

The Prohibition of Torture and Ill-treatment in the Inter-American Human Rights System

**Diego Rodríguez-Pinzón
& Claudia Martín**

A HANDBOOK
FOR VICTIMS AND
THEIR ADVOCATES

With a Foreword by Claudio Grossman



OMCT Handbook Series Vol.2

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Note to Readers

This *Handbook* is meant to support NGOs, advocates, lawyers, and indeed, the victims of torture themselves, in developing effective litigation strategies before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. As such, OMCT has striven for comprehensive coverage of the relevant areas of substance and procedure but also for clarity and accessibility. We are continuously looking for ways to improve our materials and enhance their impact. Please help us do this by submitting your comments on this book to: handbook@omct.org

Readers are also invited to visit our website featuring a page devoted to this *Handbook* which contains further reference materials including electronic versions of all of the *Handbook's* appendices available for download: www.omct.org

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Leonor Vilás Costa, Editor

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The views expressed in this book are solely those of the authors and do not represent those of any institution or organisation.

TABLE OF CONTENTS

<i>Note to Readers</i>	4
<i>Acknowledgements</i>	5
<i>Disclaimer</i>	6
<i>Foreword by Claudio Grossman</i>	13
Table of Cases	15
INTRODUCTION	27
PART I. INTRODUCTION TO THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS	31
1.1 The Organization of American States: The Development of the Human Rights System	33
1.2 The Inter-American Commission on Human Rights	38
1.2.1 Composition and Powers	38
1.2.2 Reports and On-site Visits	41
a. Country and Thematic Reports	41
b. On-site Visits	44
c. Special Rapporteurs	48
1.2.3 Individual Petitions	48
a. System of Individual Petitions under the American Convention	49
b. System of Individual Petitions under the American Declaration	53
c. The Legal Nature of Recommendations of the Inter-American Commission	54
1.3 The Inter-American Court of Human Rights	55
1.3.1 Contentious Jurisdiction	56
1.3.2 Advisory Jurisdiction	58
PART II. SUBMITTING A COMMUNICATION	61
2.1 Initiating the Proceedings	64

2.1.1	How to File a Petition	64
2.1.2	What Should the Structure of the Petition Be?	65
	<i>Textbox 1: Petition Form</i>	66
2.1.3	What Kind of Information is Needed?	66
2.2	Admissibility	68
2.2.1	Jurisdiction	69
a.	Who May Submit a Petition? (Jurisdiction <i>ratione personae</i>)	69
b.	Against Whom May a Petition Be Submitted? (Jurisdiction <i>ratione personae</i>)	71
c.	Which Claims May Be Made? (Jurisdiction <i>ratione materiae</i>)	71
i.	Violation of a Protected Right	71
ii.	Fourth Instance Formula	73
d.	Where Must the Violation Have Been Committed? (Jurisdiction <i>ratione loci</i>)	74
e.	When Must the Violation Have Been Committed? (Jurisdiction <i>ratione temporis</i>)	75
2.2.2	Statutory Requirements	76
a.	Exhaustion of Domestic Remedies	76
i.	Lack of Due Process (Art. 46(2)(a))	78
ii.	Lack of Access (Art. 46(2)(b))	78
iii.	Unwarranted Delay (Art. 46(2)(e))	79
b.	Six-month Rule	81
c.	Duplication	82
d.	Manifestly Groundless or Out of Order	82
2.3	Hearings	84
2.4	Evidence	86
2.4.1	What Evidence Should Be Presented?	86
	<i>Textbox 2: Establishing the Credibility of a Medical Examination</i>	86
2.4.2	Is It Possible or Necessary to Produce Witnesses?	87
2.4.3	Burden and Standard of Proof	88
2.4.4	Presenting Evidence and Fact-finding	90
2.5	Confidentiality and Publication	91

2.5.1	Is the Procedure Confidential?	91
2.5.2	Are the Findings Made Public?	91
2.6	Assistance and Protection	92
2.6.1	Is Legal Representation Required?	92
2.6.2	Is Financial Assistance Available?	93
2.6.3	Are Measures of Protection Provided for Petitioners and Witnesses?	93
2.7	Precautionary and Provisional Measures	94
	<i>Textbox 3: Example of Precautionary Measures</i>	95
	<i>Textbox 4: Request for Precautionary Measures</i>	96
PART III. TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT		101
3.1	Introduction	103
3.2	Scope of the Right to Humane Treatment	105
3.2.1	Torture	105
3.2.2	Cruel, Inhuman and Degrading Treatment or Punishment	107
3.2.3	“[R]espect for the Inherent Dignity of the Human Person”	108
3.3	Specific Acts and Situations	111
3.3.1	Discipline and Corporal Punishment	111
3.3.2	Rape	112
3.3.3	Forced Disappearances and Extrajudicial Executions	114
3.3.4	Suffering by Family Members as Torture or Other Cruel, Inhuman or Degrading Treatment	117
3.3.5	Threats	120
3.3.6	Conditions of Detention	121
3.3.7	Incommunicado Detention	125
3.3.8	Solitary Confinement	127
3.3.9	Unlawful Detention	129
3.3.10	Excessive Use of Force	130
3.3.11	Death Penalty	133

3.4 Other Prohibitions Under Inter-American Human Rights Law Related to Torture and Other Cruel, Inhuman or Degrading Treatment	136
3.4.1 Non-refoulement	136
3.4.2 Exclusionary Rule	137
3.5 General Duties to Respect and Ensure	138
3.5.1 Duty to Prevent	139
3.5.2 Duty to Investigate and Punish	141
3.5.3 Duty to Provide Reparation	144
3.6 Establishing State Responsibility	149
3.6.1 General	149
3.6.2 Attribution of Unlawful Activity for Acts and Omissions	152
3.6.3 Attribution of Unlawful Activity for Lack of Due Diligence	155
Index	159
About the Authors	169
Bibliography	173

APPENDICES

1. American Convention on Human Rights	179
2. American Declaration on the Rights and Duties of Man.....	205
3. Statute of the Inter-American Commission	215
4. Statute of the Inter-American Court.....	223
5. Rules of Procedure of the Inter-American Commission.....	233
6. Rules of Procedure of the Inter-American Court.....	261
7. Flowchart: Admissibility before the Commission	285
8. Flowchart: Merits before the Commission.....	287
9. Flowchart: Entire Procedure before the Court	289
10. Status of Ratification of Inter-American Human Rights Treaties.....	291

For appendices below, see companion web page to the *OMCT Handbook Series* at www.omct.org

11. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Convention of Belém do Pará	
12. Charter of the Organization of American States	
13. Inter-American Convention on Forced Disappearance of Persons	
14. Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities	
15. Inter-American Convention to Prevent and Punish Torture	
16. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador	
17. Protocol to the American Convention on Human Rights to Abolish the Death Penalty	
18. a) Request for Precautionary Measures, b) the Petitioner's submission in the Hearing regarding request to expand precautionary measures submitted by the Centre for Constitutional Rights; and c) Commissions acknowledgement of receipt of these submissions.	
19. <i>Amicus Curiae</i> brief in <i>Caesar v. Trinidad and Tobago</i> filed by the International Human Rights Clinic of Harvard Law School, Global Justice Center and Harvard Law Student Advocates for Human Rights	
20. <i>Amicus Curiae</i> brief in <i>Caesar v. Trinidad and Tobago</i> filed by INTERIGHTS	
21. Report N° 95/00, Case 11.445, Ángelo Javier Ruales Paredes v. Ecuador	
22. Report N° 19/03, Case 11.725, Carmelo Soria Espinoza v. Chile	
23. Report N° 69/03, Case 11.807, José Alberto Guadarrama García v. Mexico	
24. Report N° 105/05, Case 11.141, Villatina Massacre v. Colombia	
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 <i>Maribel Cubans</i> (Case 9903)	
26. Commission's Report on Terrorism and Human Rights	

FOREWORD

The World Organisation Against Torture (OMCT) has provided a great service to academics, practitioners and the general public through the publication of this *Handbook* on the prohibition of torture and ill-treatment in the Inter-American System, authored by Claudia Martín and Diego Rodríguez-Pinzón, two of the most authoritative experts on the Inter-American human rights system.

This *Handbook* presents in a well-structured and comprehensive manner practical and theoretical information about the Inter-American System generally and, in particular, as it relates to the prohibition of torture and cruel, inhuman and degrading treatment or punishment. The *Handbook* fills a very important void since, in spite of the relevance of the topic for the protection of human rights, there are no publications for activists and academics alike that provide information and analysis on the Inter-American System's contribution to eradicate torture.

After introducing the Inter-American System, the *Handbook* refers to its mechanisms of supervision, starting with reports and on-site visits, which formed the bulk of the Commission's work until the early 1990s. The subsequent processes of transitions to democracy that took place in the Western Hemisphere created conditions for the Inter-American System's supervisory organs – the Commission and the Court – to give preference to individual petitions, as the elected governments were generally participating in the system's procedures and did not resort to mass and gross violations of human rights as a state policy. Accordingly, the *Handbook* focuses mainly on individual petitions, addressing all relevant phases for their consideration. Rather than taking a formalist approach following just the dry path of treaty provisions, the authors pose relevant questions to give petitioners a guide for action (*e.g.*, who can submit a petition? what is the scope of the individual rules of admissibility? what are the length and consequences of proceedings?).

This pedagogical and action-oriented approach is not done, however, at the expense of complexity. The *Handbook* provides, for example, a thorough review of the theory of Fourth Instance, which in certain situations bars the Inter-American supervisory bodies from considering petitions against domestic judiciaries. Equally valuable is the identification of applicable jurisprudence for those who want to deepen their study of the Inter-American System. The *Handbook* is unique in its extensive coverage of the jurisprudence of the Inter-American Commission, which is more difficult to access than that of the Inter-American Court.

As to the specific topic of this publication, torture and cruel, inhuman and degrading treatment or punishment, the *Handbook* provides comprehensive coverage of this prohibition through both the theory and practice of the Inter-American System addressing, *inter alia*, the applicable norms, the scope of the prohibition, specific actions that have been of tremendous relevance in the hemisphere (*e.g.*, forced disappearances and extra-judicial executions), the applicable law as well as the impact of the regulation of torture in cases of extradition or expulsion. Equally valuable is the jurisprudence of the system covered by the authors concerning the proof of state responsibility and the tests required for that purpose, as the traditional test of “beyond a reasonable doubt” developed in criminal law cannot apply in situations where the passage of time, distance and the role of a state, which itself is accused of human rights violations, would make illusory the proof of responsibility. Finally, the *Handbook* covers the right to reparations which is more extensive in the Inter-American System than in the universal setting or the European regional system.

The *Handbook* regularly compares the Inter-American jurisprudence with decisions adopted under other international treaties including the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This has a practical application for those filing petitions in the Inter-American System, as almost all countries of the hemisphere have ratified both the Inter-American and the United Nations Torture Conventions, and the Inter-American Court has interpreted Article 29 of the Inter-American Convention as allowing the Commission and Court to resort to the UN Convention when interpreting the former. Moreover, the comparative analysis strengthens the notion that torture is not only a hemispheric violation of non-derogable rights, but one that is global in scope. On the other hand, this *Handbook*, by providing access to the treatment of the prohibition of torture in the Inter-American System, will open possibilities for universal and other regional supervisory organs to consider the experience in the Americas, contributing to even greater harmonization of the prohibition of torture in international law.

*Dean Claudio Grossman
Vice Chair, United Nations Committee against Torture
September 2006*

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19 Merchants v. Colombia, Judgment of July 5, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 109.

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INTRODUCTION

This *Handbook* is a practice guide for those wishing to bring legal complaints of torture or other ill-treatment before the Inter-American Human Rights System. The prohibition of torture and cruel, inhuman or degrading treatment is well-established in various Inter-American legal instruments, including the two primary human rights instruments in the Inter-American System, namely the American Convention on Human Rights (the “American Convention”) and the American Declaration of the Rights and Duties of Man (the “American Declaration”). Article 5 of the American Convention sets forth every person’s right to humane treatment. Articles XXV and XXVI of the American Declaration enshrine the right to humane treatment while in custody and the right not to be subjected to cruel, infamous or unusual punishment, respectively. The Inter-American Court of Human Rights has declared the prohibition of torture and other cruel, inhuman or degrading treatment to be a *jus cogens*, or peremptory norm.ⁱ Other international bodies as well as domestic courts have also declared the prohibition of torture to be a *jus cogens* norm.ⁱⁱ Article 27 of the American Convention specifies that the right to humane treatment is a non-derogable right, and prevents governments from resorting to it under any circumstances. The clear and resounding international consensus is that there is never an excuse for torture.

This book details the procedure for bringing successful complaints before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. In so doing, the *Handbook* provides useful information on these bodies’ practices and provides advice as to strategy for complaints, drawing from the authors’ extensive experience and long-term work with these institutions. In addition to an examination of procedural matters, the book also provides an analysis of substantive Inter-American law relating to torture and other forms of ill-treatment. Despite the focus on torture and other ill-treatment, the *Handbook* is instructive for those preparing complaints regarding other human rights violations, as well.

The combination of procedure and substance reflects the reality that, as in other areas of the law, the two frequently inform each other. The procedural

i *Lori Berenson-Mejía v. Peru*, Judgment of November 25, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 119, para. 100; *Caesar v. Trinidad and Tobago*, Judgment of March 11, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 123, para. 70.

ii *See, e.g., Al-Adsani v. the United Kingdom*, Eur. Ct. H.R., No. 35763/97, November 21, 2001; *Prosecutor v. Anto Furundzija*, International Criminal Tribunal for the Former Yugoslavia, case no. IT-95-17/1-T10, December 10, 1998, para. 144; *Nuru v. Gonzales*, U.S. Court of Appeals for the Ninth Circuit, 404 F.3d 1207, 1222 (2005).

strategies in a particular case may reflect the confines or broadness of the applicable law, and procedural rules may determine or shape the legal arguments advanced. Because it is important to bear this relationship in mind at all stages of case preparation, this *Handbook* analyzes procedural rules and substantive law together in one volume.

The book is meant to be a practical resource for readers of all levels of experience, in litigating cases before the Inter-American System. It attempts throughout to furnish answers to questions and problems which may arise when filing a complaint, whether they be specialized legal questions or practical ones. Readers with little or no experience with this regional system will find the *Handbook* a useful introduction to its organization and procedures. Short explanations have been provided for technical terms, in order to make the contents more accessible to persons with little or no background in international law. These readers and experienced practitioners alike will benefit from the *Handbook's* detailed analyses of procedural requirements and relevant substantive law.

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are the two organs of the Organization of American States (“OAS”) which examine individual complaints regarding human rights violations. Petitioners must first bring complaints to the Commission; only thereafter may the complaint reach the Court, provided that standing and jurisdiction conditions are met. For this reason, Commission procedures and requirements are dealt with first and, in some instances, in greater depth than those relating to the Court.

Complaints must allege a violation of one or more human rights codified by a number of OAS human rights instruments. These include the American Declaration and the American Convention, as well as the Inter-American Convention to Prevent and Punish Torture and the other OAS human rights treaties, if ratified by the defendant State. This *Handbook* prioritizes complaints filed under the American Convention. However, the legal analysis of ill-treatment claims under the American Convention is also applicable to complaints under the American Declaration and under other Inter-American human rights treaties, such as the Inter-American Convention to Prevent and Punish Torture.

The American Convention refers to individual complaints as “communications” and “petitions.” In other documents, the Commission also uses the term “complaints.” For purposes of this *Handbook*, the three terms are used interchangeably. The person filing the petition is referred to as the “petitioner” or the “complainant,” though in practice that person may be the petitioner’s attorney.

Commission cases are cited according to the following format: *Case Name*, Case No., Report No., Inter-Am. C.H.R., Annual Report, Document No. (year). Inter-American Court cases are cited as follows: *Case Name*, Type of Decision and Date, Inter-Am. Ct. H.R., (Series letter) Decision No.

In attempting to organize this book's contents in a clear and user-friendly manner, it has been divided into three sections:

Section 1 of the *Handbook* outlines the history and organization of the Inter-American Human Rights System. It describes the functions of the Inter-American Commission on Human Rights, with special emphasis on the system of individual complaints under the American Convention and the American Declaration. The discussion of the Inter-American Court of Human Rights describes its composition and explains the Court's dual jurisdictional system. This section is an overview and will be of particular use to readers with little or no prior experience with the Inter-American System.

Section 2 examines the process of filing a complaint from beginning to end. It contains helpful information ranging from basic filing requirements to the more complex admissibility rules. This section studies the presentation of evidence and witnesses, the hearings process and requests for precautionary and provisional measures, and addresses the issues of confidentiality and assistance to victims. Throughout, the procedural discussion incorporates substantive law in order to impart a comprehensive understanding of each step of the complaint process. The procedural flowcharts included as appendices to this book are designed to be of help while reading this section.

Section 3 analyzes the substantive law relating to torture and cruel, inhuman or degrading punishment or treatment, as interpreted and developed by the Commission's and the Court's jurisprudence. This examination starts with a legal analysis of the scope of the right to humane treatment, including the definition of torture. It proceeds to review specific acts and situations found to violate this right, which include but are not limited to rape, the suffering of victims' family members, threats, conditions of detention and the death penalty. Section 3 also addresses two prohibitions closely related to the general ban on perpetrating torture: sending a person to a country where he or she faces a serious risk of being tortured, and the exclusion of confessions obtained through ill-treatment. It continues with an analysis of the duties to respect and ensure, making clear the fundamental distinction between the two and specifying the implications of each. Although these general obligations concern all guaranteed human rights, they are analyzed in the context of the right not to be tortured or otherwise ill-treated. The section concludes with a review of State responsibility and rules relating to serious human rights abuses, focusing in particular on case law regarding torture and ill-treatment claims.

The two final subsections of section 3 (General Duties to Respect and Ensure and Establishing State Responsibility) are not unique to the right to be free from torture and other ill-treatment. However, they represent elements necessary to determine whether a given State has breached a particular right. This *Handbook* discusses these issues to the extent that all complainants will need to address them in order to be successful. In any event, the examination of these topics relies heavily on torture case law. These questions are particularly technical and relatively complicated. Nevertheless, a special effort was made to present them clearly bearing in mind the wide audience of this *Handbook*.

Many related documents are annexed to this *Handbook* for the purpose of illustrating, clarifying and completing the information contained in it. All of the appendices relate to procedural aspects of the Inter-American System and/or substantive issues linked to the right to be free of torture and ill-treatment. A few basic documents essential for an adequate understanding of matters treated here are printed at the end of the book. In addition, and due to space constraints, some appendices were not reprinted in this book but have been made available on the companion web page of the *OMCT Handbook Series* (see www.omct.org). The appendices include the relevant conventions and reports of the OAS human rights institutions, *amicus curiae* briefs and sample submissions made by parties in actual cases at various stages of the complaints procedure.

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.¹ 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 1951.² The Charter was subsequently amended by the Protocol of Buenos Aires in 1967³ and by the Protocol of Cartagena de Indias in 1985.⁴ In 1992 and 1993, two additional amending Protocols were signed: the Protocol of Washington⁵ and the Protocol of Managua.⁶ 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.”⁷ In developing these areas, however, States “shall respect the rights of the individual and the principles of universal morality.”⁸ 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.
 - 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.⁹ 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.¹⁰

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.¹¹ 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.¹²

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.”¹³ 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.¹⁴

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.”¹⁵

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, 1978.¹⁶ As of April 2006, the American Convention has been ratified by twenty-four States.¹⁷ 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 1979.¹⁸

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.¹⁹ 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.

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.²⁰

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");²¹ the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990) ("Convention Against the Death Penalty");²² the Inter-American Convention

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”);²³ the Inter-American Convention on Forced Disappearance of Persons (1994) (“Convention on Forced Disappearance”);²⁴ 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”)²⁵ and the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities (2001) (“Disabilities Convention”).²⁶

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.²⁷ 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).²⁸ Other rights recognized therein may not be the subject of individual complaints, but will be otherwise monitored by the Commission.²⁹

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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.³⁰ The Commission may also request advisory opinions from the Inter-American Court and submit draft protocols to the OAS General Assembly.³¹

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.³² Candidates must be persons of high moral standing and must possess recognized competence in the field of human rights.³³ Commission members are elected for a term of four years and may be reelected once.³⁴ 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:³⁵
 - To develop awareness of human rights;

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:³⁶
- 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 law³⁷ 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:³⁸
- 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

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.³⁹ 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.⁴⁰

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.

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,⁴¹ 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.”⁴²

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.⁴³ The authority to prepare reports is regulated in detail by the Rules of Procedure.⁴⁴

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.⁴⁵

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.”⁴⁶ Article 56 of the Rules of Procedure also refers to the Commission’s discretionary authority to decide to initiate a report on a

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.⁴⁷ 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.

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.⁴⁸

Title II, Chapter V of the Commission Rules of Procedure outlines the process that the Commission must follow in adopting and publishing a report.⁴⁹ 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.”⁵⁰ 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.⁵¹ 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.⁵² If the State fails to submit observations, the Commission publishes the report as it considers appropriate.⁵³ 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,⁵⁴ the political organization of the State, the characteristics of its legal system⁵⁵ and an

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.⁵⁶ Reports on countries affected by internal armed conflicts include sections on the activities of irregular armed groups.⁵⁷

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.⁵⁸ These visits generally⁵⁹ 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.⁶⁰ This conforms to the current mandates of special rapporteurs⁶¹ 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,⁶² 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.⁶³ 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.⁶⁴

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,⁶⁵ 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.⁶⁶ Article 18 of the Commission's Statute,⁶⁷ 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.⁶⁸ Members who are nationals of or residents in the territory of the State visited are disqualified from participating in the Special Commission.⁶⁹ 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.⁷⁰ 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.⁷¹ The State must also provide the Special Commission with human rights documents necessary for the draft of its report.⁷²

The Rules of Procedure also explicitly delineate the Special Commission's powers during an observation *in situ*.⁷³ 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

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.⁷⁴ 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.⁷⁵ 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.⁷⁶

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.⁷⁷

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.

⁷⁴ 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).

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

⁷⁶ American Convention, *supra* note 16, art. 48(1)(d).

⁷⁷ *Id.*, art. 48(2).

c. Special Rapporteurs

The Commission has also developed a practice of designating Special Rapporteurs to focus on specific thematic issues.⁷⁸ 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 Petitions⁷⁹

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.⁸⁰ On the other hand, the Commission has jurisdiction to consider individual complaints alleging violations of the American Convention by States Parties to that convention.⁸¹ 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.⁸² 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.

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.”⁸³ Article 19 of the Commission Statute contains a parallel provision.⁸⁴ Title II, Chapter III of the Commission Rules of Procedure provides specific procedural rules governing the processing of individual petitions.⁸⁵

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.”⁸⁶ Article 24 of its Rules of Procedure also grants the Commission the power to initiate, *motu proprio*, the processing of a case.⁸⁷

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.⁸⁸ In response to petitions that do not contain all of the above, the Commission may ask the petitioner to provide the omitted information.⁸⁹

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;

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.”⁹⁰

According to the Commission Rules of Procedure, the Secretariat of the Commission will conduct the initial screening of the complaint.⁹¹ 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.⁹² The Government’s observations will be provided to the petitioner for comment or rebuttal.⁹³ 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.”⁹⁴ 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.”⁹⁵ 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

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.⁹⁶

For those cases that do not result in friendly settlement, the contentious procedure continues. Once the Commission has found a petition admissible,⁹⁷ 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.⁹⁸

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.⁹⁹ 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.¹⁰⁰ The Commission will

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.¹⁰¹ 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.¹⁰²

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.¹⁰³ In practice, the majority of cases in which the State fails to comply are filed by the Commission with the Court.¹⁰⁴

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.¹⁰⁵

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

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.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

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

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.¹¹⁰

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."¹¹¹ 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."¹¹² 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

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.¹¹³

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.¹¹⁴

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.”¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ They must possess the qualifications required for the exercise of the highest

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/I.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.¹¹⁸ The judges of the Court are elected for a period of six years and may be reelected once.¹¹⁹ 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.¹²⁰ 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.¹²¹ In order to bring a case to the Court, the State concerned must have declared its acceptance of the Court's contentious jurisdiction.¹²² 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.¹²³ As of April 2006, twenty-one States parties to the American Convention had recognized the Court's contentious jurisdiction.¹²⁴ 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.¹²⁵

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

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.¹²⁶ With one exception¹²⁷, 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.¹²⁸

Following its consideration of a petition, the Commission may refer that case to the Court by filing an application.¹²⁹ Before the application is filed, the Commission "shall immediately give notice of that decision to the State, the petitioner and the victim."¹³⁰ 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.¹³¹ Furthermore, the Commission must cooperate with Court requests for additional evidence, documents and information, including the summoning of witnesses, experts and so forth.¹³² The Commission may also request that the Court hold hearings or issue provisional measures.¹³³ The Commission is authorized to participate in subsequent

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.¹³⁴ 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."¹³⁵

The judgments of the Court are final and binding.¹³⁶ 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.¹³⁷

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."¹³⁸ 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."¹³⁹ In Advisory Opinion No. 1, the Court interpreted the phrase just

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.¹⁴⁰ 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.”¹⁴¹ 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.¹⁴² As of April 2006, the Inter-American Court has rendered nineteen advisory opinions.¹⁴³

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.

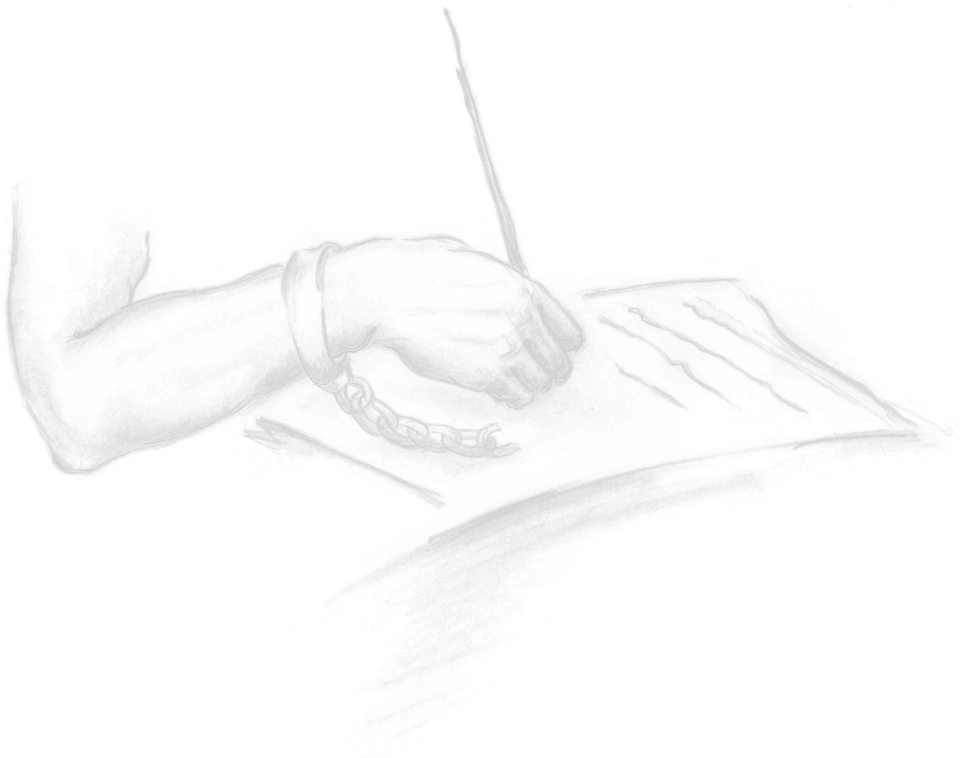
141 *Id.*; see also, Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 *Am. J. Int’l L.* 1, 5 (1985).

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.

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.²⁶⁷ 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.ccr-ny.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*).

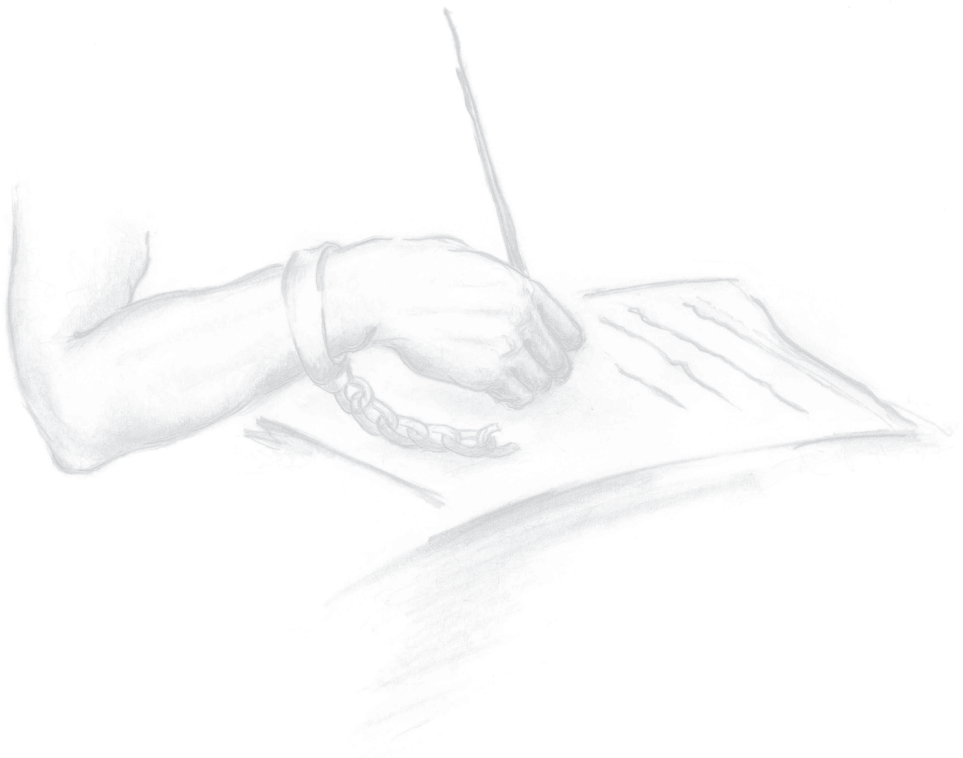
276 Commission Rules of Procedure, *supra* note 39, art. 74(1). The Commission may not, however, transmit such a request to the Court in cases against States that have not ratified the American Convention and/or have not recognized the Court’s contentious jurisdiction.

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

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

PART III

TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT



3.1 Introduction

The prohibition of torture and cruel, inhuman or degrading treatment or punishment is found in several Inter-American human rights treaties. First, the American Convention sets forth the right to humane treatment (in the Spanish version “personal integrity”) in Article 5. Article 5(1) ensures the right to physical, mental and moral integrity.²⁷⁹ The Inter-American Court has defined the scope of this right as one “that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.”²⁸⁰ Article 5(2) prohibits torture and cruel, inhuman or degrading treatment and punishment and states that persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.²⁸¹ Articles 5(3) through 5(6) provide for additional protections for persons – including minors – deprived of their liberty as a result of a pending criminal proceeding or a conviction.²⁸²

The Inter-American Torture Convention sets forth the obligation of States parties to prevent and punish torture.²⁸³ The Belém do Pará Convention reaffirms the right of women not to be subjected to torture or other treatment that does not respect their personal integrity and dignity.²⁸⁴

Additionally, any conduct that constitutes torture or other cruel, inhuman or degrading treatment or punishment is arguably prohibited by the American Declaration as well. Although this instrument does not contain a specific prohibition of torture, it guarantees to every human being the rights to life, liberty and personal security in Article I.²⁸⁵ The Inter-American Commission has consistently ruled that the right to personal security includes the right to humane treatment and personal integrity.²⁸⁶ The American Declaration also enshrines the right to humane treatment for any person held in State

279 American Convention, *supra* note 16, art. 5(1).

280 *Loayza-Tamayo*, *supra* note 112, para. 57.

281 American Convention, *supra* note 16, art. 5(2).

282 *Id.*, arts. 5(3), (4), (5), (6).

283 Inter-American Torture Convention, *supra* note 23, art. 1.

284 Belém do Pará Convention, *supra* note 25, arts. 4(b), (d), (e).

285 American Declaration, *supra* note 12, art. I.

286 *See, e.g., Ovelario Tames v. Brazil*, Case 11.516, Report No. 60/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser. L/V/II.102 Doc. 6 rev. (1998), para. 39.

custody.²⁸⁷ Moreover, it provides for the right not to receive a cruel, infamous or unusual punishment when tried for a crime.²⁸⁸

Article 27 of the American Convention, which governs the suspension of rights in times of war, public danger or other emergency that poses a threat to the independence or security of a State party, specifically provides that the right to humane treatment guaranteed in Article 5 is non-derogable.²⁸⁹ Article 5 of the Inter-American Torture Convention establishes that the existence of a state of war, threat of war, state of emergency, domestic disturbance or other type of emergency cannot be invoked to justify the perpetration of acts that may be characterized as torture.²⁹⁰ The Inter-American Torture Convention's language appears to be more restrictive than that of the American Convention because it refers only to torture; however, the Court has clearly indicated that in the Inter-American System both the prohibition of torture and that of cruel, inhuman or degrading treatment and punishment are non-derogable.²⁹¹ The Court has concluded that, independent of existing international treaties and declarations, the prohibition of torture and other cruel, inhuman or degrading treatment and punishment has become a peremptory norm of international law, also known as a *jus cogens* norm.²⁹² In *Cantoral-Benavides*, the Court stated that regardless of whether certain acts constitute torture or cruel, inhuman and degrading treatment or both, "it must be clearly understood that... they are strictly prohibited under international human rights law."²⁹³

The Court has followed the European Court of Human Rights ("European Court") by specifying that the prohibition of torture applies even in the most difficult of circumstances for the State, including those involving aggression by terrorist groups or large-scale organized crime.²⁹⁴ The Court has expressly stated that "the fact that a State is confronted with terrorism [or a situation of internal upheaval] should not lead to restrictions on the protection of the physical integrity of the person."²⁹⁵ In addition, Article 5 of the Inter-American Torture Convention states that "[n]either the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture."²⁹⁶

287 American Declaration, *supra* note 12, art. XXV.

288 American Declaration, *supra* note 12, art. XXVI.

289 American Convention, *supra* note 16, art. 27.

290 Inter-American Torture Convention, *supra* note 23, art. 5.

291 *Lori Berenson-Mejía v. Peru*, Judgment of November 25, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 119, para. 100; *Caesar v. Trinidad and Tobago*, Judgment of March 11, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 123, para. 70.

292 *Caesar*, *supra* note 291, para. 100.

293 *Cantoral-Benavides*, *supra* note 171, para. 95.

3.2 Scope of the Right to Humane Treatment

Article 5(2) of the American Convention prohibits torture and cruel, inhuman, or degrading treatment and punishment. It further states that persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. This provision, however, does not contain a detailed definition of prohibited conduct. Article 2 of the Inter-American Torture Convention provides a definition of torture but does not distinguish it from other cruel, inhuman or degrading treatment or punishment. The following sections analyze the Inter-American case law relevant to the scope of the prohibition of torture and other cruel, inhuman or degrading treatment and punishment.

3.2.1 Torture

As stated above, torture is clearly forbidden in Inter-American human rights instruments. Nonetheless, the only definition of torture is found in Article 2 of the Inter-American Torture Convention.²⁹⁷ Thus, in establishing the scope of torture under the American Convention, the Court²⁹⁸ and Commission²⁹⁹ have relied on the Article 2 definition, which states as follows:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

294 *Id.*, para. 95 (citing *Labita v. Italy*, Eur. Court H.R., April 6, 2000, para. 119; *Selmouni v. France*, Eur. Ct. H.R., No. 25803/94, July 28, 1999, para. 95; *Chahal v. United Kingdom*, Eur. Ct. H.R., No. 22414/93, November 15, 1996, Reports 1996-V, paras. 79, 80; *Tomasi v. France*, Eur. Court H.R., Ser. A Vol. 241-A, August 27, 1992, para. 115).

295 *Id.*, para. 96 (citing *Castillo-Petruzzi et al. v. Peru*, Judgment of May 30, 1999, Inter-Am. Ct. H.R., (Ser. C) No. 52, para. 197 and *Loayza-Tamayo*, *supra* note 112, para. 57); *see also*, *Bámaca-Velásquez*, *supra* note 171, para. 155.

296 Inter-American Torture Convention, *supra* note 23, art. 5.

297 Inter-American Torture Convention, *supra* note 23, art. 2.

298 *Tibi v. Ecuador*, Judgment of September 7, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 114, para. 145; *Gómez-Paquiyaúri*, *supra* note 252, para. 105

299 *Raquel Martín de Mejía v. Peru*, Case 10.970, Report No. 5/96, Inter-Am. C.H.R., Annual Report 1995, OEA/Ser.L/V/II.91 Doc. 7 rev. (1996), p. 185.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

The Court has held that the Inter-American Torture Convention constitutes part of the Inter-American *corpus iuris*, and the Court must therefore refer to it in interpreting the scope and content of Article 5(2) of the American Convention.³⁰⁰ In some cases, the Court has also relied on Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in defining this provision.³⁰¹ On that basis, the Inter-American case law has established that for an act to constitute torture under Article 5(2), the following three elements must be present:³⁰²

1. a deliberate action or intentional act;
2. severe³⁰³ physical or mental pain or anguish suffered by the victim and
3. a purpose to perpetrate the torture.

In addition, in some of its case law, the Inter-American Commission has also required that the act must be perpetrated by a State agent or committed at his or her instigation, based on Article 3 of the Inter-American Torture Convention.³⁰⁴

Torture is not limited to physical violence; it may also be perpetrated through the infliction of psychological suffering or moral anguish.³⁰⁵ In *Urrutia*, the Court stated that

according to the circumstances of each particular case, some acts of aggression inflicted on a person may be classified as mental torture,

300 *Tibi*, *supra* note 298, para. 145.

301 *Maritza Urrutia*, *supra* note 252, para. 90; *Bámaca-Velásquez*, *supra* note 171, para. 156; *Cantoral-Benavides*, *supra* note 171, para. 183.

302 *See, e.g., Gómez-Paquiyaúri*, *supra* note 252, paras.115-116; *Bámaca-Velásquez*, *supra* note 171, paras. 156-158; *Cantoral-Benavides*, *supra* note 171, paras. 97-98.

303 Unlike other international instruments that define torture, Article 2 of the Inter-American Torture Convention does not require that suffering be “severe” or reach a certain level of intensity. However, subsequent Inter-American case law has held that to classify an act as torture, the pain or suffering inflicted must indeed be severe or intense. *See, e.g., Caesar*, *supra* note 291, para. 50; *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Report No. 35/96, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 85. Nevertheless, the level of “severity” required remains unclear, blurring the line that distinguishes torture from other forms of ill-treatment.

304 *Luis Lizardo Cabrera*, *supra* note 303, para. 75; *Raquel Martín de Mejía*, *supra* note 299, p. 185.

305 *Bámaca-Velásquez*, *supra* note 171, para. 150; *Cantoral-Benavides*, *supra* note 171, para. 100.

particularly acts that have been prepared and carried out deliberately against the victim to eliminate his mental resistance and force him to accuse himself of or confess to certain criminal conducts, or to subject him to other punishments, in addition to the deprivation of freedom itself.³⁰⁶

Under Article 2 of the Inter-American Torture Convention, “torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”³⁰⁷

The Court is in agreement with the European Court’s view that the definition of torture is subject to ongoing reassessment in light of present-day conditions and the changing values of democratic societies. Therefore,

certain acts that were classified in the past as inhuman or degrading treatment, but not as torture, may be classified differently in the future, that is, as torture, since the growing demand for the protection of fundamental rights and freedoms must be accompanied by a more vigorous response in dealing with infractions of the basic values of democratic societies.³⁰⁸

3.2.2 Cruel, Inhuman and Degrading Treatment or Punishment

Neither Article 5(2) of the American Convention nor Article 2 of the Inter-American Torture Convention defines cruel, inhuman and degrading treatment and punishment. In *Caesar*, the Court cited the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Celibici*, which defined cruel or inhuman treatment as “an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”³⁰⁹ The Court has followed European human rights case law and has concluded that the essential criterion for distinguishing torture from other cruel, inhuman or degrading treatment or punishment is the intensity of the suffering.³¹⁰

306 *Maritza Urrutia*, *supra* note 252, para. 93.

307 Inter-American Torture Convention, *supra* note 23, art. 2.

308 *Cantoral-Benavides*, *supra* note 171, para. 99 (referring to *Selmouni v. France*, *supra* note 294, para. 101).

309 *Caesar*, *supra* note 291, para. 68.

310 *Id.*, para 50.

According to the Commission, the American Convention and the Inter-American Torture Convention allow it certain latitude to assess, in light of the seriousness or intensity of an act or practice, whether or not the act or practice constitutes torture or other cruel, inhuman and degrading treatment.³¹¹ The “intensity” of the suffering is relative and requires a case-by-case analysis that encompasses all the circumstances of the particular situation, including the duration of the treatment, the physical and mental consequences, the sex, the age and the health of the victim, among other factors.³¹² For example, the Court has consistently indicated that in the case of minors a higher standard of scrutiny must be applied when analyzing whether a particular act constitutes torture.³¹³ Similarly, the Commission in *Jailton Neri Da Fonseca v. Brazil* stated that “in the case of children the highest standard must be applied in determining the degree of suffering, taking into account factors such as age, sex, the effect of the tension and fear experienced, the status of the victim’s health, and his maturity, for instance.”³¹⁴ The Commission has also applied a heightened standard with regard to persons with mental disabilities.³¹⁵

With respect to degrading treatment, in *Loayza Tamayo*³¹⁶ the Court stated that “[t]he degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance.”³¹⁷ The Commission reasoned similarly in the case of *Lizardo Cabrera*.³¹⁸

3.2.3 “[R]espect for the Inherent Dignity of the Human Person”

Article 5(2) ensures the right of all persons deprived of their liberty to be treated “with respect for the inherent dignity of the human person.”³¹⁹ Although in some cases the Court and the Commission have found violations of the right

311 *Luis Lizardo Cabrera*, *supra* note 303, para. 82.

312 *Gómez-Paquiyaúri*, *supra* note 252, para. 113.

313 *Children’s Rehabilitation v. Paraguay*, Judgment of September 2, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 112, para. 162; *Gómez-Paquiyaúri*, *supra* note 252, para. 117; *Bulacio*, *supra* note 248, para. 98.

314 *Jailton Neri Da Fonseca v. Brazil*, Case 11.634, Report No. 33/04, Inter-Am. C.H.R., Annual Report 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004), para. 64.

315 *Victor Rosario Congo v. Ecuador*, Case 11.427, Report No. 63/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.95 Doc. 7 rev. (1998), para. 58.

316 *Loayza-Tamayo*, *supra* note 112.

317 *Id.*, para. 57.

318 *Luis Lizardo Cabrera*, *supra* note 303, para. 77.

319 American Convention, *supra* note 16, art. 5(2).

to respect for “personal dignity,” existing case law does not clearly define the scope of this right.³²⁰ The Commission, for example, has stated that

[a]mong the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of the human personality. From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that individuals be treated with dignity and respect... [The guarantees of Article 5(1) and (2)] presuppose that persons protected under the Convention will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic rights and freedoms of an individual, such as the right to liberty.³²¹

Consistent with this principle, Inter-American case law makes clear that the State, as the institution responsible for detention facilities, must guarantee respect for the rights of prisoners under its absolute control.³²² According to the Commission, “the act of imprisonment carries with it a specific and material commitment to protect the prisoner’s human dignity so long as the individual is in the custody of the State, which includes protecting him from possible circumstances that could imperil his life, health and personal integrity, among other rights.”³²³ The Court applied the same reasoning in *Children’s Rehabilitation* in its consideration of State duties to minors deprived of their liberty.³²⁴

In this context, the Court and the Commission have consistently found that prolonged isolation and forced incommunicado detention violate the right to

320 *De la Cruz-Flores v. Peru*, Judgment of November 18, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 115, para. 131; *Tibi*, *supra* note 298, para. 152; *Víctor Rosario Congo*, *supra* note 315, para. 59; *Loren Laroye Riebe Star et al. v. Mexico*, Case 11.610, Report No. 49/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), para. 92; *Donnason Knights v. Grenada*, Case 12.028, Report No. 47/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 117.

321 *Donnason Knights*, *supra* note 320, para. 81; *see also*, *Leroy Lamey et al. v. Jamaica*, Cases 11.826, 11.843, 11.846, 11.847, Report No. 49/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 134; *Rudolph Baptiste v. Grenada*, Case 11.743, Report No. 38/00, Inter-Am. C.H.R., Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6 rev. (1999), para. 89.

322 *Tibi*, *supra* note 298, para. 150; *Bulacio*, *supra* note 248, para. 126; *Cantoral-Benavides*, *supra* note 171, para. 87; *Durand and Ugarte v. Peru*, Judgment of August 16, 2000, Inter-Am. Ct. H.R., (Ser. C) No. 68, para. 69; *Minors in Detention v. Honduras*, Case 11.491, Report No. 41/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), para. 134.

323 *Minors in Detention v. Honduras*, *supra* note 322, para. 135.

324 *Children’s Rehabilitation*, *supra* note 313, para. 153.

respect for personal dignity.³²⁵ Persons detained illegally are especially vulnerable and therefore are more likely to experience a violation of this right.³²⁶ The Court has also found that any use of force that is not strictly required to restrain a prisoner infringes on his or her human dignity.³²⁷

With respect to conditions of detention, the Court in *Tibi* found that the conditions endured by the victim failed to respect his personal dignity.³²⁸ Mr. Tibi was detained in a severely overcrowded penitentiary, without sufficient ventilation or light, with no food or place to sleep for 45 days.³²⁹ The Commission in *Congo* concluded that the isolation of a detained person suffering from mental illness, which left him unable to feed or clean himself or meet his other basic needs, violated his right to respect for the inherent dignity of the human person.³³⁰

Regarding the medical treatment of prisoners, the Court in *De la Cruz Flores* concluded that the lack of adequate medical attention violated the victim's right to respect for her personal dignity under Article 5.³³¹ In two other cases, however, the Court reviewed the lack of adequate medical attention provided to the detained victims and found that the responsible authorities had failed to comply with the minimum standards required by the right to humane treatment, but did not specify whether they had also failed to respect the victims' inherent human dignity.³³²

The Court has found that certain methods of arrest violate this right. In *Castillo-Paéz*, for example, the Court ruled that placing a detainee in the trunk of an official vehicle *per se* violates this right, even if no other physical or other maltreatment is involved.³³³ The Court subsequently applied this ruling in *Street Children* and *Gómez-Paquiyaury*.³³⁴

325 *Castillo-Petruzzi*, *supra* note 295, para. 194; *Velásquez-Rodríguez*, *supra* note 187, para. 156; *Martín Javier Roca Casas v. Peru*, Case 11.233, Report No. 39/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 89; *Camilo Alarcon Espinoza et al. v. Peru*, Cases 10.941, 10.942, 10.944, 10.945, Report No. 40/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 83.

326 *Bulacio*, *supra* note 248, para. 127; *Bámaca-Velásquez*, *supra* note 171, para. 150; *Street Children*, *supra* note 27, para. 166.

327 *Castillo-Petruzzi*, *supra* note 295, para. 197; *Loayza-Tamayo*, *supra* note 112, para. 57.

328 *Tibi*, *supra* note 298, para. 152.

329 *Id.*, para. 151.

330 *Víctor-Rosario Congo*, *supra* note 315, para. 59.

331 *De la Cruz-Flores*, *supra* note 320, para. 131.

332 *Tibi*, *supra* note 298, para. 157; *Bulacio*, *supra* note 248, para. 131.

333 *Castillo-Páez*, *supra* note 243, para. 66.

334 *Street Children*, *supra* note 27, para. 164; *Gómez-Paquiyaury*, *supra* note 252, para. 109.

In various cases related to mandatory death sentences in certain Caribbean States, the Commission stated in each case that it

cannot reconcile the essential respect for the dignity of the individual that underlies Article 5(1) and (2) of the Convention, with a system that deprives an individual of the most fundamental of rights without considering whether this exceptional form of punishment is appropriate in the circumstances of the individual's case.³³⁵

On this basis the Commission found violations of the right to personal dignity protected in Article 5(2).³³⁶

3.3 Specific Acts and Situations

Inter-American case law has classified certain acts and situations as torture or cruel, inhuman or degrading treatment on the basis of their nature and the suffering they inflict on victims. The following subsections provide a detailed analysis of these acts and situations, as reflected in the jurisprudence of the Inter-American Court and Commission.

3.3.1 Discipline and Corporal Punishment

As noted above, the Court has ruled in several cases that any use of force that is not strictly necessary to ensure a prisoner's proper behavior constitutes a violation of his or her right to personal dignity as protected by Article 5 of the American Convention.³³⁷

The Court concluded in *Caesar* that corporal punishment is *per se* incompatible with Article 5(1) and (2) of the American Convention because of its inherently cruel, inhuman and degrading nature.³³⁸ The Court reached this conclusion on the basis of existing international human rights law and humanitarian law provisions as well as international and domestic case law and practice.³³⁹

335 *Donnason Knights*, *supra* note 320, para. 82; *Leroy Lamey*, *supra* note 321, para. 135; *Rudolph Baptiste*, *supra* note 321, para. 90.

336 *Donnason Knights*, *supra* note 320, para. 89; *Leroy Lamey*, *supra* note 321, para. 143; *Rudolph Baptiste*, *supra* note 321, para. 97.

337 *See* Section 3.2.3, *supra*.

338 *Caesar*, *supra* note 291, para. 70.

339 *Id.*, paras. 58, 60-66, 70.

The victim in *Caesar* was convicted of attempted rape under Trinidad and Tobago's Offenses against the Person Act and was sentenced to 20 years in a penitentiary with hard labor and 15 strokes of the cat-o-nine tails.³⁴⁰ The cat-o-nine tails

consists of a plaited rope instrument of nine knotted thongs of cotton cord, each of which is approximately 30 inches long and less than one quarter of an inch in diameter. The thongs are attached to a handle. The nine cotton thongs are lashed across the back of the subject, between the shoulders and the lower area of the spine.³⁴¹

The Court found that this instrument is designed to inflict "severe physical and psychological suffering."³⁴² It therefore concluded that the practice of flogging with the cat-o-nine tails reflected the institutionalization of State violence and constituted a form of torture in violation of Articles 5(1) and (2) of the American Convention.³⁴³

The Court further found that the degree of suffering experienced by Mr. Caesar was aggravated by the treatment he received before and after the flogging.³⁴⁴ In particular, over a period marked by undue delay, he suffered anguish, stress and fear while awaiting the punishment, and he was exposed to the suffering of other prisoners who had been flogged.³⁴⁵ He also experienced extreme humiliation due to the flogging itself.³⁴⁶

3.3.2 Rape

The Court has never expressly addressed the question whether rape constitutes a form of torture under Article 5. In *Loayza Tamayo* the victim alleged that she was brutally raped and mistreated while detained by the Peruvian authorities.³⁴⁷ The Court found that there was insufficient evidence to sustain the rape allegation and therefore did not rule on the issue of rape as a violation of the

340 *Id.*, para. 49(3).

341 *Id.*, para. 49(8).

342 *Id.*, para. 72.

343 *Id.*, para. 73.

344 *Id.*, para. 87.

345 *Id.*, para. 88.

346 *Id.*

347 *Loayza-Tamayo*, *supra* note 112, para. 58.

right to humane treatment.³⁴⁸ The Court did, however, hold that other substantiated mistreatment suffered by the victim breached Article 5.³⁴⁹ *Loayza Tamayo* illustrates the difficulties victims face in proving violations that do not necessarily leave physical marks and for which documentary evidence, such as medical examination reports, is difficult to obtain.

On the other hand, the Inter-American Commission has consistently found that rape is a form of torture. In *Martín de Mejía*,³⁵⁰ the Commission stated that “rape is a physical and mental abuse that is perpetrated as a result of an act of violence... Moreover, rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community.”³⁵¹

Rape survivors generally suffer psychological trauma as a result of being humiliated and victimized.³⁵² For some this trauma may be aggravated by “the condemnation of the members of their community if they report [that they have been raped or sexually assaulted].”³⁵³

In *Martín de Mejía*, the Commission found that the facts satisfied all the elements required for an act to constitute torture under the Inter-American Torture Convention definition.³⁵⁴ First, the rape had caused the victim physical and mental pain and suffering.³⁵⁵ Second, the rape was committed intentionally to intimidate the victim and punish her for her husband’s political views.³⁵⁶ Finally, the rape was perpetrated by a member of the security forces accompanied by a group of soldiers, which satisfied the State involvement or acquiescence element.³⁵⁷ The Commission also stated that “sexual abuse, besides being a violation of the victim[s]’ physical and mental integrity, implies a deliberate outrage to their dignity,” in violation of Article 11 of the American Convention.³⁵⁸

348 *Id.*

349 *Id.*

350 *Raquel Martín de Mejía*, *supra* note 299, p. 157.

351 *Id.*, p. 186 (citing Blatt, Deborah, “Recognizing Rape as a Method of Torture,” 19 *N.Y.U. Rev. L. & Soc. Change* 821, 854 (1992)).

352 *Id.* (citing Blatt, p. 855).

353 *Id.* (citing Blatt, p. 855).

354 *Id.*, p. 185.

355 *Id.*, p. 186.

356 *Id.*, pp. 186-187.

357 *Id.*, p. 187.

358 *Id.*

More recently, in *González Pérez* the Commission found that sexual violence against civilians committed by members of the security forces constituted a serious violation of the rights protected under Articles 5 and 11 of the American Convention.³⁵⁹ To support its finding, the Commission cited the International Criminal Tribunal for the Former Yugoslavia's decisions in *Celebici* and *Furundzija*; in these decisions the Tribunal declared that rape and other forms of sexual assault constitute torture and are prohibited by international law.³⁶⁰ The Commission also quoted the United Nations Special Rapporteur on Violence against Women, who had reported that "the consequences of sexual violence are physically, emotionally and psychologically devastating for women victims."³⁶¹ In addition, the United Nations Special Rapporteur on Torture had found that rape can be used as a method to punish, intimidate and humiliate.³⁶² The Commission additionally pointed out that the Belém do Pará Convention "guarantees all women the right to a life free of violence."³⁶³ Ultimately, the Commission followed its precedent in *Martín de Mejía* and ruled that the rape perpetrated against the three indigenous women in *González Pérez* constituted torture.³⁶⁴ The Commission also concluded that the rape affected the private lives of the victims and their family, "which led them to flee their community in a situation of fear, shame and humiliation."³⁶⁵

3.3.3 Forced Disappearances and Extrajudicial Executions

The Court recently applied Article II of the Inter-American Convention on Forced Disappearance of Persons to define forced disappearance as:

the act of depriving a person or persons of his [sic] or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by an absence of information or a refusal

359 *González Pérez*, *supra* note 231, paras. 45-54.

360 *Id.*, paras. 45, 49.

361 *Id.*, para. 45 (citing Ryan, Samantha I., "From the Furies of Nanking to the Eumenides of the International Criminal Court; The Evolution of Sexual Assaults as International Crimes," 11 *Pace Int'l L. Rev.* 447 (1999); Coomaraswamy, Radhika, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/1998/54, United Nations, January 26, 1998, paras. 13-14).

362 *Id.*, para. 48 (citing *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. E/CN.4/1986/15, United Nations, February 19, 1986, paras. 119, 431).

363 *Id.*, para. 46.

364 *Id.*, para. 52.

365 *Id.*

to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.³⁶⁶

The Court and the Commission consider forced disappearance to be a multiple and continuing violation of a number of rights protected by the Convention.³⁶⁷ This is not only because forced disappearance arbitrarily deprives the victim of liberty, but also because it endangers her or his personal integrity, safety and life.³⁶⁸ The victim is completely defenseless, which may easily result in further abuses.³⁶⁹ Forced disappearance according to the Court denotes “a disregard of the duty to organize the apparatus of the State in such a manner as to guarantee the rights recognized in the Convention.”³⁷⁰ Because of the difficulties in obtaining evidence in such cases,

the Court has established that if it has been proved that the State promotes or tolerates the practice of forced disappearance of persons, and the case of a specific person can be linked to this practice, either by circumstantial or indirect evidence, or both, or by pertinent logical inference, then the specific disappearance may be considered to have been proven.³⁷¹

In cases of forced disappearances, Inter-American jurisprudence has considered prolonged isolation and forced incommunicado detention to be *per se* cruel and inhuman treatment.³⁷² Moreover, in *Velásquez-Rodríguez* and

366 Convention on Forced Disappearance, *supra* note 24; *see also*, *Bámaca-Velásquez*, *supra* note 171, para. 126.

367 *See Bámaca-Velásquez*, *supra* note 171, para. 128; *see also*, *Blake*, *supra* note 242, para. 65; *Fairén-Garbi*, *supra* note 187, para. 147; *Godínez-Cruz*, *supra* note 187, paras. 163, 166; *Velásquez-Rodríguez*, *supra* note 187, paras. 155, 158; *Luis Gustavo Marroquín v. Guatemala*, Case 8075, Report No. 54/96, Inter-Am. C.H.R., Annual Report 1996, OEA/Ser.L/V/II.95 Doc. 7 rev. (1996), para. 22; *Ileana del Rosario Solares Castillo et al. v. Guatemala*, Case 9111, Report No. 60/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 31.

368 *Bámaca-Velásquez*, *supra* note 171, para. 128.

369 *Id.*

370 *Id.*, para. 129; *see also*, *Godínez-Cruz*, *supra* note 187, para. 165; *Velásquez-Rodríguez*, *supra* note 187, para. 158.

371 *Bámaca-Velásquez*, *supra* note 171, para. 130 (footnotes omitted); *see also*, *Blake*, *supra* note 242, paras. 47, 49; *Fairén-Garbi*, *supra* note 187, paras. 129-133; *Godínez-Cruz*, *supra* note 187, paras. 132-137; *Velásquez-Rodríguez*, *supra* note 187, paras. 126-131.

372 *Bámaca-Velásquez*, *supra* note 171, para. 150; *Amparo Tordecilla Trujillo v. Colombia*, Case 10.337, Report No. 7/00, Inter-Am. C.H.R., Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6 rev. (1999), para. 37; *see also*, *Ileana del Rosario Solares Castillo et al. v. Guatemala*, *supra* note 367, para. 31; *Tarcisio Medina Charry v. Colombia*, Case 11.221, Report No. 3/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), paras. 67-68; *Martín Javier Roca*, *supra* note 325, para. 89; *Godínez-Cruz*, *supra* note 187, para. 163; *Velásquez-Rodríguez*, *supra* note 187, para. 156.

Godínez-Cruz, the Court ruled that in cases where a “disappeared person” is detained by authorities shown to practice torture or other cruel, inhuman or degrading treatment, even if there is no direct evidence that the victim suffered any mistreatment, a violation of Article 5 may be found.³⁷³ Such a finding is based on the State’s failure to ensure Article 5 rights, as required by Article 1(1) of the American Convention.³⁷⁴

The Commission concluded in one of various cases of forced disappearance in Peru that

[t]he circumstances in which the victims were detained, kept hidden, isolated, and in solitary confinement, and their defenselessness as a result of being denied and prevented from exercising any form of protection or safeguards of their rights make it perfectly feasible for the armed forces to have tortured the victims with a view to extracting information about subversive groups or units. Accordingly, the Commission concludes that the Peruvian State violated the rights guaranteed to the victims under Article 5 of the Convention.³⁷⁵

It is important to note that this and similar cases against Peru occurred between 1989 and 1993, a period during which the Commission found that there was a practice of forced disappearances carried out by State agents as part of a “fight against subversion.”³⁷⁶ In cases where there is direct evidence, such as witness testimony, that a victim of forced disappearance was subject to torture or other cruel, inhuman or degrading treatment or punishment, both the Court and the Commission have shifted the burden of proof to the State to rebut these allegations; if the State failed to rebut them, the Commission and the Court presumed the allegations to be true.³⁷⁷

Additionally, the Court and the Commission have presumed the veracity of allegations of torture or other cruel, inhuman or degrading treatment in

373 *Godínez-Cruz*, *supra* note 187, para. 197; *Velásquez-Rodríguez*, *supra* note 187, para. 187.

374 *Godínez-Cruz*, *supra* note 187, para. 197; *Velásquez-Rodríguez*, *supra* note 187, para. 187.

375 *William Leon Laurente et al. v. Peru*, Cases 10.807, 10.808, 10.809, 10.810, 10.878, 11.307, Report No. 54/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.95 Doc. 7 rev. (1998), para. 112; *see also*, *David Palomino Morales et al. v. Peru*, Cases 10.551, 10.803, 10.821, 10.906, 11.180, 11.322, Report No. 53/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.95 Doc. 7 rev. (1998), para.114; *Raúl Zevallos Loayza et al. v. Peru*, Cases 10.544, 10.745, 11.098, Report No. 52/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.95 Doc. 7 rev. (1998), para. 88; *Anetro Castillo et al. v. Peru*, Cases 10.471, 11.014, 11.067, Report No. 51/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.95 Doc. 7 rev. (1998), para. 112.

376 *Palomino Morales*, *supra* note 375, para. 77.

377 *Bámaca-Velásquez*, *supra* note 171, paras. 152-153; *Manuel García Franco v. Ecuador*, Case 10.258, Report No. 1/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 63.

extrajudicial execution cases where it is established that a victim was illegally detained by State agents and where the conditions in which his or her remains are found indicate severe mistreatment.³⁷⁸ The underlying logic is that once the victim is under the absolute control of State officials, the State bears the burden of proving that she or he was not subjected to prohibited treatment while in its custody. If the State cannot rebut that presumption, the Commission and the Court will likely find a violation of Article 5 of the American Convention.³⁷⁹ The basis for such a finding is even stronger if it is demonstrated that there is a pattern of torturing prisoners in the respondent State.³⁸⁰

The Court and Commission have also found violations of the right not to be tortured or subjected to cruel, inhuman or degrading treatment in extrajudicial execution cases on the basis of the extreme suffering experienced by victims.³⁸¹ These findings recognize that such victims, once detained, must live with uncertainty as to their fate or with the knowledge of their impending death.³⁸²

3.3.4 Suffering by Family Members as Torture or Other Cruel, Inhuman or Degrading Treatment

The Court has consistently ruled that family members of victims of disappearance and extrajudicial executions experience a violation of their right not to be subjected to torture or other cruel, inhuman or degrading treatment as a direct consequence of the treatment of their loved ones.³⁸³ The Court in several cases has characterized the suffering and anguish inflicted upon victims' families as

378 *Juan Humberto Sánchez*, *supra* note 249, paras. 99-100; *Street Children*, *supra* note 27, paras. 157-160, 166, 168; *Remigio Domingo Morales et al.*, *supra* note 247, paras. 133-135; *et al.*, *Joaquín Ortega*, *supra* note 248, paras. 250-252.

379 *Juan Humberto Sánchez*, *supra* note 249, para. 100; *Street Children*, *supra* note 27, paras. 169-170; *Joaquín Ortega*, *supra* note 248, paras. 253-254.

380 *Juan Humberto Sánchez*, *supra* note 249, para. 97; *Street Children*, *supra* note 27, paras. 167, 170; *see also*, *Joaquín Ortega*, *supra* note 248, paras. 229-38, 254.

381 *Street Children*, *supra* note 27, paras. 162-163; *19 Merchants v. Colombia*, Judgment of July 5, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 109, para. 150; *Prada González y Bolaño Castro v. Colombia*, Case 11.710, Report No. 63/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 34; *Jailton Neri da Fonseca*, *supra* note 314, para. 63.

382 *Street Children*, *supra* note 27, paras. 162-163, 168; *19 Merchants*, *supra* note 381, para. 150; *Prada González y Bolaño Castro*, *supra* note 381, para. 34; *Jailton Neri da Fonseca*, *supra* note 314, paras. 63-66.

