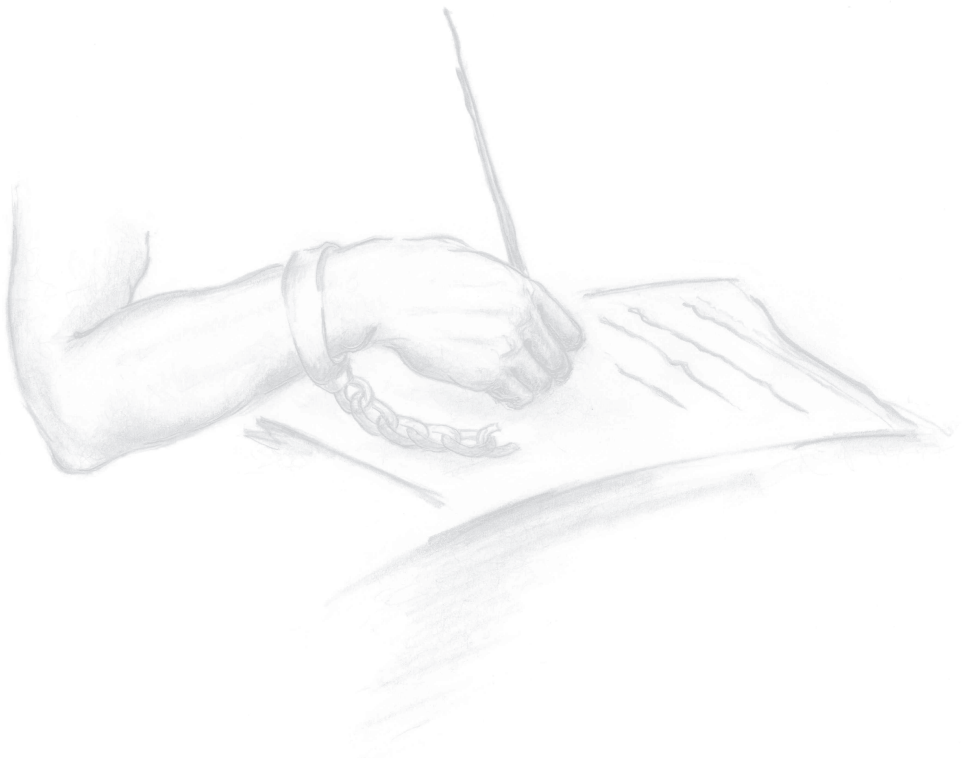


PART II

SUBMITTING A COMMUNICATION



The Inter-American System provides for an individual complaint procedure to redress human rights violations, as described in the previous section. Through this procedure, both the Commission and the Court supervise State compliance with the obligations contained in the American Declaration, the American Convention and the other regional human rights treaties. In this regard, the Inter-American System is unlike the United Nations System, in which each human rights treaty has a separate supervisory body.

The procedure always begins with the filing of a complaint with the Commission, but the cases may evolve in different ways. A case may be rendered inadmissible in the early stages of the procedure. If the admissibility requirements are found to be met, the Commission will consider the merits. The merits examination may conclude with the Commission's final report (so-called "Article 51 Report") stating the allegations and its conclusions and recommendations based on the Commission's factual findings.¹⁴⁴ Alternatively, the case may be submitted to the Court by the Commission or by a State once the confidential report on the merits (the so-called "Article 50 Report") has been sent to the State.¹⁴⁵ The complaint may also be resolved in a friendly settlement between the parties at any stage of the procedure, unless the Commission or the Court determines that it is appropriate to continue to consider the case even after a friendly settlement.¹⁴⁶

There is no established period of time in which the procedure must be completed, although several stages of the proceedings are regulated by deadlines, mainly in terms of actions by the parties. Therefore, the Commission and the Court have very few time constraints. The length of the proceedings varies from case to case, as each situation has its own particular characteristics and is contingent upon the current case load and the availability of resources. Cases are resolved on average within two to three years, with some cases receiving a final report in one and a half years and others within five years or more.

The different phases or steps of the procedure, such as admissibility determination, the gathering and weighing of evidence and hearing requests, will be analyzed in the following sections. As we go along, the Commission's and the Court's rules and practices will be distinguished.

144 American Convention, *supra* note 16, art. 51.

145 *Id.*, art. 61.

146 *Id.*, art. 48.1(f).

2.1 Initiating the Proceedings

2.1.1 How to File a Petition?

The petition must be addressed to the Executive Secretary of the Inter-American Commission on Human Rights and sent by mail to:

1889 F Street, N.W., Washington, D.C., 20006, USA.

The petition may instead be faxed to:

1-202-458-3992

or sent by e-mail to:

cidhoea@oas.org.

If the complaint is sent via e-mail the petitioner will be asked to follow-up with a hard copy by fax or mail within a specified period of time. Each petition is registered with a number in a central database, and an acknowledgment of receipt is sent to the petitioner.

Once the petition is submitted, the Commission will process it according to Article 29 of its Rules of Procedure.¹⁴⁷ The Country Desk Officer, a lawyer in charge of the country in question, then examines the petition and drafts an initial analysis. Considering this analysis, a working group within the Secretariat meets to review the petition and make recommendations to the Executive Secretary. The initial analysis is presented to a working group in order to ensure that important decisions are not made at the discretion of only one person. The main objectives of specialized working groups are fairness, increased accountability and the avoidance of delay. The working group recommends to the Executive Secretary the initiation of proceedings, the request for more information or the rejection of the petition. The Executive Secretary will then make a decision to receive and register, or to reject. The petition may be filed again stating new facts, further explaining the case or submitting additional information. A petition cannot be filed again if rejected on grounds established in Article 46.1 (b) or Article 47 (b), (c) or (d) of the Convention.

Individuals may not file complaints before the Inter-American Court. As mentioned above, only the Commission and States may directly file a case with the

147 Commission Rules of Procedure, *supra* note 39, art. 29.

Court. The Commission may refer a case to the Court provided that, among other considerations, the Commission's proceedings have been duly exhausted, a friendly settlement has not been reached during the course of Commission proceedings, the case has not been the subject of an Article 51 final public report, the State has not taken adequate measures to cease the alleged violation and the State concerned recognizes the Court's jurisdiction. The Commission has a certain degree of discretion in deciding which cases will not be submitted to the Court.¹⁴⁸ Once the Commission has engaged the Court's jurisdiction in a case, the alleged victims, their family members or their accredited representatives may directly submit requests, arguments and evidence throughout the proceedings.¹⁴⁹

2.1.2 What Should the Structure of the Petition Be?

Generally, the petition's format resembles the structure used in domestic courts. For this reason, it is recommended to secure legal advice when filing a complaint before the Inter-American Commission. The Commission provides a standard form with instructions, which assists in structuring the complaint. The form may be completed and sent online or may be downloaded in portable document format ("pdf") at <http://www.cidh.org/denuncia.eng.htm>. The recommended structure is found below.

2.1.3 What Kind of Information is Needed?

The procedure is designed to be relatively simple and accessible. In accordance with Article 28 of the Commission Rules of Procedure, petitions must contain the following information in order to be considered:

the name, nationality and signature of the person or persons making the denunciation; or in cases where the petitioner is a nongovernmental entity, the name and signature of its legal representative(s);

- b. whether the petitioner wishes that his or her identity be withheld from the State;

148 See Section 1.2.3(a), *supra*.

149 See Section 1.3.1, *supra*.

Textbox 1: Petition Form

PETITION FORM

I. PERSON, GROUP OF PERSONS OR ORGANIZATION FILING THE PETITION

Name, e-mail, postal address (this is essential), telephone.

(if the party filing the petition is a nongovernmental entity, please include the name of its legal representative(s))

Do you want the Commission to withhold the petitioner's identity during processing?

II. NAME OF THE PERSON OR PERSONS AFFECTED BY THE HUMAN RIGHTS VIOLATIONS

Name, address, telephone, e-mail, and any other information of the victim(s)

If the victim is deceased, please also identify his or her next of kin

III. OAS MEMBER STATE AGAINST WHICH THE COMPLAINT IS BROUGHT

IV. FACTS DENOUNCED

Give a full and detailed account of the events. Specify where and when the alleged violations occurred.

Available evidence

Indicate what documents can prove the violations being denounced (for example, court records, forensic reports, photographs, films, and so on). If you have the documents in your possession, please attach a copy. **DO NOT ATTACH ORIGINALS** (Copies need not be notarized or otherwise authenticated).

Name the witnesses to the violations being denounced. If those persons have made sworn statements to the court authorities, if possible send a copy of that testimony or indicate whether it can be sent sometime in the future. Indicate whether the identity of the witnesses is to be kept confidential.

Identify the persons and/or authorities responsible for the facts denounced

V. HUMAN RIGHTS VIOLATED (If possible, indicate which provisions of the American Convention or of other applicable instruments you believe were violated)

VI. LEGAL REMEDIES TO REDRESS THE CONSEQUENCES OF THE FACTS DENOUNCED

Detail the measures taken by the victim or the petitioner with judges, courts or other authorities. If the victim or petitioner was unable to institute or exhaust this type of measure, was it because (1) the domestic laws of the State do not provide for due process of law to protect the violated right; (2) the party alleging the violation was denied access to the remedies under domestic law or has been prevented from exhausting them; or (3) there has been an unwarranted delay in rendering a final judgment on the aforementioned remedies?

Kindly indicate whether any judicial inquiry was conducted and if so when it began. If it has ended, please give the date the inquiry was closed and what the finding was. If it has not yet closed, explain why.

If the court proceedings have ended, please indicate the date on which the victim was notified of the final decision.

