become instruments of ideological persecution. This idea was reflected in arguments that the IACHR should “adapt to the new times and new democracies” in the



region. Critics of the system also maintained that the headquarters of the IACHR could not be located in a country that has not ratified the American Convention, and that its rapporteurships could not receive funding from States that are “enemies of the progressive governments of the Americas.”

In the end, many of the reform proposals were aimed at curtailing the powers of the IACHR and were not necessarily linked to these supposed shortcomings. Indeed, the changes that were made to the Rules of Procedure—rather than attacking the supposed systemic problems in the protection of rights, such as the

lack of universal adherence to the American Convention, the noncompliance with decisions, and the chronic lack of adequate funding to enable the bodies to fulfill their mandates—restrict the IACHR’s framework of action for the performance of some of its functions.

The decision to reform the legal framework was not an easy step. At the time, it was a decision that carried more than a whiff of politics, made in an environment with very little room for maneuver. By amending the rules, the IACHR managed to avoid the proposal to amend the Statute that was brewing in the Permanent Council and that would likely have severely curtailed the Commission’s functions. In taking the initiative, the IACHR not only regained control of the process but also sent a political message to certain States, who took this as a call to dialogue.

The risk is that this strategic move will become institutionalized, that the IACHR will restrict its powers in order to avoid stirring up a hornet’s nest, and that it will end up, out of fear, serving the most despicable interests of governments that do not want to comply with human rights standards. If the IACHR turns timid when it comes to confronting the powers whose conduct necessitates its intervention, the fight to defend its mandate will have been in vain. Obviously, this does not mean that the IACHR

should ignore complicated and highly toxic political contexts, such as the one that drove the strengthening process. Nevertheless, the fact that the process has not formally come to a close (even though it has ended in practice) means that governments, whether or not they are close to the Commission, can always say: “If you don’t defer to us, we will restart the reform process.”

The IACHR must not be haunted by this ghost. With its new composition, the body must be clear about this—not only because of the current political situation, discussed further below, but also as an institutional strategy. Right now, the fundamental change that should be the result of this process is an internal strengthening of the IACHR, both in its cohesion as a collegial body and in its relationship with the States and the fulfillment of its mandates.

The IACHR has the opportunity to take advantage of the momentum of this discussion to further three historical debates that remain unresolved. The first concerns the slowness of the individual petitions system. Users, States, and protection bodies are already aware that the current system has collapsed and that with minimal changes to the rules and only modest injections of funding, the current system will continue to be plagued by shameful delays. The time has come to seek different options for confronting the problem and to find innovative approaches to this mechanism. It is a difficult discussion: there is no magic formula for striking the proper balance between access to the system and its ability to serve the ends of justice fairly and within a reasonable period of time. But the difficulty does not justify continuing to allow the slow but perceptible crumbling of the current model.

The second issue that must be forcefully introduced—before it is forgotten—is the necessary relationship between international human rights standards and the monitoring of public policy efforts. The IACHR has gradually become a sort of quasi-judicial forum, but not in every case does it have the power to initiate public policy dialogues with the States. An important door will be opened if this relationship can be made stronger and more productive.

The third major issue concerns the inequality agenda and the treatment of economic, social, and cultural rights (ESCR). The most unequal region of the world has made no serious attempt to understand inequality as a violation of human rights. Issues of economic, social, and cultural rights have always been secondary in the region. This situation was used by a bloc of countries—the so-called ALBA bloc—that raised valid critiques, but with a hidden intent.<sup>1</sup> In the end, they criticized the system’s inaction with

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regard to ESCR not to bolster the protection of those rights, but rather to seek a downward leveling of the work on other rights, bringing those efforts in line with the negligible efforts in the area of ESCR.

It is therefore essential that the region begin to seriously confront the major challenges of social and economic inequality that beset the hemisphere. This requires not only developing a work strategy and agenda within the IACHR (which should be led by the recently created ESCR Unit), but also working with the States to implement Article 19 of the Protocol of San Salvador. In December 2013, 25 years after the adoption of the Protocol, the States finally approved the indicators by which progress toward the satisfaction of the Protocol rights will be monitored through the reporting system. It will be critical from this point forward for the States to take seriously the task of reporting; for civil society (NGOs, research centers, universities, and State human rights institutions) to foster discussions about the reports; and for information generated by the States to be challenged.

## Political forces and alliances

The strengthening process has not only had repercussions inside the human rights protection bodies. It has also helped shift the political calculus in the region. Ultimately, the battle for the human rights system ended up being an excuse to gauge and test alliances of political interests. This sent political shock waves through the region, with not insignificant results.

Leaving aside the reasons behind the reform proposals, the discussions at the OAS have been interesting and refreshing. Finally, the OAS became a forum for multilateral discussion in which different sectors took opposing positions and debated them in order to persuade other States. The logic of imposition, which has been common in this scenario, was absent. No one held a clear majority, and as a result the political work of discussion became important.

One of the main problems with the decision by the Extraordinary General Assembly in March 2013 to continue the dialogue

<sup>1</sup> The Bolivarian Alliance for the Peoples of Our America (ALBA) currently has nine members: four in Central and South America and five in the Caribbean. In the context of this article, however, references to the ALBA bloc refer to the four countries in Central/South America, namely Ecuador, Bolivia, Venezuela, and Nicaragua, which were the ones pushing for the most drastic reforms to the inter-American system. The Caribbean ALBA countries did not take a strong position in the debate.

*A mass exodus of States from the jurisdiction of the Inter-American Court of Human Rights does not appear to be imminent, in spite of the risk that Ecuador might follow Venezuela's path in leaving the Court. This risk should not be underestimated, but it also should not be exaggerated to the point of paralyzing the system's activities.*

was the possibility that the reform process would remain open—in which case the States interested in undermining the system would have been allowed to hold a permanent sword of Damocles over the Commission that they could use at their convenience. The resolution of the General Assembly clearly states that the process is closed, but at the same time it says that each of the closed topics can be discussed again in the future.

Further dialogue on these issues cannot be prevented. The OAS is a forum for political discussion, and therefore issues concerning the organization will always be open for debate. But in reality, it is far from likely that the matter will be reopened as a formal political process within the OAS. The energy and resources that all the States invested over a period of more than two years have been exhausted. To embark on another political project of this scale would be extremely costly. Stated simply, the countries are tired of this discussion and would prefer to invest their time and energy in other matters. And some governments of the ALBA bloc of nations have made this known.

The supposed disintegration of the system—which would take place the very next day, if the reform demanded by the ALBA nations were not accepted—also has not happened. A mass exodus of States from the jurisdiction of the Inter-American Court of Human Rights does not appear to be imminent, in spite of the risk that Ecuador might follow Venezuela's path in leaving the Court. This risk should not be underestimated, but it also should not be exaggerated to the point of paralyzing the system's activities.

So, the political games will continue to be played through the same old institutional channels—for example, political jockeying to ensure a composition of the protection bodies that is favorable to one side or another. When OAS Secretary General José Miguel Insulza, during the final phase of the strengthening process, was asked his opinion regarding the amendment of the American Convention, he said simply, “If the States do not want nationals from the States that have not ratified the Convention to serve on the Commission, they do not need to amend any instruments. It is easier than that. Just don't vote for them.”

The States arrived at the 43rd General Assembly in Guatemala in June 2013 with this perspective. The predictions seemed

clear: Brazil and Mexico, which had been the major political leaders of the process, would have no problem getting their candidates elected; following an obsessive campaign by Ecuador to push the United States out of the way, the Ecuadorean candidate would lose an election in the OAS for the first time. But the predictions did not come true in their entirety. Although Mexico managed to have its candidate reelected nearly by acclamation, the campaign against the United States was unsuccessful and the candidate from Brazil went unexpectedly to a run-off election, defeating the incumbent Colombian Commissioner by a tight margin.

Many conclusions can be drawn in this scenario, but two may be particularly useful in thinking about the future of the system. First, however much the discussion was between South Americans and the United States, the Caribbean nations continue to be a very important force that can tip the balance in the OAS. And it appears that Brazil still does not have the weight it would like to have. Second, alliances are ephemeral because interests are volatile. A change in government or strategy, and yesterday's votes are lost today—or they are won, as demonstrated by the fact that Mexico, a fierce defender of the IACHR in this process, might not continue to be.

## Perspectives in the OAS

Although the issue of human rights is not the main topic of concern in the political forums of the OAS today, two ongoing processes may affect this agenda positively or negatively. The first has to do with the upcoming changes in the General Secretariat of the OAS. The 2014 General Assembly must decide who will replace Chilean national José Miguel Insulza as Secretary General. Insulza's term has been highly criticized, and he will undoubtedly not be missed by many. In particular, a broad human rights sector has been very critical of the role played by the secretary in enabling the reform process to go forward, endangering the independence of the IACHR. But what Insulza's time in office makes clear is that the Secretary General of the OAS today plays a key role in shaping the human rights agenda—for better or for worse. A good Secretary General can be a great help, and a bad one can do a lot of damage.

The second process to be initiated—and it may be beneficial, detrimental, or insignificant—is the current discussion on the reform of the OAS. So far, the process has not had much leadership, and it is not known whether it will gather sufficient momentum to result in any serious proposal. But its course must be monitored very closely. As we have seen, anything can happen, and a process can gain momentum overnight. The OAS has already demonstrated that it is not such a boring and stagnant place after all—even if Foreign Minister Holguín believes otherwise. ■

# What More Is Needed to Strengthen the Inter-American Human Rights System?

Viviana Krsticevic and Alejandra Vicente

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The past two years have seen an intense debate regarding the inter-American human rights system, concluding with amendments to the Rules of Procedure of the Inter-American Commission on Human Rights (IACHR).<sup>1</sup> Nevertheless, the new realities emerging in various countries and the demands for justice that persist in the region pose challenges that must be tackled by the bodies responsible for guaranteeing and ensuring the protection of the rights of victims. This article offers several proposals for work toward the common objective of strengthening the system, using the least obvious consequences of the reflection process and the resulting reforms as a reference point.<sup>2</sup>



codify internal working practices and guidelines, many of which were already being implemented within its Secretariat. Other reforms reflected concerns expressed by States throughout the process and raised the possibility of limiting international protection, for example, through the expansion of the grounds for shelving petitions and cases or the denial of protective precautionary measures if the Inter-American Court of Human Rights rejects provisional measures in the same matter.<sup>3</sup>

Once these amendments had been adopted by the IACHR, the debate in the OAS formally ended on March 22, 2013, at a tense Extraordinary General Assembly.<sup>4</sup> After hours of discussion, the States acknowl-

edged the reforms made by the IACHR and resolved to close the reflection process.<sup>5</sup> Nevertheless, the debate had additional

## Implications of the reflection process

Officially, the results of the debate were limited to the IACHR's adoption of several amendments to its Rules of Procedure that

<sup>1</sup> The debate, which took place between 2011 and 2013, revolved around the "Reflection on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System," a formal process launched by the States of the Organization of American States (OAS). Beyond the official discussion, the proposals of certain States gave rise to parallel debates, some fostered by the IACHR itself and others in inter-State forums such as UNASUR (Union of South American Nations), in the media, through civil society initiatives, and in academia. All of them examined the role of the protection bodies of the inter-American system, their achievements and shortcomings, their powers, and their future.

<sup>2</sup> Other publications have provided more detailed analysis of these debates, the proposals made, and the actors, key moments, and outcomes. See CEJIL, *Memoria histórica del proceso de reflexión del Sistema Interamericano de Derechos Humanos, 2011–2013*, <http://cejil.org/publicaciones>, and CEJIL, *Proposal to Improve the Inter American System of Human Rights: CEJIL's Response to Permanent Council's Document*, Position Paper 6 (2012), [http://cejil.org/sites/default/files/PolicyPaperN6\\_0.pdf](http://cejil.org/sites/default/files/PolicyPaperN6_0.pdf).

<sup>3</sup> For a detailed analysis of each of the amendments to the IACHR's Rules of Procedure and their consequences, see CEJIL, *Apuntes sobre las reformas al Reglamento de la Comisión Interamericana de DD.HH: Cambios derivados del Proceso de Reflexión 2011–2013*, Position Paper 8 (2013), [http://cejil.org/sites/default/files/Documento%20de%20Coyuntura%20N%C2%BA%208\\_2.pdf](http://cejil.org/sites/default/files/Documento%20de%20Coyuntura%20N%C2%BA%208_2.pdf).

<sup>4</sup> Regarding the positions taken and developments at the Extraordinary General Assembly, see OAS, *XLIV Extraordinary General Assembly of the OAS: Final session* (audio recording, March 22, 2013), [http://www.oas.org/oaspage/audio/eng/archives/programs/a2013/mar/03-22-13\\_44th\\_ega\\_close.mp3](http://www.oas.org/oaspage/audio/eng/archives/programs/a2013/mar/03-22-13_44th_ega_close.mp3).

<sup>5</sup> The Assembly took note of the reforms adopted by the IACHR and requested that the IACHR proceed to implement them, strengthen the promotion of human rights, and put into practice the pending recommendations of the States. The States were invited to make voluntary contributions to the system, preferably not earmarked, and the Secretary General was asked to analyze the costs of the full operation of the system's bodies. The Assembly also proposed the strengthening of all of the rapporteurships of the Commission, including by giving consideration to granting special status to all existing thematic rapporteurships. Finally, the States were urged to attain the universality of the system. OAS General Assembly, Resolution of the

*Useful steps ... would include improving the process for selecting the members of the IACHR and the Court, increasing the system's financial resources, and promoting compliance with its decisions and the incorporation of its standards.*

consequences that go beyond the reforms adopted by the Commission and that are at least as relevant, if not more so.

In spite of the challenges that arose during the reflection process, the IACHR and the Inter-American Court of Human Rights retained their functions of protecting and monitoring rights—a positive outcome. In addition, as the process unfolded it became clear that there is a new consensus among a bloc of governments that support the permanence of the inter-American system. At the same time, the support base for the system has broadened with the renewed engagement of actors from the judiciary, civil society, public opinion, and citizens in general, as evidenced in the Declaration of Bogotá, signed by notable public figures from the region.<sup>6</sup>

Nevertheless, there is lingering unease. In addition to the calls for the IACHR and the Court to act with transparency, efficacy, and sensitivity toward groups in the most vulnerable situations, certain cautionary messages have been heard regarding the issues to be handled and the strategies for approaching them. These rebukes, especially those from the States, could have an inhibiting effect on the IACHR and the Court in their handling of human rights-related matters considered sensitive by governments and other actors. Such matters include issues related to development projects and prior consultation with indigenous peoples, the criminal investigation standards so often unmet by national judicial systems, precautionary measures, and the obligation to make reparations in accordance with international standards when a human rights treaty has been violated.

Extraordinary General Assembly of March 22, 2013, “Results of the Process of Reflection on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System,” OEA/Ser.P. AG/RES. 1 (XLIV-E/13) rev. 1, July 23, 2013.

<sup>6</sup> This declaration of support for the system was signed by former presidents César Gaviria and Andrés Pastrana of Colombia, Alejandro Toledo of Peru, and Rodrigo Borja of Ecuador, as well as by Nobel laureate Adolfo Pérez Esquivel and numerous public figures from political, cultural, and activist circles. See CEJIL, “Declaración de Bogotá: Es hora de defender el Sistema Interamericano de Derechos Humanos,” September 11, 2012, <http://cejil.org/sites/default/files/2012%2009%2011%20DECLARACION%20C3%93N%20DE%20BOGOTA-1.pdf>. The declaration also garnered the support of more than 5,000 individuals who signed a petition on Avaaz.org, posted by CEJIL on November 20, 2012, and entitled “¡Defiende los derechos humanos en las Américas!” [https://secure.avaaz.org/es/petition/Defiende\\_los\\_derechos\\_humanos\\_en\\_las\\_Americas/?cWoGFdb](https://secure.avaaz.org/es/petition/Defiende_los_derechos_humanos_en_las_Americas/?cWoGFdb).

