

## **PART I**

# **INTRODUCTION TO THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS**



## 1.1 The Organization of American States: The Development of the Human Rights System

The Organization of American States (“OAS” or “the Organization”) is a regional inter-governmental organization which includes thirty-five Member States: the independent nations of North, Central and South America and the Caribbean.<sup>1</sup> Cuba remains a member, but its Government has been excluded from participation in the OAS since 1962. The OAS has also granted Permanent Observer status to fifty-seven States and to the European Union.

The OAS Charter (“Charter”), the Organization’s constituting instrument, is a multilateral treaty that was adopted and opened for signature in Bogotá, Colombia in 1948; it entered into force in December 1951.<sup>2</sup> The Charter was subsequently amended by the Protocol of Buenos Aires in 1967<sup>3</sup> and by the Protocol of Cartagena de Indias in 1985.<sup>4</sup> In 1992 and 1993, two additional amending Protocols were signed: the Protocol of Washington<sup>5</sup> and the Protocol of Managua.<sup>6</sup> The Protocol of Washington entered into force in 1997 once it was ratified by two-thirds of the Member States, and the Protocol of Managua came into force on January 29, 1996.

The Charter makes very few express references to human rights. Article 3(l) establishes that the “American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.” Article 17 provides that “each State has the right to develop its cultural, political, and economic life freely and naturally.”<sup>7</sup> In developing these areas, however, States “shall respect the rights of the individual and the principles of universal morality.”<sup>8</sup> Article 53 of the current Charter establishes the Inter-American Commission on Human Rights (“Inter-American Commission” or “Commission”) as one of the organs through which the OAS accomplishes its

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- 1 The Member States of the OAS are: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, St. Kitts and Nevis, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela.
  - 2 Organization of American States, Charter of the Organization of American States, *signed* 1948, *entered into force* Dec. 13, 1951, OEA/Ser.A/2 Add. 3 (SEPF) (amended 1967, 1985, 1992, 1993) (last amendment *entered into force* Sep. 25, 1997) [hereinafter “OAS Charter”].
  - 3 <http://www.oas.org/juridico/English/treaties/b-31.htm>.
  - 4 <http://www.oas.org/juridico/English/Treaties/A-50.htm>.
  - 5 [http://www.sap.oas.org/docs/executive\\_orders/1992/eo\\_washington\\_protocol\\_92\\_eng.pdf](http://www.sap.oas.org/docs/executive_orders/1992/eo_washington_protocol_92_eng.pdf).
  - 6 <http://www.oas.org/juridico/english/Treaties/a-58.htm>.
  - 7 OAS Charter, *supra* note 2, arts. 3(1), 17.
  - 8 *Id.*, art. 17.

objectives.<sup>9</sup> According to Article 106, the principal function of the Inter-American Commission is to promote the observance and protection of human rights and to serve as a consultative organ of the OAS in this regard.<sup>10</sup>

Initially, the 1948 Charter neither spelled out the fundamental rights referred to in what is now Article 3, nor did it create any institution for their promotion and protection.<sup>11</sup> Although the same diplomatic conference that adopted the Charter also promulgated the American Declaration of the Rights and Duties of Man (“American Declaration” or “Declaration”), because the Declaration was simply a conference resolution, its drafters considered it to be without any binding legal force.<sup>12</sup>

The OAS took an initial step toward the promotion and protection of human rights when it created the Inter-American Commission in 1959. Originally considered an “autonomous entity” of the OAS, the Commission’s mandate was to promote respect for human rights. The Statute of the Commission, as adopted by the OAS Permanent Council in 1960, provided that “for the purpose of this Statute, human rights are understood to be those set forth in the American Declaration of the Rights and Duties of Man.”<sup>13</sup> The principles adopted in the Declaration thereby became the human rights provisions applied by the Commission in executing its functions. The normative value of the Declaration, therefore, was significantly strengthened with the adoption of the Statute.<sup>14</sup>

The status of the Commission changed after the Protocol of Buenos Aires entered into force in 1979. This Protocol amended the Charter and transformed the Commission from an autonomous entity into a principal organ of the OAS, vesting it with “an institutional and constitutional legitimacy.”<sup>15</sup>

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9 *Id.*, art. 53.

10 *Id.*, art. 106.

11 *Id.*, art. 3.

12 American Declaration of the Rights and Duties of Man, *approved* by the Ninth International Conference of American States, Bogotá, Colombia, 1948, OAS Res. XXX, *reprinted* in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003) [hereinafter “American Declaration”].

13 Organization of American States, Statute of the Inter-American Commission on Human Rights, art. 1(2)(b), Resolution No. 447 *adopted* by the OAS General Assembly, Ninth Regular Session, La Paz, Bolivia, October 1979, *reprinted* in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003) [hereinafter “Commission Statute”].

14 Thomas Buergenthal, “The Revised OAS Charter and the Protection of Human Rights,” 69 *Am. J. Int’l L.* 828-829, 835 (1975).

15 *Id.*, 836.

In 1969, OAS Member States adopted and opened for signature the American Convention on Human Rights (“American Convention” or “Convention”), which came into force on July 18, 1978.<sup>16</sup> As of April 2006, the American Convention has been ratified by twenty-four States.<sup>17</sup> The Convention defined additional functions and procedures of the Inter-American Commission with respect to the human rights obligations of ratifying States. The Commission continues to carry out its previous functions, such as processing cases against States not parties to the American Convention. Thus, with the Convention there arose a parallel system which is now reflected in the Statute of the Inter-American Commission on Human Rights, approved in 1979.<sup>18</sup>

The Convention additionally created the Inter-American Court of Human Rights (“Inter-American Court” or “Court”) and established its dual jurisdiction: contentious jurisdiction and advisory jurisdiction.<sup>19</sup> States parties to the Convention as well as OAS Member States and organs of the OAS may request advisory opinions. In contrast, only the Inter-American Commission and States parties that have submitted a declaration accepting the Court’s contentious jurisdiction may bring contentious cases before the Court.

As a result of these developments, the Inter-American System comprises a complex system of adherence:

1. The minimum level of adherence, in the form of compliance with the American Declaration, is required of all OAS Member States and is monitored by the Commission.

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16 Organization of American States, American Convention on Human Rights, *signed* Nov. 22, 1969, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003); O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

17 Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, The Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. Trinidad and Tobago denounced the Convention on May 26, 1998 (effective May 26, 1999). Trinidad and Tobago justified its decision as an effort to minimize the cruel and unusual punishment suffered by death row inmates spending more than five years awaiting the imposition of their sentence. The Government argued that by withdrawing from the Convention, and thereby eliminating an avenue for appeal, death sentences would be imposed more swiftly.

18 Article 22(2) of the Commission Statute provides that the Commission “shall prepare and adopt its own Regulations, in accordance with the present Statute.” Article 24(2): “The Regulations shall contain, for this purpose, the pertinent rules established in the Statute of the Commission approved by the Council of the Organization in resolutions adopted on May 25 and June 8, 1960 . . . taking into account resolution CP/RES. 253 (343/78), ‘Transition from the present Inter-American Commission on Human Rights to the Commission provided for in the American Convention on Human Rights,’ adopted by the Permanent Council of the Organization on September 20, 1979.” Commission Statute, *supra* note 13.