VII. PLEASE INDICATE WHETHER THE VICTIM'S LIFE, INTEGRITY OR HEALTH IS IN JEOPARDY. WAS THE ASSISTANCE OF THE AUTHORITIES REQUESTED, AND IF SO, WHAT WAS THE RESPONSE?

VIII. PLEASE INDICATE WHETHER THE CLAIM CONTAINED IN THE PETITION HAS BEEN FILED WITH THE UNITED NATIONS HUMAN RIGHTS COMMITTEE OR ANY OTHER INTERNATIONAL ORGANISATION WITH SIMILAR CHARACTERISTICS.

- c. the address for receiving correspondence from the Commission and, if available, a telephone number, facsimile number and email address;
- d. an account of the act or situation that is denounced, specifying the place and date of the alleged violations;
- e. if possible, the name of the victim and of any public authority who has taken cognizance of the fact or situation alleged;
- f. the State the petitioner considers responsible, by act or omission, for the violation of any of the human rights recognized in the American Convention on Human Rights and other applicable instruments, even if no specific reference is made to the article(s) alleged to have been violated;
- g. compliance with the time period provided for in Article 32 of the Rules of Procedure;

- h. any steps taken to exhaust domestic remedies, or the impossibility of doing so; and
- i. an indication of whether the complaint has been submitted to another international settlement proceeding.¹⁵⁰

Because it is advisable to provide complete information to the Commission, it is highly recommended to attach copies of the final domestic decision even though there is no such requirement expressly stated. In fact, it is important to send all available information with the petition in order that the Commission is well-equipped to examine it.

2.2 Admissibility

In order for a petition to be admissible it must meet a certain number of conditions. First, it must fall within the Commission's jurisdiction¹⁵¹, as it is defined in the relevant instruments. The jurisdiction of each body must be understood in terms of 1) subject matter (*ratione materiae*), 2) the person(s) or institution(s) complaining, the victim(s) and the respondent State (*ratione personae*), 3) the territory where the alleged events occurred (*ratione loci*) and 4) the moment in time when they occurred (*ratione temporis*). In addition, there are several types of admissibility criteria established in Articles 31 to 34 of the Rules of Procedure.¹⁵² They provide that the petitioner must: 1) exhaust all domestic remedies, or if remedies were not exhausted, explain why an exception to the rule of exhaustion of domestic remedies applies; 2) lodge the claim within six months of the date on which the alleged victim was notified of the decision that exhausted the domestic remedies, or within a reasonable amount of time if the exhaustion requirement does not apply; 3) not duplicate procedures (as when the same petition is filed with several international adjudicatory organs, or the same petition was previously decided by the Commission) and 4) demonstrate that the petition is not manifestly unfounded or based on facts that do not amount to a violation of one of the rights protected in the Inter-American System. Below is a description of the various admissibility requirements.

150 Commission Rules of Procedure, *supra* note 39, art. 28.

151 The legal authority of an organ to consider issues brought before it.

152 Commission Rules of Procedure, *supra* note 39, arts. 31-34.

After the Executive Secretariat of the Commission determines that the complaint is complete and *prima facie* admissible, the Secretariat transmits the pertinent parts to the respondent State.¹⁵³ The State may submit preliminary objections alleging that the complaint does not meet applicable requirements, normally within two months of the date the request is transmitted.¹⁵⁴

Admissibility decisions are made by a Commission working group (known as “GRAP”) set forth in Article 36 of the Commission’s Rules of Procedure. The working group meets prior to each regular session to decide whether a petition fulfills the requirements.¹⁵⁵

Admissibility decisions are reported to the OAS General Assembly in the Commission’s Annual Report. After a report declaring a petition admissible is adopted, the petition is registered as a ‘case,’ and proceedings on the merits begin. If the petition is declared inadmissible, the proceedings will end. There is no “appeal” of admissibility decisions because they are final and not subject to review by the Inter-American Court.¹⁵⁶

2.2.1 Jurisdiction

a. Who May Submit a Petition? (Jurisdiction *ratione personae*)

According to Article 44 of the American Convention and Article 23 of the Commission Rules of Procedure, any person or group of persons or non-governmental entity legally recognized in one or more of the Member States of the OAS, has standing to submit petitions to the Commission on his own behalf or on behalf of third persons.¹⁵⁷ This article employs broad language that allows non-governmental organizations or groups of persons to be petitioners. No connection between the victim and the non-governmental organization, group

153 *Id.*, art. 30(2). See Section 2.1.1 *supra*.

154 *Id.*, art. 30(1).

155 *Id.*, art. 36.

156 However, the Court may re-examine the admissibility of a petition under its contentious jurisdiction. See Section 2.2.2(a)(iii), *infra*. Former Article 54 of its Rules of Procedure authorized the Commission to reconsider decisions at the request of the respondent State of the petitioner, but this provision was removed in the 2001 Commission Rules of Procedure.

157 American Convention, *supra* note 16, art. 44; Commission Rules of Procedure, *supra* note 39, art. 23.

of persons or individual who submits the petition is required.¹⁵⁸ The Convention also does not require the victim's consent to the filing of a petition. However, although it is not required to have a mandate or power of attorney authorization from the victim, it is desirable. It is important to note that petitioners may request that their identity be withheld from the State.¹⁵⁹

In exceptional circumstances, the Commission may begin processing a case *motu proprio*, without receiving a petition or complaint from victims or other persons or entities.¹⁶⁰ A State party to the American Convention may also submit petitions alleging violations by another State party, contingent upon its recognition of the Commission's jurisdiction over inter-State complaints.¹⁶¹

Petitions must allege a violation of the rights of a "victim." In this respect, the Inter-American Court has stated that for the Commission to admit a case it is necessary that the petition argue a concrete violation of certain individuals' human rights. As a result, a case could be declared inadmissible if the victim is not identified.¹⁶² However, as mentioned above, it is not necessary that the person submitting the petition be the victim.

The Convention does not protect the rights of juridical persons, such as corporations and non-governmental organizations. Petitions arguing a violation of the rights of such entities will be declared inadmissible by the Commission in accordance with Article 1(2) of the American Convention. This provision defines 'person' as used in the Convention to mean "human being."¹⁶³ However, under certain circumstances, it is possible to claim that a person's human rights are being violated when a corporation or non-governmental organization is subjected to certain arbitrary actions by the State.¹⁶⁴

158 See, e.g., "Baby Boy," *supra* note 40 (a number of co-petitioners were individuals or groups that deemed themselves morally committed to the outcome of the communication); *Constitutional Court v. Peru*, Competence, Judgment of September 24, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 55, para. 3 (presented by twenty-seven Peruvian Congressional Representatives). However, most petitions are submitted by the victims or their relatives. Third persons or institutions interested in the outcome of the case may intervene by submitting an *amicus curiae* brief.

159 Commission Rules of Procedure, *supra* note 39, art. 28(b).

160 *Id.*, art. 24.

161 *Id.*, art. 48.

162 See *International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, December 9, 1994, Inter-Am. Ct. H.R., (Ser. A) No. 14, paras. 45-49.

163 American Convention, *supra* note 16, art. 1(2).

164 See *ABC Color v. Paraguay*, Case 9250, Report No. 6/84, Inter-Am. C.H.R., Annual Report 1983-1984, OEA/Ser.L/V/II.63 Doc. 10 (1984).

b. Against Whom May a Petition Be Submitted? (Jurisdiction *ratione personae*)

Under the Inter-American System, individual petitions may be filed exclusively against *States*. The System is not designed to try individuals or to determine the responsibility of a specific State organ or body.

All OAS Member States may be the object of a complaint before the Commission claiming that it failed to respect one or several rights guaranteed by the American Declaration. Upon ratification of the American Convention, a State automatically empowers individuals to submit to the Commission petitions against it that allege violations of the Convention. Similarly, individual complaints may be lodged against States parties to any other Inter-American convention that provides for a complaint mechanism.¹⁶⁵

However, in order for a communication to be referred to the Court it is not enough that the concerned State has ratified the Convention. Only those States parties to the Convention, or to another convention authorizing the Court to receive applications, that have expressly accepted the Court's contentious jurisdiction may be named as defendants in cases before the Court. A State may recognize the Court's contentious jurisdiction through a general declaration to that effect, or with regard only to a single specific case by special agreement.¹⁶⁶

c. Which Claims May Be Made? (Jurisdiction *ratione materiae*)

i. Violation of a Protected Right

A petition before the Commission may allege violations of human rights recognized in the American Declaration. Depending on the respondent State, a petition may also allege violations of the American Convention; the San

¹⁶⁵ See Section 1.1 *in fine, supra*.

¹⁶⁶ American Convention, *supra* note 16, art. 62(1); *see also, Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*, Advisory Opinion OC-3/83, September 8, 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3, para. 21. As of this writing, the only State that has accepted the Court's jurisdiction by special agreement is Nicaragua. *See Genie-Lacayo v. Nicaragua*, Preliminary Objections, Judgment of January 27, 1995, Inter-Am. Ct. H.R., (Ser. C) No. 21, paras. 21, 23-4.