At the same time, the system has officially lost the full membership of one of its members, Venezuela, which has led to some very difficult challenges to its authority and has left open some debates that could have repercussions.

The new agreement in favor of the IACHR and the Court also lacks a commitment by the States to contribute the political and economic resources necessary to ensure the utmost effectiveness of the inter-American system in acting to address those human rights problems in the region that are structural in nature.

Even so, it will be possible to make progress if the States agree to take structural measures within the framework of a redefinition of the strategic priorities of the OAS. Useful steps in this direction would include improving the process for selecting the members of the IACHR and the Court, increasing the system's financial resources, and promoting compliance with its decisions and the incorporation of its standards. It would also be important for the protection bodies themselves to redefine their thematic and strategic agenda, taking account of their particular abilities to protect rights and the real needs that emerge in the region.

### **State actions to ensure the proper functioning of the inter-American protection system: Structural aspects**

Based on this analysis, it is possible to identify three areas that require an immediate response from the States.

First, there is a need to review the process for selecting the members of the IACHR and the Court. Their composition is a factor that in large measure determines the legitimacy of the protection bodies. In spite of this, and despite numerous complaints from civil society,<sup>7</sup> the selection system is still based on vote trading among the States; it prioritizes geographic diversity and the political interests of the governments proposing candidates over other criteria like subject matter expertise or racial and gender diversity. The most significant example is the composition of the Court, which is currently a human rights tribunal made up exclusively of men.

It is essential to design open and transparent selection processes at the national and regional levels that allow civil society to participate in the promotion and scrutiny of candidates for national appointment, and that prioritize the independence, suitability, and diversity of the individuals put forward. These positive reforms could arise from a mere change in practice by a significant group of States, involving the adoption of more transparent mechanisms for the submission of candidates or the

<sup>7</sup> On this issue, see CEJIL, *Aportes para el proceso de selección de miembros de la Comisión y la Corte Interamericana de Derechos Humanos* (2005), [https://cejil.org/sites/default/files/Documento\\_1\\_sp\\_0.pdf](https://cejil.org/sites/default/files/Documento_1_sp_0.pdf).

commitment to implement a policy of diversity and plurality in the composition of the bodies, among other measures.

Second, adequate funding of the system must be ensured. The lack of resources diminishes its effectiveness, with serious consequences for the system's legitimacy in the eyes of society and governments. As demonstrated by a study published during the reflection process,<sup>8</sup> the inter-American system is the poorest regional human rights protection mechanism in the world in terms of resources. The combined budget of its bodies is less than that of many ombuds offices in the countries around the region.<sup>9</sup>

This precarious situation, which does not allow the bodies to meet their minimum operating needs, appears even more serious if we consider that the reflection process diverted the attention of the IACHR even as the regulatory reforms demand even greater activity from the Commission.<sup>10</sup> Meanwhile, the Court receives more cases every year than it can adjudicate within a reasonable time period.<sup>11</sup> All of these limitations have an impact on the IACHR's ability to protect victims through the case system, which is plagued by delays that are unacceptable for a justice system. The situation also curtails the Commission's ability to perform its additional protection functions, such as advisory work, visits, reports, and so on.

Third, progress must be made in the implementation and incorporation of the decisions and standards of the IACHR and the Court in order for victims to be effectively protected.<sup>12</sup> Accordingly, it would be desirable for the States to share

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and disseminate not only best practices but also initiatives that acknowledge the binding nature of all of the system's decisions, including protection measures and friendly settlement reports. This entails, among other measures, overcoming national obstacles that hinder the proper implementation and incorporation of standards; enacting and enforcing laws for the execution of decisions; establishing coordination between branches of the State involved in compliance; and offering assurances that the authorities know and apply "conventionality control" in order to prevent new violations from occurring.<sup>13</sup>

## Key initiatives for strengthening the inter-American system

The inter-American system must strengthen its ability to interact with different actors so as to respond adequately to the human rights protection needs that persist in the Americas and that go beyond the previously discussed issues of institutional or structural architecture.

Most importantly, such improved interaction would enable the inter-American system to respond to society's demands, using its resources and tools to guarantee the individual and collective rights of citizens and communities in the region. The success of the system's work depends in part on the development of a work plan that includes a comprehensive thematic agenda and a definition of strategies, acknowledging the potential synergies for the advancement of its mandate of protecting fundamental rights. Therefore, it would be important for the IACHR to revise its human rights agenda with a participatory methodology and to delineate its priorities, especially in view of its limited resources, bearing in mind its central and distinctive role

<sup>8</sup> See CEJIL, "Report on the Financial Situation of the SIA" (in Spanish, March 14, 2013), <https://www.cejil.org/en/contenido/report-financial-situation-sia>.

<sup>9</sup> Ibid. In 2011, Colombia's Office of the Ombudsman of the People had a budget of approximately US\$94.1 million, the National Human Rights Commission of Mexico had US\$89.2 million, and the Office of the Ombudsman of the People of Ecuador had US\$7.4 million. In the same year, the Member States of the OAS earmarked US\$4.3 million from its regular fund to the IACHR and US\$2.0 million to the Inter-American Court.

<sup>10</sup> According to the IACHR's *Annual Report 2012*, in that year—during which the reflection process was being conducted intensively—there was an 18.3 percent increase in the number of petitions received by the Commission but a 24.6 percent decrease in the number of cases opened for processing. Moreover, in 2012 the IACHR issued 125 reports, down from 165 in 2011. With respect to the mechanism of precautionary measures, 448 requests were received in 2012, of which 35 were granted, compared to 422 received and 57 granted in 2011; this represents a 6.1 percent increase in requests received and a 38.5 percent decrease in requests granted. See IACHR, *Annual Report 2012*, OEA/Ser.L/V/II.147, Doc. 1, March 5, 2013.

<sup>11</sup> According to the Court's *Annual Report 2012*, it had a budget of about US\$3.6 million for the year and handed down 21 judgments in adversarial cases. The average duration of litigation in those cases was 19.2 months. I/A Court H.R., *Annual Report 2012*, [http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng\\_2012.pdf](http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf).

<sup>12</sup> Viviana Krsticevic, "Líneas de trabajo para mejorar la eficacia del Sistema," in *El futuro del Sistema Interamericano de Protección de los Derechos Humanos*, ed. Juan E. Méndez and Francisco Cox (San José: IIDH, 1997), pp. 413 ff.

<sup>13</sup> With regard to the measures that would be necessary for the implementation of decisions, see CEJIL, *Implementación de las decisiones del Sistema Interamericano de Derechos Humanos: Jurisprudencia, normativa y experiencias nacionales* (2007), [https://cejil.org/sites/default/files/implementacion\\_de\\_las\\_decisiones\\_del\\_sidh\\_0.pdf](https://cejil.org/sites/default/files/implementacion_de_las_decisiones_del_sidh_0.pdf); and CEJIL, *Implementación de las decisiones del Sistema Interamericano de Derechos Humanos: Aportes para los procesos legislativos* (2009), <https://cejil.org/publicaciones/implementacion-de-las-decisiones-del-sistema-interamericano-de-derechos-humanos-aporte>.

*The harsh reality is that serious human rights violations persist in the Americas: some are chronic and recurring, while others are the result of new social, economic, and cultural demands.*

as a human rights protection mechanism—which, ultimately, is what differentiates the Commission from other institutions, agencies, and bodies that work nationally and regionally in the hemisphere.

In reviewing their strategies, the IACHR and the Court must address the region's most pressing problems on the basis of their mandate and with the resources they have at their disposal. They must maintain their ability to protect rights vigorously and in a timely manner, without overlooking the needs and situations of persons in the most vulnerable situations. Therefore, with respect to the changes in timely intervention required by different national contexts and situations, the complementary action of the system should not be interpreted in a formalistic way that restricts the scope of protection. The system exists precisely in order to offer an appropriate solution when persons cannot obtain a response in their countries to serious human rights violations, or when that response is insufficient. As a result, the IACHR and the Court must intervene even when the State undertakes some type of action or there is a domestic court decision in the matter, provided that these actions and decisions do not meet the applicable international standards.

The possibility has also been raised in some debate forums that, in order to lighten the caseload of the IACHR and the Court, these bodies could act with greater prior scrutiny of cases, adjudicating only those that will establish standards to be followed by the national courts—that is, a sort of *certiorari*. It is not the first time that this proposal has been put forth, and our response thus far has been to oppose it.<sup>14</sup> Among other reasons, it would limit the action of the system to certain cases, it is a cri-

terion that lacks support in the Convention, and it would subject the system's bodies to significant pressures from the States. Furthermore, it should be considered that the commission of human rights violations in most cases does not occur because of ignorance of the international standard (for example, the prohibitions against torture or killing), but because of unwillingness to stand up to sectors of the State that *de facto* act unlawfully or benefit from the indifference or incompetence of the State.

Finally, the IACHR and the Court must maintain and deepen their agenda of strengthening forums for the participation of civil society and reinforce their ties to key actors concerned with the protection of human rights in the region. One of the focal points of their agenda should be to prioritize human rights defenders and justice systems. The latter not only have extended and democratized the system, but also have become driving forces in the defense of its integrity and in its consolidation and greater effectiveness.

## Conclusion

The reflection process that ended in March 2013 “took the temperature” of the hemisphere with respect to the currency of the inter-American system in different sectors. It demonstrated that the system still has support but that it continues to contend with structural weaknesses that must be remedied, and that have not been addressed by the States.

The response to these weaknesses—some of which have been addressed in this article—must be shaped by a perspective that looks beyond the political crises that at times have complicated the formal debate forums. It requires actions that take account of the fact that the strength and legitimacy of the inter-American system not only result in improved protection of the rights of individuals but also reflect the institutional and democratic maturity of the countries in the hemisphere.

The harsh reality is that serious human rights violations persist in the Americas: some are chronic and recurring, while others are the result of new social, economic, and cultural demands. These circumstances require a protection system that has the capacity to provide a timely and effective guarantee of the rights enshrined in the American Declaration of the Rights and Duties of Man in order to ensure a dignified existence, free of fear and based on rights, for all. ■

<sup>14</sup> “Symposium: A Critical Review of the Inter-American System of Human Rights: Past, Present, and Future” (in Spanish), in *Inter-American Yearbook on Human Rights 2007*, ed. Inter-American Commission on Human Rights, <http://www.anuariodh.uchile.cl/index.php/ADH/article/view-File/13454/13724>.



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# At the Center of the Discussion

## Precautionary Measures of the Inter-American Commission on Human Rights: Legal Status and Importance

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In recent years, several States of the Americas have raised concerns regarding the mandate and practice of the Inter-American Commission on Human Rights (IACHR) in several areas, including the adoption of precautionary measures. In order to better understand the legal underpinnings of this discussion, it is important to review the scope and normative contours of precautionary measures in the inter-American human rights system. This article provides a general overview of some of the most notable aspects of the current debate in the political organs of the Organization of American States (OAS). The information below suggests that, contrary to what some States argue, the Commission's practice in precautionary measures has been cautious but quite effective.

As defined by the Commission, precautionary measures are orders directed to an OAS Member State, whether related to a petition or not, concerning "serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system."<sup>2</sup> The Commission primarily grants



precautionary measures to protect persons from grave and imminent danger of injury to rights recognized under the American Declaration of the Rights and Duties of Man or the American Convention on Human Rights. Interim measures are developed based on the understanding that it is essential for the victims of human rights abuses to be able to resort to regional systems, such as the inter-American human rights system, to seek immediate protection of their basic rights recognized under regional international treaties.

### Normative human rights structure of the OAS

As the principal multilateral treaty in the Americas, the Charter of the Organization of American States sets out the legal architecture of the OAS and is binding on all Member States.<sup>3</sup> Under Article 106 of the Charter, the primary function of the IACHR is to "promote the observance and protection of human rights and to serve as a consultative organ of the [OAS] in these matters." The notion of "protection" necessarily involves the power to receive and adjudicate human rights cases. Thus, every American State, by ratifying the Charter, has accepted the competence of the Commission to consider individual complaints concerning

<sup>1</sup> A longer version of this article was published as "Precautionary Measures of the Inter-American Commission on Human Rights: Legal Status and Importance," *Human Rights Brief* (Washington College of Law, American University) 20, no. 2 (Winter 2013), <http://www.wcl.american.edu/hr-brief/20/202.cfm>.

<sup>2</sup> See "Rules of Procedure of the Inter-American Commission on Human Rights," art. 25, approved by the Commission at its 137th regular period of sessions, October 28–November 13, 2009, and modified on September 2,

2011, <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

<sup>3</sup> See IACHR, "Basic Documents Pertaining to Human Rights in the Inter-American System," <http://www.cidh.oas.org/basicos/english/Basic1.%20Intro.htm>.

*Timely implementation is often of grave importance when a precautionary measure is requested, particularly where the life or physical integrity of persons is at stake.*

alleged human rights violations that occur in its jurisdiction.<sup>4</sup>

For those States that have not yet ratified the American Convention, the Commission will determine whether the State violated the rights set forth in the American Declaration.<sup>5</sup> The Commission and the Inter-American Court of Human Rights have both held that the Declaration, although not initially adopted as a legally binding treaty, is now a source of legal obligation for OAS Member States.<sup>6</sup> Additionally, by approving the Statute of the IACHR, Member States have established the Commission's authority to receive and decide individual complaints alleging violations of the Declaration against those who are not parties to the Convention.<sup>7</sup> Furthermore, the Commission has read the Declaration as an evolving source of law, noting that its application is consistent with the practice of the Inter-American Court.<sup>8</sup> Therefore, the Declaration serves as a parallel to the American Convention for those States that have not ratified the Convention.

The requirement of extreme gravity and urgency to obtain a grant of precautionary measures presumes the existence of certain imminent danger that could result in irreparable harm to the fundamental rights of persons.<sup>9</sup> Article 25 of the Rules of Procedure of the Commission, regulating its precautionary measures, reflects elements of gravity, urgency, and irreparability comparable to those recognized for the Inter-American

Court in Article 63 of the American Convention.<sup>10</sup> The mechanism established in Article 25 of the Rules applies to all Member States of the OAS, whether or not they have ratified the American Convention, by virtue of the Commission's Statute.

Timely implementation is often of grave importance when a precautionary measure is requested, particularly where the life or physical integrity of persons is at stake. For those facing capital punishment, the implementation of the precautionary measure granted by the Commission is especially important. The Commission has stated that

the failure of a member state to preserve a condemned prisoner's life pending review by the Commission of his or her complaint emasculates the efficacy of the Commission's process, deprives condemned persons of their right to petition in the Inter-American human rights system, and results in serious and irreparable harm to those individuals, and accordingly is inconsistent with the state's human rights obligations.<sup>11</sup>

The fact that the precautionary measures of the Commission are not explicitly included in the text of the American Convention or in the Commission's Statute has raised question from a few countries regarding the authority that supports such measures. Furthermore, even if a sufficient basis exists for the authorization of such measures, the question remains whether noncompliance with the measures constitutes a failure to fulfill an international obligation of the State.

## Legal authority of the Commission's precautionary measures

The Commission has the power to interpret the scope of its own competence and jurisdiction.<sup>12</sup> In exercising such generic authority, the Commission has found that this authority includes precautionary measures under Article 25 of the Rules of Procedures because

OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commis-

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid. See also IACHR Report No. 1255, Case 12.243, Garza v. United States, OEA/ser.L/V/II.111, doc. 20 rev. P.60 (2011); IACHR Report No. 147, Case 9647, Roach & Pinkerton v. United States, OEA/ser.L/V/II.71, doc. 9 rev. I, paras. 46–49 (1987); I/A Court H.R., "Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights," Advisory Opinion OC-10/90, (ser. A) No. 10, paras. 35–45 (1989).