383 *Bámaca-Velásquez*, *supra* note 171, para. 129; *Blake*, *supra* note 242, paras. 113-114; *Street Children*, *supra* note 27, paras. 174-174.

cruel, inhuman or degrading treatment.³⁸⁴ In *19 Merchants*, the Court restricted the definition of “family member” to those with a close relationship to the victim.³⁸⁵ Therefore, the nephew and the niece of two of the victims in the case were not considered “family members.”³⁸⁶ In *Children’s Rehabilitation* the Court stated that only those who shared a relationship of personal affection and closeness with the victims, such as parents and siblings, could themselves be considered victims of an Article 5 violation as a direct consequence of the treatment of the children in this case.³⁸⁷

The Court has deemed the following to be causes of severe suffering and anguish among victims’ families: the lack of information regarding the victims’ whereabouts, the obstruction of justice and the lack of appropriate investigation and punishment of the perpetrators.³⁸⁸ The Court has also ruled that State negligence in identifying the bodies, notifying the families and mishandling the victims’ remains violates family members’ right to physical and mental integrity.³⁸⁹ In *Mack*, the Court considered the threats and harassment suffered by the victim’s family members to be a direct result of their efforts to obtain justice in the case, as well as the pattern of obstruction of criminal investigations, including the murder of a police investigator and threats to and harassment of witnesses.³⁹⁰ The Court found that all of these factors caused the family constant anguish, “feelings of frustration and powerlessness and a deep fear of suffering the same pattern of violence fostered by the State.”³⁹¹ On the foregoing basis the Court ruled that the State violated the family’s right to physical and mental integrity under Article 5 of the American Convention.³⁹²

With the exception of its decisions in *Tibi* and *De la Cruz-Flores*,³⁹³ the Court has generally not classified the suffering of family members of those illegally detained, or even those sentenced to death without due process, as a violation

384 *19 Merchants*, *supra* note 381, paras. 215-17; *Juan Humberto Sánchez*, *supra* note 249, paras. 101-102; *Gómez Paquiyauri*, *supra* note 252, para. 118.

385 *19 Merchants*, *supra* note 383, para. 218.

386 *Id.*

387 *Children’s Rehabilitation*, *supra* note 313, para. 191.

388 *Id.*; *Bámaca-Velásquez*, *supra* note 171, paras. 165-66; *Blake*, *supra* note 242, paras. 113-115.

389 *Street Children*, *supra* note 27, para. 173.

390 *Myrna Mack-Chang v. Guatemala*, Judgment of November 25, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 101, para. 232.

391 *Id.*

392 *Id.*, para. 233.

393 *De la Cruz-Flores*, *supra* note 320, para. 135-136; *Tibi*, *supra* note 298, paras. 161-162.

of Article 5 of the American Convention.³⁹⁴ In *Urrutia*, the Court recognized the suffering and anguish endured by the victims' families and stated that "therefore, it will take this circumstance into consideration when establishing reparations,"³⁹⁵ and the Court ruled similarly in *Cantoral-Benavides*.³⁹⁶ However, the Court in these cases did not find a violation of the right to humane treatment protected in Article 5 of the Convention.³⁹⁷

In *Moiwana Village*, the Court found that the events that transpired in this case had caused emotional, psychological, spiritual and economic suffering to the members of the victims' community, thereby violating those members' rights under Article 5(1) of the American Convention.³⁹⁸ In this case the Court was willing to expand the applicability of Convention rights beyond family members, to the victims' entire community.

The Moiwana Community was founded near the end of the nineteenth century by members of the N'djuka people.³⁹⁹ The N'djuka descended from slaves brought to Suriname to work on the country's plantations.⁴⁰⁰ Many of these slaves were able to escape to the eastern region of Suriname where they founded new and autonomous communities.⁴⁰¹ Six communities emerged from these escaped slaves, known as Maroons, and the N'djuka was one of these groups.⁴⁰²

In 1986, during a time of political instability marked by a conflict between State forces and an armed group known as the Jungle Commando, the Moiwana Community was the object of a military operation that resulted in thirty-nine civilian deaths and the destruction of all the community's property.⁴⁰³ The survivors were forced to flee the village to French Guyana.⁴⁰⁴ Since the attack, the village has remained abandoned.⁴⁰⁵ The members of the community have been unable to recover the remains of their loved ones in order to

394 See *Fernín Ramírez v. Guatemala*, Judgment of June 20, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 126, para. 120; *Maritza Urrutia*, *supra* note 252, para. 97; *Cantoral-Benavides*, *supra* note 171, para. 105.

395 *Maritza Urrutia*, *supra* note 252, para. 97.

396 *Cantoral-Benavides*, *supra* note 171, para. 105.

397 *Maritza Urrutia*, *supra* note 252, para. 97; *Cantoral-Benavides*, *supra* note 171, para. 105.

398 *Moiwana Village v. Suriname*, Judgment of June 15, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 124, para. 103.

399 *Id.*, para. 86.11.

400 *Id.*, para. 86.1.

401 *Id.*

402 *Id.*

403 *Id.*, para. 86.15.

404 *Id.*, para. 86.18.

405 *Id.*, para. 86.19.

bury them according to the principles of the N'djuka culture.⁴⁰⁶ Notwithstanding the community's efforts to obtain redress, the State has not investigated or punished the perpetrators of the massacre.⁴⁰⁷

In light of these facts, the Court concluded that the lack of proper investigation, together with the impossibility of recovering the victims' bodies for purposes of appropriate burial, harmed the surviving members of that Community as a whole.⁴⁰⁸ Furthermore, the fact that members of the Community had to flee to save their lives forced their separation from their traditional land, and this was found to result in a violation of the right to physical and mental integrity under Article 5(1) of the American Convention.⁴⁰⁹

Like the Court, the Commission has found that family members of disappeared persons experience mental torture, in the form of agonizing uncertainty as to whether their loved ones are still alive and where they are being held.⁴¹⁰ In *González Pérez*, the Commission concluded that the victims' mother, who witnessed the rape of her three daughters by members of the Mexican Armed Forces, suffered a violation of her right to humane treatment.⁴¹¹ In addition to witnessing the rape of her daughters, she had to endure ostracism from her community, which the Commission characterized as a form of humiliation and degradation in violation of Article 5 of the American Convention.⁴¹² In *Aguas Blancas*, the Commission found that farmworkers present while police summarily executed other rural workers suffered serious psychological harm as a result of the violent acts they witnessed and the accompanying fear for their own lives.⁴¹³

3.3.5 Threats

In keeping with the case law of the European Court, the Court and Commission have stated that the mere threat of conduct prohibited by Article 5 of the American Convention, when the threat is sufficiently real and

406 *Id.*, para. 86.20.

407 *Id.*, para. 86.33.

408 *Id.*, paras. 94-97, 98-100.

409 *Id.*, paras. 101-103.

410 *Samuel De La Cruz Gómez v. Guatemala*, Case 10.606, Report No. 11/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 47.

411 *González Pérez*, *supra* note 231, para. 53.

412 *Id.*

413 *Tomas Porfirio Rondin v. Mexico* ("*Aguas Blancas*" Case), Case 11.520, Report No. 49/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 76.

imminent, may in itself constitute a violation of that provision.⁴¹⁴ The Court and the Commission have concluded that “creating a threatening situation or threatening an individual with torture may, at least in some circumstances, constitute inhuman treatment.”⁴¹⁵ In *Tibi* and *Urrutia*, the Court stated that a threat or real risk of being subjected to physical mistreatment causes, in certain circumstances, severe anguish amounting to psychological torture.⁴¹⁶

The Commission also concluded that victims of a practice of extrajudicial execution in Guatemala were brutally tortured before being executed in order to instill extreme fear in members of their communities regarding potential involvement with subversive groups.⁴¹⁷ In *Loren Laroye Riebe Star*, the Commission found that the fear experienced by three priests when illegally detained by heavily armed State officials, compounded by the humiliating treatment they received while in custody, amounted to a violation of Article 5 of the American Convention.⁴¹⁸

3.3.6 Conditions of Detention

As stated above, under Article 5(2) any person deprived of his or her liberty has the right to be detained in conditions that are respectful of his or her personal dignity.⁴¹⁹ Because it is “responsible for detention establishments, [the State] is the guarantor of the rights of detainees.”⁴²⁰

When a State deprives an individual of his or her liberty, it confines that individual in an institution

where the various aspects of his [sic] life are subject to an established regime; where the prisoner is removed from his natural and social milieu; where the established regime is one of absolute control, a loss of privacy, limitation of living space and, above all, a radical decline in the individual’s means of defending himself. All this means that the act

414 *19 Merchants*, *supra* note 381, para. 149; *Cantoral-Benavides*, *supra* note 171, para. 102; *Street Children*, *supra* note 27, para. 165; *Prada González*, *supra* note 381, para. 34.

415 *Street Children*, *supra* note 27, para. 165; *see also*, *Prada González*, *supra* note 381, para. 34.

416 *Tibi*, *supra* note 298, para. 147; *Maritza Urrutia*, *supra* note 252, para. 92.

417 *Remigio Domingo Morales et al.*, *supra* note 247, para. 134.

418 *Loren Laroye Riebe Star*, *supra* note 320, paras. 89-92.

419 *See* Section 3.2.3, *supra*.

420 *See Hilaire*, *supra* note 185, para. 165; *see also*, *Cantoral-Benavides*, note 171, para. 87; *Neira Alegría, et al. v. Peru*, Judgment of January 19, 1995, Inter-Am. Ct. H.R., (Ser. C) No. 20, para. 60.

of imprisonment carries with it a specific and material commitment to protect the prisoner's human dignity so long as that individual is in custody of the State, which includes protecting him from possible circumstances that could imperil his life, health and personal integrity, among other rights.⁴²¹

Consequently, though deprivation of liberty entails legitimate restrictions of certain rights, the infliction of injury, unnecessary suffering or damage to health which results in the deterioration of physical, psychological or moral integrity may constitute cruel treatment in violation of Article 5(2) of the American Convention.⁴²² Furthermore, the State, when exercising its duty to protect the well-being of prisoners, must take into account any special vulnerability of a detained person, for instance, that of minors or mentally disabled persons.⁴²³

With regard to specific conditions that by their nature violate prisoners' rights, the Court in *Suárez Rosero* found that being held in a damp, underground cell measuring approximately 15 square meters with 16 other prisoners, without necessary hygiene facilities and only newspapers to sleep on, constituted cruel, inhuman and degrading treatment.⁴²⁴ In several cases regarding prisoners convicted of terrorism or related charges in Peru, the Court consistently held that the prison conditions imposed by the applicable antiterrorist legislation constituted cruel, inhuman and degrading treatment in violation of Article 5 of the American Convention.⁴²⁵ These conditions included prolonged solitary confinement, detention in small, overcrowded cells with no natural light, inadequate ventilation, no place to sleep, lack of sufficient food and restrictive visiting schedules.⁴²⁶

Additionally, the Court has ruled that a lack of appropriate and regular medical and psychological treatment equals a violation of the right to humane treatment.⁴²⁷ In two cases in which the victims were detained without conviction, the Court held that the State should allow detainees to receive medical treatment from a doctor of their choice and share with the judge, the detainee

421 *Minors in Detention*, *supra* note 322, para. 135.

422 *Lori Berenson-Mejía*, *supra* note 291, para. 101.

423 *Bulacio*, *supra* note 248, para. 126; *Víctor-Rosario Congo*, *supra* note 315, paras. 53-54.

424 *Suárez Rosero*, *supra* note 203, para. 91.

425 *See Lori Berenson-Mejía*, *supra* note 291, para. 108; *Castillo-Petruzzi*, *supra* note 295, para. 198; *Loayza-Tamayo*, *supra* note 112, para. 58.

426 *Lori Berenson-Mejía*, *supra* note 291, para. 106; *Cantoral-Benavides*, *supra* note 171, para. 85.

427 *Tibi*, *supra* note 298, para. 157; *Children's Rehabilitation*, *supra* note 313, para. 166.

and his or her lawyer the results of any examinations conducted.⁴²⁸ More recently, the Court issued a similar ruling in *De la Cruz-Flores*, in which a doctor was convicted under the Peruvian antiterrorist legislation in force during the 1990s.⁴²⁹

The Inter-American Commission has utilized the United Nations Standard Minimum Rules for the Treatment of Prisoners⁴³⁰ in assessing whether detention conditions comply with Article 5 of the American Convention, specifically regarding accommodation, hygiene, exercise, medical treatment, religious services and library facilities for prisoners.⁴³¹ In the Commission's view the rules articulated by the UN "provide reliable benchmarks as to minimal

428 *Tibi*, *supra* note 298, para. 156; *Bulacio*, *supra* note 248, para. 131.

429 *De la Cruz-Flores*, *supra* note 320, para. 132.

430 U.N. Economic and Social Council, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *United Nations Standard Minimum Rules for the Treatment of Prisoners*, paras. 10-12, 15, 21, 24-25, 31, 40-42, Res. 663 (XXIV) (July 31, 1957), Res. 2076 (LXII) (May 13, 1977).

431 *Denton Aitken v. Jamaica*, Case 12.275, Report No. 58/02, Inter-Am. C.H.R., Annual Report 2002, OEA/Ser.L/V/II.117 Doc. 1 rev. 1 (2002), para. 135; *see also*, *Leroy Lamey*, *supra* note 321; *Michael Edwards et al. v. Bahamas*, Cases 12.067, 12.068, 12.086, Report No. 48/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 195. The related articles of the *United Nations Standard Minimum Rules for the Treatment of Prisoners* provide:

10. All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

11. In all places where prisoners are required to live or work,

(a) the windows shall be large enough to enable prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;

(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner...

15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness...

21. (1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.

(2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided...

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical and mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25. (1) The medical officer shall have the care of the physical and mental health of the

international standards for the humane treatment of prisoners.”⁴³² In consequence, these standards are to be upheld, irrespective of the nature of the offense that is the reason for the imprisonment⁴³³ and regardless of the State’s economic and budgetary problems.⁴³⁴

In light of these standards, the Commission has found, *inter alia*, that solitary confinement on death row, overcrowded cells, confined and unhygienic conditions, insufficient ventilation and natural light, lack of access to exercise, education and religious services, inadequate medical care, abuse by authorities and failure to establish a complaint procedure each violate Article 5 of the American Convention.⁴³⁵

Articles 5(4), (5) and (6) of the American Convention provide for additional State obligations regarding the treatment of persons deprived of liberty.⁴³⁶ Article 5(4) mandates the separation of accused persons and convicted persons

Suite 431...

prisoners and should see daily all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner’s physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment...

31. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offenses...

40. Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.

41. (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.

(2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.

(3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.

42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

432 *Joseph Thomas*, Case 12.183, Report No. 127/01, Inter-Am. C.H.R., Annual Report 2001, OEA/Ser.L/V/II.114 Doc. 5 rev. (2001), para. 133.

433 *Id.*, para. 132.

434 *Id.*; *Donnason Knights*, *supra* note 320, para. 126; *see also*, *Damion Thomas v. Jamaica*, Case 12.069, Report No. 50/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 37; *Leroy Lamey*, *supra* note 321, para. 203.

435 *Donnason Knights*, *supra* note 320, paras. 125-126.

436 American Convention, *supra* note 16, arts. 5(4)-(6).

and requires that they receive treatment according to their status.⁴³⁷ Article 5(5) demands that minors be held separately from adults and that they be treated in accordance with their status as minors.⁴³⁸ Article 5(6) states that “punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.”⁴³⁹

In *Tibi*, the Court found that the detention facility where the victim was detained did not separate accused and convicted persons, and this exposed Mr. Tibi to violent living conditions.⁴⁴⁰ On this basis, the Court found a violation of Article 5(4) of the American Convention.⁴⁴¹

In *Children’s Rehabilitation*, the Court determined that many of the minor victims were transferred, for punishment or due to scarce resources, to adult prisons. These minors shared physical space with adult prisoners, and were thereby exposed to violence and sexual abuse.⁴⁴² The Court ruled that this situation violated Article 5(5).⁴⁴³ Similarly, the Commission in *Minors in Detention* stated that the cohabitation of juvenile and adult inmates violated the minors’ human dignity and led to abuses of their personal integrity.⁴⁴⁴

Finally, the Court in *Berenson-Mejía* found that the conditions of detention endured by the victim amounted to cruel, inhuman and degrading treatment, and it also found that the State failed to ensure that the essential aim of the victim’s punishment was her “reform and social readaptation.”⁴⁴⁵ Therefore, the Court concluded that the State party violated Article 5(6) of the American Convention.⁴⁴⁶

3.3.7 Incommunicado Detention

Detainees held incommunicado are prevented from communicating with the outside world, including their lawyers, family members and consular

437 *Id.*, art. 5(4).

438 *Id.*, art. 5(5).

439 *Id.*, art. 5(6).

440 *Tibi*, *supra* note 298, para. 158.

441 *Id.*

442 *Children’s Rehabilitation*, *supra* note 313, para. 175.

443 *Id.*

444 *Minors in Detention*, *supra* note 322, paras. 125-130.

445 *Lori Berenson-Mejía*, *supra* note 291, para. 101.

446 *Id.*

officials.⁴⁴⁷ Incommunicado detention in the case law of the Inter-American System generally refers to situations in which arrested persons are not brought before a judge or other official authorized by law to review the legality of their detention.⁴⁴⁸ Persons held incommunicado are prevented from seeking judicial review of the reasons for their detention. The Court has stated that incommunicado detention is permissible only as an exceptional measure to ensure the results of an investigation and, consequently, it should be strictly applied.⁴⁴⁹ Article 7 of the Convention provides that any person deprived of his or her liberty shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.⁴⁵⁰ Though “promptly” is not defined in the Convention, both the Court and the Commission have referred, when available, to domestic legislation, specifically to constitutional provisions that limit incommunicado detention, as guiding standards in construing the meaning of that term.⁴⁵¹ In *Street Children*, for example, the Court ruled that failure to bring the victims before a judge within 6 hours of their arrest, as required by the Guatemalan Constitution, constituted a violation of Article 7 of the Convention.⁴⁵²

The case law of the Inter-American Court and Commission states that, under certain circumstances, incommunicado detention constitutes a form of cruel, inhuman and degrading treatment in violation of Article 5(2) of the American Convention.⁴⁵³ In *Suárez Rosero* the Court held that:

One of the reasons that incommunicado detention is considered to be an exceptional instrument is the grave effects it has on the detained person. Indeed, isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly

447 *Suárez Rosero*, *supra* note 203, paras. 51, 91; *see also*, *Bulacio*, *supra* note 248, para. 130. It is worth noting that State failure to inform the consular authorities of a detainee’s country of nationality constitutes a breach of Article 36 of the Vienna Convention on Consular Relations. 596 U.N.T.S. 262, April 1963. This is an independent violation of an international treaty – albeit not one specifically intended to protect human rights – which may or may not coincide with a situation of incommunicado detention.

448 *Suárez Rosero*, *supra* note 203, para. 51; *Maritza Urrutia*, *supra* note 252, para. 73.

449 *Suárez Rosero*, *supra* note 203, para. 89; *Bulacio*, *supra* note 248, para. 127; *Castillo-Petruzzi*, *supra* note 295, para. 195.

450 American Convention, *supra* note 16, art. 7(5).

451 *Street Children*, *supra* note 27, para. 133; *Dayra María Levoyer Jiménez v. Ecuador*, Case No. 11.992, Report No. 66/01, Inter-Am. C.H.R., Annual Report 2001, OEA/Ser./L/V/II.114 Doc. 5 rev. (2001), para. 39.

452 *Street Children*, *supra* note 27, paras. 133-134, 136.

453 *See De la Cruz-Flores*, *supra* note 320, para. 130; *Cantoral-Benavides*, *supra* note 171, para. 89; *Suárez Rosero*, *supra* note 203, para. 91; *Loayza-Tamayo*, *supra* note 112, para. 58; *Ruth Rosario Garcés Valladares v. Ecuador*, Case 11.778, Report No. 64/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), paras. 45-47.

vulnerable position, and increases the risk of aggression and arbitrary acts in prisons.⁴⁵⁴

The Court ruled that holding *Suárez Rosero* incommunicado for thirty-six days was arbitrary and in violation of Ecuador's domestic laws, which prohibited incommunicado detention for more than 24 hours.⁴⁵⁵ The Court therefore deemed the victim's incommunicado detention cruel, inhuman and degrading treatment pursuant to Article 5(2) of the Convention.⁴⁵⁶ In *Castillo-Petruzzi*, the Court found that holding the victims in this case incommunicado for thirty-six and thirty-seven days constituted *per se* cruel, inhuman or degrading treatment or punishment in violation of that provision.⁴⁵⁷ The Court ruled similarly in subsequent cases against Peru in which victims were held incommunicado for periods ranging from eight days⁴⁵⁸ to one month.⁴⁵⁹

The Inter-American Commission applied the Court's approach in *Garcés Valladares*, in which it declared that the mere fact that a person is deprived of any communication with the outside world for a long period of time allows it to conclude that she or he was subjected to cruel and inhuman treatment, especially when the detention is proven to be in violation of domestic law.⁴⁶⁰ The Commission also found an Article 5(2) violation in *Levoyer Jiménez*, in which the victim was held incommunicado for thirty-nine days.⁴⁶¹

3.3.8 Solitary Confinement

The case law of the Court and the Commission has been imprecise as to the definition of "solitary confinement." As will be analyzed later in this section, the case law appears to suggest that this term encompasses at least two distinct situations: 1) prolonged isolation resulting from illegal detention, as in cases of forced disappearance or kidnapping followed by extrajudicial execution; and 2) isolation of a person who is subject to a criminal investigation or serving time after conviction.

454 *Suárez Rosero*, *supra* note 203, para. 90.

455 *Id.*, paras. 91-92.

456 *Id.*

457 *Castillo Petruzzi*, *supra* note 295, para. 192.

458 *Cantoral-Benavides*, *supra* note 171, para. 81.

459 *De la Cruz-Flores*, *supra* note 320, para. 130.

460 *Ruth Rosario Garcés Valladares*, *supra* note 455, para. 45.

461 *Dayra María Levoyer Jiménez*, *supra* note 451, paras. 82-85.

Neither the Court nor the Commission has defined the scope of “prolonged isolation.” However, regarding the first situation, the Court in *Velásquez-Rodríguez* ruled that “prolonged isolation” constitutes cruel, inhuman or degrading treatment.⁴⁶² The Court has applied this ruling in subsequent forced disappearance cases.⁴⁶³ The Commission has also ruled that prolonged isolation in the context of forced disappearances infringes upon the right not to be subjected to cruel, inhuman or degrading treatment.⁴⁶⁴ As to the second situation, the Court concluded in several cases involving antiterrorist legislation in Peru that holding victims in isolation for an extended period of time,⁴⁶⁵ with only one hour of recreation time per day, was a form of cruel, inhuman and degrading treatment in violation of Article 5(2) of the American Convention.⁴⁶⁶

On the other hand, the Commission’s case law regarding prolonged solitary confinement has been contradictory. In *Lizardo Cabrera*, the Commission found that the isolation of the victim constituted torture as defined by Article 2 of the Inter-American Torture Convention.⁴⁶⁷ First, “[t]he solitary confinement was deliberately imposed on Mr. Lizardo.”⁴⁶⁸ Second, the measure was imposed under circumstances in which the victim’s health was weakened as a result of a hunger strike, and therefore inflicted physical and mental pain.⁴⁶⁹ Third, the solitary confinement was imposed as personal punishment for Mr. Lizardo’s participation in a riot at the facility where he was detained.⁴⁷⁰ Finally, the acts complained of were perpetrated by State agents.⁴⁷¹ Though the Commission referred to the Court’s case law characterizing solitary confinement as cruel, inhuman and degrading treatment, the Commission concluded that, given the specific circumstances of this case, the isolation imposed upon Mr. Lizardo constituted torture.⁴⁷² More recently, however, the

462 *Velásquez-Rodríguez*, *supra* note 187, para. 187.

463 *Godínez-Cruz*, *supra* note 187, para.197; *Bámaca-Velásquez*, *supra* note 171, para. 150.

464 *See, e.g., Extrajudicial Executions and forced disappearances v. Peru*, Case 10.247 *et al.*, Report No. 101/01, Inter-Am. C.H.R., Annual Report 2001, OEA/Ser.L/V/II.114 Doc. 5 rev. (2001), para. 228; *Solares Castillo*, *supra* note 367, para. 35.

465 The Peruvian antiterrorist legislation provided for a year of solitary confinement for those convicted of terrorism. *See generally, García-Asto and Ramírez-Rojas v. Peru*, Judgment of November 25, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 137, para. 97.54.

466 *See id.*, para. 229; *Lori Berenson-Mejía*, *supra* note 291, paras. 103-109; *Castillo-Petruzzi*, *supra* note 295, paras. 194-199.

467 *Luis Lizardo Cabrera*, *supra* note 303, para. 86.

468 *Id.*

469 *Id.*

470 *Id.*

471 *Id.*

472 *Id.*, para. 87.

Commission in *Congo* found that solitary confinement constituted cruel, inhuman and degrading treatment.⁴⁷³ In this case, the victim was held in isolation for forty days until he died. The Commission stated that isolation may itself constitute inhumane treatment, and the effects may be aggravated when the victim suffers from a mental disability, as did Mr. Congo.⁴⁷⁴

3.3.9 Unlawful Detention

The Court has consistently held that a person unlawfully detained “is in a situation of heightened vulnerability in which there is a high risk of his or her rights being violated, such as the right to physical integrity and to be treated with dignity.”⁴⁷⁵ In such cases, the Court has determined that the victims were deprived of their liberty by State agents in violation of the procedural and substantive rules contained in Article 7(2)⁴⁷⁶ of the American Convention.⁴⁷⁷ In these cases, the victims were subjected to incommunicado detention as well.⁴⁷⁸

In addition, in *Sánchez*, the Court found that while it did not have sufficient evidence to establish precisely the days or hours of the victim’s detention, “due to the illegality of the detention, a brief period of detention is enough for it to constitute an infringement of his mental and moral integrity according to the standards of international human rights law.”⁴⁷⁹ The Court further ruled that the mere fact of unlawful detention allows the Court “to infer, even if there is no additional evidence in this regard, that treatment of the victim during his isolation was inhuman, degrading, and extremely aggressive.”⁴⁸⁰ The Court reiterated this holding in *Urrutia*⁴⁸¹ and *Gómez-Paquiyaauri*.⁴⁸²

473 *Víctor Rosario Congo*, *supra* note 315, para. 59

474 *Id.*, para. 58.

475 *Cantoral-Benavides*, *supra* note 171, para. 90 and cases cited therein; *see also*, *Bámaca-Velásquez*, *supra* note 171, para. 150.

476 Article 7(2) provides that “[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.” American Convention, *supra* note 16, art. 7(2).

477 *Bámaca-Velásquez*, *supra* note 171, para. 143; *Cantoral-Benavides*, *supra* note 171, paras. 73-77; *Street Children*, *supra* note 27, para. 132.

478 *Bámaca-Velásquez*, *supra* note 171, para. 143; *Cantoral-Benavides*, *supra* note 171, para. 81; *Street Children*, *supra* note 27, para. 164.

479 *Juan Humberto Sánchez*, *supra* note 249, para. 98.

480 *Id.*

481 *Maritza Urrutia*, *supra* note 252, para. 87.

482 *Gómez-Paquiyaauri*, *supra* note 252, para. 108.

The Commission reviewed the issue of unlawful detention as cruel and inhuman treatment in *Lizardo Cabrera*.⁴⁸³ The petitioner, a national of the Dominican Republic, was accused of perpetrating a bomb attack, arrested by the National Police and confined and tortured for five days.⁴⁸⁴ Despite the judicial decisions ordering his release based on lack of evidence, the National Police failed to do so, claiming that he must remain in prison on the basis of “police regulations.”⁴⁸⁵ The Commission found that the detention of Mr. Cabrera was illegal.⁴⁸⁶

The Commission also concluded that the victim’s continued detention rose to the level of torture, and in finding a violation of Article 5 of the American Convention, it relied on the definition of torture provided in Article 2 of the Inter-American Torture Convention.⁴⁸⁷ First, “the imprisonment [was] imposed as a deliberate act.”⁴⁸⁸ Second, “the measure affecting Mr. Lizardo constitute[d] a severe attack on his mental and moral integrity. The severity [of the treatment] derive[d] from the constant uncertainty over Mr. Lizardo’s future, which ha[d] lasted six years.”⁴⁸⁹ Third, the purpose of the detention was to inflict pain on the victim.⁴⁹⁰ Finally, the ill-treatment was committed by State agents.⁴⁹¹

3.3.10 Excessive Use of Force

In *Loayza Tamayo*, the Court stated that “[a]ny use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person... in violation of Article 5 of the American Convention.”⁴⁹² The Court reiterated this standard in *Castillo-Petruzzi* and *Cantoral-Benavides*, among other cases.⁴⁹³ In *Neira Alegría* and *Durand and Ugarte*, however, the Court rejected the argument that excessive force employed to suppress a prison riot, in which the victims lost their lives,

483 *Luis Lizardo Cabrera*, *supra* note 303, para. 1.

484 *Id.*, para. 2.

485 *Id.*, para. 8.

486 *Id.*, para. 63.

487 *Id.*

488 *Id.*, para. 85.

489 *Id.*

490 *Id.*, para. 81.

491 *Id.*, para. 85.

492 *Loayza-Tamayo*, *supra* note 112, para. 57.

493 *Cantoral-Benavides*, *supra* note 171, para. 96; *Castillo-Petruzzi*, *supra* note 295, para. 197.

constituted a violation of Article 5 of the American Convention.⁴⁹⁴ The Court concluded that, although death resulting from excessive force may trigger a violation of the right to personal integrity, the purpose and scope of Article 5 does not apply to deaths resulting from disproportionate force.⁴⁹⁵

The Commission has ruled that under certain circumstances the State has the right and the responsibility to use force to enforce the law or maintain public order, even if it may result in death or bodily injury.⁴⁹⁶ However, when force is excessive, it may infringe upon the right not to be subjected to cruel, inhuman or degrading treatment. The use of force can be characterized as excessive if it is not “necessary and proportionate to the needs of the situation and the objective to be achieved.”⁴⁹⁷ In consequence, “[t]he legitimate use of force implies, among other factors, that it be both necessary and proportional to the situation, in other words, that it be exercised with moderation and in proportion to the legitimate objective pursued, and in an effort to reduce to a minimum any personal injury and loss of human lives.”⁴⁹⁸

In *Finca “La Exacta,”* for example, more than 200 agents of the Guatemalan National Police armed with teargas and firearms and supported by helicopters, invaded property occupied by a number of farmworkers and their families protesting working conditions.⁴⁹⁹ The Government argued that the use of force was necessary to execute arrest warrants.⁵⁰⁰ As a result of this action, three persons died and eleven were severely injured.⁵⁰¹ The Commission found that the use of force in this case was not necessary to achieve the Government’s stated purpose.⁵⁰² The police had negotiated with the protesters for only a few hours before resorting to violence.⁵⁰³ They failed to wait until it became clear that the persons they sought would not surrender or cooperate.⁵⁰⁴ In addition, the means employed in the attack demonstrated that the force exerted was not proportionate to the objective of arresting a few of the occupants.⁵⁰⁵ In fact,

494 See *Durand and Ugarte*, *supra* note 322, paras. 78-79; *Neira Alegría*, *supra* note 420, para. 86.

495 *Id.*

496 *Finca “La Exacta” v. Guatemala*, Case 11.382, Report No. 57/02, Inter-Am. C.H.R., Annual Report 2002, OEA/Ser.L/V/II.117 Doc. 1 rev. 1 (2002), para. 39.

497 *Id.*, para. 40.

498 *Corumbiara Massacre v. Brazil*, Case 11.556, Report No. 32/04, Inter-Am. C.H.R., Annual Report 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004), para. 174.

499 *Finca “La Exacta,” supra* note 496, para. 35.

500 *Id.*, para. 37.

501 *Id.*, para. 68.

502 *Id.*, para. 55.

503 *Id.*, para. 54.

504 *Id.*

505 *Id.*, para. 55.

law enforcement personnel used a tractor, air support and heavy weapons to surround the occupants, then opened fire on them.⁵⁰⁶ The police tactics make clear that the attack was aimed at the forcible eviction of the occupants and not the arrest of the persons named in the warrants.⁵⁰⁷ Furthermore, the use of force involved in the police plan of attack lacked appropriate safeguards against the unrestrained use of force.⁵⁰⁸ Based on the foregoing, the Commission deemed the State action an excessive use of force, which violated the injured persons' rights to physical, mental and moral integrity under Article 5 of the American Convention.⁵⁰⁹

The Commission applied a similar analysis in *Corumbiara*, in which approximately 500 farm workers invaded a ranch and were evicted by military police, assisted by landowners and hired gunmen.⁵¹⁰ In this case, the Commission concluded that the use of excessive force, which injured and killed a number of civilians, violated their right to humane treatment.⁵¹¹ The situation was aggravated by the State's failure to investigate the resulting death and injuries.⁵¹²

The Commission also found that the release of teargas into an overcrowded cell with an obstructed ventilation system in an attempt to repress a riot violated the right to humane treatment.⁵¹³ In the context of the Colombian armed conflict, the Commission found a violation of the right to humane treatment in a case involving members of illegal armed groups who were arbitrarily executed after being captured or placed *hors de combat*.⁵¹⁴ The Commission based its decision on the following rule:

[W]hen some combatants have ceased participating in the hostilities and no longer pose a threat or the possibility of immediate harm to the adversary, they do not qualify as legitimate military targets. Mistreatment, and even more so extrajudicial executions, of wounded or captured combatants are grave violations of Common Article 3 [of the Geneva Conventions].⁵¹⁵

506 *Id.*

507 *Id.*

508 *Id.*, para. 65.

509 *See id.*, para. 68.

510 *See generally, Corumbiara Massacre, supra* note 498.

511 *Id.*, para. 226.

512 *See id.*, para. 208.

513 *Parque São Lucas v. Brazil*, Case 10.301, Report No. 40/03, Inter-Am. C.H.R., Annual Report 2003, OEA/Ser.L/V/II.118 Doc. 5 rev. 2 (2003), para. 52.

514 *Arturo Ribón Avila v. Colombia*, Case 11.142, Report No. 26/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), paras. 136, 140.

515 *Id.*, para. 140; *see also*, Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, art. 3.

In *Ul Musicue et al.*, the Commission found that forcing the victims to accompany members of the armed forces into combat, thereby exposing them to danger constituted cruel treatment in violation of Article 5 of the Convention.⁵¹⁶

3.3.11 Death Penalty

In *Hilaire*, the Court stated that even though the American Convention does not prohibit the death penalty in itself, its related provisions “should be interpreted as ‘imposing restrictions designed to delimit strictly its application and scope, in order to reduce the application of the death penalty to bring about its gradual disappearance.’”⁵¹⁷

The Commission, for its part, has found that there is a general consensus in international human rights case law that death penalty provisions in human rights treaties must be interpreted restrictively.⁵¹⁸ A restrictive interpretation is necessary “to ensure that the law strictly controls and limits the circumstances in which a person may be deprived of his life by authorities of the State.”⁵¹⁹ This interpretation also mandates strict compliance with due process standards.⁵²⁰ Furthermore, the Commission has noted that international and domestic institutions acknowledge that the death penalty is a form of punishment that differs in both substance and degree from other means of punishment.⁵²¹ The Commission itself described the death penalty as “the absolute form of punishment that results in the forfeiture of the most valuable of rights, the right to life and, once implemented, is irrevocable and irreparable.”⁵²² Therefore, Article 4 of the American Convention, which authorizes the death penalty in exceptional circumstances, must be interpreted as extremely limiting. Petitioners’ claims will be subject to “an enhanced level of scrutiny in order to ensure that any deprivation of life effected by a State Party pursuant

516 *Ceferino Ul Musicue et al. v. Colombia*, Case 9.853, Report No. 4/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc.6 rev. (1997), para. 36.

517 *Hilaire*, *supra* note 185, para. 99 (citing *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. 57).

518 *Dave Sewell v. Jamaica*, Case 12.347, Report No. 76/02, Inter-Am. C.H.R., Annual Report 2002, OEA/Ser.L/V/III17 Doc. 1 rev. 1 (2002), para. 88; *Denton Aitken*, *supra* note 431, para. 100; *Paul Lallion v. Grenada*, Case 11.765, Report No. 55/02, Inter-Am. C.H.R., Annual Report 2002, OEA/Ser.L/V/III17 Doc. 1 rev. 1 (2002), para. 60.

519 *Dave Sewell*, *supra* note 518, para. 88.

520 *Id.*; *Paul Lallion*, *supra* note 518, para. 54; *see also Denton Aitken*, *supra* note 431, para. 100.

521 *See Dave Sewell*, *supra* note 518, para. 89; *Denton Aitken*, *supra* note 431, para. 101; *Paul Lallion*, *supra* note 518, para 61.

522 *See Dave Sewell*, *supra* note 518, para. 89; *Denton Aitken*, *supra* note 431, para. 101; *Paul Lallion*, *supra* note 518, para 61.

to a death sentence complies strictly with the provisions of the Convention, including in particular Articles 4, 5 and 8 of the Convention.”⁵²³

In the Inter-American System two death penalty-related situations have been found to violate the right to humane treatment: detention on death row and mandatory death sentences. Though petitioners have advanced such arguments in several cases, the Commission has not ruled on the question whether a particular method of execution, such as hanging, constitutes cruel, inhuman or degrading treatment or punishment.⁵²⁴

The Court in *Hilaire* cited the European Court’s determination that the “death row phenomenon” is a form of cruel, inhuman and degrading treatment and is characterized by a prolonged period of detention while awaiting execution.⁵²⁵ In *Hilaire*, the Court found that the prisoners lived with the constant threat of being hanged, on the basis of laws that were incompatible with the American Convention.⁵²⁶ The period preceding their executions terrified the victims, caused them to be depressed, deprived them of sleep and caused them other ill effects.⁵²⁷ The Court therefore ruled that the conditions of the prisoners’ death row detention constituted cruel, inhuman and degrading treatment in violation of Article 5.⁵²⁸

Similarly, the Commission has concluded that prolonged solitary confinement combined with poor conditions while on death row failed to meet the minimum standards required by Articles 5(1) and (2).⁵²⁹ In *Andrews*, the Commission found that the eighteen years spent by the victim on death row, among other factors, amounted to a violation of his right not to be subjected to cruel, infamous or unusual punishment pursuant to Article XXVI of the American Declaration.⁵³⁰

523 *Dave Sewell*, *supra* note 518, para. 78; *Denton Aitken*, *supra* note 431, para. 90; *Benedict Jacob v. Grenada*, Case 12.158, Report No. 56/02, Inter-Am. C.H.R., Annual Report 2002, OEA/Ser.L/V/II.117 Doc. 1 rev.1 (2002), para. 59; *Leroy Lamey*, *supra* note 321, para. 103.

524 *Dave Sewell*, *supra* note 518, para. 118; *Benedict Jacob*, *supra* note 523, para. 98; *Joseph Thomas*, *supra* note 432, para. 136.

525 *See Hilaire*, *supra* note 185, para. 167 (citing *Soering v. United Kingdom*, Eur. Ct. H.R., No. 14038/88, July 7, 1989). The European Court in *Soering* held that prisoners sentenced to death suffer severe mental anxiety due to a variety of circumstances, including: the way in which the sentence was imposed, lack of consideration of the personal characteristics of the accused, the disproportionality between the punishment and the crime committed, detention conditions while awaiting execution and other factors.

526 *Id.*, paras. 168-169.

527 *Id.*, para. 168.

528 *Id.*, paras. 168-169.

529 *Leroy Lamey*, *supra* note 321, para. 203; *Donnason Knights*, *supra* note 320, para. 126.

530 *William Andrews v. United States*, Case 11.139, Report No. 57/96, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 178.

With regard to mandatory death sentences for all murder convictions, the Commission has consistently ruled that this practice contravenes Article 5(1) because it fails to respect the victim's physical, mental and moral integrity.⁵³¹ In *Denton Aitken*, the Commission found that depriving the victim of his most fundamental right, the right to life, without taking into account his personal circumstances and the particular circumstances of the offense, failed to respect his integrity as an individual human being and subjected him to treatment of an inhuman or degrading nature.⁵³²

In *Donnason Knights*, the Commission explained its application of Article 5 to the death penalty, particularly 5(1) and 5(2), in the following terms:

Among the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of their human personality. From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that individuals be treated with dignity and respect. Accordingly, Article 5(1) guarantees to each person the right to have his or her physical, mental, and moral integrity respected, and Article 5(2) requires all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person. These guarantees presuppose that persons protected under the Convention will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic rights and freedoms of an individual, such as the right to liberty. In the Commission's view, consideration of respect for the inherent dignity and value of individuals is especially crucial in determining whether a person should be deprived of his or her life.⁵³³

The Commission reiterated in this case that it could not reconcile respect for the dignity of the individual as protected by Article 5(1) and (2) with a mandatory death sentence, because such a system deprives the individual of the most fundamental right without considering whether execution is the appropriate punishment in the individual's particular case.⁵³⁴

531 *Denton Aitken*, *supra* note 431, para. 111; *Donnason Knights*, *supra* note 320; para. 82.

532 *Denton Aitken*, *supra* note 431, para 111.

533 *Donnason Knights*, *supra* note 320, para. 81.

534 *Id.*, para. 82.

3.4 Other Prohibitions Under Inter-American Human Rights Law Related to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Inter-American human rights law enunciates two additional prohibitions necessary for effective protection from torture and other cruel, inhuman or degrading treatment, namely: the principle of *non-refoulement* in the context of extradition or expulsion, and the exclusionary rule with respect to evidence obtained through torture. Below, we will explore the scope of these prohibitions in Inter-American law and jurisprudence.

3.4.1 Non-refoulement

Article 22(8) of the American Convention enshrines the right not to be deported or returned to a country where a person is in danger of being subjected to a violation of the right to life or personal freedom because of her or his race, nationality, religion, social status or political opinion.⁵³⁵ Furthermore, Article 13 of the Inter-American Torture Convention requires that a person not be extradited or returned to a country “when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or *ad hoc* courts in the requesting State.”⁵³⁶

The Inter-American Court has not decided any case addressing the principle of *non-refoulement*. The Commission, on the other hand, addressed this issue in the *Haitian Interdiction* case in 1997.⁵³⁷ Since the defendant State, the United States, had not ratified the Convention,⁵³⁸ the Commission applied only the American Declaration, in particular Article I, which protects the right to security.⁵³⁹ This right was defined by the Commission as “a person’s legal and

535 American Convention, *supra* note 16, art. 22(8).

536 Inter-American Torture Convention, *supra* note 23, art. 13. It is important to note that the American Convention provision only applies where the violation feared would occur because of certain enumerated grounds; however, the Inter-American Torture Convention imposes no such conditions. The Inter-American Torture Convention may therefore apply to a broader class of situations.

537 *The Haitian Centre for Human Rights et al. v. United States*, Case 10.657, Report No. 51/96, Inter-Am. C.H.R., Annual Report 1996, OEA/Ser.L/V/II.95 Doc. 7 rev. (1996).

538 The United States is not a party to the American Convention or the Inter-American Torture Convention.

539 *Haitian Centre for Human Rights*, *supra* note 537, para. 150.

uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”⁵⁴⁰

In this case, the Commission found that Haitian asylum seekers were interdicted by the U.S and returned to Haiti pursuant to a cooperative agreement between the U.S. Government and the regime established in Haiti in 1981. Because these refugees were exposed to acts of brutality by the Haitian military and its supporters upon their return, the Commission found that their interdiction and repatriation to Haiti constituted a breach of their right to security in violation of the American Declaration.⁵⁴¹ The Commission also concluded that the United States had violated their right to liberty and their right to seek and receive asylum under the American Declaration.⁵⁴²

3.4.2 Exclusionary Rule

Article 8(3) of the American Convention forbids the use of confessions in legal proceedings if it is established that the statement was obtained through coercion of any kind.⁵⁴³ Article 10 of the Inter-American Torture Convention prohibits the use of any statement obtained through torture as evidence in a legal proceeding.⁵⁴⁴ The only circumstance in which such a statement may be used as evidence is in the prosecution of the person accused of eliciting the information through torture.⁵⁴⁵ Though the Inter-American Torture Convention appears to bar evidence obtained through torture only, the American Convention, through the use of the word “coercion,” leaves room for broader application, and may encompass confessions extracted under treatment that could be characterized as cruel, inhuman and degrading. Unfortunately, the relevant case law of both the Court and the Commission is quite nascent on this point and therefore does not clarify the scope of these provisions.

In one of the few related Inter-American cases, the Court in *Cantoral-Benavides* found that the victim was tortured to “break down his psychological resistance and force him to incriminate himself or confess to certain illegal activities.”⁵⁴⁶ Thus the Court declared a violation of Article 8(3) of the

540 *Id.*, para. 170.

541 *Id.*, para. 171.

542 *Id.*, paras. 169, 163.

543 American Convention, *supra* note 16, art 8(3).

544 Inter-American Torture Convention, *supra* note 23, art. 10.

545 *Id.*

546 *Cantoral-Benavides*, *supra* note 171, para. 132.

Convention.⁵⁴⁷ The Commission found that Article 10 of the Inter-American Torture Convention was violated in *Manríquez*, in which the victim had been convicted on the basis of evidence obtained exclusively through torture.⁵⁴⁸

3.5 General Duties to Respect and Ensure

The general duties to respect and ensure enshrined in Article 1(1) of the American Convention are guiding principles regarding the attribution of State responsibility under the American Convention.⁵⁴⁹ They are also considered substantial obligations under the Convention and are violated whenever an infringement of a right protected by that treaty takes place.⁵⁵⁰ In other words, States assume these general obligations in relation to each of the rights protected by the American Convention.⁵⁵¹

The general duty to respect rights and freedoms entails a negative obligation not to violate the rights recognized in the Convention. Thus, “[w]henver a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect...”⁵⁵² The general duty to ensure involves a positive obligation to organize governmental structures, adopt appropriate measures and take action to guarantee the free and full exercise of rights.⁵⁵³ The duty to ensure is three-fold and obliges States “to prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”⁵⁵⁴ While the duty to respect is an obligation of result,⁵⁵⁵ the duty to ensure is one of means.⁵⁵⁶ Thus, the duty to ensure is not violated *per se* in each occasion the

547 *Id.*, para. 133.

548 *Manuel Manríquez v. Mexico*, Case 11.509, Report No. 2/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), para. 85.

549 See Section 3.6, *infra*.

550 *Velásquez-Rodríguez*, *supra* note 187, para. 162.

551 *Id.*

552 *Id.*, para. 169.

553 *Id.*, para. 166.

554 *Godínez-Cruz*, *supra* note 187, para. 175; see also, *Velásquez-Rodríguez*, *supra* note 187, para. 166.

555 An “obligation of result” requires States to achieve specific objectives to satisfy a substantive provision.

556 An “obligation of means” or “of conduct” requires States to take action reasonably calculated to realize a certain outcome.

measures taken by the State do not produce a satisfactory result; it must be proven that the State failed to act with due diligence either to prevent or redress the alleged violation.⁵⁵⁷

With respect to the prohibition of torture and other cruel, inhuman and degrading treatment or punishment, the duties to prevent, to investigate and punish and to make reparations emerge not only from the American Convention, but also from specific obligations under the Inter-American Torture Convention.⁵⁵⁸ In the following sections, we will analyze the scope of these obligations in light of both conventions.

3.5.1 Duty to Prevent

The Court in *Velásquez-Rodríguez* explained the duty to prevent as follows:

The duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures.⁵⁵⁹

The duty to prevent, therefore, is breached whenever it is established that the respondent State failed to act with due diligence to prevent an infringement of Convention rights. In the context of torture and other cruel, inhuman and degrading treatment, the Court in *Velásquez-Rodríguez* concluded that although it was not possible to prove that the victim was subjected to torture, “his kidnapping and imprisonment by governmental authorities, who have been shown to subject detainees to indignities, cruelty and torture, constitute a failure of Honduras to fulfill the duty imposed by Article 1(1) to ensure the rights under Article 5(1) and 5(2) of the Convention.”⁵⁶⁰ Thus, the Court found that the State had violated the right not to be tortured as a result of the State’s failure to exercise due diligence to prevent the human rights violations of

557 See *Godínez-Cruz*, *supra* note 187, para. 188.

558 In particular, Articles 1, 6, 7, 8, 10, 12. Inter-American Torture Convention, *supra* note 23.

559 *Velásquez-Rodríguez*, *supra* note 187, para. 175.

560 *Id.*, para. 187.

Mr. Velásquez Rodríguez.⁵⁶¹ The Court has recently found that the duty to prevent an Article 5 violation with regard to persons deprived of their liberty entails a positive obligation to ensure detention conditions that respect minimum basic standards of human dignity.⁵⁶² Applying this obligation, the Court held Paraguay responsible for a violation of Article 5 as read together with Article 1(1) of the American Convention, because the Government failed to ensure compliance with minimum basic standards in a juvenile detention center.⁵⁶³

Similarly, the Commission has held that the existence of a practice of incomunicado detention by State authorities followed by torture or death, to which an individual victim can be linked, permits a finding of an Article 5 violation, based on the State's failure to create conditions that ensure every individual's right not to be tortured.⁵⁶⁴ In another case, the Commission identified violations of the right not to be subjected to torture or cruel, inhuman or degrading treatment based on the State failure to adopt positive measures ensuring minimum basic prison condition standards and implement a system to address emergency situations in correctional facilities.⁵⁶⁵

The Inter-American Torture Convention includes several provisions regarding the obligation of States parties to take measures to prevent torture.⁵⁶⁶ In particular, Article 1 articulates a general obligation to prevent torture.⁵⁶⁷ Article 6 mandates that States parties criminalize acts of torture and attempts to commit torture under their national criminal laws and punish torture with severe penalties that reflect the serious nature of the crime.⁵⁶⁸ Likewise, States must implement effective measures to prevent and punish other cruel, inhuman or degrading treatment or punishment within their respective jurisdictions.⁵⁶⁹ Article 7 obligates States to train police and other public officials responsible for the custody of detainees regarding the prohibition of torture and other cruel, inhuman and degrading treatment.⁵⁷⁰

561 *Id.*

562 *Children's Rehabilitation*, *supra* note 313, para. 159.

563 *Id.*, paras. 170-171.

564 *See, e.g., Víctor Hernández Vásquez v. El Salvador*, Case 10.228, Report No. 65/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), paras. 55-56.

565 *Carandiru v. Brazil*, Case 11.291, Report No. 34/00, Inter-Am. C.H.R., Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6 rev. (1999), para. 91.

566 *See* Inter-American Torture Convention, *supra* note 23, arts. 1, 6-7.

567 *Id.*, art. 1.

568 *Id.*, art. 6.

569 *Id.*

570 *Id.*, art. 7.

On these bases, the Court has found violations of Articles 1 and 6 of the Inter-American Torture Convention whenever a State party has failed to exercise due diligence in preventing torture or other mistreatment in its jurisdiction.⁵⁷¹ The same approach has been followed by the Commission.⁵⁷²

3.5.2 Duty to Investigate and Punish

As stated previously, the Court has found that the duty to ensure imposed by Article 1(1) of the American Convention encompasses a State obligation to investigate and punish any violation of rights recognized by the Convention.⁵⁷³ The Court in *Velásquez-Rodríguez* concluded that a State party is under a legal duty “to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”⁵⁷⁴ Furthermore, the Court provided that

If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.⁵⁷⁵

The Commission has declared that the duty to investigate and punish “requires punishment not only of material authors, but also of the intellectual authors of those acts.”⁵⁷⁶

As with the duty to prevent, the failure of the State to identify and punish the perpetrator does not constitute a violation of the obligation to investigate, as long as it has exercised due diligence in its investigation.⁵⁷⁷ However, this duty

must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective

571 *See Tibi, supra* note 298, para. 159; *Gómez-Paquiyaauri, supra* note 252, paras.114-117; *Bámaca-Velásquez, supra* note 171, paras. 220-223.

572 *González Pérez, supra* note 231, para. 90.

573 *See* Section 3.5, *supra*.

574 *Velásquez-Rodríguez, supra* note 187, para. 174; *see also, Godínez-Cruz, supra* note 187, para. 184.

575 *Velásquez-Rodríguez, supra* note 187, para. 176.

576 *Corumbiara Massacre, supra* note 498, para 256.

577 *Velásquez-Rodríguez, supra* note 187, para. 177; *Godínez-Cruz, supra* note 187, para. 188.

and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.⁵⁷⁸

In Inter-American case law, the duty to investigate violations of core rights, such as the right to life and the right to be free from torture or cruel, inhuman or degrading treatment, is related to the Article 8 right to access to justice and due process and the Article 25 right to an effective remedy.⁵⁷⁹ The Court in *Velásquez-Rodríguez* held that

[u]nder the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1[(1)]).⁵⁸⁰

The victim in *Sánchez* was subjected to brutal torture and ultimately executed, and the Court in this case held that the right to an effective remedy under Articles 8 and 25, read together with Article 1(1) of the American Convention, requires a serious, impartial and effective investigation of the alleged facts.⁵⁸¹ In defining this standard, the Court referred to the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.⁵⁸²

Likewise, in *Martín de Mejía*, where the victim was raped, the Commission stated that

the obligation [to investigate] contained in Article 1(1) is a necessary corollary of the right of every individual to recourse to a tribunal to obtain judicial protection when he believes he has been a victim of violation of any of his human rights. If this were not so, the right to obtain

578 *Godínez-Cruz*, *supra* note 187, para. 188.

579 *Street Children*, *supra* note 27, para. 225.

580 *Velásquez-Rodríguez v. Honduras*, Preliminary Objections, Judgment of June 26, 1987, Inter-Am. Ct. H.R., (Ser. C) No. 1, para. 91.

581 *Juan Humberto Sánchez*, *supra* note 249, para. 127.

582 *Id.*

effective recourse set forth in Article 25 would be absolutely without content.⁵⁸³

In *González Pérez*, the Commission relied on the United Nations Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in assessing whether the investigation carried out to identify the perpetrators of the rape in this case was impartial and therefore in compliance with the Convention.⁵⁸⁴

The Inter-American Torture Convention also imposes specific obligations upon States to investigate fully and punish those responsible for torture and other cruel, inhuman or degrading treatment. Article 1 articulates the general obligation to punish torture.⁵⁸⁵ Article 8 obligates States to ensure an impartial investigation into any person's claim of prohibited conduct under its jurisdiction.⁵⁸⁶ Where there is a well-grounded reason to believe that torture has occurred in its jurisdiction, the State must immediately investigate the allegations and initiate criminal proceedings against the perpetrators, if appropriate.⁵⁸⁷ Finally, this provision ensures that victims who have exhausted domestic remedies can proceed to submit petitions to "the international fora whose competence has been recognized by that State."⁵⁸⁸

Like the duty to prevent, in cases where torture or other cruel, inhuman or degrading treatment has been alleged and the respondent State is a party to the Inter-American Torture Convention, both the Court and the Commission have found violations of Articles 1 and 8, when it was proven that the State failed to conduct an effective investigation.⁵⁸⁹

As mentioned, Article 6 obliges the States parties to criminalize and punish authors of acts of torture with adequate penalties, Article 4 of the Inter-American Torture Convention provides that having acted under the orders of a superior will not preclude a perpetrator's criminal liability.⁵⁹⁰ Article 11 imposes a duty to extradite to a requesting State any person accused or convicted of committing torture.⁵⁹¹ Article 13 states that torture is deemed to be

583 *Raquel Martín de Mejía*, *supra* note 299, p. 190.

584 *González Pérez*, *supra* note 231, para. 78.

585 Inter-American Torture Convention, *supra* note 23, art. 1.

586 *Id.*, art. 8.

587 *Id.*

588 *Id.*

589 *Tibi*, *supra* note 298, para. 159; *Maritza Urrutia*, *supra* note 252, paras. 128-130; *Bámaca-Velásquez*, *supra* note 171, paras. 221-223; *Corumbiara Massacre*, *supra* note 498, para. 287.

590 Inter-American Torture Convention, *supra* note 23, art. 4.

591 *Id.*, art. 11.

included as an extraditable offence in every extradition treaty entered into by a State party to this convention.⁵⁹² Where a State receives a request for the extradition of an alleged torturer from a State with which there is no extradition treaty, the Inter-American Torture Convention may serve as the legal basis for such extradition, provided that other legal requirements of the requested State are respected.⁵⁹³

Article 12 provides that a State shall adopt the necessary measures to exercise jurisdiction over a crime of torture when it is committed within the State's jurisdiction, when the alleged perpetrator is a national of the State or when the victim is a national of the State.⁵⁹⁴ This provision also imposes on States parties the duty to "take the necessary measures to establish its jurisdiction over the crime [of torture] when the alleged criminal is within the area under its jurisdiction;" this wording provides legal bases for establishing universal jurisdiction⁵⁹⁵ over torture perpetrators, when it is inappropriate to extradite that person to another State.⁵⁹⁶ Article 14 enshrines the *aut dedere aut punire* principle, which entails that a State that decides not to extradite an alleged perpetrator will submit the case to its domestic authorities as if the crime had taken place within its jurisdiction.⁵⁹⁷ Neither the Court nor the Commission has ever applied Article 4, 11, 12 or 13 in the context of an individual case.

3.5.3 Duty to Provide Reparation

Article 63(1) of the American Convention establishes that if the Court finds a violation of the rights protected by this treaty, the Court must provide, where appropriate, for adequate reparation to the victim.⁵⁹⁸ The Court in its Article 1(1) case law has ruled that the duty to ensure entails an obligation to make

592 *Id.*, art. 13.

593 *Id.*

594 *Id.*, art. 12.

595 Universal jurisdiction refers to the power to prosecute and try the alleged author of an offence, irrespective of the place where it was committed and irrespective of the suspect's and the victim's nationality or country of residence.

596 Inter-American Torture Convention, *supra* note 23, art. 12.

597 *Id.*, art. 14. *Aut dedere aut punire* (literally, "either extradite or punish") refers to the obligation to exercise one of two alternative powers: either to extradite an alleged offender to the requesting State, if such a request has been extended, or to try and sentence the offender in the captor State's own domestic courts. The *aut dedere aut punire* obligation complements the universal jurisdiction principle. Together they prevent a situation in which a State that is unwilling or unable to extradite an individual also may not prosecute him or her because of citizenship or because the offense occurred on another State's territory.

598 American Convention, *supra* note 16, art. 63(1).

adequate reparations.⁵⁹⁹ As regards torture, Article 9 of the Inter-American Torture Convention obliges States to incorporate into their domestic laws the duty to provide suitable compensation for torture victims.⁶⁰⁰ This provision, however, appears not to include an obligation to make reparations for other cruel, inhuman or degrading treatment or punishment.

The Court has consistently stated that it is a principle of international law, and “even a general concept of law,” that every violation of an international obligation that results in damage triggers a duty to make adequate reparation.⁶⁰¹ Each aspect of this obligation (scope, nature and determination of beneficiaries) is regulated by international law and therefore cannot be modified by a State’s domestic legislation.⁶⁰² The Court stated in its initial jurisprudence that compensation was the most common form of redress for human rights violations,⁶⁰³ but in recent years, the Court has expanded the non-pecuniary measures awarded to victims of human rights violations.⁶⁰⁴

The Court has determined that reparation for violations of international obligations must take the form, if possible, of full restitution (*restitutio in integrum*), which consists in the restoration of the situation prior to the violation, the reparation of the consequences of the violation and monetary compensation for material and nonmaterial damages, including emotional harm.⁶⁰⁵ Where full restitution is not possible “it is for the international court to determine a set of measures, in addition to ensuring the rights abridged, to address the consequences of the infractions, as well as ordering payment of a compensation for the damage caused.”⁶⁰⁶ The guiding principle is that reparation must

599 *Godínez-Cruz*, *supra* note 187, para. 175; *Velásquez-Rodríguez*, *supra* note 187, para. 166.

600 Inter-American Torture Convention, *supra* note 23, art. 9.

601 *Velásquez-Rodríguez v. Honduras*, Compensatory Damages (Art. 63(1) American Convention on Human Rights), Judgment of July 21, 1989, Inter-Am. Ct. H.R., (Ser. C) No. 7, para. 25; *see also*, *Moiwana Village*, *supra* note 398, para. 169; *Cesti-Hurtado v. Peru*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of May 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 78, para. 32.

602 *Aloeboetoe et al. v. Suriname*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of September 10, 1993, Inter-Am. Ct. H.R., (Ser. C) No. 15, para. 44; *Trujillo Oroza v. Bolivia*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of February 27, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 92, para. 61.

603 *Velásquez-Rodríguez*, *supra* note 582, para. 25.

604 *See, e.g.*, *Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 125, paras. 210-227; *Plan de Sánchez Massacre v. Guatemala*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of November 19, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 116, paras. 93-111; *see also*, *López Alvarez v. Honduras*, Judgment of February 1, 2006, Inter-Am. Ct. H.R. (Ser. C) No. 141, paras. 207-210.

605 *Raxcacó-Reyes*, *supra* note 211, para. 115; *Plan de Sánchez*, *supra* note 604, para. 53.

606 *Myrna Mack-Chang*, *supra* note 390, para. 236; *see also*, *Plan de Sánchez Massacre*, *supra* note 604, para. 59; *Gómez-Paquiayauri*, *supra* note 252, para. 189.

seek to remove the effects of the violation(s).⁶⁰⁷ The nature and amount of compensation depend on the damage inflicted and therefore are directly related to the specific violations found by the Court.⁶⁰⁸

According to the practice of the Court, adequate reparation includes pecuniary and non-pecuniary damages as well as legal costs and expenses. Pecuniary damages include the victim's loss of or reduction in income (lost earnings) as well as expenses incurred by the victim or his or her family as a result of the human rights violation(s) (consequential damages).⁶⁰⁹ In recent decisions, the Court has included in its pecuniary damages orders the loss of family assets resulting from the human rights violation(s).⁶¹⁰

Generally, the amount of pecuniary damages awarded is based on the victim's particular profession or economic situation.⁶¹¹ The Court has decided cases in which the victims had no established profession because they were deprived of their liberty,⁶¹² or were children.⁶¹³ The Court has also awarded material damages to internally displaced victims who lacked documentation of their assets or earnings.⁶¹⁴ In all such cases, the Court assessed pecuniary damages on the basis of equity⁶¹⁵ and, in some circumstances, on the basis of the minimum wage in the country.⁶¹⁶

On the other hand, non-pecuniary damages include:

both the sufferings and affliction caused to the direct victims and their next of kin – the impairment of highly significant personal values – and also the changes of a non-pecuniary nature in the lives of the victim or

607 *19 Merchants*, *supra* note 381, para. 223; *Mapiripán Massacre*, *supra* note 211, para. 245; *Pueblo Bello v. Colombia*, Judgment February 31, 2006, Inter-Am. Ct. H.R., (Ser. C) No. 140, para. 229.

608 *19 Merchants*, *supra* note 381, para. 223; *Mapiripán Massacre*, *supra* note 211, para. 245; *Pueblo Bello*, *supra* note 610, para. 229.

609 *Mapiripán Massacre*, *supra* note 211, para. 250.

610 *See, e.g., Bulacio*, *supra* note 248, para. 88; *Gutiérrez-Soler v. Colombia*, Judgment of September 12, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 132, paras. 77-78.

611 *See Loayza-Tamayo v. Peru*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of November 27, 1998, Inter-Am. Ct. H.R., (Ser. C) No. 42, para. 129.

612 *See, e.g., Neira-Alegría et al. v. Peru*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of September 19, 1996, Inter-Am. Ct. H.R., (Ser. C) No. 29.

613 *See, e.g., "Street Children" v. Guatemala (Villagrán-Morales et al.)*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of May 26, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 77.

614 *Moiwana Village*, *supra* note 398, para. 187; *Pueblo Bello*, *supra* note 607, paras. 247-248.

615 *Neira-Alegría*, *supra* note 420, paras. 49-50; *Pueblo Bello*, *supra* note 610, para. 248; *see also, Moiwana Village*, *supra* note 398, para. 187; *Plan de Sánchez Massacre*, *supra* note 604, para. 74; *Mapiripán Massacre*, *supra* note 211, para. 274.

616 *See, e.g., Street Children*, *supra* note 613, para. 79.

his family. As it is not possible to assign a precise monetary equivalent to non-pecuniary damage, there are only two ways in which it can be compensated, in order to make integral reparation to the victims. First, by the payment of an amount of money or the delivery of goods or services of a significant financial value, which the Court determines by the reasonable application of legal discretion and fairness; and, second, by the execution of acts or civil works of a public nature or with public impact that have effects such as the recovery of the victims' memory, acknowledgement of their dignity, consolation of their next of kin, or dissemination of a message of official disapproval of the respective human rights violations and of commitment to efforts to ensure that they do not happen again.⁶¹⁷

In general, with regard to material or pecuniary damages, the Court awards monetary payment.⁶¹⁸ In some cases, however, the Court has found that the decision recognizing the violation of the victim's rights constitutes sufficient reparation.⁶¹⁹

With regard to non-pecuniary damages, the Court has developed an innovative approach to the scope of measures of redress ordered to States. For example, the Court in recent cases has ordered States to adopt stricter measures to protect persons deprived of their physical liberty from being subjected to mistreatment. In *Sánchez*, the Court ordered Honduras to create a national record of detainees in order to monitor the legality of arrests carried out by State agents and also to prevent violations of the right not to be tortured or subjected to other forms of cruel, inhuman or degrading treatment.⁶²⁰ The registry must include the name of the person arrested, the reasons for his or her detention, the authority ordering the detention, the date and time of the detention and release, as well as information regarding the applicable warrant.⁶²¹

A similar approach was followed by the Court in *Bulacio*,⁶²² and in this case the Court reiterated the importance of respecting basic due process rights, such as notification of the detainee as to the reasons for the arrest, immediate judicial review and notification of a family member, lawyer or consular official, in the prevention of torture or other cruel, inhuman or degrading treatment.⁶²³

617 *Trujillo-Oroza v. Bolivia*, *supra* note 602, para. 77.