Salvador Protocol; the Convention Against the Death Penalty; the Inter-American Torture Convention; the Convention on Forced Disappearance of Persons and/or the Belém do Pará Convention.¹⁶⁷

The Court has jurisdiction over “all matters relating to the interpretation or the application of the Convention.”¹⁶⁸ To the extent that certain provisions of the American Convention make reference to other treaties, the Court may also have limited jurisdiction over those instruments. Its jurisdiction extends as well to other treaties that confer jurisdiction on it, provided that the respondent State has duly ratified them and has recognized the Court’s jurisdiction. In this connection, the Convention on Forced Disappearance expressly grants the Court jurisdiction over complaints filed under that Convention;¹⁶⁹ the Inter-American Torture Convention broadly provides that “the case may be submitted to the international fora whose competence has been recognized by that State,”¹⁷⁰ and this has been interpreted to include the Court when the State had accepted its jurisdiction.¹⁷¹ The Additional Protocol on Human Rights in the Area of Economic, Social and Cultural Rights authorizes the Court’s limited jurisdiction over breaches of labor union rights and the right to education.¹⁷² The Court may not consider direct violations of treaties that do not confer jurisdiction on it, even if ratified by the respondent State.¹⁷³ As discussed above, under the American Convention a State may limit the Court’s jurisdiction over contentious cases filed against it to “specific cases.”¹⁷⁴

Article 47(b) of the Convention expressly requires that a petition “state facts that tend to establish a violation of the rights guaranteed by [the] Convention.” Allegations that fall outside the scope of the Convention are declared inadmissible. The Court has applied a high standard in determining that a petition does not claim violations of protected rights. It requires a “clear, manifest certainty so perceptible that nobody may rationally place it in doubt.”¹⁷⁵

167 In order to allege a violation of these conventions, the respondent State must have ratified that instrument.

168 American Convention, *supra* note 16, art. 62(1).

169 Convention on Forced Disappearance, *supra* note 24, Art. XIII.

170 Inter-American Torture Convention, *supra* note 23, art. 8.

171 *Panel Blanca*, *supra* note 27, para. 136 and Resolution 3; *Bámaca-Velásquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am. Ct. H.R., (Ser. C) No. 70, para. 223; *Cantoral-Benavides v. Peru*, Judgment of August 18, 2000, Inter-Am. Ct. H.R., (Ser. C) No. 69, para. 191; *Street Children*, *supra* note 27, para. 252.

172 Protocol of San Salvador, *supra* note 21, art. 19(6); *see also, Baena-Ricardo et al. v. Panama*, Judgment of February 2, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79, para. 95.

173 *Las Palmeras v. Colombia*, Preliminary Objections, Judgment of February 4, 2000, Inter-Am. Ct. H.R., (Ser. C) No. 67, para. 16, Resolutions 2 and 3.

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

175 *Genie Lacayo*, *supra* note 166, para. 36.

ii. Fourth Instance Formula

The Commission has developed through its practice the so-called Fourth Instance Formula, essentially a doctrine that affords a level of deference or discretion to the State under certain conditions. The Fourth Instance Formula arose from the principle that the Commission should supervise State compliance with Inter-American human rights instruments but should not act as an appellate court for the decisions of domestic courts. Under the Fourth Instance Formula, if a petitioner merely argues that a decision of a national court is erroneous as a matter of domestic law, and alleges no violation of the Convention, the petition will be dismissed. The Inter-American Commission cannot review findings or interpretations of domestic law made by national courts unless such decisions constitute Convention violations. In *Marzioni v. Argentina*, the Commission stated:

The basic premise of this formula is that the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved.

The Commission is competent to declare a petition admissible and rule on its merits when it portrays a claim that a domestic legal decision constitutes a disregard of the right to a fair trial, or if it appears to violate any other right guaranteed by the Convention. However, if it contains nothing but the allegation that the decision was wrong or unjust in itself, the petition must be dismissed under this formula. The Commission's task is to ensure the observance of the obligations undertaken by the States parties to the Convention, but it cannot serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction. Such examination would be in order only insofar as the mistakes entailed a possible violation of any of the rights set forth in the Convention.¹⁷⁶

The Commission developed the formula pursuant to the requirement that petitions must state facts that tend to establish a violation of the rights guaranteed by the Convention.¹⁷⁷ On that basis, it must dismiss any claim exclusively

176 *Marzioni v. Argentina*, Case 11.673, Report No. 39/96, Inter-Am. C.H.R., Annual Report 1996, OEA/Ser.L/V/II.95 Doc. 7 rev. (1996), paras. 50-51; *see also*, *Plan de Sánchez Massacre v. Guatemala*, Case 11.763, Report No. 31/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), para. 24; *Gilbert Bernard Little v. Costa Rica*, Case 11.472, Report No. 85/98, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6, rev. (1998), paras. 50-51; *Jorge Enrique Benavides v. Colombia*, Report No. 34/97, October 3, 1997 Petition, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6, rev. (1997), paras. 23-24.

177 American Convention, *supra* note 16, art. 47(b).

arguing judicial error. However, the formula does not bar admissibility when the petition alleges a violation of due process, discrimination or a violation of other rights recognized by the Convention.¹⁷⁸

It is important to note that the Fourth Instance Formula is directly related to the existence of a functioning judiciary and to the level of discretion afforded to a domestic court in, for example, estimating the value of evidence or establishing the domestic law applicable to a case. Therefore, to override the threshold set by the Commission, a petitioner must prove that there is manifest arbitrariness in the domestic judicial proceedings such that a right protected by the Convention is violated.¹⁷⁹

From a purely legal point of view, the Fourth Instance Formula simply recognizes that if it is alleged that a State judiciary has violated the Convention, the Commission will review the case and, if appropriate, declare the State internationally responsible. This is the same reasoning the Commission applies to petitions claiming Convention violations by agents of any other State organ. However, the basic difference arguably lies in the requirement that the violation be “manifestly arbitrary.”

d. Where Must the Violation Have Been Committed? (Jurisdiction *ratione loci*)

Violations of rights alleged before the Inter-American Commission and Court are not geographically limited to those committed on the respondent State’s territory. Instead, in line with other major human rights treaties, the American Convention obliges States parties to “ensure to all persons *subject to their jurisdiction* the free and full exercise” of the rights guaranteed therein.¹⁸⁰ Therefore, States parties are also liable for acts perpetrated abroad, if committed by their agents in areas effectively controlled by that State.

The question has come before the Commission on several occasions, recently in relation to the status of detainees at the Guantánamo Bay military base. The Commission found that the detainees were under the United States’ jurisdiction, because they were “wholly within the authority and control of the United

178 *Jorge Enrique Benavides*, *supra* note 176, para. 23.

179 *Carlos Garcia Saccone v. Argentina*, Case 11.671, Report No. 8/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.102 Doc. 6 rev. (1997), paras. 53-54; *Plan de Sánchez Massacre*, *supra* note 176, para. 67.

180 American Convention, *supra* note 16, art. 1(1) (emphasis added).

States Government,” and it further added that they were held at the “unfettered discretion of the US.”¹⁸¹

e. When Must the Violation Have Been Committed? (Jurisdiction *ratione temporis*)

For a petition to be admissible it must allege a violation that occurred while the relevant instrument is binding on the respondent State. As to the Declaration, this means that only violations committed after the State party joined the OAS may be the subject of a complaint before the Commission. Regarding the various conventions, the rights contained in a given treaty may only be invoked if breached after the State ratified the treaty, after it entered into force and before a State denunciation of the treaty took effect. Concerning the referral of the case to the Court, the question remains as to whether a violation that occurred after the treaty entered into force but before the State accepted the Court’s jurisdiction may be the object of a petition.

With regard to continuous violations, such as disappearances, the Court has found that it has jurisdiction over the ongoing effects of events that took place before the State accepted the Court’s jurisdiction.¹⁸² The same logic could apply to continuous crimes committed before the ratification of the relevant convention. It must be added that according to the Court, torture is a violation that cannot be characterized as a continuous violation.¹⁸³

A State may free itself from convention obligations by denouncing the convention. Denunciation is normally subject to conditions specified in the treaty in question. The American Convention stipulates that denunciation is only possible after five years have passed since its entry into force, “by means of notice given one year in advance”.¹⁸⁴ As a result, the denunciation is not effective until one year after it is issued. Moreover, although already established in the

181 *Detainees in Guantánamo Bay, Cuba* (regarding jurisdiction over extraterritorial activities). Request for Precautionary Measures, Inter-Am. C.H.R. (March 13, 2002); *see also, Decision of the Commission as to the admissibility [of Haitians to the United States]*, Case 10.675, Report No. 28/93, Inter-Am. C.H.R., Annual Report 1993, OEA/Ser.L/V.85 Doc. 9 rev. (1994); *Salas and others v. United States*, Case 10.573, Report No. 31/93, Inter-Am. C.H.R., Annual Report 1993, OEA/Ser.L/V.85 Doc. 9 rev. (1994) (*U.S. military action in Panama*).

182 *Blake v. Guatemala*, Preliminary Objections, Judgment of July 2, 1996, Inter-Am. Ct. H.R., (Ser. C) No. 27, paras. 29-40; *see also, Genie Lacayo*, *supra* note 166.

183 *Alfonso Martín del Campo-Dodd v. Mexico*, Preliminary Objections, Judgment of September 3, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 113, paras. 78-85.

184 American Convention, *supra* note 16, art. 78(1).

law of treaties, the Convention specifies that “denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in [the] Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.”¹⁸⁵

With specific regard to the Court, a State may also, in its acceptance of the Court’s jurisdiction, restrict in terms of time the violations that may be alleged against it by means of a condition *ratione temporis*.¹⁸⁶

2.2.2 Statutory Requirements

a. Exhaustion of Domestic Remedies

As mentioned above, petitioners must exhaust domestic remedies prior to filing a complaint before the Commission. Exhaustion of domestic remedies requires that petitioners first attempt to redress the violation through domestic procedures available in the State. These procedures mainly refer to judicial remedies and administrative actions capable of adequately and effectively redressing the alleged violation.¹⁸⁷ The complainant should demonstrate that these remedies have been exhausted, or that there has been an attempt to exhaust them, by including details of all complaints submitted to the national authorities and evidence of any legal proceeding that may have taken place.