<sup>7</sup> Brian D. Tittmore, "Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle Against Terrorism," *Human Rights Law Review* 6, no. 2 (2006): 378, 382.

<sup>8</sup> Richard J. Wilson, "The United States' Position on the Death Penalty in the Inter-American Human Rights System," *Santa Clara Law Review* 42, no. 4 (2002): 1159.

<sup>9</sup> See IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, para. 432, <http://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>.

<sup>10</sup> Ibid.

<sup>11</sup> IACHR, *Annual Report 2000*, Chapter III, "The Petitions System and Individual Cases," Case No. 12.243, Merits Report No. 52/01, Juan Raul Garza, para. 117, <http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/USA12.243a.htm>. See also Isabela Piacentini de Andrade, "Protective Measures in the Inter-American Human Rights System," Lawyers' Rights Watch Canada, <http://www.lrwc.org/ws/wp-content/uploads/2012/03/Protective-measures-Inter-American-System.pdf>.

<sup>12</sup> Statute of the Inter-American Commission on Human Rights, art. 22–24, October 1, 1979, O.A.S. Res. 447 (IX-0/79), OEA/Ser.P/IX.0.2/80, [http://www.oas.org/xxxiiiga/english/docs\\_en/cidh\\_statute\\_files/basic15.htm](http://www.oas.org/xxxiiiga/english/docs_en/cidh_statute_files/basic15.htm).

sion's Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate.<sup>13</sup>

Thus, precautionary measures appear to be recognized by the Commission as an "inherent" power of its adjudicatory functions in individual cases. Such interpretation is firmly grounded in several provisions of the Statute of the Commission, the OAS Charter, and the American Convention. Article 18 of the Statute authorizes the Commission "to request that the governments of the states provide it with reports on measures they adopt in matters of human rights." Article 106 of the OAS Charter directs the Commission to "promote the observance and protection of human rights." Regarding States not yet party to the American Convention, Article 20 of the Commission Statute empowers the Commission to "examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights." For States that have ratified the American Convention, Article 41 of the Convention grants the Commission the power to "take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention" (a provision that is reiterated in Article 19 of the Statute) and to "request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights." As all three instruments contemplate the promotion and observance of human rights but do not specify the means by which to do this, it is clear that the Commission has the authority to make use of reasonable tools, such as precautionary measures, to fulfill its duty to protect and promote human rights.

## Binding nature of precautionary measures

Precautionary measures are not only authorized in the normative structure that regulates the Commission, but compliance by Member States of the OAS is also obligatory. States must comply with their obligations under the basic principle of the law of international responsibility and their obligations under interna-

*Precautionary measures are not only authorized in the normative structure that regulates the Commission, but compliance by Member States of the OAS is also obligatory.*

tional treaties in good faith (*pacta sunt servanda*) in conformity with Article 27 of the Vienna Convention on the Law of Treaties of 1969.<sup>14</sup> Thus, States cannot excuse noncompliance on the basis of their domestic law.

In this vein, the Commission has reiterated that "its ability to effectively investigate and determine capital cases has been frequently undermined when states have scheduled and carried out the execution of condemned persons, despite the fact that those individuals have proceedings pending before the Commission."<sup>15</sup> Furthermore, the Commission has determined that when a Member State dismisses such orders, that State "disregards its fundamental human rights obligations under the OAS Charter and related instruments."<sup>16</sup> The Inter-American Court has also pointed out that, based on the principles of effectiveness and good faith, States are to respect its provisional measures as well as the Commission's precautionary measures.<sup>17</sup> In doing so, States must "'heed' the recommendations contained in the Commission's reports and do their best to implement them, pursuant to the principle of good faith."<sup>18</sup>

<sup>14</sup> Vienna Convention on the Law of Treaties, art. 26–27, May 23, 1969, 1155 U.N.T.S. 331. The treaty provides that States must comply with their treaty-based obligations in good faith and may not invoke the provisions of their internal law as justification for failure to perform international responsibilities.

<sup>15</sup> IACHR, *Napoleon Beazley v. United States*, Case No. 12.412. Merits Report No. 101/03, December 29, 2003, para. 51. Cited in Eva Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (Antwerp: Intersentia, 2010), p. 906.

<sup>16</sup> *Garza v. United States*, *supra* note 6, para. 117.

<sup>17</sup> *James et al. v. Trinidad and Tobago*, Provisional Measures ordered by the Inter-American Court of Human Rights in the Matter of the Republic of Trinidad and Tobago, November 26, 2001, [http://www.corteidh.or.cr/docs/medidas/james\\_se\\_14\\_ing.pdf](http://www.corteidh.or.cr/docs/medidas/james_se_14_ing.pdf).

<sup>18</sup> Juan E. Mendez, "The Inter-American System of Protection: Its Contributions to the International Law of Human Rights," in *Realizing Human Rights: Moving from Inspiration to Impact*, ed. Samantha Power and Graham Allison (New York: St. Martin's Press, 2000). See also Cecilia Cristina Naddo, "The Inter-American System of Human Rights: A Research Guide" (GlobalLex, New York University School of Law, August/September 2010), [http://www.nyulawglobal.org/Globalex/Inter\\_American\\_human\\_rights.htm](http://www.nyulawglobal.org/Globalex/Inter_American_human_rights.htm), citing Claudio Grossman, "American Declaration on the Rights and Duties of Man and the Inter-American Commission on Human Rights," Max Planck Encyclopedia of Public International Law, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e831?rskey=X-eEMMo&result=4&prd=EPIL>.

<sup>13</sup> See *Garza v. United States*, *supra* note 6, para. 117.

*In fact, many of the calls for “reform” have come from States that have been under strict scrutiny of the system due to their precarious human rights situation.*

The Commission also reaffirmed the legally binding nature of its precautionary measures in its Resolution 1/2005 of March 8, 2005, along with other documents issued by the Commission, holding that Member States have a duty to comply in light of the fundamental role that the measures play in maintaining the efficacy of the Commission’s mandates.<sup>19</sup> Member States that fail to recognize the binding nature of precautionary measures render the measures and the regional protection system ineffectual.

The precautionary measures of the Inter-American Commission require States to comply, without provision for exceptions based on domestic political or legal concerns.<sup>20</sup> Although not all Member States of the OAS recognize precautionary measures as binding, the measures should be afforded a comparable legal value as those resolutions that the Commission adopts regarding individual cases, such as reports on admissibility and/or merits. OAS Member States have conferred on the Commission extensive powers to promote and protect human rights under the OAS Charter, the IACHR Statute, the American Convention, and several other regional treaties. Therefore, under this mandate, the Commission is allowed, and compelled, to articulate its powers in order to prevent, to the extent possible, violations of human rights, especially in serious situations where danger is imminent and the harm would be irreparable. To argue otherwise would lead us to the unreasonable assumption that States created the Commission with ample supervisory powers but deliberately decided to limit the Commission’s ability to cooperate with them to *prevent* serious human rights violations.

It is worth mentioning that the Inter-American Court of Human Rights, the European Court of Human Rights, and the International Court of Justice (ICJ) have rendered similar pronouncements confirming the obligatory nature of protective

measures.<sup>21</sup> The European Court and the ICJ have done so even though their respective governing treaties do not expressly recognize such interim measures for those international bodies.

### **Some comments on the Commission’s practice and the current “reform” debate**

The Inter-American Commission is currently facing one of the most significant challenges in its history. For years, several Member States of the OAS have periodically advanced the idea of “strengthening” or “reforming” the system, but in the end, no additional political or financial support has been afforded to the Inter-American Commission or the Inter-American Court. In fact, many of the calls for “reform” have come from States that have been under strict scrutiny of the system due to their precarious human rights situation. These calls, therefore, appear to be a reaction by those States to supervisory actions of the Commission and the Court, and indeed would seem to be an effort to undermine the independence and autonomy of the Commission. Furthermore, one of the issues triggering such reaction has been, in fact, the use of the precautionary measures in certain cases.

It is also important to mention that in recent years, the Commission, in coordination with the Inter-American Court, has remained in constant contact with all stakeholders of the system—victims, States, nongovernmental organizations, academics—in a periodic process of consultation. This has led to significant improvements in the procedures of the Commission. Many of the changes have been beneficial to victims, such as allowing them to directly litigate their cases before the Court or to advance additional legal arguments beyond those initially accepted by the Commission, among many other positive adjustments. In addition, many other changes have also recognized the procedural rights of States in individual complaints by having a more rigorous review of jurisdiction and admissibility of cases or factual grounds to request precautionary measures. For example, only 15.8 percent of the petitions filed were accepted for processing in 2011 and only 13.5 percent of the requests for precautionary measures were finally granted in that year.

The Commission issued 771 precautionary measures from 1994 to 2012, focusing mostly on the core basic rights recognized by the human rights instruments. A recent study indicates that the Commission adopted a great majority of its mea-

<sup>19</sup> Tittlemore, “Guantanamo Bay,” *supra* note 7, p. 382, citing IACHR Resolution 1/2005, para. 1, March 8, 2005, <http://www.cidh.oas.org/resolutions/resolution1.05.htm>; see also IACHR, “Basic Documents,” *supra* note 3.

<sup>20</sup> See Clara Burbano Herrera, *Provisional Measures in the Case Law of the Inter-American Court of Human Rights* (Antwerp: Intersentia, 2010), p. 213.

<sup>21</sup> *Ibid.*

sures in cases where life and personal integrity were at stake.<sup>22</sup> This study indicates that measures adopted from 1996 to 2010 were issued to protect mainly civil and political rights, “particularly the right to life (Article 4) with 599 measures and the right to humane treatment (Article 5) with 528 measures from a total of 688.”<sup>23</sup> In a few cases the Commission has referred to other rights such as freedom of expression (24 precautionary measures), health (18), property (12), political rights (3), work (3), cultural identity (3), or right to information (3). In other words, precautionary measures have been used mostly in serious situations in which the life or personal integrity of persons is at stake. This shows that the Commission has clearly exercised restraint when dealing with situations that involve more complex rights where the determination of “gravity” and “urgency” requires a more refined and cautious analysis.

Based on the information available, it is possible to dispel some of the most common misconceptions regarding the work of the Commission, specifically regarding precautionary measures. These studies show that the Commission has been quite deliberate in tailoring its measures to prevent the violation of the most basic rights. When granting precautionary measure requests, the Commission’s practices demonstrate a deliberate and cautious assessment of each request, looking at whether the situation truly necessitates precautionary measures given its gravity and urgency. Thus, the concern of some States with precautionary measures does not appear to be legitimate. Rather, such concern appears to be grounded in feelings of injured sovereignty among some States of the region, rather than in a genuine desire to improve the protective tools of the Commission.

<sup>22</sup> Clara Burbano Herrera and Diego Rodríguez-Pinzón, “Interim Measures in the Case-Law of the Inter-American Commission on Human Rights,” in *Interim Measures in International Human Rights Law*, ed. Clara Burbano Herrera and Yves Haeck (New York: Oxford University Press, forthcoming).

<sup>23</sup> *Ibid.*

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These studies also show that the four States with the highest numbers of precautionary measures between 1994 and 2012 were Colombia, Guatemala, Mexico, and the United States. This counters the perception that the Commission does not confront countries like the United States regarding human rights violations. Colombia had the most precautionary measures during this period (173), followed by Guatemala (97), Mexico (75), and the United States (72). In other words, more than half of the 771 precautionary measures issued between 1994 and 2012 were directed at these four countries.

These studies show that the precautionary measures issued during the period examined were directed at protecting, to a great extent, persons detained and condemned to death: 139 measures out of 771 total. Based on the information published by the Commission, in 14 cases execution orders were stayed; in three cases the sentence was commuted; in two cases the detainees were released; and in 26 cases the detainees were executed.

The 14 cases where death row inmates were able to obtain stays of execution were all related to the United States. On the other hand, of the 26 cases reported by the Commission in which the detainees were executed, all except for one were US cases. ■



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# The Role of Key Actors

## The United States and Human Rights in the Americas: Establishing Credibility and Legitimacy through Action

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In June 2013, the new US Secretary of State, John Kerry, travelled to Antigua, Guatemala, to attend the General Assembly of the Organization of American States (OAS). It was his first major visit to the region as President Obama's second-term chief diplomat. Secretary Kerry carried a strong message focusing on the need for the OAS to undertake reforms and recommit to its core mission of promoting human rights, democracy, and development.<sup>1</sup> His message on human rights in the Western hemisphere was both critical and timely. It came at a moment when the principal mechanism for promoting such rights, the Inter-American Commission on Human Rights (IACHR), has been subject to political attacks and proposals aimed at undermining its independence and effectiveness. As Kerry reminded the General Assembly:

The Americas presents a vivid example to the world that diversity is a strength, and that inclusion works, and that justice can actually overcome impunity, and that the rights of individuals must be protected against government overreach and abuse. It's up to us to ensure the continued integrity of our [inter-]American institutions by reinforcing and strengthening them. And in the case of the [Inter-] American Commission on Human Rights, this means ensuring its independence, its autonomy, and its financial stability. All OAS member-



states, including my own, are subject to the commission's review, and no country has been singled out or targeted. All of our governments need to be prepared to work with and support the commission. And as a hemisphere, we have made enormous strides over the past generation in enabling the ideals of the American Declaration of Rights and Duties of Man.<sup>2</sup>

While Kerry's statement did not signal a shift in the US posture toward human rights in the region, it did ring hollow. The United States' own record on human rights is marked by failure to live up to its regional and interna-

tional human rights commitments and fully engage with the system. This has undercut its legitimacy and credibility to speak with force on these issues.

First, the US history of supporting nondemocratic Latin American governments—including dictatorships that committed gross human rights violations—continues to cast a shadow over US credibility, particularly as the government continues to block legal actions *within the United States* to hold former government officials accountable for complicity in past abuses. Just ask long-time human rights attorney Jennifer Harbury about her decades-long struggle to seek justice for the CIA's involvement in her husband's death in Guatemala.<sup>3</sup>

<sup>1</sup> Associated Press, "John Kerry Seeks Changes to OAS," *Politico*, April 6, 2013, <http://www.politico.com/story/2013/06/john-kerry-latin-america-oas-changes-92245.html>.

<sup>2</sup> John Kerry, "Remarks at the General Assembly of the Organization of American States Plenary Session," OAS Plenary Session, Antigua, Guatemala, June 5, 2013, <http://www.state.gov/secretary/remarks/2013/06/210497.htm>.

<sup>3</sup> "Interview with Jennifer K. Harbury," by Antonio Prieto, January 29, 1999, Information Services Latin America (ISLA), <http://isla.igc.org/Features/>

Second, US credibility suffers because the country has failed to join the 23 (of 35) OAS Member States that have ratified the American Convention on Human Rights.<sup>4</sup> This sends the signal that the United States promotes human rights in the region *as a matter of a policy* and not based on legally binding obligations. Washington thus evades accountability, as there are no effective mechanisms with enforcement powers to address violations.

Third, while the United States has long been a formal (if selective) participant in the proceedings at the IACHR via hearings, cases, and precautionary measures, its record of compliance and implementation is dismal. The last session of the Commission, held in October 2013, is a good example. The US government failed to participate meaningfully in, or respond to, hearings on critical issues, including indefinite detention in Guantanamo and the unprecedented global web of surveillance run by the National Security Agency (NSA), on the pretext that the government shutdown had left inadequate time to prepare for the hearings.<sup>5</sup> Notwithstanding this last-minute and unconvincing excuse, the Commission rebuked the United States for a number of its policies, including failure to comply with the precautionary measure on Guantanamo Bay in place since 2002.

More frustrating is the government's failure to even respond to petitions filed by US-based human rights groups. For example, since 2008 the American Civil Liberties Union has filed four separate petitions<sup>6</sup> on behalf of victims of torture under the George W. Bush administration, some of whom were subject to the secret CIA "extraordinary rendition" program. Despite repeated urging by the Commission, Washington has yet to respond.