19 See Sections 1.3.1 and 1.3.2, *infra*.

2. A second level applies to States that have ratified the American Convention but have not accepted the contentious jurisdiction of the Court. These States must comply with their Convention obligations but are not subject to rulings of the Court in contentious cases.
3. The highest level of adherence is required of those States that have also accepted the contentious jurisdiction of the Court. They must comply with Convention obligations and may be the subject of binding Court judgments.

The Commission and Court's powers to monitor State adherence are not alternative but cumulative; all Member States must comply with the Declaration, and all Convention parties must comply with the Declaration and the Convention. States that accept the Court's contentious jurisdiction must comply with the Declaration, the Convention and applicable Court judgments. The related powers and functions of the Commission and the Court will be described in detail in the following sections.<sup>20</sup>

The Member States of the OAS have adopted additional human rights conventions: the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, "Protocol of San Salvador" (1988) ("Protocol of San Salvador");<sup>21</sup> the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990) ("Convention Against the Death Penalty");<sup>22</sup> the Inter-American Convention

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20 For more historical and contextual information on the Inter-American Human Rights System, see Tom Farer, "The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox," 19 *Hum. Rts. Q.* 510, 510-546 (1997); Robert K. Goldman, "The Protection of Human Rights in the Americas: Past Present and Future," *New York University Center for International Studies Policy Papers* 5.2 (1972); Robert K. Goldman, "History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights," *Hum. Rts. Q.*, forthcoming; Grossman, Claudio, "Message by Dean Claudio Grossman, President of the Inter-American Commission on Human Rights, in the Inaugural Session of the 95th Ordinary Term of the IACHR Sessions," *The Future of the Inter-American System of Protection of Human Rights*, Méndez, J., and Cox, F., Eds., San Jose: Inter-American Institute of Human Rights, 1998.

21 Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," Nov. 17, 1988, entered into force Nov. 16, 1999; O.A.S.T.S. No. 69 (entered into force upon the ratification of eleven States); reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003) [hereinafter "Protocol of San Salvador"].

22 Organization of American States, Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990; O.A.S.T.S. No. 73 (enters into force for each State that ratifies it or accedes to it); reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003) [hereinafter "Protocol to Abolish the Death Penalty"].

to Prevent and Punish Torture (1985) (“Inter-American Torture Convention”);<sup>23</sup> the Inter-American Convention on Forced Disappearance of Persons (1994) (“Convention on Forced Disappearance”);<sup>24</sup> the Inter-American Convention for the Prevention, Punishment, and Eradication of the Violence against Women, “Convention of Belém do Pará” (1994) (“Belém do Pará Convention”)<sup>25</sup> and the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities (2001) (“Disabilities Convention”).<sup>26</sup>

All of the Conventions mentioned above with the exception of the Disabilities Convention provide for an individual complaint procedure before the Commission and ultimately before the Court. However, the Torture Convention and the Belém do Pará Convention do not expressly authorize the referral of cases to the Inter-American Court. Nevertheless, the Court has ruled that it also has jurisdiction in cases involving alleged violations of the Inter-American Torture Convention, in accordance with Article 8 of that treaty.<sup>27</sup> It is expected that the Court will similarly interpret Article 7 of the Belém do Pará Convention, which contains an individual complaints provision that is more specific than that which is found in the Inter-American Torture Convention. With regard to the Protocol of San Salvador, the Commission and Court may only receive cases claiming violations of Protocol Articles 8(a) (trade union rights) or 13 (right to education).<sup>28</sup> Other rights recognized therein may not be the subject of individual complaints, but will be otherwise monitored by the Commission.<sup>29</sup>

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- 23 Organization of American States, Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, *entered into force* Feb. 28, 1987, O.A.S.T.S. No. 67; *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003) [hereinafter “Inter-American Torture Convention”].
- 24 Organization of American States, Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, *entered into force* Mar. 28, 1996; *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 33 I.L.M. 1429 (1994) [hereinafter “Convention on Forced Disappearance”].
- 25 Organization of American States, Inter-American Convention for the Prevention, Punishment, and Eradication of the Violence against Women, “Convention of Belém do Pará,” June 9, 1994, *entered into force* Mar. 5, 1995; *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 33 I.L.M. 1534 (1994) [hereinafter “Belém do Pará Convention”].
- 26 Organization of American States, Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities, June 7, 1999, *entered into force* Sep. 14, 2001, AG/RES. 1608; *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003).
- 27 “*Street Children*” v. *Guatemala (Villagrán-Morales et al.)*, Judgment of November 19, 1999, Inter-Am. Ct. H.R., (Ser. C) No. 63, paras. 247-52; *The “Panel Blanca” v. Guatemala (Paniagua-Morales et al.)*, Judgment of March 8, 1998, Inter-Am. Ct. H.R., (Ser. C) No. 37, para. 136.
- 28 Protocol of San Salvador, *supra* note 21, art. 19(6).
- 29 *Id.*, art. 19(7).

The Commission's power to examine individual complaints is without prejudice to its general statutory powers, which extend to all of the treaties mentioned above. Under these powers, as discussed in the following section, the Commission may make recommendations to States regarding the adoption of measures for the promotion and protection of human rights, prepare studies and reports, request information from States, respond to States' inquiries, submit Annual Reports to the OAS General Assembly and conduct on-site observations with Government consent or invitation.<sup>30</sup> The Commission may also request advisory opinions from the Inter-American Court and submit draft protocols to the OAS General Assembly.<sup>31</sup>

## 1.2 The Inter-American Commission on Human Rights

### 1.2.1 Composition and Powers

The Inter-American Commission on Human Rights is composed of seven members elected in their individual capacities by the OAS General Assembly, from a list of candidates proposed by Member States.<sup>32</sup> Candidates must be persons of high moral standing and must possess recognized competence in the field of human rights.<sup>33</sup> Commission members are elected for a term of four years and may be reelected once.<sup>34</sup> The Inter-American Commission is located in Washington, D.C., where the headquarters of the OAS are based.

In accordance with its Statute, the Commission exercises three categories of powers.

1. With respect to all OAS Member States, the Commission's powers are as follows:<sup>35</sup>
  - To develop awareness of human rights;

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30 Commission Statute, *supra* note 13, art. 18.

31 *Id.*, art. 19.

32 *Id.*, art. 3; American Convention, *supra* note 16, art. 36.

33 Commission Statute, *supra* note 13, art. 2; American Convention, *supra* note 16, art. 34.

34 Commission Statute, *supra* note 13, art. 4; American Convention, *supra* note 16, art. 37. As of September 2006, the members of the Commission are the following: Evelio Fernández Arévalos, Paulo Sérgio Pinheiro, Florentín Meléndez, Clare Kamau Roberts, Freddy Gutiérrez Trejo, Paolo G. Carozza and Victor E. Abramovich.