The rationale underlying the exhaustion of domestic remedies rule is the principle that States must be afforded the opportunity to resolve the matter in their jurisdictions before being brought before an international complaint

185 American Convention, *supra* note 16, art. 78(2); *see also*, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of June 21, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 94, para. 13.

186 *Serrano-Cruz Sisters v. El Salvador*, Judgment of March 1, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 120, paras. 100-106.

187 *See Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988, Inter-Am. Ct. H.R., (Ser. C) No. 4, paras. 56-68; *Godínez-Cruz v. Honduras*, Judgment of January 20, 1989, Inter-Am. Ct. H.R., (Ser. C) No. 5, paras. 59-71; *Fairén-Garbi and Solís-Corrales v. Honduras*, Judgment of June 26, 1987, Inter-Am. Ct. H.R., (Ser. C) No. 2, paras. 80-88, 90-93; *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a and 46.2.b, American Convention on Human Rights)*, Advisory Opinion OC-11/90, August 10, 1990, Inter-Am. Ct. H.R., (Ser. A) No. 11, para. 24.

procedure.¹⁸⁸ It is important to emphasize that this international human rights mechanism is subsidiary to domestic jurisdiction;¹⁸⁹ the effect of this rule is “to assign to the jurisdiction of the Commission an essentially subsidiary role.”¹⁹⁰

International law requires that domestic remedies be both adequate and effective. For instance, *habeas corpus* may appear to be the ‘adequate’ local remedy designed to protect the rights of victims of forced disappearances. This remedy aims to protect the right to life, humane treatment and personal liberty, among other rights. It is not enough that the remedy exists in the domestic legal system, however, because such a remedy must also be in fact effective. The remedy must also have the ability to achieve the result for which it was conceived, which means access to tribunals and collateral due process guarantees must be adequately secured.¹⁹¹

Article 31 of the Commission Rules of Procedure and Article 46(2) of the American Convention describe cases in which the exhaustion of domestic remedies requirement shall not be applied.¹⁹² Where the following circumstances are present, the requirement is waived:

- a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or,

188 The Commission has stated that “[t]he rule of prior exhaustion of domestic remedies lies in the principle that the defendant State must be allowed, before anything else, to provide redress on its own and within the framework of its internal legal system.” *Salvador Jorge Blanco v. Dominican Republic*, Case 10.208, Report No. 15/89, Inter-Am. C.H.R., Annual Report 1988-1989, OEA/Ser.L/V/II.76, Doc.10 (1989), Conclusion, para. 5.

189 This relationship ensures that domestic remedies are not superseded by an international organ and that the State has an opportunity to correct any wrongdoing before its international responsibility is declared. *Cheryl Monica Joseph v. Canada*, Case 11.092, Report No. 27/93, Inter-Am. C.H.R., Annual Report 1993, OEA/Ser.L/V.85 Doc. 9 rev. (1994), para. V.B.13.

190 *Salvador Jorge Blanco*, *supra* note 188, para. 5.

191 *Velásquez-Rodríguez*, *supra* note 187, paras. 66-68; *Godínez-Cruz*, *supra* note 187, paras. 69-71; *Fairén Garbi*, *supra* note 187, paras. 91-93; *Exceptions to the Exhaustion of Domestic Remedies*, *supra* note 187, paras. 34-36.

192 Commission Rules of Procedure, *supra* note 39, art. 31; American Convention, *supra* note 16, art. 46(2).

- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.¹⁹³

When a petitioner expressly claims inability to prove compliance with the exhaustion rule, the burden of proof shifts to the State. The State concerned must then demonstrate to the Commission which specific domestic remedies have not been previously exhausted, and that these remedies are adequate and effective.¹⁹⁴

i. Lack of Due Process (Art. 46(2)(a))

The Commission has considered the absence of due process fatal to a finding that domestic remedies are effective. In *Alan García v. Peru*¹⁹⁵ the Commission concluded that the notion of effective remedies includes access to the remedies and the ability to exhaust them, and the absence of these elements triggers one of the exceptions to the exhaustion rule. The Commission further concluded that, in order to be effective, remedies afford due process guarantees¹⁹⁶ in the framework of an impartial and independent judiciary.¹⁹⁷

ii. Lack of Access (Art. 46(2)(b))

Lack of access to domestic remedies within the meaning of Article 46(2)(b) of the Convention involves all circumstances that in any way might impede the exhaustion of domestic remedies. This includes not only the absence of available remedies, but also any situation in which the State limits the exercise of existing remedies.¹⁹⁸ The existence of a general situation of corruption that obstructs access to courts or otherwise prevents victims from exhausting domestic remedies therefore falls under Article 46(2)(b) of the Convention.¹⁹⁹

193 Commission Rules of Procedure, *supra* note 39, art. 31.

194 *Id.*, art. 46(3).

195 *Alan García v. Peru*, Case 11.006, Report No. 1/95, Inter-Am. C.H.R., Annual Report 1994, OEA/Ser.L/V/II.88 Doc. 9 rev.1 (1995), para. 17.

196 *Id.*, para. 26.

197 *Id.*, para. 23.

198 See *Exceptions to the Exhaustion of Domestic Remedies*, *supra* note 187; *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R., (Ser. A) No. 9, para. 24.

199 *Newton Coutinho Mendes v. Brazil*, Case 11.405, Report No. 59/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), para. 96.

In *Borges Serrano v. Brazil*,²⁰⁰ the Commission found that a minor who was shot and left paralyzed by a military policeman was prevented from exhausting domestic remedies. The State argued that the victim did not appeal the acquittal of the perpetrator. However, the Commission found that the existence of a provision in the Code of Military Penal Procedures permitting only a military prosecutor to appeal denied the minor the opportunity to exhaust domestic remedies. In *Emilio Tec Pop v. Guatemala*,²⁰¹ a minor was arbitrarily detained for one month by the Guatemalan army. The relatives of the minor filed a criminal complaint before a court, but there was no evidence that the criminal proceedings were ever instituted or pursued by the State. The Commission found that the State had the duty to prosecute *de oficio* (*motu proprio*), and that because no action had been taken, “as a practical matter, domestic remedies were unavailable to the petitioners.”²⁰²

iii. Unwarranted Delay (Art. 46(2)(e))

An unwarranted delay in obtaining a final domestic judgment also triggers an exemption to the requirement of exhaustion of domestic remedies. There are three basic elements to consider when determining whether a delay is unwarranted: a) the complexity of the matter, b) the judicial activity of the interested party and c) the behavior of the judicial authorities.²⁰³ In making such a determination, the Commission does not look exclusively at the general situation of a country; it also takes into account the proceedings before local courts in investigating the violations.²⁰⁴ The Commission considers that “[i]n cases of *prima facie* unacceptable duration it rests upon the respondent government to adduce specific reasons for the delay,” which will be subject “to the Commission’s closest scrutiny.”²⁰⁵ For example, in one case, the Commission

200 *Edson Damião Calixto et Roselândio Borges Serrano v. Brazil*, Cases 11.285, 11.290, Report No. 18/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), paras. 42-48.

201 *Emilio Tec Pop v. Guatemala*, Case 11.312, Report No. 53/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), paras. 21-26.

202 *Id.*, para. 24.

203 *Suárez Rosero v. Ecuador*, Judgment of November 12, 1997, Inter-Am. Ct. H.R., (Ser. C) No. 35, para. 72; *Genie Lacayo v. Nicaragua*, Judgment of January 29, 1997, Inter-Am. Ct. H.R., (Ser. C) No. 30, para. 77.

204 *Manuel Stalin Bolaños Quiñones v. Ecuador*, Case 10.580, Report No. 10/95, Inter-Am. C.H.R., Annual Report 1995, OEA/Ser.L/V/II.91 Doc. 7 (1996); *Calderón Jurado v. Colombia*, Case 10.454, Report No. 32/92, Inter-Am. C.H.R., Annual Report 1992-1993, OEA/Ser.L/V/II.83 Doc. 14 corr.1 (1993); *de Jesús Pedraza v. Colombia*, Case 10.581, Report No. 33/92, Inter-Am. C.H.R., Annual Report 1992-1993, OEA/Ser.L/V/II.83 Doc. 14 corr.1 (1993).

205 *Jorge A. Giménez v. Argentina*, Case 11.245, Report No. 12/96, Inter-Am. C.H.R., Annual Report 1996, OEA/Ser.L/V/II.91 Doc. 7 rev. (1996), para. 101.

found that four years without resolution in the criminal prosecution of three perpetrators constituted unwarranted delay.²⁰⁶ Similarly, it held in another case that a seven-year delay in a penal process against several perpetrators was excessive.²⁰⁷ In *Baruch Ivcher Bronstein v. Peru*, in which a person was deprived of his nationality, the Commission found that a seven-month delay in the judicial process in question triggered the unwarranted delay exception.²⁰⁸ In *Jorge Luis Bronstein et al. v. Argentina*, the Commission concluded that one year and four months of preventive detention constituted an undue delay with respect to Articles 8 and 7(5) of the Convention.²⁰⁹ In *Genie Lacayo*, the Court indicated that in the admissibility determination regarding the exhaustion of domestic remedies, the Commission was the organ called upon to interpret the relevant provisions, subject to an eventual review by the Court.²¹⁰

In general, to determine which situations merit exceptions to the exhaustion of domestic remedies rule, it is necessary to consult the jurisprudence of the Commission and the Court. Likewise, it is relevant to review the jurisprudence of other international human rights bodies, such as the European Court of Human Rights and the UN Human Rights Committee, which monitors the International Covenant on Civil and Political Rights, since both the Commission and the Court refer frequently to these human rights systems in their decisions.²¹¹

206 *Edson Damião Calixto*, *supra* note 200, paras. 25-28.