618 *Myrna Mack-Chang*, *supra* note 390, para. 267; *Trujillo-Oroza*, *supra* note 602, para. 79.

619 *Cantos v. Argentina*, Judgment of November 28, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 97, para. 71.

620 *Juan Humberto Sánchez*, *supra* note 249, para. 189.

621 *Id.*

622 *Bulacio*, *supra* note 248, para. 132.

623 *Id.*, paras. 128-130.

For that reason, the Court ordered the State to amend its domestic legislation to ensure respect for these rights in the future.⁶²⁴ Furthermore, in *Gutiérrez Soler*, the Court ordered the State to implement a program to train doctors, judges and prosecutors on the United Nations Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”) in order to prevent future acts of torture.⁶²⁵ The Court also ordered the State to strengthen the existing monitoring mechanisms in its national detention centers.⁶²⁶ The State must perform a medical examination of the detainee immediately upon detention, periodically assess the mental health of the detention center’s personnel and authorize regular access to detention centers for representatives of official human rights institutions.⁶²⁷

In cases in which the Court found a violation of the right not to be tortured or subjected to cruel, inhuman or degrading treatment, the Court has, as a form of reparation, ordered the State to carry out an effective investigation to identify the perpetrators and where warranted, to punish them according to domestic law.⁶²⁸ Victims and their families must have full access to and participation in criminal proceedings, and investigation results must be publicly available.⁶²⁹ In *Tibi*, the Court ordered the State to publish the relevant parts of its decision in the State official publication (*Diario Oficial*), in another national Ecuadorian newspaper and in a widely circulated French newspaper.⁶³⁰ In addition, the State was ordered to acknowledge its international responsibility for the events that transpired in the case through a written declaration published in Ecuadorian and French newspapers.⁶³¹

With respect to legal costs and expenses, the Court has held that

it is for the Court to prudently assess [the] scope [of reimbursement], including expenses incurred before the authorities under domestic jurisdiction and those incurred in the course of the proceeding before the inter-American [sic] system, bearing in mind the circumstances of the specific case and the nature of international jurisdiction for the protection of human rights. This assessment can be based on the principle

624 *Id.*, para. 144.

625 *Gutiérrez Soler*, *supra* note 610, para. 110.

626 *Id.*, para. 111.

627 *Id.*, para. 112.

628 *Tibi*, *supra* note 298, para. 258; *Maritza Urrutia*, *supra* note 252, para. 177; *Juan Humberto Sánchez*, *supra* note 249, para. 186.

629 *Juan Humberto Sánchez*, *supra* note 249, para. 186.

630 *Tibi*, *supra* note 298, para. 260.

631 *Id.*, para. 261.

of fairness and take into account the expenses stated by the parties, insofar as their *quantum* is reasonable.⁶³²

The Commission, based on its findings of violations to the American Convention, recommends to the responsible State that it make appropriate reparations to redress these violations. However, the Commission does not specify in its public reports the scope or nature of those reparations.⁶³³

3.6 Establishing State Responsibility

3.6.1 General

In monitoring State compliance with the American Convention and other Inter-American instruments, the Court and the Commission have jurisdiction over States, but not over individuals. They do not determine individual culpability for human rights violations and do not impose punishments on individuals.⁶³⁴ The function of the Commission and the Court is to protect victims, determine whether their rights have been violated and order appropriate redress for the harm caused by such violations.⁶³⁵

The Inter-American Commission, however, may monitor the conduct of non-State actors under its power to examine the general situation of human rights in a particular State. Usually, the Commission includes its findings regarding non-State actors in its general reports on individual countries. For example, in its Third Report on Colombia, the Commission recognized that many actors contribute to the situation of violence in that country and the State is not internationally responsible for all of the harm caused to its citizens by non-State agents.⁶³⁶ In addition, the Commission devoted a section of the report to

632 *Myrna Mack-Chang*, *supra* note 390, para. 290.

633 *See, e.g., Corumbiara Massacre*, *supra* note 498, para. 307; *Dayra María Levoyer Jiménez*, *supra* note 451, para. 123.

634 *Castillo-Petruzzi*, *supra* note 295, para. 90; *International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention*, *supra* note 162, para. 56.

635 *See Hilaire*, *supra* note 185, para. 66; *Cantoral-Benavides*, *supra* note 171, para. 46; *Castillo-Petruzzi*, *supra* note 295, para. 90; *Panel Blanca*, *supra* note 27, para. 71; *Suárez Rosero*, *supra* note 203, para. 37.

636 Inter-Am. C.H.R., *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102 Doc. 9 rev. 1, February 26, 1999, Chapter 1, paras. 1-6.

violations of international humanitarian law perpetrated by non-State armed groups involved in the Colombian conflict.⁶³⁷

In its first contentious cases, the Court defined the rules governing the attribution of international responsibility to States when the American Convention has been violated. In *Velásquez-Rodríguez*, the Court held that

Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.⁶³⁸

The Commission has followed this approach and has cited extensively the Court's case law when deciding imputing international responsibility to States.⁶³⁹

Recently the Court in *Maripipán Massacre* went even further in delineating the rules governing the attribution of international responsibility. In essence, the Court held that although the American Convention refers to general rules of international law regarding State responsibility, Articles 1(1) and 2 are *lex specialis*.⁶⁴⁰ The special nature of the Convention as a human rights treaty, vis-à-vis general rules of international law, requires that attribution of international responsibility, as well as the determination of its scope and effects, be established in light of the provisions of that treaty.⁶⁴¹

Two recent developments in the Court's case law appear to be in line with its later position regarding the specific application of the Convention in attributing State responsibility. First, the Court has found that human rights violations

637 *Id.*, Chapter 4.

638 *Velásquez-Rodríguez*, *supra* note 187, para. 164; *see also*, *Caballero-Delgado*, *supra* note 111, paras. 54-56; *Godínez-Cruz*, *supra* note 187, para. 173.

639 *See, e.g.*, *Coutinho Mendes*, *supra* note 199, para. 102; *Ignacio Ellacuría, S. J. et al. v. El Salvador*, Case 10.488, Report No. 136/99, Inter-Am. C.H.R., Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6 rev. (1999), para. 157; *Hugo Bustios Saavedra v. Peru*, Case 10.548, Report No. 38/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 83; *Marroquín*, *supra* note 367, para. 37.

640 Literally, "special law." This term refers to a principle of international law according to which the more specific norms, or body of norms, regulating a given issue will prevail over more general rules (*lex generalis*).

641 *Mapiripán Massacre*, *supra* note 211, para 107.

committed against members of a certain group, such as children,⁶⁴² or committed under certain circumstances, as in the context of a pattern of violations, may warrant a finding of aggravated State responsibility.⁶⁴³ In *Plan de Sánchez*, the Court stated that the aggravated nature of the State's pattern of abuses against an indigenous community should be considered in determining appropriate reparations.⁶⁴⁴

The Court's case law has been inconsistent as to the extinguishment of a State's international responsibility for Convention violations. In *Las Palmeras*, the Court ruled that the domestic court decision awarding monetary compensation to the victims' families extinguished the State's international responsibility.⁶⁴⁵ More recently, however, in *Gómez-Paquiyaury* and *Canese*, the Court appears to have dramatically reversed its position by suggesting that, if by the time the petition was submitted to the Inter-American System the State had not redressed the violation, any subsequent action to remedy the situation would not permit the State to avoid international responsibility.⁶⁴⁶ In both cases, despite the fact that domestic courts had adopted measures to redress the human rights violations, the Court continued to review the cases and found the States in violation of the Convention.

In Inter-American case law regarding the attribution of international responsibility for human rights violations, there are two grounds on which a State may be found responsible. First, international responsibility may be directly imputable to a State as a result of acts and omissions perpetrated by State agents or organs (duty to respect); second, a State may be found responsible for acts perpetrated by non-State actors when it fails to exercise due diligence in preventing, investigating and redressing the alleged violation (duty to ensure). These two grounds are explained in more detail in the following sections.

642 *Children's Rehabilitation*, *supra* note 313, para. 251; *Gómez-Paquiyaury*, *supra* note 252, para. 76; *Molina-Theissen v. Guatemala*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of July 3, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 108, para. 41.

643 *Myrna Mack-Chang*, *supra* note 390, para. 139.

644 *Plan de Sánchez Massacre*, *supra* note 604, paras. 81.

645 *Las Palmeras v. Colombia*, Judgment of December 6, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 90, paras. 32-34.

646 *Gómez-Paquiyaury*, *supra* note 252, para. 75; *Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 111, para. 71.

3.6.2 Attribution of Unlawful Activity for Acts and Omissions

Inter-American case law reflects general rules of international law regarding the attribution of international responsibility for State acts or omissions. Any act or omission committed by a State organ or agent which violates a person's rights is a breach of the duty to respect under Article I(1), and the responsibility therefore is imputable to the State.⁶⁴⁷ According to the Court, "[t]his conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."⁶⁴⁸ The State agent's motivation in committing the violation is irrelevant for purposes of attributing international responsibility to the State. The Court has consistently held that a State may be found responsible even where the perpetrator of the violation cannot be identified.⁶⁴⁹

International responsibility may result from the acts or omissions of any State organ, whether executive, legislative or judicial.⁶⁵⁰ The Court has held, for example, that a State may breach its American Convention obligations by adopting measures that fail to respect the provisions of the Convention.⁶⁵¹ The fact that measures have been adopted in conformity with a State's domestic law is not relevant to the determination of international responsibility.⁶⁵² A State may also be found responsible for failing to adopt measures to ensure a full exercise of Convention rights, as required by Article 2.⁶⁵³ In "*The Last*

647 *Mayagna (Sumo) Awajitjini Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79, para. 154; *Velásquez-Rodríguez*, *supra* note 187, para. 169.

648 *Velásquez-Rodríguez*, *supra* note 187, para. 170; *see also*, *Godínez-Cruz*, *supra* note 187, paras. 178-180; *Caballero-Delgado*, *supra* note 111, para. 56; *Neira Alegría*, *supra* note 420, para. 63; "*Five Pensioners*" *v. Peru*, Judgment of February 28, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 98, para. 163.

649 *Panel Blanca*, *supra* note 27, para. 91; *Gangaram-Panday*, *supra* note 242, para. 62; *Godínez-Cruz*, *supra* note 187, para. 183; *Velásquez-Rodríguez*, *supra* note 187, para. 173.

650 "*The Last Temptation of Christ*" *v. Chile (Olmedo-Bustos et al.)*, Judgment of February 5, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 73, para. 72.

651 *Certain Attributes of the Inter-American Commission On Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*, Advisory Opinion OC-13/93, July 16, 1993, Inter-Am. Ct. H.R., (Ser. A) No. 13, para. 26; *Barrios Altos v. Peru*, Judgment of March 14, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 75, para. 42.

652 *Certain Attributes of the Inter-American Commission on Human Rights*, *supra* note 651, para. 26; *Hilaire*, *supra* note 185, para. 152.

653 *Certain Attributes of the Inter-American Commission on Human Rights*, *supra* note 651, para. 26; *International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention*, *supra* note 162, para. 37.

Temptation of Christ,” the Court examined a film censorship policy implemented by all three branches of the Chilean Government and provided for in the Chilean Constitution. The Court found Chile internationally responsible for the violation of the right to freedom of expression protected under Article 13 of the American Convention.⁶⁵⁴

The Commission’s case law conforms to the Court’s. In *Canuto de Oliveira*, for example, the Commission ruled that

international law assigns the State international responsibility for the behavior of its institutions and agents when they are operating in that capacity, even if outside the normal scope of their functions. This includes the higher organs of the State, such as the Executive, Legislative, and Judicial Branches, and acts and omissions of public officials or agents acting in their place.⁶⁵⁵

Furthermore, the federal clause contained in Article 28 of the American Convention has not prevented the Court and the Commission to attribute international responsibility to federal States for acts or omissions committed by agents or organs of their political subdivisions.⁶⁵⁶ In *Garrido and Baigorria*, the Court noted that “the case law, which has stood unchanged for more than a century, holds that a State cannot plead its federal structure to avoid complying with an international obligation.”⁶⁵⁷ The Commission in *Canuto de Oliveira* found the State of Brazil responsible for the murder of a union leader, perpetrated at the order of the Mayor of Rio Maria del Sur, a town in the Federal State of Pará.⁶⁵⁸

The Court and the Commission have found States responsible for their support of, tolerance for and acquiescence to human rights violations by private

654 “*The Last Temptation of Christ*,” *supra* note 650, para. 72.

655 *João Canuto De Oliveira v. Brazil*, Case 11.287, Report No. 24/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 39; *see also, e.g., Tarcisio Medina Charry*, *supra* note 374, paras. 104-105; *Arturo Ribón Avila*, *supra* note 514, para. 149.

656 American Convention, *supra* note 16. Article 28 provides:

“1. When a State Party is a Federal State, the National Government of that State Party shall comply with all the provisions of this Convention related to the subjects over which it exercises legislative and judicial jurisdiction.

2. As regards provisions pertaining to matters that fall within the scope of the entities comprising the federation, the national Government must immediately take the pertinent steps pursuant to its constitution and laws, so that the competent authorities of said entities may adopt the necessary provisions to ensure compliance with this Convention.”

657 *Garrido and Baigorria v. Argentina*, Judgment of February 2, 1996, Inter-Am. Ct. H.R., (Ser. C) No. 26, para. 46.

658 *João Canuto de Oliveira*, *supra* note 655, paras. 41, 43-44.

actors.⁶⁵⁹ Violations perpetrated by private individuals or groups acting as government proxies may also be attributed to the State.⁶⁶⁰ In *Blake*, the Court determined that members of the civil patrol, a private paramilitary group, who murdered the victim were agents of the State, because “at the time the events in this case occurred, the civil patrols enjoyed an institutional relationship with the Army, performed activities in support of the armed forces’ functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision.”⁶⁶¹

In two recent cases against Colombia, the Court ruled on the relationship between the paramilitary and State agents. In *19 Merchants*, the Court found that the extrajudicial execution of nineteen victims was carried out by paramilitary members, with the cooperation and support of top commanders of the Colombian Army, with whom the paramilitary group held a close relationship.⁶⁶² The Court therefore ruled that Colombia was responsible for the violations of several rights protected by the Convention.⁶⁶³ Similarly, in *Mapiripán Massacre*, it was established that paramilitary members landed in two commercial planes at an airport controlled by the Armed Forces; they were later transported in military trucks to the place where the massacre occurred.⁶⁶⁴ The paramilitary members wore military attire, carried guns authorized for military use and communicated with radios.⁶⁶⁵ They took control of Mapiripán and tortured and murdered approximately 49 victims.⁶⁶⁶ The Court found Colombia internationally responsible for the arbitrary deprivation of the victims’ lives and for other violations of the American Convention, precisely because the perpetrators acted with the cooperation and active support of the Colombian Army.⁶⁶⁷

The Commission in its Third Report on the Situation of Human Rights in Colombia stated that

in all cases where paramilitaries act as proxies of State agents or with the cooperation or acquiescence of those agents, the State becomes

659 *Panel Blanca*, *supra* note 27, para. 91; *Velásquez-Rodríguez*, *supra* note 187, para. 173; *María Mejía v. Guatemala*, Case 10.553, Report No. 32/96, Inter-Am. C.H.R., Annual Report 1996, OEA/Ser.L/V/II.95 Doc 7 rev. (1996), para. 57.

660 *See, e.g., Third Report on the Human Rights Situation in Colombia*, *supra* note 636, Chapter IV, para. 234.

661 *Blake*, *supra* note 242, para. 76.

662 *19 Merchants*, *supra* note 381, para. 138.

663 *Id.*, para. 295.

664 *Mapiripán Massacre*, *supra* note 211, paras. 96.30-96.32.

665 *Id.*, paras. 96.34.

666 *Id.*, paras. 96.39.

667 *Id.*, para. 123.

internationally responsible for the abuses which they commit. The international responsibility of the State for the human rights abuses committed is not diminished by the fact that the State has enunciated a general policy against the paramilitaries.⁶⁶⁸

The Commission applied this rule in *Riofrío Massacre*, in which the cooperation of paramilitary forces with State agents in the perpetration of human rights violations was clearly established.⁶⁶⁹

3.6.3 Attribution of Unlawful Activity for Lack of Due Diligence

Inter-American case law comports with a well-established principle of international law according to which the acts and omissions of private individuals are not directly attributable to States.⁶⁷⁰ In *Velásquez-Rodríguez*, however, the Court stated:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.⁶⁷¹

The legal basis for the ultimate attribution of responsibility to a State for private acts relies on State failure to comply with the duty to ensure, found in Article 1(1) of the American Convention. The Court's case law reflects this principle by repeatedly holding States internationally responsible based on their lack of due diligence to prevent human rights violations, to investigate

668 *Third Report on the Human Rights Situation in Colombia*, *supra* note 636, Chapter IV, para. 249.

669 *Riofrío Massacre v. Colombia*, Case 11.654, Report No. 62/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.11 Doc. 20 rev. (2000), para. 51.

670 International Law Commission (ILC), Draft Articles on State Responsibility for Internationally Wrongful Acts with commentaries, Report of the ILC to the UN General Assembly, adopted at its 53rd Session, *Official Records of the General Assembly, Fifty-sixth session, Suppl. No 10 (A/56/10)*, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, Chapter II, pp. 83-84, paras. 2-3.

671 *Velásquez-Rodríguez*, *supra* note 187, para. 172; *see also*, *Godínez-Cruz*, *supra* note 187, paras. 181-182; *Caballero-Delgado*, *supra* note 111, para. 56.

and sanction the perpetrators or to provide appropriate reparations to the victims or their families.⁶⁷²

The Commission adopts the Court's approach to the attribution of State responsibility for the acts and omissions of private individuals. In *Maria Da Penha*, for example, the Commission found that the State's failure to exercise due diligence to prevent and investigate a domestic violence complaint warranted a finding of State responsibility under the American Convention and the Belém do Pará Convention.⁶⁷³ Similarly, in *Ortiz v. Guatemala*, the Commission found a pattern of repression in Guatemala against members of the Church who worked with the poor and indigenous, and the human rights violations perpetrated against Sister Ortiz were found to be linked to that practice. The existence of the practice evidenced the State's failure to prevent human rights violations and investigate and punish those who committed them.⁶⁷⁴ In *Víctor Manuel Oropeza*, the Commission did not find the State responsible for failure to prevent the violation of the victim's right to life, because the threats against Mr. Oropeza were never reported to the competent authorities.⁶⁷⁵ The Commission did, however, find the State responsible for the lack of an appropriate investigation into the victim's assassination.⁶⁷⁶

In the past, establishing State responsibility for the failure to prevent, investigate and provide reparations did not benefit from Court or Commission guidance regarding the scope of "due diligence." In the recent *Pueblo Bello Massacre* decision, however, the Court made clear that the duty to ensure does not imply the State's unlimited responsibility for any private action.⁶⁷⁷ Instead, the State's duty to prevent and protect against private acts or omissions is limited to situations in which the State is aware of the existence of an actual and immediate risk to an individual or group and where the State has a reasonable opportunity to prevent or avoid that risk.⁶⁷⁸

672 *Juan Humberto Sánchez*, *supra* note 249, paras. 109-113; *Bámaca-Velásquez*, *supra* note 171, paras. 132-135; for a different approach, *see Las Palmeras*, *supra* note 645, para. 42 (where the Court, after establishing that the act could not be linked to a State agent, held that Colombia had carried out a proper investigation into the alleged murder of one of the victims and that, therefore, it had discharged its duty to ensure the victim's right to life).

673 *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), paras. 43-44; 55-57.

674 *Dianna Ortíz v. Guatemala*, Case 10.526, Report No. 31/96, Inter-Am. C.H.R., Annual Report 1996, OEA/Ser.L/V/II.95 Doc. 7 rev. (1996), paras. 80-84, 127.

675 *Víctor Manuel Oropeza v. Mexico*, Case 11.740, Report No. 130/99, Inter-Am. C.H.R., Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6 rev. (1999), para. 26.

676 *Id.*, para. 44.

677 *Pueblo Bello*, *supra* note 607, para. 123.

678 *Id.*

INDEX

A

admissibility 2.2

appeal of decisions 2.2

criteria, *see* admissibility criteria

consequences of inadmissibility 2.1.1, 2.2, 2.2.2(a)(iii)

decisions of Commission 1.2.3(a), 2.2, 2.5.2

procedure 1.2.3(a), 2.2

publication of decisions in Annual Reports 2.2, 2.5.2

admissibility criteria 2.2, 2.2.1, 2.2.2

anonymous applications 2.2.1(a), 2.6.3

duplication 1.2.3(a), 2.2.2(c)

exhaustion, *see* exhaustion of domestic remedies

fourth instance formula 2.2.1(c)(ii)

jurisdiction, *see* jurisdiction of the Commission

manifestly groundless or out of order 1.2.3(a), 2.2.2(d)

timeliness 1.2.3(a), 2.2.2(b)

advisory opinions, *see* jurisdiction of the Court**American Convention on Human Rights** 1.1, 1.2.1-1.2.2, 1.2.3(a), 1.2.3(c), 1.3, 2.1, 2.2.1-2.2.2, 2.4, 3.1-3.6

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (“Protocol of San Salvador”) 1.1

communications under, *see* communications

State responsibility, *see* State responsibility

American Declaration of the Rights and Duties of Man 1.1, 1.2.2(a), 1.2.3, 2.7, 3.1, 3.3.11, 3.4.1

communications under, *see* communications

State responsibility, *see* State responsibility

arrest and interrogation, *see* detention and humane treatment

B

burden of proof 2.2.2(a), 2.4.3, 3.3.3

in the establishment of facts 2.4.3, 3.3.3
in the exhaustion of domestic remedies 2.2.2(a)
presumptions 2.4.3, 3.3.3

C

Charter, *see* Organization of American States

children 1.2.2(a), 3.2.2-3.2.3, 3.3.6, 3.5.3, 3.6.1
aggravated State responsibility 3.6.1
detention with adults 3.3.6
dignity of 3.2.3
intensity of suffering of 3.2.2
reparation 3.5.3
reports on rights of 1.2.2(a)

Commission, *see* Inter-American Commission on Human Rights

communications to the Commission 1.2.3(a)-1.2.3(b), IIIff
admissibility, *see* admissibility
anonymous filing, *see* admissibility criteria
compliance with decisions 1.2.3(a)-1.2.3(c)
confidentiality 2.2.1(a), 2.5.1-2.5.2, 2.6.3
evidence, *see* evidence
final report 1.2.3(a)-1.2.3(b), II, 2.5.2
findings and recommendations 1.2.1-1.2.3(c), II, 2.1.1, 2.3, 3.6.1
follow-up procedures 1.2.3(a)-1.2.3(b)
friendly settlement 1.2.3(a)-1.2.3(b), II, 2.1.1, 2.3, 2.5.2, 2.6
hearings, *see* hearings before the Commission
inter-State complaints 1.2.1, 1.3.1, 2.2.1
jurisdiction, *see* jurisdiction of the Commission
merits 1.2.3(a), 2.1, 2.1.3, 2.2.1(c), 2.2.2(d), 2.3, 2.4-2.4.4, 2.5.2, 2.7,
IIIff
precautionary measures, *see* precautionary measures
procedure IIIff

- time frame II
- when to file 2.2.2(a)-2.2.2(b)
- where to file 2.1.1
- who may file 2.2.1(a)
- requests for information 1.1, 1.2.1, 1.2.3(a)-1.2.3(b), 2.1.1
- Secretariat and Executive Secretary decisions 1.2.3(a), 2.1.1, 2.2, 2.3, 2.7
- structure of communication 2.1.2
- submission by Commission to Court 1.2.3(a), 1.3.1
- time limits 1.2.3(a), II, 2.1.3, 2.2, 2.2.1(e), 2.2.2(b)
- under the American Convention 1.2.3-1.2.3(a), 1.2.1, 2.2.1(b)-2.2.1(c)
- under the American Declaration 1.2.3, 1.2.3(b), 1.2.1, 2.2.1(b)-2.2.1(c), 3.4.1
- communications to the Court** 1.3ff, Iff
 - Court judgments 1.3.1
 - evidence, *see* evidence
 - hearings, *see* hearings before the Court
 - inter-State complaints 1.3.1
 - jurisdiction, *see* jurisdiction of the Court
 - provisional measures, *see* provisional measures
 - referral by Commission 1.2.3(a), 1.3.1
 - time limits II
 - who may file 1.3.1
- compensation**, *see* reparation
- complaints**, *see* communications
- Convention**, *see* American Convention on Human Rights
- Convention of Belém do Pará** 1.1, 3.1, 3.6.3
- corporal punishment** 3.3.1
- costs**, *see* reparation
- Court**, *see* Inter-American Court of Human Rights
- cruel treatment and punishment**, *see* humane treatment

D

death penalty 1.1, 2.2.1(c)(i), 2.7, 3.2.3, 3.3.4, 3.3.11

decisions

Commission, *see* communications to the Commission

Court, *see* communications to the Court

Declaration, *see* American Declaration of the Rights and Duties of Man

degrading treatment and punishment, *see* humane treatment

deportation, *see* expulsion

detention 2.2.2(a)(iii), 3.3.11, 3.5.1, 3.5.3

conditions of 2.7, 3.2.3, 3.3.6, 3.3.11, 3.5.3

incommunicado 2.7, 3.2.3, 3.3.3, 3.3.7, 3.3.9

solitary confinement 3.3.8

unlawful 3.3.9

disappearances 1.1, 1.2.2(a), 2.2.1(c)(1), 2.2.1(e), 2.2.2(a), 2.4.3, 3.3.3-3.3.4, 3.3.8, 3.3.11

domestic remedies, *see* exhaustion of domestic remedies

due process, *see* exhaustion of domestic remedies

E

establishment of facts, *see* evidence and burden of proof

evidence 1.2.3(a), 1.3.1, II, 2.1.1, 2.2.2(d), 2.3-2.4, 3.3.2, 3.3.9

admissibility of 2.4.2, 2.4.4

circumstantial 2.4.3-2.4.4, 3.3.3, 3.3.9

Commission hearings, *see* hearings before the Commission

Court consideration of evidence adduced before the Commission 1.3.1

Court hearings, *see* hearings before the Court

Court's *motu proprio* gathering of additional evidence 2.4.4

documents recommended 2.4.1-2.4.2

documents required 2.2.2(d), 2.4.1

examination of 1.3.1, 2.4.3-2.4.4

failure to provide requested evidence 2.4.3

- initial submission limitation 2.4.4
 - obtained through ill-treatment 3.4, 3.4.2
 - weight of evidence 1.3.1, 2.2.1(c)(ii), 2.4.3
 - witnesses 2.4.2
 - exhaustion of domestic remedies** 1.2.1, 1.2.3(a), 2.1.3, 2.2-2.2.2(b), 3.5.2
 - access to domestic remedies 2.2.2(a)(ii)
 - “adequate and effective” 2.2.2(a)
 - burden of proof 2.2.2(a)
 - due process 2.2.2(a)(i)
 - exceptions generally 2.2.2(a)
 - filing complaint before remedies exhausted 2.2.2(a)(iii)
 - rationale behind 2.2.2(a)
 - unwarranted delay 2.2.2(a)(iii)
 - expulsion**, *see* non-refoulement
 - extradition**, *see* non-refoulement
 - extrajudicial executions** 1.2.2(a), 3.3.3-3.3.5, 3.3.8, 3.3.10, 3.6.2
- F**
- family members** 2.6.3, 3.3.2, 3.3.4, 3.3.7, 3.5.2-3.5.3
 - financial assistance** 2.6.2
 - force, excessive use of** 3.2.3, 3.3.1, 3.3.10
 - friendly settlement**, *see* communications

G**H**

- hearings before the Commission** 1.2.3(b), 2.3, 2.4.2, 2.5.1, 2.6.3
- hearings before the Court** 1.3.1, 2.3, 2.4.2, 2.4.4, 2.6.3
- humane treatment, right to** 2.2.2(a), 2.4.3, 3.1-3.2, 3.3.2, 3.3.4-3.3.6, 3.3.10-3.3.11
 - absolute nature 3.1

cruel treatment and punishment 2.4.3, 2.7, 3.1-3.2, 3.2.2, 3.3.3-3.3.4,
3.3.6-3.3.11, 3.4-3.4.2, 3.5ff

degrading treatment and punishment 2.4.3, 2.7, 3.1-3.2.2, 3.3-3.3.1,
3.3.3-3.3.4, 3.3.6-3.3.11, 3.4-3.4.2, 3.5ff

inhuman treatment and punishment 2.4.3, 2.7, 3.1-3.2, 3.2.2-3.3.4, 3.3.6-
3.3.11, 3.4-3.4.2, 3.5ff

intensity 3.2.2

other prohibitions 3.4ff

psychological suffering 3.1, 3.2.1, 3.3.1-3.3.7, 3.4.2

“respect for the inherent dignity of the human person” 3.1-3.2, 3.2.2-
3.2.3, 3.3.1-3.3.2, 3.3.6, 3.3.9-3.3.11, 3.5.1, 3.5.3

specific acts or situations 3.3ff

suffering of family members 3.3.4, *see also* family

torture 1.2.2(a), 2.2.1(e), 2.4.3, 2.7, 3.1-3.2.2, 3.3-3.3.6, 3.3.8-3.3.9,
3.4ff, 3.5ff, 3.6.2

Torture Convention, *see* Inter-American Convention to Prevent and Punish

I

inadmissibility, *see* admissibility

inherent dignity of the human person, *see* humane treatment

inhuman treatment and punishment, *see* humane treatment

Inter-American Commission on Human Rights 1.1, 1.2.1-1.2.3(c), 1.3.1-
1.3.2, Iff, 3.1, 3.2.1-3.2.3, 3.3, 3.3.2-3.3.11, 3.4.1-3.4.2, 3.5ff, 3.6ff

communications to, *see* communications

composition 1.2.1

hearings, *see* hearings before the Commission

jurisdiction, *see* jurisdiction of the Commission

on-site visits 1.2.2(b)

powers and functions 1.1, 1.2.1-1.2.3, 1.3.1-1.3.2, 3.6.1

recommendations of 1.2.1-1.2.2(a), 1.2.3-1.2.3(c), II, 2.1.1, 2.3, 3.6.1

reports 1.2.1, 1.2.2(a)-1.2.2(b), 1.2.3(a)-1.2.3(b), II, 2.5.2

Rules of Procedure 1.2.1, 1.2.2(a)-1.2.2(b), 1.2.3(a)-1.2.3(b), 2.1.1-
2.1.3, 2.2, 2.2.1(a), 2.2.2(a)-2.2.2(b), 2.2.2(d), 2.3, 2.4.2, 2.6.3, 2.7

- Special Rapporteurs 1.2.2(b)-1.2.2(c)
- Statute 1.1, 1.2.1, 1.2.2(a)-1.2.2(b), 1.2.3(a)
- Inter-American Convention to Prevent and Punish Torture** 1.1, 2.2.1(c)(i), 3.1-3.2.2, 3.3.2, 3.3.8-3.3.9, 3.4.1-3.4.2, 3.5ff
- Inter-American Court of Human Rights** 1.1, 1.2.1, 1.3ff, II, 2.2, 2.2.1(a), 2.2.1(c)(i), 2.2.1(d)-2.2.1(e), 2.2.2(a)(iii), 2.2.2(d), 2.3, 2.4.1-2.4.4, 2.5.2, 2.6.2-2.7, 3.1, 3.2.1-3.2.3, 3.3ff, 3.4.1-3.4.2, 3.5ff, 3.6ff
- advisory opinions, *see* jurisdiction of the Court
- deliberations 2.3, 2.4.2-2.4.4
- hearings, *see* hearings before the Court
- judgments 1.3.1, 2.3, 2.5.2
- judges and composition 1.3
- jurisdiction, *see* jurisdiction of the Court
- President of 2.7
- referrals to 1.2.3-1.2.3(c), 1.3.1-1.3.2, 2.1.1, 2.2.1(a)-2.2.1(c)(i), 2.2.1(e), 2.5.2, 2.7
- Rules of Procedure 2.3, 2.4.2, 2.4.4, 2.6.3, 2.7
- interim measures**, *see* precautionary measures and provisional measures

J

- judges**, *see* Inter-American Court of Human Rights
- jurisdiction of the Commission** 1.2.1, 1.2.3, 1.2.3(b), 2.2-2.2.1(e), 2.2.2(a), 2.7, 3.6.1
- communications under the American Convention 1.2.3, 1.2.3(b), *see also* communications
- communications under the American Declaration 1.2.3, 1.2.3(b), *see also* communications
- ratione loci* 2.2, 2.2.1(d)
- ratione materiae* 2.2, 2.2.1(c)
- ratione personae* 2.2-2.2.1(b)
- ratione temporis* 2.2, 2.2.1(e)
- jurisdiction of the Court** 1.1, 1.2.3(b), 1.3, 2.2ff, 3.6.1
- advisory 1.1, 1.3.2

contentious 1.1, 1.2.1, 1.2.3, 1.3.1, 2.1.1, 2.2ff

State acceptance of Court's contentious jurisdiction 1.1, 1.2.1, 1.2.3,
1.3.1, 2.1.1, 2.2.1(b), 2.2.1(e)

jurisprudence 2.2.2(a)(iii), 2.2.2(d), 2.4.3, 3.2, 3.2.3, 3.3ff, 3.4ff, 3.5ff

Commission 2.2.2(a)(iii), 2.2.2(d), 3.2.3, 3.3ff, 3.4.2, 3.5ff

Court 2.2.2(a)(iii), 2.2.2(d), 3.2.3, 3.3ff, 3.4.2, 3.5ff

other international human rights bodies 2.2.2(a)(iii), 2.4.3, 3.2.2, 3.3.2,
3.3.5

K

L

legal aid, *see* financial assistance

legal representation 1.3.1, 2.1.1, 2.1.3, 2.2.1(a), 2.6.1

M

N

non-refoulement 3.4-3.4.1

non-State actors, *see* State responsibility

O

on-site visits, *see* Inter-American Commission on Human Rights

Organization of American States 1.1, 1.2.1, 1.2.2(b), 2.7

Charter and protocols 1.1, 1.2.3, 1.2.3(c), 2.7

General Assembly 1.1, 1.2.1-1.2.2(b), 1.2.3(b), 1.3, 2.2, 2.5.2

Organs 1.1, 1.2ff, 1.3ff, *see also* Inter-American Commission on
Human Rights *and* Inter-American Court of Human Rights

Member States 1.1, 1.2.1-1.2.2(c), 1.2.3-1.2.3(a), 1.2.3(c), 1.3.2,
2.2.1(a)-2.2.1(b)

P

petitions, *see* communications

power of attorney, *see* legal representation

precautionary measures 1.2.3(b), 2.5.2, 2.7

prison conditions, *see* detention

private (non-State) actors, *see* State responsibility

proceedings of the Commission, *see* Inter-American Commission on Human Rights

proceedings of the Court, *see* Inter-American Court of Human Rights

provisional measures 1.2.1, 1.2.3(c), 1.3.1, 2.7

punishment, *see* humane treatment *and* corporal punishment

Q**R**

rape 3.3.1-3.3.2, 3.3.5

refoulement, *see* non-refoulement

reparation 1.3.1, 3.3.4, 3.5, 3.5.3, 3.6.1, 3.6.3

costs and expenses 1.3.1

non-pecuniary damages 3.5.3

pecuniary damages 3.5.3

phase 1.3.1, 2.6.2

reports, *see* Inter-American Commission on Human Rights

Rules of Procedure of the Commission, *see* Inter-American Commission on Human Rights

Rules of Procedure of the Court, *see* Inter-American Court of Human Rights

S

solitary confinement, *see* detention

Special Rapporteurs, *see* Inter-American Commission on Human Rights

standard of proof 2.2.1(c)(i), 2.2.2(d), 2.4.3, 3.2.2-3.2.3

State responsibility 2.2.1(b), 2.2.1(c)(ii), 2.2.2(a), 2.4.3, 3.2.3, 3.3.6, 3.5ff, 3.6ff
acts and omissions 2.4.3, 3.6.2
attribution of 3.6ff
due diligence 3.6.3
duty to investigate and punish 3.5.2
duty to prevent 3.2.3, 3.3.6, 3.5.1
duty to respect and ensure 3.5ff
non-State actors 3.5.2, 3.6.1, 3.6.2-3.6.3

T

threats 2.7, 3.3.4-3.3.5, 3.3.11, 3.6.3

torture, *see* humane treatment

Torture Convention, *see* Inter-American Convention to Prevent and Punish Torture *and* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

treaties 1.1, 1.2.1, 1.3.2, II, 2.2.1(c)(i), 2.2.1(d)-2.2.1(e), 2.4.1, 3.1, 3.2.1, 3.3.11, 3.5.3, 3.6.1

U

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 3.2.1

V

W

Y

Z

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APPENDICES

AMERICAN CONVENTION ON HUMAN RIGHTS

(Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969)

Preamble

The American states signatory to the present Convention,

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters,

Have agreed upon the following:

PART I - STATE OBLIGATIONS AND RIGHTS PROTECTED

CHAPTER I - GENERAL OBLIGATIONS

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, “person” means every human being.

Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

CHAPTER II - CIVIL AND POLITICAL RIGHTS

Article 3. Right to Juridical Personality

Every person has the right to recognition as a person before the law.

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Article 6. Freedom from Slavery

1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.
2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.
3. For the purposes of this article, the following do not constitute forced or compulsory labor:
 - a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work

or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;

- b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;
- c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or
- d. work or service that forms part of normal civic obligations.

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously estab-

lished by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
 - a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
 - b. prior notification in detail to the accused of the charges against him;
 - c. adequate time and means for the preparation of his defense;
 - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
 - e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
 - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
 - g. the right not to be compelled to be a witness against himself or to plead guilty; and
 - h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 9. Freedom from Ex Post Facto Laws

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall

not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Article 10. Right to Compensation

Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

Article 11. Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

Article 12. Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 14. Right of Reply

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

Article 15. Right of Assembly

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.

Article 16. Freedom of Association

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

Article 17. Rights of the Family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.
5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

Article 18. Right to a Name

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

Article 19. Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

Article 20. Right to Nationality

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Article 22. Freedom of Movement and Residence

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
2. Every person has the right to leave any country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal

freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

9. The collective expulsion of aliens is prohibited.

Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:
 - a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
 - b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
 - c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
 - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b. to develop the possibilities of judicial remedy; and
 - c. to ensure that the competent authorities shall enforce such remedies when granted.

CHAPTER III - ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

Article 26. Progressive Development

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

CHAPTER IV - SUSPENSION OF GUARANTEES, INTERPRETATION, AND APPLICATION

Article 27. Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

Article 28. Federal Clause

1. Where a State Party is constituted as a federal state, the national government of

such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.
3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized.

Article 29. Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Article 30. Scope of Restrictions

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

Article 31. Recognition of Other Rights

Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.

CHAPTER V - PERSONAL RESPONSIBILITIES

Article 32. Relationship between Duties and Rights

1. Every person has responsibilities to his family, his community, and mankind.
2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

PART II - MEANS OF PROTECTION

CHAPTER VI - COMPETENT ORGANS

Article 33

The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

- a. the Inter-American Commission on Human Rights, referred to as “The Commission;” and
- b. the Inter-American Court of Human Rights, referred to as “The Court.”

CHAPTER VII - INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Section 1. Organization

Article 34

The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights.

Article 35

The Commission shall represent all the member countries of the Organization of American States.

Article 36

1. The members of the Commission shall be elected in a personal capacity by the General Assembly of the Organization from a list of candidates proposed by the governments of the member states.
2. Each of those governments may propose up to three candidates, who may be nationals of the states proposing them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.

Article 37

1. The members of the Commission shall be elected for a term of four years and may be reelected only once, but the terms of three of the members chosen in the first election shall expire at the end of two years. Immediately following that election the General Assembly shall determine the names of those three members by lot.
2. No two nationals of the same state may be members of the Commission.

Article 38

Vacancies that may occur on the Commission for reasons other than the normal expiration of a term shall be filled by the Permanent Council of the Organization in accordance with the provisions of the Statute of the Commission.

Article 39

The Commission shall prepare its Statute, which it shall submit to the General Assembly for approval. It shall establish its own Regulations.

Article 40

Secretariat services for the Commission shall be furnished by the appropriate specialized unit of the General Secretariat of the Organization. This unit shall be provided with the resources required to accomplish the tasks assigned to it by the Commission.

Section 2. Functions

Article 41

The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- a. to develop an awareness of human rights among the peoples of America;

- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c. to prepare such studies or reports as it considers advisable in the performance of its duties;
- d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- g. to submit an annual report to the General Assembly of the Organization of American States.

Article 42

The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Article 43

The States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention.

Section 3. Competence

Article 44

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the

Commission containing denunciations or complaints of violation of this Convention by a State Party.

Article 45

1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.
2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.
3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.
4. Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization.

Article 46

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
 - a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
 - b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
 - c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and
 - d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.
2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Article 47

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

- a. any of the requirements indicated in Article 46 has not been met;
- b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;
- c. the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or
- d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

Section 4. Procedure

Article 48

1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:
 - a. If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.
 - b. After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed.

- c. The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.
 - d. 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.
 - e. The Commission may request the states concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned.
 - f. 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 this Convention.
2. However, 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.

Article 49

If a friendly settlement has been reached in accordance with paragraph 1.f of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to this Convention, and shall then be communicated to the Secretary General of the Organization of American States for publication. This report shall contain a brief statement of the facts and of the solution reached. If any party in the case so requests, the fullest possible information shall be provided to it.

Article 50

1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report.
2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.
3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.

Article 51

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.
2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.
3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

CHAPTER VIII - INTER-AMERICAN COURT OF HUMAN RIGHTS

Section 1. Organization

Article 52

1. The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.
2. No two judges may be nationals of the same state.

Article 53

1. The judges of the Court shall be elected by secret ballot by an absolute majority vote of the States Parties to the Convention, in the General Assembly of the Organization, from a panel of candidates proposed by those states.
2. Each of the States Parties may propose up to three candidates, nationals of the state that proposes them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.

Article 54

1. The judges of the Court shall be elected for a term of six years and may be reelected only once. The term of three of the judges chosen in the first election shall expire at the end of three years. Immediately after the election, the names of the three judges shall be determined by lot in the General Assembly.
2. A judge elected to replace a judge whose term has not expired shall complete the term of the latter.
3. The judges shall continue in office until the expiration of their term. However, they shall continue to serve with regard to cases that they have begun to hear and that are still pending, for which purposes they shall not be replaced by the newly elected judges.

Article 55

1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.
2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an ad hoc judge.
3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an ad hoc judge.
4. An ad hoc judge shall possess the qualifications indicated in Article 52.
5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

Article 56

Five judges shall constitute a quorum for the transaction of business by the Court.

Article 57

The Commission shall appear in all cases before the Court.

Article 58

1. The Court shall have its seat at the place determined by the States Parties to the Convention in the General Assembly of the Organization; however, it may convene in the territory of any member state of the Organization of American States when

a majority of the Court considers it desirable, and with the prior consent of the state concerned. The seat of the Court may be changed by the States Parties to the Convention in the General Assembly by a two-thirds vote.

2. The Court shall appoint its own Secretary.
3. The Secretary shall have his office at the place where the Court has its seat and shall attend the meetings that the Court may hold away from its seat.

Article 59

The Court shall establish its Secretariat, which shall function under the direction of the Secretary of the Court, in accordance with the administrative standards of the General Secretariat of the Organization in all respects not incompatible with the independence of the Court. The staff of the Court's Secretariat shall be appointed by the Secretary General of the Organization, in consultation with the Secretary of the Court.

Article 60

The Court shall draw up its Statute which it shall submit to the General Assembly for approval. It shall adopt its own Rules of Procedure.

Section 2. Jurisdiction and Functions

Article 61

1. Only the States Parties and the Commission shall have the right to submit a case to the Court.
2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed.

Article 62

1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

Article 63

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

Article 64

1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

Article 65

To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.

Section 3. Procedure

Article 66

1. Reasons shall be given for the judgment of the Court.

2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.

Article 67

The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

Article 68

1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.
2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

Article 69

The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Parties to the Convention.

CHAPTER IX - COMMON PROVISIONS

Article 70

1. The judges of the Court and the members of the Commission shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law. During the exercise of their official function they shall, in addition, enjoy the diplomatic privileges necessary for the performance of their duties.
2. At no time shall the judges of the Court or the members of the Commission be held liable for any decisions or opinions issued in the exercise of their functions.

Article 71

The position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of such judge or member, as determined in the respective statutes.

Article 72

The judges of the Court and the members of the Commission shall receive emoluments and travel allowances in the form and under the conditions set forth in their statutes, with due regard for the importance and independence of their office. Such emoluments and travel allowances shall be determined in the budget of the Organization of American States, which shall also include the expenses of the Court and its Secretariat. To this end, the Court shall draw up its own budget and submit it for approval to the General Assembly through the General Secretariat. The latter may not introduce any changes in it.

Article 73

The General Assembly may, only at the request of the Commission or the Court, as the case may be, determine sanctions to be applied against members of the Commission or judges of the Court when there are justifiable grounds for such action as set forth in the respective statutes. A vote of a two-thirds majority of the member states of the Organization shall be required for a decision in the case of members of the Commission and, in the case of judges of the Court, a two-thirds majority vote of the States Parties to the Convention shall also be required.

PART III - GENERAL AND TRANSITORY PROVISIONS

CHAPTER X - SIGNATURE, RATIFICATION, RESERVATIONS, AMENDMENTS, PROTOCOLS, AND DENUNCIATION

Article 74

1. This Convention shall be open for signature and ratification by or adherence of any member state of the Organization of American States.
2. Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.
3. The Secretary General shall inform all member states of the Organization of the entry into force of the Convention.

Article 75

This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.

Article 76

1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.
2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

Article 77

1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.
2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it.

Article 78

1. The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties.
2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this 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.

CHAPTER XI - TRANSITORY PROVISIONS

Section 1. Inter-American Commission on Human Rights

Article 79

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each member state of the Organization to present, within ninety days, its candidates for membership on the Inter-American Commission on Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented, and transmit it to the member states of the Organization at least thirty days prior to the next session of the General Assembly.

Article 80

The members of the Commission shall be elected by secret ballot of the General Assembly from the list of candidates referred to in Article 79. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the member states shall be declared elected. Should it become necessary to have several ballots in order to elect all the members of the Commission, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the General Assembly.

Section 2. Inter-American Court of Human Rights

Article 81

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each State Party to present, within ninety days, its candidates for membership on the Inter-American Court of Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented and transmit it to the States Parties at least thirty days prior to the next session of the General Assembly.

Article 82

The judges of the Court shall be elected from the list of candidates referred to in Article 81, by secret ballot of the States Parties to the Convention in the General Assembly. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties shall be declared elected. Should it become necessary to have several ballots in order to elect all the judges of the Court, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the States Parties.

AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

*(Approved by the Ninth International Conference of American States,
Bogotá, Colombia, 1948)*

WHEREAS:

The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness;

The American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality;

The international protection of the rights of man should be the principal guide of an evolving American law;

The affirmation of essential human rights by the American States together with the guarantees given by the internal regimes of the states establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable,

The Ninth International Conference of American States

AGREES:

To adopt the following

AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

Preamble

All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.

The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.

Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis.

Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources.

Since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.

And, since moral conduct constitutes the noblest flowering of culture, it is the duty of every man always to hold it in high respect.

CHAPTER ONE

Rights

Article I. Every human being has the right to life, liberty and the security of his person.

Right to life, liberty and personal security.

Article II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Right to equality before law.

Article III. Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.

Right to religious freedom and worship.

Article IV. Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

Right to freedom of investigation, opinion, expression and dissemination.

Article V. Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

Right to protection of honor, personal reputation, and private and family life.

Article VI. Every person has the right to establish a family, the basic element of society, and to receive protection therefor.

Right to a family and to protection thereof.

Article VII. All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

Right to protection for mothers and children.

Article VIII. Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.

Right to residence and movement.

Article IX. Every person has the right to the inviolability of his home.

Right to inviolability of the home.

Article X. Every person has the right to the inviolability and transmission of his correspondence.

Right to the inviolability and transmission of correspondence

Article XI. Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

Right to the preservation of health and to well-being.

Article XII. Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.

Right to education

Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.

The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide.

Every person has the right to receive, free, at least a primary education.

Article XIII. Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

Right to the benefits of culture.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

Article XIV. Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit.

Right to work and to fair remuneration.

Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.

Article XV. Every person has the right to leisure time, to wholesome recreation, and to the opportunity for advantageous use of his free time to his spiritual, cultural and physical benefit.

Right to leisure time and to the use thereof.

Article XVI. Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.

Right to social security.

Article XVII. Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

Right to recognition of juridical personality and civil rights.

Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Right to a fair trial.

Article XIX. Every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.

Right to nationality.

Article XX. Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

Right to vote and to participate in government.

Article XXI. Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.

Right of assembly.

Article XXI. Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.

Right of assembly.

Article XXIII. Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

Right to property.

Article XXIV. Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

Right of petition.

Article XXV. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

Right of protection from arbitrary arrest.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

Article XXVI. Every accused person is presumed to be innocent until proved guilty.

Right to due process of law.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

Article XXVII. Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

Right of asylum.

Article XXVIII. The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

Scope of the rights of man.

CHAPTER TWO

Duties

Article XXIX. It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality.

Duties to society.

Article XXX. It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it.

Duties toward children and parents.

Article XXXI. It is the duty of every person to acquire at least an elementary education.

Duty to receive instruction.

Article XXXII. It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.

Duty to vote.

Article XXXIII. It is the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be.

Duty to obey the law

Article XXXIV. It is the duty of every able-bodied person to render whatever civil and military service his country may require for its defense and preservation, and, in case of public disaster, to render such services as may be in his power.

Duty to serve the community and the nation.

It is likewise his duty to hold any public office to which he may be elected by popular vote in the state of which he is a national.

Article XXXV. It is the duty of every person to cooperate with the state and the community with respect to social security and welfare, in accordance with his ability and with existing circumstances.

Duties with respect to social security and welfare.

Article XXXVI. It is the duty of every person to pay the taxes established by law for the support of public services.

Duty to pay taxes.

Article XXXVII. It is the duty of every person to work, as far as his capacity and possibilities permit, in order to obtain the means of livelihood or to benefit his community.

Duty to work.

Article XXXVIII. It is the duty of every person to refrain from taking part in political activities that, according to law, are reserved exclusively to the citizens of the state in which he is an alien.

Duty to refrain from political activities in a foreign country.

STATUTE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Approved by Resolution N° 447 taken by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz, Bolivia, October 1979

I. NATURE AND PURPOSES

Article 1

1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.
2. For the purposes of the present Statute, human rights are understood to be:
 - a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;
 - b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

II. MEMBERSHIP AND STRUCTURE

Article 2

1. The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights.
2. The Commission shall represent all the member states of the Organization.

Article 3

1. The members of the Commission shall be elected in a personal capacity by the General Assembly of the Organization from a list of candidates proposed by the governments of the member states.

2. Each government may propose up to three candidates, who may be nationals of the state proposing them or of any other member state of the Organization. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the proposing state.

Article 4

1. At least six months prior to completion of the terms of office for which the members of the Commission were elected,^[1] the Secretary General shall request, in writing, each member state of the Organization to present its candidates within 90 days.
2. The Secretary General shall prepare a list in alphabetical order of the candidates nominated, and shall transmit it to the member states of the Organization at least thirty days prior to the next General Assembly.

Article 5

The members of the Commission shall be elected by secret ballot of the General Assembly from the list of candidates referred to in Article 4(2). The candidates who obtain the largest number of votes and an absolute majority of the votes of the member states shall be declared elected. Should it become necessary to hold several ballots to elect all the members of the Commission, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the General Assembly.

Article 6

The members of the Commission shall be elected for a term of four years and may be reelected only once. Their terms of office shall begin on January 1 of the year following the year in which they are elected.

Article 7

No two nationals of the same state may be members of the Commission.

Article 8

1. Membership on the Inter-American Commission on Human Rights is incompatible with engaging in other functions that might affect the independence or impartiality of the member or the dignity or prestige of his post on the Commission.
2. The Commission shall consider any case that may arise regarding incompatibility in accordance with the provisions of the first paragraph of this Article, and in accordance with the procedures provided by its Regulations.

If the Commission decides, by an affirmative vote of a least five of its members,

that a case of incompatibility exists, it will submit the case, with its background, to the General Assembly for decision.

3. A declaration of incompatibility by the General Assembly shall be adopted by a majority of two thirds of the member states of the Organization and shall occasion the immediate removal of the member of the Commission from his post, but it shall not invalidate any action in which he may have participated.

Article 9

The duties of the members of the Commission are:

1. Except when justifiably prevented, to attend the regular and special meetings the Commission holds at its permanent headquarters or in any other place to which it may have decided to move temporarily.
2. To serve, except when justifiably prevented, on the special committees which the Commission may form to conduct on-site observations, or to perform any other duties within their ambit.
3. To maintain absolute secrecy about all matters which the Commission deems confidential.
4. To conduct themselves in their public and private life as befits the high moral authority of the office and the importance of the mission entrusted to the Commission.

Article 10

1. If a member commits a serious violation of any of the duties referred to in Article 9, the Commission, on the affirmative vote of five of its members, shall submit the case to the General Assembly of the Organization, which shall decide whether he should be removed from office.
2. The Commission shall hear the member in question before taking its decision.

Article 11

1. When a vacancy occurs for reasons other than the normal completion of a member's term of office, the Chairman of the Commission shall immediately notify the Secretary General of the Organization, who shall in turn inform the member states of the Organization.
2. In order to fill vacancies, each government may propose a candidate within a period of 30 days from the date of receipt of the Secretary General's communication that a vacancy has occurred.
3. The Secretary General shall prepare an alphabetical list of the candidates and shall

transmit it to the Permanent Council of the Organization, which shall fill the vacancy.

4. When the term of office is due to expire within six months following the date on which a vacancy occurs, the vacancy shall not be filled.

Article 12

1. In those member states of the Organization that are Parties to the American Convention on Human Rights, the members of the Commission shall enjoy, from the time of their election and throughout their term of office, such immunities as are granted to diplomatic agents under international law. While in office, they shall also enjoy the diplomatic privileges required for the performance of their duties.
2. In those member states of the Organization that are not Parties to the American Convention on Human Rights, the members of the Commission shall enjoy the privileges and immunities pertaining to their posts that are required for them to perform their duties with independence.
3. The system of privileges and immunities of the members of the Commission may be regulated or supplemented by multilateral or bilateral agreements between the Organization and the member states.

Article 13

The members of the Commission shall receive travel allowances and per diem and fees, as appropriate, for their participation in the meetings of the Commission or in other functions which the Commission, in accordance with its Regulations, entrusts to them, individually or collectively. Such travel and per diem allowances and fees shall be included in the budget of the Organization, and their amounts and conditions shall be determined by the General Assembly.

Article 14

1. The Commission shall have a Chairman, a First Vice-Chairman and a Second Vice-Chairman, who shall be elected by an absolute majority of its members for a period of one year; they may be re-elected only once in each four-year period.
2. The Chairman and the two Vice-Chairmen shall be the officers of the Commission, and their functions shall be set forth in the Regulations.

Article 15

The Chairman of the Commission may go to the Commission's headquarters and remain there for such time as may be necessary for the performance of his duties.

III. HEADQUARTERS AND MEETINGS

Article 16

1. The headquarters of the Commission shall be in Washington, D.C.
2. The Commission may move to and meet in the territory of any American State when it so decides by an absolute majority of votes, and with the consent, or at the invitation of the government concerned.
3. The Commission shall meet in regular and special sessions, in conformity with the provisions of the Regulations.

Article 17

1. An absolute majority of the members of the Commission shall constitute a quorum.
2. In regard to those States that are Parties to the Convention, decisions shall be taken by an absolute majority vote of the members of the Commission in those cases established by the American Convention on Human Rights and the present Statute. In other cases, an absolute majority of the members present shall be required.
3. In regard to those States that are not Parties to the Convention, decisions shall be taken by an absolute majority vote of the members of the Commission, except in matters of procedure, in which case, the decisions shall be taken by simple majority.

IV. FUNCTIONS AND POWERS

Article 18

The Commission shall have the following powers with respect to the member states of the Organization of American States:

- a. to develop an awareness of human rights among the peoples of the Americas;
- b. to make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights;
- c. to prepare such studies or reports as it considers advisable for the performance of its duties;
- d. to request that the governments of the states provide it with reports on measures they adopt in matters of human rights;

- e. to respond to inquiries made by any member state through the General Secretariat of the Organization on matters related to human rights in the state and, within its possibilities, to provide those states with the advisory services they request;
- f. to submit an annual report to the General Assembly of the Organization, in which due account shall be taken of the legal regime applicable to those States Parties to the American Convention on Human Rights and of that system applicable to those that are not Parties;
- g. to conduct on-site observations in a state, with the consent or at the invitation of the government in question; and
- h. to submit the program-budget of the Commission to the Secretary General, so that he may present it to the General Assembly.

Article 19

With respect to the States Parties to the American Convention on Human Rights, the Commission shall discharge its duties in conformity with the powers granted under the Convention and in the present Statute, and shall have the following powers in addition to those designated in Article 18:

- a. to act on petitions and other communications, pursuant to the provisions of Articles 44 to 51 of the Convention;
- b. to appear before the Inter-American Court of Human Rights in cases provided for in the Convention;
- c. to request the Inter-American Court of Human Rights to take such provisional measures as it considers appropriate in serious and urgent cases which have not yet been submitted to it for consideration, whenever this becomes necessary to prevent irreparable injury to persons;
- d. to consult the Court on the interpretation of the American Convention on Human Rights or of other treaties concerning the protection of human rights in the American states;
- e. to submit additional draft protocols to the American Convention on Human Rights to the General Assembly, in order to progressively include other rights and freedoms under the system of protection of the Convention, and
- f. to submit to the General Assembly, through the Secretary General, proposed amendments to the American Convention on Human Rights, for such action as the General Assembly deems appropriate.

Article 20

In relation to those member states of the Organization that are not parties to the

American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18:

- a. to pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man;
- b. to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and,
- c. to verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

V. SECRETARIAT

Article 21

1. The Secretariat services of the Commission shall be provided by a specialized administrative unit under the direction of an Executive Secretary. This unit shall be provided with the resources and staff required to accomplish the tasks the Commission may assign to it.
2. The Executive Secretary, who shall be a person of high moral character and recognized competence in the field of human rights, shall be responsible for the work of the Secretariat and shall assist the Commission in the performance of its duties in accordance with the Regulations.
3. The Executive Secretary shall be appointed by the Secretary General of the Organization, in consultation with the Commission. Furthermore, for the Secretary General to be able to remove the Executive Secretary, he shall consult with the Commission and inform its members of the reasons for his decision.

VI. STATUTE AND REGULATIONS

Article 22

1. The present Statute may be amended by the General Assembly.
2. The Commission shall prepare and adopt its own Regulations, in accordance with the present Statute.

Article 23

1. In accordance with the provisions of Articles 44 to 51 of the American Convention on Human Rights, the Regulations of the Commission shall determine the procedure to be followed in cases of petitions or communications alleging violation of any of the rights guaranteed by the Convention, and imputing such violation to any State Party to the Convention.
2. If the friendly settlement referred to in Articles 44-51 of the Convention is not reached, the Commission shall draft, within 180 days, the report required by Article 50 of the Convention.

Article 24

1. The Regulations shall establish the procedure to be followed in cases of communications containing accusations or complaints of violations of human rights imputable to States that are not Parties to the American Convention on Human Rights.
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, with the modifications and amendments introduced by Resolution XXII of the Second Special Inter-American Conference, and by the Council of the Organization at its meeting held on April 24, 1968, taking into account resolutions 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.

VII. TRANSITORY PROVISIONS

Article 25

Until the Commission adopts its new Regulations, the current Regulations (OEA/Ser.L/VII. 17, doc. 26) shall apply to all the member states of the Organization.

Article 26

1. The present Statute shall enter into effect 30 days after its approval by the General Assembly.
2. The Secretary General shall order immediate publication of the Statute, and shall give it the widest possible distribution.

STATUTE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz, Bolivia, October 1979 (Resolution N° 448)

CHAPTER I

GENERAL PROVISIONS

Article 1. Nature and Legal Organization

The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.

Article 2. Jurisdiction

The Court shall exercise adjudicatory and advisory jurisdiction:

1. Its adjudicatory jurisdiction shall be governed by the provisions of Articles 61, 62 and 63 of the Convention, and
2. Its advisory jurisdiction shall be governed by the provisions of Article 64 of the Convention.

Article 3. Seat

1. The seat of the Court shall be San José, Costa Rica; however, the Court may convene in any member state of the Organization of American States (OAS) when a majority of the Court considers it desirable, and with the prior consent of the State concerned.
2. The seat of the Court may be changed by a vote of two-thirds of the States Parties to the Convention, in the OAS General Assembly.

CHAPTER II

COMPOSITION OF THE COURT

Article 4. Composition

1. The Court shall consist of seven judges, nationals of the member states of the OAS, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them as candidates.
2. No two judges may be nationals of the same State.

Article 5. Judicial Terms

1. The judges of the Court shall be elected for a term of six years and may be reelected only once. A judge elected to replace a judge whose term has not expired shall complete that term.
2. The terms of office of the judges shall run from January 1 of the year following that of their election to December 31 of the year in which their terms expire.
3. The judges shall serve until the end of their terms. Nevertheless, they shall continue to hear the cases they have begun to hear and that are still pending, and shall not be replaced by the newly elected judges in the handling of those cases.

Article 6. Election of the Judges - Date

1. Election of judges shall take place, insofar as possible, during the session of the OAS General Assembly immediately prior to the expiration of the term of the outgoing judges.
2. Vacancies on the Court caused by death, permanent disability, resignation or dismissal of judges shall, insofar as possible, be filled at the next session of the OAS General Assembly. However, an election shall not be necessary when a vacancy occurs within six months of the expiration of a term.
3. If necessary in order to preserve a quorum of the Court, the States Parties to the Convention, at a meeting of the OAS Permanent Council, and at the request of the President of the Court, shall appoint one or more interim judges who shall serve until such time as they are replaced by elected judges.

Article 7. Candidates

1. Judges shall be elected by the States Parties to the Convention, at the OAS General Assembly, from a list of candidates nominated by those States.

2. Each State Party may nominate up to three candidates, nationals of the state that proposes them or of any other member state of the OAS.
3. When a slate of three is proposed, at least one of the candidates must be a national of a state other than the nominating state.

Article 8. Election - Preliminary Procedures

1. Six months prior to expiration of the terms to which the judges of the Court were elected, the Secretary General of the OAS shall address a written request to each State Party to the Convention that it nominate its candidates within the next ninety days.
2. The Secretary General of the OAS shall draw up an alphabetical list of the candidates nominated, and shall forward it to the States Parties, if possible, at least thirty days before the next session of the OAS General Assembly.
3. In the case of vacancies on the Court, as well as in cases of the death or permanent disability of a candidate, the aforementioned time periods shall be shortened to a period that the Secretary General of the OAS deems reasonable.

Article 9. Voting

1. The judges shall be elected by secret ballot and by an absolute majority of the States Parties to the Convention, from among the candidates referred to in Article 7 of the present Statute.
2. The candidates who obtain the largest number of votes and an absolute majority shall be declared elected. Should several ballots be necessary, those candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the States Parties.

Article 10. Ad Hoc Judges

1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.
2. If one of the judges called upon to hear a case is a national of one of the States Parties to the case, any other State Party to the case may appoint a person to serve on the Court as an ad hoc judge.
3. If among the judges called upon to hear a case, none is a national of the States Parties to the case, each of the latter may appoint an ad hoc judge. Should several States have the same interest in the case, they shall be regarded as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.
4. The right of any State to appoint an ad hoc judge shall be considered relinquished if the State should fail to do so within thirty days following the written request from the President of the Court.