35 Commission Statute, *supra* note 13, art. 18.

- To recommend measures in favor of human rights in the framework of national legislation and international commitments;
  - To prepare such studies or reports as it considers advisable;
  - To request that Governments report on measures adopted domestically;
  - To respond to inquiries and provide advisory services and
  - To conduct on-site observations with the State's consent or invitation.
2. In relation to those OAS Member States that are not parties to the American Convention, the Commission has these specific powers:<sup>36</sup>
- To pay particular attention to the observance of the following rights contained in the American Declaration: the right to life, liberty and personal security, the right to equality before law, the right to religious freedom and worship, the right to freedom of investigation, opinion, expression and dissemination, the right to a fair trial, the right to protection from arbitrary arrest, the right to due process of law<sup>37</sup> and
  - To examine communications, to request information and to make recommendations once it is verified that domestic remedies have been exhausted.
3. With regard to States Parties to the American Convention, the Statute authorizes the following additional powers:<sup>38</sup>
- To act on petitions and other communications;
  - To appear before the Inter-American Court of Human Rights;
  - To request of the Inter-American Court of Human Rights provisional measures in serious and urgent cases;
  - To consult the Court on the interpretation of the American Convention or other human rights treaties;
  - To submit additional draft protocols to the American Convention in order to include progressively other rights and freedoms under the system of the Convention and

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36 *Id.*, art. 20.

37 In this regard, it is important to note that the Commission considers the American Convention as a source in interpreting the rights contained in the American Declaration.

38 Commission Statute, *supra* note 13, art. 19; American Convention, *supra* note 16, art. 41.



- To submit to the General Assembly, through the Secretary General, proposed amendments to the American Convention.

Additionally, under the American Convention, the Commission may also receive and examine inter-State complaints, those filed by one State alleging that another State is in breach of the Convention, where both States have recognized the Commission's competence to consider such complaints, upon ratification of the Convention or at any later time.<sup>39</sup> When a State has accepted the Commission's competence and the Commission receives a communication from another State, the procedure is governed by Title II, Chapter II of the Rules of Procedure. However, inter-State communications are not explicitly established for States that have not ratified the Convention. It is not yet clear if such States can file a complaint against another State before the Commission under the American Declaration.

In sum, the Commission's authority arises from its dual nature: it is an organ of the OAS Charter with a statutory mandate based on the American Declaration, and it is also an organ of the American Convention. As mentioned above, the powers and functions of the Commission *vis-à-vis* each State will vary depending on whether the State has ratified the Convention and accepted the Court's contentious jurisdiction. Nonetheless, the different spheres of action are closely interconnected, and they are complementary rather than mutually exclusive. As a result, the Commission may consider sources of interpretation and information from one sphere and use them in another.<sup>40</sup>

Throughout its history, the Commission has developed and enhanced its statutory powers and later its powers under the American Convention, through the modification of its own Rules of Procedure. Utilizing its regulatory powers, the Commission has defined several "tools" essential to the monitoring and protection of human rights in the hemisphere, specifically, on-site visits and country reports, as well as the consideration of individual petitions. A recent example of such expansion is the adoption of the new Rules of Procedure in 2000 and subsequent amendments in 2002 and 2003.

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39 Organization of American States, Rules of Procedure of the Inter-American Commission on Human Rights, art. 48, *approved* Dec. 4-8, 2000 (amended Oct. 2002, Oct. 2003); *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003) [hereinafter "Commission Rules of Procedure"]. American Convention, *supra* note 16, art. 45.

40 *See supra* note 37; "*Baby Boy Case*", Case 2141, Report No. 23/81, Inter-Am. C.H.R., Annual Report 1980-1981, OEA/Ser.L/V/II.54 Doc. 9 rev. 1 (1981).

## 1.2.2. Reports and On-Site Visits

### a. Country and Thematic Reports

As part of its power to monitor human rights conditions in OAS Member States,<sup>41</sup> the Inter-American Commission publishes special reports regarding human rights situations in specific States. Recent practice of the Commission reflects a trend to address certain issues increasingly in the form of “thematic reports.”<sup>42</sup>

The power to prepare reports was established in Article 9 of the original Commission Statute. The wording of this article was later reproduced in Article 41(c) of the American Convention and in Article 18(c) of the current Statute.<sup>43</sup> The authority to prepare reports is regulated in detail by the Rules of Procedure.<sup>44</sup>

Although there is no express provision establishing the obligatory character of the recommendations issued by the Commission in such reports, upon adoption and/or ratification of Inter-American human rights instruments, States must comply with their provisions in good faith. Therefore, because the Commission was created to supervise compliance with the System’s human rights obligations, States are obliged to abide by the findings and recommendations issued in Commission reports.<sup>45</sup>

The Commission may draft reports based on a myriad of factors and circumstances. The language of Article 41(c) of the Convention and 18(c) of the Statute indicates that the Commission may prepare studies or reports “as it considers advisable.”<sup>46</sup> Article 56 of the Rules of Procedure also refers to the Commission’s discretionary authority to decide to initiate a report on a

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41 Commission Rules of Procedure, *supra* note 39, arts. 56, 58; Commission Statute, *supra* note 13, arts. 18-19; American Convention, *supra* note 16, art. 41.

42 See Inter-Am. C.H.R., *Report on the Demobilization Process in Colombia*, OEA/Ser.L/V/II.120 Doc. 60, December 13, 2004; Inter-Am. C.H.R., *Special Report on the Human Rights Situation at the Challapalca Prison, Department of Tacna, Republic of Peru*, OEA/Ser.L/V/II.118, Doc.3, October 9, 2003.

43 Commission Statute, *supra* note 13, art. 18(c); American Convention, *supra* note 16, art. 41(c).

44 Commission Rules of Procedure, *supra* note 39, arts. 56-58.

45 See Section 1.2.3(c), *infra*.

46 Commission Statute, *supra* note 13, art 18(c); American Convention, *supra* note 16, art. 41(c).

particular country.<sup>47</sup> In 1997, the Commission issued the following guiding criteria for initiating a country report to be included in Chapter IV of the Commission's Annual Report:

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

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47 See Commission Rules of Procedure, *supra* note 39, art. 56: "Preparation of Reports: The Commission shall submit an annual report to the General Assembly of the OAS. In addition, the Commission shall prepare the studies and reports it deems advisable for the performance of its functions and shall publish them as it sees fit." It is possible that the Commission will not have decided to prepare a report on a particular situation but is then invited by the State to observe the human rights situation in its territory. After the visit is carried out, the Commission generally drafts and publishes a special report making available its findings.

5. The fifth criterion regards temporary or structural situations that may appear in member states confronted, for various reasons, with situations that seriously affect the enjoyment of fundamental rights enshrined in the American Convention or the American Declaration. This criterion includes, for example: grave situations of violations that prevent the proper application of the rule of law; serious institutional crises; processes of institutional change which have negative consequences for human rights; or grave omissions in the adoption of the provisions necessary for the effective exercise of fundamental rights.<sup>48</sup>

Title II, Chapter V of the Commission Rules of Procedure outlines the process that the Commission must follow in adopting and publishing a report.<sup>49</sup> Article 57(2) of the Rules states that in preparation of the report “the Commission shall gather information from all the sources it deems necessary for the protection of human rights.”<sup>50</sup> After the Commission approves the draft report, it is sent to the Government concerned for comments. The Commission establishes a deadline for the State’s submission of its observations.<sup>51</sup> Once the Government responds, the Commission evaluates its comments and decides whether to amend the report based on the State response. The Commission subsequently publishes the report.<sup>52</sup> If the State fails to submit observations, the Commission publishes the report as it considers appropriate.<sup>53</sup> After the final adoption of the report, the Commission submits it to the OAS Permanent Council and General Assembly and to the State concerned.