And if ignoring petitions were not grave enough, the United States often flouts precautionary measures<sup>7</sup>—essentially injunctive relief measures—that aim to prevent imminent risk of irreparable harm to persons or groups of persons, such as death-row inmates, in violation of human rights commitments.<sup>8</sup> This

*Si While the United States has long been a formal (if selective) participant in the proceedings at the IACHR via hearings, cases, and precautionary measures, its record of compliance and implementation is dismal.*

was recently exemplified in the case of Mexican national Edgar Tamayo Arias, who was executed by the state of Texas in clear violation of international law.<sup>9</sup>

Since 2009, an array of US civil society groups have appealed to the US government and provided it with concrete ideas and recommendations to establish the country as a credible human rights leader in the OAS region. In a series of letters in 2012, groups recommended, among other things, that the United States lead by example by complying with Commission recommendations and by ratifying the American Convention on Human Rights and other regional human rights treaties.<sup>10</sup>

The Carter administration signed the American Convention on Human Rights in 1977, but the treaty has not been ratified by the US Senate. Under the US Constitution, a treaty negotiated and signed by the executive branch must be approved by two-thirds of the Senate (known as "advice and consent"). This is a major obstacle to treaty ratification, especially where individual rights are at stake, as in human rights conventions. With only three key human rights treaties ratified in the past two decades (each with significant reservations and limitations that diminish their impact), the American Convention has a slim chance of ratification in the near future.

US failure to ratify the Convention, which offers valuable safeguards against human rights violations, clearly undermines the universality of inter-American human rights standards and fuels notions of US exceptionalism. However, failure to ratify should not prevent the United States from leading in the promotion and protection of human rights or justify inaction. Through meaningful engagement with the Inter-American Commission, the United States would demonstrate a good example, especially

Guatemala/guate3.html.

<sup>4</sup> American Convention on Human Rights (Pact of San Jose, Costa Rica) (B-32), OAS, November 22, 1969, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm).

<sup>5</sup> Carmen Lomellin, Re: 149th Period of Sessions: United States' Request for Postponement, Office of the Permanent Representative of the United States of America to the Organization of American States, October 18, 2013, <http://www.oas.org/en/iachr/decisions/pdf/USRequestforPostponement.pdf>.

<sup>6</sup> Jamil Dakwar, "Seeking International Accountability for Victims of U.S. Torture," *ACLU Blog of Rights*, June 26, 2013, <https://www.aclu.org/blog/human-rights-national-security/seeking-international-accountability-victims-us-torture>.

<sup>7</sup> Inter-American Commission on Human Rights, Precautionary Measures, OAS-IACHR, accessed January 27, 2014, <http://www.oas.org/en/iachr/decisions/precautionary.asp>.

<sup>8</sup> Jamil Dakwar, "Executing Human Dignity: U.S. Death Penalty System Dominates IACHR Report," *ACLU Blog of Rights*, April 21, 2013, <https://www.aclu.org/blog/capital-punishment-human-rights/executing-hu->

[man-dignity-us-death-penalty-system-dominates-iachr](http://www.aclu.org/blog/capital-punishment-human-rights/man-dignity-us-death-penalty-system-dominates-iachr).

<sup>9</sup> Inter-American Commission on Human Rights, "IACHR Condemns Execution of Edgar Tamayo Arias in the United States," January 27, 2014, [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/006.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/006.asp).

<sup>10</sup> Francisco J. Rivera, "RE: Strengthening Process of the Inter-American Human Rights System," Santa Clara University School of Law, International Human Rights Clinic, November 19, 2012, <http://law.scu.edu/wp-content/uploads/12121120Santa20Clara20sign-on20letter20to20US20OAS20Amb20-20WEBSITE.pdf>.

*US failure to ratify the Convention, which offers valuable safeguards against human rights violations, clearly undermines the universality of inter-American human rights standards and fuels notions of US exceptionalism.*

when that responsibility lies within the purview of the executive branch of the federal government. Yet, the US government continues to drag its feet in prioritizing human rights, failing to implement commitments and recommendations and continuing to ignore serious cases brought before the Commission.

Recent revelations of massive NSA communications surveillance include reports that the US government has spied on close Latin American allies (Washington even reportedly grounded the Bolivian president's plane as it tried to extradite Edward Snowden).<sup>11</sup> These revelations have understandably infuriated US allies and foes alike. More than ever, the United States is facing an uphill battle to prove its bona fides on human rights issues. It is not only seen as a hypocrite in resisting calls to practice at home what it preaches abroad, but now is increasingly seen as a violator of human rights. This sets a dangerous precedent by encouraging other governments to justify and legitimize their own rights violations. In addition to NSA spying, the United States is out of step with most Western democracies in a range of other areas, including the use of drones, mass incarceration, the inhumane system of immigrant detention, impunity for torture, the death penalty, juvenile life-without-parole sentences, and voter suppression.<sup>12</sup>

The recent adoption by the United Nations General Assembly of the first-ever resolution on privacy rights in the digital age signals the emergence of a regional and global push against US policies that violate human rights.<sup>13</sup> While the United States succeeded in watering down the resolution, which was sponsored by Brazil and Germany, this development should serve as a wake-up call to Washington to get its act together and move beyond rhetorical commitment to human rights. A more meaningful and substantive engagement would require a shift toward domestic and foreign policy that honors human rights obligations in good faith. US engagement with the Inter-American Commission on Human Rights is a valuable starting point.

Additional steps the United States should take include:

- Responding to petitions in a timely manner, including those addressing human rights violations committed in the context of US counterterrorism operations overseas, and facilitating access to justice and reparations for torture, forced disappearance, arbitrary detention, and other related abuses.
- Responding to and complying with, in a timely and coordinated manner, the precautionary measures and other decisions and recommendations issued by the IACHR. This could be done through transparent inter-agency mechanisms, staffed by senior officials, with strong, clear mandates and timelines to implement these decisions.
- Increasing efforts to raise public awareness about the importance of the inter-American human rights system, and taking concrete steps to engage federal elected officials, the media, and the US public, as well as state and local governments across the country.
- Taking measures to support the mandate and work of the Inter-American Court of Human Rights (similar to those to increase US support for the International Criminal Court) and addressing obstacles to US ratification of the American Convention. This could be done by raising awareness of the value of accountability mechanisms (such as the Inter-American Court) and through domestic policy changes, in addition to other options.

By taking these first steps, the United States would demonstrate its commitment to effectively and meaningfully promote and support human rights in the OAS region. ■

<sup>11</sup> Anthony Boodle, "Brazil, Mexico Ask U.S. to Explain If NSA Spied on Presidents," Reuters, September 2, 2013, <http://www.reuters.com/article/2013/09/02/us-usa-security-brazil-mexico-idUSBRE9810B620130902>. William Neuman and Alison Smale, "Barring of Bolivian Plane Infuriates Latin America as Snowden case Widens," *New York Times*, July 3, 2013, <http://www.nytimes.com/2013/07/04/world/snowden.html>.

<sup>12</sup> American Civil Liberties Union, "Time to Rein in the Surveillance State," ACLU online, <https://www.aclu.org/time-rein-surveillance-state-0>. American Civil Liberties Union, "Drones," *ACLU Blog of Rights*, <https://www.aclu.org/blog/tag/drones>. American Civil Liberties Union, "What You Should Know about the U.S. and Human Rights," ACLU online, December 10, 2013, <https://www.aclu.org/sites/default/files/assets/121013-human-rightsfacts.pdf>.

<sup>13</sup> United Nations General Assembly, "Agenda Item 69(b): The Right to Privacy in the Digital Age," UNGA 68th Session, Third Committee, November 20, 2013, <http://ptlb.in/clpic/wp-content/uploads/2013/11/United-Nations-UN-Draft-Resolution-On-The-Right-To-Privacy-In-The-Digital-Age-Final-Version.pdf>



## DPLF launches a compilation of jurisprudence on the rights of indigenous peoples



Available in Spanish only.

The *Digest of Latin American jurisprudence on the rights of indigenous peoples to participation, prior consultation, and community property* compiles and analyzes judicial decisions made by the high courts of nine Latin American countries: Argentina, Bolivia, Colombia, Chile, Ecuador, Guatemala, Nicaragua, Panama, and Peru. The Digest is currently available only in Spanish.

The number of social conflicts related to the land rights, territory, and natural resources of indigenous peoples has increased considerably over the last few years. In the midst of these conflicts, some Latin American judges and courts have carried out the important but little publicized work of adapting landmark decisions that recognize the rights of indigenous peoples, often in adverse political contexts. These judicial decisions represent, without a doubt, an important contribution to the protection of the rights of indigenous peoples in Latin America.

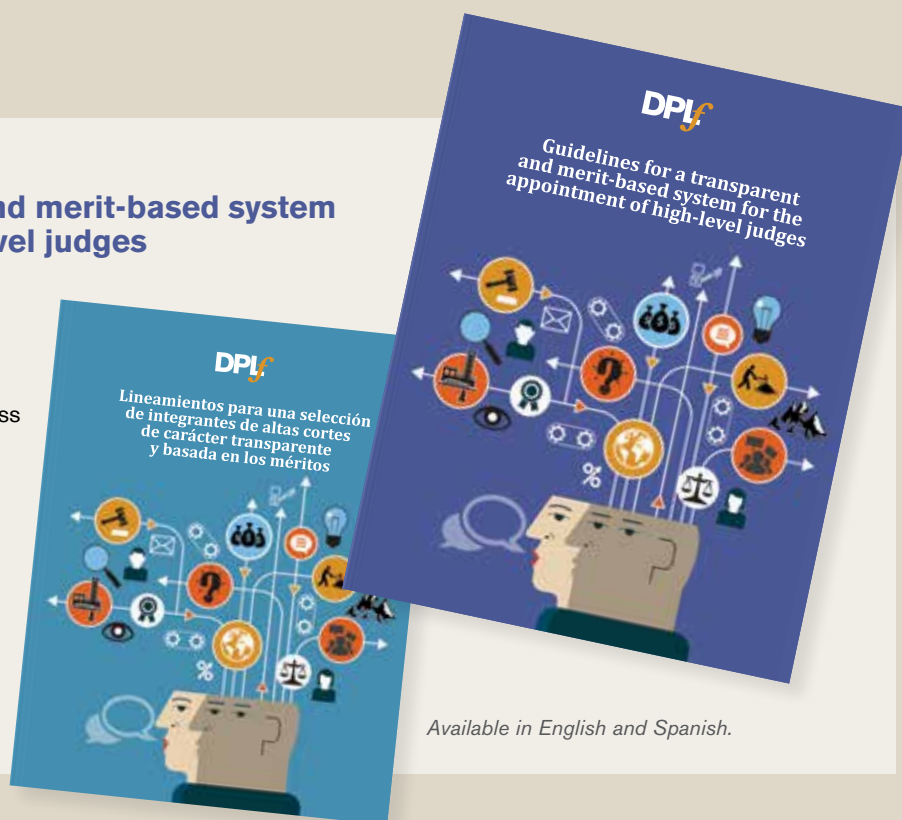
The Digest lays out the debates and judicial challenges these judges have had to resolve and shows the different ways in which international norms—such as the International Labour Organization Convention 169 or the United Nations Declaration on the Rights of Indigenous Peoples—have been interpreted and applied in different judicial, political, and cultural contexts.

The Digest was written by María Clara Galvis and Ángela María Ramírez. It includes a prologue by **James Anaya**, former United Nations Special Rapporteur on the Rights of Indigenous Peoples, and an epilogue by **Humberto Sierra Porto**, President of the Inter-American Court of Human Rights.

DPLF hopes that this publication will contribute to the dissemination of the judicial decisions included in this compilation and to fruitful discussion and debate on these issues.

### Guidelines for a transparent and merit-based system for the appointment of high-level judges

This document contains recommendations on the necessary elements in the selection process of high-level judges and in the candidates' profiles, in order to ensure that only the most qualified professionals are selected to occupy such important positions.



Available in English and Spanish.

## Many Brazil

Juana Kweitel and Raísa Cetra

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Brazil played a number of different roles during the process to reform the inter-American human rights system, which lasted for nearly two years. Its initial stance of calling into serious question the autonomy and independence of the Inter-American Commission on Human Rights (IACHR) centered on its reaction to the precautionary measures adopted in April 2011 in the case of the Belo Monte hydroelectric dam. Later, as other States began also to raise questions about the issues that most jeopardized the integrity of the IACHR, Brazil's aggressiveness—at least officially—began to lessen. As of early 2014, the relationship between Brazil and the system has been partially reestablished. Nevertheless, some fundamental steps must still be taken in order to reach a truly productive degree of cooperation.

### After Belo Monte, the beginning of the most dangerous reform

Two months after the IACHR issued its precautionary measures with respect to the Belo Monte hydroelectric plant, a new process to reform the inter-American human rights system began. In June 2011, the Permanent Council of the Organization of American States (OAS) created 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 Belo Monte hydroelectric complex project, now part of the Programa de Aceleração do Crescimento (Growth Acceleration Program), was originally part of a project from the 1970s. Located in northern Brazil, on the Xingú River in the Amazon Basin, the project threatens to affect the lives and physical welfare of thousands of people by flooding more than 500 square



kilometers and decreasing the water flow of the river for nearly 100 kilometers.<sup>1</sup> The affected population includes indigenous peoples as well as riverside dwellers, farmers, fishermen, and communities of *quilombos* (descendants of slaves, whose land rights are recognized in the 1988 Constitution).<sup>2</sup>

There are significant gaps in the efforts to measure the real impacts of this project.<sup>3</sup> Nonetheless, it is being carried out, and without proper consultation with the affected population.<sup>4</sup> In April 2011, at the request of a number of organizations—Movimento Xingu Vivo para Sempre (MXVPS), Coordenação das

Organizações Indígenas da Amazônia Brasileira (Coiab), Pre-lazia do Xingu, Conselho Indígena Missionário (Cimi), Sociedade Paraense de Defesa dos Direitos Humanos (SDDH), Justiça Global, and Associação Interamericana para a Defesa do Ambiente (AIDA)—the IACHR issued precautionary measures asking Brazil to suspend the hydroelectric project until the right to free, prior, and informed consultation of the indigenous peoples could be protected.<sup>5</sup>

<sup>1</sup> See DhESCA Platform, *Violações de Direitos Humanos no Licenciamento da Usina Hidrelétrica de Belo Monte: Relatório da Missão Xingu*, April 2010, <http://www.xinguvivo.org.br/wp-content/uploads/2010/10/Relatorio-da-Plataforma-DHESCA-sobre-viola%C3%A7%C3%B5es-dos-direitos-humanos-do-projeto-Belo-Monte.pdf>.

<sup>2</sup> See Instituto Socioambiental, "Xingu Vivo: Especial Belo Monte," <http://www.socioambiental.org/esp/bm/loc.asp>.

<sup>3</sup> DhESCA Platform, *Violações de Direitos Humanos*, *supra* note 1.

<sup>4</sup> See Daniel Leib Zugman, "O dever de consulta aos povos indígenas e a construção da usina de Belo Monte," *Revista Discente Direito FGV* (São Paulo), year 2, vol. 1, no. 3 (July 2013), <http://direitogv.fgv.br/publicacoes/revista/artigo/dever-de-consulta-aos-povos-indigenas-construcao-usina-de-belo-monte>.

<sup>5</sup> See IACHR, "Indigenous Communities of the Xingu River Basin, Pará, Brazil," PM 382/10, April 1, 2011, <http://www.oas.org/en/iachr/decisions/precautionary.asp>.