5. The provisions of Articles 4, 11, 15, 16, 18, 19 and 20 of the present Statute shall apply to ad hoc judges.

Article 11. Oath

1. Upon assuming office, each judge shall take the following oath or make the following solemn declaration: “I swear” - or “I solemnly declare” - “that I shall exercise my functions as a judge honorably, independently and impartially and that I shall keep secret all deliberations.”
2. The oath shall be administered by the President of the Court and, if possible, in the presence of the other judges.

CHAPTER III

STRUCTURE OF THE COURT

Article 12. Presidency

1. The Court shall elect from among its members a President and Vice-President who shall serve for a period of two years; they may be reelected.
2. The President shall direct the work of the Court, represent it, regulate the disposition of matters brought before the Court, and preside over its sessions.
3. The Vice-President shall take the place of the President in the latter’s temporary absence, or if the office of the President becomes vacant. In the latter case, the Court shall elect a new Vice-President to serve out the term of the previous Vice-President.
4. In the absence of the President and the Vice-President, their duties shall be assumed by other judges, following the order of precedence established in Article 13 of the present Statute.

Article 13. Precedence

1. Elected judges shall take precedence after the President and Vice-President according to their seniority in office.
2. Judges having the same seniority in office shall take precedence according to age.
3. Ad hoc and interim judges shall take precedence after the elected judges, according to age. However, if an ad hoc or interim judge has previously served as an elected judge, he shall have precedence over any other ad hoc or interim judge.

Article 14. Secretariat

1. The Secretariat of the Court shall function under the immediate authority of the Secretary, in accordance with the administrative standards of the OAS General Secretariat, in all matters that are not incompatible with the independence of the Court.
2. The Secretary shall be appointed by the Court. He shall be a full-time employee serving in a position of trust to the Court, shall have his office at the seat of the Court and shall attend any meetings that the Court holds away from its seat.
3. There shall be an Assistant Secretary who shall assist the Secretary in his duties and shall replace him in his temporary absence.
4. The Staff of the Secretariat shall be appointed by the Secretary General of the OAS, in consultation with the Secretary of the Court.

CHAPTER IV

RIGHTS, DUTIES AND RESPONSIBILITIES

Article 15. Privileges and Immunities

1. The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents under international law. During the exercise of their functions, they shall, in addition, enjoy the diplomatic privileges necessary for the performance of their duties.
2. At no time shall the judges of the Court be held liable for any decisions or opinions issued in the exercise of their functions.
3. The Court itself and its staff shall enjoy the privileges and immunities provided for in the Agreement on Privileges and Immunities of the Organization of American States, of May 15, 1949, mutatis mutandis, taking into account the importance and independence of the Court.
4. The provision of paragraphs 1, 2 and 3 of this article shall apply to the States Parties to the Convention. They shall also apply to such other member states of the OAS as expressly accept them, either in general or for specific cases.
5. The system of privileges and immunities of the judges of the Court and of its staff may be regulated or supplemented by multilateral or bilateral agreements between the Court, the OAS and its member states.

Article 16. Service

1. The judges shall remain at the disposal of the Court, and shall travel to the seat of

the Court or to the place where the Court is holding its sessions as often and for as long a time as may be necessary, as established in the Regulations.

2. The President shall render his service on a permanent basis.

Article 17. Emoluments

1. The emoluments of the President and the judges of the Court shall be set in accordance with the obligations and incompatibilities imposed on them by Articles 16 and 18, and bearing in mind the importance and independence of their functions.
2. The ad hoc judges shall receive the emoluments established by Regulations, within the limits of the Court's budget.
3. The judges shall also receive per diem and travel allowances, when appropriate.

Article 18. Incompatibilities

1. The position of judge of the Inter-American Court of Human Rights is incompatible with the following positions and activities:
 - a. Members or high-ranking officials of the executive branch of government, except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not Chiefs of Missions to the OAS or to any of its member states;
 - b. Officials of international organizations;
 - c. Any others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office.
2. In case of doubt as to incompatibility, the Court shall decide. If the incompatibility is not resolved, the provisions of Article 73 of the Convention and Article 20(2) of the present Statute shall apply.
3. Incompatibilities may lead only to dismissal of the judge and the imposition of applicable liabilities, but shall not invalidate the acts and decisions in which the judge in question participated.

Article 19. Disqualification

1. Judges may not take part in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity.

2. If a judge is disqualified from hearing a case or for some other appropriate reason considers that he should not take part in a specific matter, he shall advise the President of his disqualification. Should the latter disagree, the Court shall decide.
3. If the President considers that a judge has cause for disqualification or for some other pertinent reason should not take part in a given matter, he shall advise him to that effect. Should the judge in question disagree, the Court shall decide.
4. When one or more judges are disqualified pursuant to this article, the President may request the States Parties to the Convention, in a meeting of the OAS Permanent Council, to appoint interim judges to replace them.

Article 20. Disciplinary Regime

1. In the performance of their duties and at all other times, the judges and staff of the Court shall conduct themselves in a manner that is in keeping with the office of those who perform an international judicial function. They shall be answerable to the Court for their conduct, as well as for any violation, act of negligence or omission committed in the exercise of their functions.
2. The OAS General Assembly shall have disciplinary authority over the judges, but may exercise that authority only at the request of the Court itself, composed for this purpose of the remaining judges. The Court shall inform the General Assembly of the reasons for its request.
3. Disciplinary authority over the Secretary shall lie with the Court, and over the rest of the staff, with the Secretary, who shall exercise that authority with the approval of the President.
4. The Court shall issue disciplinary rules, subject to the administrative regulations of the OAS General Secretariat insofar as they may be applicable in accordance with Article 59 of the Convention.

Article 21. Resignation - Incapacity

1. Any resignation from the Court shall be submitted in writing to the President of the Court. The resignation shall not become effective until the Court has accepted it.
2. The Court shall decide whether a judge is incapable of performing his functions.
3. The President of the Court shall notify the Secretary General of the OAS of the acceptance of a resignation or a determination of incapacity, for appropriate action.

CHAPTER V

THE WORKINGS OF THE COURT

Article 22. Sessions

1. The Court shall hold regular and special sessions.
2. Regular sessions shall be held as determined by the Regulations of the Court.
3. Special sessions shall be convoked by the President or at the request of a majority of the judges.

Article 23. Quorum

1. The quorum for deliberations by the Court shall be five judges.
2. Decisions of the Court shall be taken by a majority vote of the judges present.
3. In the event of a tie, the President shall cast the deciding vote.

Article 24. Hearings, Deliberations, Decisions

1. The hearings shall be public, unless the Court, in exceptional circumstances, decides otherwise.
2. The Court shall deliberate in private. Its deliberations shall remain secret, unless the Court decides otherwise.
3. The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate.

Article 25. Rules and Regulations

1. The Court shall draw up its Rules of Procedure.
2. The Rules of Procedure may delegate to the President or to Committees of the Court authority to carry out certain parts of the legal proceedings, with the exception of issuing final rulings or advisory opinions. Rulings or decisions issued by the President or the Committees of the Court that are not purely procedural in nature may be appealed before the full Court.
3. The Court shall also draw up its own Regulations.

Article 26. Budget, Financial System

1. The Court shall draw up its own budget and shall submit it for approval to the General Assembly of the OAS, through the General Secretariat. The latter may not introduce any changes in it.
2. The Court shall administer its own budget.

CHAPTER VI

RELATIONS WITH GOVERNMENTS AND ORGANIZATIONS

Article 27. Relations with the Host Country, Governments and Organizations

1. The relations of the Court with the host country shall be governed through a headquarters agreement. The seat of the Court shall be international in nature.
2. The relations of the Court with governments, with the OAS and its organs, agencies and entities and with other international governmental organizations involved in promoting and defending human rights shall be governed through special agreements.

Article 28. Relations with the Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights shall appear as a party before the Court in all cases within the adjudicatory jurisdiction of the Court, pursuant to Article 2(1) of the present Statute.

Article 29. Agreements of Cooperation

1. The Court may enter into agreements of cooperation with such nonprofit institutions as law schools, bar associations, courts, academies and educational or research institutions dealing with related disciplines in order to obtain their cooperation and to strengthen and promote the juridical and institutional principles of the Convention in general and of the Court in particular.
2. The Court shall include an account of such agreements and their results in its Annual Report to the OAS General Assembly.

Article 30. Report to the OAS General Assembly

The Court shall submit a report on its work of the previous year to each regular session of the OAS General Assembly. It shall indicate those cases in which a State has failed to comply with the Court's ruling. It may also submit to the OAS General Assembly proposals or recommendations on ways to improve the inter-American system of human rights, insofar as they concern the work of the Court.

CHAPTER VII

FINAL PROVISIONS

Article 31. Amendments to the Statute

The present Statute may be amended by the OAS General Assembly, at the initiative of any member state or of the Court itself.

Article 32. Entry into Force

The present Statute shall enter into force on January 1, 1980.

**RULES OF PROCEDURE OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

(Approved by the Commission at its 109th Special Session held from December 4 to 8, 2000, amended at its 116th regular period of sessions, held from October 7 to 25, 2002 and at its 118th regular period of sessions, held from October 7 to 24, 2003).

**TITLE I
ORGANIZATION OF THE COMMISSION**

**CHAPTER I
NATURE AND COMPOSITION**

Article 1. Nature and Composition

1. The Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States whose principal functions are to promote the observance and defense of human rights and to serve as an advisory body to the Organization in this area.
2. The Commission represents all the Member States of the Organization.
3. The Commission is composed of seven members elected in their individual capacity by the General Assembly of the Organization. They shall be persons of high moral character and recognized competence in the field of human rights.

**CHAPTER II
MEMBERSHIP**

Article 2. Duration of the Term of Office

1. The members of the Commission shall be elected for four years and may be reelected only once.

2. In the event that new members of the Commission have not been elected to replace those completing their term of office, the latter shall continue to serve until the new members are elected.

Article 3. Precedence

The members of the Commission shall follow the President and Vice-Presidents in order of precedence according to their seniority in office. When there are two or more members with equal seniority, precedence shall be determined according to age.

Article 4. Incompatibility

1. The position of member of the Inter-American Commission on Human Rights is incompatible with the exercise of activities which could affect the independence or impartiality of the member, or the dignity or prestige of the office. Upon taking office, members shall undertake not to represent victims or their relatives, or States, in precautionary measures, petitions and individual cases before the IACHR for a period of two years, counted from the date of the end of their term as members of the Commission.
2. The Commission, with the affirmative vote of at least five of its members, shall decide whether a situation of incompatibility exists.
3. The Commission, prior to taking a decision, shall hear the member whose activities are claimed to be incompatible.
4. The decision with respect to the incompatibility, together with all the background information, shall be sent to the General Assembly, through the Secretary General of the Organization, for the purposes set forth in Article 8(3) of the Commission's Statute.

Article 5. Resignation

The resignation of a member of the Commission shall be submitted to the President of the Commission in writing. The President shall immediately notify the Secretary General of the OAS for the appropriate purposes.

CHAPTER III

BOARD OF OFFICERS OF THE COMMISSION

Article 6. Composition and Functions

The Commission shall have as its board of officers a President, a First Vice-President and a Second Vice-President, who shall perform the functions set forth in these Rules of Procedure.

Article 7. Elections

1. Only members present shall participate in the election of each of the officers referred to in the preceding article.
2. Elections shall be by secret ballot. However, with the unanimous consent of the members present, the Commission may decide on another procedure.
3. The affirmative vote of an absolute majority of the members of the Commission shall be required for election to any of the positions referred to in Article 6.
4. Should it be necessary to hold more than one ballot for election to any of these positions, the names receiving the lowest number of votes shall be eliminated successively.
5. Elections shall be held on the first day of the Commission's first session of the calendar year.

Article 8. Duration of Term of Officers

1. The term of office of the officers is one year. The term runs from the date of their election until the elections held the following year for the new board, pursuant to Article 7, paragraph 5. The members of the board of officers may be re-elected to their respective positions only once during each four-year period.
2. In the event that the term of office of a Commission member expires, and he or she is President or Vice-President, the provisions of Article 9, paragraphs 2 and 3 of these Rules of Procedure shall apply.

Article 9. Resignation, Vacancy and Replacements

1. If a member of the board of officers resigns from that position or ceases to be a member of the Commission, the Commission shall fill the position at the next period of sessions for the remainder of the term of office.
2. The First Vice-President shall serve as President until the Commission elects a new President under the provisions of paragraph 1 of this article.
3. In addition, the First Vice-President shall replace the President if the latter is temporarily unable to perform his or her duties. In the event of the absence or disability of the First Vice-President, or if that position is vacant, the Second Vice-President shall serve as President. In the event of the absence or disability of the Second Vice-President, the member with the greatest seniority according to Article 3 shall serve as President.

Article 10. Powers of the President

1. The powers of the President shall be:
 - a. to represent the Commission before the other organs of the Organization and other institutions;
 - b. to convoke sessions of the Commission in accordance with the Statute and these Rules of Procedure;
 - c. to preside over sessions of the Commission and submit to it for consideration all matters appearing on the agenda of the work program approved for the corresponding session; to decide the points of order raised during the deliberations; and to submit matters to a vote in accordance with the applicable provisions of these Rules of Procedure;
 - d. to give the floor to the members in the order in which they have requested it;
 - e. to promote the work of the Commission and oversee compliance with its program budget;
 - f. to present a written report to the Commission at the beginning of its period of sessions on what he or she has done during its recesses to carry out the functions assigned to him or her by the Statute and these Rules of Procedure;
 - g. to seek compliance with the decisions of the Commission;
 - h. to attend the meetings of the General Assembly of the OAS and other activities related to the promotion and protection of human rights;
 - i. to travel to the headquarters of the Commission and remain there for as long as he or she considers necessary to carry out his or her functions;
 - j. to designate special committees, ad hoc committees and subcommittees composed of several members to carry out any mandate within his or her area of competence; and,
 - k. to perform any other functions that may be conferred upon him or her in these Rules of Procedure or other tasks entrusted to him or her by the Commission.
2. The President may delegate to one of the Vice-Presidents or to another member of the Commission the powers specified in paragraphs (a), (h) and (k).

CHAPTER IV

EXECUTIVE SECRETARIAT

Article 11. Composition

The Executive Secretariat of the Commission shall be composed of an Executive Secretary and at least one Assistant Executive Secretary, with the professional, technical and administrative staff needed to carry out its activities.

Article 12. Powers of the Executive Secretary

1. The powers of the Executive Secretary shall be:
 - a. to direct, plan, and coordinate the work of the Executive Secretariat;
 - b. to prepare, in consultation with the President, the draft program-budget of the Commission, which shall be governed by the budgetary provisions in force for the OAS, and with respect to which he or she shall report to the Commission;
 - c. to prepare the draft work program for each session in consultation with the President;
 - d. advise the President and members of the Commission in the performance of their duties;
 - e. to present a written report to the Commission at the beginning of each period of sessions on the activities of the Secretariat since the preceding period of sessions, and on any general matters that may be of interest to the Commission; and,
 - f. to implement the decisions entrusted to him or her by the Commission or its President.
2. The Assistant Executive Secretary shall replace the Executive Secretary in the event of his or her absence or disability. In the absence or disability of both, the Executive Secretary or the Assistant Executive Secretary, as the case may be, shall designate one of the specialists of the Executive Secretariat as a temporary replacement.
3. The Executive Secretary, Assistant Executive Secretary, and staff of the Executive Secretariat must observe the strictest discretion in all matters the Commission considers confidential. Upon taking office, the Executive Secretary shall undertake not to represent victims or their relatives, or States, in precautionary measures, petitions, or individual cases before the IACHR for a period of two years, counted from the time he or she ceases to discharge the functions of Executive Secretary.

Article 13. Functions of the Executive Secretariat

The Executive Secretariat shall prepare the draft reports, resolutions, studies and any other work entrusted to it by the Commission or by the President. In addition, it shall receive and process the correspondence, petitions and communications addressed to the Commission. The Executive Secretariat may also request that interested parties provide any information it deems relevant, in accordance with the provisions of these Rules of Procedure.

CHAPTER V

FUNCTIONING OF THE COMMISSION

Article 14. Periods of Sessions

1. The Commission shall hold at least two regular periods of sessions per year for the duration previously determined by it and as many special sessions as it deems necessary. Prior to the conclusion of each period of sessions, the date and place of the next period shall be determined.
2. The sessions of the Commission shall be held at its headquarters. However, the Commission may decide to meet elsewhere, pursuant to the vote of an absolute majority of its members and with the consent or at the invitation of the State concerned.
3. Each period of sessions shall consist of the number of sessions necessary to carry out its activities. The sessions shall be confidential, unless the Commission determines otherwise.
4. Any member who because of illness or for any other serious reason is unable to attend all or part of any session of the Commission, or to fulfill any other function, shall notify the Executive Secretary to this effect as soon as possible. The Executive Secretary shall so inform the President and ensure that those reasons appear in the record.

Article 15. Rapporteurships and Working Groups

1. The Commission may create rapporteurships to better fulfill its functions. The rapporteurs shall be designated by the vote of an absolute majority of the members of the Commission and may be Commission members or other persons. The Commission shall determine the characteristics of the mandate entrusted to each rapporteurship. The rapporteurs shall periodically present their work plans to the plenary of the Commission.
2. The Commission may also create working groups or committees to prepare its periods of sessions or to carry out special programs or projects. The Commission shall constitute working groups as it sees fit.

Article 16. Quorum for Sessions

The presence of an absolute majority of the members of the Commission shall be necessary to constitute a quorum.

Article 17. Discussion and Voting

1. The sessions shall conform primarily to the Rules of Procedure and secondarily to the pertinent provisions of the Rules of Procedure of the Permanent Council of the OAS.
2. Members of the Commission may not participate in the discussion, investigation, deliberation or decision of a matter submitted to the Commission in the following cases:
 - a. if they are nationals of the State which is the subject of the Commission's general or specific consideration, or if they were accredited or carrying out a special mission as diplomatic agents before that State; or,
 - b. if they have previously participated in any capacity in a decision concerning the same facts on which the matter is based or have acted as an adviser to, or representative of any of the parties interested in the decision.
3. If a member considers that he or she should abstain from participating in the study or decision of a matter, that member shall so inform the Commission, which shall decide if the disqualification is warranted.
4. Any member may raise the issue of the disqualification of another member on the basis of the grounds set forth in paragraph 2 of this article.
5. When the Commission is not meeting in regular or special session, the members may deliberate and decide on matters within their competence by the means they consider appropriate.

Article 18. Special Quorum to take Decisions

1. The Commission shall decide the following matters by an absolute majority vote of its members:
 - a. election of the board of officers of the Commission;
 - b. interpretation of the application of these Rules of Procedure;
 - c. adoption of a report on the situation of human rights in a specific State; and,
 - d. for matters where such a majority is required under the provisions of the American Convention, the Statute or these Rules of Procedure.

2. In respect of other matters, the vote of the majority of the members present shall be sufficient.

Article 19. Explanation of Vote

1. Whether or not members agree with the decision of the majority, they shall be entitled to present a written explanation of their vote, which shall be included following the text of that decision.
2. If the decision concerns the approval of a report or preliminary report, the explanation of the vote shall be included following the text of that report or preliminary report.
3. When the decision does not appear in a separate document, the explanation of the vote shall be included in the minutes of the meeting, following the decision in question.
4. The explanation of vote shall be presented in writing, to the Secretariat, within the 30 days following the period of sessions in which the decision in question was adopted. In urgent cases, an absolute majority of the members may stipulate a shorter period. Once that deadline has elapsed, and no written explanation of the vote has been presented to the Secretariat, the member in question shall be deemed to have desisted from submitting an explanation of his or her vote, without prejudice to his or her dissent being recorded.

Article 20. Minutes of the Sessions

1. Summary minutes shall be taken of each session. They shall state the day and time at which it was held, the names of the members present, the matters dealt with, the decisions taken, and any statement made by a member especially for inclusion in the minutes. These minutes are confidential internal working documents.
2. The Executive Secretariat shall distribute copies of the summary minutes of each session to the members of the Commission, who may present their observations to the Secretariat prior to the period of sessions at which those minutes are to be approved. If there has been no objection as of the beginning of that period of sessions, the minutes shall be considered approved.

Article 21. Compensation for Special Services

Pursuant to the approval of an absolute majority of its members, the Commission may entrust any member with the preparation of a special study or other specific work to be carried out individually outside the sessions. Such work shall be compensated in accordance with the funds available in the budget. The amount of the fees shall be set on the basis of the number of days required for the preparation and drafting of the work.

TITLE II
PROCEDURE

CHAPTER I
GENERAL PROVISIONS

Article 22. Official Languages

1. The official languages of the Commission shall be Spanish, French, English and Portuguese. The working languages shall be those decided on by the Commission every two years, in accordance with the languages spoken by its members.
2. Any member of the Commission may dispense with the interpretation of debates and preparation of documents in his or her language.

Article 23. Presentation of Petitions

Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure. 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.

Article 24. Consideration Motu Proprio

The Commission may also, *motu proprio*, initiate the processing of a petition which, in its view, meets the necessary requirements.

Article 25. Precautionary Measures

1. In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.
2. If the Commission is not in session, the President, or, in his or her absence, one of

the Vice-Presidents, shall consult with the other members, through the Executive Secretariat, on the application of the provision in the previous paragraph. If it is not possible to consult within a reasonable period of time under the circumstances, the President or, where appropriate, one of the Vice-President shall take the decision on behalf of the Commission and shall so inform its members.

3. The Commission may request information from the interested parties on any matter related to the adoption and observance of the precautionary measures.
4. The granting of such measures and their adoption by the State shall not constitute a prejudgment on the merits of a case.

CHAPTER II

PETITIONS REFERRING TO THE AMERICAN CONVENTION ON HUMAN RIGHTS AND OTHER APPLICABLE INSTRUMENTS

Article 26. Initial Review

1. The Executive Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission that fulfill all the requirements set forth in the Statute and in Article 28 of these Rules of Procedure.
2. If a petition or communication does not meet the requirements called for in these Rules of Procedure, the Executive Secretariat may request that the petitioner or his or her representative satisfy those that have not been fulfilled.
3. If the Executive Secretariat has any doubt as to whether the requirements referred to have been met, it shall consult the Commission.

Article 27. Condition for Considering the Petition

The Commission shall consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments, with respect to the Member States of the OAS, only when the petitions fulfill the requirements set forth in those instruments, in the Statute, and in these Rules of Procedure.

Article 28. Requirements for the Consideration of Petitions

Petitions addressed to the Commission shall contain the following information:

- a. 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;
- 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 these Rules of Procedure;
- h. any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure; and,
- i. an indication of whether the complaint has been submitted to another international settlement proceeding as provided in Article 33 of these Rules of Procedure.

Article 29. Initial Processing

1. The Commission, acting initially through the Executive Secretariat, shall receive and carry out the initial processing of the petitions presented as follows:
 - a. it shall receive the petition, register it, record the date of receipt on the petition itself and acknowledge receipt to the petitioner;
 - b. if the petition does not meet the requirements of these Rules of Procedure, it may request that the petitioner or his or her representative complete them in accordance with Article 26(2) of these Rules;
 - c. if the petition sets forth distinct facts, or if it refers to more than one person or to alleged violations not interconnected in time and place, the claims may be divided and processed separately, so long as all the requirements of Article 28 of these Rules of Procedure are met;
 - d. if two or more petitions address similar facts, involve the same persons, or reveal the same pattern of conduct, they may be joined and processed together;
 - e. in the situations provided for in subparagraphs c and d, it shall give written notification to petitioners.
2. In serious or urgent cases, the Executive Secretariat shall immediately notify the Commission.

Article 30. Admissibility Procedure

1. The Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure
2. For this purpose, it shall forward the relevant parts of the petition to the State in question. The identity of the petitioner shall not be revealed without his or her express authorization. The request to the State for information shall not constitute a prejudgment with regard to any decision the Commission may adopt on the admissibility of the petition.
3. The State shall submit its response within two months counted from the date the request is transmitted. The Executive Secretariat shall evaluate requests for extensions of this period that are duly founded. However, it shall not grant extensions that exceed three months from the date of the first request for information sent to the State.
4. In serious or urgent cases, or when it is believed that the life or personal integrity of a person is in real or imminent danger, the Commission shall request the promptest reply from the State, using for this purpose the means it considers most expeditious.
5. Prior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing, as provided for in Chapter VI of these Rules of Procedure.
6. Once the observations have been received or the period set has elapsed with no observations received, the Commission shall verify whether the grounds for the petition exist or subsist. If it considers that they do not exist or subsist, it shall order the case archived.

Article 31. Exhaustion of Domestic Remedies

1. In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.
2. The provisions of the preceding paragraph shall not apply when:
 - 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,
 - c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.
3. When the petitioner contends that he or she is unable to prove compliance with the

requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

Article 32. Deadline for the Presentation of Petitions

1. The Commission shall consider those petitions that are lodged within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.
2. In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

Article 33. Duplication of Procedures

1. The Commission shall not consider a petition if its subject matter:
 - a. is pending settlement pursuant to another procedure before an international governmental organization of which the State concerned is a member; or,
 - b. essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member.
2. However, the Commission shall not refrain from considering petitions referred to in paragraph 1 when:
 - a. the procedure followed before the other organization is limited to a general examination of the human rights situation in the State in question and there has been no decision on the specific facts that are the subject of the petition before the Commission, or it will not lead to an effective settlement; or,
 - b. the petitioner before the Commission or a family member is the alleged victim of the violation denounced and the petitioner before the other organization is a third party or a nongovernmental entity having no mandate from the former.

Article 34. Other Grounds for Inadmissibility

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 these Rules of Procedure;
- 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.

Article 35. Desistance

The petitioner may at any time desist from his or her petition or case, to which effect he or she must so state in writing to the Commission. The statement by the petitioner shall be analyzed by the Commission, which may archive the petition or case if it deems this appropriate, or continue to process it in the interest of protecting a particular right.

Article 36. Working Group on Admissibility

A working group shall meet prior to each regular session in order to study the admissibility of petitions and make recommendations to the plenary of the Commission.

Article 37. Decision on Admissibility

1. Once it has considered the positions of the parties, the Commission shall make a decision on the admissibility of the matter. The reports on admissibility and inadmissibility shall be public and the Commission shall include them in its Annual Report to the General Assembly of the OAS.
2. When an admissibility report is adopted, the petition shall be registered as a case and the proceedings on the merits shall be initiated. The adoption of an admissibility report does not constitute a prejudgment as to the merits of the matter.
3. In exceptional circumstances, and after having requested information from the parties in keeping with the provisions of Article 30 of these Rules of Procedure, the Commission may open a case but defer its treatment of admissibility until the debate and decision on the merits. The case shall be opened by means of a written communication to both parties.

Article 38. Procedure on the Merits

1. Upon opening the case, the Commission shall set a period of two months for the petitioners to submit additional observations on the merits. The pertinent parts of those observations shall be transmitted to the State in question so that it may submit its observations within two months.
2. Prior to making its decision on the merits of the case, the Commission shall set a time period for the parties to express whether they have an interest in initiating the friendly settlement procedure provided for in Article 41 of these Rules of Procedure. The Commission may also invite the parties to submit additional observations in writing.
3. If it deems it necessary in order to advance in its consideration of the case, the Commission may convene the parties for a hearing, as provided for in Chapter VI of these Rules of Procedure.

Article 39. Presumption

The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion.

Article 40. Onsite Investigation

1. If it deems it necessary and advisable, the Commission may carry out an on-site investigation, for the effective conduct of which it shall request and the State concerned shall furnish all pertinent facilities.
2. However, 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 on-site investigation with the prior consent of the State in whose territory a violation has allegedly been committed.

Article 41. Friendly Settlement

1. On its own initiative or at the request of any of the parties, 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 on the basis of respect for the human rights recognized in the American Convention on Human Rights, the American Declaration and other applicable instruments.
2. The friendly settlement procedure shall be initiated and continue on the basis of the consent of the parties.
3. When it deems it necessary, the Commission may entrust to one or more of its members the task of facilitating negotiations between the parties.
4. The Commission may terminate its intervention in the friendly settlement procedure if it finds that the matter is not susceptible to such a resolution or any of the parties does not consent to its application, decides not to continue it, or does not display the willingness to reach a friendly settlement based on respect for human rights.
5. If a friendly settlement is reached, the Commission shall adopt a report with a brief statement of the facts and of the solution reached, shall transmit it to the parties concerned and shall publish it. Prior to adopting that report, the Commission shall verify whether the victim of the alleged violation or, as the case may be, his or her successors, have consented to the friendly settlement agreement. In all cases, the friendly settlement must be based on respect for the human rights recognized in the American Convention on Human Rights, the American Declaration and other applicable instruments.

6. If no friendly settlement is reached, the Commission shall continue to process the petition or case.

Article 42. Decision on the Merits

1. The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge.
2. The Commission shall deliberate in private, and all aspects of the discussions shall be confidential.
3. Any question put to a vote shall be formulated in precise terms in one of the official languages of the OAS. At the request of any member, the text shall be translated by the Secretariat into one of the other official languages and distributed prior to the vote.
4. The minutes referring to the Commission's deliberations shall restrict themselves to the subject of the debate and the decision approved, as well as any separate opinions and any statements made for inclusion in the minutes. . . If the report does not represent, in whole or in part, the unanimous opinion of the members of the Commission, any of them may add his or her opinion separately, following the procedure established in Article 19.4 of these Rules of Procedure.

Article 43. Report on the Merits

After the deliberation and vote on the merits of the case, the Commission shall proceed as follows:

1. If it establishes that there was no violation in a given case, it shall so state in its report on the merits. The report shall be transmitted to the parties, and shall be published and included in the Commission's Annual Report to the OAS General Assembly.
2. If it establishes one or more violations, it shall prepare a preliminary report with the proposals and recommendations it deems pertinent and shall transmit it to the State in question. In so doing, it shall set a deadline by which the State in question must report on the measures adopted to comply with the recommendations. The State shall not be authorized to publish the report until the Commission adopts a decision in this respect.
3. It shall notify the petitioner of the adoption of the report and its transmittal to the State. In the case of States Parties to the American Convention that have accepted the contentious jurisdiction of the Inter-American Court, upon notifying the petitioner, the Commission shall give him or her one month to present his or her position as to whether the case should be submitted to the Court. When the petitioner is interested in the submission of the case, he or she should present the following:

- a. the position of the victim or the victim's family members, if different from that of the petitioner;
- b. the personal data relative to the victim and the victim's family members;
- c. the reasons he or she considers that the case should be referred to the Court;
- d. the documentary, testimonial, and expert evidence available; and,
- e. the claims concerning reparations and costs.

Article 44. Referral of the Case to the Court

1. If the State in question has accepted the jurisdiction of the Inter-American Court in accordance with Article 62 of the American Convention, and the Commission considers that the State has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it shall refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary.
2. The 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.

Article 45. Publication of the Report

1. If within three months from the transmittal of the preliminary report to the State in question the matter has not been solved or, for those States that have accepted the jurisdiction of the Inter-American Court, has not been referred by the Commission or by the State to the Court for a decision, the Commission, by an absolute majority of votes, may issue a final report that contains its opinion and final conclusions and recommendations.
2. The final report shall be transmitted to the parties, who, within the time period set by the Commission, shall present information on compliance with the recommendations.
3. The Commission shall evaluate compliance with its recommendations based on the information available, and shall decide on the publication of the final report by the

vote of an absolute majority of its members. The Commission shall also make a determination as to whether to include it in the Annual Report to the OAS General Assembly, and/or to publish it in any other manner deemed appropriate.

Article 46. Follow-Up

1. Once the Commission has published a report on a friendly settlement or on the merits in which it has made recommendations, it may adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations.
2. The Commission shall report on progress in complying with those agreements and recommendations as it deems appropriate.

Article 47. Certification of Reports

The originals of the reports signed by the Commissioners who participated in their adoption shall be deposited in the files of the Commission. The reports transmitted to the parties shall be certified by the Executive Secretariat.

Article 48. Interstate Communications

1. A communication presented by a State Party to the American Convention on Human Rights that has accepted the competence of the Commission to receive and examine such communications against other States Parties shall be transmitted to the State Party in question, whether or not it has accepted the Commission's competence in this respect. If that competence has not been accepted, the communication shall be transmitted in order that the State concerned may exercise its option under Article 45, paragraph 3 of the Convention, to recognize that competence in the specific case that is the subject of the communication.
2. If the State in question has accepted the Commission's competence to consider a communication from another State Party, the respective procedure shall be governed by the provisions of the present Chapter II, insofar as they apply.

CHAPTER III

PETITIONS CONCERNING STATES THAT ARE NOT

PARTIES TO THE AMERICAN CONVENTION ON HUMAN RIGHTS

Article 49. Receipt of the Petition

The Commission shall receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration of the

Rights and Duties of Man in relation to the Member States of the Organization that are not parties to the American Convention on Human Rights.

Article 50. Applicable Procedure

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.

CHAPTER IV
ONSITE OBSERVATIONS

Article 51. Designation of the Special Commission

On-site observations shall in each case be conducted by a Special Commission named for that purpose. The number of members of the Special Commission and the designation of its President shall be determined by the Commission. In cases of great urgency, such decisions may be made by the President subject to the approval of the Commission.

Article 52. Disqualification

A member of the Commission who is a national of or who resides in the territory of the State in which the on-site observation is to be conducted shall be disqualified from participating in it.

Article 53. Schedule of Activities

The Special Commission shall organize its own activities. To that end, it may assign any activity related to its mission to its own members and, in consultation with the Executive Secretary, to any staff members or necessary personnel of the Executive Secretariat.

Article 54. Necessary Facilities and Guarantees

In extending an invitation for an on-site observation or in giving its consent thereto, the State shall furnish to the Special Commission all necessary facilities for carrying out its mission. In particular, it shall commit itself not to take any reprisals of any kind against any persons or entities cooperating with or providing information or testimony to the Special Commission.

Article 55. Other Applicable Standards

Without prejudice to the provisions in the preceding article, any on-site observation agreed upon by the Commission shall be carried out in accordance with the following standards:

- a. the Special Commission or any of its members shall be able to interview any persons, groups, entities or institutions freely and in private;
- b. the State shall grant the necessary guarantees to those who provide the Special Commission with information, testimony or evidence of any kind;
- c. the members of the Special Commission shall be able to travel freely throughout the territory of the country, for which purpose the State shall extend all the corresponding facilities, including the necessary documentation;
- d. the State shall ensure the availability of local means of transportation;
- e. the members of the Special Commission shall have access to the jails and all other detention and interrogation sites and shall be able to interview in private those persons imprisoned or detained;
- f. the State shall provide the Special Commission with any document related to the observance of human rights that the latter may consider necessary for the presentation of its reports;
- g. the Special Commission shall be able to use any method appropriate for filming, photographing, collecting, documenting, recording, or reproducing the information it considers useful;
- h. the State shall adopt the security measures necessary to protect the Special Commission;
- i. the State shall ensure the availability of appropriate lodging for the members of the Special Commission;
- j. the same guarantees and facilities that are set forth in this article for the members of the Special Commission shall also be extended to the staff of the Executive Secretariat;
- k. the expenses incurred by the Special Commission, each of its members and the staff of the Executive Secretariat shall be borne by the OAS, subject to the pertinent provisions.

CHAPTER V

ANNUAL REPORT AND OTHER REPORTS OF THE COMMISSION

Article 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. Once their publication is approved, the Commission shall transmit them, through the General Secretariat, to the Member States of the OAS and its pertinent organs.

Article 57. Annual Report

1. The Annual Report presented by the Commission to the General Assembly of the OAS shall include the following:
 - a. An analysis of the human rights situation in the hemisphere, along with recommendations to the States and organs of the OAS as to the measures necessary to strengthen respect for human rights;
 - b. a brief account of the origin, legal bases, structure and purposes of the Commission, as well as the status of ratifications of the American Convention and all other applicable instruments;
 - c. a summary of the mandates and recommendations conferred upon the Commission by the General Assembly and the other competent organs, and of the status of implementation of such mandates and recommendations;
 - d. a list of the periods of sessions held during the time period covered by the report and of other activities carried out by the Commission to achieve its purposes, objectives and mandates;
 - e. a summary of the activities of the Commission carried out in cooperation with other organs of the OAS and with regional or universal organs of the same type, and the results achieved;
 - f. the reports on individual petitions and cases whose publication has been approved by the Commission, as well as a list of the precautionary measures granted and extended, and of its activities before the Inter-American Court;
 - g. a statement on the progress made in attaining the objectives set forth in the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and all other applicable instruments;
 - h. any general or special report the Commission considers necessary with regard to the situation of human rights in the Member States, and, as the case may be, follow-up reports noting the progress achieved and the difficulties that have existed with respect to the effective observance of human rights; and,

- i. any other information, observation or recommendation that the Commission considers advisable to submit to the General Assembly, as well as any new activity or project that implies additional expenditures.
2. For the preparation and adoption of the reports provided for in paragraph 1(h) of this article, the Commission shall gather information from all the sources it deems necessary for the protection of human rights. Prior to its publication in the Annual Report, the Commission shall provide a copy of said report to the respective State. That State may send the Commission the views it deems pertinent within a maximum time period of one month from the date of transmission. The contents of the report and the decision to publish it shall be within the exclusive discretion of the Commission.

Article 58. Report on Human Rights in a State

The preparation of a general or special report on the status of human rights in a specific State shall meet the following standards:

- a. after the draft report has been approved by the Commission, it shall be transmitted to the government of the Member State in question so that it may make any observations it deems pertinent;
- b. the Commission shall indicate to that State the deadline within which it must present its observations;
- c. once the Commission has received the observations from the State, it shall study them and, in light thereof, may maintain or modify its report and decide how it is to be published;
- d. if no observation has been submitted by the State as of the expiration of the deadline, the Commission shall publish the report in the manner it deems appropriate;
- e. after its publication, the Commission shall transmit it through the General Secretariat to the Member States and General Assembly of the OAS.

CHAPTER VI

HEARINGS BEFORE THE COMMISSION

Article 59. Initiative

The Commission may decide to hold hearings on its own initiative or at the request of an interested party. The decision to convoke the hearings shall be made by the President of the Commission, at the proposal of the Executive Secretary.

Article 60. Purpose

The hearings may have the purpose of receiving information from the parties with respect to a petition or case being processed before the Commission, follow-up to recommendations, precautionary measures, or general or particular information related to human rights in one or more Members States of the OAS.

Article 61. Guarantees

The State in question shall grant the necessary guarantees to all the persons who attend a hearing or who in the course of a hearing provide information, testimony or evidence of any type to the Commission. That State may not prosecute the witnesses or experts, or carry out reprisals against them or their family members because of their statements or expert opinions given before the Commission.

Article 62. Hearings on Petitions or Cases

1. Hearings on petitions or cases shall have as their purpose the receipt of oral or written presentations by the parties relative to new facts and information additional to that which has been produced during the proceeding. The information may refer to any of the following issues: admissibility; the initiation or development of the friendly settlement procedure; the verification of the facts; the merits of the matter; follow-up on recommendations; or any other matter pertinent to the processing of the petition or case.
2. 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.
3. 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.
4. 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.

Article 63. Presentation and Production of Evidence

1. During the hearing, the parties may present any document, testimony, expert report or item of evidence. At the request of a party or on its own initiative, the Commission may receive the testimony of witnesses or experts.
2. With respect to the documentary evidence submitted during the hearing, the Commission shall grant the parties a prudential time period for submitting their observations.

3. A party that proposes witnesses or experts for a hearing shall so state in its request. For this purpose, it shall identify the witness or expert and the purpose of his or her witness or expert testimony.
4. Upon deciding on the request for a hearing, the Commission shall also determine whether to receive the witness or expert testimony proposed.
5. When one party offers witness and expert testimony, the Commission shall notify the other party to that effect.
6. In extraordinary circumstances and for the purpose of safeguarding the evidence, the Commission may, at its discretion, receive testimony in hearings without satisfying the terms of the previous paragraph. In such circumstances, it shall take the measures necessary to guarantee the procedural balance between the parties in the matter submitted for its consideration.
7. The Commission shall hear one witness at a time; the other witnesses shall remain outside the hearing room. Witnesses may not read their presentations to the Commission.
8. Prior to giving their testimony, witnesses and experts shall identify themselves and take an oath or make a solemn promise to tell the truth. At the express request of the interested person, the Commission may maintain the identity of a witness or expert in confidence when necessary to protect him or her or other persons.

Article 64. Hearings of a General Nature

1. Persons who are interested in presenting testimony or information to the Commission on the human rights situation in one or more States, or on matters of general interest, shall direct a request for a hearing to the Executive Secretariat with proper notice prior to the respective session.
2. Persons making such a request shall indicate the purpose of their appearance, a summary of the information they will furnish, the approximate time required for that purpose, and the identity of the participants.

Article 65. Participation of the Commission Members

The President of the Commission may form working groups to participate in the program of hearings.

Article 66. Attendance

Attendance at the hearings shall be limited to the representatives of the parties, the Commission, the staff of the Executive Secretariat, and the Recording Secretaries. The decision to allow the presence of other persons shall vest exclusively in the Commission, which shall so inform the parties prior to beginning the hearing, orally or in writing.

Article 67. Expenses

The party that proposes the production of evidence at a hearing shall cover all of the attendant expenses.

Article 68. Documents and Minutes of the Hearings

1. A summary of the minutes of hearing shall be prepared and shall record the day and time it was held, the names of the participants, the decisions adopted, and the commitments assumed by the parties. The documents submitted by the parties in the hearing shall be attached as annexes to the minutes.
2. The minutes of the hearings are internal working documents of the Commission. If a party so requests, the Commission shall provide a copy, unless, in the view of the Commission, its contents could entail some risk to persons.
3. The Commission shall make a tape of the testimony and shall make it available to the parties that so request.

TITLE III

RELATIONS WITH THE INTERAMERICAN COURT OF HUMAN RIGHTS

CHAPTER I

DELEGATES, ADVISERS, WITNESSES AND EXPERTS

Article 69. Delegates and Assistants

1. The Commission shall entrust one or more of its members and its Executive Secretary to represent it and participate as delegates in the consideration of any matter before the Inter-American Court of Human Rights. That representation shall remain in effect as long as the delegate is a member of the Commission or serves as its Executive Secretary, although the Commission may, under exceptional circumstances, decide to extend the duration of that representation.
2. If the petitioner so requests, the Commission shall include him or her as a delegate.
3. In appointing such delegates, the Commission shall issue any instructions it considers necessary to guide their actions before the Court.
4. When it designates more than one delegate, the Commission shall assign to one of them the responsibility of resolving situations that are not foreseen in the instructions, or of clarifying any doubts raised by a delegate.

5. The delegates may be assisted by any person designated by the Commission. In the discharge of their functions, the advisers shall act in accordance with the instructions of the delegates.

Article 70. Witnesses and Experts

1. The Commission may also request the Court to summon other persons as witnesses or experts.
2. The summoning of such witnesses or experts shall be in accordance with the Rules of Procedure of the Court.

CHAPTER II

PROCEDURE BEFORE THE COURT

Article 71. Notification to the State and the Petitioner

If the Commission decides to refer a case to the Court, the Executive Secretary shall immediately give notice of that decision to the State, the petitioner and the victim. With that communication the Commission shall transmit to the petitioner all the elements necessary for the preparation and presentation of the application.

Article 72. Presentation of the Application

1. When, in accordance with Article 61 of the American Convention on Human Rights, the Commission decides to bring a case before the Court, it shall submit an application specifying the:
 - a. claims on the merits, and reparations and costs sought;
 - b. parties in the case;
 - c. presentation of the facts;
 - d. information on the opening of the procedure and admissibility of the petition;
 - e. individualization of the witnesses and experts and the purpose of their statements;
 - f. legal grounds and the pertinent conclusions;
 - g. available information on the original complainant, the alleged victims, their family members or duly accredited representatives;
 - h. names of its delegates; and,
 - i. the report provided for in Article 50 of the American Convention.

2. The Commission's application shall be accompanied by certified copies of the items in the file that the Commission or its delegate considers pertinent.

Article 73. Transmittal of other Elements

The Commission shall transmit to the Court, at its request, any other evidence, document or information concerning the case, with the exception of documents concerning futile attempts to reach a friendly settlement. The transmittal of documents shall in each case be subject to the decision of the Commission, which shall withhold the name and identity of the petitioner, if the latter has not authorized that this be revealed.

Article 74. Provisional Measures

1. The Commission may request that the Court adopt provisional measures in cases of extreme gravity and urgency, and when it becomes necessary to avoid irreparable damage to persons in a matter that has not yet been submitted to the Court for consideration.
2. When the Commission is not in session, that request may be made by the President, or in his or her absence, by one of the Vice-Presidents in order of precedence.

TITLE IV

FINAL PROVISIONS

Article 75. Calendar Computation

All time periods set forth in the present Rules of Procedure—in numbers of days—will be understood to be counted as calendar days.

Article 76. Interpretation

Any doubt that might arise with respect to the interpretation of these Rules of Procedure shall be resolved by an absolute majority of the members of the Commission.

Article 77. Amendment of the Rules of Procedure

The Rules of Procedure may be amended by an absolute majority of the members of the Commission.

Article 78. Transitory Provision

The amendments to these Rules of Procedure, approved at the 116th regular period of sessions of the Commission, held from October 7 to 25, 2002, whose texts in English and Spanish are equally authentic, shall enter into force on January 1, 2003.

Article 4(1) was amended by Inter.-American Commission at its 116th regular period of sessions, held from October 7 to 25, 2002.

Article 12(3) was amended by the Inter.-American Commission at its 116th regular period of sessions, held from October 7 to 25, 2002.

Article 19(4) was amended by Inter.-American Commission at its 118th regular period of sessions, held from October 6 to 24, 2003.

Article 42(4) was amended by Inter.-American Commission at its 118th regular period of sessions, held from October 6 to 24, 2003.

Article 69(1) and 69(2) were amended by the Inter-American Commission at its 116th regular period of sessions, held from October 7 to 25, 2002.

Article 71) and 69(2) were amended by the Inter-American Commission at its 118th regular period of sessions, held from October 6 to 24, 2003.

RULES OF PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Approved on November 25, 2003, during Sessions 9 and 10 of the Court's LXI Ordinary Period of Sessions, held from November 20 to December 4, 2003.

PRELIMINARY PROVISIONS

Article 1. Purpose

1. These Rules regulate the organization and establish the procedure of the Inter-American Court of Human Rights.
2. The Court may adopt such other Rules as may be necessary to carry out its functions.
3. In the absence of a provision in these Rules or in case of doubt as to their interpretation, the Court shall decide.

Article 2. Definitions

For the purposes of these Rules:

1. the term “**Agent**” refers to the person designated by a State to represent it before the Inter-American Court of Human Rights;
2. the term “**Deputy Agent**” refers to the person designated by a State to assist the Agent in the discharge of his duties and to replace him during his temporary absences;
3. the expression “**General Assembly**” refers to the General Assembly of the Organization of American States;
4. the term “**Commission**” refers to the Inter-American Commission on Human Rights;
5. the expression “**Permanent Commission**” refers to the Permanent Commission of the Inter-American Court of Human Rights;
6. The expression “**Permanent Council**” refers to the Permanent Council of the Organization of American States;

7. the term “**Convention**” refers to the American Convention on Human Rights (Pact of San José, Costa Rica);
8. the term “**Court**” refers to the Inter-American Court of Human Rights;
9. the term “**Delegates**” refers to the persons designated by the Commission to represent it before the Court;
10. the expression “**original claimant**” refers to the person, group of persons, or non-governmental entity that instituted the original petition before the Commission, pursuant to Article 44 of the Convention;
11. the term “**day**” shall be understood to be a natural day;
12. the expression “**States Parties**” refers to the States that have ratified or adhered to the Convention;
13. the expression “**Member States**” refers to the States that are members of the Organization of American States;
14. the term “**Statute**” refers to the Statute of the Court adopted by the General Assembly of the Organization of American States on 31 October 1979 (AG/RES. 448 [IX-0/79]), as amended;
15. the expression “**next of kin**” refers to the immediate family, that is, the direct ascendants and descendants, siblings, spouses or permanent companions, or those determined by the Court, if applicable;
16. the expression “**report of the Commission**” refers to the report provided for in Article 50 of the Convention;
17. the term “**Judge**” refers to the judges who compose the Court for each case;
18. the expression “**Titular Judge**” refers to any judge elected pursuant to Articles 53 and 54 of the Convention;
19. the expression “**Interim Judge**” refers to any judge appointed pursuant to Articles 6(3) and 19(4) of the Statute;
20. the expression “**Judge ad hoc**” refers to any judge appointed pursuant to Article 55 of the Convention;
21. the term “**month**” shall be understood to be a calendar month;
22. the acronym “**OAS**” refers to the Organization of American States;
23. the expression “**parties to the case**” refers to the victim or the alleged victim, the State and, only procedurally, the Commission;
24. the term “**President**” refers to the President of the Court;

25. the term “**Secretariat**” refers to the Secretariat of the Court;
26. the term “**Secretary**” refers to the Secretary of the Court;
27. the expression “**Deputy Secretary**” refers to the Deputy Secretary of the Court;
28. the expression “**Secretary General**” refers to the Secretary General of the Organization of American States;
29. the expression “**Vice-President**” refers to the Vice-President of the Court;
30. the expression “**alleged victim**” refers to the person whose rights under the Convention are alleged to have been violated;
31. the term “**victim**” refers to the person whose rights have been violated, according to a judgment pronounced by the Court.

TITLE I

ORGANIZATION AND FUNCTIONING OF THE COURT

Chapter I

THE PRESIDENCY AND VICE-PRESIDENCY

Article 3. Election of the President and the Vice-President

1. The President and the Vice-President shall be elected by the Court for a period of two years and may be reelected. Their term shall begin on the first day of the first session of the corresponding year. The election shall take place at the last regular session held by the Court during the preceding year.
2. The elections referred to in this Article shall be by secret ballot of the Titular Judges present. The judge who wins four or more votes shall be deemed to have been elected. If no candidate receives the required number of votes, a ballot shall take place between the two judges who have received the most votes. In the event of a tie, the judge having precedence in accordance with Article 13 of the Statute shall be deemed to have been elected.

Article 4. Functions of the President

1. The functions of the President are to:
 - a. represent the Court;

- b. preside over the meetings of the Court and to submit for its consideration the topics appearing on the agenda;
 - c. direct and promote the work of the Court;
 - d. rule on points of order that may arise during the meetings of the Court. If any judge so requests, the point of order shall be decided by a majority vote;
 - e. present a biannual report to the Court on the activities he has carried out as President during that period;
 - f. exercise such other functions as are conferred upon him by the Statute or these Rules, or entrusted to him by the Court.
2. In specific cases, the President may delegate the representation referred to in paragraph 1(a) of this Article to the Vice-President, to any of the judges or, if necessary, to the Secretary or to the Deputy Secretary.
 3. If the President is a national of one of the parties to a case before the Court, or in special situations in which he considers it appropriate, he shall relinquish the Presidency for that particular case. The same rule shall apply to the Vice-President or to any judge called upon to exercise the functions of the President.

Article 5. Functions of the Vice-President

1. The Vice-President shall replace the President in the latter's temporary absence, and shall assume the Presidency when the absence is permanent. In the latter case, the Court shall elect a Vice-President to serve out the rest of the term. The same procedure shall be followed if the absence of the Vice-President is permanent.
2. In the absence of the President and the Vice-President, their functions shall be assumed by the other judges in the order of precedence established in Article 13 of the Statute.

Article 6. Commissions

1. The Permanent Commission shall be composed by the President, the Vice-President and any other judges the President deems it appropriate to appoint, according to the needs of the Court. The Permanent Commission shall assist the President in the exercise of his functions.
2. The Court may appoint other commissions for specific matters. In urgent cases, they may be appointed by the President if the Court is not in session.
3. The commissions shall be governed by the provisions of these Rules, as applicable.

Chapter II

THE SECRETARIAT

Article 7. Election of the Secretary

1. The Court shall elect its Secretary, who must possess the legal qualifications required for the position, a good command of the working languages of the Court, and the experience necessary for discharging his functions.
2. The Secretary shall be elected for a term of five years and may be re-elected. He may be removed at any time if the Court so decides. A majority of no fewer than four judges, voting by secret ballot in the presence of a quorum, is required for the appointing or removal of the Secretary.

Article 8. Deputy Secretary

1. The Deputy Secretary shall be appointed on the proposal of the Secretary, in the manner prescribed in the Statute. He shall assist the Secretary in the performance of his functions and replace him during his temporary absences.
2. If the Secretary and the Deputy Secretary are both unable to perform their functions, the President may appoint an Interim Secretary.
3. If the Secretary and the Deputy Secretary are both temporarily away from the seat of the Court, the Secretary may appoint a lawyer of the Secretariat to be in charge of the Court in their absence(*).

Article 9. Oath

1. The Secretary and the Deputy Secretary shall take an oath or make a solemn declaration before the President undertaking to discharge their duties faithfully, and to respect the confidential nature of the facts that come to their attention while exercising their functions.
2. The staff of the Secretariat, including any persons called upon to perform interim or temporary duties, shall, upon assuming their functions, take an oath or make a solemn declaration before the President undertaking to discharge their duties faithfully and to respect the confidential nature of the facts that come to their attention while exercising their functions. If the President is not present at the seat of the Court, the Secretary shall administer the oath.
3. All oaths shall be recorded in a document to be signed by the person being sworn in and by the person administering the oath.

Article 10. Functions of the Secretary

The functions of the Secretary shall be to:

- a. communicate the judgments, advisory opinions, orders and other rulings of the Court;
- b. keep the minutes of the meetings of the Court;
- c. attend the meetings of the Court held at its seat or elsewhere;
- d. deal with the correspondence of the Court;
- e. direct the administration of the Court, pursuant to the instructions of the President;
- f. prepare the drafts of the working schedules, rules and regulations, and budgets of the Court;
- g. plan, direct and coordinate the work of the staff of the Court;
- h. carry out the tasks assigned to him by the Court or by the President;
- i. perform any other duties provided for in the Statute or in these Rules.

Chapter III

FUNCTIONING OF THE COURT

Article 11. Regular Sessions

During the year, the Court shall hold the sessions needed for the exercise of its functions on the dates decided upon by the Court at the previous session. In exceptional circumstances, the President may change the dates of these sessions after prior consultation with the Court.

Article 12. Special Sessions

Special sessions may be convoked by the President on his own initiative or at the request of a majority of the judges.

Article 13. Quorum

The quorum for the deliberations of the Court shall consist of five judges.

Article 14. Hearings, Deliberations and Decisions

1. Hearings shall be public and shall be held at the seat of the Court. When exceptional circumstances so warrant, the Court may decide to hold a hearing in private or at a different location. The Court shall decide who may attend such hearings. Even in these cases, however, minutes shall be kept in the manner prescribed in Article 43 of these Rules.

2. The Court shall deliberate in private, and its deliberations shall remain secret. Only the judges shall take part in the deliberations, although the Secretary and the Deputy Secretary or their substitutes may attend, as well as such other Secretariat staff as may be required. No other persons may be admitted, except by special decision of the Court and after taking an oath or making a solemn declaration.
3. Any question that calls for a vote shall be formulated in precise terms in one of the working languages. At the request of any of the judges, the Secretariat shall translate the text thereof into the other working languages and distribute it prior to the vote.
4. The minutes of the deliberations of the Court shall be limited to a statement of the subject of the discussion and the decisions taken. Separate opinions, dissenting and concurring, and declarations made for the record shall also be noted.

Article 15. Decisions and Voting

1. The President shall present, point by point, the matters to be voted upon. Each judge shall vote either in the affirmative or the negative; there shall be no abstentions.
2. The votes shall be cast in inverse order to the order of precedence established in Article 13 of the Statute.
3. The decisions of the Court shall be adopted by a majority of the judges present at the time of the voting.
4. In the event of a tie, the President shall have a casting vote.

Article 16. Continuation in Office by the Judges

1. Judges whose terms have expired shall continue to exercise their functions in cases that they have begun to hear and that are still pending. However, in the event of death, resignation or disqualification, the judge in question shall be replaced by the judge who was elected to take his place, if applicable, or by the judge who has precedence among the new judges elected upon expiration of the term of the judge to be replaced.
2. All matters relating to reparations and indemnities, as well as supervision of the implementation of the judgments of the Court, shall be heard by the judges comprising it at that stage of the proceedings, unless a public hearing has already been held. In that event, they shall be heard by the judges who had attended that hearing.
3. All matters relating to provisional measures shall be heard by the Court composed of Titular Judges.

Article 17. Interim Judges

Interim Judges shall have the same rights and functions as Titular Judges, except for such limitations that have been expressly established.

Article 18. Judges Ad Hoc

1. In a case arising under Article 55(2) and 55(3) of the Convention and Article 10(2) and 10(3) of the Statute, the President, acting through the Secretariat, shall inform the States referred to in those provisions of their right to appoint a Judge *ad hoc* within 30 days of notification of the application.
2. When it appears that two or more States have a common interest, the President shall inform them that they may jointly appoint one Judge *ad hoc*, pursuant to Article 10 of the Statute. If those States have not communicated their agreement to the Court within 30 days of the last notification of the application, each State may propose its candidate within 15 days. Thereafter, and if more than one candidate has been nominated, the President shall choose a common Judge *ad hoc* by lot, and shall communicate the result to the interested parties.
3. Should the interested States fail to exercise their right within the time limits established in the preceding paragraphs, they shall be deemed to have waived that right.
4. The Secretary shall communicate the appointment of Judges *ad hoc* to the other parties to the case.
5. The Judge *ad hoc* shall take an oath at the first meeting devoted to the consideration of the case for which he has been appointed.
6. Judges *ad hoc* shall receive honoraria on the same terms as Titular Judges.

Article 19. Impediments, excuses and disqualification

1. Impediments, excuses and disqualification of Judges shall be governed by the provisions of Article 19 of the Statute.
2. Motions for impediments and excuses must be filed prior to the first hearing of the case. However, if the grounds therefore were not known at the time, such motions may be submitted to the Court at the first possible opportunity, so that it can rule on the matter immediately.
3. When, for any reason whatsoever, a judge is not present at one of the hearings or at other stages of the proceedings, the Court may decide to disqualify him from continuing to hear the case, taking all the circumstances it deems relevant into account.

TITLE II
PROCEDURE
Chapter I
GENERAL RULES

Article 20. Official Languages

1. The official languages of the Court shall be those of the OAS, which are Spanish, English, Portuguese and French.
2. The working languages shall be those agreed upon by the Court each year. However, in a specific case, the language of one of the parties may be adopted as a working language, provided it is one of the official languages.
3. The working languages for each case shall be determined at the beginning of the proceedings, unless they are the same as those already being employed by the Court.
4. The Court may authorize any person appearing before it to use his own language if he does not have sufficient knowledge of the working languages. In such circumstances, however, the Court shall make the necessary arrangements to ensure that an interpreter is present to translate that testimony into the working languages. The interpreter must take an oath or make a solemn declaration, undertaking to discharge his duties faithfully and to respect the confidential nature of the facts that come to his attention in the exercise of his functions.
5. The Court shall, in all cases, determine which text is authentic.

Article 21. Representation of the States

1. The States Parties to a case shall be represented by an Agent, who may, in turn, be assisted by any persons of his choice.
2. If a State replaces its Agent, it shall so notify the Court, and the replacement shall only take effect once the notification has been received at the seat of the Court.
3. A Deputy Agent may be designated who will assist the Agent in the exercise of his functions and replace him during his temporary absences.
4. When appointing its Agent, the State in question shall indicate the address at which all relevant communications shall be deemed to have been officially received.

Article 22. Representation of the Commission

The Commission shall be represented by the Delegates it has designated for the purpose. The Delegates may be assisted by any persons of their choice.

Article 23. Participation of the Alleged Victims

1. When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their pleadings, motions and evidence, autonomously, throughout the proceedings.
2. When there are several alleged victims, next of kin or duly accredited representatives, they shall designate a common intervener who shall be the only person authorized to present pleadings, motions and evidence during the proceedings, including the public hearings.
3. In case of disagreement, the Court shall make the appropriate ruling.

Article 24. Cooperation of the States

1. The States Parties to a case have the obligation to cooperate so as to ensure that all notices, communications or summonses addressed to persons subject to their jurisdiction are duly executed. They shall also facilitate compliance with summonses by persons who either reside or are present within their territory.
2. The same rule shall apply to any proceeding that the Court decides to conduct or order in the territory of a State Party to a case.
3. When the performance of any of the measures referred to in the preceding paragraphs requires the cooperation of any other State, the President shall request the corresponding government to provide the requisite assistance.

Article 25. Provisional Measures

1. At any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, order such provisional measures as it deems pertinent, pursuant to Article 63(2) of the Convention.
2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission.
3. In contentious cases already submitted to the Court, the victims or alleged victims, their next of kin, or their duly accredited representatives, may present a request for provisional measures directly to the Court(*).
4. 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.
5. If the Court is not sitting, the President, in consultation with the Permanent Commission and, if possible, with the other judges, shall call upon the government concerned to adopt such urgent measures as may be necessary to ensure the effectiveness of any provisional measures that may be ordered by the Court at its next session.

6. The beneficiaries of urgent measures or provisional measures ordered by the President may address their comments on the report made by the State directly to the Court. The Inter-American Commission of Human Rights shall present observations to the State's report and to the observations of the beneficiaries or their representatives(**).
7. The Court, or its President if the Court is not sitting, may convoke the parties to a public hearing on provisional measures.
8. In its Annual Report to the General Assembly, the Court shall include a statement concerning the provisional measures ordered during the period covered by the report. If those measures have not been duly implemented, the Court shall make such recommendations as it deems appropriate.

Article 26. Filing of Briefs

1. The application, the reply thereto, the written brief containing pleadings, motions, and evidence, as well as any other written material addressed to the Court, may be presented in person, by courier, facsimile, telex, mail or any other method generally used. When any such material is transmitted to the Court by electronic means, the original documents, as well as accompanying evidence, shall be submitted within 7 days(***).
2. The original application, the reply thereto, the written brief containing pleadings, motions and evidence (Article 36 of the Rules of Procedure), the reply to the preliminary objections (Article 37(4) of the Rules of Procedure), as well as all respective attachments, shall be accompanied by 3 identical copies(*).
3. The President may, in consultation with the Permanent Commission, reject any communication from the parties which he considers patently inadmissible, and shall order that it be returned to the interested party, without further action.

Article 27. Default Procedure

1. When a party fails to appear in or continue with a case, the Court shall, on its own motion, take such measures as may be necessary to complete the consideration of the case.
2. When a party enters a case at a later stage of the proceedings, it shall take up the proceedings at that stage.

Article 28. Joinder of Cases and Proceedings

1. The Court may, at any stage of the proceedings, order the joinder of interrelated cases, when there is identity of parties, subject-matter and ruling law.
2. The Court may also order that the written or oral proceedings of several cases, including the introduction of witnesses, be carried out jointly.

3. After consulting the Agents and the Delegates, the President may direct that two or more cases be conducted simultaneously.

Article 29. Decisions

1. The judgments and orders for discontinuance of a case shall be rendered exclusively by the Court.
2. All other orders shall be rendered by the Court if it is sitting, and by the President if it is not, unless otherwise provided. Decisions of the President that are not purely procedural may be appealed before the Court.
3. Judgments and orders of the Court may not be contested in any way.

Article 30. Publication of Judgments and Other Decisions

1. The Court shall order the publication of:
 - a. its judgments and other decisions, including separate opinions, dissenting or concurring, whenever they fulfill the requirements set forth in Article 56(2) of these Rules;
 - b. documents from the case file, except those considered irrelevant or unsuitable for publication;
 - c. records of the hearings;
 - d. any other document that the Court considers suitable for publication.
2. The judgments shall be published in the working languages used in each case. All other documents shall be published in their original language.
3. Documents relating to cases already adjudicated, and deposited with the Secretariat of the Court, shall be made accessible to the public, unless the Court decides otherwise.

Article 31. Application of Article 63(1) of the Convention

Application of this provision may be invoked at any stage of the proceedings.

Chapter II

WRITTEN PROCEEDINGS

Article 32. Institution of the Proceedings

For a case to be referred to the Court under Article 61(1) of the Convention, the application shall be filed in the Secretariat of the Court in the working languages. Whereas the filing of an application in only one working language shall not suspend the proceeding, the translations into the other language or languages must be submitted within 30 days.