There are no written standards set forth in the Convention, the Commission Statute or in its Rules of Procedure regarding the content of country reports. In practice, the Commission generally follows a standard report template. The reports usually include chapters on background information,<sup>54</sup> the political organization of the State, the characteristics of its legal system<sup>55</sup> and an

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48 Inter-Am. C.H.R., *Annual Report of the Inter-American Commission on Human Rights 2004*, OEA/Ser.L/V/II.122 Doc. 5 rev. 1, February 23, 2005 [hereinafter Annual Report 2004].

49 Commission Rules of Procedure, *supra* note 39, Title II, Chapter V.

50 *Id.*, art. 57(2).

51 *Id.*, arts. 58(a)-(b).

52 *Id.*, art. 58(c).

53 *Id.*, art. 58(d).

54 This section may include information on the reasons that prompted the Commission to examine the general human rights situation of a country (e.g. massive violations of human rights); the political situation prevailing in the State considered; on-site visits undertaken to gather information; activities developed by the Commission in the territory of the country concerned; et cetera.

55 This section may include an analysis of the organization of the State in general, and the organization of the judiciary in particular. Also, the Commission studies the scope of the human rights protected by the Constitution and the laws of the country. Finally, it may describe the international human rights obligations that are binding upon the State observed.

examination of State compliance with the American Declaration and/or the American Convention. In some country reports, the Commission has included chapters on the rights of indigenous people, children, women, refugees and internally displaced persons.<sup>56</sup> Reports on countries affected by internal armed conflicts include sections on the activities of irregular armed groups.<sup>57</sup>

In the examination of rights protected by the Declaration and the Convention, the Commission may include individual cases to illustrate violations of certain rights. Sometimes the individual petitions referred to in the report are still under consideration by the Commission; therefore, the Commission will clarify that its observations related to these cases do not imply prejudgment of the merits and that they will continue to be processed as required by the Rules of Procedure. Some reports include the final resolution adopted and published in cases already processed by the Commission.

## b. On-site Visits

The Commission conducts on-site visits to verify directly the human rights conditions in individual States.<sup>58</sup> These visits generally<sup>59</sup> result in the

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- 56 Inter-Am. C.H.R., *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111 Doc. 21 rev., April 6, 2001; Inter-Am. C.H.R., *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser.L/V/II.110 Doc. 52, March 9, 2001, Chapters VII-IX; Inter-Am. C.H.R., *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106 Doc. 59 rev., June 2, 2000, Chapters VII-VIII, X; Inter-Am. C.H.R., *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106 Doc. 40 rev., February 28, 2000, Chapters IV-VI; Inter-Am. C.H.R., *Report on the Situation of Human Rights in the Dominican Republic*, OEA/Ser.L/V/II.104 Doc. 49 rev. 1, October 7, 1999, Chapters X-XI.
- 57 Inter-Am. C.H.R., *Second Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.84 Doc. 39 rev., October 14, 1993, Chapter X; Inter-Am. C.H.R., *Fourth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.83 Doc. 16 rev., June 1, 1993, Chapter XI; Inter-Am. C.H.R., *Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.83 Doc. 31, March 12, 1993, Chapter III. D.
- 58 This does not refer to *in loco* investigations conducted to verify the facts of an individual complaint. The publication of such findings must follow the rules that govern the processing of individual communications.
- 59 Though the findings of the Commission following on-site observations are usually published, on some occasions they have not been made public or they were published several years after the visits took place. The Commission visited the Bahamas in May 1994 and Jamaica in December 1994 but has not, as of this writing, published a report or made its findings public. See Inter-American Commission on Human Rights, *Annual Report of the Inter-American Human Rights Commission 1994*, OEA/Ser.L/V.88 Doc. 9 rev. 1, Washington, D.C.: IACHR, February 17, 1995, Chapter II, 3d, 3g, pp. 23, 26). The Commission in its 1993 Report on the Human Rights Situation in Peru attached as appendices “preliminary reports” or “confidential communications” prepared following subsequent visits to Peru between 1989 and 1992. See Inter-American Commission on Human Rights, Report on the Situation of Human Rights, Peru, *supra* note 57, pp. 33-101.

preparation of a special report. On-site visits have traditionally consisted of formal missions conducted by all seven members of the Commission, but the emerging practice is to undertake more focused and limited field visits, by a limited number of Commissioners, followed by press releases and thematic reports.<sup>60</sup> This conforms to the current mandates of special rapporteurs<sup>61</sup> and the work of staff members serving as country desk officers. As explained above, although on-site visits and preparation of reports are two separate Commission functions,<sup>62</sup> in practice they are closely related.

Initially, the power of the Commission to undertake on-site visits was extremely precarious as it was not clearly stated in the enabling Statute. However, the practice developed by the Commission was generally accepted by the States and the OAS itself.<sup>63</sup> It was not until the American Convention came into force and the new Statute was adopted by the OAS General Assembly that this function of the Commission was made explicit.<sup>64</sup>

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60 An example of this trend is the on-site visit of Commissioner Susana Villarán to Colombia from July 11-17, 2004, to gather information concerning initiatives for the demobilization of illegal armed groups in that country and the legal framework and mechanisms aimed at ensuring that the process conformed to Colombia's international obligations. This on-site visit was followed by the release on December 29, 2004 of the Commission's Report on the Demobilization Process in Colombia, *supra* note 42. *See also* the on-site visits carried out in Haiti by the Commission and several press releases issued after each visit (from September 1st to 3rd, 2004, from April 18th to 22nd, 2005, from July 11th to 15th, 2005, from November 2nd to 5th, 2005) that concluded in the report on Haiti. For the report, *see*, Inter-Am. C.H.R., *Haiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti and the International Community*, OEA/Ser.L/V/II.123 Doc. 6 rev. 1, October 26, 2005. For information regarding on-site visits, *see* Inter-Am. C.H.R., Annual Report 2004, *supra* note 48, Chapter II, paras. 27-30 (indicating that a on-site visit was carried on by Commissioner Clare K. Roberts in September 1-3, 2004). For press releases, *see* Inter-Am. C.H.R., "IACHR Completes Visit to Haiti," Press Release 19/04, Washington, D.C., September 7, 2004, *available at* <http://www.cidh.org/Comunicados/English/2004/19.04.htm>; Inter-Am. C.H.R., "IACHR Calls for Greater International Action in Haiti," Press Release 16/05, Washington, D.C., April 22, 2005, *available at* <http://www.cidh.org/Comunicados/English/2005/16.05eng.htm>; Inter-Am. C.H.R., "IACHR Calls for Immediate Measures to Quell Unprecedented Violence in Haiti," Press Release 29/05, Washington, D.C., July 22, 2005, *available at* <http://www.cidh.org/Comunicados/English/2005/29.05eng.htm>.

61 *See* sub-section (c) *infra*.

62 *See* Commission Statute, *supra* note 13, arts. 18(c), (g); American Convention, *supra* note 16, art. 41(c).

63 Medina Quiroga, Cecilia, *The Battle for Human Rights: Gross, Systematic Violations of Human Rights and the Inter-American System*, The Hague: Kluwer Law International, 1988.