Brazil's reaction to the precautionary measures in the Belo Monte case was virulent, surprising, and unexpected.<sup>6</sup> Brazil has no history of rejecting a decision of the international human rights protection system, as it did in this case.<sup>7</sup> Many Brazilian authorities spoke out publicly to criticize the system and the IACHR in particular. The Ministry of Foreign Affairs (MRE) issued a public note calling the precautionary measures "rash and unjustifiable."<sup>8</sup> Brazil recalled its permanent representative to the OAS, suspended its mandatory contribution to the OAS for several months, and withdrew the candidacy of Brazilian national Paulo Vannuchi to the IACHR. Other authorities also made similar declarations. The Senate, for example, passed a "vote of censure" against the OAS based on the decision made by the IACHR.<sup>9</sup>

After Brazil made public its very hostile positions, countries like Venezuela, Nicaragua, Bolivia, Colombia, Ecuador, and Peru started to question the efficiency and legitimacy of the system and, more specifically, of the IACHR.

The issues raised in this reform process expressly included precautionary measures, as well as procedural concerns in the processing of individual petitions and cases, friendly settlement agreements, the existence of thematic rapporteurships, the criteria for the drafting of Chapter IV of the IACHR's Annual Report,<sup>10</sup> the promotion of human rights, and the financial strengthening of the system.<sup>11</sup>

## Brazil in the Permanent Council

The proposals put forward by Brazil during the reform process focused primarily on precautionary measures<sup>12</sup> and changed

over the course of the process.<sup>13</sup> Brazil defined its position by proposing (a) that the IACHR "*should precisely determine the applicable criteria as regards what constitute serious or urgent situations or a danger of imminent harm to a person*, which give rise to an application for such measures. It should also *explicitly identify the elements that establish a colorable claim of seriousness, urgency, and imminent danger of irreparable harm to the individual in each particular case*";<sup>14</sup> (b) that a qualified majority be required, when the IACHR is in session, in cases where precautionary measures are adopted prior to receiving the State's reply;<sup>15</sup> and (c) that the IACHR be prevented from issuing precautionary measures in cases where the Inter-American Court of Human Rights has denied a request for provisional measures.<sup>16</sup> The IACHR considered these three proposals, at least

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motion, with less emphasis on protection; the shelving of cases on grounds of lengthy procedural inactivity; the expansion of the friendly settlement process; and the drafting of a code of conduct for the IACHR. See Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the IAHRs, "Proposals by the Delegation of Brazil on the Topics 'Grounding of Decisions,' 'Processing of Petitions, Cases and Precautionary Measures,' 'Deadlines for States,' 'Friendly Settlement Mechanism,' 'Promotion of Human Rights,' and 'Transparent Management,' GT/SIDH/INF. 48/11, December 6, 2011; and Federative Republic of Brazil, "Propostas de implementação das recomendações do Grupo de Trabalho de Reflexão sobre o Funcionamento da Comissão Interamericana de Direitos Humanos," November 2012, <http://scm.oas.org/pdfs/2012/CP29609%20Anexo%20II.pdf>.

<sup>13</sup> In addition to the three proposals enumerated in the text, Brazil took several suggestions to the Working Group regarding precautionary measures. It stressed that the IACHR should (a) keep in mind that its proceedings are of a quasi-legal nature and give rise to recommendations; (b) formulate clear guidelines for setting aside proceedings when the purpose has been lost; (c) satisfy itself that the petitioner's representative has power of attorney to act in his name, unless, for exceptional reasons, this requirement could not be met before the petition was lodged; in such cases, the IACHR should order the petitioner to comply with this requirement as soon as possible; (d) establish that precautionary measures will lose their purpose when the State demonstrates that domestic judicial remedies are sufficient; (e) establish a time limit for precautionary measures to remain in force; (f) establish that precautionary measures should be requested following consultation with the State concerned; and (g) take into account reasons of force majeure that may prevent the State from complying with precautionary measures. In the Permanent Council, Brazil proposed that the IACHR (a) draft a case-by-case work plan for the periodic review of precautionary measures; (b) perform a study to discuss ways of improving the mechanisms for determining and individually identifying the beneficiaries of precautionary measures; (c) determine that the petitioners must explain any inability to obtain documents confirming the consent of the beneficiaries; (d) grant reasonable case-by-case deadlines for the implementation of precautionary measures; and (e) establish that the beneficiaries' refusal to accept the precautionary measures is grounds for lifting them.

<sup>14</sup> Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the IAHRs, "Proposals by the Delegation of Brazil," *supra* note 12, proposal 1.2. Emphasis added.

<sup>15</sup> Federative Republic of Brazil, "Propostas de implementação," *supra* note 12, proposal II.A.f, p. 10.

<sup>16</sup> *Ibid.*, proposal II.A.I, p. 11.

<sup>6</sup> See Deisy Ventura, Flávia Piovesan, and Juana Kweitel, "Sistema interamericano sob forte ataque," *Folha de S. Paulo*, August 7, 2012, <http://www1.folha.uol.com.br/fsp/opiniaao/59213-sistema-interamericano-sob-forte-ataque.shtml>.

<sup>7</sup> See Deisy Ventura and Raísa Cetra, "O Brasil e o Sistema Interamericano de Direitos Humanos: de Maria Da Penha à Belo Monte," April 2012, [http://www.conectas.org/arquivos-site/Ventura%20Cetra%20O%20Brasil%20e%20o%20SIDH%202012%20\(2\)\(1\).pdf](http://www.conectas.org/arquivos-site/Ventura%20Cetra%20O%20Brasil%20e%20o%20SIDH%202012%20(2)(1).pdf).

<sup>8</sup> See Brazilian Ministry of Foreign Affairs, "Solicitação da Comissão Interamericana de Direitos Humanos (CIDH) da OEA," Note no. 142, April 5, 2011, <http://www.itamaraty.gov.br/sala-de-imprensa/notas-a-imprensa/solicitacao-da-comissao-interamericana-de-direitos-humanos-cidh-da-oea>.

<sup>9</sup> See Federal Senate of Brazil, "Aprovado voto de censura à OEA por declaração contra Belo Monte," June 9, 2011, <http://www12.senado.gov.br/noticias/materias/2011/06/09/aprovado-voto-de-censura-a-oea-por-declaracao-contra-belo-monte>.

<sup>10</sup> Chapter IV of the IACHR's Annual Report examines the human rights situation of the countries that received special attention from the IACHR during the year.

<sup>11</sup> See Victoria Amato, "Taking Stock of the Reflection on the Workings of the Inter-American Commission on Human Rights," *Aportes DPLF*, no. 16 (March 2012): 5, <http://www.dplf.org/sites/default/files/1338572412.pdf>.

<sup>12</sup> Brazil also supported the following proposals, among others, throughout the process: increased efforts by the IACHR to fulfill its mandate of pro-

partially, in the process of amending its Rules of Procedure.<sup>17</sup>

With regard to the first proposal, concerning the definitions and criteria, the IACHR included definitions of seriousness, urgency, and irreparable harm, as well as the obligation to justify the decision to grant measures in a specific case. This measure, on one hand, makes the IACHR's action more inflexible; on the other hand, requiring more extensive legal argument without providing for additional financial and human resources could cause the IACHR's work to come to a standstill<sup>18</sup> (see Articles 25.2, 25.3, 25.4, and 25.7.c of the amended Rules of Procedure).

With regard to the second proposal, although the qualified majority rule was not adopted, it was decided that the IACHR shall review the measure "as soon as possible, or at the latest during its next period of sessions" in cases where a measure has been adopted without the State having been heard, regardless of whether it was decided by the president or by the full session of the IACHR (see Article 25.5 of the amended Rules of Procedure). These new regulations could make the precautionary measures adopted in this manner extremely fragile and precarious.

The last proposal was also considered in part, since the IACHR can only render a decision if new facts have arisen subsequent to the Court's denial of a request for provisional measures (see Article 25.13 of the amended Rules of Procedure).

At the same time that it was very actively promoting its concerns regarding precautionary measures, Brazil remained silent on some key points of the reform. Its silence ended up creating political space for the advancement of other proposals that were also quite damaging to the autonomy of the IACHR. Dissatisfied with Brazil's failure to take a position on important issues in the reform process, Brazilian civil society organizations pressured the government to open a space for dialogue on the subject.

The day the new law on access to public information came into force (May 16, 2011), Conectas Direitos Humanos, a non-governmental organization, requested that the MRE release all the telegrams exchanged between Brasilia and the Brazilian mission to the OAS in order to provide a clearer picture of

Brazil's stance during the reform process.<sup>19</sup> The request was denied at all levels. The ministry's main argument was that the negotiations were still underway and that the release of those documents could jeopardize Brazil's image. When the reform process came to an end, in March 2013, Conectas asked for a review of the classified status of the requested documents; this was also denied on the grounds that the process was still not over. The reaction of the MRE is a clear example of the fact that Brazilian diplomacy is far from having a culture of transparency, even with the enactment of the access law.

Nevertheless, this request was important in opening a channel for dialogue between the MRE and Brazilian organizations regarding the positions taken by the State in the reform process. In its initial response to this request, the MRE proposed that a meeting be held with members of civil society to clarify Brazil's position. Conectas accepted the suggestion and, along with other organizations, requested such a meeting. Since then, several encounters have been held with Brazilian civil society within the framework of the reform process. It should be noted that the organizations themselves must cover the cost of travel to take part in these meetings, which in Brazil—given the enormous distances—can be quite expensive. On only one occasion was a mechanism available for remote participation.

These meetings were useful in demanding that Brazil make its positions public and discuss them in advance with civil society. As part of this process, Brazil later declared itself in favor of the autonomy and independence of the IACHR,<sup>20</sup> in favor of maintaining Chapter IV of the IACHR's Annual Report,<sup>21</sup> against a reform of the Rules of Procedure led by the States,<sup>22</sup> and against the amendment of the Statute.

In addition to the matter of precautionary measures, Brazil also expressed interest in the issue of the funding of the IACHR, calling attention to the fact that the level of support is quite meager in relation to the body's activities. Although this concern was inconsistent with the rest of its positions, it acknowledged that the IACHR has scarce resources. It proposed the development of new studies and tools, along with an intensification of

<sup>17</sup> See "Rules of Procedure of the Inter-American Commission on Human Rights," approved by the Commission at its 137th regular period of sessions, October 28–November 13, 2009, and modified on September 2, 2011, <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

<sup>18</sup> See Conectas Direitos Humanos, Justiça Global, and Article 19, "Considerações acerca das propostas do governo brasileiro ao Conselho Permanente sobre o processo de fortalecimento do Sistema Interamericano," São Paulo, December 5, 2012, [http://www.conectas.org/arquivos-site/2012\\_12\\_05%20-%20Carta\\_BrasilPropostasCPOEA%20-%20Conectas-Art19-JG%20-%20Portugu%C3%AAs\(1\).pdf](http://www.conectas.org/arquivos-site/2012_12_05%20-%20Carta_BrasilPropostasCPOEA%20-%20Conectas-Art19-JG%20-%20Portugu%C3%AAs(1).pdf).

<sup>19</sup> See Conectas Direitos Humanos, "Pedido LAI sobre processo de Fortalecimento do Sistema Interamericano (y actualizaciones)," May 2012, <http://www.conectas.org/pt/acoefs/justica/lei-de-acesso-a-informacao/30-pedido-lai-sobre-processo-de-fortalecimento-do-sistema-interamericano>.

<sup>20</sup> See Conectas Direitos Humanos, "OEA conclui amanhã reforma do Sistema Interamericano de Direitos Humanos sob clima de expectativa," March 21, 2013, <http://www.conectas.org/pt/acoefs/politica-externa/noticia/oea-conclui-amanha-reforma-do-sistema-interamericano-de-direitos-humanos-sob-clima-de-expectativa>, and "Termina o Processo de Reforma do Sistema Interamericano," March 26, 2013, <http://www.conectas.org/pt/noticia/finaliza-o-processo-de-reforma-do-sistema-interamericano>.

<sup>21</sup> See Federative Republic of Brazil, "Propostas de implementação," *supra* note 12.

<sup>22</sup> See Conectas Derechos Humanos, *supra* note 20.

the IACHR's role of promotion, but this was not accompanied by any specific proposal for an increase in funding.<sup>23</sup>

During the reform process, Brazil also advocated the universality of the system—although when Venezuela withdrew from the American Convention on Human Rights, Brazil remained absolutely silent.<sup>24</sup>

Indeed, the Brazilian position overall left some room for doubt, because toward the end of the process Brazil took contradictory stances on a given issue in different contexts. While Brazil expressed satisfaction in the OAS Permanent Council with the reforms proposed by the IACHR, it was simultaneously taking part in a new forum for negotiation, the Conference of States Parties to the American Convention, which sought to reopen some of the issues that had already been resolved.<sup>25</sup>

## After the reform

Since the end of the reform process and the adoption of the IACHR's amended Rules of Procedure, Brazil has demonstrated a certain willingness to reestablish its relationship with the IACHR. As one of its symbolic acts, Brazil once again nominated Paulo Vannuchi as a candidate for Commissioner, and he was elected by the OAS General Assembly in June 2013.<sup>26</sup>

However, Brazil has yet to appoint a permanent representative to head its delegation to the OAS. The last representative was recalled following the precautionary measures in the Belo Monte case, and more than two years later, a replacement still has not been appointed.

As one of the countries that proposed changes that would require increased funding, and kept this issue at the forefront during the reform process, Brazil should set an example and increase its contributions to the IACHR. According to the IACHR's website, the last voluntary contribution made by Brazil was a symbolic amount of US\$10,000 in 2009.<sup>27</sup>

The strengthening of the system also requires compliance with the decisions and recommendations of the IACHR and the

Court. In the case of *Gomes Lund et al.*,<sup>28</sup> for example, Brazil is not demonstrating full compliance with the decision of the Court, which asked Brazil to repeal all laws that prevent the prosecution of human rights violators, including the Brazilian amnesty law. The Federal Supreme Court and various Brazilian authorities have upheld the constitutionality and legitimacy of this law, contrary to the decision of the inter-American system.<sup>29</sup> Congress is even considering including a reference to the amnesty law in the draft bill that defines the criminal offense of forced disappearance, which would make it even more difficult to prosecute those who perpetrated such acts during the military dictatorship.

Going forward, Paulo Vannuchi's actions in the IACHR will be important in defining the relationship between Brazil and the system. Vannuchi has more than enough credentials as a human rights defender and is also an expert political negotiator, which is crucial at this time in the IACHR. The challenge will be to shed the mantle of "State representative"—he was the minister of human rights for five years—and assume the new one of "independent expert." This change, which is not merely symbolic, might very well be a determining factor in the IACHR's development of its human rights protection role in a manner that is truly autonomous, independent, and effective.

## Conclusion

"If Brazil gets into the international game, it must do so in good faith," warned Professor Flavia Piovesan during the reform process.<sup>30</sup> The violation of this principle of good faith may be the most problematic legacy of the reform process. Brazil showed that it is willing to shake up the game board and try to change the rules when the game fails to play out according to its interests. It also became clear that other States—emboldened by the positions of a large State—are willing to form the lines of attack, safeguarding Brazil and protecting it from the collateral damage of its positions. ■

<sup>23</sup> See Federative Republic of Brazil, "Propostas de implementação," *supra* note 12, pp. 16–18.

<sup>24</sup> See Conectas Direitos Humanos, "Nota pública sobre decisão da Venezuela de se retirar da Convenção Americana de Direitos Humanos," September 12, 2012, <http://www.conectas.org/pt/acoef/politica-externa/noticia/nota-publica-sobre-decisao-da-venezuela-de-se-retirar-da-convencao-americana-de-direitos-humanos>.

<sup>25</sup> See Conectas Derechos Humanos, *supra* note 20.

<sup>26</sup> See María Clara Galvis and Katya Salazar, "43rd OAS General Assembly: Sound Judgment Prevailed," DPLF Justicia en las Américas (blog), June 10, 2013, <http://dplfblog.com/2013/06/20/43rd-oas-general-assembly-sound-judgment-prevailed/>.