Article 33. Filing of the Application

The brief containing the application shall indicate:

1. the claims (including those relating to reparations and costs); the parties to the case; a statement of the facts; the orders on the opening of the proceeding and the admissibility of the petition by the Commission; the supporting evidence, indicating the facts on which it will bear; the particulars of the witnesses and expert witnesses and the subject of their statements; the legal arguments, and the pertinent conclusions. In addition, the Commission shall include the name and address of the original petitioner, and also the name and address of the alleged victims, their next of kin or their duly accredited representatives, when this is possible.
2. the names of the Agents or the Delegates.
3. the names and addresses of the representatives of the alleged victims and their next of kin. If this information is not provided in the application, the Commission shall act on behalf of the alleged victims and their next of kin in its capacity as guarantor of the public interest under the American Convention on Human Rights to ensure that they have the benefit of legal representation(*).

If the application is filed by the Commission, it shall be accompanied by the report referred to in Article 50 of the Convention.

Article 34. Preliminary Review of the Application

When, during a preliminary review of the application, the President finds that the basic requirements have not been met, he shall request the applicant to correct any deficiencies within 20 days.

Article 35. Notification of the Application

1. The Secretary of the Court shall notify of the application to:
 - a. The President and the judges of the Court;

- b. the respondent State;
 - c. the Commission, when it is not the applicant;
 - d. the original claimant, if known;
 - e. the alleged victim, his next of kin, or his duly accredited representatives, if applicable.
2. The Secretary shall inform the other States Parties, the Permanent Council of the OAS through its President, and the Secretary General of the OAS, of the filing of the application.
 3. When notifying, the Secretary shall request the respondent States to designate their Agent, and the Commission to appoint its Delegates, within one month. Until the Delegates are duly appointed, the Commission shall be deemed to be properly represented by its President for all purposes of the case.

Article 36. Written Brief Containing Pleadings, Motions and Evidence(*)

1. When the application has been notified to the alleged victim, his next of kin or his duly accredited representatives, they shall have a period of 2 months, which may not be extended, to present autonomously to the Court their pleadings, motions and evidence.

Article 37. Preliminary Objections

1. Preliminary objections may only be filed in the brief answering the application.
2. The document setting out the preliminary objections shall set out the facts on which the objection is based, the legal arguments, and the conclusions and supporting documents, as well as any evidence which the party filing the objection may wish to produce.
3. The presentation of preliminary objections shall not cause the suspension of the proceedings on the merits, nor the respective time periods or terms.
4. Any parties to the case wishing to submit written briefs on the preliminary objections may do so within 30 days of receipt of the communication.
5. When the Court considers it indispensable, it may convene a special hearing on the preliminary objections, after which it shall rule on the objections.
6. The Court may decide on the preliminary objections and the merits of the case in a single judgment, under the principle of procedural economy.

Article 38. Answer to the application

1. The respondent shall answer the application in writing within a period of 4 months of the notification, which may not be extended. The requirements indicated in

Article 33 of these Rules shall apply. The Secretary shall communicate the said answer to the persons referred to in Article 35(1) above. Within this same period, the respondent shall present its comments on the written brief containing pleadings, motions and evidence. These observations may be included within the answer to the application or within a separate brief(**).

2. In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested.

Article 39. Other Steps in the Written Proceedings

Once the application has been answered, and before the opening of the oral proceedings, the parties may seek the permission of the President to enter additional written pleadings. In such a case, the President, if he sees fit, shall establish the time limits for presentation of the relevant documents.

Chapter III

ORAL PROCEEDINGS

Article 40. Opening

The President shall announce the date for the opening of the oral proceedings and shall call such hearings as may be necessary.

Article 41. Conduct of the Hearings

1. The President shall direct the hearings. He shall prescribe the order in which the persons eligible to take part shall be heard, and determine the measures required for the smooth conduct of the hearings.
2. The provisions of Article 23 of these Rules of Procedure shall be observed, with regard to who may speak for the victims or the alleged victims, their next of kin or their duly accredited representatives.

Article 42. Questions Put During the Hearings

1. The judges may ask all persons appearing before the Court any questions they deem proper.
2. The witnesses, expert witnesses and any other persons the Court decides to hear may, subject to the control of the President, be examined by the persons referred to in Articles 21, 22 and 23 of these Rules.

3. The President is empowered to rule on the relevance of the questions posed and to excuse the person to whom the questions are addressed from replying, unless the Court decides otherwise. Leading questions shall not be permitted.

Article 43. Minutes of the Hearings

1. Summarized minutes shall be taken at each hearing and shall contain the following(*):
 - a. the names of the judges present;
 - b. the names of those persons referred to in Articles 21, 22 and 23 of these Rules, who are present at the hearing;
 - c. the names and personal information of the witnesses, expert witnesses and other persons appearing at the hearing;
 - d. statements made expressly for the record by the States Parties, by the Commission, by the victims or alleged victims, by their next of kin or their duly accredited representatives;
 - e. the text of any decisions rendered by the Court during the hearing.
2. The Secretariat shall record the hearings and attach a copy of the recording to the case file.
3. The Agents, Delegates, victims or alleged victims, their next of kin or their duly accredited representatives shall receive a copy of the recording of the public hearing at its conclusion, or within a period of 15 days.

Chapter IV

EVIDENCE

Article 44. Admission

1. Items of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto and, when appropriate, in the document setting out the preliminary objections and in the answer thereto.
2. 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.
3. Should any of the parties allege *force majeure*, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the

Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing parties are guaranteed the right of defense.

4. In the case of the alleged victim, his next of kin or his duly accredited representatives, the admission of evidence shall also be governed by the provisions of Articles 23, 36 and 37(5) of the Rules of Procedure.

Article 45. Procedure for Taking Evidence

The Court may, at any stage of the proceedings:

1. Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant.
2. Request the parties to provide any evidence within their reach or any explanation or statement that, in its opinion, may be useful.
3. Request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point. The documents may not be published without the authorization of the Court.
4. Commission one or more of its members to hold hearings, including preliminary hearings, either at the seat of the Court or elsewhere, for the purpose of gathering evidence(*).

Article 46. Cost of Evidence

The party requesting the production of an item of evidence shall cover its cost.

Article 47. Convocation of Witnesses and Expert Witnesses()**

1. The Court shall determine when the parties are to call their witnesses and expert witnesses whom the Court considers it necessary to hear. Furthermore, the summons shall indicate the name of the witness or expert witness as well as the object of the testimony.
2. The party proposing testimonial or expert evidence shall bear the costs of the appearance of its witness or witnesses before the Tribunal.
3. The Court may require that particular witnesses and expert witnesses offered by the parties give their testimony through sworn declarations or affidavits. Once the sworn declaration or affidavit is received, it shall be transmitted to the other parties in order for them to present their observations.

Article 48. Oath or Solemn Declaration by Witnesses and Expert Witnesses

1. After his identity has been established and before giving evidence, every witness shall take an oath or make a solemn declaration in which he shall state that he will speak the truth, the whole truth and nothing but the truth.
2. After his identity has been established and before performing his task, every expert witness shall take an oath or make a solemn declaration in which he shall state that he will discharge his duties honorably and conscientiously.
3. The oath shall be taken, or the declaration made, before the Court or the President or any of the judges so delegated by the Court.

Article 49. Objections to Witnesses

1. Any party may object to a witness before he testifies.
2. If the Court considers it necessary, it may nevertheless hear, for purposes of information, a person who is not qualified to be heard as a witness.
3. The Court shall assess the value of the testimony and of the objections made by the parties.

Article 50. Objections to Expert Witnesses

1. The grounds for disqualification applicable to judges under Article 19(1) of the Statute shall also apply to expert witnesses.
2. Objections shall be presented within 15 days of notification of the appointment of the expert witness.
3. If the expert witness who has been challenged contests the ground invoked against him, the Court shall rule on the matter. However, when the Court is not in session, the President may, after consultation with the Permanent Commission, order the evidence to be presented. The Court shall be informed thereof and shall rule on the value of the evidence.
4. Should it become necessary to appoint a new expert witness, the Court shall rule on the matter. Nevertheless, if the evidence needs to be heard as a matter of urgency, the President, after consultation with the Permanent Commission, shall make the appointment and inform the Court accordingly. The Court shall rule on the value of the evidence.

Article 51. Protection of Witnesses and Expert Witnesses

States may neither institute proceedings against witnesses or expert witnesses nor bring illicit pressure to bear on them or on their families on account of declarations or opinions they have delivered before the Court.

Article 52. Failure to Appear or False Evidence

The Court shall inform the States when those persons summoned to appear or declare, fail to appear or refuse to give evidence without good reason, or when, in the opinion of the Court, they have violated their oath or solemn declaration, so that the appropriate action may be taken under the relevant domestic legislation.

Chapter V

EARLY TERMINATION OF THE PROCEEDINGS

Article 53. Discontinuance of a Case

1. When the party that has brought the case notifies the Court of its intention not to proceed with it, the Court shall, after hearing the opinions of the other parties thereto, decide whether to discontinue the hearing and, consequently, to strike the case from its list.
2. If the respondent informs the Court of its acquiescence to the claims of the party that has brought the case as well as the to claims of the representatives of the alleged victims, his next of kin or representatives, the Court, after hearing the opinions of the other parties to the case whether such acquiescence and its juridical effects are acceptable. In that event, the Court shall determine the appropriate reparations and indemnities(*).

Article 54. Friendly Settlement

When the parties to a case before the Court inform it of the existence of a friendly settlement, compromise, or any other occurrence likely to lead to a settlement of the dispute, the Court may strike the case from its list.

Article 55. Continuation of a Case

The Court, may notwithstanding the existence of the conditions indicated in the preceding paragraphs, and bearing in mind its responsibility to protect human rights, decide to continue the consideration of a case.

Chapter VI

JUDGMENTS

Article 56. Contents of the Judgment

1. The judgment shall contain:

- a. the names of the President, the judges who rendered it, the Secretary and Deputy Secretary.
 - b. the identity of the parties and their representatives;
 - c. a description of the proceedings;
 - d. the facts of the case;
 - e. the conclusions of the parties;
 - f. the legal arguments;
 - g. the ruling on the case;
 - h. the decision, if any, on reparations and costs;
 - i. the result of the voting;
 - j. a statement indicating which text is authentic.
2. Any judge who has taken part in the consideration of a case is entitled to append a separate opinion, concurring or dissenting, to the judgment. These opinions shall be submitted within a time limit to be fixed by the President, so that the other judges may take cognizance thereof prior to notification of the judgment. The said opinions shall only refer to the issues covered in the judgment.

Article 57. Judgment on Reparations

1. When no specific ruling on reparations has been made in the judgment on the merits, the Court shall set the time and determine the procedure for the deferred decision thereon.
2. If the Court is informed that the parties to the case have reached an agreement in regard to the execution of the judgment on the merits, it shall verify the fairness of the agreement and rule accordingly.

Article 58. Delivery and Communication of the Judgment

1. When a case is ready for judgment, the Court shall deliberate in private and adopt the judgment, which shall be notified to the parties by the Secretariat.
2. The texts, legal arguments and votes shall all remain secret until the parties have been notified of the judgment.
3. Judgments shall be signed by all the judges who participated in the voting and by the Secretary. However, a judgment signed by the majority of the judges and the Secretary shall also be valid.
4. Separate opinions, dissenting or concurring, shall be signed by the judges submitting them and by the Secretary.

5. The judgments shall conclude with an order, signed by the President and the Secretary and sealed by the latter, providing for the communication and execution of the judgment.
6. The originals of the judgments shall be deposited in the archives of the Court. The Secretary shall dispatch certified copies to the States Parties, the parties to the case, the Permanent Council through its President, the Secretary General of the OAS, and any other interested person who requests them.

Article 59. Request for Interpretation

1. The request for interpretation, referred to in Article 67 of the Convention, may be made in connection with judgments on the merits or on reparations and shall be filed with the Secretariat. It shall state with precision the issues relating to the meaning or scope of the judgment of which the interpretation is requested.
2. The Secretary shall transmit the request for interpretation to the parties to the case and shall invite them to submit any written comments they deem relevant, within the time limit established by the President.
3. When considering a request for interpretation, the Court shall be composed, whenever possible, of the same judges who delivered the judgment of which the interpretation is being sought. However, in the event of death, resignation, impediment, excuse or disqualification, the judge in question shall be replaced pursuant to Article 16 of these Rules.
4. A request for interpretation shall not suspend the effect of the judgment.
5. The Court shall determine the procedure to be followed and shall render its decision in the form of a judgment.

TITLE III

ADVISORY OPINIONS

Article 60. Interpretation of the Convention

1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought.
2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates.
3. If the advisory opinion is sought by an OAS organ other than the Commission, the

request shall also specify, further to the information listed in the preceding paragraph, how it relates to the sphere of competence of the organ in question.

Article 61. Interpretation of Other Treaties

1. If the interpretation requested refers to other treaties concerning the protection of human rights in the American states, as provided for in Article 64(1) of the Convention, the request shall indicate the name of, and parties to, the treaty, the specific questions on which the opinion of the Court is being sought, and the considerations giving rise to the request.
2. If the request is submitted by an OAS organ, it shall indicate how the subject of the request falls within the sphere of competence of the organ in question.

Article 62. Interpretation of Domestic Laws

1. A request for an advisory opinion presented pursuant to Article 64(2) of the Convention shall indicate the following:
 - a. the provisions of domestic law and of the Convention or of other treaties concerning the protection of human rights to which the request relates;
 - b. the specific questions on which the opinion of the Court is being sought;
 - c. the name and address of the applicant's Agent.
2. Copies of the domestic laws referred to in the request shall accompany the application.

Article 63. Procedure

1. On receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all the Member States, the Commission, the Permanent Council of the OAS through its President, the Secretary General of the OAS and the OAS organs within whose spheres of competence the subject of the revision of request falls, as appropriate.
2. The President shall establish the time limits for the filing of written comments by the interested parties.
3. The President may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, he may do so after prior consultation with the Agent.
4. At the conclusion of the written proceedings, the Court shall decide whether there should be oral proceedings and shall fix the date for such a hearing, unless it delegates the latter task to the President. Prior consultation with the Agent is required in cases governed by Article 64(2) of the Convention.

Article 64. Application by Analogy

The Court shall apply the provisions of Title II of these Rules to advisory proceedings, to the extent that it deems them to be compatible.

Article 65. Delivery and Content of Advisory Opinions

1. The delivery of advisory opinions shall be governed by Article 58 of these Rules.
2. Advisory opinions shall contain:
 - a. the name of the President, the judges who rendered the opinion, the Secretary and Deputy Secretary;
 - b. the issues presented to the Court;
 - c. a description of the proceedings;
 - d. the legal arguments;
 - e. the opinion of the Court;
 - f. a statement indicating which text is authentic.
3. Any judge who has taken part in the delivery of an advisory opinion is entitled to append a separate opinion, dissenting or concurring, to the opinion of the Court. These opinions shall be submitted within a time limit to be fixed by the President, so that the other judges can take cognizance thereof before the advisory opinion is rendered. They shall be published in accordance with Article 30(1)(a) of these Rules.
4. Advisory opinions may be delivered in public.

TITLE IV

FINAL AND TRANSITORY PROVISIONS

Article 66. Amendments to the Rules of Procedure

These Rules of Procedure may be amended by the decision of an absolute majority of the Titular Judges of the Court. Upon their entry into force, they shall abrogate the previous Rules of Procedure.

Article 67. Entry into Force

These Rules of Procedure, the Spanish and English versions of which are equally authentic, shall enter into force on 1 June 2001.

Done at the seat of the Inter-American Court of Human Rights in San José, Costa Rica on this twenty-fourth day of November, 2000.

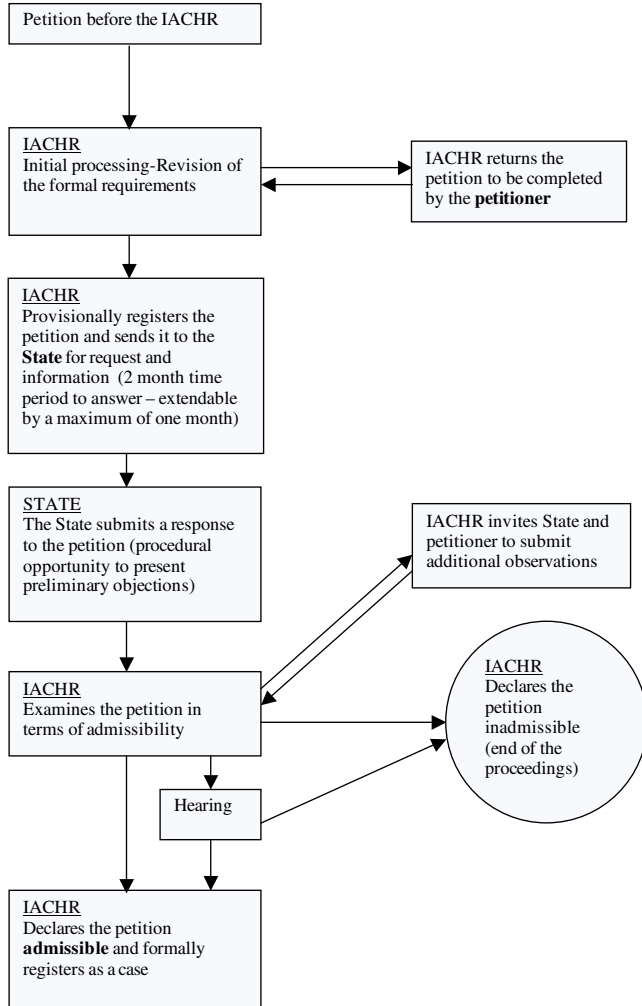
* Reformed by the Court during its LXI Ordinary Period of Sessions held from November 20 to December 4, 2003. Reforms were approved during sessions 9 and 10 on November 25, 2003, and shall enter into force on January 1, 2004.

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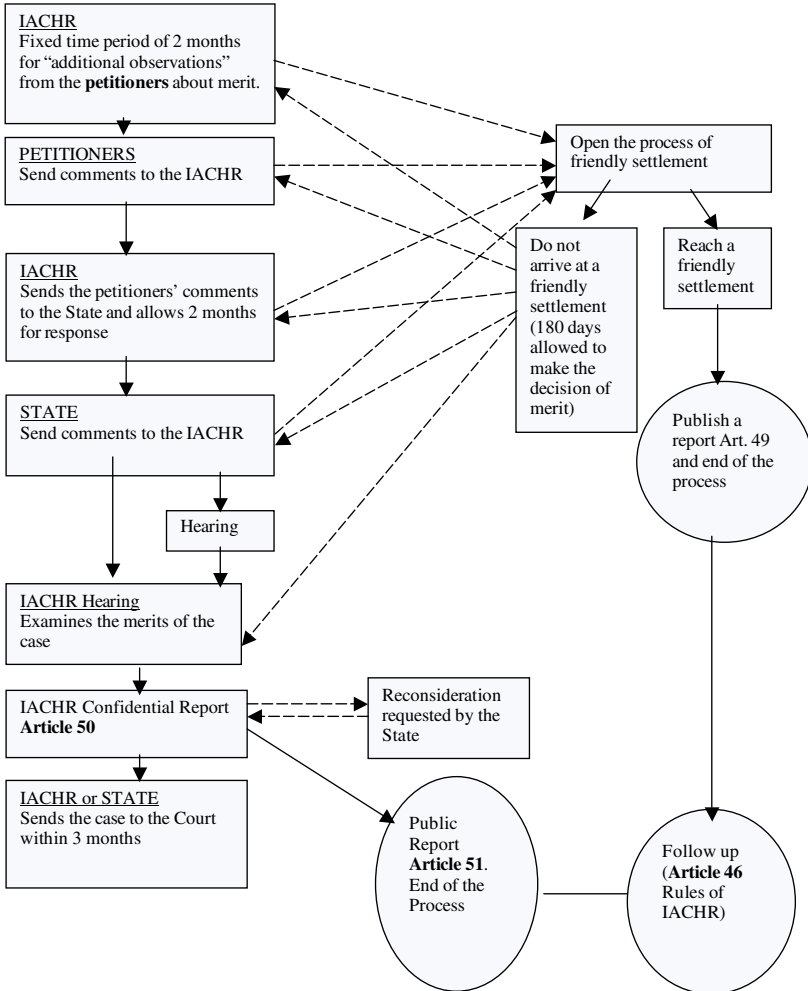
PROCESSING OF INDIVIDUAL PETITIONS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

**Inter-American Commission on Human Rights (IACHR)
Admission and Admissibility Phase**



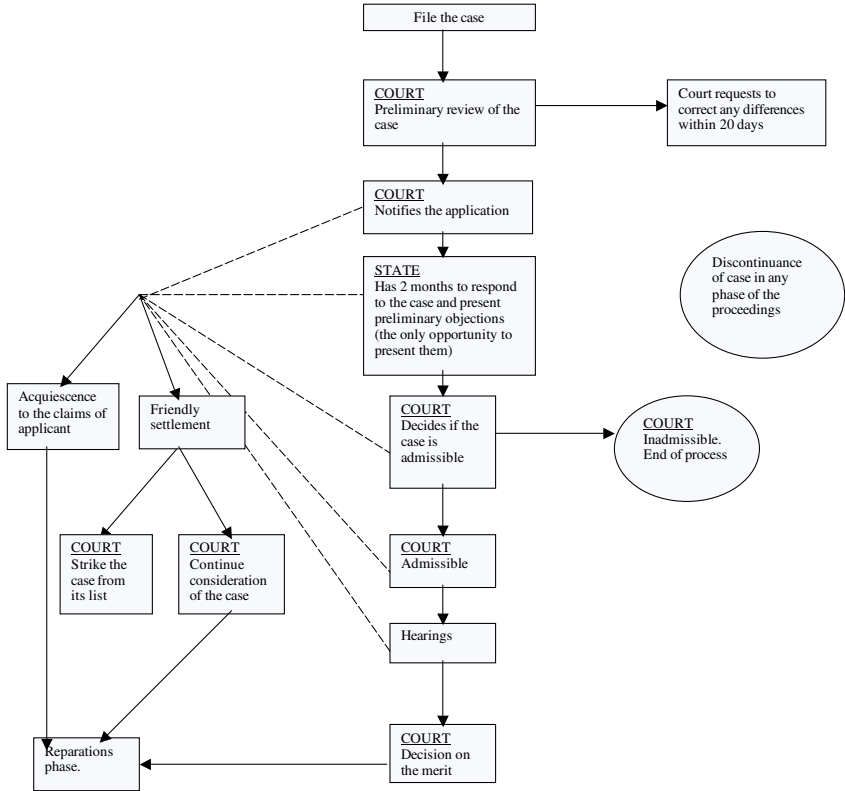
PROCESSING INDIVIDUAL PETITIONS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

**Inter-American Commission on Human Rights (IACHR)
 Merit Phase**



PROCESSING INDIVIDUAL PETITIONS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Inter-American Court of Human Rights



**STATUS OF RATIFICATION
OF INTER-AMERICAN HUMAN RIGHTS TREATIES**

Country	Signature Ratification	Charter of the Organisation of American States	Protocol of Cartagena de Indias	Protocol of Washington	Protocol de Managua	Protocol of Buenos Aires
Antigua & Barbuda	S	12/03/81	12/14/86	12/14/92	06/10/93	12/03/81
	R	12/03/81	11/07/86	03/12/03	03/12/03	12/03/81
Argentina	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	01/19/56	10/31/88	03/17/94	12/05/94	07/10/67
Bahamas	S	03/03/82	12/05/85	12/14/92	06/10/93	03/03/82
	R	03/01/82	11/07/86	05/20/94	05/20/94	03/01/82
Barbados	S	10/09/67	12/05/85	08/05/94	-	03/16/70
	R	11/14/67	11/06/86	07/08/94	07/08/94	03/16/70
Belize	S	01/08/91	-	-	06/10/93	-
	R	01/08/91	-	05/11/95	05/11/95	-
Bolivia	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	09/25/50	11/12/88	09/14/94	03/29/94	02/20/70
Brazil	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	02/11/50	09/20/88	04/13/94	08/31/95	04/03/68
Canada	S	11/13/89	-	12/14/92	06/10/93	-
	R	12/20/89	-	08/26/93	08/26/93	-
Chile	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	05/05/53	06/16/89	08/24/94	09/14/94	04/12/71
Colombia	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	12/07/51	03/06/87	05/17/96	10/04/96	12/27/69
Costa Rica	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	10/30/48	09/18/90	05/02/95	06/22/95	04/30/68
Cuba	S	04/30/48	-	-	-	-
	R	07/08/52	-	-	-	-
Dominica	S	05/22/79	12/05/85	-	06/10/93	05/22/79
	R	05/22/79	11/07/86	-	02/20/95	05/22/79
Dominican Republic	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	04/11/49	11/06/86	-	08/12/98	10/31/67
Ecuador	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	12/21/50	04/27/90	06/30/95	06/30/95	08/20/70
El Salvador	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	08/15/50	11/15/88	02/25/94	01/16/95	06/18/68
Grenada	S	05/13/75	06/10/86	12/14/92	06/10/93	03/08/82
	R	05/13/75	10/24/86	-	11/20/95	05/13/75
Guatemala	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	03/18/51	04/10/01	01/07/99	12/10/96	12/18/67
Guyana	S	01/08/91	-	12/14/92	06/10/93	-
	R	01/08/91	-	01/08/96	01/08/96	-
Haiti	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	08/21/50	-	-	-	03/26/70
Honduras	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	01/13/50	03/16/87	05/22/96	05/21/98	02/17/70
Jamaica	S	06/27/69	12/05/85	12/14/92	06/10/93	02/27/70
	R	08/07/69	10/31/86	-	07/10/95	02/16/70
Mexico	S	04/30/48	12/05/85	-	06/10/93	02/27/67
	R	11/23/48	08/31/88	-	12/18/93	03/14/68
Nicaragua	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	06/21/50	11/11/88	05/03/95	05/03/95	07/27/68
Panama	S	04/30/48	06/13/86	12/14/92	06/10/93	02/27/67
	R	03/16/51	07/13/89	05/12/95	05/12/95	01/29/69
Paraguay	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	03/30/50	03/06/87	08/26/94	08/26/94	12/19/67
Peru	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	05/15/52	09/18/96	09/18/96	09/18/96	01/09/70
St. Kitts & Nevis	S	03/12/84	04/16/86	12/14/92	06/10/93	03/12/84
	R	03/12/84	11/06/86	-	03/17/95	03/12/84
St. Lucia	S	05/22/79	12/05/85	12/14/92	06/10/93	05/22/79
	R	05/22/79	01/22/87	-	05/12/95	05/22/79

THE PROHIBITION OF TORTURE AND ILL-TREATMENT IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM
A HANDBOOK FOR VICTIMS AND THEIR ADVOCATES

St. Vincent & Grenadines	S	12/03/81	09/28/87	03/05/96	06/10/93	12/03/81
	R	12/03/81	06/15/87	05/23/96	05/23/96	12/03/81
Suriname	S	02/22/77	12/05/85	12/14/92	06/10/93	02/22/77
	R	06/01/77	11/11/87	-	-	06/01/77
Trinidad & Tobago	S	03/13/67	-	-	06/10/93	05/20/68
	R	03/14/67	-	-	08/03/95	05/20/68
United States	S	04/30/48	11/07/86	01/28/93	06/10/93	02/27/67
	R	06/15/51	-	06/07/94	06/07/94	04/23/68
Uruguay	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	08/17/55	10/01/90	12/04/97	-	04/04/74
Venezuela	S	04/30/48	12/05/85	12/14/92	06/10/93	02/27/67
	R	12/21/51	05/20/93	09/12/97	12/26/94	09/26/68

Country	Signature Ratification	Pact of San Jose, Costa Rica	Protocol of San Salvador	Protocol to abolish the death penalty	Convention on the forced disappearance of persons	Convention to prevent and punish torture	Convention of Belem do Para
Antigua & Barbuda	S	-	-	-	-	-	-
	R	-	-	-	-	-	08/12/98
Argentina	S	02/02/84	11/17/88	-	06/10/94	02/10/86	06/10/94
	R	08/14/84	06/30/03	-	10/31/95	11/18/88	04/09/96
Bahamas	S	-	-	-	-	-	05/16/95
	R	-	-	-	-	-	05/03/95
Barbados	S	06/20/78	-	-	-	-	05/16/95
	R	11/05/81	-	-	-	-	02/08/95
Belize	S	-	-	-	-	-	11/15/96
	R	-	-	-	-	-	11/25/96
Bolivia	S	-	11/17/88	-	09/14/94	12/09/85	09/14/94
	R	06/20/79	-	-	09/19/96	-	10/26/94
Brazil	S	-	-	06/07/94	06/10/94	01/24/86	06/09/94
	R	07/09/92	08/08/96	07/31/96	-	06/09/89	11/16/95
Canada	S	-	-	-	-	-	-
	R	-	-	-	-	-	-
Chile	S	11/22/69	06/05/01	09/10/01	06/10/94	09/24/87	10/17/94
	R	08/10/90	-	-	-	09/15/88	10/24/96
Colombia	S	11/22/69	-	-	08/05/94	12/09/85	-
	R	05/28/73	10/22/97	-	04/01/05	12/02/98	10/03/96
Costa Rica	S	11/22/69	11/17/88	10/28/91	06/10/94	07/31/86	06/09/94
	R	03/02/70	09/29/99	03/30/98	03/20/96	11/25/99	07/05/95
Cuba	S	-	-	-	-	-	-
	R	-	-	-	-	-	-
Dominica	S	-	-	-	-	-	-
	R	06/03/93	-	-	-	-	06/30/95
Dominican Republic	S	11/22/69	11/17/88	-	-	03/31/86	06/09/94
	R	12/08/77	-	-	-	12/12/86	01/10/96
Ecuador	S	11/22/69	11/17/88	08/27/90	-	05/30/86	01/10/95
	R	06/20/78	02/10/93	02/05/98	-	09/30/99	06/30/95
El Salvador	S	07/14/78	11/17/88	-	-	10/16/87	08/14/95
	R	07/14/78	05/04/95	-	-	10/17/94	11/13/95
Grenada	S	11/22/69	-	-	-	-	-
	R	04/27/78	-	-	-	-	11/29/00
Guatemala	S	-	11/17/88	-	07/27/99	10/27/86	06/24/94
	R	-	05/30/00	-	07/27/99	12/10/86	01/04/95
Guyana	S	-	-	-	-	-	01/10/95
	R	09/14/77	-	-	-	-	01/08/96
Haiti	S	11/22/69	11/17/88	-	-	06/13/86	-
	R	09/05/77	-	-	-	-	04/07/97
Honduras	S	09/16/77	-	-	04/28/05	03/11/86	06/10/94
	R	07/19/78	-	-	04/28/05	-	07/04/95
Jamaica	S	-	-	-	-	-	12/14/05
	R	03/02/81	-	-	-	-	11/11/05
Mexico	S	11/22/69	11/17/88	-	02/28/02	02/10/86	06/04/95
	R	09/25/79	03/08/96	-	02/28/02	02/11/87	06/19/98

APPENDIX 10
STATUS OF RATIFICATION OF INTER-AMERICAN HUMAN RIGHTS TREATIES

Nicaragua	S	11/22/69	11/17/88	08/30/90	-	09/29/87	06/09/94
	R	05/08/78	-	03/24/99	-	-	10/06/95
Panama	S	11/22/69	11/17/88	11/26/90	07/31/95	02/10/86	10/05/94
	R	08/18/89	10/28/92	06/27/91	07/31/95	06/27/91	04/26/95
Paraguay	S	07/27/77	08/26/96	06/08/99	08/26/96	10/25/89	10/17/95
	R	07/12/78	05/28/97	10/31/00	08/26/96	02/12/90	09/29/95
Peru	S	09/07/77	11/17/88	-	-	01/10/86	07/12/95
	R	01/21/78	05/17/95	-	02/08/02	02/27/90	04/02/96
St. Kitts & Nevis	S	-	-	-	-	-	06/09/94
	R	-	-	-	-	-	03/17/95
St. Lucia	S	-	-	-	-	-	11/11/94
	R	-	-	-	-	-	03/08/95
St. Vincent & Grenadines	S	-	-	-	-	-	03/05/96
	R	-	-	-	-	-	05/23/96
Suriname	S	-	-	-	-	11/12/87	-
	R	11/12/87	02/28/90	-	-	11/12/87	02/19/02
Trinidad & Tobago	S	-	-	-	-	-	11/03/95
	R	04/03/91	-	-	-	-	01/04/96
United States	S	06/01/77	-	-	-	-	-
	R	-	-	-	-	-	-
Uruguay	S	11/22/69	11/17/88	10/02/90	02/06/96	12/09/85	06/30/94
	R	03/26/85	11/21/95	02/08/94	02/06/96	09/23/92	01/04/96
Venezuela	S	11/22/69	01/27/89	09/25/90	07/06/98	12/09/85	06/09/94
	R	06/23/77	-	08/24/92	07/06/98	06/25/91	01/16/95

The World Organisation Against Torture (OMCT) coordinates the activities of the SOS-Torture Network, which is the world's largest coalition of non-governmental organisations fighting against torture and ill-treatment, arbitrary detention, extrajudicial executions, forced disappearances, and other serious human rights violations. OMCT's growing global network currently includes 282 local, national, and regional organisations in 92 countries spanning all regions of the world. An important aspect of OMCT's mandate is to respond to the advocacy and capacity-building needs of its network members, including the need to develop effective international litigation strategies to assist victims of torture and ill-treatment in obtaining legal remedies where none are available domestically, and to support them in their struggle to end impunity in states where torture and ill-treatment remain endemic or tolerated practices. In furtherance of these objectives, OMCT has published a *Handbook Series* of four volumes, each one providing a guide to the practice, procedure, and jurisprudence of the regional and international mechanisms that are competent to examine individual complaints concerning the violation of the absolute prohibition of torture and ill-treatment. This *Handbook* on the prohibition of torture and ill-treatment in the Inter-American System is the second of the series.

THE PROHIBITION OF TORTURE AND ILL-TREATMENT IN THE INTER-AMERICAN SYSTEM: A HANDBOOK FOR VICTIMS AND THEIR ADVOCATES

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**INTER-AMERICAN CONVENTION ON THE
PREVENTION, PUNISHMENT AND ERADICATION
OF VIOLENCE AGAINST WOMEN
"CONVENTION OF BELEM DO PARA"**

(Adopted in Belém do Pará, Brasil, on June 9, 1994,
at the twenty fourth regular session of the
General Assembly)

THE STATES PARTIES TO THIS CONVENTION,

RECOGNIZING that full respect for human rights has been enshrined in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights, and reaffirmed in other international and regional instruments;

AFFIRMING that violence against women constitutes a violation of their human rights and fundamental freedoms, and impairs or nullifies the observance, enjoyment and exercise of such rights and freedoms;

CONCERNED that violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men;

RECALLING the Declaration on the Elimination of Violence against Women, adopted by the Twenty-fifth Assembly of Delegates of the Inter-American Commission of Women, and affirming that violence against women pervades every sector of society regardless of class, race or ethnic group, income, culture, level of education, age or religion and strikes at its very foundations:

CONVINCED that the elimination of violence against women is essential for their individual and social development and their full and equal participation in all walks of life; and

CONVINCED that the adoption of a convention on the prevention, punishment and eradication of all forms of violence against women within the framework of the Organization of American States is a positive contribution to protecting the rights of women and eliminating violence against them,

HAVE AGREED to the following:

CHAPTER I

DEFINITION AND SCOPE OF APPLICATION

Article 1

For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.

Article 2

Violence against women shall be understood to include physical, sexual and psychological violence:

- a. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;
- b. that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and
- c. that is perpetrated or condoned by the state or its agents regardless of where it occurs.

CHAPTER II

RIGHTS PROTECTED

Article 3

Every woman has the right to be free from violence in both the public and private spheres.

Article 4

Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others:

- a. The right to have her life respected;
- b. The right to have her physical, mental and moral integrity respected;
- c. The right to personal liberty and security;
- d. The right not to be subjected to torture;
- e. The rights to have the inherent dignity of her person respected and her family protected;
- f. The right to equal protection before the law and of the law;

- g. The right to simple and prompt recourse to a competent court for protection against acts that violate her rights;
- h. The right to associate freely;
- i. The right of freedom to profess her religion and beliefs within the law; and
- j. The right to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making.

Article 5

Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognize that violence against women prevents and nullifies the exercise of these rights.

Article 6

The right of every woman to be free from violence includes, among others:

- a. The right of women to be free from all forms of discrimination; and
- b. The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.

CHAPTER III

DUTIES OF THE STATES

Article 7

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

- a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
- b. apply due diligence to prevent, investigate and impose penalties for violence against women;
- c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and

eradicate violence against women and to adopt appropriate administrative measures where necessary;

- d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
- e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
- f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;
- g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and
- h. adopt such legislative or other measures as may be necessary to give effect to this Convention.

Article 8

The States Parties agree to undertake progressively specific measures, including programs:

- a. to promote awareness and observance of the right of women to be free from violence, and the right of women to have their human rights respected and protected;
- b. to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women;
- c. to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women;
- d. to provide appropriate specialized services for women who have been subjected to violence, through public and private sector agencies, including shelters, counseling services for all family members where appropriate, and care and custody of the affected children;

- e. to promote and support governmental and private sector education designed to raise the awareness of the public with respect to the problems of and remedies for violence against women;
- f. to provide women who are subjected to violence access to effective readjustment and training programs to enable them to fully participate in public, private and social life;
- g. to encourage the communications media to develop appropriate media guidelines in order to contribute to the eradication of violence against women in all its forms, and to enhance respect for the dignity of women;
- h. to ensure research and the gathering of statistics and other relevant information relating to the causes, consequences and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement the necessary changes; and
- i. to foster international cooperation for the exchange of ideas and experiences and the execution of programs aimed at protecting women who are subjected to violence.

Article 9

With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.

CHAPTER IV

INTER-AMERICAN MECHANISMS OF PROTECTION

Article 10

In order to protect the rights of every woman to be free from violence, the States Parties shall include in their national reports to the Inter-American Commission of Women information on measures adopted to prevent and prohibit violence against women, and to assist women affected by violence, as well as on any difficulties they observe in applying those measures, and the factors that contribute to violence against women.

Article 11

The States Parties to this Convention and the Inter-American Commission of Women may request of the Inter-American Court of Human Rights advisory opinions on the interpretation of this Convention.

Article 12

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.

CHAPTER V

GENERAL PROVISIONS

Article 13

No part of this Convention shall be understood to restrict or limit the domestic law of any State Party that affords equal or greater protection and guarantees of the rights of women and appropriate safeguards to prevent and eradicate violence against women.

Article 14

No part of this Convention shall be understood to restrict or limit the American Convention on Human Rights or any other international convention on the subject that provides for equal or greater protection in this area.

Article 15

This Convention is open to signature by all the member states of the Organization of American States.

Article 16

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 17

This Convention is open to accession by any other state. Instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 18

Any State may, at the time of approval, signature, ratification, or accession, make reservations to this Convention provided that such reservations are:

- a. not incompatible with the object and purpose of the Convention, and
- b. not of a general nature and relate to one or more specific provisions.

Article 19

Any State Party may submit to the General Assembly, through the Inter-American Commission of Women, proposals for the amendment of this Convention.

Amendments shall enter into force for the states ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

Article 20

If a State Party has two or more territorial units in which the matters dealt with in this Convention are governed by different systems of law, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or to only one or more of them.

Such a declaration may be amended at any time by subsequent declarations, which shall expressly specify the territorial unit or units to which this Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat

of the Organization of American States, and shall enter into force thirty days after the date of their receipt.

Article 21

This Convention shall enter into force on the thirtieth day after the date of deposit of the second instrument of ratification. For each State that ratifies or accedes to the Convention after the second instrument of ratification is deposited, it shall enter into force thirty days after the date on which that State deposited its instrument of ratification or accession.

Article 22

The Secretary General shall inform all member states of the Organization of American States of the entry into force of this Convention.

Article 23

The Secretary General of the Organization of American States shall present an annual report to the member states of the Organization on the status of this Convention, including the signatures, deposits of instruments of ratification and accession, and declarations, and any reservations that may have been presented by the States Parties, accompanied by a report thereon if needed.

Article 24

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it by depositing an instrument to that effect with the General Secretariat of the Organization of American States. One year after the date of deposit of the instrument of denunciation, this Convention shall cease to be in effect for the denouncing State but shall remain in force for the remaining States Parties.

Article 25

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall send a certified copy to the Secretariat of the United Nations for registration and publication in accordance with the provisions of Article 102 of the United Nations Charter.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective governments, have signed this Convention, which shall be called the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará."

DONE IN THE CITY OF BELEM DO PARA, BRAZIL, the ninth of June in the year one thousand nine hundred ninety-four.

**INTER-AMERICAN CONVENTION ON THE PREVENTION,
PUNISHMENT, AND ERADICATION OF VIOLENCE AGAINST WOMEN
"CONVENTION OF BELÉM DO PARÁ"**

(Adopted in Belém do Pará, Brasil, on June 9, 1994,
at the twenty fourth regular session of the
General Assembly)

ENTRY INTO FORCE: March 5, 1995
DEPOSITARY: General Secretariat OAS (Original instrument and
ratifications)
TEXT
UN REGISTRATION:

COUNTRY	SIGNATURE	DEPOSIT
Antigua and Barbuda	-	11/19/98 AD
Argentina	06/10/94	07/05/96 RA
Bahamas	05/16/95	05/16/95 AD
Barbados	05/16/95	05/16/95 RA
Belize	11/15/96	11/25/96 AD
Bolivia	09/14/94	12/05/94 RA
Brazil	06/09/94	11/27/95 RA
Chile	10/17/94	11/15/96 RA
Colombia	-	11/15/96 AD
Costa Rica	07/05/95	07/12/95 RA
Dominica	-	06/06/95 RA
Dominican Republic	06/09/94	03/07/96 RA
Ecuador	01/10/95	09/15/95 RA
El Salvador	08/14/95	01/26/96 RA
Grenada	-	02/15/01 RA
Guatemala	06/24/94	04/04/95 RA
Guyana	01/10/95	02/28/96 RA
Haiti	-	06/02/97 RA
Honduras	06/10/94	07/12/95 RA
Jamaica	12/14/05	12/14/05 RA
Mexico	06/04/95	11/12/98 RA
Nicaragua	06/09/94	12/12/95 RA
Panama	10/05/94	07/12/95 RA
Paraguay	10/17/95	10/18/95 RA
Peru	07/12/95	06/04/96 RA
St. Kitts & Nevis	06/09/94	06/12/95 RA
Saint Lucia	11/11/94	04/04/95 RA
St. Vincent & Grenadines	03/05/96	05/31/95 RA
Suriname	-	03/08/02 RA

Trinidad and Tobago	11/03/95	05/08/96 RA
Uruguay	06/30/94	2 April 1996
Venezuela	06/09/94	02/03/95 RA

AD: ACCESSION

RA: RATIFICATION

**CHARTER
OF THE ORGANIZATION
OF AMERICAN STATES**

As amended by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Buenos Aires", signed on February 27, 1967, at the Third Special Inter-American Conference,

by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Cartagena de Indias", approved on December 5, 1985, at the Fourteenth Special Session of the General Assembly,

by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Washington", approved on December 14, 1992, at the Sixteenth Special Session of the General Assembly,

and by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Managua", adopted on June 10, 1993, at the Nineteenth Special Session of the General Assembly.

CHARTER OF THE ORGANIZATION OF AMERICAN STATES*

IN THE NAME OF THEIR PEOPLES, THE STATES REPRESENTED AT THE NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES,

Convinced that the historic mission of America is to offer to man a land of liberty and a favorable environment for the development of his personality and the realization of his just aspirations;

Conscious that that mission has already inspired numerous agreements, whose essential value lies in the desire of the American peoples to live together in peace and, through their mutual understanding and respect for the sovereignty of each one, to provide for the betterment of all, in independence, in equality and under law;

Convinced that representative democracy is an indispensable condition for the stability, peace and development of the region;

Confident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man;

Persuaded that their welfare and their contribution to the progress and the civilization of the world will increasingly require intensive continental cooperation;

Resolved to persevere in the noble undertaking that humanity has conferred upon the United Nations, whose principles and purposes they solemnly reaffirm;

Convinced that juridical organization is a necessary condition for security and peace founded on moral order and on justice; and

In accordance with Resolution IX of the Inter-American Conference on Problems of War and Peace, held in Mexico City,

**HAVE AGREED
upon the following**

**CHARTER OF THE ORGANIZATION
OF AMERICAN STATES**

PART ONE

Chapter I

NATURE AND PURPOSES

Article 1

The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency.

The Organization of American States has no powers other than those expressly conferred upon it by this Charter, none of whose provisions authorizes it to intervene in matters that are within the internal jurisdiction of the Member States.

Article 2

The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes:

- a) To strengthen the peace and security of the continent;
- b) To promote and consolidate representative democracy, with due respect for the principle of nonintervention;
- c) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States;
- d) To provide for common action on the part of those States in the event of aggression;
- e) To seek the solution of political, juridical, and economic problems that may arise among them;
- f) To promote, by cooperative action, their economic, social, and cultural development;
- g) To eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere; and

- h) To achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.

Chapter II

PRINCIPLES

Article 3

The American States reaffirm the following principles:

- a) International law is the standard of conduct of States in their reciprocal relations;
- b) International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law;
- c) Good faith shall govern the relations between States;
- d) The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy;
- e) Every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State.
Subject to the foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic, and social systems;
- f) The elimination of extreme poverty is an essential part of the promotion and consolidation of representative democracy and is the common and shared responsibility of the American States;
- g) The American States condemn war of aggression: victory does not give rights;
- h) An act of aggression against one American State is an act of aggression against all the other American States;
- i) Controversies of an international character arising between two or more American States shall be settled by peaceful procedures;
- j) Social justice and social security are bases of lasting peace;
- k) Economic cooperation is essential to the common welfare and prosperity of the peoples of the continent;
- l) The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex;

- m) The spiritual unity of the continent is based on respect for the cultural values of the American countries and requires their close cooperation for the high purposes of civilization;
- n) The education of peoples should be directed toward justice, freedom, and peace.

Chapter III

MEMBERS

Article 4

All American States that ratify the present Charter are Members of the Organization.

Article 5

Any new political entity that arises from the union of several Member States and that, as such, ratifies the present Charter, shall become a Member of the Organization. The entry of the new political entity into the Organization shall result in the loss of membership of each one of the States which constitute it.

Article 6

Any other independent American State that desires to become a Member of the Organization should so indicate by means of a note addressed to the Secretary General, in which it declares that it is willing to sign and ratify the Charter of the Organization and to accept all the obligations inherent in membership, especially those relating to collective security expressly set forth in Articles 28 and 29 of the Charter.

Article 7

The General Assembly, upon the recommendation of the Permanent Council of the Organization, shall determine whether it is appropriate that the Secretary General be authorized to permit the applicant State to sign the Charter and to accept the deposit of the corresponding instrument of ratification. Both the recommendation of the Permanent Council and the decision of the General Assembly shall require the affirmative vote of two thirds of the Member States.

Article 8

Membership in the Organization shall be confined to independent States of the Hemisphere that were Members of the United Nations as of December 10, 1985, and the nonautonomous territories mentioned in document OEA/Ser. P, AG/doc.1939/85, of November 5, 1985, when they become independent.

Article 9

A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.

- a) The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of promoting the restoration of representative democracy in the affected Member State have been unsuccessful;
- b) The decision to suspend shall be adopted at a special session of the General Assembly by an affirmative vote of two-thirds of the Member States;
- c) The suspension shall take effect immediately following its approval by the General Assembly;
- d) The suspension notwithstanding, the Organization shall endeavor to undertake additional diplomatic initiatives to contribute to the re-establishment of representative democracy in the affected Member State;
- e) The Member which has been subject to suspension shall continue to fulfill its obligations to the Organization;
- f) The General Assembly may lift the suspension by a decision adopted with the approval of two-thirds of the Member States;
- g) The powers referred to in this article shall be exercised in accordance with this Charter.

Chapter IV

FUNDAMENTAL RIGHTS AND DUTIES OF STATES

Article 10

States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law.

Article 11

Every American State has the duty to respect the rights enjoyed by every other State in accordance with international law.

Article 12

The fundamental rights of States may not be impaired in any manner whatsoever.

Article 13

The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law.

Article 14

Recognition implies that the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States.

Article 15

The right of each State to protect itself and to live its own life does not authorize it to commit unjust acts against another State.

Article 16

The jurisdiction of States within the limits of their national territory is exercised equally over all the inhabitants, whether nationals or aliens.

Article 17

Each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.

Article 18

Respect for and the faithful observance of treaties constitute standards for the development of peaceful relations among States. International treaties and agreements should be public.

Article 19

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

Article 20

No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

Article 21

The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

Article 22

The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.

Article 23

Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 19 and 21.

Chapter V

PACIFIC SETTLEMENT OF DISPUTES

Article 24

International disputes between Member States shall be submitted to the peaceful procedures set forth in this Charter.

This provision shall not be interpreted as an impairment of the rights and obligations of the Member States under Articles 34 and 35 of the Charter of the United Nations.

Article 25

The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time.

Article 26

In the event that a dispute arises between two or more American States which, in the opinion of one of them, cannot be settled through the usual diplomatic channels, the parties shall agree on some other peaceful procedure that will enable them to reach a solution.

Article 27

A special treaty will establish adequate means for the settlement of disputes and will determine pertinent procedures for each peaceful means such that no dispute between American States may remain without definitive settlement within a reasonable period of time.

Chapter VI

COLLECTIVE SECURITY

Article 28

Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States.

Article 29

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an armed attack or by an act of aggression that is not an armed attack, or by an extracontinental conflict, or by a conflict between two or more American States, or by any other fact or situation that might endanger the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject.

Chapter VII

INTEGRAL DEVELOPMENT

Article 30

The Member States, inspired by the principles of inter-American solidarity and cooperation, pledge themselves to a united effort to ensure international social justice in their relations and integral development for their peoples, as conditions essential to peace and security. Integral development encompasses the economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved.

Article 31

Inter-American cooperation for integral development is the common and joint responsibility of the Member States, within the framework of the democratic principles and the institutions of the inter-American system. It should include the economic, social, educational, cultural, scientific, and technological fields, support the achievement of national objectives of the Member States, and respect the priorities established by each country in its development plans, without political ties or conditions.

Article 32

Inter-American cooperation for integral development should be continuous and preferably channeled through multilateral organizations, without prejudice to bilateral cooperation between Member States.

The Member States shall contribute to inter-American cooperation for integral development in accordance with their resources and capabilities and in conformity with their laws.

Article 33

Development is a primary responsibility of each country and should constitute an integral and continuous process for the establishment of a more just economic and social order that will make possible and contribute to the fulfillment of the individual.

Article 34

The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals:

- a) Substantial and self-sustained increase of per capita national product;
- b) Equitable distribution of national income;
- c) Adequate and equitable systems of taxation;
- d) Modernization of rural life and reforms leading to equitable and efficient land-tenure systems, increased agricultural productivity, expanded use of land, diversification of production and improved processing and marketing systems for agricultural products; and the strengthening and expansion of the means to attain these ends;
- e) Accelerated and diversified industrialization, especially of capital and intermediate goods;
- f) Stability of domestic price levels, compatible with sustained economic development and the attainment of social justice;
- g) Fair wages, employment opportunities, and acceptable working conditions for all;
- h) Rapid eradication of illiteracy and expansion of educational opportunities for all;
- i) Protection of man's potential through the extension and application of modern medical science;
- j) Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food;
- k) Adequate housing for all sectors of the population;
- l) Urban conditions that offer the opportunity for a healthful, productive, and full life;

- m) Promotion of private initiative and investment in harmony with action in the public sector; and
- n) Expansion and diversification of exports.

Article 35

The Member States should refrain from practicing policies and adopting actions or measures that have serious adverse effects on the development of other Member States.

Article 36

Transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries.

Article 37

The Member States agree to join together in seeking a solution to urgent or critical problems that may arise whenever the economic development or stability of any Member State is seriously affected by conditions that cannot be remedied through the efforts of that State.

Article 38

The Member States shall extend among themselves the benefits of science and technology by encouraging the exchange and utilization of scientific and technical knowledge in accordance with existing treaties and national laws.

Article 39

The Member States, recognizing the close interdependence between foreign trade and economic and social development, should make individual and united efforts to bring about the following:

- a) Favorable conditions of access to world markets for the products of the developing countries of the region, particularly through the reduction or elimination, by importing countries, of tariff and nontariff barriers that affect the exports of the Member States of the Organization, except when such barriers are applied in order to diversify the economic structure, to speed up the development of the less-developed Member States, and intensify their process of economic integration, or when they are related to national security or to the needs of economic balance;
- b) Continuity in their economic and social development by means of:
 - i. Improved conditions for trade in basic commodities through international agreements, where appropriate; orderly marketing procedures that avoid the disruption of markets, and other measures designed to promote the expansion of markets and to obtain dependable incomes for producers,

adequate and dependable supplies for consumers, and stable prices that are both remunerative to producers and fair to consumers;

- ii. Improved international financial cooperation and the adoption of other means for lessening the adverse impact of sharp fluctuations in export earnings experienced by the countries exporting basic commodities;
- iii. Diversification of exports and expansion of export opportunities for manufactured and semimanufactured products from the developing countries; and
- iv. Conditions conducive to increasing the real export earnings of the Member States, particularly the developing countries of the region, and to increasing their participation in international trade.

Article 40

The Member States reaffirm the principle that when the more developed countries grant concessions in international trade agreements that lower or eliminate tariffs or other barriers to foreign trade so that they benefit the less-developed countries, they should not expect reciprocal concessions from those countries that are incompatible with their economic development, financial, and trade needs.

Article 41

The Member States, in order to accelerate their economic development, regional integration, and the expansion and improvement of the conditions of their commerce, shall promote improvement and coordination of transportation and communication in the developing countries and among the Member States.

Article 42

The Member States recognize that integration of the developing countries of the Hemisphere is one of the objectives of the inter-American system and, therefore, shall orient their efforts and take the necessary measures to accelerate the integration process, with a view to establishing a Latin American common market in the shortest possible time.

Article 43

In order to strengthen and accelerate integration in all its aspects, the Member States agree to give adequate priority to the preparation and carrying out of multinational projects and to their financing, as well as to encourage economic and financial institutions of the inter-American system to continue giving their broadest support to regional integration institutions and programs.

Article 44

The Member States agree that technical and financial cooperation that seeks to promote regional economic integration should be based on the principle of harmonious, balanced, and efficient development, with particular attention to the relatively less-developed countries, so that it may be a decisive factor that will enable

them to promote, with their own efforts, the improved development of their infrastructure programs, new lines of production, and export diversification.

Article 45

The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:

- a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security;
- b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working;
- c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws;
- d) Fair and efficient systems and procedures for consultation and collaboration among the sectors of production, with due regard for safeguarding the interests of the entire society;
- e) The operation of systems of public administration, banking and credit, enterprise, and distribution and sales, in such a way, in harmony with the private sector, as to meet the requirements and interests of the community;
- f) The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system. The encouragement of all efforts of popular promotion and cooperation that have as their purpose the development and progress of the community;
- g) Recognition of the importance of the contribution of organizations such as labor unions, cooperatives, and cultural, professional, business, neighborhood, and community associations to the life of the society and to the development process;
- h) Development of an efficient social security policy; and
- i) Adequate provision for all persons to have due legal aid in order to secure their rights.

Article 46

The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal.

Article 47

The Member States will give primary importance within their development plans to the encouragement of education, science, technology, and culture, oriented toward the overall improvement of the individual, and as a foundation for democracy, social justice, and progress.

Article 48

The Member States will cooperate with one another to meet their educational needs, to promote scientific research, and to encourage technological progress for their integral development. They will consider themselves individually and jointly bound to preserve and enrich the cultural heritage of the American peoples.

Article 49

The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases:

- a) Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge;
- b) Middle-level education shall be extended progressively to as much of the population as possible, with a view to social improvement. It shall be diversified in such a way that it meets the development needs of each country without prejudice to providing a general education; and
- c) Higher education shall be available to all, provided that, in order to maintain its high level, the corresponding regulatory or academic standards are met.

Article 50

The Member States will give special attention to the eradication of illiteracy, will strengthen adult and vocational education systems, and will ensure that the benefits of culture will be available to the entire population. They will promote the use of all information media to fulfill these aims.

Article 51

The Member States will develop science and technology through educational, research, and technological development activities and information and dissemination programs. They will stimulate activities in the field of technology for the purpose of adapting it to the needs of their integral development. They will organize their

cooperation in these fields efficiently and will substantially increase exchange of knowledge, in accordance with national objectives and laws and with treaties in force.

Article 52

The Member States, with due respect for the individuality of each of them, agree to promote cultural exchange as an effective means of consolidating inter-American understanding; and they recognize that regional integration programs should be strengthened by close ties in the fields of education, science, and culture.

* Signed in Bogotá in 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993. In force as of September 25, 1997.

PART TWO
Chapter VIII
THE ORGANS

Article 53

The Organization of American States accomplishes its purposes by means of:

- a) The General Assembly;
- b) The Meeting of Consultation of Ministers of Foreign Affairs;
- c) The Councils;
- d) The Inter-American Juridical Committee;
- e) The Inter-American Commission on Human Rights;
- f) The General Secretariat;
- g) The Specialized Conferences; and
- h) The Specialized Organizations.

There may be established, in addition to those provided for in the Charter and in accordance with the provisions thereof, such subsidiary organs, agencies, and other entities as are considered necessary.

Chapter IX

THE GENERAL ASSEMBLY

Article 54

The General Assembly is the supreme organ of the Organization of American States. It has as its principal powers, in addition to such others as are assigned to it by the Charter, the following:

- a) To decide the general action and policy of the Organization, determine the structure and functions of its organs, and consider any matter relating to friendly relations among the American States;
- b) To establish measures for coordinating the activities of the organs, agencies, and entities of the Organization among themselves, and such activities with those of the other institutions of the inter-American system;
- c) To strengthen and coordinate cooperation with the United Nations and its specialized agencies;
- d) To promote collaboration, especially in the economic, social, and cultural fields, with other international organizations whose purposes are similar to those of the Organization of American States;

- e) To approve the program-budget of the Organization and determine the quotas of the Member States;
- f) To consider the reports of the Meeting of Consultation of Ministers of Foreign Affairs and the observations and recommendations presented by the Permanent Council with regard to the reports that should be presented by the other organs and entities, in accordance with the provisions of Article 91.f, as well as the reports of any organ which may be required by the General Assembly itself;
- g) To adopt general standards to govern the operations of the General Secretariat; and
- h) To adopt its own rules of procedure and, by a two-thirds vote, its agenda.

The General Assembly shall exercise its powers in accordance with the provisions of the Charter and of other inter-American treaties.

Article 55

The General Assembly shall establish the bases for fixing the quota that each Government is to contribute to the maintenance of the Organization, taking into account the ability to pay of the respective countries and their determination to contribute in an equitable manner. Decisions on budgetary matters require the approval of two thirds of the Member States.

Article 56

All Member States have the right to be represented in the General Assembly. Each State has the right to one vote.

Article 57

The General Assembly shall convene annually during the period determined by the rules of procedure and at a place selected in accordance with the principle of rotation. At each regular session the date and place of the next regular session shall be determined, in accordance with the rules of procedure.

If for any reason the General Assembly cannot be held at the place chosen, it shall meet at the General Secretariat, unless one of the Member States should make a timely offer of a site in its territory, in which case the Permanent Council of the Organization may agree that the General Assembly will meet in that place.

Article 58

In special circumstances and with the approval of two thirds of the Member States, the Permanent Council shall convoke a special session of the General Assembly.

Article 59

Decisions of the General Assembly shall be adopted by the affirmative vote of an absolute majority of the Member States, except in those cases that require a two-

thirds vote as provided in the Charter or as may be provided by the General Assembly in its rules of procedure.

Article 60

There shall be a Preparatory Committee of the General Assembly, composed of representatives of all the Member States, which shall:

- a) Prepare the draft agenda of each session of the General Assembly;
- b) Review the proposed program-budget and the draft resolution on quotas, and present to the General Assembly a report thereon containing the recommendations it considers appropriate; and
- c) Carry out such other functions as the General Assembly may assign to it.

The draft agenda and the report shall, in due course, be transmitted to the Governments of the Member States.

Chapter X

THE MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS

Article 61

The Meeting of Consultation of Ministers of Foreign Affairs shall be held in order to consider problems of an urgent nature and of common interest to the American States, and to serve as the Organ of Consultation.

Article 62

Any Member State may request that a Meeting of Consultation be called. The request shall be addressed to the Permanent Council of the Organization, which shall decide by an absolute majority whether a meeting should be held.

Article 63

The agenda and regulations of the Meeting of Consultation shall be prepared by the Permanent Council of the Organization and submitted to the Member States for consideration.

Article 64

If, for exceptional reasons, a Minister of Foreign Affairs is unable to attend the meeting, he shall be represented by a special delegate.

Article 65

In case of an armed attack on the territory of an American State or within the region of security delimited by the treaty in force, the Chairman of the Permanent

Council shall without delay call a meeting of the Council to decide on the convocation of the Meeting of Consultation, without prejudice to the provisions of the inter-American Treaty of Reciprocal Assistance with regard to the States Parties to that instrument.

Article 66

An Advisory Defense Committee shall be established to advise the Organ of Consultation on problems of military cooperation that may arise in connection with the application of existing special treaties on collective security.

Article 67

The Advisory Defense Committee shall be composed of the highest military authorities of the American States participating in the Meeting of Consultation. Under exceptional circumstances the Governments may appoint substitutes. Each State shall be entitled to one vote.

Article 68

The Advisory Defense Committee shall be convoked under the same conditions as the Organ of Consultation, when the latter deals with matters relating to defense against aggression.

Article 69

The Committee shall also meet when the General Assembly or the Meeting of Consultation or the Governments, by a two-thirds majority of the Member States, assign to it technical studies or reports on specific subjects.

Chapter XI

THE COUNCILS OF THE ORGANIZATION

Common Provisions

Article 70

The Permanent Council of the Organization and the Inter-American Council for Integral Development are directly responsible to the General Assembly, and each has the authority granted to it in the Charter and other inter-American instruments, as well as the functions assigned to it by the General Assembly and the Meeting of Consultation of Ministers of Foreign Affairs.

Article 71

All Member States have the right to be represented on each of the Councils. Each State has the right to one vote.

Article 72

The Councils may, within the limits of the Charter and other inter-American instruments, make recommendations on matters within their authority.

Article 73

The Councils, on matters within their respective competence, may present to the General Assembly studies and proposals, drafts of international instruments, and proposals on the holding of specialized conferences, on the creation, modification, or elimination of specialized organizations and other inter-American agencies, as well as on the coordination of their activities. The Councils may also present studies, proposals, and drafts of international instruments to the Specialized Conferences.

Article 74

Each Council may, in urgent cases, convoke Specialized Conferences on matters within its competence, after consulting with the Member States and without having to resort to the procedure provided for in Article 122.

Article 75

The Councils, to the extent of their ability, and with the cooperation of the General Secretariat, shall render to the Governments such specialized services as the latter may request.

Article 76

Each Council has the authority to require the other Council, as well as the subsidiary organs and agencies responsible to them, to provide it with information and advisory services on matters within their respective spheres of competence. The Councils may also request the same services from the other agencies of the inter-American system.

Article 77

With the prior approval of the General Assembly, the Councils may establish the subsidiary organs and the agencies that they consider advisable for the better performance of their duties. When the General Assembly is not in session, the aforesaid organs or agencies may be established provisionally by the corresponding Council. In constituting the membership of these bodies, the Councils, insofar as possible, shall follow the criteria of rotation and equitable geographic representation.

Article 78

The Councils may hold meetings in any Member State, when they find it advisable and with the prior consent of the Government concerned.

Article 79

Each Council shall prepare its own statutes and submit them to the General Assembly for approval. It shall approve its own rules of procedure and those of its subsidiary organs, agencies, and committees.

Chapter XII

THE PERMANENT COUNCIL OF THE ORGANIZATION

Article 80

The Permanent Council of the Organization is composed of one representative of each Member State, especially appointed by the respective Government, with the rank of ambassador. Each Government may accredit an acting representative, as well as such alternates and advisers as it considers necessary.