64 Commission Statute, *supra* note 13, art. 18(g).

It must be noted that although Article 41 of the American Convention does not provide for on-site observations,<sup>65</sup> section (c) of this article has been interpreted to allow the Commission to prepare reports or studies the Commission considers advisable in the fulfillment of its duties. Carrying out an observation *in situ* to collect information or to verify the situation of a particular State may be considered a means to the preparation of such reports or studies.<sup>66</sup> Article 18 of the Commission's Statute,<sup>67</sup> however, clearly provides that "[t]he Commission shall have the following powers with respect to the member states of the Organization of American States: ... to conduct on-site observations in a state, with the consent or at the invitation of the government in question ... "

The Commission Rules of Procedure reflect the practice it has developed. Title II, Chapter IV of the Rules of Procedure, entitled "On-Site Observations", establishes that observations *in loco* shall be carried out by a Special Commission appointed each time the Commission decides to conduct such a visit.<sup>68</sup> Members who are nationals of or residents in the territory of the State visited are disqualified from participating in the Special Commission.<sup>69</sup> The State inviting the Commission to carry out a visit to its territory, or consenting to the visit, must furnish the facilities necessary for the observation. In particular, the State must respect the integrity of the persons and organizations collaborating with the Special Commission.<sup>70</sup> The State concerned must provide security as well as accommodation and means of transportation to Special Commission members as well as to the staff of its Secretariat.<sup>71</sup> The State must also provide the Special Commission with human rights documents necessary for the draft of its report.<sup>72</sup>

The Rules of Procedure also explicitly delineate the Special Commission's powers during an observation *in situ*.<sup>73</sup> It shall be able to interview persons, groups or institutions freely and in private; to travel freely in the territory of the State visited; to have access to jails and other centers of detention or interrogation as well as to privately interview persons detained therein and to use

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65 See American Convention, *supra* note 16, art. 41.

66 See Cecilia Medina Quiroga, *supra* note 63, p. 131.

67 As stated before, the Statute of the Inter-American Commission on Human Rights is applicable to all Member States of the OAS.

68 See Commission Rules of Procedure, *supra* note 39, art. 51. Currently, Special Commissions are usually composed of at least one member, along with staff of the Secretariat.

69 *Id.*, art. 52.

70 *Id.*, art. 54.

71 *Id.*, art. 55.

72 *Id.*

73 *Id.*

any method appropriate for collecting, recording or reproducing information that it considers useful.

As developed in practice, the Special Commission also meets with State authorities such as the President, members of the legislature and members of the judiciary. It receives individual complaints to be processed pursuant to the Convention, Statute and Rules of Procedure; it also observes judicial proceedings and investigates the facts of individual cases, among other activities.<sup>74</sup> As stated above, the information gathered by the Commission during an on-site observation generally results in a country report of the human rights situation of the State visited.

Another form of *in loco* visits is related to the Commission's power to act on individual petitions denouncing Convention violations.<sup>75</sup> As part of the investigation into the allegations contained in these petitions, the Commission may carry out investigations *in loco* according to Article 48 of the Convention:

If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities.<sup>76</sup>

The language of Article 48 applies only to individual cases that are under consideration by the Commission in which the State concerned has had an opportunity to present its observations. The second paragraph of the same article provides for an exception:

in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed.<sup>77</sup>

The State consent requirement is justified by the fact that the State will not yet have had the opportunity to present its observations. In practice, the Commission in both situations asks the State concerned for its consent or for an invitation before undertaking an on-site investigation.

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<sup>74</sup> See David Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 *Am. U. J. Int'l L. & Pol'y* 95, 98 (1993).

<sup>75</sup> See American Convention, *supra* note 16, arts. 44-51. See also, 2.4.4, *infra*.

<sup>76</sup> American Convention, *supra* note 16, art. 48(1)(d).

<sup>77</sup> *Id.*, art. 48(2).



### c. Special Rapporteurs

The Commission has also developed a practice of designating Special Rapporteurs to focus on specific thematic issues.<sup>78</sup> The Commission has designated rapporteurships on the rights of women, freedom of expression and migrant workers and their families. These functions are usually entrusted to one of the Commissioners. However, the Special Rapporteur on Freedom of Expression is an independent expert designated by the Commission and holds a full-time position.

#### 1.2.3. Individual Petitions<sup>79</sup>

The system of individual petitions allows persons or groups of persons to submit to the Commission complaints alleging violations of the American Convention and the American Declaration by OAS Member States. There are two parallel complaint systems. On the one hand, the Commission may examine petitions under the American Declaration regarding OAS Member States that are not parties to the Convention.<sup>80</sup> On the other hand, the Commission has jurisdiction to consider individual complaints alleging violations of the American Convention by States Parties to that convention.<sup>81</sup> One important distinction between the two systems is that at the end of the Commission proceedings, the Commission may only refer to the Inter-American Court a complaint alleging Convention violations against a State that has ratified the American Convention and has recognized the Court's contentious jurisdiction.<sup>82</sup> In other words, complaints filed only under the Declaration cannot reach the Court. This is a significant distinction because, unlike the Court, the Commission is a quasi-judicial body that issues findings and recommendations, but it may not issue legally binding judicial decisions in a strict sense.

The following analysis will first deal with petitions filed with the Commission under the American Convention. It will then briefly address the OAS Charter-based petition system under the American Declaration.

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78 For more information visit <http://www.cidh.org/relatorias.eng.htm>.

79 For the purposes of this *Handbook* the terms "petition," "communication" and "complaint" are used interchangeably.

80 Commission Rules of Procedure, *supra* note 39, art. 33.

81 American Convention, *supra* note 16, art. 44; Commission Rules of Procedure, *supra* note 39, art. 49.

82 American Convention, *supra* note 16, art. 33; Commission Rules of Procedure, *supra* note 39, art. 44.

### a. System of Individual Petitions under the American Convention

Article 41(f) of the American Convention states that the Commission shall “take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention.”<sup>83</sup> Article 19 of the Commission Statute contains a parallel provision.<sup>84</sup> Title II, Chapter III of the Commission Rules of Procedure provides specific procedural rules governing the processing of individual petitions.<sup>85</sup>

According to Article 44 of the Convention, “[a]ny person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention by a State Party.”

Article 23 of the Rules of Procedure adopts this language and states that petitions must assert “alleged violations of a human right recognized, as the case may be, in the American Convention on Human Rights or in the American Declaration of the Rights and Duties of Man.”<sup>86</sup> Article 24 of its Rules of Procedure also grants the Commission the power to initiate, *motu proprio*, the processing of a case.<sup>87</sup>

Petitions must contain information regarding the person, group of persons or non-governmental organization filing the complaint, an account of the Convention or Declaration violation, the name of the State responsible, information regarding exhaustion of domestic remedies and whether the petition has been submitted to another international settlement mechanism.<sup>88</sup> In response to petitions that do not contain all of the above, the Commission may ask the petitioner to provide the omitted information.<sup>89</sup>

Under the Convention and the Commission Rules of Procedure, petitions must meet certain requirements in order to be considered admissible:

1. Domestic remedies must be exhausted;

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83 American Convention, *supra* note 16, art. 41(f).

84 Commission Statute, *supra* note 13, art. 19(a).

85 Commission Rules of Procedure, *supra* note 39, Title II, Chapter III.

86 *Id.*, art. 23. This includes petitions against States not parties to the American Convention, but such petitions may only allege the violations of rights recognized in the American Declaration.