207 *Ovelario Tames v. Brazil*, Case 11.516, Report No. 19/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 22.

208 *Baruch Ivcher Bronstein v. Peru*, Case 11.762, Report No. 20/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), paras. 53-54.

209 *Jorge Luis Bronstein et al. v. Argentina*, Cases 11.205, 11.236, 11.238, 11.239, 11.242, 11.243, 11.244, 11.247, 11.249, 11.248, 11.249, 11.251, 11.254, 11.255, 11.257, 11.261, 11.263, 11.305, 11.320, 11.326, 11.330, 11.499, 11.504, Report No. 2/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), paras. 59-60.

210 *Genie Lacayo*, *supra* note 166. The Court has claimed unrestricted authority to review admissibility. *Velásquez-Rodríguez v. Honduras*, Preliminary Objections, Judgment of June 26, 1987, Inter-Am. Ct. H.R., (Ser. C) No. 1, para. 29. *See* Section 2.2 *in fine*. Judge Cançado Trindade, in his dissenting opinion in *Genie Lacayo*, stated that the Court should not re-open the question of admissibility, and that the question should be resolved definitively by the Commission.

211 *Gómez-Palomino v. Peru*, Judgment of November 22, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 136, para. 3; *Palamara-Iribarne v. Chile*, Judgment of November 22, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 135, paras. 1, 219; *The Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 134, paras. 106, 212-13, 234; *Raxcacó-Reyes v. Guatemala*, Judgment of September 15, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 133, paras. 7, 9, 79, 97; *Serrano-Cruz Sisters v. El Salvador*, Request for an Interpretation of the Judgment on the Merits, Reparations and Legal Costs (Art. 67 American Convention on Human Rights), Judgment of September 9, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 131, para. 33.

Lastly, regarding the exhaustion requirement, the fundamental objective of the Inter-American System is the protection of human rights primarily in the domestic sphere and secondarily in the international sphere. For this reason, civil society organizations may find it useful to submit a petition to the Commission even when domestic remedies have not been exhausted, even though the petition may run the risk of being deemed inadmissible. The purpose of this strategy is to utilize the international sphere to induce changes in the conduct of courts at the national level. The objective may be, for example, to alert the judge in a domestic case that it is the object of international scrutiny. This may create multiple effects on the domestic proceeding, such as expediting a judicial proceeding delayed by the State, or guaranteeing due process when there may be problems in that respect. In addition, the possibility of filing the petition in the future, even if it is declared inadmissible due to the failure to exhaust domestic remedies, is preserved because the case may return to the Commission when domestic remedies have been exhausted.²¹² Nevertheless, petitioners must be careful not to abuse their right of petition before the Commission.

b. Six-month Rule

The communication or complaint must be sent to the Commission within six months of the date on which the alleged victim is notified of the final decision that exhausts domestic remedies. This deadline is set forth in Article 46(1)(b) of the American Convention and Article 32 of the Commission Rules of Procedure.²¹³

Petitions warranting an exception to the exhaustion of domestic remedies requirement²¹⁴ shall be presented within a reasonable period of time.²¹⁵ In determining what constitutes a “reasonable period of time,” the Commission

212 Commission Rules of Procedure, *supra* note 39, arts. 32(1), 33(2)(a).

213 Commission Rules of Procedure, *supra* note 39, art. 32; American Convention, *supra* note 16, art. 46(1)(b).

214 *See* Sections 2.2.2(a)(i)-(iii), *supra*.

215 Commission Rules of Procedure, *supra* note 39, art. 32(2); *see also*, Section 2.2.2(b), *supra*.

shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.²¹⁶

c. Duplication

Petitions may be rejected based on duplication of procedures, pursuant to Articles 46(1)(c) and 47(d) of the Convention and Article 33 of the Commission Rules of Procedure.²¹⁷ These norms provide that the Commission shall not admit petitions that:

1. Are pending before other similar international complaint procedures;
2. Substantially reproduce other cases pending before the Commission;
3. Have already been decided by it or
4. Essentially duplicate a claim that is pending before another international system of which the State is a member.

The individual communications procedures of the UN Human Rights Committee and the UN Committee Against Torture are examples of adjudicatory proceedings that may duplicate the Commission's procedure. However, the former UN Human Rights Commission procedure known as "1503" is not considered potentially duplicative because it examines consistent patterns of gross human rights violations demonstrated by a series of individual communications.²¹⁸

d. Manifestly groundless or out of order

Pursuant to Article 47(c) of the Convention, petitions may be rejected if they are manifestly groundless or out of order; this includes petitions lacking in sufficient evidence for a *prima facie* showing and those in which new and

216 See *Ramon Mauricio Garcia-Prieto Giralte v. El Salvador*, Case 11.697, Report No. 27/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), para. 52; see also, *Rumaldo Juan Pacheco Osco et al. v. Bolivia*, Case 301/02, Report No. 53/04, Inter-Am. C.H.R., Annual Report 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004), para. 24; *Horacio Verbitsky et al. v. Argentina*, Case 12.128, Report No. 3/04, Inter-Am. C.H.R., Annual Report 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004), para. 47; *Mario Alberto Jara Oñate et al. v. Chile*, Case 12.195, Report No. 31/03, Inter-Am. C.H.R., Annual Report 2003, OEA/Ser.L/V/II.118 Doc. 5 rev. 2 (2003), para. 37.

217 American Convention, *supra* note 16, arts. 46(1)(c), 47(d); Commission Rules of Procedure, *supra* note 39, art. 33(1).

218 *Manuel Stalin Bolaños-Quiñonez*, *supra* note 204.

contradictory evidence arises.²¹⁹ The Commission explains this ground for inadmissibility in Article 34 of its Rules as follows:

The Commission shall declare any petition or case inadmissible when:

- a. it does not state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules of Procedure; or
- b. the statements of the petitioner or of the State indicate that it is manifestly groundless or out of order; or,
- c. supervening information or evidence presented to the Commission reveals that a matter is inadmissible or out of order.²²⁰

There are few examples in the case law of the Commission,²²¹ and the Court. In *Genie Lacayo*, the Court briefly analyzed the scope of Article 47(c) of the Convention:

The Convention not only determines what requirements a petition or communication must meet in order to be admitted by the Commission (Art. 46) but also determines cases of inadmissibility (Art. 47). The Government's arguments seem to indicate that it understands this principle, since it states "*there was full proof that the criminal investigation and prosecution were proceeding normally,*" and the petition before the Commission was "manifestly groundless" or totally inapplicable under the terms of Article 47(c) ("*The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: ...c) the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order*"). Nevertheless, the subjects of the investigation and the criminal proceedings are part of the merits, whereby it becomes evident that, for the Commission, it was neither "obvious" nor "manifest" that there were arguments to declare the case inadmissible. The terms of Article 47(c) exclude any conclusion based on appearance and demand a "*clear, manifest certainty so perceptible that nobody may rationally place it in doubt*" (Royal Spanish Academy, Dictionary of the Spanish Language), which is not the case here.²²²

219 American Convention, *supra* note 16, art. 47(c).

220 Commission Rules of Procedure, *supra* note 39, art. 34.

221 For example, see Inter-Am. C.H.R., *Report on the Work Accomplished during its Twentieth Session, December 2-12, 1968*, OEA/Ser.L/V/II.20 Doc. 33, May 2, 1969, p. 13.

222 *Genie Lacayo*, *supra* note 166, para. 36.

2.3 Hearings

According to Article 59 of the Commission Rules of Procedure, the Commission may hold hearings at the request of an interested party or on its own initiative.²²³ The decision to hold a hearing shall be made by the President of the Commission, at the proposal of the Executive Secretary. Hearings may be held for purposes such as the following: determining admissibility, furthering the information supplied by any interested party, initiating or developing a friendly settlement procedure, verifying the facts or merits of the matter, following up on recommendations or any other matter pertinent to the processing of the petition.

During the hearing, any document, testimony, expert report or evidentiary item may be presented.²²⁴ Additionally, “[a]t the request of a party or on its own initiative, the Commission may receive the testimony of witnesses or experts.”²²⁵

Article 62 of the Commission Rules of Procedure describes the process for requesting a hearing:

Requests for hearings must be submitted in writing at least 40 days prior to the beginning of the respective session of the Commission. Requests for hearings shall indicate their purpose and the identity of the participants.

If the Commission accedes to the request or decides to hold a hearing on its own initiative, it shall convoke both parties. If one party, having been duly notified, does not appear, the Commission shall proceed with the hearing. The Commission shall adopt the necessary measures to maintain in confidence the identity of the experts and witnesses if it believes that they require such protection.

The Executive Secretariat shall inform the parties as to the date, place and time of the hearing at least one month in advance. However, that time period may be reduced if the participants grant the Executive Secretariat prior and express consent to that effect.²²⁶

223 Commission Rules of Procedure, *supra* note 39, art. 59.

224 *Id.*, art. 63(1).

225 *Id.*

226 *Id.*, art. 62.

The parties may request a hearing during any phase of the Court's proceedings.²²⁷ According to Article 14 of the Court Rules of Procedure, hearings should be public and are held in San José, Costa Rica.²²⁸ In exceptional circumstances the Court may hold a hearing at a different location. The Court shall decide who may attend such hearings. Court hearings are held with the purpose of presenting witnesses and their testimony. Judges may only ask questions in order to receive additional information or clarify any obscure point in the evidence already presented.