<sup>27</sup> See the IACHR page on financial resources, [http://www.oas.org/en/iachr/mandate/financial\\_resources.asp](http://www.oas.org/en/iachr/mandate/financial_resources.asp).

<sup>28</sup> See I/A Court H.R., Case of *Gomes Lund et al.* ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 24, 2010, Series C, No. 219.

<sup>29</sup> Federal Supreme Court (STF), "STF é contra revisão da Lei de Anistia por sete votos a dois," Notícias STF, April 29, 2010, <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=125515>.

<sup>30</sup> See Conectas Direitos Humanos, "Se o Brasil entrou no jogo internacional, há que cumpri-lo de boa fe, diz Flávia Piovesan," August 8, 2012, <http://www.conectas.org/pt/acoef/politica-externa/noticia/undefinedse-o-brasil-entrou-no-jogo-internacional-ha-que-cumpri-lo-de-boa-fe-undefined-diz-flavia-piovesan>.

# Looking at the Horizon

## Inter-American Achievements and Challenges

Diego García-Sayán

Judge, former president of the Inter-American Court of Human Rights

Latin America is progressing in its democratic rights. To be sure, the journey has its ups and downs, like any process in reality. Some specific and undeniable advances are visible in different areas of social and institutional life. For example, electoral democracy has essentially become institutionalized, and there are different mechanisms for preventing, responding to, and processing human rights violations—mechanisms that were nonexistent just a couple of decades ago.

In this process of transformation, the inter-American justice system has played a fundamental role in contributing to the protection of human rights. While the prevailing viewpoint up until a couple of decades ago was rather skeptical, we have recently entered a period of enormous dynamism and impact on the daily reality of our peoples and institutions.

At the end of 2013 I finished my second term as President of the Inter-American Court of Human Rights. After holding this position for four years, I feel it is the right time to accept the invitation to share some thoughts about the evolution of the inter-American justice system in this publication, which is so relevant and committed to the cause of human rights. There are three key factors to be underscored in the evolution of the Inter-American Court during this period.

### “Democratic demand”

The first is the growth of “democratic demand.” Because of this, increasingly varied matters are finding their way to the Court—matters that, a few years ago, no one would have thought to submit to an international tribunal. They include discrimination based on sexual orientation, conflicts arising from public and pri-



vate investment in indigenous lands and territories and the dynamic of prior consultation, public access to information held by the State, methods of assisted fertilization, and many others. With this ever-broadening diversity of subject matters, together with those that the Court has traditionally handled, the number of judgments handed down in the past four years is equivalent to 32 percent of the cases adjudicated since the Court was established in 1979.

This process of thematic diversification and expansion is due mainly to the growing public perception that people are entitled to rights and that

this includes the possibility of acting, even in international tribunals, to protect these rights. The objective is not merely to achieve a “testimonial” outcome, but rather to obtain specific institutional responses and solutions with effects that are visible in real life—that is, measures and actions that redress the alleged violation and, in particular, seek to ensure the nonrepetition of a similar violation or infringement.

### Solid and consistent case law

A second—and essential—factor is the consolidation and development of the fundamental case law of the Court regarding the guidelines for the validity of human rights, for example, on key issues such as the obligation to investigate and punish serious human rights violations, the rules of due process, and the rights of indigenous peoples. Or the repeated—and unanimous—case law that firmly protects freedom of expression but harmonizes and balances this freedom with the right to honor and with the right of those who feel adversely affected to use available judicial means for their defense.

The Court has thus given shape to a body of substantive decisions on a growing variety of complex issues that affect different peoples and sectors of society. It has ruled on these matters in the exercise of its jurisdiction to create law within the framework of the provisions of the American Convention on Human Rights. This has also influenced the complex and varied reality of the region's countries. As a result, a rich jurisprudence on diverse topics and judicial policies has been laboriously woven over a quarter century.

Certain issues stand out within this lively judicial dynamic, such as the crime of the forced disappearance of persons. The Inter-American Court was the first international tribunal to treat these cases as multi-offense, continuing crimes. It established the principle that so long as the whereabouts of the disappeared person have not been established, the crime is understood to be continuing; this means, among other things, that its criminal prosecution is not barred by a statute of limitation. This legal approach has been taken up and developed in the national legislation of several countries in the region, as well as in the practice of courts that have found criminal liability for forced disappearance by making use of this concept. In addition, this approach has significantly strengthened the development of this issue in the International Criminal Court.

The complex issue of indigenous peoples' rights has also received special attention from the Inter-American Court over the past 10 years. Although the indigenous issue was seldom brought before the Court in the initial years of its work, that changed at the turn of the century. The breach between international law and the rights of indigenous peoples is today much less profound and dramatic than in the past. But it has been, and continues to be, a highly complex and problematic area concerning a sector of the population that has been very harshly affected by a long history of oppression and exclusion. As Nash well notes:

A significant part of the human rights violations in our hemisphere is centered on vulnerable groups (women, indigenous people, children, migrant workers), and these violations bear a direct relationship to cultural patterns that enable their perpetuation. [...] The indigenous peoples of our hemisphere clearly belong to these vulnerable categories [...].<sup>1</sup>

<sup>1</sup> Claudio E. Nash Rojas, "Los derechos humanos de los indígenas en la jurisprudencia de la Corte Interamericana de Derechos Humanos," in *Derechos humanos y pueblos indígenas: Tendencias internacionales y contexto chileno* (Temuco, Chile: Instituto de Estudios Internacionales, Universidad de la Frontera, 2004), p. 3. Translation by DPLF.

*Indigenous communities increasingly avail themselves of the international legal system to assert their rights, which is undoubtedly a significant and innovative advance.*

Several analysts, such as Pasqualucci, contend that the Inter-American Court of Human Rights is one of the key driving forces at the global level for the progressive development of the law.<sup>2</sup> Core principles such as nondiscrimination, the right to participation in public matters, and respect for customary law are important inputs in international human rights law today.

Indigenous communities increasingly avail themselves of the international legal system to assert their rights, which is undoubtedly a significant and innovative advance. The rights of indigenous peoples and the historical drama surrounding them, such as exclusion and discrimination, were not initially front and center in the inter-American justice system. Indeed, during the early years of the Court's operation, it was rather exceptional for cases involving the rights of indigenous peoples to come before the Court. The first case, concerning Suriname, was heard in 1993. It was only beginning in 2001—that is, more than 20 years after the Court's establishment—that these matters began to be brought before the Court with any regularity.

The important developments that have taken place recently with respect to issues such as prior consultation have fundamentally addressed the tension that exists today in over a dozen countries between the dynamics of public or private investment, on one hand, and the rights of indigenous peoples to land and territory, on the other. In its judgment in the case of *Kichwa Indigenous People of Sarayaku v. Ecuador*,<sup>3</sup> the Court refined and clarified its case law on issues such as prior consultation and other related matters.

In the area of freedom of expression, the Inter-American Court has established a consistent body of case law that is clearly delineated on several levels. First, it reaffirms freedom of expression as a right of journalists. But it has gone much further in its considerations, because society as a whole is entitled to the right to informational pluralism, according to which "equity must regulate the flow of information. [...] The protection of the human rights of those who face the power of the media and the attempt

<sup>2</sup> Pasqualucci calls it "progressive case law." Jo M. Pasqualucci, "The Evolution of International Indigenous Rights in the Inter-American Human Rights System," *Human Rights Law Review* 6, no. 2 (2006): 281–322.

<sup>3</sup> I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment of June 27, 2012, Series C, No. 245.

...what is interesting and perhaps most important is that the cases decided by the Inter-American Court tend to become emblematic cases and a source of doctrinal and jurisprudential inspiration for the national courts...

to ensure the structural conditions which allow the equitable expression of ideas [can be explained in these terms].<sup>4</sup> In 1985, when the Court issued its advisory opinion on the *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, it had already established that it is “indispensable” for there to be “a plurality of means of communication, [and] the barring of all monopolies thereof, in whatever form.”<sup>5</sup>

Second, the Court has established consistently and repeatedly that the right to freedom of expression must always be weighed against the rights to honor and to privacy, and that society and the State must guarantee individuals adequate judicial means to achieve this balance. The Court has established that both freedom of expression and the right to one’s honor must be protected and that “the prevalence of either of them in a particular case will depend on the considerations made as to proportionality.”<sup>6</sup> With respect to the tools that the State must provide to individuals to exercise the right to honor, the case law of the Court has consistently held that “the Court does not deem any criminal sanction regarding the right to inform or give one’s opinion to be contrary to the provisions of the Convention”; it has held this unanimously and repeatedly.<sup>7</sup>

In more recent times, finally, there have been groundbreaking judgments on issues such as the prohibition of discrimination based on sexual orientation,<sup>8</sup> in which the Court not only adjudicated the specific case but also established the fundamental principle that no one may be subject to discrimination based on his or her sexual orientation in relation to any of the rights

enshrined in the Convention. The judgment on the outlawing of in vitro fertilization is another notable example of the creation of innovative case law in light of new issues.<sup>9</sup>

## The jurisprudential dialogue

The third factor to be underscored is probably the most significant: an inter-American justice system that engages in dialogue with individuals and national institutions and is putting down roots in societies. This is the factor that, historically, is without a doubt the most important.

The Inter-American Court now holds public hearings not only at its headquarters but also in 16 other countries in the region. During 2013, it held hearings in Medellín, Mexico City, and Brasília. On each occasion, thousands of people followed the hearings closely and later incorporated much of what they saw there into their own actions as judges, lawyers, and academics.

As we know, the Court’s judgments, according to the Convention, are “final and not subject to appeal.” In “case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment” (Article 67 of the Convention). The States Parties “undertake to comply with the judgment of the Court in any case to which they are parties” (Article 68 of the Convention).

It is important to note that the case law of the Inter-American Court is increasingly providing inputs to the high courts of several countries in the region, including on substantive issues that are complex and critical. Indeed, what is interesting and perhaps most important is that the cases decided by the Inter-American Court tend to become emblematic cases and a source of doctrinal and jurisprudential inspiration for the national courts, because they deal with major issues that require a solution in light of the Inter-American Convention. Along these lines, “conventionality control”—that is, the construction of national judgments in accordance with the criteria contained in the judgments of the Inter-American Court—has gone from being a matter of academic reflection to being an obligation that is increasingly established by high national courts for the judges of their respective countries.

The Court’s decisions have, then, an impact that goes beyond the limits of each specific case. The case law that is shaped through successive interpretations influences the countries of

<sup>4</sup> I/A Court H.R., *Case of Kimel v. Argentina*, Merits, Reparations, and Costs, Judgment of May 2, 2008, Series C, No. 177, para. 57.

<sup>5</sup> I/A Court H.R., Advisory Opinion OC-5/85 of November 13, 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Series A, No. 05, para. 34.

<sup>6</sup> *Ibid.*, para. 51.

<sup>7</sup> *Ibid.*, para. 78; I/A Court H.R., *Case of Fontevecchia and D’Amico v. Argentina*, Merits, Reparations, and Costs, Judgment of November 29, 2011, Series C, No. 237, para. 55; and *Case of Mémoli v. Argentina*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 22, 2013, Series C, No. 265, para. 126.

<sup>8</sup> I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment of February 24, 2012, Series C, No. 239.

<sup>9</sup> I/A Court H.R., *Case of Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 28, 2012, Series C, No. 257.



the region through legal reforms or local case law that incorporates the standards established by the Inter-American Court into domestic law.

These case law developments of the Inter-American Court have, in and of themselves, enormous legal and conceptual significance. The national courts have been the instruments for the creative and meaningful impact of this case law, opening the way for the mitigation and questioning of the classic rules of positive law formally in effect.

In what we have called “jurisprudential dialogue,” there is a lively and growing interaction between what the Inter-American Court does, on one hand, and what the national courts do, on the other. Thus, the judgments of the Inter-American Court incorporate the opinions and reasoning of national courts, such as the Constitutional Court or the Council of State of Colombia, for example.

So-called “conventionality control” is a very important process today. It has been clearly established, for example, by the Supreme Court of Mexico in its determination that inter-American criteria are binding (mandatory) for all judges in Mexico, even if the country has not been a party to the case. This criterion has already been established by the high courts of Colombia (“relevant interpretive criterion”) and Peru, among many others.

The outlook is encouraging. The inter-American judgments are essentially being respected, and national justice systems are starting to gain their own strength by drawing on inter-American criteria. The “jurisprudential dialogue” is, then, a reality and

not a mere ideal or aspiration. However, there are various substantive challenges ahead for the inter-American justice system in both the short and long terms. I would like to underscore three of them.

First, threats to public safety caused by crime, especially organized crime, constantly tempt democratic society to respond improperly (through “popular justice,” death squads, and the like). It is possible—and indispensable—to carry out effective democratic public policies in this area through prevention, efficient policing, and citizen participation.

A second challenge is to resolve the social tensions linked to investment in the lands and territories of indigenous peoples. The Court’s conceptualization requires the reinforcement and improvement of national institutional capacities in that direction.

Third, the region needs to bring a close to all remaining internal armed conflicts. In this respect, the path from war to peace in Colombia and the design and implementation of transitional justice in that country is now one of the crucial institutional challenges related directly to justice and human rights. It is necessary to bring the objective of justice and the objective of peace and reconciliation into line with one another. Some standards and guidelines were established in this regard in the judgment in the case of *El Mozote v. El Salvador*,<sup>10</sup> to which I adhere. ■

<sup>10</sup> I/A Court H.R., *Case of the Massacres of El Mozote and Neighboring Locations v. El Salvador*, Merits, Reparations, and Costs, Judgment of October 25, 2012, Series C, No. 252.

## Reform of the Inter-American Commission on Human Rights: and now what? (Lima, Peru. September 5, 2013)

On September 5, 2013 in Lima, Peru a public forum titled “Reform of the Inter-American Commission on Human Rights: and now what?” was held with the participation of members of the Inter-American Commission on Human Rights (IACHR), representatives of the Peruvian government, donor community and civil society representatives from the region. This public forum was organized as the closing activity of a two day reflection exercise, during which participants discussed the impact the IACHR reform process has had on the defense of human rights in the region.

In the public forum, the IACHR was represented by Jose de Jesus Orozco, the presiding IACHR President at that time, and Emilio Alvarez-Icaza, the IACHR’s Executive Secretary. Walter Alban, Peru’s Representative before the OAS at the time, spoke for the Peruvian government. Civil society was represented by Katya Salazar, Executive Director of DPLF, Ernesto de la Jara, Founding Director of IDL and Christian Steiner, Director of Konrad Adenauer (KAS) Foundation’s Rule of Law Program in Latin America. The event was organized by these organizations with the support of KAS and the National Endowment for Democracy (NED).



# The Inter-American System in View of the New Regional Institutional Framework for Human Rights<sup>1</sup>

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Over the past few years, the Inter-American Commission on Human Rights (IACHR) has gone through an intense process of debate regarding its role and its fundamental areas of responsibility.<sup>2</sup> Within this framework, several States raised the need to reconsider the work of the international protection body in light of current realities in the hemisphere.<sup>3</sup> In addition to the discussions on the scope and use of its tools, the IACHR faced various challenges to its strategic agenda and principal alliances.<sup>4</sup> It was a complex process due to the diversity of actors and interests at stake, one that featured legitimate criticism of the IACHR's work as well as proposals aimed solely at



curtailing its powers. The process resulted in changes to the Commission's Rules of Procedure, institutional practices, and policies. It culminated in the 44th Extraordinary General Assembly of the Organization of American States (OAS), whose final resolution managed to keep the Commission's powers intact and prevent the potential disintegration of the inter-American human rights protection system.<sup>5</sup>

To examine the debates on the role and duties of the Commission solely in terms of the discussions

that have taken place within the OAS since 2011 would be to tell just a small part of the story. A distinct feature of this latest reform process, one that differentiates it from prior discussions about the work of the regional protection bodies,<sup>6</sup> is the multiplicity of forums in which debate was held on the present and future of the inter-American human rights system. In recent years, the region's institutional framework has acquired new components, starting with the promotion and creation of subregional mechanisms that provide a forum for political decisions with immediate or potential impacts on human rights. These mechanisms were highly visible and relevant in the debates on the IACHR.