87 *Id.*, art. 24.

88 *See id.*, art. 28; *see also*, Section 2.1.3, *infra*.

89 *Id.*, art. 26(2).

2. The petition must be lodged within six months of the date the petitioner was notified of the final domestic judgment or, if no decision was handed down, within a reasonable period, after the moment the alleged violation occurred;
3. The petition must not be pending before another international proceeding for settlement;
4. The petition must state facts which “tend to establish a violation of the rights guaranteed by [the] Convention;” and
5. The complaint must not be “manifestly groundless or obviously out of order.”<sup>90</sup>

According to the Commission Rules of Procedure, the Secretariat of the Commission will conduct the initial screening of the complaint.<sup>91</sup> In practice, the Secretariat does not make a final decision on admissibility at this stage; the first screening entails a *prima facie* analysis of the admissibility requirements established in the Convention and the Commission Rules of Procedure. If it accepts, in principle, the admissibility of a petition, the Secretariat will initiate the contentious phase of the proceeding by requesting information from the Government concerned.<sup>92</sup> The Government’s observations will be provided to the petitioner for comment or rebuttal.<sup>93</sup> The final decision on admissibility is made by the Commission in its report.

Article 48(1)(f) of the Convention states that “the Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in [the] Convention.”<sup>94</sup> Article 41(1) of the Commission Rules of Procedure adds that “[o]n its own initiative or at the request of any of the parties concerned, the Commission shall place itself at the disposal of the parties concerned, *at any stage of the examination of a petition or case*, with a view to reaching a friendly settlement of the matter.”<sup>95</sup> In practice, the Commission usually offers the possibility of a friendly settlement once the petition is declared admissible and before considering the merits of the case. According

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90 American Convention, *supra* note 16, arts. 46-47; Commission Rules of Procedure, *supra* note 39, arts. 32-34; *see also*, Section 2.2, *infra*.

91 Commission Rules of Procedure, *supra* note 39, arts. 26-29.

92 *Id.*, art. 30

93 *Id.*

94 American Convention, *supra* note 16, art. 48(1)(f).

95 Commission Rules of Procedure, *supra* note 39, art. 41(1) (emphasis added). This also applies to cases against States not parties to the American Convention.

to Article 49 of the Convention, if a friendly settlement is reached, the Commission prepares a report briefly describing the facts and the terms of the agreement.<sup>96</sup>

For those cases that do not result in friendly settlement, the contentious procedure continues. Once the Commission has found a petition admissible,<sup>97</sup> it will proceed with the merits phase of the case. Articles 50 and 51 of the Convention and 37 to 48 of the Commission Rules of Procedure govern the Commission's consideration of merits in cases against States parties to the American Convention.<sup>98</sup>

If the Commission finds no violation of protected rights in a particular case, it will state this in a report that is transmitted to the parties and later published. If the Commission does find a violation, it will prepare a report "setting forth the facts and stating its conclusions"; it may also include the recommendations it considers appropriate to remedy the situation.<sup>99</sup> The report will be sent to the State concerned along with a deadline to report on measures it adopts in compliance with the Commission's recommendations.<sup>100</sup> The Commission will

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96 American Convention, *supra* note 16, art. 49. The terms of an agreement under the friendly settlement mechanism vary – sometimes radically – from one case to another. The variation reflects the specific demands and strategies of the parties, the steps taken by the Commission, the development of negotiations and the length of the process. The will of and the alternatives available to each party, along with the specific facts of the case, will obviously have an important influence on the negotiations and the final result. A significant percentage of individual complaints filed with the Commission are resolved through friendly settlement. However, the friendly settlement option has been criticized. Many authors have questioned the general propriety of employing a bargaining/trade-off model in the field of human rights law. The process is considered likely to be tainted by the power imbalance between the parties, given the history of State violence and abuses against the victim. Moreover, the Commission assumes a dual, even conflicting, role of both mediator and prosecutor, which may undermine its credibility in both aspects. The Commission has in fact little room, first of all, to decide whether to engage in the mediation and, secondly, to decide at any point whether to continue the process. Nevertheless, the friendly settlement mechanism offers the victim the possibility to address directly the offending Government and ask it to assume its responsibilities. Furthermore, if in the course of negotiation the victim withdraws certain demands, she or he may ultimately enjoy a greater reparation than under a Commission recommendation or Court judgment: a State is more likely to comply with its own settlement agreement than with the decision of another entity. Also, although it may not strictly adhere to established principles regarding reparation and punishment, a friendly settlement may facilitate reconciliation, including at the social level, in situations of serious systematic violations. Through the settlement option the victim may obtain reparation much sooner than under a Commission or Court decision and can also avoid the high costs of litigation. For further discussion *see*, Patricia E. Standaert, *The Friendly Settlement of Human Rights Abuses in the Americas*, 9 *Duke J. Comp. & Int'l L.* 519 (1999).

97 *See* Section 2.2, *infra*.

98 American Convention, *supra* note 16, arts. 50-51; Commission Rules of Procedure, *supra* note 39, arts. 37-48.

99 American Convention, *supra* note 16, art. 50(1).

100 Commission Rules of Procedure, *supra* note 39, art. 43(2).

inform the petitioner of the adoption of the report and will ask him or her to present in one month his or her position as to whether the case should be submitted to the Inter-American Court.<sup>101</sup> This is the petitioner's only opportunity to influence the decision to submit a case to the Court, as only the Commission and States may file cases with the Court.<sup>102</sup>

One of the most important modifications of the Rules of Procedure in 2001 requires the Commission to submit to the Court those cases in which States have failed to comply with the recommendations, unless the absolute majority of the Commission's members reach a well-founded decision not to do so.<sup>103</sup> In practice, the majority of cases in which the State fails to comply are filed by the Commission with the Court.<sup>104</sup>

Article 44(2) of the Commission Rules of Procedure further provides that, in deciding whether to refer a case to the Court,

[t]he Commission shall give fundamental consideration to obtaining justice in the particular case, based, among others, on the following factors:

- a. the position of the petitioner;
- b. the nature and seriousness of the violation;
- c. the need to develop or clarify the case-law of the system;
- d. the future effect of the decision within the legal systems of the Member States; and,
- e. the quality of the evidence available.<sup>105</sup>

In cases against a State that has not recognized the Court's contentious jurisdiction, and cases which the Commission does not submit to the Court, after the expiration of the deadline, the Commission will prepare a final report with

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101 *Id.*, art. 43(3).

102 American Convention, *supra* note 16, art. 61(1).

103 Commission Rules of Procedure, *supra* note 39, art. 44(1). The 2001 reform of the Rules of Procedure of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, though very positive in terms of promoting access to justice, has also made more obvious the problems of an overburdened system and scarce economical and human resources.

104 The case may also be referred to the Court by the State concerned. As of this writing, the only such instance was the matter of *Viviana Gallardo et al.*, Decision of November 13, 1981, Inter-Am. Ct. H.R., (Ser. B) No. 101/81, filed by Costa Rica. The Court declared the application inadmissible on other grounds, while not calling into question the standing of a State party to lodge a case when that same State is the respondent.