The Judges deliberate in private, then issue an opinion. Along with the opinion, dissenting and concurring opinions and declarations made for the record are recorded in the minutes of the deliberations.²²⁹ The decisions of the Court are adopted by a majority of the Judges present at the time of voting, and if in the case of a tie the President casts the deciding vote.²³⁰

Hearings before the Commission play a key role in the petitioner's litigation strategy. They are the Commission's only opportunity to receive testimony or expert evidence directly. The impact of an oral presentation given by the victim, a witness or expert witnesses may be decisive in the final outcome of a case. However, because the hearings are generally held in Washington, D.C., the costs for a petitioner may be excessive. For this reason, it is important to seek funding or grants from philanthropic entities that allow the petitioner to send key witnesses to the hearings. Another alternative is to turn to non-governmental organizations that may be interested in the case. Such organizations often have the resources available to support certain cases in which the organization has a special interest. Some of these organizations are in Washington, D.C., which may facilitate more consistent contact with the Secretariat of the Commission, although this is not required.

Hearings may also be used strategically with respect to public opinion. Publicizing hearings is often an efficient method of compelling the State to reach a friendly settlement or make progress on a case in order to avoid damage to public opinion. It is important that petitioners devise a press strategy before the hearing is held.

227 Court Rules of Procedure, *supra* note 126, arts. 14, 36(5), 40, 45.

228 *Id.*, art. 14.

229 *Id.*, art. 56(2).

230 *Id.*, art. 15.

2.4 Evidence

2.4.1 What Evidence Should Be Presented?

When filing a petition before the Inter-American Commission, a wide range of evidence may be presented. Any information that can assist the Commission or the Court in understanding the events that occurred should be submitted with the petition in order to be admitted promptly into evidence. Petitioners generally provide documents, experts' reports, videos, photographs, newspapers, et cetera. Unlike the presentation of evidence before a domestic court, it is not necessary to certify the documents before a notary public. Furthermore, neither the Commission nor the Court requires hard copies of the documents presented, though it is always advisable to provide them.

It is important to note that if the petitioner argues that a domestic law is incompatible with a Convention provision, he or she must prove that the particular law or rule exists. Whereas in national legal systems the national law is presumed to be known, in international fora the laws are mere facts when arguing their incompatibility with international norms. The existence of a given domestic law or rule will generally be proven by presenting its text; merely citing to it will not suffice.

*Textbox 2: Establishing the Credibility of a Medical Examination*²³¹

In the case of *Ana, Beatriz and Celia González Pérez*, the Inter-American Commission followed the United Nations Commission on Human Rights guidelines in determining the credibility of a medical examination, a crucial element in establishing rape. In this case the Commission said:

According to these principles, the conduct of doctors should, at all times, be in keeping with “the strictest ethical guidelines” and the consent of the person to be examined should be obtained. Examinations shall take place in accordance with medical practices, and “never in the presence of security agents or other government officials.” The “reliable report” to be prepared immediately by medical experts should include, at a minimum, the following information:

- (i) Circumstances of the interview: name of the subject and name affiliation of those present at the examination; the exact time and date; the location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g. detention center, clinic, house, etc.); the circumstances of the subject at the

231 *Ana, Beatriz and Celia González Pérez v. Mexico*, Case 11.565, Report No. 53/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), paras. 39-40.

time of the examination (e.g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanor of those accompanying the prisoner, threatening statements to the examiner, etc.); and any other relevant factor;

- (ii) History: a detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the times when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms;
- (iii) Physical and psychological examination: records of all physical and psychological findings on clinical examination including appropriate diagnostic tests and, where possible, color photographs of all injuries;
- (iv) Opinion: an interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill treatment. A recommendation for any necessary medical and psychological treatment and/or further examination should be given;
- (v) Authorship: the report should clearly identify those carrying out the examination and should be signed.

The Commission also found that “the medical reports, the parameters of which are defined by the United Nations, must be confidential and must be delivered to the alleged victim or representative appointed by that person. It adds “the report should also be provided in writing, where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment.”

2.4.2 Is It Possible or Necessary to Produce Witnesses?

The presentation of witnesses is possible and highly advisable as a powerful source of evidence, because it offers the same strategic advantages of a hearing. However, it is not compulsory. Both the Commission and the Court have broad discretion to accept and take into consideration almost any type of evidence. Therefore, it is always helpful to present witnesses whose testimony will support a case. The Commission may receive the testimony of witnesses or experts at a party’s request or on its own initiative.²³² In a hearing request, a party may also request the testimony of witnesses. The Commission will determine whether to receive the witnesses’ testimony when deciding whether to hold the hearing.²³³ When a party offers witnesses, the Commission will inform the other party. However, “[i]n extraordinary circumstances and for the purpose of safeguarding the evidence, the Commission may, at its discretion, receive testimony [without informing the other party].”²³⁴

232 Commission Rules of Procedure, *supra* note 39, art. 63(1).

233 *Id.*, art. 63(4).

234 *Id.*, art. 63(6).

Article 63 of the Commission Rules of Procedure establishes that an oath or a solemn promise to tell the truth shall be taken from the witnesses or experts testifying at the hearing.²³⁵ This same requirement applies to the witnesses testifying before the Inter-American Court.²³⁶

According to Article 47(1) of the Court Rules of Procedure, the Court shall determine which witnesses will testify and when they will testify in a hearing.²³⁷ Any party may object to a witness before he or she testifies. Nonetheless, if the Court considers it necessary, it may hear for purposes of information a person who is not qualified to be heard as a witness.²³⁸

2.4.3 Burden and Standard of Proof

The Court has consistently ruled that the petitioner bears the initial burden of proving the facts underlying his or her claims.²³⁹ The Commission, when reviewing the merits of a case, will analyze the evidence and the arguments presented by the parties. During this process, any facts that the State does not rebut the Commission will presume to be true.²⁴⁰ The Court has also ruled that a State's failure to reply to all the claims submitted in the petition to the Court gives rise to a presumption that the unchallenged facts are true, provided that inferences from the presumed facts are consistent with other evidence on record.²⁴¹

Regarding the weighing of evidence, the Court ruled in *Velásquez-Rodríguez* that “international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment.”²⁴² On those grounds, the Court in practice conducts a flexible analysis of the evidence presented, “in accordance with the rules of logic and based on experience.”²⁴³

235 *Id.*, art. 63(8).

236 Court Rules of Procedure, *supra* note 126, art. 48.

237 *Id.*, art. 47(1).

238 *Id.*, art. 49.

239 *Velásquez-Rodríguez*, *supra* note 187, para. 123.

240 Commission Rules of Procedure, *supra* note 39, art. 39.

241 *Bámaca-Velásquez*, *supra* note 171, para. 100.

242 *Velásquez-Rodríguez*, *supra* note 187, para. 127; *see also*, *Blake v. Guatemala*, Judgment of January 24, 1998, Inter-Am. Ct. H.R., (Ser. C) No. 36, para. 49; *Suárez Rosero*, *supra* note 203, para. 33; *Gangaram-Panday v. Suriname*, Judgment of January 21, 1994, Inter-Am. Ct. H.R., (Ser. C) No. 16, para. 49; *Fairén-Garbi*, *supra* note 187, para. 130; *Godínez-Cruz*, *supra* note 187, para. 133.

243 *Cantoral-Benavides*, *supra* note 171, para. 48; *see also*, *Blake*, *supra* note 242, para. 50; *Castillo-Páez v. Peru*, Judgment of November 3, 1997, Inter-Am. Ct. H.R., (Ser. C) No. 34, para. 39; *Loayza-Tamayo*, *supra* note 112, para. 42.

As a general rule, the Court has established that:

In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation ... The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State.²⁴⁴

The Court has further noted that:

Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim. Since the Court is an international tribunal, it has its own specialized procedures. All the elements of domestic legal procedures are therefore not automatically applicable.²⁴⁵

There are very few individual cases in which the Court or the Commission has had direct evidence of the perpetration of torture or other cruel, inhuman or degrading treatment. In the absence of such evidence, the Court has followed two approaches in attributing international responsibility to States for the perpetration of such acts. First, the Court in some cases has established that there existed in the State a practice of subjecting victims to torture or other mistreatment. Where the case under analysis was linked to that practice based on the *modus operandi* of the perpetrators, the Court attributed responsibility to the State without direct evidence of State agent involvement.²⁴⁶ Likewise, the Commission has also followed this analysis to establish the violation of the right to humane treatment as protected by Article 5 of the American Convention.²⁴⁷

Alternatively, the Court and the Commission have applied a burden-shifting approach where a person under the absolute control of State agents claims that he or she was subjected to torture or other cruel, inhuman or degrading treatment. The burden shifts to the State to prove that the victim was not subject to prohibited treatment while in its custody. If the State cannot meet the burden,

244 *Velásquez-Rodríguez*, *supra* note 187, paras. 135-136.

245 *Id.*, paras. 131-132.

246 *Id.*, para. 126; *see also*, *Street Children*, *supra* note 27, para. 167; *Fairén-Garbi*, *supra* note 187, para. 129; *Godínez-Cruz*, *supra* note 187, para. 132.