Article 81

The office of Chairman of the Permanent Council shall be held by each of the representatives, in turn, following the alphabetic order in Spanish of the names of their respective countries. The office of Vice Chairman shall be filled in the same way, following reverse alphabetic order.

The Chairman and the Vice Chairman shall hold office for a term of not more than six months, which shall be determined by the statutes.

Article 82

Within the limits of the Charter and of inter-American treaties and agreements, the Permanent Council takes cognizance of any matter referred to it by the General Assembly or the Meeting of Consultation of Ministers of Foreign Affairs.

Article 83

The Permanent Council shall serve provisionally as the Organ of Consultation in conformity with the provisions of the special treaty on the subject.

Article 84

The Permanent Council shall keep vigilance over the maintenance of friendly relations among the Member States, and for that purpose shall effectively assist them in the peaceful settlement of their disputes, in accordance with the following provisions.

Article 85

In accordance with the provisions of this Charter, any party to a dispute in which none of the peaceful procedures provided for in the Charter is under way may resort to the Permanent Council to obtain its good offices. The Council, following the provisions of the preceding article, shall assist the parties and recommend the procedures it considers suitable for peaceful settlement of the dispute.

Article 86

In the exercise of its functions and with the consent of the parties to the dispute, the Permanent Council may establish ad hoc committees.

The ad hoc committees shall have the membership and the mandate that the Permanent Council agrees upon in each individual case, with the consent of the parties to the dispute.

Article 87

The Permanent Council may also, by such means as it deems advisable, investigate the facts in the dispute, and may do so in the territory of any of the parties, with the consent of the Government concerned.

Article 88

If the procedure for peaceful settlement of disputes recommended by the Permanent Council or suggested by the pertinent ad hoc committee under the terms of its mandate is not accepted by one of the parties, or one of the parties declares that the procedure has not settled the dispute, the Permanent Council shall so inform the General Assembly, without prejudice to its taking steps to secure agreement between the parties or to restore relations between them.

Article 89

The Permanent Council, in the exercise of these functions, shall take its decisions by an affirmative vote of two thirds of its Members, excluding the parties to the dispute, except for such decisions as the rules of procedure provide shall be adopted by a simple majority.

Article 90

In performing their functions with respect to the peaceful settlement of disputes, the Permanent Council and the respective ad hoc committee shall observe the provisions of the Charter and the principles and standards of international law, as well as take into account the existence of treaties in force between the parties.

Article 91

The Permanent Council shall also:

- a) Carry out those decisions of the General Assembly or of the Meeting of Consultation of Ministers of Foreign Affairs the implementation of which has not been assigned to any other body;
- b) Watch over the observance of the standards governing the operation of the General Secretariat and, when the General Assembly is not in session, adopt provisions of a regulatory nature that enable the General Secretariat to carry out its administrative functions;
- c) Act as the Preparatory Committee of the General Assembly, in accordance with the terms of Article 60 of the Charter, unless the General Assembly should decide otherwise;
- d) Prepare, at the request of the Member States and with the cooperation of the appropriate organs of the Organization, draft agreements to promote and facilitate cooperation between the Organization of American States and the United Nations or between the Organization and other American agencies of recognized international standing. These draft agreements shall be submitted to the General Assembly for approval;

- e) Submit recommendations to the General Assembly with regard to the functioning of the Organization and the coordination of its subsidiary organs, agencies, and committees;
- f) Consider the reports of the Inter-American Council for Integral Development, of the Inter-American Juridical Committee, of the Inter-American Commission on Human Rights, of the General Secretariat, of specialized agencies and conferences, and of other bodies and agencies, and present to the General Assembly any observations and recommendations it deems necessary; and
- g) Perform the other functions assigned to it in the Charter.

Article 92

The Permanent Council and the General Secretariat shall have the same seat.

Chapter XIII

THE INTER-AMERICAN COUNCIL FOR INTEGRAL DEVELOPMENT

Article 93

The Inter-American Council for Integral Development is composed of one principal representative, of ministerial or equivalent rank, for each Member State, especially appointed by the respective Government.

In keeping with the provisions of the Charter, the Inter-American Council for Integral Development may establish the subsidiary bodies and the agencies that it considers advisable for the better performance of its duties.

Article 94

The purpose of the Inter-American Council for Integral Development is to promote cooperation among the American States for the purpose of achieving integral development and, in particular, helping to eliminate extreme poverty, in accordance with the standards of the Charter, especially those set forth in Chapter VII with respect to the economic, social, educational, cultural, scientific, and technological fields.

Article 95

In order to achieve its various goals, especially in the specific area of technical cooperation, the Inter-American Council for Integral Development shall:

- a) Formulate and recommend to the General Assembly a strategic plan which sets forth policies, programs, and courses of action in matters of cooperation for integral development, within the framework of the general policy and priorities defined by the General Assembly;
- b) Formulate guidelines for the preparation of the program-budget for technical cooperation and for the other activities of the Council;

- c) Promote, coordinate, and assign responsibility for the execution of development programs and projects to the subsidiary bodies and relevant organizations, on the basis of the priorities identified by the Member States, in areas such as:
 - 1) Economic and social development, including trade, tourism, integration and the environment;
 - 2) Improvement and extension of education to cover all levels, promotion of scientific and technological research, through technical cooperation, and support for cultural activities; and
 - 3) Strengthening of the civic conscience of the American peoples, as one of the bases for the effective exercise of democracy and for the observance of the rights and duties of man.

These ends shall be furthered by sectoral participation mechanisms and other subsidiary bodies and organizations established by the Charter and by other General Assembly provisions;

- d) Establish cooperative relations with the corresponding bodies of the United Nations and with other national and international agencies, especially with regard to coordination of inter-American technical cooperation programs;
- e) Periodically evaluate cooperation activities for integral development, in terms of their performance in the implementation of policies, programs, and projects, in terms of their impact, effectiveness, efficiency, and use of resources, and in terms of the quality, inter alia, of the technical cooperation services provided; and report to the General Assembly.

Article 96

The Inter-American Council for Integral Development shall hold at least one meeting each year at the ministerial or equivalent level. It shall also have the right to convene meetings at the same level for the specialized or sectorial topics it considers relevant, within its province or sphere of competence. It shall also meet when convoked by the General Assembly or the Meeting of Consultation of Foreign Ministers, or on its own initiative, or for the cases envisaged in Article 37 of the Charter.

Article 97

The Inter-American Council for Integral Development shall have the nonpermanent specialized committees which it decides to establish and which are required for the proper performance of its functions. Those committees shall operate and shall be composed as stipulated in the Statutes of the Council.

Article 98

The execution and, if appropriate, the coordination, of approved projects shall be entrusted to the Executive Secretariat for Integral Development, which shall report on the results of that execution to the Council.

Chapter XIV

THE INTER-AMERICAN JURIDICAL COMMITTEE

Article 99

The purpose of the Inter-American Juridical Committee is to serve the Organization as an advisory body on juridical matters; to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation.

Article 100

The Inter-American Juridical Committee shall undertake the studies and preparatory work assigned to it by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, or the Councils of the Organization. It may also, on its own initiative, undertake such studies and preparatory work as it considers advisable, and suggest the holding of specialized juridical conferences.

Article 101

The Inter-American Juridical Committee shall be composed of eleven jurists, nationals of Member States, elected by the General Assembly for a period of four years from panels of three candidates presented by Member States. In the election, a system shall be used that takes into account partial replacement of membership and, insofar as possible, equitable geographic representation. No two Members of the Committee may be nationals of the same State.

Vacancies that occur for reasons other than normal expiration of the terms of office of the Members of the Committee shall be filled by the Permanent Council of the Organization in accordance with the criteria set forth in the preceding paragraph.

Article 102

The Inter-American Juridical Committee represents all of the Member States of the Organization, and has the broadest possible technical autonomy.

Article 103

The Inter-American Juridical Committee shall establish cooperative relations with universities, institutes, and other teaching centers, as well as with national and international committees and entities devoted to study, research, teaching, or dissemination of information on juridical matters of international interest.

Article 104

The Inter-American Juridical Committee shall draft its statutes, which shall be submitted to the General Assembly for approval.

The Committee shall adopt its own rules of procedure.

Article 105

The seat of the Inter-American Juridical Committee shall be the city of Rio de Janeiro, but in special cases the Committee may meet at any other place that may be designated, after consultation with the Member State concerned.

Chapter XV

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Article 106

There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.

An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.

Chapter XVI

THE GENERAL SECRETARIAT

Article 107

The General Secretariat is the central and permanent organ of the Organization of American States. It shall perform the functions assigned to it in the Charter, in other inter-American treaties and agreements, and by the General Assembly, and shall carry out the duties entrusted to it by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, or the Councils.

Article 108

The Secretary General of the Organization shall be elected by the General Assembly for a five-year term and may not be reelected more than once or succeeded by a person of the same nationality. In the event that the office of Secretary General becomes vacant, the Assistant Secretary General shall assume his duties until the General Assembly shall elect a new Secretary General for a full term.

Article 109

The Secretary General shall direct the General Secretariat, be the legal representative thereof, and, notwithstanding the provisions of Article 91.b, be responsible to the General Assembly for the proper fulfillment of the obligations and functions of the General Secretariat.

Article 110

The Secretary General, or his representative, may participate with voice but without vote in all meetings of the Organization.

The Secretary General may bring to the attention of the General Assembly or the Permanent Council any matter which in his opinion might threaten the peace and security of the Hemisphere or the development of the Member States.

The authority to which the preceding paragraph refers shall be exercised in accordance with the present Charter.

Article 111

The General Secretariat shall promote economic, social, juridical, educational, scientific, and cultural relations among all the Member States of the Organization, with special emphasis on cooperation for the elimination of extreme poverty, in keeping with the actions and policies decided upon by the General Assembly and with the pertinent decisions of the Councils.

Article 112

The General Secretariat shall also perform the following functions:

- a) Transmit *ex officio* to the Member States notice of the convocation of the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Inter-American Council for Integral Development, and the Specialized Conferences;
- b) Advise the other organs, when appropriate, in the preparation of agenda and rules of procedure;
- c) Prepare the proposed program-budget of the Organization on the basis of programs adopted by the Councils, agencies, and entities whose expenses should be included in the program-budget and, after consultation with the Councils or their permanent committees, submit it to the Preparatory Committee of the General Assembly and then to the Assembly itself;
- d) Provide, on a permanent basis, adequate secretariat services for the General Assembly and the other organs, and carry out their directives and assignments. To the extent of its ability, provide services for the other meetings of the Organization;
- e) Serve as custodian of the documents and archives of the inter-American Conferences, the General Assembly, the Meetings of Consultation of Ministers of Foreign Affairs, the Councils, and the Specialized Conferences;
- f) Serve as depository of inter-American treaties and agreements, as well as of the instruments of ratification thereof;
- g) Submit to the General Assembly at each regular session an annual report on the activities of the Organization and its financial condition; and

- h) Establish relations of cooperation, in accordance with decisions reached by the General Assembly or the Councils, with the Specialized Organizations as well as other national and international organizations.

Article 113

The Secretary General shall:

- a) Establish such offices of the General Secretariat as are necessary to accomplish its purposes; and
- b) Determine the number of officers and employees of the General Secretariat, appoint them, regulate their powers and duties, and fix their remuneration.

The Secretary General shall exercise this authority in accordance with such general standards and budgetary provisions as may be established by the General Assembly.

Article 114

The Assistant Secretary General shall be elected by the General Assembly for a five-year term and may not be reelected more than once or succeeded by a person of the same nationality. In the event that the office of Assistant Secretary General becomes vacant, the Permanent Council shall elect a substitute to hold that office until the General Assembly shall elect a new Assistant Secretary General for a full term.

Article 115

The Assistant Secretary General shall be the Secretary of the Permanent Council. He shall serve as advisory officer to the Secretary General and shall act as his delegate in all matters that the Secretary General may entrust to him. During the temporary absence or disability of the Secretary General, the Assistant Secretary General shall perform his functions.

The Secretary General and the Assistant Secretary General shall be of different nationalities.

Article 116

The General Assembly, by a two-thirds vote of the Member States, may remove the Secretary General or the Assistant Secretary General, or both, whenever the proper functioning of the Organization so demands.

Article 117

The Secretary General shall appoint, with the approval of the Inter-American Council for Integral Development, an Executive Secretary for Integral Development.

Article 118

In the performance of their duties, the Secretary General and the personnel of the Secretariat shall not seek or receive instructions from any Government or from any authority outside the Organization, and shall refrain from any action that may be incompatible with their position as international officers responsible only to the Organization.

Article 119

The Member States pledge themselves to respect the exclusively international character of the responsibilities of the Secretary General and the personnel of the General Secretariat, and not to seek to influence them in the discharge of their duties.

Article 120

In selecting the personnel of the General Secretariat, first consideration shall be given to efficiency, competence, and integrity; but at the same time, in the recruitment of personnel of all ranks, importance shall be given to the necessity of obtaining as wide a geographic representation as possible.

Article 121

The seat of the General Secretariat is the city of Washington, D.C.

Chapter XVII

THE SPECIALIZED CONFERENCES

Article 122

The Specialized Conferences are intergovernmental meetings to deal with special technical matters or to develop specific aspects of inter-American cooperation. They shall be held when either the General Assembly or the Meeting of Consultation of Ministers of Foreign Affairs so decides, on its own initiative or at the request of one of the Councils or Specialized Organizations.

Article 123

The agenda and rules of procedure of the Specialized Conferences shall be prepared by the Councils or Specialized Organizations concerned and shall be submitted to the Governments of the Member States for consideration.

Chapter XVIII

THE SPECIALIZED ORGANIZATIONS

Article 124

For the purposes of the present Charter, Inter-American Specialized Organizations are the intergovernmental organizations established by multilateral agreements and having specific functions with respect to technical matters of common interest to the American States.

Article 125

The General Secretariat shall maintain a register of the organizations that fulfill the conditions set forth in the foregoing Article, as determined by the General Assembly after a report from the Council concerned.

Article 126

The Specialized Organizations shall enjoy the fullest technical autonomy, but they shall take into account the recommendations of the General Assembly and of the Councils, in accordance with the provisions of the Charter.

Article 127

The Specialized Organizations shall transmit to the General Assembly annual reports on the progress of their work and on their annual budgets and expenses.

Article 128

Relations that should exist between the Specialized Organizations and the Organization shall be defined by means of agreements concluded between each

organization and the Secretary General, with the authorization of the General Assembly.

Article 129

The Specialized Organizations shall establish cooperative relations with world agencies of the same character in order to coordinate their activities. In concluding agreements with international agencies of a worldwide character, the Inter-American Specialized Organizations shall preserve their identity and their status as integral parts of the Organization of American States, even when they perform regional functions of international agencies.

Article 130

In determining the location of the Specialized Organizations consideration shall be given to the interest of all of the Member States and to the desirability of selecting the seats of these organizations on the basis of a geographic representation as equitable as possible.

PART THREE

Chapter XIX

THE UNITED NATIONS

Article 131

None of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations.

Chapter XX

MISCELLANEOUS PROVISIONS

Article 132

Attendance at meetings of the permanent organs of the Organization of American States or at the conferences and meetings provided for in the Charter, or held under the auspices of the Organization, shall be in accordance with the multilateral character of the aforesaid organs, conferences, and meetings and shall not depend on the bilateral relations between the Government of any Member State and the Government of the host country.

Article 133

The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes.

Article 134

The representatives of the Member States on the organs of the Organization, the personnel of their delegations, as well as the Secretary General and the Assistant Secretary General shall enjoy the privileges and immunities corresponding to their positions and necessary for the independent performance of their duties.

Article 135

The juridical status of the Specialized Organizations and the privileges and immunities that should be granted to them and to their personnel, as well as to the officials of the General Secretariat, shall be determined in a multilateral agreement. The foregoing shall not preclude, when it is considered necessary, the concluding of bilateral agreements.

Article 136

Correspondence of the Organization of American States, including printed matter and parcels, bearing the frank thereof, shall be carried free of charge in the mails of the Member States.

Article 137

The Organization of American States does not allow any restriction based on race, creed, or sex, with respect to eligibility to participate in the activities of the Organization and to hold positions therein.

Article 138

Within the provisions of this Charter, the competent organs shall endeavor to obtain greater collaboration from countries not Members of the Organization in the area of cooperation for development.

Chapter XXI

RATIFICATION AND ENTRY INTO FORCE

Article 139

The present Charter shall remain open for signature by the American States and shall be ratified in accordance with their respective constitutional procedures. The original instrument, the Spanish, English, Portuguese, and French texts of which are equally authentic, shall be deposited with the General Secretariat, which shall transmit certified copies thereof to the Governments for purposes of ratification. The instruments of ratification shall be deposited with the General Secretariat, which shall notify the signatory States of such deposit.

Article 140

The present Charter shall enter into force among the ratifying States when two thirds of the signatory States have deposited their ratifications. It shall enter into force with respect to the remaining States in the order in which they deposit their ratifications.

Article 141

The present Charter shall be registered with the Secretariat of the United Nations through the General Secretariat.

Article 142

Amendments to the present Charter may be adopted only at a General Assembly convened for that purpose. Amendments shall enter into force in accordance with the terms and the procedure set forth in Article 140.

Article 143

The present Charter shall remain in force indefinitely, but may be denounced by any Member State upon written notification to the General Secretariat, which shall communicate to all the others each notice of denunciation received. After two years from the date on which the General Secretariat receives a notice of denunciation, the present Charter shall cease to be in force with respect to the denouncing State, which shall cease to belong to the Organization after it has fulfilled the obligations arising from the present Charter.

Chapter XXII

TRANSITORY PROVISIONS

Article 144

The Inter-American Committee on the Alliance for Progress shall act as the permanent executive committee of the Inter-American Economic and Social Council as long as the Alliance is in operation.

Article 145

Until the inter-American convention on human rights, referred to in Chapter XV, enters into force, the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights.

Article 146

The Permanent Council shall not make any recommendation nor shall the General Assembly take any decision with respect to a request for admission on the part of a political entity whose territory became subject, in whole or in part, prior to December 18, 1964, the date set by the First Special Inter-American Conference, to litigation or claim between an extracontinental country and one or more Member States of the Organization, until the dispute has been ended by some peaceful procedure. This article shall remain in effect until December 10, 1990.

**INTER-AMERICAN CONVENTION ON
FORCED DISAPPEARANCE OF PERSONS**

(Adopted at Belém do Pará, on June 9, 1994, at the
twenty fourth regular session of the General Assembly)

PREAMBLE

The member states of the Organization of American States signatory to the present Convention,

DISTURBED by the persistence of the forced disappearance of persons;

REAFFIRMING that the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in this Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights;

CONSIDERING that the forced disappearance of persons in an affront to the conscience of the Hemisphere and a grave and abominable offense against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States;

CONSIDERING that the forced disappearance of persons of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights;

RECALLING that the international protection of human rights is in the form of a convention reinforcing or complementing the protection provided by domestic law and is based upon the attributes of the human personality;

REAFFIRMING that the systematic practice of the forced disappearance of persons constitutes a crime against humanity;

HOPING that this Convention may help to prevent, punish, and eliminate the forced disappearance of persons in the Hemisphere and make a decisive contribution to the protection of human rights and the rule of law,

RESOLVE to adopt the following Inter-American Convention on Forced Disappearance of Persons:

Article I

The States Parties to this Convention undertake:

a. Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees;

b. To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories;

c. To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons;

d. To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.

Article II

For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

Article III

The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.

The States Parties may establish mitigating circumstances for persons who have participated in acts constituting forced disappearance when they help to cause the victim to reappear alive or provide information that sheds light on the forced disappearance of a person.

Article IV

The acts constituting the forced disappearance of persons shall be considered offenses in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases in the following instances:

- a. When the forced disappearance of persons or any act constituting such offense was committed within its jurisdiction;
- b. When the accused is a national of that state;
- c. When the victim is a national of that state and that state sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.

This Convention does not authorize any State Party to undertake, in the territory of another State Party, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of that other Party by its domestic law.

Article V

The forced disappearance of persons shall not be considered a political offense for purposes of extradition.

The forced disappearance of persons shall be deemed to be included among the extraditable offenses in every extradition treaty entered into between States Parties.

The States Parties undertake to include the offense of forced disappearance as one which is extraditable in every extradition treaty to be concluded between them in the future.

Every State Party that makes extradition conditional on the existence of a treaty and receives a request for extradition from another State Party with which it has no extradition treaty may consider this Convention as the necessary legal basis for extradition with respect to the offense of forced disappearance.

States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offense as extraditable, subject to the conditions imposed by the law of the requested state.

Extradition shall be subject to the provisions set forth in the constitution and other laws of the request state.

Article VI

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offense had been committed within its jurisdiction, for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the state that has requested the extradition.

Article VII

Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.

However, if there should be a norm of a fundamental character preventing application of the stipulation contained in the previous paragraph, the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the corresponding State Party.

Article VIII

The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them.

The States Parties shall ensure that the training of public law-enforcement personnel or officials includes the necessary education on the offense of forced disappearance of persons.

Article IX

Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.

The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties.

Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations.

Article X

In no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency be invoked to justify the forced disappearance of persons. In such cases, the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom.

In pursuing such procedures or recourse, and in keeping with applicable domestic law, the competent judicial authorities shall have free and immediate access to all detention centers and to each of their units, and to all places where there is reason to believe the disappeared person might be found including places that are subject to military jurisdiction.

Article XI

Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay, in accordance with applicable domestic law.

The States Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with their domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities.

Article XII

The States Parties shall give each other mutual assistance in the search for, identification, location, and return of minors who have been removed to another state or detained therein as a consequence of the forced disappearance of their parents or guardians.

Article XIII

For the purposes of this Convention, the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights and to the Statute and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures.

Article XIV

Without prejudice to the provisions of the preceding article, when the Inter-American Commission on Human Rights receives a petition or communication regarding an alleged forced disappearance, its Executive Secretariat shall urgently and confidentially address the respective government, and shall request that government to provide as soon as possible information as to the whereabouts of the allegedly disappeared person together with any other information it considers pertinent, and such request shall be without prejudice as to the admissibility of the petition.

Article XV

None of the provisions of this Convention shall be interpreted as limiting other bilateral or multilateral treaties or other agreements signed by the Parties.

This Convention shall not apply to the international armed conflicts governed by the 1949 Geneva Conventions and their Protocols, concerning protection of wounded, sick, and shipwrecked members of the armed forces; and prisoners of war and civilians in time of war.

Article XVI

This Convention is open for signature by the member states of the Organization of American States.

Article XVII

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article XVIII

This Convention shall be open to accession by any other state. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article XIX

The states may express reservations with respect to this Convention when adopting, signing, ratifying or acceding to it, unless such reservations are incompatible with the object and purpose of the Convention and as long as they refer to one or more specific provisions.

Article XX

This Convention shall enter into force for the ratifying states on the thirtieth day from the date of deposit of the second instrument of ratification.

For each state ratifying or acceding to the Convention after the second instrument of ratification has been deposited, the Convention shall enter into force on the thirtieth day from the date on which that state deposited its instrument of ratification or accession.

Article XXI

This Convention shall remain in force indefinitely, but may be denounced by any State Party. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. The Convention shall cease to be in effect for the denouncing state and shall remain in force for the other States Parties one year from the date of deposit of the instrument of denunciation.

Article XXII

The original instrument of this Convention, the Spanish, English, Portuguese, and French texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall forward certified copies thereof to the United Nations Secretariat, for registration and publication, in accordance with Article 102 of the Charter of the United Nations. The General Secretariat of the Organization of American States shall notify member states of the Organization and states acceding to the Convention of the signatures and deposit of instruments of ratification, accession or denunciation, as well as of any reservations that may be expressed.

INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PERSONS

(Adopted at Belém do Pará, on June 9, 1994, at the
twenty fourth regular session of the General Assembly)

ENTRY INTO FORCE: March 28, 1996
DEPOSITORY: OAS General Secretariat (Original instrument and
ratifications)
TEXT:
UN REGISTRATION:

SIGNATORY COUNTRIES	DEPOSIT OF RATIFICATION
Argentina	28 February 1999
^{4/} Bolivia	5 May 1999
Brazil	
Chile	
^{1/} Colombia	12 April 2005
Costa Rica	2 June 1996
^{7/} Ecuador	
^{2/} Guatemala	25 February 2000 ^{a/}
Honduras	11 July 2005
^{9/} Mexico	9 April 2002 ^{b/}
Nicaragua	
^{5/} Panama	28 February 1996
^{6/} Paraguay	26 November 1996
^{8/} Peru	13 February 2002
^{3/} Uruguay	2 April 1996
Venezuela	19 January 1999

All States herein signed the Convention on June 10, 1994, with the exception of those indicated in the notes.

1. Signed 5 August 1994 at the OAS General Secretariat.
2. Signed 24 June 1994 at the OAS General Secretariat.
3. Signed 30 June 1994 at the OAS General Secretariat.
4. Signed 14 September 1994 at the OAS General Secretariat.
5. Signed 5 October 1994 at the OAS General Secretariat.
6. Signed 2 April 1996 at the OAS General Secretariat.
7. Signed 8 February 2000 at the OAS General Secretariat.
8. Signed 8 January 2001 at the OAS General Secretariat.
9. Signed 4 May 2001 at the OAS General Secretariat.

a. Guatemala:

Pursuant to Article XIX of the Convention, the Republic of Guatemala, upon ratifying the Convention, formulates a reservation regarding the application of Article V thereof, since Article 27 of its Political Constitution establishes that "extradition proceedings, for political crimes shall not be instituted against Guatemalans, who shall in no case be handed over to a foreign government, except as provided in treaties and conventions concerning crimes against humanity or against international law,"

and that for the time being, there is no domestic Guatemalan legislation governing the matter of extradition.

Withdrawal of the reservation regarding the application of Article V made at the time

of the reservation (September 7, 2001).

b. Mexico: Inter-American Convention on the Forced Disappearance of Persons Reservation made when depositing the instrument of ratification (April 9, 2002)

"The Government of the United Mexican States, upon ratifying the Inter-American Convention on the Forced Disappearance of Persons adopted in Belem, Brazil on June 9, 1994 makes express reservation to Article IX, inasmuch as the Political Constitution recognizes military jurisdiction when a member of the armed forces commits an illicit act while on duty. Military jurisdiction does not constitute a special jurisdiction in the sense of the Convention given that according to Article 14 of the Mexican Constitution nobody may be deprived of his life, liberty, property, possessions, or rights except as a result of a trial before previously established courts in which due process is observed in accordance with laws promulgated prior to the fact." Interpretative declaration made when depositing the instrument of ratification (April 9, 2002)

Based on Article 14 of the Political Constitution of the United Mexican States, the Government of Mexico declares, upon ratifying the Inter-American Convention on the Forced Disappearance of Persons adopted in Belem, Brazil on June 9, 1994, that it shall be understood that the provisions of said Convention shall apply to acts constituting the forced disappearance of persons ordered, executed, or committed after the entry into force of this Convention.

INTER-AMERICAN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST PERSONS WITH DISABILITIES

(Adopted at Guatemala City, Guatemala at the twenty-ninth regular session of the General Assembly of the OAS, held on June 7, 1999)

THE STATES PARTIES TO THIS CONVENTION,

REAFFIRMING that persons with disabilities have the same human rights and fundamental freedoms as other persons; and that these rights, which include freedom from discrimination based on disability, flow from the inherent dignity and equality of each person;

CONSIDERING that the Charter of the Organization of American States, in Article 3.j, establishes the principle that "social justice and social security are bases of lasting peace";

CONCERNED by the discrimination to which people are subject based on their disability;

BEARING IN MIND the agreement of the International Labour Organisation on the vocational rehabilitation and employment of disabled persons (Convention 159); the Declaration of the Rights of Mentally Retarded Persons (UN General Assembly resolution 2856 (XXVI) of December 20, 1971); the Declaration on the Rights of Disabled Persons (UN General Assembly resolution 3447 (XXX) of December 9, 1975); the World Programme of Action concerning Disabled Persons (UN General Assembly resolution 37/52 of December 3, 1982); the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights, "Protocol of San Salvador" (1988); the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (UN General Assembly resolution 46/119 of December 17, 1991); the Declaration of Caracas of the Pan American Health Organization; resolution AG/RES. 1249 (XXIII-O/93), "Situation of Persons with Disabilities in the American Hemisphere"; the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (UN General Assembly resolution 48/96 of December 20, 1993); the Declaration of Managua (December 1993); the Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights (157/93); resolution AG/RES. 1356 (XXV-O/95), "Situation of Persons with Disabilities in the American Hemisphere"; and AG/RES. 1369 (XXVI-O/96), "Panama Commitment to Persons with Disabilities in the American Hemisphere"; and

COMMITTED to eliminating discrimination, in all its forms and manifestations, against persons with disabilities,

HAVE AGREED as follows:

Article I

For the purposes of this Convention, the following terms are defined:

1. Disability

The term "disability" means a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.

2. Discrimination against persons with disabilities

- a. The term "discrimination against persons with disabilities" means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.
- b. A distinction or preference adopted by a state party to promote the social integration or personal development of persons with disabilities does not constitute discrimination provided that the distinction or preference does not in itself limit the right of persons with disabilities to equality and that individuals with disabilities are not forced to accept such distinction or preference. If, under a state's internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well-being, such declaration does not constitute discrimination.

Article II

The objectives of this Convention are to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society.

Article III

To achieve the objectives of this Convention, the states parties undertake:

1. To adopt the legislative, social, educational, labor-related, or any other measures needed to eliminate discrimination against persons with disabilities and to promote their full integration into society, including, but not limited to:
 - a. Measures to eliminate discrimination gradually and to promote integration by government authorities and/or private entities in providing or making available goods, services, facilities, programs, and activities such as employment, transportation, communications, housing, recreation, education, sports, law enforcement and administration of justice, and political and administrative activities;
 - b. Measures to ensure that new buildings, vehicles, and facilities constructed or manufactured within their respective territories facilitate transportation, communications, and access by persons with disabilities;
 - c. Measures to eliminate, to the extent possible, architectural, transportation, and communication obstacles to facilitate access and use by persons with disabilities; and

- d. Measures to ensure that persons responsible for applying this Convention and domestic law in this area are trained to do so.
2. To work on a priority basis in the following areas:
 - a. Prevention of all forms of preventable disabilities;
 - b. Early detection and intervention, treatment, rehabilitation, education, job training, and the provision of comprehensive services to ensure the optimal level of independence and quality of life for persons with disabilities; and
 - c. Increasing of public awareness through educational campaigns aimed at eliminating prejudices, stereotypes, and other attitudes that jeopardize the right of persons to live as equals, thus promoting respect for and coexistence with persons with disabilities;

Article IV

To achieve the objectives of this Convention, the states parties undertake to:

1. Cooperate with one another in helping to prevent and eliminate discrimination against persons with disabilities;
2. Collaborate effectively in:
 - a. Scientific and technological research related to the prevention of disabilities and to the treatment, rehabilitation, and integration into society of persons with disabilities; and
 - b. The development of means and resources designed to facilitate or promote the independence, self-sufficiency, and total integration into society of persons with disabilities, under conditions of equality.

Article V

1. To the extent that it is consistent with their respective internal laws, the states parties shall promote participation by representatives of organizations of persons with disabilities, nongovernmental organizations working in this area, or, if such organizations do not exist, persons with disabilities, in the development, execution, and evaluation of measures and policies to implement this Convention.

2. The states parties shall create effective communication channels to disseminate among the public and private organizations working with persons with disabilities the normative and juridical advances that may be achieved in order to eliminate discrimination against persons with disabilities.

Article VI

1. To follow up on the commitments undertaken in this Convention, a Committee for the Elimination of All Forms of Discrimination against Persons with

Disabilities, composed of one representative appointed by each state party, shall be established.

2. The committee shall hold its first meeting within the 90 days following the deposit of the 11th instrument of ratification. Said meeting shall be convened by the General Secretariat of the Organization of American States and shall be held at the Organization's headquarters, unless a state party offers to host it.

3. At the first meeting, the states parties undertake to submit a report to the Secretary General of the Organization for transmission to the Committee so that it may be examined and reviewed. Thereafter, reports shall be submitted every four years.

4. The reports prepared under the previous paragraph shall include information on measures adopted by the member states pursuant to this Convention and on any progress made by the states parties in eliminating all forms of discrimination against persons with disabilities. The reports shall indicate any circumstances or difficulties affecting the degree of fulfillment of the obligations arising from this Convention.

5. The Committee shall be the forum for assessment of progress made in the application of the Convention and for the exchange of experience among the states parties. The reports prepared by the committee shall reflect the deliberations; shall include information on any measures adopted by the states parties pursuant to this Convention, on any progress they have made in eliminating all forms of discrimination against persons with disabilities, and on any circumstances or difficulties they have encountered in the implementation of the Convention; and shall include the committee's conclusions, its observations, and its general suggestions for the gradual fulfillment of the Convention.

6. The committee shall draft its rules of procedure and adopt them by a simple majority.

7. The Secretary General shall provide the Committee with the support it requires in order to perform its functions.

Article VII

No provision of this Convention shall be interpreted as restricting, or permitting the restriction by states parties of the enjoyment of the rights of persons with disabilities recognized by customary international law or the international instruments by which a particular state party is bound.

Article VIII

1. This Convention shall be open for signature by all member states in Guatemala City, Guatemala, on June 8, 1999, and, thereafter, shall remain open for signature by all states at the headquarters of the Organization of American States, until its entry into force.

2. This Convention is subject to ratification.

3. This Convention shall enter into force for the ratifying states on the 30th day following the date of deposit of the sixth instrument of ratification by a member state of the Organization of American States.

Article IX

After its entry into force, this Convention shall be open for accession by all states that have not signed it.

Article X

1. The instruments of ratification and accession shall be deposited with the General Secretariat of the Organization of American States.

2. For each state that ratifies or accedes to the Convention after the sixth instrument of ratification has been deposited, the Convention shall enter into force on the 30th day following deposit by that state of its instrument of ratification or accession.

Article XI

1. Any state party may make proposals for amendment of this Convention. Said proposals shall be submitted to the General Secretariat of the OAS for dissemination to the states parties.

2. Amendments shall enter into force for the states ratifying them on the date of deposit of the respective instruments of ratification by two thirds of the member states. For the remaining states parties, they shall enter into force on the date of deposit of their respective instruments of ratification.

Article XII

The states may enter reservations to this Convention when ratifying or acceding to it, provided that such reservations are not incompatible with the aim and purpose of the Convention and relate to one or more specific provisions thereof.

Article XIII

This Convention shall remain in force indefinitely, but any state party may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. The Convention shall cease to have force and effect for the denouncing state one year after the date of deposit of the instrument of denunciation, and shall remain in force for the other states parties. Such denunciation shall not exempt the state party from the obligations imposed upon it under this Convention in respect of any action or omission prior to the date on which the denunciation takes effect.

Article XIV

1. The original instrument of this Convention, the English, French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall send a certified copy

thereof to the United Nations Secretariat for registration and publication pursuant to Article 102 of the United Nations Charter.

2. The General Secretariat of the Organization of American States shall notify the member states of that Organization and the states that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation, and any reservations entered.

INTER-AMERICAN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST PERSONS WITH DISABILITIES

(Adopted at Guatemala City, Guatemala on June 7, 1999,
at the twenty-ninth regular session of the General Assembly)

ENTRY INTO FORCE: September 14, 2001

DEPOSITORY: OAS General Secretariat (Original instrument and ratifications)

TEXT:

UN

REGISTRATION:

SIGNATORY COUNTRIES	DEPOSIT OF RATIFICATION
Argentina	10 January 2001
Bolivia	30 May 2003
Brazil	15 August 2001
Chile	26 February 2002
Colombia	11 February 2004
Costa Rica	8 February 2000
Dominica (Commonwealth)	
Dominican Republic	
Ecuador	18 March 2004
El Salvador	8 March 2002
Guatemala	28 January 2003
Haiti	
Jamaica	
Mexico	25 January 2001
Nicaragua	25 November 2002
Panama	16 February 2001
Paraguay	22 October 2002
Peru	30 August 2001
Uruguay	20 July 2001
Venezuela	

All States listed herein signed the Convention on June 8, 1999.

INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

(Adopted at Cartagena de Indias, Colombia, on December 9, 1985, at the fifteenth regular session of the General Assembly)

The American States signatory to the present Convention,

Aware of the provision of the American Convention on Human Rights that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment;

Reaffirming that all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations and are violations of the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights;

Noting that, in order for the pertinent rules contained in the aforementioned global and regional instruments to take effect, it is necessary to draft an Inter-American Convention that prevents and punishes torture;

Reaffirming their purpose of consolidating in this hemisphere the conditions that make for recognition of and respect for the inherent dignity of man, and ensure the full exercise of his fundamental rights and freedoms,

Have agreed upon the following:

Article 1

The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

Article 2

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

Article 3

The following shall be held guilty of the crime of torture:

a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.

b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

Article 4

The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability.

Article 5

The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.

Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.

Article 6

In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

Article 7

The States Parties shall take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest.

The States Parties likewise shall take similar measures to prevent other cruel, inhuman, or degrading treatment or punishment.

Article 8

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

Article 9

The States Parties undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture.

None of the provisions of this article shall affect the right to receive compensation that the victim or other persons may have by virtue of existing national legislation.

Article 10

No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means.

Article 11

The States Parties shall take the necessary steps to extradite anyone accused of having committed the crime of torture or sentenced for commission of that crime, in accordance with their respective national laws on extradition and their international commitments on this matter.

Article 12

Every State Party shall take the necessary measures to establish its jurisdiction over the crime described in this Convention in the following cases:

- a. When torture has been committed within its jurisdiction;
- b. When the alleged criminal is a national of that State; or
- c. When the victim is a national of that State and it so deems appropriate.

Every State Party shall also take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11.

This Convention does not exclude criminal jurisdiction exercised in accordance with domestic law.

Article 13

The crime referred to in Article 2 shall be deemed to be included among the extraditable crimes in every extradition treaty entered into between States Parties. The States Parties undertake to include the crime of torture as an extraditable offence in every extradition treaty to be concluded between them.

Every State Party that makes extradition conditional on the existence of a treaty may, if it receives a request for extradition from another State Party with which it has no extradition treaty, consider this Convention as the legal basis for extradition in respect of the crime of torture. Extradition shall be subject to the other conditions that may be required by the law of the requested State.

States Parties which do not make extradition conditional on the existence of a treaty shall recognize such crimes as extraditable offences between themselves, subject to the conditions required by the law of the requested State.

Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.

Article 14

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested the extradition.

Article 15

No provision of this Convention may be interpreted as limiting the right of asylum, when appropriate, nor as altering the obligations of the States Parties in the matter of extradition.

Article 16

This Convention shall not limit the provisions of the American Convention on Human Rights, other conventions on the subject, or the Statutes of the Inter-American Commission on Human Rights, with respect to the crime of torture.

Article 17

The States Parties undertake to inform the Inter-American Commission on Human Rights of any legislative, judicial, administrative, or other measures they adopt in application of this Convention.

In keeping with its duties and responsibilities, the Inter-American Commission on Human Rights will endeavor in its annual report to analyze the existing situation

in the member states of the Organization of American States in regard to the prevention and elimination of torture.

Article 18

This Convention is open to signature by the member states of the Organization of American States.

Article 19

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 20

This Convention is open to accession by any other American state. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 21

The States Parties may, at the time of approval, signature, ratification, or accession, make reservations to this Convention, provided that such reservations are not incompatible with the object and purpose of the Convention and concern one or more specific provisions.

Article 22

This Convention shall enter into force on the thirtieth day following the date on which the second instrument of ratification is deposited. For each State ratifying or acceding to the Convention after the second instrument of ratification has been deposited, the Convention shall enter into force on the thirtieth day following the date on which that State deposits its instrument of ratification or accession.

Article 23

This Convention shall remain in force indefinitely, but may be denounced by any State Party. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, this Convention shall cease to be in effect for the denouncing State but shall remain in force for the remaining States Parties.

Article 24

The original instrument of this Convention, the English, French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall send a certified copy to the Secretariat of the United Nations for registration and publication, in accordance with the provisions of Article 102 of the United Nations Charter. The General Secretariat of the Organization of American States shall notify the member states of the Organization and the States that have acceded to the Convention of

signatures and of deposits of instruments of ratification, accession, and denunciation, as well as reservations, if any.

INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

(Adopted at Cartagena de Indias, Colombia, on December 9, 1985, at the fifteenth regular session of the General Assembly)

ENTRY INTO FORCE: 28 February 1987, in accordance with Article 22 of the Convention

DEPOSITARY: OAS General Secretariat (Original instrument and ratifications)

TEXT: OAS, Treaty Series, Nº 67

UN REGISTRATION:

COUNTRIES	SIGNATORY DEPOSIT OF RATIFICATION
^{4/} Argentina	31 March 1989
^{1/} Bolivia	
^{3/} Brazil	20 July 1989
^{11/} Chile	30 September 1988 ^{b/}
^{1/} Colombia	19 January 1999
^{9/} Costa Rica	8 February 2000
^{6/} Dominican Republic	29 January 1987
^{7/} Ecuador	9 November 1999
^{13/} El Salvador	5 December 1994
^{10/} Guatemala	29 January 1987 ^{a/}
^{8/} Haiti	
^{5/} Honduras	
^{4/} Mexico	22 June 1987
^{12/} Nicaragua	
^{4/} Panama	28 August 1991
^{15/} Paraguay	9 March 1990
^{2/} Peru	28 March 1991
^{14/} Suriname	12 November 1987
^{1/} Uruguay	10 November 1992
^{1/} Venezuela	26 August 1991

1. Signed 9 December 1985 at the Fifteenth Regular Session of the General Assembly.
2. Signed 10 January 1986 at the OAS General Secretariat.
3. Signed 24 January 1986 at the OAS General Secretariat.
4. Signed 10 February 1986 at the OAS General Secretariat.

5. Signed 11 March 1986 at the OAS General Secretariat.
6. Signed 31 March 1986 at the OAS General Secretariat.
7. Signed 30 May 1986 at the OAS General Secretariat.
8. Signed 13 June 1986 at the OAS General Secretariat.
9. Signed 31 July 1986 at the OAS General Secretariat.
10. Signed 27 October 1986 at the OAS General Secretariat, with the following reservation:

(Reservation made at the time of signature)

The Republic of Guatemala does not accept the application nor shall it apply the third paragraph of Article 8, because in conformance with its domestic legal procedures, when the appeals have been exhausted, the decision acquitting a defendant charged with the crime of torture becomes final and may not be submitted to any international fora.

11. Signed 24 September 1987 at the OAS General Secretariat.
12. Signed 29 September 1987 at the OAS General Secretariat.
13. Signed 16 October 1987 at the OAS General Secretariat.
14. Signed 12 November 1987 at the OAS General Secretariat.
15. Signed 25 October 1989 at the OAS General Secretariat.

a. Guatemala:

(Reservation made at the time of ratification)

With the reservation made at the time of the signature.

Withdrawal of Reservations:

On October 1, 1990, deposited at the General Secretariat, an instrument dated August 6, 1990, withdrawing the reservation made by the Government of Guatemala at the time of signing the Convention and reiterated at the time of ratifying it on December 10, 1986.

b. Chile:

(Reservations made at the time of ratification)

- a) To Article 4, to the effect that, inasmuch as it alters the principle of "automatic obedience" established in Chile's domestic law, the Government of Chile will enforce the provisions of that international rule in respect of subordinate personnel subject to the jurisdiction of the Code of Military Justice, provided that execution of an order whose obvious intent is the perpetration of the acts stipulated in Article 2, is not demanded by the superior over the subordinate's representation.
- b) With regard to the final paragraph of Article 13, because of the discretionary and subjective way in which the rule is drafted.

- c) The Government of Chile states that in its relations with the countries of the Americas that are Parties to the present Convention, it will apply this Convention in those cases where there is incompatibility between its provisions and those of the Convention against torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by the United Nations in 1984.
- d) With regard to the third paragraph of Article 8, since a case may only be submitted to the international fora whose competence has been recognized by the State of Chile.

Withdrawal of Reservations:

On August 21, 1990 deposited an instrument dated May 18, 1990, withdrawing the reservations formulated by the Government of Chile to Article 4 and to the final paragraph of Article 13 of the Convention.

**ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION
ON HUMAN RIGHTS IN THE AREA OF ECONOMIC, SOCIAL
AND CULTURAL RIGHTS "PROTOCOL OF SAN SALVADOR"**

(Adopted at San Salvador, El Salvador on November 17, 1988, at
the eighteenth regular session of the General Assembly)

Preamble

The States Parties to the American Convention on Human Rights "Pact San José, Costa Rica,"

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of the human person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States;

Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified;

Recognizing the benefits that stem from the promotion and development of cooperation among States and international relations;

Recalling that, in accordance with the Universal Declaration of Human Rights and the American Convention on Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights;

Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources; and

Considering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof,

Have agreed upon the following Additional Protocol to the American Convention on Human Rights "Protocol of San Salvador:"

Article 1

Obligation to Adopt Measures

The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

Article 2

Obligation to Enact Domestic Legislation

If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality.

Article 3

Obligation of nondiscrimination

The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

Article 4

Inadmissibility of Restrictions

A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.

Article 5

Scope of Restrictions and Limitations

The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.

Article 6

Right to Work

1. Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.

2. The State Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled. The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.

Article 7

Just, Equitable, and Satisfactory Conditions of Work

The States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to:

- a. Remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction;
- b. The right of every worker to follow his vocation and to devote himself to the activity that best fulfills his expectations and to change employment in accordance with the pertinent national regulations;
- c. The right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority;
- d. Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation;
- e. Safety and hygiene at work;
- f. The prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety, or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received;

g. A reasonable limitation of working hours, both daily and weekly. The days shall be shorter in the case of dangerous or unhealthy work or of night work;

h. Rest, leisure and paid vacations as well as remuneration for national holidays.

Article 8

Trade Union Rights

1. The States Parties shall ensure:

a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;

b. The right to strike.

2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.

3. No one may be compelled to belong to a trade union.

Article 9

Right to Social Security

1. Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents.

2. In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.

Article 10

Right to Health

1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.

2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:

- a. Primary health care, that is, essential health care made available to all individuals and families in the community;
- b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction;
- c. Universal immunization against the principal infectious diseases;
- d. Prevention and treatment of endemic, occupational and other diseases;
- e. Education of the population on the prevention and treatment of health problems, and
- f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

Article 11

Right to a Healthy Environment

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment.

Article 12

Right to Food

1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.
2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.

Article 13

Right to Education

1. Everyone has the right to education.

2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.

3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:

- a. Primary education should be compulsory and accessible to all without cost;
- b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
- c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;
- d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;
- e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.

5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.

Article 14

Right to the Benefits of Culture

1. The States Parties to this Protocol recognize the right of everyone:
 - a. To take part in the cultural and artistic life of the community;
 - b. To enjoy the benefits of scientific and technological progress;
 - c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science, culture and art.

3. The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to this Protocol recognize the benefits to be derived from the encouragement and development of international cooperation and relations in the fields of science, arts and culture, and accordingly agree to foster greater international cooperation in these fields.

Article 15

Right to the Formation and the Protection of Families

1. The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions.

2. Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation.

3. The States Parties hereby undertake to accord adequate protection to the family unit and in particular:

a. To provide special care and assistance to mothers during a reasonable period before and after childbirth;

b. To guarantee adequate nutrition for children at the nursing stage and during school attendance years;

c. To adopt special measures for the protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities;

d. To undertake special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility.

Article 16

Rights of Children

Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

Article 17

Protection of the Elderly

Everyone has the right to special protection in old age. With this in view the States Parties agree to take progressively the necessary steps to make this right a reality and, particularly, to:

- a. Provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves;
- b. Undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires;
- c. Foster the establishment of social organizations aimed at improving the quality of life for the elderly.

Article 18

Protection of the Handicapped

Everyone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality. The States Parties agree to adopt such measures as may be necessary for this purpose and, especially, to:

- a. Undertake programs specifically aimed at providing the handicapped with the resources and environment needed for attaining this goal, including work programs consistent with their possibilities and freely accepted by them or their legal representatives, as the case may be;
- b. Provide special training to the families of the handicapped in order to help them solve the problems of coexistence and convert them into active agents in the physical, mental and emotional development of the latter;
- c. Include the consideration of solutions to specific requirements arising from needs of this group as a priority component of their urban development plans;
- d. Encourage the establishment of social groups in which the handicapped can be helped to enjoy a fuller life.

Article 19

Means of Protection

1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American

States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol.

2. All reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.

3. The Secretary General of the Organization of American States shall also transmit to the specialized organizations of the inter-American system of which the States Parties to the present Protocol are members, copies or pertinent portions of the reports submitted, insofar as they relate to matters within the purview of those organizations, as established by their constituent instruments.

4. The specialized organizations of the inter-American system may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity.

5. The annual reports submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture shall contain a summary of the information received from the States Parties to the present Protocol and the specialized organizations concerning the progressive measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.

6. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

7. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.

8. The Councils and the Inter-American Commission on Human Rights, in discharging the functions conferred upon them in this article, shall take into account the progressive nature of the observance of the rights subject to protection by this Protocol.

Article 20

Reservations

The States Parties may, at the time of approval, signature, ratification or accession, make reservations to one or more specific provisions of this Protocol, provided that such reservations are not incompatible with the object and purpose of the Protocol.

Article 21

Signature, Ratification or Accession.

Entry into Effect

1. This Protocol shall remain open to signature and ratification or accession by any State Party to the American Convention on Human Rights.
2. Ratification of or accession to this Protocol shall be effected by depositing an instrument of ratification or accession with the General Secretariat of the Organization of American States.
3. The Protocol shall enter into effect when eleven States have deposited their respective instruments of ratification or accession.
4. The Secretary General shall notify all the member states of the Organization of American States of the entry of the Protocol into effect.

Article 22

Inclusion of other Rights and Expansion of those Recognized

1. Any State Party and the Inter-American Commission on Human Rights may submit for the consideration of the States Parties meeting on the occasion of the General Assembly proposed amendments to include the recognition of other rights or freedoms or to extend or expand rights or freedoms recognized in this Protocol.
2. Such amendments shall enter into effect for the States that ratify them on the date of deposit of the instrument of ratification corresponding to the number representing two thirds of the States Parties to this Protocol. For all other States Parties they shall enter into effect on the date on which they deposit their respective instrument of ratification.

**ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS
IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS
"PROTOCOL OF SAN SALVADOR"**

(Adopted at San Salvador, El Salvador on November 17, 1988, at
the eighteenth regular session of the General Assembly)

ENTRY INTO FORCE: November 16, 1999

DEPOSITORY: OAS General Secretariat (Original instrument and ratifications).

TEXT: OAS. Treaty Series, N° 69.

UN REGISTRATION:

SIGNATORY COUNTRIES	DEPOSIT OF RATIFICATION
Argentina	23 October 2003
Bolivia	
Brazil	21 August 1996 ^{a/}
Colombia	23 December 1997 ^{a/}
Costa Rica	16 November 1999
^{3/} Chile	
Dominican Republic	
Ecuador	25 March 1993
El Salvador	6 June 1995
Guatemala	5 October 2000
Haiti	
Mexico	16 April 1999 ^{b/}
Nicaragua	
Panama	18 February 1993
^{2/} Paraguay	3 June 1997
Peru	4 June 1995
Suriname	10 July 1990 ^{a/}
Uruguay	2 April 1996
^{1/} Venezuela	

All States listed herein signed the Protocol on November 17, 1988, with exception of those indicated in the notes.

1. Signed 27 January 1989 at the OAS General Secretariat.
 - a. Accession.
2. Signed 26 August 1996 at the OAS General Secretariat.
3. Signed June 5, 2001 at the OAS thirty-first General Assembly held in San José, Costa Rica.
 - b. Mexico

The Government of Mexico ratifies the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights on the understanding that Article 8 of that Protocol shall be applied in the Mexican Republic in the ways and according to the procedures contemplated in applicable provisions of the Political Constitution of the United Mexican States and its enabling regulations.

**PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS TO
ABOLISH THE DEATH PENALTY**

(Adopted at Asunción, Paraguay, on June 8, 1990, at the
twentieth regular session of the General Assembly)

PREAMBLE

THE STATES PARTIES TO THIS PROTOCOL,

CONSIDERING:

That Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty;

That everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason;

That the tendency among the American States is to be in favor of abolition of the death penalty;

That application of the death penalty has irrevocable consequences, forecloses the correction of judicial error, and precludes any possibility of changing or rehabilitating those convicted;

That the abolition of the death penalty helps to ensure more effective protection of the right to life;

That an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights, and

That States Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas,

**HAVE AGREED TO SIGN THE FOLLOWING PROTOCOL TO THE AMERICAN
CONVENTION
ON HUMAN RIGHTS TO ABOLISH THE DEATH PENALTY**

Article 1

The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.

Article 2

1. No reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they

reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.

2. The State Party making this reservation shall, upon ratification or accession, inform the Secretary General of the Organization of American States of the pertinent provisions of its national legislation applicable in wartime, as referred to in the preceding paragraph.

3. Said State Party shall notify the Secretary General of the Organization of American States of the beginning or end of any state of war in effect in its territory.

Article 3

1. This Protocol shall be open for signature and ratification or accession by any State Party to the American Convention on Human Rights.

2. Ratification of this Protocol or accession thereto shall be made through the deposit of an instrument of ratification or accession with the General Secretariat of the Organization of American States.

Article 4

This Protocol shall enter into force among the States that ratify or accede to it when they deposit their respective instruments of ratification or accession with the General Secretariat of the Organization of American States.

PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS TO ABOLISH THE DEATH PENALTY

(Adopted at Asunción, Paraguay, on June 8, 1990, at the twentieth regular session of the General Assembly)

ENTRY INTO FORCE:

DEPOSITORY: OAS General Secretariat (Original instrument and ratifications).

TEXT: OAS, Treaty Series, No. 73

UN REGISTRATION:

SIGNATORY COUNTRIES	DEPOSIT OF RATIFICATION
⁷ /Brazil	13 August 1996 ^a /
⁸ /Chile	
⁶ /Costa Rica	26 May 1998
¹ /Ecuador	15 April 1998
² /Nicaragua	9 November 1999
⁵ /Panama	28 August 1991

⁹ /Paraguay	7 December 2000
⁴ /Uruguay	4 April 1994
³ /Venezuela	6 October 1993

1. Signed 27 August 1990 at the OAS General Secretariat.
2. Signed 30 August 1990 at the OAS General Secretariat.
3. Signed 25 September 1990 at the OAS General Secretariat.
4. Signed 2 October 1990 at the OAS General Secretariat.
5. Signed 26 November 1990 at the OAS General Secretariat.
6. Signed 28 October 1991 at the OAS General Secretariat.
7. Signed 7 June 1994 at the twenty-fourth regular session of the General Assembly.
8. Signed 10 September 2001 at the OAS General Secretariat.
9. Signed on 8 June 1999 at the OAS twenty-ninth regular session held in Guatemala City, Guatemala.

a. **Brazil**

In ratifying the Protocol to Abolish the Death Penalty, adopted in Asunción on June 8, 1990, make hereby, in compliance with constitutional requirements, a reservation under the terms of Article 2 of the said Protocol, which guarantees states parties the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.

**TO THE HONORABLE MEMBERS OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES:**

**REQUEST BY THE CENTER FOR CONSTITUTIONAL RIGHTS, THE HUMAN
RIGHTS CLINIC AT COLUMBIA LAW SCHOOL AND THE CENTER FOR JUSTICE
AND INTERNATIONAL LAW FOR PRECAUTIONARY MEASURES UNDER
ARTICLE 25 OF THE COMMISSION'S REGULATIONS**

By the undersigned, appearing as counsel for petitioners under the provisions of Article 23 of the Commission's Regulations:

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I. INTRODUCTION

Petitioners seek the urgent intervention of this Commission in order to prevent continued unlawful acts that threaten the rights of individuals detained by the United States government at its military base at Guantanamo Bay, Cuba. Although the United States has an obligation and right to arrest and try the perpetrators of the horrendous crimes of September 11, it must do so in compliance with fundamental principles of national, human rights and humanitarian law. It has not done so. The United States' failure to abide by these fundamental principles is setting a precedent for the actions of other states, states that will see U.S. actions as supporting their own violations of international law and human dignity.

Petitioners, therefore, are requesting Precautionary Measures to protect the detainees' rights to be treated as prisoners-of-war (pows), to be free from arbitrary, incommunicado, and prolonged detention, unlawful interrogations, and trials by military commission in which they could be sentenced to death. These rights are protected pursuant to Articles I, XVII, XVIII, XXV, XXVI of the American Declaration on the Rights and Duties of Man (ADRDM), which imposes binding international obligations on the United States.

II. STATEMENT OF FACTS

In the wake of the terrorist attacks of September 11, 2001, the United States of America planned and carried out a massive military campaign against the Taliban regime then in power in Afghanistan and an organization called al Qaida. The U.S. Congress authorized this military action by granting the President authority to "use all necessary and appropriate force against

those nations, organization, or persons he determined” were either involved in the September 11 attacks, aided in their commission, or harbored others who were involved in the attacks.¹

During the course of the campaign, President Bush, Secretary of Defense Rumsfeld, and other members of the United States’ military acting at their direction repeatedly described the campaign as a “war.” On September 12, 2001, President Bush described the attacks on the World Trade Center as acts of war.² On September 20, 2001, President Bush announced the start of the “war on terror”³ and on September 25, 2001, he stated that “[w]e’re in a war we’re going to win.”⁴

On October 7, 2001, the President announced that the U.S. military had begun air strikes against al Qaida camps and Taliban installations.⁵ U.S ground troops first arrived in Afghanistan on October 20, 2001 and immediately engaged Taliban forces in battle. Following the capture of Kabul and other major cities in November, military operations focused on eliminating bastions of resistance in Kandahar and the Tora Bora caves in early December.⁶

On November 13, 2001, President Bush issued a Military Order authorizing the Secretary of Defense to detain anyone whom the President determined in writing:

- i. is or was a member of the organization known as al Qaida, or
- ii. has engaged in, aided or abetted, or conspired to commit, acts of

¹ S.J. Res. (107th Cong. September 14, 2001). See: **Appendix Doc. 1 (p.2)**

² See <http://USinfo.state.gov/topical/pol/terror/01091208.htm>. See: **Appendix, Doc. 2 (p. 3)**

³ See <http://USinfo.state.gov/topical/pol/terror/01092051.htm>. See: **Appendix, Doc. 3 (p. 5)**

⁴ See <http://USinfo.state.gov/topical/pol/terror/01092512.htm>. See: **Appendix, Doc. 4 (p. 12)**

⁵ See <http://USinfo.state.gov/topical/pol/terror/01100750.htm>. See: **Appendix, Doc. 5 (p. 16)**

⁶ Thom Shanker, *Conduct of War is Defined By Success of Special Forces*, New York Times, Monday, January 21, 2002 at A1, 8. See: **Appendix, Doc. 6 (p. 19)**

international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

iii. has knowingly harbored any such person.⁷

The Military Order also provides that “if the individual is to be tried,” such trials will be held before military commissions operating in accordance with the basic rules set forth in the Order, which allows the non-unanimous imposition of death sentences. There is no requirement that a detained individual be brought to trial. The Military Order also states that persons detained or tried under its provisions “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”⁸

On November 16, the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights sent an urgent appeal to the United States government regarding the Military Order signed by President George W. Bush. In his appeal, the Special Rapporteur expressed concern about, among other things, the setting up of military tribunals to try those subject to the Order; the absence of a guarantee of the right to legal representation and advice while in detention; the establishment of an executive review process to replace the right to appeal the conviction and sentence to a higher tribunal; and the exclusion of jurisdiction of any other courts and international tribunals.⁹

⁷ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, Vol. 66, No. 222, Section 2(a) (1) (i) – (iii). **See: Appendix, Doc. 7 (p. 28)**

⁸ *Id.*, Section 7(b)(2). **See: Appendix, Doc. 7 (p. 31)**

⁹ Available at http://www.unog.ch/unog01/files/002_media/f2_cmq.html. **See: Appendix, Doc. 8 (p.32)**

Subsequent to the issuance of the Military Order, thousands of prisoners were captured by U.S. and Northern Alliance forces in Afghanistan. On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray at the U.S. Naval Station in Guantanamo Bay, Cuba. It was reported that the transferred prisoners could face trials by military commission under the Military Order and possibly the death penalty.¹⁰ There have been allegations of ill-treatment of the prisoners in transit and at Guantanamo, including reports that they were shackled, hooded and sedated during the 25-hour flight from Afghanistan, their beards and heads forcibly shaved, and that upon arrival at Guantanamo they are housed in small cells that fail to protect against the elements.¹¹

As more shipments of prisoners began arriving at Guantanamo, international bodies such as the European Union, the International Committee of the Red Cross and a number of foreign governments expressed grave concerns over the treatment of the detainees, their confinement conditions and the refusal of the United States to afford them status under the Geneva Conventions.¹²

On January 16, 2002, the United Nations High Commissioner for Human Rights issued a statement regarding the Guantanamo detentions, noting that:

¹⁰ See e.g., Richard Sisk, *Airport Gun Battle Firefight Erupts As Prisoners Are Flown To Cuba*, New York Daily News, Friday, January 11, 2002 at 27. **See: Appendix, Doc. 9 (p. 33)**

¹¹ See e.g., Amnesty International, *USA: AI calls on the USA to end legal limbo of Guantanamo prisoners*, AI Index: AMR 51/009/2002, issued 15/01/2002, at <http://web.amnesty.org/ai.nsf/Index/AMR510092002>. **See: Appendix, Doc. 10 (p. 35)** The detainees have been confined in makeshift eight-by-eight foot cells made of chain link fence, with corrugated metal roofs and concrete slab floors. The open-air cages are surrounded by razor wire and guard towers; prisoners have reportedly been provided with thin foam mattresses and rations in plastic bags. Tony Winton, *Guantanamo Gets Ready to House War Prisoners; Site Once Held Boat People*, The Record, Thursday, January 10, 2002 at A13. **See: Appendix, Doc. 11 (p. 37)** See also: BBC, *Inside Camp X-Ray*, available at http://news.bbc.co.uk/1/hi/english/static/in_depth/americas/2002/inside_camp_xray/default.stm. **See: Appendix, Doc. 12 (p. 39 - 43)**

¹² Lynne Sladky, *More Scrutiny on Suspects' Treatment*, Associated Press, Tuesday January 22, http://dailynews.yahoo.com/h/ap/20020122/wl/guantanamo_prison_38.html. **See: Appendix, Doc. 13 (p. 45 - 46)**

“All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949.

The legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention.

All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention.

Any possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention.”¹³

It is the official position of the United States’ government that none of the detainees are pows. Instead, officials have repeatedly described the prisoners as “unlawful combatants” who are not subject to the Geneva Conventions.¹⁴ In its most recent statement on the status of those detained at Guantanamo, the government announced that although it would apply the Geneva Conventions to the Taliban prisoners, it would not extend them to members of al Qaida. In addition, the Government stated that the Taliban prisoners did not meet the criteria for pows set forth in the Conventions and that they were therefore not entitled to the protections of the Conventions.¹⁵ This determination was made without the convening of a competent tribunal required by Article 5 of the Third Geneva Convention.¹⁶

¹³ *Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba*, 16 January 2002, at: <http://www.unhchr.ch/hurricane/hurricane.nsf/newsroom>. **See: Appendix, Doc. 14 (p.48)**

¹⁴ *Davis Bloom and Soledad O’Brien, Former Defense Secretary William Cohen Discusses the Status of Prisoners Held by US in Guantanamo Bay and Afghanistan*, NBC News, Saturday, January 12, 2002. **See: Appendix, Doc. 15 (p.49 - 50)**

¹⁵ See: <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>. **See: Appendix, Doc. 16 (p. 52)**

¹⁶ Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949 (ratified by the United States without reservation on 2 August 1955) (Geneva III), Article 5.