105 Commission Rules of Procedure, *supra* note 39, art. 44(2).

its findings, conclusions and recommendations that will be transmitted to the parties. Finally, if an absolute majority votes to do so, the Commission will publish the report.<sup>106</sup> A decision in a case will be final with the publication of the “final report” of the Commission.

The Commission Rules of Procedure provide for a follow-up mechanism to monitor compliance with the Commission’s decisions in cases that were not submitted to the Court.<sup>107</sup> Since 2001, the Commission publishes each year in its Annual Report its views in every case, based on the submissions of the parties.

### **b. System of Individual Petitions under the American Declaration**

The Commission’s power to consider individual communications under the Declaration is established in Article 20(b) of its Statute and Article 49 of its Rules of Procedure.<sup>108</sup> Although the rules relating to States parties and to States not parties to the American Convention are found in different chapters of the Commission Rules of Procedure (Title II, Chapter II and Chapter III, respectively), the procedure is identical in the examination and deliberation phases of the process.<sup>109</sup>

Commission Rules of Procedure Articles 28 to 43 and 45 to 47 authorize the Commission to examine petitions, adopt precautionary measures, conduct on-site visits and facilitate friendly settlements. The Commission may also issue and transmit to the parties final reports containing its views, final conclusions and recommendations. In evaluating compliance with its recommendations, the Commission shall decide whether to publish the final report, whether to

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106 *Id.*, art. 45; American Convention, *supra* note 16, art. 51(3).

107 Commission Rules of Procedure, *supra* note 39, art. 46. The Commission may also hold hearings for purposes of case follow-up, according to Article 60 of its Rules of Procedure.

108 Some States have contested this power of the Commission. See Appendix No. 25, Response of the Government of the United States of America to Inter-American Commission on Human Rights Report 85/00 of October 23, 2000 Concerning Mariel Cubans (Case 9903) available at <http://www.cidh.org/Respuestas/USA.9903.htm>. However, the Commission’s authority to examine petitions under the American Declaration is recognized by Inter-American rules and case law.

109 Commission Rules of Procedure, *supra* note 39, art. 50: “The procedure applicable to petitions concerning Member States of the OAS that are not parties to the American Convention shall be that provided for in the general provisions included in Chapter I of Title II; in Articles 28 to 43 and 45 to 47 of these Rules of Procedure.” Therefore, provisions concerning standing, requirements and admissibility of petitions against States parties to the Convention also apply to petitions against States not parties.

include it in the Annual Report to the OAS General Assembly and/or whether to publish it in any other manner. Lastly, the Commission may initiate follow-up measures such as information requests and hearings. Petitions filed pursuant only to the American Declaration may not be referred to the Inter-American Court, and the processing of such cases ends with the Commission.<sup>110</sup>

### **c. The Legal Nature of Recommendations of the Inter-American Commission**

The Commission is widely considered a quasi-judicial body, since it issues *recommendations*, as opposed to judicial decisions. Despite the Commission's authority and its fundamental and historical role within the OAS, some States continue to question the obligatory nature of Commission decisions and a few refuse to comply with them. The Inter-American Court itself has stated that "a recommendation does not have the character of an obligatory judicial decision for which the failure to comply would generate State responsibility."<sup>111</sup> However, the Court later clarified in *Loayza Tamayo v. Peru* that States parties to the American Convention have "the obligation to make every effort to [comply] with the recommendation of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organization of American States."<sup>112</sup> The same reasoning would apply to States that are not parties to the Convention. As the Commission stated in its 1997 Annual Report:

The Inter-American Court has indicated that States parties to the American Convention have the obligation to adopt the recommendations issued by the Commission in its reports on individual cases, in the light of the principle of good faith. This obligation extends to the member States in general, provided that, pursuant to the OAS Charter, the Commission remains one of the main organs of the Organization with the function of promoting the observance and defense of human rights in the hemisphere.

Accordingly, the Commission urges the member States, whether they are parties to the American Convention or not, to fulfill their international obligations by following the recommendations issued in the

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110 *Id.*, art. 50.

111 *Caballero-Delgado and Santana v. Colombia*, Judgment of December 8, 1995, Inter-Am. Ct. H.R., (Ser. C) No. 22, para. 67.

112 *Loayza Tamayo v. Peru*, Judgment of September 17, 1997, Inter-Am. Ct. H.R., (Ser. C) No. 33, para. 80.

reports on individual cases and abiding by the requests of provisional measures.<sup>113</sup>

In any event, local non-governmental organizations, academics and civil society have a crucial role to play in enforcing Commission decisions. The Center for Justice and International Law (CEJIL), a non-governmental organization that is very active before the Commission, has said in this respect:

It is fortunate, since [States] have not shown the sufficient will in this regard, that not all decisions about the design of the implementation mechanisms for the international bodies rest solely in the hands of the Executive Branches of the States of the region ... the effective implementation ... probably depends, in practice, on coordinated action by different organs of the State as well as the creative petitions and solutions that academics and human rights defense attorneys come up with.<sup>114</sup>

### 1.3 The Inter-American Court of Human Rights

The Inter-American Court is the only judicial organ of the Inter-American Human Rights System. It is “an autonomous judicial institution” entrusted with “the application and interpretation of the American Convention.”<sup>115</sup> It is composed of seven members who serve in their individual capacities. They are elected in the General Assembly by an absolute vote of States parties to the American Convention, from a panel of candidates nominated by those States.<sup>116</sup> To be elected to the Court, candidates must be jurists of the highest moral authority and of recognized competence in the field of human rights.<sup>117</sup> They must possess the qualifications required for the exercise of the highest

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113 Inter-Am. C.H.R., *Annual Report of the Inter-American Commission on Human Rights 1997*, OEA/Ser.L/V/II.98 Doc. 6 rev., April 13, 1998, Chapter VII, para. 12.

114 Center for Justice and International Law, “Un-kept promises: The implementation of the decisions of the Commission and the Court,” *Gaceta* No. 10, available at <http://www.cejil.org/gacetas.cfm?id=30>.

115 Organization of American States, Statute of the Inter-American Court of Human Rights, art. 1, Resolution 448, adopted by the OAS General Assembly, Ninth Regular Session, La Paz, Bolivia, October 1979; reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003) [hereinafter “Court Statute”]. As stated above, the Court may exercise jurisdiction over other Inter-American conventions as long as they so provide.

116 *Id.*, arts. 6-7; American Convention, *supra* note 16, arts. 52-53.

117 American Convention, *supra* note 16, art. 52(1).



judicial functions under the laws of the nominating State.<sup>118</sup> The judges of the Court are elected for a period of six years and may be reelected once.<sup>119</sup> The Inter-American Court of Human Rights is located in San José, Costa Rica.

According to Articles 62 and 64 of the American Convention, the Inter-American Court has two different jurisdictions: contentious jurisdiction and advisory jurisdiction.<sup>120</sup> Each is discussed in more detail in the following sections.