247 *See, e.g.*, *Remigio Domingo Morales et al., v. Guatemala*, Cases 10.626, 10.627, 11.198(A), 10.799, 10.751, 10.901, Report No. 59/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000).

the Commission and the Court may find a violation of Article 5 of the American Convention.²⁴⁸ In *Juan Humberto Sánchez v. Honduras*, the Court found a violation of the right not to be tortured:

[A]s the conditions in which [the victim's] mortal remains were found authorize the inference that he suffered severe tortures at the hands of his captors. In this regard, the Court emphasizes that, on the night of July 11, 1992, before he was captured by the military, Juan Humberto Sánchez was in normal physical conditions, in view of which the State should reasonably explain what happened to him. At the time the instant Judgment is issued, the State has not yet provided a reasonable explanation of how and why the corpse of Juan Humberto Sánchez was in said conditions when it was found, and this therefore constitutes a violation of Article 5 of the American Convention.²⁴⁹

2.4.4 Presenting Evidence and Fact-finding

According to Article 44 of the Court Rules of Procedure, the parties must indicate in their initial submissions the evidence they will produce during the proceedings.²⁵⁰ Thus, with the exception of *force majeure* or supervening events, any submission presented after the initial written submissions will be rejected by the Court.²⁵¹

With respect to the submission of evidence, the Court has established that its proceedings are not subject to the same formalities as domestic proceedings. Therefore, “when incorporating certain elements into the body of evidence, particular attention must be paid to the circumstances of the specific case and to the limits imposed by respect for legal certainty and the procedural equality of the parties.”²⁵²

On the other hand, the Commission and the Court can make use of any resources deemed necessary for the consideration of the case. The

248 *Bulacio v. Argentina*, Judgment of September 18, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 100, para. 127; *Remigio Domingo Morales et al.*, *supra* note 247, para. 136; *Joaquín Ortega et al. v. Guatemala*, Case 10.586, Report No. 39/00, Inter-Am. C.H.R., Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6 rev. (1999), paras. 253-254.

249 *Juan Humberto Sánchez v. Honduras*, Judgment of June 7, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 99, para. 100.

250 Court Rules of Procedure, *supra* note 126, art. 44.

251 *Id.*

252 *Maritza Urrutia v. Guatemala*, Judgment of November 27, 2003, Inter-Am. Ct. H.R., (Ser. C) 103, para. 48; *see also, Gómez-Paquiyaui Brothers v. Peru*, Judgment of July 8, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 110, para. 41.

Commission may initiate an on-site investigation of the alleged events in order to gather additional information. In practice, State consent for such a visit is very important. Furthermore, Article 45 of its Rules of Procedure gives the Court ample powers to gather *motu proprio* any additional evidence that it considers necessary.²⁵³ Within those powers, the Court may hear witnesses or expert witnesses, request from the parties the production of certain evidence, request a report or opinion from a third party or commission its own Judges to hold hearings at the seat of the Court or elsewhere.²⁵⁴ The Rules also provide the Court with powers to give judicial effect to evidence adequately gathered during the Commission's proceedings.²⁵⁵

2.5 Confidentiality and Publication

2.5.1 Is the Procedure Confidential?

Commission sessions are confidential unless the Commission authorizes third parties to be present (with the consent of the parties, when the Commission session is a hearing).²⁵⁶ Summary minutes are taken of each meeting by the Executive Secretariat of the Commission. These minutes shall state the date and time of the meeting, the names of the members present, the matters addressed, the decisions made and any statement by a member made especially for inclusion in the minutes.

Otherwise, the parties are able to publicize the Commission's proceedings in a case through press releases, conferences or other methods.

2.5.2 Are the Findings Made Public?

The reports by the Commission and the Court are made public and posted on the internet and in the OAS Annual Reports. Several decisions are made by the Commission and the Court in their proceedings. Admissibility decisions are published on the Commission's website (www.cidh.org) immediately after the Commission adopts them. Additionally, the Commission includes these

253 Court Rules of Procedure, *supra* note 126, art. 45.

254 *Id.*

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

256 Commission Rules of Procedure, *supra* note 39, art. 14(3).

reports in its Annual Report to the General Assembly of the OAS. This Report also details the precautionary measures that have been granted and extended.

There is also the possibility that the parties will reach a friendly settlement. In these cases, the Commission shall draw up a report containing a statement of the facts and the solution reached. This report shall be transmitted to the petitioner, the States and the Secretary General of the OAS for its publication. If the parties do not reach a friendly settlement, the Commission will also write a report stating the facts and the Commission's conclusions. If this report does not represent the unanimous agreement of the members of the Commission, any member may attach a separate opinion. Also, written and oral statements made by the parties will be attached upon request. The report shall be transmitted to the State concerned. All the information related to a failed friendly settlement will remain confidential. In the event the case is referred to the Court by the Commission, this report will not be submitted. This allows the parties freely to discuss possible avenues of reaching a friendly settlement without fear of damaging their position later in the proceedings if they do not reach an amicable settlement of the case.

After a friendly settlement has failed, the Commission has six months to issue the so-called "Article 50" report, which is a confidential decision on the merits of the case transmitted only to the State, not to the petitioners. The Commission will establish a time period within which the State must comply with the decision. Once this period expires, the Commission will decide whether the State has taken adequate measures and whether it will submit the case to the Court or publish its final report, known as the "Article 51" report. This report is published by the Commission on its website and in its Annual Report.

2.6 Assistance and Protection

2.6.1 Is Legal Representation Required?

Legal representation is not required, although it is helpful for petitioners to be assisted by a lawyer or a non-governmental organization with experience in human rights.²⁵⁷ Due to a change in the political climate of the hemisphere and recent reforms in the System, the proceedings before the Commission

²⁵⁷ *Id.*, art. 23 (establishing that "the petitioner *may* designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in another writing).

have become more similar to judicial proceedings than previously. Petitions lodged in the Commission involve sophisticated legal matters, and for this reason, the assistance of a lawyer increases the chances of success.

2.6.2 Is Financial Assistance Available?

The Commission and the Court do not have a legal aid system. It is important to secure the necessary funding to be able to litigate the case adequately before the Commission and the Court. Costs incurred during litigation include, among others, bringing key witnesses to hearings and making oral pleadings before the Commission or the Court. In order to offset these costs, petitioners may search for grants or seek the assistance of a non-governmental organization interested in taking a case where the subject matter adequately fits within its mandate.

It is important to bear in mind that the Inter-American Court, in the reparation phase, will assess payment for costs incurred by the petitioners when litigating the case both nationally and internationally.

2.6.3 Are Measures of Protection Provided for Petitioners and Witnesses?

Measures are available for the protection of petitioners and witnesses. When submitting the complaint, the petitioner shall state whether he or she wishes that his or her identity be withheld from the State.²⁵⁸ If a party wants the identity of a witness to remain confidential, he or she must so state in the hearing request. When necessary, the Commission will conceal the witness's identity for protection.²⁵⁹

Also, according to Article 61 of the Commission Rules of Procedure, the State in question shall grant the necessary guarantees to everyone who attends a hearing or who in the course of a hearing provides information, testimony or evidence of any type to the Commission.²⁶⁰ The State may not prosecute the witnesses or experts, or carry out reprisals against them or their families because of statements or expert opinions given before the Commission.²⁶¹

258 *Id.*, art. 28(b).

259 *Id.*, arts. 62(3), 63(8), 73.

260 *Id.*, art. 61.

261 *Id.*

Regarding witnesses before the Inter-American Court, Article 51 of the Court Rules of Procedure explains that States shall abstain from instituting proceedings against witnesses or expert witnesses and from unlawfully pressuring them or their families on account of declarations or opinions delivered before the Court.²⁶²

Additionally, both the Commission and the Court have the power to issue interim measures of protection, which are discussed in next section. These measures may be requested to protect petitioners, witnesses or the actual victim and his or her family.

2.7 Precautionary and Provisional Measures²⁶³

Precautionary measures are interim measures for the prevention of irreparable harm to persons, available during the processing of a case. The Commission may request that a State adopt precautionary measures “in serious and urgent cases, and whenever necessary according to the information available.”²⁶⁴ Examples of serious and urgent situations posing an imminent risk to life and safety include death threats, unlawful death sentences, the risk of torture, inhuman or degrading punishment or treatment and serious danger arising from conditions of detention. The Commission’s decision to recommend such measures and their subsequent adoption by the State do not reflect prejudgment on the merits of a case.²⁶⁵

The Commission may also request that the Court adopt *provisional measures* in urgent cases, as will be explained below.²⁶⁶ Provisional measures requested of the Court are generally for protection of the victim, her or his family, witnesses or other persons involved in the case.

262 Court Rules of Procedure, *supra* note 126, art. 51.

263 Various terms are used in international instruments to designate these measures, including “provisional measures,” “interim measures,” “precautionary measures,” “conservatory measures” and “urgent measures.” The Inter-American instruments refer to interim measures adopted by the Commission as “precautionary measures” and interim measures adopted by the Court as “provisional measures.”

264 Commission Rules of Procedure, *supra* note 39, art. 25.

265 *Id.*, art. 25(4).

266 *Id.*, art. 74.

Textbox 3: Example of Precautionary Measures

On October 14, 2004, the IACHR granted precautionary measures in favor of **Holmes Enrique Fernández, Jorge Salazar, and other members of the Cauca Association of Displaced Persons of Naya (Asociación Caucana de Desplazados del Naya—ASOCAIDENA)**, which, since December 2003, brought together 70 families of displaced persons of African descent, indigenous people, and colonizers who survived the massacre perpetrated on April 12, 2001 in Alto Naya. Available information indicates that the members of ASOCAIDENA—now relocated in La Laguna, Timbío, Department of Cauca—have been the target of threats against their life and personal safety by members of paramilitary groups operating in the zone and that, on September 30, 2004, Holmes Enrique Fernández and Jorge Salazar were the targets of an ultimatum by paramilitary groups, indicating that the time had come to settle scores with the leaders of the association for their activity in the zone. In view of the situation of the beneficiaries, the Commission requested the Colombian Government to adopt the measures necessary to guarantee the lives and physical integrity of Holmes Enrique Fernández, Jorge Salazar, and other members of ASOCAIDENA and to report on the actions adopted for the purpose of putting an end to the incidents justifying the adoption of precautionary measures. The Commission continues to monitor the situation of the protected persons.²⁶⁷

The Commission may adopt precautionary measures on its own initiative or at the petitioner’s request.²⁶⁸ Item VII on the Commission’s petition form²⁶⁹ seeks information from the petitioner regarding the need for precautionary measures: “Please indicate whether the victim’s life, integrity or health is in jeopardy. Was the assistance of the authorities requested, and if so, what was the response?”