Although the International Committee of the Red Cross (ICRC) rarely acknowledges publicly differences with governments, it did so with regard to the United States' refusal to treat the Taliban and al Quida detainees as pows. On February 8, the day after announcement of the United States' position, Darcy Christen, a spokesperson for the ICRC, said of the detainees: "They were captured in combat [and] we consider them prisoners of war."¹⁷ The ICRC emphasized that it was up to a court to decide if a detainee was not a pow:

You cannot simply...decide what applies to one person and what applies to another. This has to go to a court because it is a legal decision not a political one.¹⁸

In its Press Release of February 9, the ICRC again stated that captured "members of armed forces and militias associated to them" are protected by Geneva III and that there "are divergent views between the United States and the ICRC" as to the procedures "on how to determine that the persons detained are not entitled to prisoner of war status."¹⁹

United States' authorities are now detaining 254 male prisoners representing 25 nationalities at the Guantanamo compound.²⁰ Although the authorities have refused to divulge the identities or nationalities of the detainees, media reports indicate that they include nationals of the United Kingdom, Australia, France, Belgium, Sweden, Algeria, Yemen, Afghanistan,

¹⁷ Richard Waddington, *Guantanamo Inmates Are POWs Despite Bush View - ICRC*, Reuters, February 9, 2002. See: **Appendix, Doc. 17 (p. 54)**

¹⁸ *Id.*

¹⁹ ICRC, Communication to the press No. 02/11, February 9, 2002. See: **Appendix, Doc. 18 (p.56)**

²⁰ John Mintz, *Guantanamo Could Be Terrorist Penal Colony*, Washington Post, February 13, 2002, South Florida Sun-Sentinel.com news, available at www.sun-sentinel.com/news/nationworld/. See: **Appendix, Doc. 19 (p. 57 - 59)**

Saudi Arabia, Kuwait and Pakistan.²¹ The only reported consular visits to Guantánamo have been carried out by British governmental officials.²²

Interrogation of the Guantanamo prisoners began on January 23; none of the detainees were allowed to have lawyers present during questioning by officers from several United States' civilian and military agencies.²³ The U.S. military has reportedly built several windowless plywood structures on the outskirts of the detention center for the purpose of obtaining information from the 254 detainees held there.²⁴

The ranks of the prisoners already held incommunicado at Guantanamo are expected to increase in the near future now that more open-air cells have been constructed.²⁵ There are no indications that the detainees have been informed of their rights under the Geneva Conventions, the ICCPR, the ADRDM, the Vienna Convention on Consular Relations, or any other international instrument which safeguards the fundamental human rights of detainees.²⁶ As a

²¹ See e.g., Tony Winton, *Saudis Want Detainees Returned Home*, Associated Press, Tuesday January 29 at http://dailynews.yahoo.com/h/ap/20020129/wl/guantanamo_detainees_8.html. See: **Appendix, Doc. 20 (p.61)**

²² *Supra* n.12

²³ Jane Sutton, *Prisoners at Guantanamo Bay Face First Questioning*, Reuters, Wednesday January 23, at http://dailynews.yahoo.com/h/nm/20020123/ts/attack_guantanamo_dc_27.html. See: **Appendix, Doc. 21 (p. 64)**

²⁴ Reuters, *'Good Cop, Bad Cop Gets Al Qaeda to Talk*, Friday February 1, at: http://story.news.yahoo.com/news?tmpl=story&u=/nm/20020201/ts_nm/attack_interrogations_dc_1. See: **Appendix, Doc. 22 (p. 67)**

²⁵ Jane Sutton, *U.S. Finishes Camp X-Ray, Awaits More Prisoners*, Reuters, Saturday February 2, 2002, at http://dailynews.yahoo.com/h/nm/20020123/ts/attack_guantanamo_dc_27.html. See: **Appendix, Doc. 23 (p. 69)**

²⁶ See United Nations General Assembly Resolution on the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Resolution 43/173 (9 December 1988), Principle 11; United Nations Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, (27 August to 7 September 1990), Principles 1 to 8; Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal for Rwanda and the Former Yugoslavia and Rwanda (As Amended) 29 November 1999, Rules 5, 9, 12 and 67. See: **Appendix, Doc. 24, 25 and 26 (p. 73, 81, 87, 88, 98 and 99)**

result, prisoners at Camp X-Ray are completely unable either to protect or to vindicate violations of their fundamental rights under domestic and international law.

In published statements, both the Secretary of Defense and other officials recently indicated the United States may hold the detainees under these conditions indefinitely.²⁷

III. REQUEST FOR PRECAUTIONARY MEASURES

Petitioners seek the urgent intervention of this Commission, in order to prevent continued unlawful acts by the United States that threaten the Guantanamo detainees' rights under the ADRDM. Under Article 25 of its regulations, the Commission may intercede in "serious and urgent cases, and whenever necessary according to the information available. . . to prevent irreparable harm to persons." This is such an urgent case.

A. The Geneva Convention Violations

The United States has repeatedly refused the entreaties of the international community to treat the detainees under the procedures established under the Geneva Conventions. Geneva III applies to the treatment and legal status of pows. The convention requires that persons captured during an international armed conflict are presumed to be pows until a competent tribunal determines otherwise.²⁸ Instead of following these procedures, which require individual determinations as to whether or not a combatant is a pow, the United States has simply decided en masse that none of the Taliban or al Qaeda detainees is a pow. This non-individualized

²⁷ See, e.g. Time Magazine, *Welcome to Camp X-Ray*, February 3, 2002. **See: Appendix, Doc. 27 (p.104)** Rumsfeld has laid out four options: a military trial, a trial in U.S. criminal courts, return to their home countries for prosecution, or continued detention "while additional intelligence is gathered." A recent "knowledgeable source" stated that "It's become clear that some of the al-Qaida detainees, even if they're not convicted of anything, will have to remain in detention for quite some time." Washington Post, February 13, 2002, *Supra.* n.19. This seems a distinct possibility; the Pentagon plans to build 408 cells at Camp X-Ray. *Id*

²⁸ Geneva III, Articles 4 & 5

determination made by United States' officials is contrary to the procedures established by the clear commands of Geneva III.

As a result none of the detainees are receiving the protections afforded pows – protections to which they are entitled-- until the United States convenes a competent tribunal to determine their status.²⁹ These include a prisoner's right under Articles 70 and 71 of Geneva III to write directly to his family "informing his relatives of his capture, address and state of health" and to send and receive correspondence. Pows are also entitled to treatment and housing similar to that of U.S. soldiers, issuance of identity cards, protection from interrogation camps (which is what Guantanamo appears to be) and the use of coercion during interrogation. A pow also has the right to engage in hostilities without criminal penalty and valuable procedural protections in any prosecution for war crimes-- protections equivalent to those given to a U.S. soldier during a court-martial.³⁰ As military commissions cannot try U.S. soldiers, neither can they try the detainees at Guantanamo.

B. Human Rights Violations Relating To the Arbitrary, Incommunicado, and Prolonged Detention of the Guantanamo Prisoners

As described above, the United States' treatment of the Guantanamo detainees violates norms of international humanitarian law relating to the treatment of individuals detained during times of international armed conflict. United States' actions violate international human rights norms as well. As this Commission has observed, the application of international humanitarian law does not "exclude or displace" the application of international human rights law, since both share a

²⁹ *Id.* Article 5

³⁰ Pows can be charged with war crimes committed both before and during hostilities, Art.85, but the trials of such crimes must be before the same courts employing the same procedures as those of the detaining power. Art. 102, Geneva III.

“common nucleus of non-derogable rights and a common purpose of protecting human life and dignity.”³¹

The United States’ detention of the Guantanamo prisoners is arbitrary. The prohibition against arbitrary detention is a norm of customary international law, and has the status of *jus cogens*.³² In determining what constitutes an “arbitrary” detention, this Commission should consider several factors, beginning with the text of Article XXV, which provides:

1. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law;
2. Each individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court; and
3. All detainees have the right to be tried without undue delay or released.

The provisions of Article XXV indicate the *minimal* procedural guarantees that must be followed. They are not, however, the exclusive source of international norms relating to this inquiry. In evaluating whether the incommunicado and prolonged detention of the Guantanamo prisoners violates international law, this Commission should also consider whether the United States has observed other norms of international law relating to pre-trial detention.³³ For example, international law requires that a detained person be permitted to communicate with family, consult counsel, and meet with consular representatives. The provisions of article 9 of the ICCPR, which require that all detainees be brought promptly before a judge or other officer

³¹ Coard et al v United States, Case 10,951, Inter-Am. C.H.R. Report No. 109/99, (1999), para.39.

³² See, e.g., *Rodriguez-Fernandez v. Wilkinson*, 505 F.Supp. 787, 798 (D. Kan. 1980) noting, that “[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.”).

³³ See *Coard case Supra*. n. 31, para. 40.

authorized by law, and be allowed access to a court that will decide without delay the lawfulness of their detentions, must also be considered. An individual's detention is arbitrary if she or he is denied these procedural guarantees.

The United States' treatment of the Guantanamo detainees violates virtually every human rights norm relating to preventive detention. As described in the statement of facts above the United States has denied the detainees access to counsel, consular representatives, and family members, has failed to notify them of the charges they are facing, has refused to allow for judicial review of the detentions, and has expressed its intent to hold the detainees indefinitely. Meanwhile, the United States has continued to interrogate the prisoners.

C. Violations Relating to Trial Before Military Commissions

The United States intends to subject certain detainees to trial before military commissions, in which they could face the death penalty. The commissions could begin processing cases at any time. Meanwhile, the detainees have been given no facilities to begin preparing their defense, and no court has reviewed the validity of their prolonged detention.

As noted above, the United States has cited the Military Order as justification for the detention of the Guantanamo prisoners. This same Order authorizes the trial by military commission for certain detainees. The military commissions authorized by the Order violate several established principles of international law, including Articles I, XVII, XVIII, XXV, and XXVI of the ADRDM.

First, the military commissions fail to provide minimal guarantees of due process. Instead, the commissions are designed to ensure swift convictions and possible death sentences based on secret evidence. Only the executive branch of the United States' government would

review the convictions and death sentences, with no right to judicial review, and no right to appeal. In short, trials before military commissions would be skewed in favor of the government, would fail to provide adequate due process protections, and would violate established canons of due process.

Second, the military commissions do not constitute “courts previously established in accordance with pre-existing laws” as required pursuant to Article XXVI of the ADRDM.

Finally, as this Commission is well aware, the United States has reserved the right to execute those convicted by the military commissions. There can be no question that capital proceedings before military commission would violate the most fundamental human rights of the detainees, including the right to life. Because of these myriad defects, petitioners are requesting that the Commission issue Precautionary Measures, directing the United States to refrain from subjecting any detainee to trial by military commission.

Based on these facts, petitioners have amply demonstrated the detainees will suffer irreparable harm, if this Commission fails to issue Precautionary Measures.

IV. PRECAUTIONARY MEASURES ARE NECESSARY TO AVERT “IRREPARABLE HARM”

Although Precautionary Measures are warranted when an individual’s liberty or her or his life is at risk, this Commission has also found Precautionary Measures justified where the rights at stake involve the protection of an individual’s property.³⁴

In determining the meaning of “irreparable harm,” this Commission should take into consideration not only its previous decisions on Precautionary Measures but also the jurisprudence of the Inter-American Court on Human Rights on the grant of Provisional

³⁴ Mary and Carrie Dann v. United States (Dann Band of the Western Shoshone Nation), Case 11.140, No. 99/99.

Measures.³⁵ This is especially so given that the Court’s authority to issue the latter derives from Article 63(2) of the American Convention on Human Rights, which contains language virtually identical to that of Article 25 of this Commission’s Rules of Procedure.³⁶

Precautionary Measures are warranted whenever a petitioner faces a serious threat to his or her physical, psychological or moral integrity.³⁷ In the *Loayza Tamayo case*, the Court issued Provisional Measures to end solitary confinement and incommunicado detention imposed on a person who had been committed for the crime of terrorism against Peru.

Although “irreparable harm” may be shown by demonstrating the existence of a serious risk to life or personal integrity,³⁸ neither the wording nor the spirit of Article 25 of the Commission’s Rules of Procedure require such a showing.³⁹ To the contrary, the Court has held that an imminent risk to freedom of expression and democratic values can constitute “irreparable harm.”⁴⁰

³⁵ Although the United States is not a party to the Convention, and thus Article 25 of the Rules of Procedure of the Inter-American Commission on Human Rights applies rather than Article 63 of the Inter-American Convention on Human Rights, due to the similarity between these two provisions, jurisprudence interpreting Article 63(2) is relevant in interpreting the meaning of the term “irreparable harm.”

³⁶ Article 63 of that Convention relevantly provides that: “In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not submitted to the Court, it may act at the request of the Commission.”

³⁷ *Loayza Tamayo Case*, Provisional Measures, Inter-Am. Ct. H.R. July 2, 1996.

³⁸ *See, e.g., Loayza Tamayo case*, Provisional Measures, Inter-Am. Ct. H.R., February 3, 2001.

³⁹ *See: Case of Haitians and Dominicans of Haitian Origin in the Dominican Republic*, Provisional Measures. Inter-Am. Ct. H.R., August 18, 2000.

⁴⁰ *The La Nación Newspaper case*, Provisional Measures, Inter-Am. Ct. H.R., May 23, 2001. In this case, the Court held that if a libel judgment was executed against a journalist, it might cause effects that could never be eliminated retroactively and/or cause unnecessary prolongation of a harmful situation. It also considered that these effects could include impingement on the journalist’s freedom of expression as well as the freedom of expression of Costa Rican society generally, that the petitioner’s name would be registered in the Judicial Register of Offenders,

Restrictions on access to counsel and other impingements on due process rights can also constitute “irreparable harm.” Thus, in *Manriquez v. Mexico*,⁴¹ when the Mexican authorities denied a prisoner’s attorney access to her client because she refused to subject herself to a strip search, the Commission asked Mexico to adopt Precautionary Measures to allow the full exercise of the prisoner’s due process rights and judicial guarantees, including allowing his attorney to visit him to prepare his defense, to ensure confidentiality in attorney-client conversations and to afford his attorney dignified and non-discriminatory treatment.

In addition to their essentially preventive nature, the purpose of Provisional Measures is to provide effective protection for fundamental rights, inasmuch as they seek to avoid irreparable damage to persons. Thus, in the *Ivcher Bronstein case*,⁴² the Court ordered Provisional Measures to protect the petitioners’ physical, psychological and moral integrity, and preserve their right to due process. In that case, the Peruvian government stripped one of the petitioners of his naturalized Peruvian citizenship and divested him of his ownership of a television station ostensibly because that station had broadcast programs critical of influential government officials. The Court concluded that the damage one of the petitioners had sustained, in part *due to the failure to accord due process*, was of enormous magnitude, would be very difficult to redress in full and was being aggravated on a daily basis.⁴³

reparation might never make the petitioner whole again, and the Court’s decision on the merits might be without useful effect.

⁴¹ Case 11.509, Report No. 2/99, Inter-Am. C.H.R. (1999)

⁴² Provisional Measures, Inter-Am. Ct. H.R., November 23, 2000

⁴³ See also *Paniagua Morales case*, Provisional Measures, Inter-Am. Ct. H.R., January 29, 2001 (provisional measures warranted because of risk to the life and personal safety of a witness).

When seeking Precautionary Measures, there is usually a need to identify individually the people who are in danger of suffering irreparable harm.⁴⁴ This does not always have to be the case, however. In the *Peace Community of San José de Apartadó case*, the Court did not require that each individual be identified since they formed part of an organized community, located in a determined geographic place, whose members could be identified and individualized and who, due to their membership in the community, faced a similar risk of suffering acts of aggression against their personal integrity and lives. Thus, the community could be dealt with collectively. In the present case, the Guantanamo detainees are located in a determined geographic place and, by virtue of their detention their identities are known to the United States. In addition, they are all in a situation of similar risk of continuing injury to their fundamental rights. Precautionary Measures may therefore be issued for them as a group. This is especially important given the continuing refusal of the United States to release the names and nationalities of the detainees.

The Guantanamo detainees will suffer irreparable harm if the Precautionary Measures requested are not ordered. The requested Measures are directed and narrowly tailored toward the avoidance of that harm. Among other things, the United States is failing to provide access to any judicial procedures to determine the legality of their continued detention and is taking advantage of the detainees' isolation from legal counsel, family, and consular representatives to subject them to prolonged interrogations.

The facts set forth in this Request for Precautionary Measures establish *prima facie* violations of Articles I, XVII, XVIII, XXV and XXVI of the ADRDM and the risk of irreparable harm.

⁴⁴ See e.g. *Case of Haitians and Dominicans of Haitian Origin case*, Supra n. 39

**V. THE COMMISSION SHOULD TAKE PRECAUTIONARY MEASURES
TO ASSIST THE GUANTANAMO DETAINEES**

Petitioners respectfully seek the Commission's intervention and the issuance of the following Precautionary Measures, requesting that the United States' government:

1. Adopt those measures necessary to protect the right to personal integrity and fair trial of the detainees at Guantanamo.
2. Treat each detainee as a POW until any doubt regarding such status is determined by a competent tribunal pursuant to Article 5 of Geneva III, as mandated by pre-existing law, including international humanitarian law.
3. Afford each detainee the right and liberties guaranteed by the ADRDM as mandated by pre-existing law, including international humanitarian law. These guarantees should include the following:
 - a. Notification in writing of the charges faced by each detainee;
 - b. Access to legal counsel, and confidentiality of attorney-client communications;
 - c. Access to judicial review of those determinations affecting their rights and status.
4. Identify the detainees by name, nationality, and address, where known.
5. Notify all detainees of their rights under Article 36 of the Vienna Convention on Consular Relations, and grant them access to consular representatives.
6. Suspend the interrogation of the detainees until the rights of the detainees are fully guaranteed.

7. Stay any proceeding before military commissions, pending resolution of the prisoners' status and until such commissions comply with pre-existing law and due process.
8. Permit the Commission to conduct an on-site investigation, through a Special Commission named under Articles 40 and 51-55 of its Regulations.
9. Petitioners further urge this Commission to find that any order of Precautionary Measures is binding on the United States. *See: LaGrand Case (Germany v. United States)*, 2001 ICJ 104, (Judgment) paras. 109, 128(5).

Dated: February 25, 2001

Respectfully submitted,

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October 20, 2005

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Organization of American States
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**RE: PETITIONERS' SUBMISSION FOR OCTOBER 20, 2005,
HEARING REGARDING REQUEST TO EXPAND
PRECAUTIONARY MEASURES NO. 259**

Dear Mr. Canton:

Petitioners submit these observations for the October 20, 2005, hearing regarding Precautionary Measures No. 259, in which Petitioners will update the Commission since our February 22, 2005 submission, and seek to extend Precautionary Measures No. 259 to prevent the United States Government from transferring Guantánamo detainees to countries where they are likely to be tortured, and from continuing to violate the detainees' essential religious rights and rights to adequate medical care, especially with regard to the detainees' ongoing hunger strike. Petitioners also further update the Commission on the status of the military tribunals and the habeas corpus petitions, including the Government's continued denial of and interference with the detainees' rights to counsel. Petitioners regret that we are required to once again seek an extension of Precautionary Measures No. 259,¹ which the U.S. Government has refused to comply with, but the situation at Guantánamo grows increasingly dire.

I. Introduction

More than *four* years since September 11, 2001, the United States continues to detain over 500 men at Guantánamo without having properly determined their legal status or trying any of them for a crime. Despite the tremendous obstacles, approximately 280 of those men have obtained counsel to represent them on habeas corpus petitions in the United States District Court

¹ On March 12, 2002, the Commission issued Precautionary Measures No. 259, requesting that the U.S. Government take the urgent measures necessary to have the legal status of the Guantánamo detainees determined by a competent tribunal. On March 14, 2003, the Commission also requested "information concerning the location, status and treatment of individuals detained by the United States in other facilities in connection with its post-September 11, 2001 anti-terrorist initiatives", including information regarding the U.S. policies governing torture or other cruel, inhumane or degrading treatment. On July 29, 2004, the Commission requested that the Government investigate all allegations of torture and other ill treatment of detainees under its authority and control and to prosecute those responsible, including those responsible through superior responsibility. On March 3, 2005, the Commission held a hearing on Petitioners' request to provide an update on the situation of the Guantánamo detainees, to refute the Government's argument that the Commission doesn't have jurisdiction and that exhaustion of domestic remedies is required before precautionary measures are issued, and to seek an extension of the precautionary measures to cover the potential use of information obtained through torture in ongoing administrative and judicial proceedings.



to challenge their detentions, but the substance of their claims has yet to be heard by any court.² Since the U.S. Supreme Court's decision in *Rasul v. Bush*³ confirming that Guantánamo detainees can challenge their detentions in U.S. courts, the U.S. Government continues to argue that the detainees have no rights, domestic or international, to be enforced. On September 8, 2005, the United States Court of Appeals for the D.C. Circuit heard argument regarding whether the detainees have common-law rights to challenge their detention, due process rights under the U.S. Constitution (because they are non-citizens held at a base on Cuba), or rights under international law, including the Geneva Conventions.⁴ The Appellate Court has not yet issued a decision, and a petition for review by the Supreme Court is expected regardless of the outcome. As Petitioners noted in their February 2005 submission, the Government's refusal to address the merits of the Guantánamo detainees' claims through delaying the habeas petitions, which were originally brought in 2002, is tantamount to denying them any remedy at all.

While private habeas counsel is currently representing over 225 detainees, an additional 54 detainees have pro se petitions on file in the United States District Court for the District of Columbia. Pro se petitions were filed, at a lengthy delay, when detainees in Guantánamo wrote directly to the Court seeking representation and due process rights. On October 14, 2005, the Court appointed the Federal Public Defender offices to represent these pro se petitioners. In one case, petitioner wrote a handwritten note to the Court on February 22, 2005 seeking to challenge his detention, yet his pro se petition was not filed and docketed until June 22, 2005, and now that counsel is appointed he will have awaited for representation for nearly eight months from the time he first wrote to the Court.⁵

Even though these represented detainees are supposed to have access to their counsel, such access has been interfered with in numerous ways, as discussed below in Section II. Meanwhile there are still approximately 270 detainees who have been completely denied *any* right to access counsel because no one except the Government knows who they are. CCR brought a habeas petition on behalf of these unknown, unrepresented detainees being held incommunicado, but that case has been stayed pending resolution of the habeas appeal described above.

The Combatant Status Review Tribunals set up to determine whether detainees were enemy combatants have now been completed, and have ruled that 558 of the 596 detainees are enemy combatants not entitled to prisoner-of-war protections. The Military Commissions trying some detainees are scheduled to proceed following the lifting of a court-ordered stay, and the Government has implemented procedural changes in the commissions, none of which address Petitioners' concerns. See Section III, below.

² The Center for Constitutional Rights (CCR) is coordinating all of the habeas representation for the Guantánamo detainees, and is co-counsel on many of the petitions. See Petitioners' February 22, 2005, submission, pp. 3-4 for a more detailed discussion of the lower court rulings.

³ The Supreme Court opinion in *Rasul v. Bush*, 124 S. Ct. 2686 (2004) is available at <http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourtus.gov/opinions/03pdf/03-334.pdf>.

⁴ The Government continues to argue it has to the power to seize individuals and send them to Guantánamo for un-reviewable detention, claiming that it could do so without giving the detainees any due process at all, even going so far as to claim that the much belated Combatant Status Review Tribunal (CSRT) proceedings determining whether they were enemy combatants were unnecessary.

⁵ *Aminullah v. Bush*, 05-cv-1237 (D.D.C).

Almost 250 detainees once held at Guantánamo have been transferred to other countries, including Egypt, Iran, Yemen, and Tajikistan.⁶ Upon news that the Government was planning on transferring potentially hundreds of detainees from Guantánamo, habeas counsel have been seeking temporary restraining orders from the courts requiring 30 days notice of a transfer to try to ensure that detainees will not be sent to countries for torture or indefinite imprisonment without due process. Habeas counsel generally requested advance notice to be able to contest any such removal from Guantánamo and preserve the jurisdiction of the Court. Not all of these motions have been granted, so that at least approximately 300 detainees remain without any judicial protection from being sent to countries where they will likely be tortured. See Section IV.

To protest their indefinite detention and mistreatment, the Guantánamo detainees have engaged in widespread and often life-threatening hunger strikes, including one that began on August 8, 2005 and is still ongoing. The Red Cross reported that 200 detainees were participating as of October 7, 2005, and that twenty-one participants were being force fed through nasal tubes.⁷ The hunger strikes and the Government's failure to provide effective medical care are discussed below, at Section V.

Finally, the Commission is well aware of the widespread reports of torture and cruel, inhuman or degrading treatment at U.S. detention facilities around the world, including at Guantánamo, as discussed in Petitioners' February 2005 submission. In July 2005, documents were released revealing that the Pentagon continues to conceal its use of torture against Guantánamo detainees.⁸ Just recently, President Bush threatened to veto a bill passed by the United States Senate banning cruel, inhuman or degrading treatment of prisoners held by the military, saying it would bind the President's hands in wartime.⁹ The Bush administration continues to block a true investigation of the abuse, torture and murder of people held by the U.S. at Guantánamo, Abu Ghraib and other detention camps around the world.

The devastating long-term psychological effects of the detainees' indefinite detention, torture, and other mistreatment have been recently documented. Physicians for Human Rights has documented these effects, often referred to as post-traumatic stress disorder, which include "depression, thoughts of suicide and nightmares, memory loss, emotional problems" and "incoherent speech, disorientation, hallucination, irritability, anger, delusions, and sometimes paranoia."¹⁰ A former Guantánamo chaplain also recently noted the regressive behaviors of

⁶ US Department of Defense News Release: *Detainee Transfer Announced*. 22 August 2005. Available at <http://www.defenselink.mil/releases/2005/nr20050822-4501.html>. According to the U.S. Government, the Tajikistan Government commits serious human rights abuses. U.S. Department of State Country Reports on Human Rights Practices 2003: Tajikistan, available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27868.htm>

⁷ *Id.*

⁸ These documents were disclosed pursuant to litigation following Freedom of Information Act requests made by the ACLU and CCR. See, *Pentagon Still Keeping Information from Public, ACLU Charges*, July 27, 2005. Available at: www.aclu.org (last visited Oct. 5, 2005) (describing reports received from the Department of Defense after court order that the Department produce the documents).

⁹ Eric Schmitt, *Senate Moves to Protect Military Prisoners Despite Veto Threat*, New York Times, October 6, 2005.

¹⁰ *Break Them Down: Systematic Use of Psychological Torture*, Physicians for Human Rights Report, 48, May 2005. Available at: http://www.phrusa.org/research/torture/report_breakthemdown.html.

detainees as a result of being “so traumatized by prolonged stress” that they lost their “sense of themselves and revert[ed] to the mindset of a child”: detainees responded in child-like voices, talked complete nonsense, and acted out childishly while standing atop their beds.¹¹

The Government also regularly violates the Muslim detainees’ religious rights under Article III of the American Declaration of the Rights and Duties of Man (American Declaration). Moreover, it fails to recognize these violations as “abuse” and therefore fails to punish perpetrators of religious discrimination. Petitioners request that the Commission expand the scope of Precautionary Measures No. 259 against the Government to prevent the Government from continuing to violate its detainees’ essential religious rights, particularly in the context of interrogations and approved interrogation techniques. See Section VI.

II. Denial of and Interference with Access to Counsel

In addition to the fact that approximately 225 detainees still have **no** access to counsel at all, various barriers to accessing legal counsel remain for the approximately 275 detainees who do have representation.

a. Interference with Attorney-Client Relationship

The U.S. military interferes on multiple levels with the Guantánamo detainees’ right to a confidential attorney-client relationship, the first of which is to diminish trust between the detainee and counsel. Interrogators have told detainees that those who seek or retain a lawyer will not be released and that the lawyers are liars and cannot be trusted.¹² Interrogators have also told detainees that their lawyers are Jewish and therefore will not act in their client’s best interest.¹³ Interrogators have even gone so far as to impersonate lawyers in order to interview detainees, only to reveal their true identity to detainees later.¹⁴ All of these tactics foster distrust among detainees towards their attorneys.

In October 2004, a U.S. Federal District court ordered the Government to cease its monitoring of meetings between detainees and their lawyers—both real time monitoring and review of attorney notes—finding that it “inappropriately burden[ed]” the attorney-client

¹¹ *For God and Country: Faith and Patriotism Under Fire*, 2005, a passage read by Juan Gonzalez during a radio interview on *Democracy Now!*, October 6, 2005, available at: <http://www.democracynow.org/print.pl?sid=05/10/06/1316240>.

¹² Charlie Savage, *Guantanamo Detainees Find Fault with Lawyers: Inmate Frustration Breeds Mistrust*, *Boston Globe*, Aug. 10, 2005. Available at: http://www.boston.com/news/nation/washington/articles/2005/08/10/guantanamo_detainees_find_fault_with_lawyers/. Declaration of Clive A. Stafford Smith (“Smith Declaration”), ¶ 104, Sept. 12, 2005, submitted in *Sadar Doe v. Bush*, Petitioners’ opposition to respondents’ motion to show cause why case should not be dismissed for lack of proper “next friend” standing and opposition to motion to stay proceedings, Civil Action No. 05-CV-1704-JR (D.D.C. Sept. 12, 2005); Charlie Savage, *Guantanamo Detainees Find Fault with Lawyers: Inmate Frustration Breeds Mistrust*, *Boston Globe*, Aug. 10, 2005. Available at: http://www.boston.com/news/nation/washington/articles/2005/08/10/guantanamo_detainees_find_fault_with_lawyers/.

¹³ Savage, Aug. 10, 2005.

¹⁴ *Id.*; Smith Declaration at ¶ 103.

relationship.¹⁵ Although the court's ruling was specific to the case of the Kuwaiti Detainee Petitioners, the Government's practice of monitoring attorney-client meetings was deemed impermissible. However, while the government has officially ceased monitoring of attorney-client conversations since the court's ruling, reports from detainees reveal that the Government continues informal monitoring of such communications.¹⁶ Interrogators make comments to detainees after meetings that include information discussed with their lawyers.¹⁷ In addition, interrogation of detainees after meetings include probing into what was discussed with their lawyers; detainees report that the more information they gave to their lawyer, the more abuse they suffered.¹⁸

The military also imposes harsh restrictions on detainees' communication with their lawyers. The government prohibits phone calls to detainees; in order to see their lawyers the detainees must obtain special written authorization, and these meetings are subject to strict time limits.¹⁹ The military has also frequently punished detainees for receiving attorney visits, placing detainees in solitary confinement several days before and after a visit by their lawyer.²⁰ Finally, the government has also prevented the prompt receipt of mail from detainees, sometimes delaying correspondence to lawyers for months.²¹

The aforementioned examples of the Government's deceitful and restrictive tactics used to erode trust and undermine detainees' communication with counsel elucidate the need for expanded precautionary measures to ensure confidential attorney-client communications as previously requested in Petitioner's February 2005 submission.

b. Denial of Access to Counsel

In many cases, the U.S. military has actively prevented or deterred detainees' access to counsel. In the case of Saadiq Doe, the government refused to provide information or access to his lawyer, despite knowing that Saadiq had counsel with whom he wanted to meet, had been determined to be a non-enemy combatant, and despite receiving several specific requests for meetings from his lawyer.²² In *Al Odah*, a lawyer was denied access to his clients who had been hospitalized as a result of a hunger strike.²³ Although the military finally allowed counsel to meet the detainees, the military forcibly brought the detainees from the hospital in an inhumane manner rather than allow the lawyer to visit them in the hospital.²⁴ The Government failed to

¹⁵ Memorandum Opinion, *Al Odah v. United States*, p. 15, Civil Action No. 02-828-CKK (D.D.C. Oct. 20, 2005).

¹⁶ Smith Declaration, at ¶ 105-107.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Savage, Aug. 10, 2005.

²⁰ Smith Declaration at ¶ 99-101.

²¹ Savage, Aug. 10, 2005.

²² Motion for leave to file sur-reply to respondents omnibus reply in support of motion for order to show cause why case should not be dismissed for lack of proper "next friend" standing, or, in the alternative, to stay proceedings pending related appeals, *Kiyemba v. Bush*, No. 05-CV-01509-RMU(D.D.C. Oct.11, 2005).

²³ Motion for temporary restraining order and emergency hearing for judicial supervision and family communications regarding force-feeding of Kuwaiti detainees, *Al Odah v. United States*, No. 02-CV-0828-CKK (D.D.C.Oct.7, 2005).

²⁴ *Id.*

inform the detainees' counsel of their clients' life-threatening condition, and to this day refuses to provide counsel with the medical records of the detainees.²⁵

Despite having blocked all reasonable forms of obtaining legal representation, the government has also challenged the legality of certain forms of "next-friend" habeas corpus petitions. The government has argued that the court has no jurisdiction unless it can be demonstrated that petitioner himself cannot file the petition on his own behalf, and that the "friend" has a significant relationship with petitioner, such as a parent or spouse.²⁶ This would prevent a fellow prisoner from serving as a "next friend" in order to obtain a lawyer for an unnamed detainee—a method by which a large number of *Doe* detainees have obtained access to a lawyer, and for some the only method by which to obtain representation.

c. Other restrictions on access to counsel

The Government denies the detainees Arabic-English dictionaries, without which they cannot understand court filings and government notices, and thus cannot competently defend themselves.²⁷ To make matters worse, counsel's requests for security clearance forms for experts have been repeatedly denied, making it impossible for the experts to evaluate classified information regarding the detainee's determination as an "enemy combatant."²⁸ The Government has also denied the use of either of two expeditious methods approved by the Defense Department for the transmission of presumptively classified counsel notes from Guantánamo, delaying by several weeks or a month counsel's receipt of such mail. Finally, the government has denied counsel access to the internet while in Guantánamo, despite making such services available to the press.²⁹ The multiple methods by which the government has interfered with detainees' access to counsel seriously undermines their ability to receive competent representation. The government has failed to provide legitimate reasons for such destructive barriers.

III. Update on the Military Tribunals

Petitioners detailed in their February 22, 2005, submission to the Commission the many ways in which the different military tribunals at Guantánamo violate the detainees' rights. The Combatant Status Review Tribunals (CSRTs) established to determine whether detainees were enemy combatants have now been completed, and have ruled that all but 38 of 596 detainees are enemy combatants not entitled to prisoner-of-war protections.³⁰ Several of the 38 men

²⁵ *Id.*

²⁶ *Ahmed Doe v. Bush, et al.*, Respondents' motion for order to show why case should not be dismissed for lack of proper "next friend" standing, or, in the alternative, to stay proceedings pending related appeals and for continued coordination, No. 05-CV-1458 (ESH) (D.D.C. Sep.29,2005).

²⁷ *Al Odah v. United States*, Motion to Enforce Court's Order of October 20,2004, On Access to Counsel and For Appointment of Special Master and Protective Motion for Modification of Stay Pending Appeal, No. 02-CV-0828 (CKK) (D.D.C. Feb.24, 2005).

²⁸ *Id.*

²⁹ *Id.*

³⁰ CCR filed a motion on September 21, 2005, seeking the factual returns for all unrepresented detainees who have been classified as "no longer enemy combatants" and seeking permission for counsel to meet with them, but there has been no action by the court.

determined to no longer be enemy combatants since March 29, 2005,³¹ are still being held at Guantánamo purportedly because the Government does not know where to send them.³² The Annual Review Boards (ARBs), an annual proceeding following each detainee's CSRT determination conducted to evaluate the detainees' "dangerousness", and whether to release, transfer or continue to detain them. There have been 309 ARB proceedings thus far, through which only 8 people have been released, 55 have been transferred, and decisions to continue to detain were made for 111 of the detainees, leaving 135 awaiting determination.³³

The military commissions, the only tribunals that will actually "try" the detainees for any "offense", had been temporarily stayed by a federal district court upon a challenge by one of the men identified to go before them.³⁴ Only four Guantánamo detainees have been charged and are therefore currently scheduled to be tried by the military commissions, and apparently charges are being prepared against eight other detainees.³⁵ On July 15, 2005, the D.C. Circuit Court of Appeals³⁶ reversed the lower court, deciding that it did not have the power to rule on much of the case, because many of the detainee's claims could be raised on appeal if and when he is convicted, and because the Geneva Conventions do not create privately enforceable rights.³⁷ The Court went on to decide, gratuitously, that the Geneva Conventions do not apply to the detainee in question or any member of al-Qaeda.³⁸ Review of the decision has been sought in the Supreme Court, which has not yet issued a decision on whether it will hear the case. Meanwhile, the military commissions are scheduled to resume the week of November 17, 2005.³⁹

³¹ "U.S. Releases 8 Guantanamo Prisoners, 510 remain." Will Dunham, Reuters, July 20, 2005, available at http://rn-c.rednova.com/news/general/181579/us_releases_8_guantanamo_prisoners_510_remain/index.html. Since July 20th, three detainees have been released to Egypt, Yemen, and Tajikistan. See U.S. Department of Defense News Release, 1 October 2005, 'Detainee Transfer Announced', available at <http://www.defenselink.mil/releases/2005/nr20051001-4826.html> (Egypt); U.S. Department of Defense News Release, 22 August 2005, 'Detainee Transfer Announced', available at <http://www.defenselink.mil/releases/2005/nr20050822-4501.html> (Yemen, Tajikistan).

³² In August, the Government stated that 15 Uighurs and 2 Uzbeks could not be returned to their home countries because of fears of torture, but could be released into the custody of another government. *U.S. holding talks on return of detainees*, J. White and R. Wright, Washington Post, August 9 2005. The Government has claimed that it has unsuccessfully tried numerous countries for the Uighurs, but attempts by habeas counsel to work with the Government to secure a place for these individuals were rejected outright, and collaboration does not appear to be possible.

³³ Administrative Review Board Summary, a summary of Acting Deputy Secretary of Defense Gordon England's review of board recommendations, available at <http://www.defenselink.mil/news/Oct2005/d20051011arb.pdf>.

³⁴ *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. November 8, 2004). The lower court had decided that the Geneva Conventions protect the Guantánamo detainees, and that the military commission is unlawful because there was never a proper determination that the detainee was not a Prisoner of War. *Id.* at 161-63.

³⁵ U.S. Department of Defense News Release, "Military Commissions to Resume", July 18 2005, available at <http://www.defenselink.mil/releases/2005/nr20050718-4063.html>.

³⁶ The Court of Appeals' opinion was joined in full by then-Judge John Roberts, now Supreme Court Chief Justice Roberts. Subsequently, the Court refused to allow another detainee to intervene to challenge the validity of the decision because Judge Roberts participated in making the ruling during the time he was meeting with Bush Administration officials about a possible nomination to the Supreme Court. *Hamdan v Rumsfeld*, No. 04-5393, (D.C. Cir., Oct 11 2005) (order denying non-party motion to intervene).

³⁷ *Hamdan v. Rumsfeld*, 415 F.3d 33, 39-41 (D.C. Cir. July 15, 2005).

³⁸ *Id.* at 41-42.

³⁹ *United States of America v. David M. Hicks*, PO 106, Docketing Order, September 23, 2005, available at <http://www.defenselink.mil/news/Oct2005/d20051011PO106.pdf>.

On August 31, 2005, Secretary of Defense Donald Rumsfeld approved changes to “improve military commission procedures.”⁴⁰ None of these changes resolve Petitioners’ original complaints regarding the military commissions.⁴¹ First, commission officers still have discretion to exclude a detainee from his own commission proceeding.⁴² Second, Military Commissions still reserve the right to withhold information or evidence from the detainees and their civilian defense counsels.⁴³ While now the presiding officer must exclude protected information from trial if the admission of such evidence “would result in the denial a full and fair trial,”⁴⁴ the military commission, not an independent judicial body, determines in each case what “full and fair” trial means. The detainees therefore remain vulnerable to being charged and convicted with evidence to which they have no access. Additionally, charges and convictions under the commissions may still be supported by evidence the Government has acquired through the application of torture or cruel, inhuman and degrading treatment.⁴⁵ Third, the detainees still lack access to meaningful judicial review. As the case was before, only Executive panels or personnel (including the Secretary of Defense and the President) review the commissions’ decisions. A detainee never has access to an independent civilian court. Finally, the commissions may still try a detainee for offenses not recognized under international law, and could implement terms so broad that no individual would be able to ascertain from them proscribed behavior.

Besides failing to resolve the military commissions’ original faults, the new commission rules present new problems. For example, the Government now reserves the right to monitor communications between detainees and their defense counsels (military or civilian).⁴⁶ This rule effectively destroys attorney-client confidentiality and privilege, and will likely inhibit detainees from fully participating in their own defenses. Another new, problematic rule is that both the Presiding Officer and commission members may be present for evidentiary hearings.⁴⁷ Consequently, debates over evidence that result in a ruling of inadmissibility will take place before commission members who are subsequently intended not to have seen or heard that evidence. To further the absurdity: if the commission disagrees with a Presiding Officer’s ruling regarding the admissibility of that evidence, the Presiding Officer then joins the commission to vote on whether his decision should be overturned.

⁴⁰ *Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures*, U.S. Department of Defense, Office of the Assistant Secretary of Defense, News Release, August 31, 2005, available at <http://www.defenselink.mil/releases/2005/nr20050831-4608.html>.

⁴¹ Petitioners’ Observations to U.S. Government’s 2004 Response, February 22nd 2005 (arguing that the Government’s military commission procedures violated the detainees’ due process rights on five grounds. First, commission officers had the discretion to exclude a detainee from his own commission proceeding. Second, detainees could be convicted by evidence to which they had no access. Third, the Executive ultimately determined the outcome of each trial. Fourth, the commissions could try a detainee for an offense not recognized or valid under international law. Fifth, the commissions could implement terms so broad that no individual would be able to understand and anticipate proscribed behavior.)

⁴² Department of Defense, *Military Commission Order No. 1* [Commission Order No. 1], 6.B.3, August 31, 2005.

⁴³ *Id.*, at 6.D.(5).(b).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Department of Defense, *Military Commission Order No. 3*, Section 3, September 21, 2005.

⁴⁷ *Id.*, at 4.A.(5).(a).

Ultimately, the military commissions remain a charade; this is confirmed by Section 10 of the Military Commission Order which explicitly states that the order does not create any enforceable rights or privileges, whether substantive or procedural.⁴⁸ The detainees, trapped by Executive fiat, have yet to be granted due process.

IV. Transfers to Countries Where Detainees Are Likely to Suffer Torture and Other Cruel, Inhuman or Degrading Treatment

In Petitioners' February 13, 2003, request to the Commission, we discussed the Government's practice of "rendering" persons under its control to countries where it is aware torture occurs, in violation of Articles I, XXV, XXVI and XXVII of the American Declaration as well as Article 3 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT).⁴⁹ Since that submission, more light has been shed on this U.S. practice of *refoulement*, or the "extraordinary rendition" of individuals to countries and under circumstances in which the Government must know that detainees will be tortured, or at least that they will likely be held without charges, and interrogated through torture.⁵⁰ U.S. officials pick up people in foreign countries, including Sweden, Germany, and Italy, and take them to other countries known to torture suspects, like Egypt, Jordan, Syria, Saudi Arabia, and Afghanistan. Some have then ended up at Guantánamo.⁵¹ It is not publicly known how many people the Government has rendered to be tortured, although estimates range from 150 to the thousands.⁵²

The Government claims that 247 detainees have already been released from detainees Guantánamo.⁵³ As pressure to close the facility mounts, and as the detainees' habeas petitions slowly make their way back up to the Supreme Court, the use of extra-legal and illegal transfers

⁴⁸ *Id.* at 10.

⁴⁹ Request for Precautionary Measures under Article 25 of the Commissions Regulations on behalf of unnamed persons detained and interrogated by the United States Government, Feb. 13 2003.

⁵⁰ The Center for Human Rights and Global Justice, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions,'" N.Y.U. School of Law, 2004, available at <http://www.nyuhr.org/docs/TortureByProxy.pdf>; The Center for Human Rights and Global Justice, "Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush", N.Y.U. School of Law, June 28, 2005, available at <http://www.nyuhr.org/Beyond%20Guantanamo%20Report%20FINAL.pdf>; Jane Mayer, *Annals of Justice: Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, The New Yorker, February 14 and 21, 2005, available at http://www.newyorker.com/printables/fact/050214fa_fact6.

⁵¹ For example, Mamdouh Habib was picked up in Pakistan and then taken to Egypt and tortured, and then to Guantánamo, until he was released to Australia. *See*, The Center for Human Rights and Global Justice, "Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush", N.Y.U. School of Law, June 28, 2005, available at <http://www.nyuhr.org/Beyond%20Guantanamo%20Report%20FINAL.pdf>.

⁵² Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, The New Yorker (Feb. 14, 2005), available at www.newyorker.com/printables/fact/050214fa_fact6; Jane Mayer, Panel discussion, "Transferring Terrorist Suspects to Other Countries: Legal and Policy Implications of Extraordinary Rendition", Constitution Project, Wash. D.C. (Apr. 20, 2005).

⁵³ Department of Defense Press Release, 10/01/2005, available at <http://www.defenselink.mil/releases/2005/nr20051001-4826.html>. DoD has transferred or released 246 detainees from Guantánamo - 178 for release, and 68 transferred to other governments (29 to Pakistan, five to Morocco, seven to France, seven to Russia, four to Saudi Arabia, two to Spain, one to Sweden, one to Kuwait, one to Australia, nine to Great Britain and two to Belgium). There are approximately 505 detainees currently at Guantánamo

from Guantánamo is likely to increase. In March 2005, U.S. officials announced that they were intending to transfer most of the 110 Afghan nationals in Guantánamo to Kabul's exclusive control.⁵⁴

Two months ago, the United States government announced that it had commenced negotiating agreements for the transfer of Guantánamo detainees to ten Muslim countries.⁵⁵ The terms of the agreements have not yet been made public, however a draft of one such agreement that was provided to a news agency, CNN, indicated that the United States would seek a commitment from each of these countries to: treat detainees "humanely and in a manner consistent with applicable international obligations"; refrain from torture; allow the United States or a third party such as the International Committee of the Red Cross (ICRC) access to the detainees to "verify the assurances"; "investigate, detain and prosecute" the detainee to the fullest extent possible; and provide the United States with "advance notice" and place the detainee on "watch lists" should a country decide to release a detainee.⁵⁶ Despite these potential agreements, great concern remains that many of those transferred will be subjected to indefinite detention without trial, torture and other abuse. In fact, the three or four countries to which the majority of the detainees will be transferred – Saudi Arabia, Yemen, and Afghanistan – have deplorable human rights records, a fact documented by the U.S. government's own State Department Country Reports for many years.⁵⁷

It is thought that similar agreements are being pursued with Saudi Arabia and Yemen; there are purportedly approximately 121 Saudis and over 100 Yemeni detainees at Guantánamo.⁵⁸ The U.S. State Department reports that the Saudi Arabia Government's human rights record is poor, and that security forces torture and abuse prisoners.⁵⁹ There have also been credible reports of torture in Yemeni prisons, including beating with cudgels and immersing in water.⁶⁰ One Yemeni national, Walid al-Qadasi, was returned to Yemen from Guantánamo in April 2004, and alleges that he was drugged prior to and during the transfer. More than a year

⁵⁴ *Afghanistan agrees to accept detainees; U.S. negotiating Guantanamo transfers*, J. White and R. Wright, Washington Post, August 5, 2005

⁵⁵ "U.S. Holding Talks on Return of Detainees; Administration Close to Reaching Agreements With 10 Muslim Governments", Robin Wright and Josh White, Washington Post, August 9, 2005.

⁵⁶ "U.S. Officials: Gitmo transfer talks active", Andrea Koppel and Elise Labott, CNN 9 August 2005. Available at <http://www.cnn.com/2005/US/08/09/detainee.release/index.html>

⁵⁷ U.S. Department of State Country Reports on Human Rights Practices 2004: Afghanistan, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41737.htm>

⁵⁸ Amnesty report: "USA: Guantanamo Bay detainees to be transferred back to Afghanistan," August 5, 2005, available at http://www.amnesty.org.au/Act_now/action_centre/usa_guantanamo_detainees_to_be_transferred_back_to_afghanistan.

⁵⁹ U.S. Department of State Country Reports on Human Rights Practices 2004: Saudi Arabia, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41731.htm>

⁶⁰ Human Rights Watch report on Yemen, 2005, available at <http://www.hrw.org/wr2k/Mena-11.htm>. The U.S. State Department has reported that conditions in Yemeni prisons were extremely overcrowded, sanitary conditions were poor, and food and healthcare were inadequate to non-existent. U.S. Department of State Country Reports on Human Rights Practices 2004: Yemen, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41736.htm>. The UN Human Rights Committee has also expressed concern about the Yemeni human rights record. Conclusions and recommendations of the UN Committee against Torture: Yemen, 5/02/2004, CAT/C/CR/31/4 (Concluding Observations/Comments): available at <http://www.unhcr.ch/tbs/doc.nsf/0/e8ad754e16566e4fc1256e6800349a5c?Opendocument>.

later he was still being held in the Political Security Prison at Sana'a, without charge, although a lawyer was finally allowed to meet with him in June 2005.⁶¹ The head of the Political Security Prison reported that al-Qadasi and other Yemeni prisoners were being held at the behest of the U.S. government and would remain in detention in Yemen until the U.S. provided information on them, whereupon they would be investigated further.⁶²

Recently, habeas counsel for some of the represented detainees have obtained preliminary injunctions prohibiting the Government from removing them from Guantánamo without first giving both counsel and the court 30 days notice of the intended transfer.⁶³ Some of these petitions are pending, some have been denied, and the unrepresented detainees also have no protection, leaving at least approximately 300 detainees without any judicial protection from illegal transfers. This month, a wheelchair-bound Egyptian detainee, Sami al-Laithi, who had a petition for injunctive relief pending, was transferred to Egypt, a country known to torture detainees.⁶⁴ He was transferred months after he was cleared of being an enemy combatant, without any notice being given to his lawyer.⁶⁵

The Government claims that prior to a transfer from Guantánamo it makes a determination as to whether it is more likely than not that a detainee will be tortured. There is no evidence, however, that the detainees are consulted before the decision is made, or permitted to challenge it afterwards. The U.S. Government also claims to get “diplomatic assurances” from the foreign government that the detainees will not be tortured - but these are obviously ineffective, as they are unenforceable and not monitored.⁶⁶ Moreover, the process of obtaining diplomatic assurances is not open to public scrutiny, so it is not possible to verify the Government’s claim. Even Attorney General Alberto Gonzales has admitted that the U.S. cannot control what countries to do someone once they have them, and that he didn't know if countries actually comply with diplomatic assurances.⁶⁷ There is also no opportunity for potential transferees to challenge the credibility or reliability of these assurances before an independent judicial body, and there is no requirement for the Government to take the past human rights history of the country into account.⁶⁸

⁶¹ Amnesty International report: Torture and Secret Detention: Testimony of the ‘Disappeared’ in the War on Terror. AMR 51/108/2005 Available at <http://web.amnesty.org/library/index/engamr511082005>

⁶² *Id.*

⁶³ See, e.g., *Abdah v Bush*, No. 04-1254, 2005 WL 711814 (D.D.C. Mar. 29, 2005).

⁶⁴ The U.S. State Department’s latest report on Egypt stated that “torture and abuse of detainees by police, security personnel, and prison guards remained common and persistent,” and detailed numerous cases. State Dept. Country Report on Human Rights Practices Egypt 2004, Released by the Bureau of Democracy, Human Rights and Labor, Feb 28, 2005. Available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41720.htm>.

⁶⁵ U.S. Department of Defense News Release: *Detainee Transfer Announced*, October 1, 2005, available at <http://www.defenselink.mil/releases/2005/nr20051001-4826.html>.

⁶⁶ The U.N. Special Rapporteur on Torture reported to the U.N. General Assembly in July 2002 that diplomatic assurances would only be acceptable where assurances are “unequivocal”, and there is a system in place to “monitor” the protection of the returned person from torture and ill treatment. Interim report of the Special Rapporteur on Torture, Theo van Boven, to the General Assembly A/57/173, July 2, 2002, Articles 20-31.

⁶⁷ Attorney General Alberto Gonzales Said the United States does not Send Detainees to Nations Allowing Torture, but Once They are Transferred, Can’t Ensure Good Treatment,” Miami Herald, March 8, 2005.

⁶⁸ <http://hrw.org/reports/2004/un0404/diplomatic0404.pdf>.

In addition to the rights protected under the American Declaration, the U.S. is party to several international treaties which prohibit both the use of torture and the transfer of individuals to countries where they are in danger or at risk of torture. Article 3 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) prohibits *refoulement* where there is a “substantial likelihood” that an individual “may be in danger of” torture.⁶⁹ Article 7 of the International Covenant on Civil and Political Rights (ICCPR) prohibits *refoulement* where individuals may be “at risk” of either torture or cruel, inhuman or degrading treatment.⁷⁰ The Refugee Convention affords protection against *refoulement* to individuals with a “well-founded fear of persecution”.⁷¹ Transfers must also take into account the principle of *non-refoulement* as reflected in Article 13 of the Inter-American Convention to Prevent and Punish Torture, which prohibits extradition of an individual where his life is in danger, there is reason to believe that he may be subject to torture or CID, or tried by special or ad hoc courts.⁷² Article 22(8) of the American Convention on Human Rights provides that no person may be returned to any country, even their country of origin if in that country there is a danger that his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.⁷³

In situations of armed conflict, both international human rights law and humanitarian law apply.⁷⁴ A person captured in the zone of military hostilities “must have some status under international law; he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention....There is no intermediate status; nobody in enemy hands can be outside the law.”⁷⁵ Although the state is obligated to repatriate Prisoners of War as soon as hostilities cease,⁷⁶ the ICRC’s commentary on the 1949 Conventions states that

⁶⁹ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature December 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), entered into force June 26, 1987, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535.

⁷⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 Dec. 16, 1966, entered into force 23 March 1976, 999 U.N.T.S. 171; Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (HRC General Comment 31).

⁷¹ Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152, entered into force Apr. 22, 1954. Although the United States did not ratify the Refugee Convention, it is a party to it through its accession to the 1967 Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, entered into force Oct. 1967, 2004) (1967 Protocol), which adopted and extended the Refugee Convention’s protections.

⁷² Signed at Cartagena de Indias, Colombia, on December 9 1985 at the fifteenth regular session of the General Assembly.

⁷³ Article 22 (8) American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

⁷⁴ IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.1 16 Doc. 5 rev. 1 corr. (22 October 2002), at p.53 ¶ 61; IACHR, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L.V/II.102 doc. 9 rev. 1, 26 February 1999, at 95, Part IV, para. 83.

⁷⁵ Oscar Uhler et al., *Geneva Convention IV: ICRC Commentary 51* (1958); Geneva Convention IV, art. 4(1) & 4(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50, 1125 U.N.T.S. 3 (1977); FM 27-10 ¶ 73.

⁷⁶ Article 118 of Third Geneva Convention states that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” Third Geneva Convention, *supra* note 15, Art. 118. Article 134 of the Fourth Geneva Convention

prisoners should not be repatriated where there are serious reasons for fearing that repatriating the individual would be contrary to general principles of established international law for the protection of human beings.⁷⁷ Thus, the Guantánamo detainees are protected by international human rights protections and humanitarian law.

Another problem highlighted by the Government's Extraordinary Renditions Policy is its practice of secrecy in the name of protecting national security and foreign relations. Not only are the renditions conducted secretly and completely outside of the law, but the Government is also using secrecy to prevent judicial review of the policy and claims for compensation. Canadian citizen Maher Arar sued U.S. Government officials for detaining him in New York on his way home to Canada, interfering with his access to counsel and the courts, and sending him to Syria where he was tortured and detained for nearly a year.⁷⁸ The U.S. Government has argued that the bulk of Mr. Arar's case, which essentially challenges the Government's Extraordinary Renditions practice, cannot be litigated because the reason he was sent to Syria instead of Canada is a state secret, which if disclosed would harm national security and foreign relations. If the Court accepts the Government's position, not only would the Government's practice of sending people to countries to be detained, interrogated and tortured be beyond judicial review, but so could any of the Government's illegal acts done in the name of "national security". Even the issue of whether diplomatic assurances were obtained can be deemed a "state secret". This restriction on information by the Government serves no legitimate purpose in violation of the Commission's Recommendations in its Report on Terrorism and Human Rights.⁷⁹

V. Hunger Strikes at Guantánamo Bay

The Guantánamo detainees have engaged in several widespread, serious and often life-threatening hunger strikes.⁸⁰ As of October 7, 2005, the Red Cross reported that 200 detainees were participating in a hunger strike. Twenty-one of those participants are in the hospital and are being force fed through nasal tubes.⁸¹ The hunger strike is well into its second month and the U.S. military's ability to effectively end the strike without subjecting the detainees to further harm or indignity is in serious doubt.

The prevalence of hunger strikes in prisons is primarily because prisoners do not have other means of protest.⁸² In the past, the Commission has requested a government to adopt

requires parties to "endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation. Fourth Geneva Convention, *supra* note 15, Art. 134. Thus, repatriation of detainees upon cessation of hostilities is mandated by the Geneva Conventions.

⁷⁷ Jean S. Pictet (ed.), GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY, ICRC, Geneva, 1960, 543 (emphasis added).

⁷⁸ *Arar v. Ashcroft*, 04-CV-0249 (E.D.N.Y).

⁷⁹ IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.1 16 Doc. 5 rev. 1 corr. (October 22, 2002), at IV.F.11(d); see also IV.G.13, providing for the right to judicial protection.

⁸⁰ Barbara Olshansky and Gitanjali Gutierrez, *The Guantánamo Prisoner Hunger Strikes and Protests: February 2002-August 2005, A Special Report by the Center for Constitutional Rights*, p. 6, September 8, 2005. Available at: http://www.ccr-ny.org/v2/legal/september_11th/docs/Gitmo_Hunger_Strike_Report_Sept_2005.pdf.

⁸¹ *Id.*

⁸² Herman Reyes, *Medical and Ethical Aspects of Hunger Strikes in Custody and the Issue of Torture*, in *Maltreatment and Torture* (M. Oehmchen, ed.) (1998), available at www.icrc.org/web/Eng/siteeng0.nsf/html/57jppz.

precautionary measures to protect a petitioner who was participating in a hunger strike.⁸³ Most recently, the Commission asked the government of Haiti to take urgent measures to guarantee the life and physical integrity of a detainee on hunger strike.⁸⁴ The United States Military, in its management of detainees on hunger strike at Guantánamo Bay, has proven itself to be incapable of effective and just treatment.

a. June-July 2005 Hunger Strike

The current wave of hunger strikes began in June 2005 with a brief respite in late July. It began again in early August after the military broke its promises to the detainees. According to statements by Omar Deghayes, a British detainee in Guantánamo, the hunger strike started on June 21, 2005.⁸⁵ However, the strike was not publicized until July 20, 2005 when it was announced by two Afghani citizens who had recently been released from Guantánamo.⁸⁶ The men stated that about 180 prisoners had been on a hunger strike for two weeks.⁸⁷ At first, the Pentagon denied being aware of the strike and when it finally acknowledged the strike it stated that only 52 detainees had been participating for a week.⁸⁸

The hunger strike reportedly called for starvation until death or until the detainees' demands were met.⁸⁹ The prisoners demanded: respect of religion, fair trials and proper legal representation, proper food and clean water, sunlight, contact with families, abandonment of the "level system" by which prisoners are treated differently depending on the color of their jumpsuits, a neutral body to oversee the conditions at Guantánamo, and effective medical treatment.⁹⁰

The DOD's method of dealing with the hunger strike was first to ignore and deny it, second to admit it but to assert that it was more limited than in fact it was, and third to force feed those detainees whose physical health was threatened. Reportedly, men who refused food for 20 days were placed on intravenous drips.⁹¹ At least 50 detainees were force fed during the June-July hunger strike.⁹² Prisoners were vomiting blood, collapsing in their cells, and falling unconscious.⁹³

⁸³ Inter-American Commission on Human Rights Requests Precautionary Measures in the "La Tablada" Case, Press Release (December 11, 2000) available at www.cidh.org/communicados/english/2000/press20-00.htm.

⁸⁴ Inter-American Commission on Human Rights Expresses Concern Over the Situation of Yvon Neptune, Press Release (May 06, 2005) available at www.cidh.org/communicados/english/2005/19.05.htm

⁸⁵ Motion for a Preliminary Injunction Concerning Conditions of Confinement, *Deghayes v. Bush*, 2005 U.S. Dist. LEXIS 21384 (D.C. Dist.2005), No. 04-CV-02215, (August 29, 2005).

⁸⁶ Halima Kazem, *Freed Afghans Decry Guantanamo Conditions*, Los Angeles Times, July 21, 2005, at A3.

⁸⁷ *Id.*

⁸⁸ Rupert Cornwell, *Prisoners at Guantanamo Bay go on Hunger Strike in Protest at Conditions*, The Independent, July 23, 2005, at 31.

⁸⁹ CRC Report at 12.

⁹⁰ *Id.*

⁹¹ Audrey Gillian, *Hunger Strikers Pledge to Die in Guantanamo*, The Guardian, September 9, 2005, at 1.

⁹² Letta Tayler, *People Will Definitely Die*, Newsday, September 10, 2005, at A14.

⁹³ *Id.*

The June-July hunger strike led the DOD to make several promises to the detainees, including a representation committee for the prisoners.⁹⁴ Apparently, because of the committee's work, the detainees were given bottled water with each meal and promised that the "level system" would end.⁹⁵ The prisoners decided to end the strike on July 28th when the Government promised them that within 10 days the prison would be brought to Geneva Convention's standards.⁹⁶ The DOD did not keep its promises to the detainees and has since stated that a committee did not exist and that the camp was already complying with the Geneva Conventions.⁹⁷

b. The August-October 2005 Hunger Strike

After the detainees realized their demands had not been met and that they had been tricked into ending the strike, they began another strike on August 8, 2005.⁹⁸ News of the current strike came when a lawyer representing detainees released a statement by one of his clients: "They have betrayed our trust. I do not plan to stop until I either die or we are respected."⁹⁹ The Government denied the existence of the hunger strikes until two weeks after it had started. Since acknowledging the hunger strike, it has downplayed the number of detainees involved and the gravity of the situation.¹⁰⁰ In late August, the military spokesperson called this hunger strike a "fast" and stated that the Government was monitoring some detainees who missed nine meals over a 72-hour period.¹⁰¹ On September 2, the DOD claimed that there were only 76 detainees on strike with only nine hospitalized.¹⁰² Only a week later, Major Jeff Weir stated that there were 89 prisoners on a hunger strike with 15 hospitalized, of whom 13 were being fed through tubes.¹⁰³

According to Amnesty International, 210 people were taking part in the hunger strike while the government had put the numbers as low as 36.¹⁰⁴ Unrecognized participation in a hunger strike could mean that detainees are not receiving adequate medical care or attention. Amnesty International also declared that several of the detainees on strike were critically ill.¹⁰⁵ By the end of September, a month and a half into the strike, the detainees were reported to be reduced to "skeletal status" and were "being force fed" to stay alive. Lawyers who went to see the detainees were denied access to their clients who had been hospitalized and could not assess the health and status of their clients.¹⁰⁶ At the time, 128 detainees were reportedly participating

⁹⁴ Audrey Gillian, *Hunger Strikers Pledge to Die in Guantanamo*, The Guardian, September 9, 2005, at 1.

⁹⁵ Charlie Savage, *Lawyers Cite Guantanamo Concessions*, The Boston Globe, August 13, 2005, A1.

⁹⁶ Letta Tayler, *People Will Definitely Die*, Newsday, September 10, 2005, at A14.

⁹⁷ Charlie Savage, *Lawyers Cite Guantanamo Concessions*, The Boston Globe, August 13, 2005, A1.

⁹⁸ Charlie Savage, *89 Prisoners Resume Hunger Strike at Guantanamo*, The Boston Globe, August 26, 2005, at A6.

⁹⁹ *Id.*

¹⁰⁰ Amnesty International, Press Release, September 23, 2005, available at www.amnesty.org

¹⁰¹ Charlie Savage, *89 Prisoners Resume Hunger Strike at Guantanamo*, The Boston Globe, August 26, 2005, at A6.

¹⁰² Steven Jacobs, *U.S. Denies Guantanamo Bay Prison Abuse*, Associated Press, September 2, 2005.

¹⁰³ Andrew Woodcock, *Guantanamo Hunger Striker's Won't Be Allowed to Die*, Press Association, September 9, 2005.

¹⁰⁴ Amnesty International, Press Release, September 23, 2005, available at www.amnesty.org

¹⁰⁵ *Id.*

¹⁰⁶ Tom Clifford, *Guantanamo Detainees Just Skin and Bone*, Global News Wire, Asia Africa Intelligence Wire, September 28, 2005.

in the hunger strike with 18 whose conditions were so critical that they were hospitalized and force fed.¹⁰⁷

The situation is so dire that lawyers for several detainees have asked federal judges to intervene and help end the hunger strike. The petitioners argued that detainees were given poor medical treatment or denied treatment altogether during the hunger strike.¹⁰⁸ The Court relied on U.S. Army Major General Jay W. Hood's statement that the military would "prevent unnecessary loss of life by the detainees through standard medical intervention, *including involuntary medical intervention*," as proof that the detainees were given adequate medical attention and denied the petitioner's request for preliminary injunction.¹⁰⁹ However, the Court did not question the quality and medical soundness of the Army's method of "medical intervention."¹¹⁰ As demonstrated above, the Army's method of "medical intervention" has been to force feed detainees who are hospitalized.