### 1.3.1 Contentious Jurisdiction

Contentious jurisdiction may be defined as the jurisdiction to adjudicate cases concerning alleged American Convention violations by States parties to that convention.<sup>121</sup> In order to bring a case to the Court, the State concerned must have declared its acceptance of the Court's contentious jurisdiction.<sup>122</sup> The declaration of acceptance can be made *ipso facto*, upon ratification of the Convention or at a later time, or on an *ad hoc* basis with regard to one specific case. The acceptance by means of a declaration may be unconditional, conditional on reciprocity, for a specified period or for specific cases.<sup>123</sup> As of April 2006, twenty-one States parties to the American Convention had recognized the Court's contentious jurisdiction.<sup>124</sup> No individual case can be presented directly to the Court for its consideration. Applications are only lodged before the Court after the completion of the Commission's individual complaints process.<sup>125</sup>

According to Article 61(1) of the Convention, only the Commission and States parties to the Convention may refer cases to the Court. In contrast with the European System, individuals are barred from directly submitting cases to the Inter-American Court. However, once the case is brought to the Court, victims, their relatives or their legal representatives may autonomously submit

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118 Court Statute, *supra* note 115, art. 4; American Convention, *supra* note 16, art. 52.

119 Court Statute, *supra* note 115, art. 5; American Convention, *supra* note 16, art. 54.

120 American Convention, *supra* note 16, arts. 62, 64.

121 Thomas Buergenthal, Dinah Shelton, and David P. Stewart, *International Human Rights in a Nutshell*, 1st ed. St. Paul, Minnesota, West Publishing, 1988, p. 155.

122 Court Statute, *supra* note 115, art. 62.

123 American Convention, *supra* note 16, art. 62(2).

124 Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Uruguay and Venezuela.

125 American Convention, *supra* note 16, art. 61(2).

requests, arguments and evidence throughout the proceeding.<sup>126</sup> With one exception<sup>127</sup>, the cases considered by the Court have always been referred by the Commission. The Court has not yet considered an inter-State complaint.

Article 62(3) of the Convention establishes that a case may be referred by one State against another State, provided that both States parties have recognized the Court's contentious jurisdiction. In addition, Article 62(2) provides that States may accept the Court's jurisdiction on condition of reciprocity. In this case, the State making such a declaration may only be subject to an inter-State complaint if the State filing the complaint has also accepted the Court's jurisdiction.<sup>128</sup>

Following its consideration of a petition, the Commission may refer that case to the Court by filing an application.<sup>129</sup> Before the application is filed, the Commission "shall immediately give notice of that decision to the State, the petitioner and the victim."<sup>130</sup> The Commission's application shall contain, among other information, the claims on the merits, reparations and costs sought, the parties in the case, the facts alleged, information regarding the procedure before the Commission, the Article 50 report and the applicable law and related conclusions.<sup>131</sup> Furthermore, the Commission must cooperate with Court requests for additional evidence, documents and information, including the summoning of witnesses, experts and so forth.<sup>132</sup> The Commission may also request that the Court hold hearings or issue provisional measures.<sup>133</sup> The Commission is authorized to participate in subsequent

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126 Organization of American States, Rules of Procedure of the Inter-American Court on Human Rights, art. 23, *approved* Nov. 25, 2003, *entered into force* January 21, 2004; *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003) [hereinafter "Court Rules of Procedure"] (authorizing participation). Since 2001, the victim or the alleged victim is a "party to the case" before the Court according to art. 2(23) of the Court Rules of Procedure. The victim's activity before the Court is independent of that of the Commission, though coordination may occur, similar to many domestic legal systems in which the prosecutor and the victim's private attorney act independently before a criminal court.

127 *Viviana Gallardo et al.*, *supra* note 104. The case was sent by the Government of Costa Rica directly to the Court. The Court declared the application inadmissible in a November 13, 1981 decision and referred it to the Commission. (*See* Inter-Am. C.H.R., Resolution No. 13/83, June 30, 1983, OEA/Ser.L/II.61 Doc. 22, rev. 1).

128 Thomas Buergenthal, et al., *supra* note 121, pp. 157-58.

129 Commission Rules of Procedure, *supra* note 39, art. 72.

130 *Id.*, art. 71.

131 *Id.*, art. 72; *see also*, Court Rules of Procedure, *supra* note 126, art. 33. The application shall also contain the names of the Agents or Delegates that will represent the Commission.

132 Commission Rules of Procedure, *supra* note 39, arts. 70, 73; *see also*, Court Rules of Procedure, *supra* note 126, art. 43.

133 Commission Rules of Procedure, *supra* note 39, art. 74.

phases of the procedure, such as reparations, interpretation of judgments and the follow-up to Court decisions.

The Court is not bound by the Commission's prior factual findings and may at any stage obtain new evidence on its own motion.<sup>134</sup> Although in its early practice the Court reviewed the entire case *ex novo*, this has changed, and the Court only solicits new evidence and reviews the facts when deemed absolutely necessary. The Court Rules of Procedure empower it to assign appropriate weight to evidence collected during the Commission proceedings. Article 44(2) of the Rules provides that "evidence tendered to the Commission shall form part of the file, provided that it has been received in a procedure with the presence of both parties, unless the Court considers it essential that such evidence should be repeated."<sup>135</sup>

The judgments of the Court are final and binding.<sup>136</sup> A decision awarding compensatory damages may be executed in the country concerned in accordance with its domestic procedures governing the execution of judgments against the State.<sup>137</sup>

### 1.3.2 Advisory Jurisdiction

The jurisdiction of the Court to render advisory opinions interpreting American States' human rights treaty obligations is established in Article 64 of the Convention. As revealed by this article's language, States parties to the American Convention as well as other OAS Member States and OAS organs, including the Inter-American Commission, may request advisory opinions, "within their spheres of competence."<sup>138</sup> In the exercise of its advisory jurisdiction, the Court has the power to interpret the American Convention and "other treaties concerning the protection of human rights in the American states."<sup>139</sup> In Advisory Opinion No. 1, the Court interpreted the phrase just

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134 Court Rules of Procedure, *supra* note 126, art. 44(1).

135 *Id.*, art. 44(2).

136 American Convention, *supra* note 16, arts. 67-68; Court Rules of Procedure, *supra* note 126, art. 59 (allowing parties to request interpretation by the Court of judgments on the merits or on reparations. But this does not imply a review of the decisions, it just intends to clarify their content).

137 American Convention, *supra* note 16, art. 68(2).

138 *Id.*, art. 64. The OAS organs that may request advisory opinions include the General Assembly, the Permanent Council, the General Secretariat and the Specialized Organizations, such as the Pan-American Health Organization and the Inter-American Commission of Women.

139 *Id.*, art. 64(1).

quoted.<sup>140</sup> It ruled that the language of Article 64 conferred upon it “the power to interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the inter-American system.”<sup>141</sup> In addition, the Court is also empowered to issue advisory opinions requested by an individual OAS Member State regarding the compatibility of its domestic laws with the American Convention or other human rights treaties to which it is a party.<sup>142</sup> As of April 2006, the Inter-American Court has rendered nineteen advisory opinions.<sup>143</sup>

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140 “*Other Treaties*” *Subject to the Advisory Jurisdiction of the Court (art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82, September 24, 1982, Inter-Am. Ct. H.R., (Ser. A) No. 1.

141 *Id.*; see also, Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 *Am. J. Int’l L.* 1, 5 (1985).

142 See American Convention, *supra* note 16, art. 64(2).

143 Advisory Opinions have interpreted several provisions of the American Convention, including, among others, Articles 1, 2, 4, 7, 8, 13, 14, 19, 25, 27, 29, 41, 44, 46, 50, 51 and 64.