Precautionary measures may be requested along with the petition or at any stage of the process. When a petitioner seeks precautionary measures, the Commission registers the request and enters it in a database. In practice, within twenty-four to forty-eight hours a working group convenes to assess the situation. If the Commission is in session, it decides whether or not to grant the request. If the Commission is not in session, the President, or one of the Vice Presidents if the President is absent, shall consult with the other members

267 Inter-Am. C.H.R., Annual Report 2004, *supra* note 48, Chapter III.C.1., para. 23.

268 Commission Rules of Procedure, *supra* note 39, art. 25(1).

269 See Section 2.1.2, *supra*.

through the Executive Secretariat. If consultation with the Commission members is not possible within a reasonable period of time under the circumstances, the President, or if necessary one of the Vice Presidents, will decide on behalf of the Commission and shall so inform its members.²⁷⁰

The Commission granted precautionary measures in thirty three cases in 2005, compared to thirty-seven cases in 2004, fifty-six in 2003 and ninety-one in 2002. In 2004, the Commission granted precautionary measures in favor of inmates at the Penitentiary of the Province of Mendoza, Argentina, after receiving information about eleven deaths there.²⁷¹ It also adopted precautionary measures in connection with mandatory death sentences, execution methods and detention conditions in Barbados.²⁷² In another case measures were granted in favor of Brazilian indigenous peoples whose lives, personal safety and access to land were in imminent danger after an armed group attacked them; the attack resulted in one death, one disappearance and the destruction of thirty-four homes.²⁷³

Textbox 4: Request for Precautionary Measures

Center for Constitutional Rights

Docket: Petition to Inter-American Commission on Human Rights on Behalf of the Guantánamo Detainees

On February 25, 2002, the Center for Constitutional Rights, the Human Rights Clinic at Columbia Law School, and the Center for Justice and International Law requested that the Inter-American Commission on Human Rights (IAHCR) of the Organization of American States (OAS) immediately intervene to protect the rights of approximately 300 Al-Qaeda and Taliban captives detained by the U.S. government at Guantánamo Bay, Cuba.

Petitioners requested that the following precautionary measures be taken: that the detainees be treated as Prisoners of War, and that their international human rights be honored. Furthermore detainees should not be subjected to arbitrary, incommunicado, and prolonged detention, unlawful interrogations, or trials by military commission in which they could be sentenced to death. These rights are outlined in the American Declaration on the Rights and Duties of Man and the Inter-American Commission is authorized to take immediate action when irreparable harm is threatened. The US has denied the detainees the international human rights protections

270 Commission Rules of Procedure, *supra* note 39, art. 25(2).

271 Inter-Am. C.H.R., Annual Report 2004, *supra* note 48, Chapter III.C.1., para. 11.

272 *Id.*, Chapter III.C.1., para. 12.

273 *Id.*, Chapter III.C.1., para. 13.

they are owed claiming that the detainees are not prisoners of war, but are instead “unlawful combatants.”

On March 13, 2002, the Inter-American Commission on Human Rights ordered the United States to “take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal.” CCR president and Cooperating Attorney Michael Ratner called the OAS’ decision “a victory for advocates of the rule of law and due process.” He explained that this is the first ruling by an international panel basically saying that the Geneva Convention applies and you have to treat them with the competent tribunals before you deny their prisoners-of-war status.” He urged the US to respond positively, stating that if the US failed to abide by the commission’s recommendations, it would be a lawless act and a violation of the US’s treaty obligations.”

On April 15, 2002, the IAHCR notified CCR that the U.S. had rejected the IACHR’s decision to adopt precautionary measures. The government argued that the IACHR had neither the jurisdiction to apply precautionary measures nor the right to interpret the Geneva Convention. CCR, on the other hand, believes that the US is bound by the Commission’s declaration. Although the US has failed to sign the OAS’s American Convention on Human Rights, it is a signatory of the OAS’s Charter and therefore is bound under the terms of the charter’s American Declaration of the Rights and Duties of Man. In the past, however, the US has ignored the Inter-American Court on Human Rights. For example, it rejected that Court’s determination that the death sentence for juveniles in the US was illegal. A hearing was held on the government’s position at the IAHCR in October 2002. A decision is pending.

On July 29, 2004, the Inter-American Commission on Human Rights/Organization of American States (the Commission) sent out a letter suggesting that the United States had contradicted its previous statements that all measures would be taken to prevent the torture or other cruel, inhuman or degrading treatment of detainees at Guantánamo. The letter was sent in response to a June 28 submission made by attorneys at the New York based Center for Constitutional Rights (CCR) requesting expansion of the Precautionary Measures previously adopted by the Commission in relation to detainees in Guantánamo. In its submission, CCR provided the Commission with new evidence regarding the conditions and treatment of persons detained by the United States at Guantánamo Bay and elsewhere.

In its latest exchange with the U.S., citing U.S. government legal memoranda on the possible use of torture and other cruel, inhuman or degrading treatment during interrogation of detainees, the Commission chastised the Bush Administration for lapses in information. The Commission’s letter states,

This information appears to contradict previous assurances provided to the Commission by your Excellency’s government that it is the United States policy to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with the commitment to prevent torture and other cruel, inhuman or degrading treatment or punishment.

The Commission also expressed continued concern over the legal status of the detainees and doubts over the legitimacy of the planned military tribunals. The Commission held that the United States is not effectively protecting the fundamental rights to which the detainees may be entitled. CCR asserts that the United States' refusal to comply with the Commission's requests to date is yet another example of the Bush administration's blatant disregard for international law and governing international bodies.

In December 2004, the Government responded to the Commission, alleging still that the Commission lacks jurisdiction to issue precautionary measures to the United States, and adding a new claim that domestic remedies haven't been exhausted because of the habeas petitions and various military tribunals. On February 22, 2005, Petitioners submitted their reply refuting the Government's contentions, and updating the Commission on new information that had come to light about the U.S. Government's treatment of detainees at Guantánamo and elsewhere. Petitioners requested that the Commission extend the Precautionary Measures to preclude the use of information obtained through torture in ongoing proceedings against the detainees. Petitioners also asked the Commission to reiterate its July 2004 request that the U.S. investigate and prosecute the high-level officials responsible for the torture of detainees who are under its authority and control. The Commission held a hearing on March 3, 2005.

Upon Petitioners' request to have the Precautionary Measures further extended, the Commission held another hearing on October 20, 2005. On October 28, 2005, the Commission issued measures requesting that the U.S. government ensure the detainees at Guantánamo are not transferred to countries where there are substantial grounds for believing they would be in danger of being subjected to torture or other mistreatment. The Commission also requested that the U.S. not permit any statement obtained under torture to be used in a legal proceeding, in accordance with international law. The Commission reiterated its request that the government investigate and prosecute instances of abuse and torture, which it clarified does not mean letting the Department of Defense continue to investigate itself. Finally, the Commission repeated its demand that the U.S. have the legal status of the Guantánamo detainees determined by a competent tribunal, emphasizing that the military tribunals and habeas corpus proceedings have not adequately addressed this request to date.

On June 12, 2006, the Commission requested that the U.S. provide information within 10 days concerning the recent suicides committed by three detainees being held at Guantánamo.²⁷⁴

274 Courtesy of the Center for Constitutional Rights (CCR), available at http://www.ccrny.org/v2/legal/september_11th/sept11Article.asp?ObjID=71t0qaX9CP&Content=134. The CCR Legal Team is comprised of Maria LaHood, Cooperating Attorney and CCR President Michael Ratner and Cooperating Attorneys Anthony DiCaprio, Beth Stephens and Judith Chomsky. Cynthia Soohoo, also a Cooperating Attorney, was a signatory on behalf of Columbia Human Rights Clinic and Richard Wilson of the International Human Rights Clinic Washington College of Law, American University. To read CCR's official request for precautionary measures, see Appendix No. 18 (see companion website www.omct.org)

Precautionary measures have sufficient legal authority to compel a State to adopt the necessary measures to prevent irreparable harm to occur.²⁷⁵ Furthermore, if a State that has accepted the contentious jurisdiction of the Court fails to adopt the measures, the Commission may request that the Court grant provisional measures “in cases of extreme gravity and urgency, and when it becomes necessary to avoid irreparable damage to persons,” even in cases that have not yet been submitted to the Court for consideration.²⁷⁶

In cases pending before the Court, it may order provisional measures at a party’s request or on its own motion, for the purpose of preventing irreparable damage to persons.²⁷⁷ Article 25(4) of the Court Rules of Procedure states:

The request may be made to the President, to any Judge of the Court, or to the Secretariat, by any means of communication. In every case, the recipient of the request shall immediately bring it to the President’s attention.²⁷⁸

275 The rationale supporting this notion is similar to that applicable to the obligatory character of the recommendations of the Commission (*see* Section 1.2.3 (c), *supra*).

276 Commission Rules of Procedure, *supra* note 39, art. 74(1). The Commission may not, however, transmit such a request to the Court in cases against States that have not ratified the American Convention and/or have not recognized the Court’s contentious jurisdiction.

277 Court Rules of Procedure, *supra* note 126, art. 25(1).

278 *Id.*, art. 25(4).