Particularly notable, in this regard, are the initiatives within the Union of South American Nations (UNASUR) for the creation of a new mechanism with a human rights mandate, as well as the discussions on the work of the inter-Amer-

<sup>1</sup> This topic was addressed in greater detail by the author, together with Camila Barretto Maia, in "Debates actuales sobre la institucionalidad regional en derechos humanos: El futuro del Sistema Interamericano y las nuevas dinámicas de integración en América Latina," in *Derechos Humanos en Argentina: Informe 2013*, ed. Centro de Estudios Legales y Sociales (Buenos Aires: Siglo XXI Editores, 2013).

<sup>2</sup> The IACHR set up a specific website that provides information on the process and links to the documents that have been drafted within its framework, available at <http://www.oas.org/es/cidh/mandato/fortalecimiento.asp>.

<sup>3</sup> In the past the system faced various threats that dissipated, time and again, both because they came from States that lacked sufficient weight to impose their views and because the criticisms and proposals lacked sufficient legitimacy to gain wide acceptance. Nevertheless, intense discussions began in 2011, and this time the positions of various States with the ability to influence and persuade others converged. The challenges to the powers of the IACHR raised by Brazil, Ecuador, Bolivia, Nicaragua, Venezuela, and Colombia created the context for the development of the so-called "strengthening" process.

<sup>4</sup> Among other issues, several States questioned the legality and legitimacy of the IACHR's power to grant precautionary measures, the criteria for the drafting of Chapter IV of its Annual Report, and the funding and work priorities of the Special Rapporteurship for Freedom of Expression. An additional criticism was that the inter-American system lacks universality because neither the United States nor Canada has ratified the American Convention on Human Rights.

<sup>5</sup> In this regard, see CELS, "Asamblea Extraordinaria de la OEA sobre la CIDH: La salida del consenso" (March 27, 2013), <http://www.cels.org.ar/comunicacion/?info=detalleDoc&ids=4&lang=es&ss=46&idc=1606>.

<sup>6</sup> The formal debate about the powers, functions, and work of the inter-American system's bodies that took place between the beginning of 2011 and March 2013 was not the first one; there have been several past discussions of this same subject. See, for example, 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)*, OEA/Ser.G, CP/CAJP-2665/08 rev. 8 corr. 3, March 18, 2009.

ican system that took place during the MERCOSUR Meeting of High-Level Human Rights Authorities (RAADH). We must also mention the work of the so-called Conference of States Parties to the American Convention on Human Rights, convened during the reflection process, even though these appear to have been *ad hoc* sessions aimed at obtaining results that could not achieve a consensus within the OAS. A full understanding of the most recent reform process requires us to take account of the discussions around the IACHR's role and development that arose in these subregional forums.

## UNASUR and the challenge of nonduplication

In 2011, while the reform process was underway in the OAS, some discussions began regarding the possible creation of a space within UNASUR that would be dedicated to the subject of human rights. This process began with a presentation by Ecuador calling for the creation of a South American Human Rights Coordination Office and the establishment of a working group to study a proposal on the treatment and promotion of human rights in UNASUR. This initiative was directly linked to the debates that were taking place at the same time with respect to the inter-American human rights system.<sup>7</sup> Thus Ecuador's original proposal emphasized:

The bodies that monitor compliance with Human Rights in the Americas have set aside what should be their main objective, the promotion and development of mechanisms that aid the social—but above all, human—development of our peoples. Currently, the principal activity of these bodies is to receive petitions and to examine and adjudicate cases, but the reality and the need of our peoples go far beyond seeing an annual report with recommendations to the States that may or may not be fulfilled. The creation of a space focusing on the protection, development, and above all the practice of Human Rights at the UNASUR level is imperative at this time.<sup>8</sup>

Given this analysis, the Ecuadoran government proposed the creation of an “inter-State” coordination office that could ad-

*To demand the substitution of one forum by another ignores the fundamental differences between human rights protection systems such as the inter-American system and an exclusively political forum or council dealing with the same subject.*

dress the region's human rights problems, including by receiving and processing complaints of human rights violations.

Various States and civil society organizations viewed this proposal with concern. They believed that it sought the direct substitution of the inter-American human rights system by a new and different framework within UNASUR—or at the least, its indirect substitution through delegitimization. The apparent intent was to replace a mechanism made up of independent experts—who, among other duties, evaluate cases submitted by victims of human rights violations—with another system that has a different focus and is composed solely of government representatives.

To demand the substitution of one forum by another ignores the fundamental differences between human rights protection systems such as the inter-American system and an exclusively political forum or council dealing with the same subject. Although mechanisms of the latter type—such as the Universal Periodic Review (UPR) conducted by the United Nations Human Rights Council—can contribute in various ways to improving the human rights situation, they cannot replace judicial or quasi-judicial mechanisms composed of human rights experts.<sup>9</sup> The rationale for the latter is that individuals whose fundamental rights have been violated should be able to resort to an additional level of review once domestic response channels have been exhausted. This international remedy pro-

<sup>7</sup> Ecuador's proposal states that “the creation of the [South American Human Rights Coordination Office] will take account of the valuable recommendations made by the States to the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights, which were approved by the Permanent Council on January 25, 2012, and which, apparently, have remained simple recommendations” (emphasis added).

<sup>8</sup> Ecuadorian Ministry of Foreign Affairs, Trade and Integration, “Proposal for the Creation of a South American Human Rights Coordination Office.” Translation by DPLF.

<sup>9</sup> An evaluation of the achievements and potential of a mechanism such as the UPR involves acknowledging its inherent limitations. It is a mechanism made up of representatives of the States, most of whom not only lack human rights training but also tend not to be objective, given that their work logically entails defending the rights of their own States. Therefore, whether or not a given review process amounts to “an assessment undertaken in an objective and transparent manner of the human rights situation in the country under review, including positive developments and the challenges faced by the country” (Human Rights Council, “Institution-building of the United Nations Human Rights Council,” Resolution 5/1, June 18, 2007) depends essentially and solely on the good faith with which the States take part. In any case, the type of assessment done for the UPR differs greatly from the work involved in the “protection” of human rights, which is accomplished through other mechanisms that examine complaints of human rights violations and seek redress, with a view to ensuring the nonrepetition of similar violations.

*... the civil society organizations of the region have an important role to play in advancing a strategic agenda that channels its potential and removes the specter of the replacement or duplication of human rights mechanisms once and for all.*

vides a space that is meant to be distinct and independent from national governments. Although a political forum made up of States could receive complaints from individuals, having those complaints examined by the States themselves would make it nearly impossible to resolve the cases with sufficient impartiality. Such a forum would also be unable to guarantee that the political officials involved would have expertise in the field of human rights.<sup>10</sup>

Fortunately, at the meetings held to examine Ecuador's proposal, it was possible to advance the idea that whatever new mechanism might be created, it was necessary to "avoid the duplication of regulatory developments and of protection, supervision, and coordination bodies already existing at the universal or regional level."<sup>11</sup> After two rounds of debate it was concluded that a useful system for dealing with human rights within UNASUR should aim, first and foremost, to fully realize the potential of a body for political coordination among governments, rather than seeking to replace bodies that have been working to promote and protect human rights in the region for decades. It was thus suggested that a High Level Group for the Cooperation and Coordination of Human Rights in UNASUR be established. According to the minutes of the second meeting, "this authority would be in

charge of coordinating cooperation among the States in compliance with their obligations to promote, protect, guarantee, respect, and develop human rights through joint strategies and actions to strengthen their public policies, according to their current realities."<sup>12</sup> In addition, the meeting selected key issues to be dealt with in this new forum, including strategies to promote the inclusion of and respect for the rights of persons with disabilities; the promotion of national mechanisms for the prevention and eradication of torture; the guarantee of the rights of persons deprived of liberty; and the "strengthening of the economic, social, and cultural rights perspective as a focal point for national economic and social development strategies."<sup>13</sup> This proposal was finally approved by the heads of State at the UNASUR summit in Paramaribo, Suriname, in late August 2013.<sup>14</sup>

Although the risk of replacing the inter-American system was avoided, it remains to be seen how this new forum for intergovernmental coordination will take shape. Undoubtedly, the civil society organizations of the region have an important role to play in advancing a strategic agenda that channels its potential and removes the specter of the replacement or duplication of human rights mechanisms once and for all. The challenge now is to identify potential ways in which the new entity can complement the inter-American system and other subregional mechanisms with a human rights mandate, such as the RAADH.

## Human rights in MERCOSUR

The oldest system of subregional integration operating in Latin America is the Common Market of the South, known as MERCOSUR. Although it was originally conceived with strictly economic objectives, it eventually ceased to be only a common market and became a strategic alliance based on certain shared principles. This evolution entailed the significant expansion of the MERCOSUR agenda, followed by an intense process of institutional expansion. Within this framework, an *ad hoc* group on human rights was formed, later defined as the RAADH.<sup>15</sup> Additionally, MERCOSUR'S Institute for Public Policy on Human Rights (IPPDH) was created in 2010.

<sup>10</sup> The differences between mechanisms made up of government representatives, on one hand, and judicial or quasi-judicial mechanisms composed of experts, on the other, explain the fact that in the United Nations human rights system, the treaty bodies system and the Human Rights Council co-exist and are considered equally relevant. These two central parts of the United Nations system allow for diverse methods of action and response. One is predominantly technical and quasi-judicial, aims to be independent, and is open to the individual complaints of victims of human rights violations; the other is intergovernmental and has objectives more closely tied to policy coordination and articulation, as well as the handling of large-scale crises. See Barretto Maia et al., "Debates actuales sobre la institucionalidad regional en derechos humanos," *supra* note 1.

<sup>11</sup> 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, Minutes of the First Meeting of the WG to Study a Proposal for the Treatment and Promotion of Human Rights in UNASUR, para. 3.

<sup>12</sup> 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, Minutes of the Second Meeting of the WG to Study a Proposal for the Treatment and Promotion of Human Rights in UNASUR, January 17–18, 2013.

<sup>13</sup> *Ibid.*

<sup>14</sup> In its first year, the new UNASUR human rights group was chaired by Peru.

<sup>15</sup> Since 2010, CELS has participated regularly in the RAADH forum, attending six of the recent meetings.

The RAADH is a forum that facilitates an open exchange on the subject of human rights among the main political authorities in the subregion with a view to articulating public policies in the domestic sphere, as well as foreign policy decisions related to human rights. Although there have been 24 regular sessions and five extraordinary sessions to date, the work of this body has faced various obstacles, mainly of a bureaucratic/institutional nature. These have prevented the RAADH from becoming an active policy coordination body with a direct and significant impact in the area of human rights. The reasons for these limitations include, among other things, the absence of strategic planning of the organization's agenda. As a result, its main decisions until recently were mere reiterations of declarations made by the heads of State.

In recent years, the intense work of the IPPDH has made it possible to resolve some of these difficulties, with various relevant initiatives being discussed and adopted. They include a request for an advisory opinion from the Inter-American Court of Human Rights on migrant children, work toward the preparation of a Guide to Records on Repressive Operations in the Southern Cone, and several decisions on coordination of foreign policy regarding positions before the United Nations Human Rights Council, which have included, for example, the joint advocacy of a special rapporteurship on the rights of the elderly.

Nevertheless, there is still much work to be done. Above all, greater political commitment on the part of the States is needed in order for this institutional forum to reach its potential. It is possible to identify different thematic issues that could be given even greater weight in the ongoing work agenda of the RAADH, based on the shared history of the countries in the group or the inherently transnational nature of these issues. This offers the potential for significant results in foreign policy coordination, as well as in the joint formulation of public policies on issues of mutual concern.

In any event, it is clear that the RAADH decided to play a role in the discussions surrounding the inter-American system. These debates unfolded at the same time that other debates were taking place at the Conference of States Parties to the American Convention on Human Rights.

## Reform of the system on the agenda of permanent and ad hoc political blocs

In late 2012, the debates concerning the IACHR made their way onto the agenda of the RAADH. Given the direction of the discussions underway on the powers of the regional protection bodies, the Uruguayan delegation proposed the adoption of a declaration in support of the inter-American human

rights system at the IV Extraordinary Meeting of the RAADH in Brasilia.<sup>16</sup> At that meeting, however, the representation of Brazil and Argentina had been entrusted to lower-ranking officials. Venezuela, which had just been made a permanent member of MERCOSUR,<sup>17</sup> had sent a representative who did not have decision-making authority. In these circumstances, and given the impossibility of delving into a political discussion that could lead to a regional stance, it was agreed that Uruguay would convene a special meeting to discuss the position of the RAADH on the situation of the inter-American system prior to the OAS Extraordinary General Assembly scheduled for March 2013.<sup>18</sup>

Accordingly, the V Extraordinary Meeting of the RAADH had only one item on its agenda: the current status of the IACHR. By then, the Declaration of Guayaquil had already been made public. This declaration was the outcome of the First Conference of States Parties to the American Convention on Human Rights (ACHR), convened by Ecuador and held in Guayaquil on March 11, 2013. Thus, the Guayaquil initiatives and the decisions of the extraordinary session of the MERCOSUR body intersected.

Ecuador's proposal to hold a conference limited to States Parties to the ACHR was meant to restrict the debates on the inter-American system to those countries that, in Ecuador's opinion, should be considered its legitimate actors, insofar as they had established a full relationship with the bodies of the system by ratifying the system's framework treaty, the American Convention. The announcement of this forum was a clear attempt to exclude the United States and Canada from the discussions.<sup>19</sup> In this sense it signaled one of the main issues in the reform process: the changes on the geopolitical scene and the intent of certain States to break away from a scenario influenced by the United States, which they saw as having molded the agenda and work methods of the Inter-American Commis-

<sup>16</sup> The draft declaration, prepared with the support of the civil society organizations in attendance, underscored the principles of autonomy and independence of the system's bodies, assessed the specific impacts of the IACHR and the Inter-American Court of Human Rights in periods of dictatorship as well as democracy, and highlighted the complementarity of forums such as the RAADH with the work of the regional human rights protection bodies. See Meeting of High-Level Human Rights Authorities, Minutes of the IV Extraordinary Meeting of the RAADH, Brasilia, November 2012, Annex VIII.

<sup>17</sup> Venezuela became a permanent member of MERCOSUR in mid-2012. It warrants special reproach that, one week after its admission to MERCOSUR, Venezuela decided to withdraw from the American Convention. In spite of its new status as a permanent member of the bloc, no significant political steps were taken to reverse a decision that weakens the system of protection enjoyed by persons under Venezuela's jurisdiction.

<sup>18</sup> In this regard, see Meeting of High-Level Human Rights Authorities, Minutes, *supra* note 16.

<sup>19</sup> Neither the United States nor Canada has ratified the ACHR. The United States signed it in 1977 but has never ratified it.

*The formal conclusion of the process in no way means that all tensions and discussions concerning the system's role in the region have been resolved. Rather, the path forward will depend on the role played by different actors in the system...*

sion on Human Rights and, in particular, the work of its Special Rapporteurship for Freedom of Expression. Accordingly, the central topics addressed—first at the Guayaquil meeting and then at the one in Montevideo, also in March 2013—were the supposed imbalance between the human rights protection and promotion work for which the IACHR is responsible; the system's sources of funding; the work of the Special Rapporteurship for Freedom of Expression; the composition of the Commission; and, finally, the need to reconsider the location of the IACHR's headquarters.

While it was initially feared that the basic powers of the IACHR could be endangered by the momentum of the discussions at the conferences, far from the debates within the Permanent Council of the OAS, these fears were not borne out. The necessary consensus to undermine the work of the IACHR was not there. The Declaration of Guayaquil—taken up again by the V RAADH—took balanced positions. So, for example, rather than approving a decision that could diminish the work of the single special rapporteurship, it was decided to underscore the need for all of the rapporteurships to have the necessary resources to fully perform their work. When the Declaration was scrutinized by MERCOSUR, an interesting—and still unexploited—opportunity arose for the “overcoming of difficulties related to the implementation of decisions and the progressive incorporation of IAHR standards” to be included as a priority theme of action for the RAADH.<sup>20</sup>

The 44th Extraordinary General Assembly of the OAS, held in March 2013 to consider the process of “strengthening” the IACHR, marked a clear turning point for all of the debates underway. In spite of various attempts to prolong the discussion about the Commission's key powers (for example, the ability to grant precautionary measures), the final resolution of the day resisted these attacks. It thus became possible to shut down—nearly completely, and at least for a time—an

environment conducive to the weakening of the regional protection bodies.

A political process is flexible by nature, and this Extraordinary Assembly cannot be assumed to have put a definitive end to all discussions regarding the reform of the agenda and work methods of the IACHR and the Inter-American Court.<sup>21</sup> The formal conclusion of the process in no way means that all tensions and discussions concerning the system's role in the region have been resolved. Rather, the path forward will depend on the role played by different actors in the system, and above all by the IACHR itself, through the building of a strategic and constructive agenda on its main thematic issues, lines of action, and alliances that also provides for interaction and cooperation with the new subregional mechanisms with a human rights mandate.<sup>22</sup>

## Closing remarks

The changes to the regional political landscape in recent years have included significant steps toward a new and more complex institutional architecture of human rights protection. The diversification of forums for debate on the present and future of the inter-American system is a clear demonstration of the importance of these new spheres. For the sake of the hemisphere's peoples, it is imperative to undertake a comprehensive reflection on how best to establish and deepen the complementarity between the different components of the current regional and subregional institutional framework of human rights. ■

<sup>21</sup> Indeed, following the final resolution of the process within the OAS, there were at least three rounds of debate in which attempts to reform the system persisted on the agenda, although they met with little enthusiasm. With less political support than at the discussions in Guayaquil, and with little prospect of taking the issues to the Permanent Council of the OAS, Bolivia convened the Second Conference of States Parties to the ACHR in mid-May 2013. There the agenda was once again marked by discussions of the universality of the system, with the paradoxical absence of any action regarding the situation of Venezuela, which at the time could still have withdrawn its decision to withdraw from the American Convention. The other key questions on the agenda were the location of the Commission's headquarters and its sources of funding. These issues were addressed again at the two subsequent sessions of the RAADH in June and November 2013, but without any major announcements or conclusions.

<sup>22</sup> An encouraging fact regarding the intersection of the discussions in these contexts and the work of the bodies of the system is that during 2013, the Commission requested that the RAADH assume the status of Permanent Observer. This explains, for example, the participation of Commissioner Rosa María Ortiz at the XXIII RAADH session in Montevideo in June 2013.

<sup>20</sup> In this regard, see Meeting of High-Level Human Rights Authorities, Minutes of the Fifth Extraordinary RAADH, Montevideo, March 14, 2013.

# The Conferences of States Parties to the American Convention on Human Rights: Form over Substance

Daniel Cerqueira

Senior program officer at the Due Process of Law Foundation (DPLF)

On March 11, 2013, the first Conference of States Parties to the American Convention on Human Rights took place in Guayaquil, Ecuador. Since then, two more have been held: in Cochabamba, Bolivia, on May 14, 2013, and in Montevideo, Uruguay, on January 21–22, 2014. These initiatives offer an alternative to the Organization of American States (OAS) as a forum for discussing the challenges facing the bodies of the inter-American human rights system. As such, in principle, they should warrant the support of the inter-American community; but the way in which they are being held raises doubts as to whether their true intent is to improve the system.

Among the points addressed in the closing declarations of the conferences of States Parties, two in particular stand out: the universal ratification of the inter-American human rights treaties and the potential relocation of the headquarters of the Inter-American Commission on Human Rights (IACHR). As to the first point, there has been progress over the past two decades with respect to the ratification of the inter-American instruments and protocols to the American Convention by various countries in the region. Nevertheless, the denunciation of the American Convention by Trinidad and Tobago in 1999 and by Venezuela in 2013—and the announcements by several other governments that they would follow suit—indicates a setback to the effort to attain universal ratification of the region's human rights instruments. Given this reality, the fact that the issue is being addressed in forums outside the OAS itself should be seen as something positive, insofar as it calls attention to the omission of those countries that resist acceding to the regional treaties, thereby weakening the system and depriving their citizens of better international protection of their rights.



With regard to moving the Commission's headquarters, it is likewise useful to raise the issue, provided that the debate is framed by an increase in financial resources for the system's bodies, improved dissemination of information, and better user access. Although those elements were mentioned in the closing declarations of the three conferences of States Parties held to date, some countries have used the location debate mainly as a way to put pressure on the United States—which currently hosts the IACHR headquarters—to ratify the American Convention. The steps taken by

the OAS and the system's own bodies have not been successful in persuading the United States and other countries to overcome the domestic challenges preventing their ratification of the Convention. In this context, the proposal to move the headquarters away from Washington, DC, could serve as an additional argument. Nevertheless, a debate of such importance should not be used for the purpose of weakening the position of any one country in the political forums of the OAS.

Nor should it serve to maintain the pressures to which the IACHR was exposed during the strengthening process. Surprisingly, among the 53 recommendations made to the IACHR on December 13, 2011, by the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights—which was formed by the Permanent Council—there was no reference to moving the Commission's headquarters. This issue was raised by some delegations at the end of the strengthening process, when it became clear that a minority wished to amend the Statute of the IACHR, Article 16.1, which establishes that the "headquarters of the Commission shall be in Washington, DC." It is important to recall that one of the points of consensus among civil society organizations during the discussion forums

on the strengthening process was their opposition to amending the IACHR Statute.

The tense and prolonged debates between the States, civil society, and other actors with regard to strengthening the inter-American system have now wound down. Thus it is troubling that the current discussion on changing the location of the IACHR headquarters is being used to keep open the possibility of convening an Extraordinary OAS General Assembly in order to amend Article 16.1 of the IACHR Statute and, along with it, other substantive provisions, without the proper participation of all of the system's users. While some States, supported at the time by the Secretary General of the OAS, called for a reform of the IACHR Statute in order to further regulate precautionary measures and other powers of the Commission, the resolution of the Extraordinary General Assembly of March 23, 2013, ruled out that possibility. It would be detrimental to keep it alive surreptitiously based on discussions that, in one way or another, were already aired during two years of consultations and deliberations before the Extraordinary General Assembly brought the so-called strengthening process to an end.

In the reform process recently concluded, the avowed goal of "strengthening" was belied by the intense criticism of the IACHR on the part of some States. It is essential that the advocates of new inter-governmental forums act with transparency and respect the important voice of civil society in any discussion of the workings of the inter-American system. To date, the deliberations at the conferences of States Parties to the American Convention have been characterized by a degree of secretiveness that would seem

to be inspired by the papal conclave, with two notable differences. At a conclave, the agenda—the election of the pontiff—is widely known, and the decision is made by the highest ecclesiastic authorities meeting in a plenary session. At the conferences of States Parties, by contrast, the agenda has been confidential and hidden from all those not present. Moreover, the number of foreign ministers participating in these gatherings has steadily decreased: at the recent meeting in Montevideo, only 14 of the 23 invited delegations showed up, and only four of them were headed by their foreign ministers. It bears noting, furthermore, that while the host countries' heads of State opened the conferences in Cochabamba and Guayaquil, the Uruguayan President did not attend the conference held this year in Montevideo. This dwindling involvement of officials at the highest levels raises questions about the weight of decisions made at the conferences.

We must not discount the importance of these additional forums as a useful complement to those existing within the sphere of the OAS for the discussion of how to improve the workings of the system's bodies. The three conferences of States Parties held to date have addressed some relevant issues. However, the tight secrecy and the absence of space for the participation of civil society organizations have compromised both the substance of the discussions and the legitimacy of the closing declarations. It is hoped that the next conference—to be held in Haiti on a date yet to be determined—will see improvements in the procedure, especially in terms of the opportunity for civil society organizations to have access to the agenda and to make their points of view heard during the deliberations. ■

## DPLF congratulates María Clara Galvis Patiño on being named Assistant Justice in Colombia's Superior Judicial Council



Until her designation to Colombia's Superior Judicial Council in March of 2014, Maria Clara served as DPLF's Senior Legal Advisor. Over nearly six years, she accompanied our organization in defining our legal strategies, extending technical support to our staff, and training various groups throughout Latin America. We are especially appreciative

of her work as author and editor on a number of DPLF publications, including *Digest of Latin American Jurisprudence on International Crimes Volume I & II*, *Digest of Latin American Jurisprudence on the Rights of Indigenous Peoples to Participation, Prior Consultation and Community Property*, the *Guide for Defending the Rights of Indigenous*

*Peoples*, and a number of editions of our institutional magazine *AportesDPLF*. Her deep knowledge of international and inter-American human rights law, transitional justice and rights of indigenous peoples was instrumental in allowing DPLF to add to the debate on these issues and helped position our organization as a source of serious dialogue and recommendations with civil society, public officials and the inter-American human rights system. Beyond her valuable professional skills, Maria Clara has been a friend and counselor who has shared our concerns and hopes like those of many colleagues in the region struggling for a better quality of life for those most vulnerable through the use of the law. We wish her the best in her new position and with the same friendship as ever we hope to continue to collaborate together for a future guided by the rule of law and respect for the human rights of all.



# New Challenges Facing the Inter-American Human Rights System

## Interview with Commissioner Paulo Vannuchi

**P**aulo Vannuchi, a Brazilian political scientist and journalist, was elected to the Inter-American Commission on Human Rights by the General Assembly of the Organization of American States (OAS) for the 2014–2017 period. He has served as an advisor to labor unions and was minister of human rights during the administration of President Lula da Silva. He began his term at the Commission on January 1, 2014. This interview was conducted shortly before he assumed the position.

**DPLF:** *In your capacity as Commissioner-elect, you must enjoy a dual view—external and internal—of the challenges and difficulties facing the Inter-American Commission on Human Rights (IACHR). What do you think are the issues or rights that the IACHR has most successfully promoted and protected since the 1980s?*

**Paulo Vannuchi:** Among the various historic achievements of the IACHR, the greatest has been the bold role it has played in making sure that the systematic human rights violations committed by military dictatorships against their political opponents cannot be forgotten or erased by self-amnesty laws that conflict with the provisions of the Pact of San José.

In the case of Brazil, the decision of the inter-American system in the *Guerrilha do Araguaia* case (1972–1974)<sup>1</sup> created a tension that the judiciary and the Brazilian State itself will have to confront without further delay. They must either decide that the judgment handed down by the Inter-American Court of Human Rights in December 2010—after years of work by the Commission—is irrelevant, as the minister of defense stated at the time, or they must comply with the provisions of an international treaty to which the State voluntarily acceded, acknowledging that the 1979 amnesty law cannot prevent all clarification of individual responsibility. I have no doubt that the second path will prevail. What we do not know is whether it will take one year or 10 years.

**DPLF:** *Conversely, what do you think are the issues or rights that the Commission still has not made substantial progress in promoting or protecting, and that are a sort of pending debt owed to the people of the region?*



**PV:** We have still not made sufficient progress on the broad range of economic, social, and cultural rights. Since 1988, the inter-American system has had the Protocol of San Salvador, which paved the way for decades of advancement in this area, but the protocol still lacks universal accession. Above all, the central directive of the Vienna Conference of 1993, which proclaimed the concept of the indivisibility of human rights in stronger terms than ever before, has not yet been put into action. This key notion undermines both the discourse of anyone who would sacrifice rights relating to freedom in the name of pursuing social and economic equality, and the cynical glorification of the laws of the market, which conceals the absence of real freedom in contexts where basic equality rights are not respected.

**DPLF:** *If you had to choose and prioritize three key aspects or conditions for strengthening the human rights promotion and defense work of the IACHR, which would you choose?*

**PV:** First of all, building a constructive agenda with each State Party, so that the actions taken in defense of rights—which generally involve demands, pressures, and complaints—occur in tandem with the formation of alliances and coordination with the segments of government that are most sensitive

to the issue of human rights. In this way, local and central governments would more clearly perceive that the inter-American system rigorously fulfills its role of monitoring and imposing demands but also works with the States themselves to coordinate joint actions on human rights education programs, the development of national human rights plans, seminars on conventionality control by the national judiciaries, and many similar activities.

Another priority is to attain real financial autonomy that would shield the inter-American system from any type of bias related to donations made by countries and nongovernmental organizations.

Finally, the necessary universality. An inter-American human rights protection system in which the countries are unequal in their degree of adherence and respect for its rules is fragile.

**DPLF:** *Of all of the “new” issues or rights that the inter-American system has addressed in recent years, the human rights of indigenous peoples have taken on special political, economic, social, and cultural relevance and have been the subject of various judgments by the Court, as well as reports, hearings, and on-site visits by the Commission. What do you think is the role of the IACHR in achieving the difficult balance between legitimate economic development, on one hand, and respect for the rights of indigenous peoples and the right to a healthy and balanced environment, on the other?*

**PV:** It is not that difficult to define general rules for that balance, based on common sense. The difficult task is to implement a policy that would break with 500 years of State violence, social exclusion, prejudice, and even hatred toward the Americans who were already living in our countries before the arrival of Columbus.

The general rules point to the need to protect the rights of indigenous peoples, the possession of their ancestral lands, and their cultural expressions, languages, rituals, and modes of production. But the idea of Amazonian, Andean, and Caribbean sanctuaries, where all productive or even business activity is prohibited, should also be rejected. A balance must be struck between two types of human rights that must not be allowed to conflict: the right to work, the need to create employment in very poor regions, and the fight against hunger and extreme poverty, on one hand, versus environmental rights, the rights of indigenous

*Another priority is to attain real financial autonomy that would shield the inter-American system from any type of bias related to donations made by countries and NGOs. Finally, the necessary universality. An inter-American human rights protection system in which the countries are unequal in their degree of adherence and respect for its rules is fragile.*

peoples and riverbank dwellers, and respect for the Pacha Mama [Mother Earth], on the other.

One path toward making this a reality can be found in Norberto Bobbio’s explanation of fairness as justice in a specific case: it calls for treating unequals unequally in order to create equality. In other words, human rights defenders cannot make the fundamentalist mistake of condemning each and every large productive or infrastructure investment. But their role is always to defend vulnerable sectors of society from States and

from mining, hydroelectric, gas, railroad, roadway, and port monopolies.

**DPLF:** *Where and how would you like to see the IACHR at the end of your term?*

**PV:** I would like to see the 35 countries (not just 34) of the three Americas and the Caribbean united in a common commitment to defend human rights, without distinction among them as to the degree of adherence to the tenets and instruments of the inter-American system, and with all of them aware that there can be no hierarchical ranking of the rights of freedom and rights of equality.

I would also like to see the agenda for freedom of expression move forward in condemning the murder of journalists and criticizing national laws that limit this right, which is a fundamental pillar of democratic life. But at the same time, I would like this agenda to be given equal weight, like two sides of a coin, with another objective that is not as widely accepted today: access to the mass media must be democratized so that indigenous peoples, environmentalists, labor unions, farmers, and popular movements of all stripes can also have their own radio and television broadcasting stations, magazines, and newspapers. ■

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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.

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