At the same time as these requests, a military spokesperson stated that within a week, the number of strikers had dropped from 128 to 36. The spokesperson did not give an adequate reason for the sharp decline. Lawyers for the detainees contend that the military has repeatedly "concealed and misrepresented facts about the hunger strike and the detainees' medical condition."¹¹¹ According to lawyers, one detainee was "skin and bones and looked like one of the victims of starvation in the Sudan" with feeding tubes dangling from his nose.¹¹² The other detainee could not even maintain his balance without a walker. He had to have six soldiers assist him to a chair so he could be interviewed by his attorney. Another detainee had not eaten for fifteen days when his lawyer saw him, but the government had not included him in the list of hunger strikers or given him medical attention.¹¹³

Of particular concern was Fawzi Al Odah who was "emaciated" and bleeding from his nostrils where large feeding tubes dangled. The detainee claimed that the doctors had inserted the tubes without an anesthetic, which caused him "such pain that the nurses had to avert their eyes." He also stated that he suffers constant vomiting and diarrhea from the force feedings.¹¹⁴ Other lawyers have described their clients as looking "gaunt and unwell" and fear that the conditions have deteriorated further.¹¹⁵ Even more recently, an emergency hearing was held at the United States District Court regarding the condition and treatment of striking detainees.¹¹⁶ The DOD still did not reveal the names of detainees being force fed and lawyers for CCR expressed

¹⁰⁷ *Numbers*, Time Magazine, September 26, 2005, 18.

¹⁰⁸ *Jamil El-Banna v. Bush*, 2005 U.S. Dist. LEXIS 21384 (D.C. Dist. 2005).

¹⁰⁹ *Id.* at 7 (emphasis theirs).

¹¹⁰ *Id.*

¹¹¹ Motion for Temporary Restraining Order and Emergency Hearing for Judicial Supervision and Family Communications Regarding Force-Feeding of Kuwaiti Detainees, *Al Odah, et al. v. U.S.*, (No. CV 02-0828) (September 20, 2005).

¹¹² *Id.* at 11.

¹¹³ Neil A. Lewis, *Detainees Goes to Court*, The New York Times, September 22, 2005, at 29.

¹¹⁴ Letta Tayler, *Furor Over Hunger Strike*, Newsday, September 22, 2005, A24.

¹¹⁵ Carol D. Leonig, *Detainee Hunger Strike Prompts Request for Health Records Access*, September 21, 2005.

¹¹⁶ *In an Emergency Hearing CCR Counsel Argue for Information on Medical Treatment of Striking Detainees*, October 14, 2005 available at <http://www.ccr-ny.org/v2/newsroom/releases/pReleases.asp?ObjID=5GQSRCs4up&Content=643>

concern that men would definitely die.¹¹⁷ The Court gave the United States until October 19, 2005 to respond.¹¹⁸

c. The Government's Failure to Provide Effective Medical Care to the Detainees

The United States government, through its spokesperson, has stated that it would not allow the detainees to die.¹¹⁹ In late September, the DOD said its “policy is to preserve the life of detainees. Detailed policy and procedures are in place to avert death from fasting and from failure to drink. The health status of detainees who are voluntary fasting is closely monitored”¹²⁰ It is apparent from its practices that the DOD’s method of keeping the detainees alive is to feed them against their will through nasal tubes rather than to provide the detainees with religious counseling or family access to persuade them to cease their strike. Lawyers for the detainees have also stated that the medical personnel at Guantanamo are perpetuating the detainees' physical and mental anguish through medical mistreatment during the force-feeding.¹²¹ The DOD has repeatedly tried to persuade the detainees to sign waiver forms which would allow it to intravenously feed the detainees if they were to go on a hunger strike, but the detainees have refused to sign the forms.¹²² Senior U.S. officials have anonymously expressed concern over their ability to cope with the current hunger strike and have gone against the official statements of the military, stating that the situation is greatly troublesome and that they have tried several methods to end the strike without success.¹²³

The World Medical Association has also passed two declarations that address physician’s duties to striking prisoners. Of particular relevance is the Malta Declaration which states that a physician must notify the family of a hunger strike of the prisoner's participation in the protest.¹²⁴ Complaints have already been made by the detainees and their lawyers that the DOD has refused to reveal even the names of those detainees who are hospitalized, much less the identities of those participating in the strike. Fundamentally, the hunger strikers should be given a fair hearing rather than be allowed to suffer from potentially permanent physical and mental problems or ultimately death as a result of the strike. Finally, the conditions of the striking detainees, as demonstrated above, show the inhumane actions of the military in its attempts to keep detainees alive and to keep lawyers from finding out the degree of the problem.

The proper method of dealing with this strike is not force-feeding but hearing and honestly responding to the detainee grievances and complying with international standards.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Carol D. Leonig, *Detainee Hunger Strike Prompts Request for Health Records Access*, September 21, 2005.

¹²⁰ Neil A. Lewis, *Detainees Goes to Court*, *The New York Times*, September 22, 2005, at 29.

¹²¹ Emergency Guantánamo Hunger Strike Hearing, *Al Joudi v. Bush*, No. 05-301 (D.D.C. October 14, 2005).

¹²² CRC Report at 12.

¹²³ Neil A. Lewis, *Guantanamo Strike Has Directors Worried*, *International Herald Tribune*, September 19, 2005, at 7.

¹²⁴ World Medical Association Declaration on Hunger Strikes, adopted by the 43rd World Medical Assembly Malta, November 1991 and editorially revised at the 44th World Medical Assembly, Marbella, Spain, September 1992, available at <http://www.wma.net/e/policy/h31.htm>, para 6.

VI. The Government Violates the Guantánamo Detainees' Article III Religious Rights.

The United States Government regularly violates Guantánamo detainees' religious rights. Article III of the American Declaration states that "every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private."¹²⁵ Article XX of The Statute of the Inter-American Commission on Human Rights states that the Commission must "pay particular attention to the observance of the human rights referred to in Article[...] III..."¹²⁶ The American Declaration's preamble explains, in part, why religious freedom is so "essential": legal duties presuppose moral duties, which express and derive from spirituality and spiritual development.¹²⁷

The Inter-American Convention Against Terrorism (IACT) reaffirms that the "fight against terrorism" in the Americas must respect both international law and human rights.¹²⁸ In particular, Article 15 of the IACT demands that "the measures carried out by the states parties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms."¹²⁹ The Inter-American human rights system's jurisprudence also recognizes that "the international human rights law applies at all times, in peacetime and in situations of armed conflict."¹³⁰ Specifically, both the Inter-American Court and Commission may consider international humanitarian law to interpret the human rights obligations created by the American Declaration.¹³¹ In its Report on Terrorism and Human Rights, the Commission explains that this approach is "mandated by the international instruments to which states are legally bound, including the [American Declaration]."¹³²

The United States Government asserts that it respects the religious rights of the Guantánamo detainees.¹³³ But the Government's actions belie its claims. First, US military personnel frequently violate the religious rights the Government claims to offer its Muslim detainees. Second, the Government created and executes an interrogation policy that attacks precisely the religious freedoms Article III is meant to protect. Third, the Government fails to recognize religious discrimination as abuse and consequently fails to punish the individuals who

¹²⁵ American Declaration of the Rights and Duties of Man [American Declaration], available at <http://www.iachr.org/Basicos/basic2.htm>.

¹²⁶ Statute of the Inter-American Commission of Human Rights, available at <http://www.iachr.org/Basicos/basic15.htm>.

¹²⁷ American Declaration, at *Preamble*

¹²⁸ Inter-American Convention Against Terrorism, OAS General Assembly Resolution AG/RES. 1840 (XXXII-O/02) 2nd plenary session, June 3rd 2002, available at <http://www.iachr.org/Terrorism/Eng/part.v.htm>.

¹²⁹ *Id.*

¹³⁰ IACHR, *Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba*, March 12, 2002 (reiterated July 23, 2002, March 18, 2003, June 9th, 2004); See also *Abella v. Argentina*, Case No. 11.137, Report No 5/97, Annual Report of the IACHR 1997, para. 161; *Coard et al v. Unites States*, Case No. 10.951, Report No 109/99, Annual Report of the IACHR 1999, paras. 37-42.

¹³¹ *Caso Bamaca Velasquez, Sentencia Sobre Fondo*, Judgment No. 70, 25 November 2000, available at http://www.corteidh.or.cr/serie_c/C_70_ESP.html. See also *Las Palmeras Case*, Preliminary Objections, Judgment No.67, Feb. 4, 2000. For a discussion of these cases, see *Observations to the U.S. Government's Response to Request for Precautionary Measures*, Submitted May 13, 2005, pp. 6-7.

¹³² IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.1 16 Doc. 5 rev. 1 corr. (22 October 2002), at I.A.22.

¹³³ Donna Miles, *Joint Task Force Respects Detainees Religious Practices*, American Forces Information Service, June 29, 2005, available at http://www.defenselink.mil/news/Jun2005/20050629_1904.html.

perpetrate it. Consequently, the Government has caused and continues to cause irreparable moral injury to its Muslim detainees.

a. **United States Military Personnel Frequently Violate the Religious Rights the Government Claims to Offer the Guantánamo Detainees.**

United States military personnel frequently violate the religious rights the Government claims to offer its detainees. For example, while the Government claims to provide Muslim detainees with Qur'ans,¹³⁴ detainees, former detainees, and government officials have reported numerous incidences in which military personnel have kicked,¹³⁵ thrown,¹³⁶ or stomped on those holy books;¹³⁷ hosed them with water;¹³⁸ written obscenities in them,¹³⁹ or simply disallowed detainees from having them.¹⁴⁰ Although in January of 2003 the Government instituted a policy essentially prohibiting military personnel from handling the Qur'an (after an MP stomped on a Qu'ran, causing the first hunger strike),¹⁴¹ according to one former detainee "the rule was repeatedly and systematically infringed by the establishment itself."¹⁴² Another detainee corroborated this statement, claiming that "years [after he first arrived at Guantánamo], incidents [of Qur'an desecration] still took place and occurred with frequency."¹⁴³

Similarly, while the Government purports to broadcast the Muslim call to prayer five times per day, detainees and former detainees complain that military personnel frequently obstruct the call by playing music, broadcasting unrelated English messages, or speaking over it, sometimes sarcastically mimicking its message.¹⁴⁴ Additionally, detainees complain that military personnel play the call to prayer too infrequently or not at all.¹⁴⁵

Finally, although the Government purports to give detainees sufficient time to pray every day, detainees complain that military personnel regularly desecrate the prayer time. One

¹³⁴ Donna Miles, *Joint Task Force Respects Detainees Religious Practices*, *supra*.

¹³⁵ Center for Constitutional Rights [CCR], *Composite Statement: Detention in Afghanistan and Guantanamo Bay* [Composite Statement], p. 39, available at <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>. See also, Enclosure 1: Koran Inquiry: Description of Incidents, United States Southern Command, June 3rd, 2005 [Qur'an Inquiry], available at <http://www.southcom.mil/pa/Media/Releases/PR050603a.pdf>.

¹³⁶ Neil A. Lewis, *Guantanamo Prisoners Go on Hunger Strike*, *New York Times*, September 18, 2005.

¹³⁷ Qur'an Inquiry, *supra*.

¹³⁸ Cageprisoners, Statement by Jamal Al-Harith, *Report into the Systematic and Institutionalized US Desecration of the Qur'an and other Islamic Rituals: Testimonies from Former Guantanamo Bay Detainees* [Qur'an Desecration Report], May 26, 2005, p. 7, available at <http://www.cageprisoners.com>.

¹³⁹ Qur'an Inquiry, *supra*.

¹⁴⁰ Qur'an Desecration Report, *supra*. See also, Composite Statement *supra*.

¹⁴¹ The Center for Constitutional Rights [CCR], *Special Report: The Guantanamo Prisoner Hunger Strikes and Protests: February 2002 – August 2005* [Guantanamo Prisoner Strikes Report], at p. 10.

¹⁴² Qur'an Desecration Report, *supra*.

¹⁴³ *Id.*

¹⁴⁴ Mark Sullivan, Esq., *Guantanamo Bay Detainee Statements: Jum'ah AbdulLatif Al Dossari, Isa Ali Abdulla Al Murbati, Abdullah Al Noaimi and Adel Kamel Abdulla Haji* [Detainees' Statements]. Dorsey & Whitney LLP, May 2005, at p. 8. See also, Guantanamo Prisoner Strikes Report, *supra* at p. 10, available at http://www.humanrightsfirst.org/us_law/PDF/detainees/client-stat-051805.pdf.

¹⁴⁵ Colin Freeze, *Canadian Teen in Guantanamo on Hunger Strike, Lawyers Say*, *The Globe and Mail*, January 9th, 2005.

detainee stated that “during prayers, guards turn on fans, turn up the radio and whistle.”¹⁴⁶ An FBI agent wrote that detainees discuss “all the time” how “MPs make fun of them while they pray.”¹⁴⁷ One detainee stated that “guards laugh at prisoners while they are praying.”¹⁴⁸ For the past two years, the Government has denied the detainees an Imam, altogether.¹⁴⁹

b. The United States Government Created and Executes an Interrogation Policy that Attacks the Religious Rights Article III Protects.

A memo issued by Defense Secretary Donald Rumsfeld on April 16, 2003, currently delimits the behavior of Government interrogators at Guantánamo.¹⁵⁰ The memo authorizes interrogators to employ the “Futility” technique.¹⁵¹ An act under the “Futility” technique aims to undermine the subject’s confidence in the structures that support his cause, thereby “convincing the source that resistance is futile.”¹⁵²

Under the “Futility” technique, female military interrogators may “perform acts designed to take advantage of their gender in relation to Muslim males.”¹⁵³ This policy permits interrogators to degrade the moral infrastructure of Islam, which strictly forbids adultery, sex between unmarried men and women, and promiscuity, among other things. The “Futility” interrogation policy authorizes female interrogators to remove their [Battle Dress Uniform] tops and rub themselves against the detainees; make lewd sexual comments, noises, and gestures to the detainees; and fondle [the detainees’] genitalia.¹⁵⁴ It permits male or female interrogators to force detainees to stand naked while females are present.¹⁵⁵ One detainee complained that he frequently heard crying and screaming from an interrogation room “along with a female laughing.” He said he could also hear these interrogators “making derogatory statements about God, including saying--presumably pursuant to the “Futility” technique--‘where is God now?’”¹⁵⁶

¹⁴⁶ *Canadian Teen in Guantanamo Bay Went on Hunger Strike in July*, Canadian Press News Wire, September 1, 2005.

¹⁴⁷ ACLU and CCR FOIA recovery from FBI [FOIA], at p. 1293, available at http://action.aclu.org/torturefoia/released/072605/1243_1381.pdf.

¹⁴⁸ Charlie Savage, *89 Prisoners Resume Hunger Strike at Guantanamo*, Boston Globe, August 26, 2005.

¹⁴⁹ Interview with James Yee, former Muslim Chaplain at Guantanamo Bay, October 6th, 2005, available at <http://www.democracynow.org/article.pl?sid=05/10/06/1316240>.

¹⁵⁰ Final Report of the Independent Panel to Review DoD Detention Operations [Report to Review Detention Operations], Appendix E, *Evolution of Interrogation Techniques – GTMO*, available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>. Currently, the United States Congress is debating proposed Amendment No. 1977 to H.R. 2863, which would establish the Army Field Manual as the uniform standard for the interrogation of Department of Defense detainees. Even if the Amendment is ratified, the “Futility” interrogation technique will remain available to interrogators at Guantanamo, as this technique is authorized under the aforementioned Army Field Manual.

¹⁵¹ Report to Review Detention Operations, *supra*.

¹⁵² Kathleen T. Rhem, *Alleged Guantanamo Abuse Did Not Rise to Level of ‘Inhumane,’* American Forces Press Service, July 13, 2005.

¹⁵³ 15-6 Report to Review Detention Operations, *supra*, at p. 7.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Detainees’ Statements, *supra*, p. 13.

Any Government-sanctioned degradation of Islam violates Article III of the American Declaration. However, examined as part of the “Futility” interrogation technique, the Government’s discrimination against Muslims is particularly disturbing. Even the Government has acknowledged that to some extent, “sexually suggestive behavior by interrogators... raises problematic issues concerning... religious sensitivities.”¹⁵⁷ As mentioned earlier, the “Futility” technique aims to undermine the subject’s confidence in the structures that support his cause. Therefore, when the Government admits it targets the “Muslim” aspect of its detainees’ personalities during “Futility” interrogations, it necessarily admits that it seeks to persuade Muslim men that their religion, Islam, is a futile cause; that Islam and Islamic aspirations no longer have meaning or efficacy. The Government could not discriminate more against the detainees’ religious freedom: were interrogators’ techniques successful, the detainees would abandon their spiritual beliefs altogether as vain. Today, as reports emerge of detainees starving themselves to gain respect for Islam¹⁵⁸ or throwing their Qur’ans and renouncing their faiths in despair,¹⁵⁹ the Commission must act immediately to address Government policies meant to degrade Islam, particularly those informing interrogation techniques.

c. The Government Fails to Recognize Religious Discrimination as Abuse, and Consequently Fails to Sufficiently Punish the Individuals Who Violate the Guantánamo Detainees’ Article III Religious Rights.

Government-initiated investigative reports regarding detention operations reaffirm that religious discrimination at Guantánamo is not considered “abuse.” They simultaneously reveal that the Government fails to punish military personnel who violate the detainees’ Article III religious freedoms. For example, in 2004, Defense Secretary Donald Rumsfeld appointed Vice Admiral Albert T. Church to conduct a “comprehensive review of Department of Defense [DoD] interrogation operations.”¹⁶⁰ Reviewing over two years of interrogations at Guantánamo, Admiral Church ultimately found only “three cases of closed, substantiated interrogation-related abuse,” and stated that all three cases resulted in “disciplinary action” against the interrogators.¹⁶¹

In pertinent part, Church stated these cases “included those of two female interrogators who, on their own initiative, touched and spoke to detainees in a sexually suggestive manner in order to incur stress based on the detainees’ religious beliefs.”¹⁶² Church’s statement implies that it is wrong for interrogators to “touch[] and [speak] to detainees in a sexually suggestive manner in order to incur stress based on the detainees’ religious beliefs” and that those who do are punished. Neither implication is true. As previously discussed, female interrogators *are* authorized to perform “acts designed to take advantage of their gender in relation to Muslim males.”¹⁶³ The Government “disciplined” the military personnel Church references merely for “failure to document the techniques to be implemented by the interrogator prior to the

¹⁵⁷ U.S. Department of Defense, *Church Report Executive Summary* [Church Report], available at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>, March 10, 2005, at p. 12.

¹⁵⁸ Colin Freeze, *Canadian Teen in Guantanamo on Hunger Strike, Lawyers Say*, *supra*.

¹⁵⁹ Qur’an Inquiry, *supra*

¹⁶⁰ Church Report, *supra* at p. 1.

¹⁶¹ *Id.*, at p. 14.

¹⁶² *Id.*

¹⁶³ 15-6 Report to Review Detention Operations, *supra* at pp. 15-16.

interrogation” and for “using a technique that was not approved in advance.”¹⁶⁴ That this investigation uncovered only three instances of “abuse” at Guantánamo, despite the detainees’ numerous complaints of religious discrimination (and other mistreatment), reaffirms several of Petitioner’s beliefs: first, the Government *permits* interrogators to attack the sexual morals of Islam; second, the Government does not consider religious discrimination “abuse”--at least not in the context of interrogations; third, Government procedures designed to receive and address detainees’ complaints lack efficacy; fourth, the Government defines “abuse” too narrowly; fifth, the Government refuses to meaningfully investigate and punish those responsible for abusing the detainees.

Two other Government investigations regarding Guantánamo have produced similarly empty results. One found that only three interrogation acts since 2002 violated the DoD’s authorized interrogation techniques, and that none of these acts constituted inhumane treatment.¹⁶⁵ Another found five instances since 2002 where military personnel mistreated prisoners, but recommended--without explanation--that four of the cases be “closed” and merited “no further investigation.”¹⁶⁶ Ultimately, all reports reaffirm that Government investigations regarding Guantánamo are little more than smoke and mirrors obscuring the simple truth that the Government persistently violates its detainees’ most fundamental rights.

d. Conclusion

The Government regularly violates its Muslim detainees’ Article III religious rights. Additionally, it fails to recognize these violations as “abuse” and therefore fails to punish perpetrators of religious discrimination. Consequently, the Government has caused and continues to cause irreparable moral injury to its Muslim detainees. As the “right to religious freedom and worship” is “essential” under the American Declaration, and as the Commission may authorize Precautionary Measures to prevent irreparable moral injury, Petitioners request that the Commission expand the scope of Precautionary Measures No. 259 against the Government to prevent the Government from continuing to violate its detainees’ essential religious rights, particularly in the context of interrogations and approved interrogation techniques.

VII. Conclusion and Requested Relief

Accordingly, Petitioners renew the requests made in their February 2005 submission, and further seek an expansion of Precautionary Measures No. 259 to request the United States to:

Petitioners respectfully seek the Commission’s intervention and the issuance of the following Precautionary Measures, requesting that the United States Government:

1. Cease sending persons under its control to third countries where they may be at risk of torture or cruel, inhuman or degrading treatment;

¹⁶⁴ *Id.*, at p. 8.

¹⁶⁵ *Id.*, at p. 1.


¹⁶⁶ Qur’an Inquiry, *supra*.

2. Give individuals facing transfer from Guantánamo, and their lawyers, including CCR as coordinating counsel for the unknown detainees, 30 days notice before they are transferred;
3. Give individuals facing transfer a real opportunity to contest the transfer, including access to counsel and an independent hearing;
4. Ensure honest, confidential, and prompt communication between detainees and their counsel, including ending the practice of monitoring attorney-client meetings or threatening or punishing detainees for meeting with their lawyers;
5. Refrain from exploiting detainees' Islamic faith or practice in order to torture or otherwise persecute them, specifically refrain from confiscating, withholding, or desecrating religious objects, including the Qu'ran;
6. Allow detainees to observe Islamic dietary practices in accordance with their faith, particularly during their observance of the Ramadan holiday and provide detainees with access to religious counseling;
7. Notify consulate, families, and attorneys of prisoners participating in hunger strikes and ensure that appropriate, medical attention is provided to hunger-striking prisoners with their consent by an independent medical team;
8. Allow family members to contact hospitalized hunger-striking prisoners and ensure legal counsel can make regular and timely contact with ill prisoners;

Petitioners look forward to addressing these matters at the October 20, 2005 hearing.

Respectfully submitted,

For and on Behalf of Petitioners:



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COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINÉ DES DROITS DE L'HOMME



ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006 U.S.A.

October 28, 2005

Ref. Detainees in Guantanamo Bay, Cuba
Precautionary Measures Precautionary Measures N° 259
United States

Dear Ms. LaHood:

On behalf of the Inter-American Commission on Human Rights, I write in order to acknowledge receipt of your observations dated October 20, 2005 concerning the precautionary measures noted above.

I also wish to inform you that during the Commission's 123rd Regular Period of Sessions, the Commission considered the information provided by the parties in this matter since the Commission's last reiteration of the precautionary measures on July 29, 2004. This information included the written submissions of the United States dated December 15, 2004 and October 19, 2005, the written observations of the Petitioners dated February 22, 2005 and October 20, 2005, and the oral submissions made by the parties during the hearings convened before the Commission on March 3, 2005 during the Commission's 122nd Regular Period of Session and on October 20, 2005 during the Commission's 123rd Regular Period of Sessions. Based upon the information provided, the Commission decided to reiterate and extend the precautionary measures, and accordingly, in a note of today's date, addressed the government of the United States in the following terms:

As Your Excellency is aware, in the precautionary measures granted on March 12, 2002, which were maintained and expanded in communications dated July 23, 2002, March 18, 2003, and July 29, 2004, the Commission asked the United States to:

- (1) take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.
- (2) to conduct thorough and impartial investigations into all allegations of torture and other ill treatment of detainees under its authority and control and to prosecute individuals who may be responsible for such conduct, including those who may be implicated through the doctrine of superior responsibility, in light of the State's obligation to ensure that detainees are not subjected to treatment that may amount to torture or may otherwise be cruel, inhuman or degrading as defined under applicable international norms.

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In its communications, the Commission also requested that the United States provide information concerning the location, status and treatment of individual detained by the United States in other facilities in connection with its post-September 11, 2001 anti-terrorist initiatives, including information as to the United States' policies and practices governing the prohibition of any form of treatment that may amount to torture or cruel, inhumane or degrading in nature in the detention or interrogation of such persons. In addition, the Commission asked for information concerning the Petitioners' allegation that children under the age of 18 continued to be held by the United States at Guantanamo Bay and that they have not been segregated from the adult population or provided with education or rehabilitation assistance.

Additional Observations of the United States

In its written and oral representations to the Commission, Your Excellency's government has made several submissions. First, the United States has argued that the Petitioners' request is inadmissible for failure to exhaust domestic remedies. In particular, the State contends that there are ongoing and timely federal habeas corpus proceedings arising out the June 28, 2004 decision of the United States Supreme Court in the case of *Rasul v. Bush*,¹ in which that Court held that United States courts have jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. According to the United States, as of September 27, 2005, 160 habeas lawsuits involving 292 detainee petitions have been filed with US courts.² These proceedings are said to include *Hamdan v. Rumsfeld*³ and *In re Guantanamo Detainees*,⁴ in which the US District Court reached conflicting conclusions on the question of whether non-resident aliens have any cognizable constitutional rights or any viable claims either under treaties or customary international law, and in respect of which a decision on a consolidated appeal to the US Court of Appeals for the District of Columbia is said to be pending.⁵ Your Excellency's government also indicates that in the course of these habeas corpus proceedings, the federal courts have reviewed or are reviewing numerous motions and other requests including motions to dismiss the petition, motions for a restraining order, motions regarding transfer of a detainee from Guantanamo, requests for discovery, and motions relating to procedures regulating access of attorneys to individuals, and that the government has filed extensive submissions in these proceedings.⁶

The State also referred in this connection to certain administrative proceedings established at Guantanamo Bay, including proceedings before Combatant Status Review Tribunals that began in July 2004 and are comprised of officials of the US armed forces who determine whether detainees are properly classified as "enemy combatants." In addition, the Commission was informed of Administrative Review Boards, which are also comprised of members of the US armed forces and are said to provide an opportunity for the detainee to explain "why he or she no longer presents a threat to the United States or its allies in the ongoing armed conflict with al Qaida and its affiliates or supporters or to explain why release would otherwise be appropriate."⁷ The State argues that these proceedings constitute additional domestic proceedings available to the detainees, and further, that these proceedings address satisfactorily the principal concerns raised by the Commission in its request for precautionary measures.⁸

In addition to its submissions on the admissibility of the precautionary measures request, the United States reiterated its previous argument that the Commission's jurisdiction and competence do not extend to the laws and customs of war or to issuing requests for

¹ U.S.S.C., *Rasul et al. v. Bush, President of the United States, et al.*, No. 03-334 (June 28, 2004).

² State's observations of October 19, 2005, pp. 1, 5.

³ *Hamdan v. Rumsfeld*, 415 F. 3d 33 (D.C. Cir. 2005).

⁴ *In re Guantanamo Detainees*, 355 F. Supp. 2d 311 (D.D.C. 2005).

⁵ *Boumediene v. Bush*, 2005 U.S. Lexis 14580 (D.C. Cir. 2005).

⁶ State's observations of October 19, 2005, p. 6.

⁷ State's observations of December 15, 2005, pp. 9-13, 19-21.

⁸ State's observations of October 19, 2005, p. 2.

precautionary measures against non-States Parties to the American Convention.

With respect to the issue of the treatment of detainees, the State has contended that the US President and the Department of Defense have confirmed that the United States remains committed to complying with its obligations under the Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment. In this regard, the Department of Defense denies any allegations of torture at Guantanamo and restates its commitment to treating detainees humanely. It has also indicated that there have been several official reviews of conditions of detention at Guantanamo and elsewhere, and that allegations of detainee abuse are investigated and those who commit wrongdoing will be punished. According to Your Excellency's government, as of December 2004 major independent investigations at Guantanamo have documented eight instances of infractions which have resulted in action ranging from admonishment to court-martial.⁹ In addition, the State indicates that detainees are provided with excellent medical care, including mental health treatment, that they receive adequate food, shelter and clothing, and that they are permitted to receive and send mail to family and friends via petitions and postcards.¹⁰ Regarding interrogation techniques at Guantanamo, the State referred the Commission to a June 22, 2004 US Department of Defense press release explaining the various interrogation techniques approved and disapproved at Guantanamo from the period beginning January 2002, and indicated that the facility at Guantanamo is continually open to the ICRC, chaplain staff and legal staff, and foreign and domestic media, and that official reviews have been conducted by the Department of Defense into conditions at Guantanamo as well as individual allegations of abuse.¹¹ These are said to have included an investigation at the direction of the Secretary of Defense in response to a request by the Australian Government following claims of mistreatment of two Australian detainees at Guantanamo, where the investigation ultimately revealed no information to support the allegation.¹²

With respect to interrogation techniques in particular, the United States has indicated that the Department of Defense has taken several actions in an attempt to address allegations of any prisoner abuse by US military personnel abroad, including the establishment of an Independent Panel to review operations and provide independent advice on the treatment of detainees. The State has also indicated that more than 50 individuals have been referred for court-martial and that new guidelines have been issued by the Secretary of Defense on procedures for investigations into deaths of any person held as a detainee in the custody of the US armed forces.¹³

Further, the State contends that there are no juveniles currently detained at Guantanamo and that the three juveniles under the age of sixteen previously held there were treated appropriately and were transferred to Afghanistan under conditions intended to provide for their safety and rehabilitation.¹⁴

Finally, with regard to its actions involving the possible repatriation of detainees, the United States indicates that it takes seriously the principle of non-refoulement. It states in this respect that its policy is to obtain specific assurances from a receiving country that it will not torture the individual being transferred to that country, that it would take steps to investigate credible allegations of torture and take appropriate action if there were reasons to believe that those assurances were not being honored, and that it would not transfer a detainee where those assurances are not sufficient when balanced against an individual's specific claim.¹⁵

⁹ State's observations of December 15, 2004, pp. 22-25.

¹⁰ State's observations of December 15, 2004, p.30.

¹¹ State's observations of December 15, 2004, pp. 25-27.

¹² State's observations of December 15, 2004, pp. 26-27.

¹³ State's observations of December 15, 2004, pp. 28-29.

¹⁴ State's observations of December 15, 2004, pp. 18-19.

¹⁵ State's observations of December 15, 2004, p. 27-28 .

Additional Observations of the Petitioners

In their additional observations to the Commission, the Petitioners have contested the jurisdictional objections raised by the State as well as observations on the merits of the precautionary measures. With respect to the proceedings pending before US courts and administrative tribunals, the Petitioners state that as of October 2005, more than 500 men continue to be detained at Guantanamo Bay.¹⁶ They also claim that of these, approximately 280 have obtained counsel to represent them on habeas corpus petitions in the US District Court to challenge their detentions, but the substance of their claims has yet to be determined by any court.¹⁷ Accordingly, the Petitioners state that there are still approximately 225 detainees who have been completely denied any right to access counsel because no one except the government knows who they are. In addition, for those detainees with counsel, the Petitioners contend that the US military has interfered on multiple levels with the Guantanamo detainees' right to a confidential attorney-client relationship, including measures to diminish trust between detainees and their lawyers and monitoring attorney-client meetings.¹⁸

Further, the Petitioners indicated in their October 20, 2005 observations that reviews by the Combatant Status Review Tribunal, which determine whether a detainee is an "enemy combatant," had been completed and that 558 of the 596 detainees were determined to be "enemy combatants not entitled to prisoner of war protections," but that several of the 38 men determined not to be enemy combatants since March 29, 2005 are still being held at Guantanamo purportedly because the Government does not know where to send them.¹⁹ The Petitioners also state that there have been 309 Administrative Review Board proceedings to date, which are to assess annually the need to continue to detain each enemy combatant during the course of ongoing hostilities, through which 8 people have been released, 55 have been transferred, and decisions to continue to detain were made for 111 of the detainees, leaving 135 awaiting determination. In addition, according to the Petitioners, Military Commissions that have been set up to try detainees for crimes arising out of the armed conflict detainees are scheduled to proceed in respect of four detainees who have been charged following the lifting of a court-ordered stay.²⁰ The Petitioners also claim that procedural changes implemented by the government to the Commissions do not address the Petitioners' concerns regarding the fairness of the process.²¹

In this regard, the Petitioners claim that none of the tribunals established at Guantanamo Bay, including the Combatant Status Review Tribunals, the Administrative Review Boards, or the Military Commissions, fulfill international standards of due process, in part because they apply an overbroad notion of "enemy combatant," the detainees do not have access to classified material and, in the case of the first two bodies, they are presided over by US military personnel and do not provide for the right to independent counsel for the detainee.²² Moreover, according to the

¹⁶ Petitioners' observations of October 20, 2005, p. 1.

¹⁷ Petitioners' observations of October 20, 2005, pp. 1-2.

¹⁸ Petitioners' observations of October 20, 2005, pp. 4-6, citing, *inter alia*, Charlie Savage, Guantanamo Detainees Find Fault with Lawyers: Inmate Frustration Breeds Mistrust, Boston Globe, August 10, 2005; Declaration of Clive A. Stafford Smith, para. 104, September 12, 2005, submitted in *Sadar Doe v. Bush*, Petitioners' opposition to respondents' motion to show cause why the case should not be dismissed for lack of proper "next friend" standing and opposition to motion to stay proceedings, Civil Action No. 05-CV-1704-JR (D.D.C. September 12, 2005).

¹⁹ Petitioners' observations of October 20, 2005, pp. 6-7, citing, *inter alia*, J. White and R. Wright, *U.S. holding talks on return of detainees*, Washington Post, August 9, 2005 (indicating that in August, the US government stated that 15 Uighurs and 2 Uzbeks could not be returned to their home countries because of fears of torture, but could be released into the custody of another government).

²⁰ Petitioners' observations of October 20, 2005, p. 7, citing *Hamdan v. Rumsfeld*, 415 F. 3d 33 (D.C. Cir. July 15, 2005); *United States of America v. David M. Hicks*, PO 106, Docketing Order, September 23, 2005.

²¹ Petitioners' observations of October 20, 2005, p. 2.

Petitioners, detainees have reported that they have given false information because of torture and the Combatant Status Review Tribunals have relied on such statements in determining whether detainees should be classified as enemy combatants, contrary to the obligations of the United States under international law.²³ Accordingly, the Petitioners have requested the Commission to further expand its precautionary measures by urging the US government to comply with its obligation not to use torture or other abusive tactics when it determines the legal status of individuals in US detention or other proceedings.²⁴

With respect to the conditions and treatment of detainees, the Petitioners have argued that assurances by the U.S. government that it is treating the detainees humanely have been proven to be unreliable based upon recent sources indicating that detainees have been subjected to treatment including beatings, sleep deprivation, exposure to extreme temperatures, sensory deprivation, and prolonged isolation and that such treatment has been approved at the highest levels of authority in the United States. Alleged sources for this information include media reports, statements by U.S. government officials, government legal memoranda leaked to the media, reports by the International Committee of the Red Cross, and first-hand accounts provided by at least 17 individuals who had since been released from Guantanamo.²⁵ In their October 20, 2005 observations, the Petitioners added that Guantanamo Bay detainees engaged in widespread and often life-threatening hunger strikes in June to July 2005 and from August to October 2005 in order to protest their detention and treatment, that 200 detainees were participating as of October 7, 2005 and that 21 participants were being force fed through nasal tubes but without effective medical care.²⁶ Further, the Petitioners state that US authorities regularly violate the Muslim detainees' religious rights through interrogation policies such as the "Futility" technique that aim to undermine the subject's confidence in the structure that support his cause by degrading his religion,²⁷ as well as by failing to recognize religious discrimination as abuse and punish individuals who perpetrate it, among other means.²⁸ Finally, the Petitioners allege that the US government has failed to investigate high-level officials for torture and other cruel, inhuman or degrading treatment in US detention facilities, but rather has rewarded and promoted such officials.²⁹

With respect to the transfer of detainees, the Petitioners have claimed that 247 detainees once held at Guantanamo have been transferred to other countries, including Egypt, Iran, Yemen and Tajikistan, in circumstances that do not adequately protect against the possibility that the transferees may be subjected to torture or other inhuman treatment.³⁰ The Petitioners note in this respect that the countries to whom the detainees have been transferred have deplorable human rights records as documented for many years by the U.S. State Department's Country Reports, and that although the U.S. government has negotiated transfer agreements with some Muslim countries that would seek assurances that they would refrain from torture and that

²² Petitioners' observations of February 22, 2005, pp. 5-12; Petitioners' observations of October 20, 2005, pp. 6-9, citing, *inter alia*, Administrative Review Board Summary, a summary of Acting Deputy Secretary of Defense Gordon England's review of board recommendations; Department of Defense, Military Commission Order No. 1, August 31, 2005.

²³ Petitioners' observations of February 22, 2005, pp. 21-24.

²⁴ Petitioners' observations of February 22, 2005, p. 21.

²⁵ Petitioners' observations of February 22, 2005, pp. 13-17, Petitioners' observations of October 20, 2005, p. 2.

²⁶ Petitioners' observations of October 20, 2005, pp. 3, 13-17, citing, *inter alia*, World Medical Association Declaration on Hunger Strikes, adopted by the 43rd World Medical Assembly Malta, November 1991 and editorially revised at the 44th World Medical Assembly, Marbella, Spain, September 1992.

²⁷ Petitioners' observations of October 20, 2005, pp. 20-21, citing, *inter alia*, Final Report of the Independent Panel to Review DoD Detention Operations, available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

²⁸ Petitioners' observations of October 20, 2005, pp. 18-22.

²⁹ Petitioners' observations of February 22, 2005, pp. 18-19.

³⁰ Petitioners' observations of October 20, 2005, pp. 9-13. See also State's Observations, December 15, 2004, p. 18 (indicating that as of December 14, 2004, 57 detainees had been transferred from Guantanamo to the control of other governments, including 29 to Pakistan, 7 to Russia, 5 to Morocco, 5 to Great Britain, 4 to France, 4 to Saudi Arabia, 1 to Denmark, 1 to Spain, and 1 to Sweden).

transferees would be treated humanely,³¹ great concerns remain that many of those transferred will be subjected to indefinite detention without trial, torture and other abuse.³² Further, the Petitioners note that the United States has no means of enforcing or monitoring compliance with assurances given by the receiving state.³³ The Petitioners note that habeas counsel for some of the represented detainees have obtained preliminary injunctions from the US courts prohibiting the Government from removing them from Guantanamo without first giving both counsel and the court 30 days notice of the intended transfer. According to the Petitioners, some of these petitions are pending, some have been denied, and unrepresented detainees are left with no judicial protection from illegal transfers.³⁴ Based upon these submissions, the Petitioners have asked the Commission to expand its precautionary measures to cease sending persons under US control to third countries where they may be at risk of torture or cruel, inhuman or degrading treatment, give individuals facing transfer from Guantanamo and their lawyers, including the Center for Constitutional Rights as coordinating counsel for the unknown detainees, 30 days notice before they are transferred, and give individuals facing transfer a real opportunity to contest the transfer including access to counsel and an independent hearing.

Findings of the Inter-American Commission on Human Rights

After considering the observations of the parties, the Commission has made the following findings concerning its precautionary measures granted in favor of the detainees at Guantanamo Bay.

With regard to the jurisdictional objections raised by the United States, the Commission has already considered and rejected the State's claims based upon the Commission's authority to adopt precautionary measures in respect of non-states parties to the American Convention and to consider and apply international humanitarian law and does not consider it necessary to deliberate further on these points.

With respect to the State's objection to the precautionary measures based upon non-exhaustion of domestic remedies, which was first raised in the State's observations of December 17, 2004, the Commission acknowledges the international principle according to which the international jurisdiction of human rights is intended to reinforce and complement, rather than replace, domestic jurisdiction. It is for this reason that the rule of prior exhaustion of domestic remedies is applied to petitions filed before the inter-American human rights system, in order to allow the State to resolve the problem under its internal law before being confronted with an international proceeding. At the same time, it has been recognized by this Commission and other international adjudicative bodies that the effective exercise of their mandates requires the ability, in certain circumstances, to request a state to act or refrain from acting in situations of extreme gravity or urgency where application of the usual rule of exhaustion of domestic remedies may not be appropriate or practicable.³⁵ This arises most frequently where urgent measures are

³¹ Petitioners' observations of October 20, 2005, p. 10, citing Andrea Koppel and Elise Labott, U.S. Officials: Gitmo transfer talks active, CNN, August 9, 2005, available at <http://www.cnn.com/2005/US/08/09/detainee.release/index.html>; Robin Wright and Josh White, U.S. Holding Talks on Return of Detainees; Administration Close to Reaching Agreements with 10 Muslim Governments, Washington Post, August 9, 2005.

³² Petitioners' observations of October 20, 2005, pp. 10-11.

³³ Petitioners' observations of October 20, 2005, p. 11, citing "Attorney General Alberto Gonzales Said the United States does not Send Detainees to Nations Allowing Torture, but Once They are Transferred, Can't Ensure Good Treatment, Miami Herald, March 8, 2005.

³⁴ Petitioners' observations of October 20, 2005, p. 11, citing, *inter alia*, *Abdah v. Bush*, No. 04-1254, 2005 WL 711814 (D.D.C. March 29, 2005).

³⁵ See, e.g., Commission's Rules of Procedure, Article 25(1) (providing that "In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons"); American Convention on Human Rights, Art. 63(2) (providing that "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission"); Statute of the International Court of Justice, Article 41(1) (providing that "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party"); European Court of Human Rights, Rules of Court (October 2005), Rule 39(1) (providing that "[t]he Chamber or, where

necessary to preserve the tribunal's ability to consider a complaint and issue an effective remedy, for example by avoiding irreparable prejudice to the rights of the parties pending the determination of a petition or case,³⁶ or where such measures are otherwise necessary to prevent irreparable harm to persons.³⁷ In light of the inherently urgent and vital nature of such measures, the Commission, like other international bodies,³⁸ has not considered establishment of the exhaustion of domestic remedies requirement to be a precondition for its longstanding authority to grant precautionary measures.³⁹ At the same time, the Commission may take into account the possible existence and invocation of protective measures at the domestic level in determining whether to grant or maintain precautionary measures. Consequently, in the present case, the Commission cannot accept the State's submission that alleged non-exhaustion of domestic remedies *per se* deprives the Commission of jurisdiction to grant or maintain the precautionary measures in this matter.

With respect to the Commission's request for the State to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a

appropriate, its President may, at the request of a party or any other person concerned, or of its own motion, indicate to the parties any interim measures which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it"; Rules of Procedure of the Human Rights Committee, adopted July 26, 1989, Art. 86 (providing that (t)he Committee may, prior to forwarding its views on the communication to the State part concerned, inform the State of its views whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In so doing, the Committee shall inform the State party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication"); Rules of Procedure of the UN Committee Against Torture, UN Doc. CAT/C/Rev.4, Art. 108(1) (providing that "{a)t any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) for new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations").

³⁶ See, e.g., Case N° 12.243, Report N° 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000, para. 117; IACHR, Fifth Report on the Situation of Human Rights in Guatemala, Doc. OEA/Ser.L/V/II.111 doc.21 rev. (6 April 2001), paras. 71, 72; I/A Court H.R., Case of James *et al.* (Trinidad and Tobago), Order of August 29, 1998, "Considering" para. 9 (finding that executing the beneficiaries of the measures pursuant to death sentences before the Commission and the Court had an opportunity to decide petitions filed on their behalf would "create an irremediable situation incompatible with the object and purpose of the Convention, would amount to a disavowal of the authority of the Commission, and would adversely affect the very essence of the Inter-American system").

³⁷ See, e.g., I/A Court H.R., Lysias Fleury Case, Order for Provisional Measures dated June 7, 2003, "Considering", paras. 6, 7 (observing that aim of provisional measures in national legal systems, in general, is to protect the rights of the parties to a dispute, ensuring that the judgment on the merits is not hindered by their actions *pendente lite*, but that "the aim of urgent and provisional measures, in International Human Rights Law, goes further, inasmuch as, in addition to their essentially preventive nature, they effectively protect fundamental rights, insofar as they seek to avoid irreparable damage to persons").

³⁸ See, e.g., ICJ, Case Concerning Avena and other Mexican Nationals (Mexico v. United States), Order for the Indication of Provisional Measures dated 5 February 2003, General List No. 128, para. 58 (stipulating that the granting of provisional measures under Article 41 of the Court's Statute that requested the United States to ensure that three individuals related to the case before the Court were not executed pending the final judgment in the proceedings "in no way prejudge[d] the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves"; Eur. Court H.R., Case of Ocalan v. Turkey, Judgment of March 12, 2003, para. 5 (indicating that shortly following the lodging of the application in the case, the Court requested interim measures from the Government of Turkey to ensure that proceedings against the applicant in the State Security Court complied with the due process protections under Article 6 of the European Convention and to "take all necessary steps to ensure that the death penalty is not carried out so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant's complaints under the Convention"); UN Human Rights Committee, K.C. (Canada), Communication No. 486/1992, UN Doc. CCPR/C/45/D/486/1992 (August 17, 1992), para. 5.2 (requesting interim measures under Article 86 of the Committee's Rules of Procedure to defer the author's extradition until the Committee had an opportunity to consider the admissibility of the issues placed before it); UN Committee Against Torture, Mafhoud Brada (France), Communication No. 195/2002, UN Doc. CAT/C/34/D/195/2002 (May 24, 2005), para. 1.2 (requesting pursuant to Article 108(9) of the Committee's Rules of Procedure that the State not deport the complainant to Algeria while his complaint was considered).

³⁹ The Commission's authority to request precautionary measures was first included in Article 26(2) of the Commission's Regulations adopted in 1980, which provided that "ijn urgent cases when it becomes necessary to avoid irreparable damage to persons, the Commission may request that provisional measures be taken to avoid irreparable damages in cases where the denounced facts are true." See (Current) Regulations of the Inter-American Commission on Human Rights, approved by the Commission at its 660th Meeting, 49th Session, held on April 18, 1980, in Inter-American Commission on Human Rights, Ten Years of Activities, 1971-1981 (1982) at p. 62. The Commission began reporting on precautionary measures granted by it beginning in its 1997 Annual Report. For past summaries of precautionary measures granted by the Commission, see Annual Report of the IACHR 1997, 1998, Chapters III(2)(A), Annual Reports of the IACHR 199-2004, Chapters III(C)(1).

competent tribunal, the State has argued that the actions of the various tribunals established at Guantanamo Bay as well as the federal courts of the United States are addressing the concerning raised by the Commission and therefore that it is "wholly unnecessary and improper for the Commission to retain jurisdiction over this proceeding." In this respect, the Commission observes that when it first adopted these precautionary measures in March 2002, the urgency of the matter arose from the fact that according to available information, the detainees at Guantanamo Bay remained entirely at the unfettered discretion of the United States government. As no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights, the Commission considered that the rights and protections to which the detainees may be entitled under international or domestic law could not be said to be the subject of effective legal protection by the State absent clarification of the legal status of the detainees. Over two years later, the U.S. Supreme Court reached essentially the same conclusion in its judgment in the case of *Rasul v. Bush*,⁴⁰ in which a majority of the Court held that United States courts have jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. The Court's finding in this respect was based upon, *inter alia*, the longstanding and fundamental role that the writ of habeas corpus plays as a means of reviewing Executive detention. In this respect, Mr. Justice Stevens, writing for the majority, quoted Justice Jackson's statement from his dissenting opinion in the case of *Shaughnessey v. United States ex rel. Mezei*, that

"Executive imprisonment has long been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint."⁴¹

Notwithstanding the Supreme Court's pronouncement, the information before the Commission indicates that over one year since the decision, nearly half of the detainees at Guantanamo Bay have not been given effective access to counsel or otherwise provided with a fair opportunity to pursue a habeas corpus proceeding in accordance with the Supreme Court's ruling, despite the fact that the purpose of habeas is intended to be a timely remedy aimed at guaranteeing personal liberty and humane treatment.⁴² Moreover, in those habeas petitions that have been filed, no final determinations have yet been reached as to the legal status of the detainees or the rights to which they are entitled under domestic or international law. While the State argues that the procedures before the Combatant Status Review Board and the Administrative Review Boards likewise satisfy the Commission's request, it remains entirely unclear from the outcome of those proceedings what the legal status of the detainees is or what rights they are entitled to under international or domestic law. The information available only indicates that 558 of the 596 detainees have been found by the Combatant Status Review Tribunal to be "enemy combatants not entitled to prisoner of war protections." Accordingly, the Commission does not consider that these procedures have adequately responded to the concerns at the base of the Commission's request for precautionary measures.

In these circumstances, the Commission considers that the urgent situation at Guantanamo Bay continues to exist and, moreover, has been exacerbated by the fact that some detainees have been subjected to additional processes and proceedings, including removal to third countries and trial by military commission, while their legal status remains unclear. Based upon these considerations, the Commission finds that the State has not complied with this aspect of the Commission's request for precautionary measures, that a serious and urgent situation of irreparable harm to persons remains at Guantanamo Bay, and therefore reiterates its request that the State take the immediate measures necessary to have the legal status of the detainees at Guantanamo Bay effectively determined by a competent tribunal.

⁴⁰ U.S.S.C., *Rasul et al. v. Bush, President of the United States, et al.*, No. 03-334 (June 28, 2004).

⁴¹ *Id.*, at 6, citing *Shaughnessey v. United States ex rel. Mezei*, 345 U.S. 206, 218-219 (1953) (Dissenting opinion of Justice Jackson).

⁴² *See* I/A Court H.R., *Castillo Paéz Case*, Judgment of November 3, 1997, Ser. C No. 34, para. 83 (holding that "[t]he purpose of habeas corpus is not only to guarantee personal liberty and humane treatment, but also to prevent disappearance or failure to determine the place of detention, and, ultimately, to ensure the right to life").

The Commission has also requested that the State conduct thorough and impartial investigations into all allegations of torture and other ill treatment of detainees under its authority and control and to prosecute individuals who may be responsible for such conduct, including those who may be implicated through the doctrine of superior responsibility. In this regard, it has long been emphasized within the inter-American human rights system that states must use the means at their disposal to prevent human rights violations and to provide effective remedies for any violations that do occur, including undertaking thorough and effective investigations capable of identifying and punishing persons responsible for human rights infringements.⁴³ In response to the Commission's request, the State has indicated, without significant detail, that several official reviews of conditions of detention at Guantanamo and elsewhere have been undertaken and that allegations of detainee abuse are investigated and those who commit wrongdoing are punished. The State has also indicated that as of December 2004 major independent investigations at Guantanamo have documented eight instances of infractions which have resulted in action ranging from admonishment to court-marshal.

The Commission is encouraged by indications that the State has taken some measures to investigate and prosecute allegations of mistreatment at Guantanamo Bay. At the same time, the Commission remains concerned by the information presented by the Petitioners and available through the media more generally which suggests that instances of abuse and other inhumane treatment may be continuing at Guantanamo and that these instances may include the denial of proper medical treatment to detainees who have participated in hunger strikes as well as methods of interrogation directed at the religious affiliations of certain detainees. The Commission is also concerned that, according to the State's submissions, all of the investigations of abuse at Guantanamo have been undertaken internally by the Department of Defense, which is the very institution alleged to be responsible for the instances of abuse, which may call into question the impartiality of the measures taken. As the Commission has previously found, notwithstanding the threat or gravity of a situation of terrorist violence, and regardless of whether it arises in the context of armed conflict, the right to humane treatment is a non-derogable right, and the prohibition against torture constitutes a peremptory norm of international law and therefore may not be suspended or restricted under any circumstances.⁴⁴ In light of the serious nature of these allegations, the Commission reiterates its request that the State take all measures necessary to thoroughly and impartially investigate, prosecute and punish all instances of torture and other mistreatment that may be perpetrated against the detainees at Guantanamo Bay, whether through methods of interrogation of otherwise. This must include respect for the prohibition against the use in any legal proceeding of statements obtained through torture, except against a person accused of torture as evidence that the statement was made.⁴⁵

With respect to the Petitioners' allegations concerning the transfer or removal of detainees to third countries in circumstances which do not adequately protect against the possibility that the transferees may be subjected to torture or other inhuman treatment, the State has indicated that it takes seriously the principle of non-refoulement, and that its policy is to obtain specific assurances from a receiving country that it will not torture the individual being transferred to that country and would not transfer a detainee where those assurances are not sufficient when balanced against an individual's specific claim. The submissions of the Petitioners concerning transfer agreements allegedly entered into between the United States and certain Muslim governments appear to support the State's claims in this regard.

On this issue, the Commission has previously stated that the obligation of non-refoulement under applicable international instruments is absolute and does not depend upon a claimant's status as a refugee. This obligation also necessarily requires that persons who may face a risk of torture cannot be rejected at the border or expelled without an adequate, individualized examination of their circumstances even if they do not qualify as refugees, and that the process requires the strictest adherence to all applicable safeguards, including the right to have one's eligibility to enter the process decided by a competent, independent and impartial

⁴³ See, e.g., I/A Court H.R., Velásquez Rodríguez Case, Judgment of 28 July 1988, Series C N° 4, paras. 172-174.

⁴⁴ See IACHR, Report on Terrorism and Human Rights (2002), OAS Doc. OEA/Ser.LV/II.116 Doc. 5 rev. 1 corr. (22 October 2002), para. 216.

⁴⁵ See, e.g., UN Convention Against Torture, Article 15 (providing that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made").

decision-maker, through a process which is fair and transparent.⁴⁶ The Commission has also specifically stated that

[f]or persons who have been subject to certain forms of persecution, such as torture, return to their home country would place them at a risk which is impermissible under international law. As noted above, the prohibition of torture as a norm of *jus cogens*--as codified in the American Declaration generally, and Article 3 of the UN Convention against Torture in the context of expulsion--applies beyond the terms of the 1951 Convention. The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue.⁴⁷

There is no question that transferring or removing a detainee to a country where he or she may face a real risk of torture or other mistreatment can give rise to a serious and urgent risk of irreparable harm warranting precautionary measures from this Commission.⁴⁸ From the information available to the Commission, which includes judicial decisions from courts in the United States and findings by the U.S. government itself, at least some of the detainees at Guantanamo face real risks of torture and other mistreatment if removed or transferred to other governments. Further, the information presented indicates that although the United States government may request assurances from the receiving state, it has no method of enforcing or monitoring compliance with these assurances once the detainee is removed, a defect that has been criticized by other international human rights authorities.⁴⁹ Given the absolute nature of the non-refoulement principle and the serious nature of the consequences if it is not fully respected and enforced, the Commission respectfully requests that the United States take the measures necessary to ensure that any detainees who may face a risk of torture or other cruel, inhuman or degrading treatment if transferred, removed or expelled from Guantanamo Bay are provided an adequate, individualized examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker. Where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other mistreatment, the State should ensure that the detainee is not transferred or removed and that diplomatic assurances are not used to circumvent the State's non-refoulement obligation.

Finally, the Commission respectfully requests that the United States provide information concerning the Petitioners' allegation that juveniles under the age of 18 continue to be held by the United States at Guantanamo Bay and that they have not been segregated from the adult population or provided with education or rehabilitation assistance.

⁴⁶ See IACHR, Report on Terrorism and Human Rights (2002), para. 394, citing IACHR, 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, paras. 25, 70.

⁴⁷ IACHR, 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, para. 154. See also IACHR, Report on Terrorism and Human Rights (2002), para. 395.

⁴⁸ See, e.g., Case 11.661, Report 7/02, Manichavasgan Suresh v. Canada, Annual Report of the IACHR 2002, paras. 7, 8. See similarly UNCAT, Communication No. 195/2002 (France), UN Doc. CAT/C/34/D/195/2002, paras. 1.1, 6.1, 6.2.

⁴⁹ See, e.g., Report of the UN Special Rapporteur on Torture, Theo van Boven, to the General Assembly, UN Doc. A/59/324 (July 2, 2002), para. 37(mentioning a number instances in which there were strong indications that diplomatic assurances were not respected and indicating that, as a baseline, in circumstances where a person would be returned to a place where torture is systematic, "the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to"); Report of the UN Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman, UN Doc. E/CN.4/2005/103 (February 7, 2005), paras. 56-61 (noting that unlike assurances on the use of the death penalty or trial by a military court which are readily verifiable, assurances against torture and other abuse require constant vigilance by competent and independent personnel and that the mere fact that such assurances are sought is a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated, and concluding that "[g]iven the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation, or other transfer, diplomatic assurances should not be used to circumvent that non-refoulement obligation"). See also Human Rights Committee, UN Doc. CCPR/C/SWE, para. 12.

Summary of Precautionary Measures Request

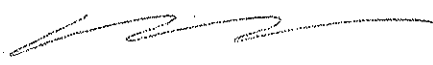
Based upon the foregoing findings, the Commission respectfully request that Your Excellency's Government:

1. take the immediate measures necessary to have the legal status of the detainees at Guantanamo Bay effectively determined by a competent tribunal;
2. take all measures necessary to thoroughly and impartially investigate, prosecute and punish all instances of torture and other mistreatment that may be perpetrated against the detainees at Guantanamo Bay, whether through methods of interrogation or otherwise, and to ensure respect for the prohibition against the use in any legal proceeding of statements obtained through torture, except against a person accused of torture as evidence that the statement was made;
3. take the measures necessary to ensure that any detainees who may face a risk of torture or other cruel, inhuman or degrading treatment if transferred, removed or expelled from Guantanamo Bay are provided an adequate, individualized examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker. Where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other mistreatment, the State should ensure that the detainee is not transferred or removed and that diplomatic assurances are not used to circumvent the State's non-refoulement obligation.

The Commission notes that during its last hearing on these measures on October 20, 2005, your government's representative declined to make any oral representations, and that the State indicated in its October 19, 2005 written representations that it intends to defer further formal participation in the matter until the international law requirement of exhaustion of domestic remedies has been fulfilled. The Commission regrets the stance taken by the United States and hopes that it will reconsider its position in light of the Commission's findings in this matter and the important role that the State's participation in this and other proceedings before the Commission plays in reinforcing the protection of fundamental rights in our Hemisphere.

In its communication to the United States, the Commission asked that the State provide information concerning compliance with its precautionary measures, together with the additional information requested, within 30 days.

Sincerely yours,



Clare K. Roberts
President

**IN THE
INTER-AMERICAN COURT OF HUMAN RIGHTS**

Winston Caesar,

Petitioner,

v.

The Republic of Trinidad and Tobago,

Respondent

**BRIEF AMICI CURIAE OF
HLS ADVOCATES FOR HUMAN RIGHTS and the
GLOBAL JUSTICE CENTER
IN SUPPORT OF THE APPLICATION OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

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TABLE OF CONTENTS

I. BACKGROUND 1

A. Statement of Identity and Interest.....1

B. Summary of Argument2

C. Summary of Relevant Facts4

II. PRELIMINARY OBJECTIONS7

A. This Court Properly Has Jurisdiction Over this Case.7

**B. Trinidad’s Denunciation of the American Convention Does Not Preclude
 Jurisdiction.....7**

**C. Trinidad’s Attempt to Impose Limits on its Instrument of Acceptance
 Does Not Preclude Jurisdiction.....8**

**III. TRINIDAD SUBJECTED MR. CAESAR TO AT LEAST SEVEN SEPARATE
FORMS OF ABUSE, EACH OF WHICH CONSITUTES AN INDEPENDENT,
DISCRETE VIOLATION OF ARTICLE 5 OF THE AMERICAN
CONVENTION.10**

**A. For the Benefit of Both States and Prisoners, this Court Should
 Specifically Identify Each of the Abuses Suffered by Mr. Caesar that
 Violates Article 5 of the American Convention.10**

**B. At Least Seven Separate Forms of Abuse Endured by Mr. Caesar Violated
 His Right to Humane Treatment Under Article 5 of the American
 Convention.....10**

**1. Trinidad Violated Mr. Caesar’s Article 5 Rights by Subjecting Him
 to Physical Conditions of Detention that were Degrading and
 Inhuman.12**

**2. Trinidad Violated Article 5 by Failing to Provide Mr. Caesar with
 Adequate Medical Treatment for His Ailments, Independent of
 Those Resulting from His Flogging.....17**

**3. Trinidad Violated Article 5 by Prolonging the Duration of Mr.
 Caesar’s Pre-Flogging Confinement and Repeatedly Leading Him
 to Believe That He Would Imminently Suffer Corporal
 Punishment.....21**

**4. Trinidad Violated Article 5 by Repeatedly Exposing Mr. Caesar to
 the Anguish of the Flogging He Was Sentenced to Suffer.26**

**5. Trinidad Violated Article 5 by Subjecting Mr. Caesar to a Flogging
 by The Cat-O-Nine Tails.28**

**6. Trinidad Violated Article 5 by Humiliating Mr. Caesar During the
 Administration of the Flogging.....31**

**7. Trinidad Violated Article 5 by Failing to Provide Mr. Caesar with
 Adequate Medical Treatment for Injuries Sustained During his
 Flogging.....33**

IV.	TRINIDAD’S FLOGGING OF MR. CAESAR WITH THE CAT-O-NINE TAILS CONSTITUTES TORTURE AND THEREFORE QUALIFIES FOR EXTRAORDINARY CONDEMNATION UNDER INTERNATIONAL LAW.....	36
A.	Trinidad’s Flogging of Mr. Caesar with the Cat-O-Nine Tails Constitutes Torture.....	36
1.	Torture is Differentiated under International Law from Other Forms of Cruel, Inhuman, or Degrading Treatment.	36
2.	Trinidad’s Flogging of Mr. Caesar, Standing Alone, Meets the Test for Torture Under International Law.	38
a.	Flogging with the Cat-O-Nine Tails is a Particularly Severe form of Cruel and Degrading Punishment as it is Designed to Inflict Maximum Physical Pain and Dehumanize the Victim.	38
b.	Trinidad’s Practice of Flogging with the Cat-O-Nine Tails is Deliberate.	40
3.	Trinidad’s Flogging Of Mr. Caesar, Exacerbated By Other Abuses, Constitutes Torture.....	40
B.	It is Important That This Court Expressly Hold that the Flogging of Mr. Caesar by Means of the Cat-O-Nine Tails Constituted Torture.	43
1.	Classifying Mr. Caesar’s Flogging as Torture Would Make His Treatment a <i>Jus Cogens</i> Violation.....	43
2.	Under the Torture Convention, the Classification of Mr. Caesar’s Flogging as Torture Has Other Significant Legal Ramifications.	45
V.	CONCLUSION.....	47

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BRIEF OF
HLS ADVOCATES FOR HUMAN RIGHTS
AND THE
GLOBAL JUSTICE CENTER
AS AMICI CURIAE
IN SUPPORT OF THE APPLICATION OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS¹

I. BACKGROUND

A. Statement of Identity and Interest

Harvard Law Student Advocates for Human Rights (“HLS Advocates”) is an officially registered student-run group at Harvard Law School, operating with the support of the Harvard Law School Human Rights Program. HLS Advocates promotes human rights and the rule of law in partnership with non-governmental organizations throughout the world. The views expressed in this submission do not necessarily reflect the views of Harvard Law School or Harvard University.

The Global Justice Center is a non-profit, international human rights organization dedicated to the promotion of social justice and human rights in Brazil and throughout the Americas through rigorous documentation and distribution of reports on rights abuses, as well as through the use of international mechanisms for the protection of human rights. The Global Justice Center is the petitioner of record in some twenty matters before the inter-American

¹ No counsel for any party had any role in authoring this brief, and no one other than the *amici curiae* provided any monetary contribution to its preparation or submission. Both HLS Advocates and The Global Justice Center received assistance in the preparation of this brief from the international law firm of Latham & Watkins LLP.

system for the protection of human rights, and has filed more than 100 denunciations with United Nations special mechanisms. The Global Justice Center supports increased use of international mechanisms through intensive courses, on-site training and joint actions at the international level with local NGOs.

Due to the significance of the issues raised in *Winston Caesar v. The Republic of Trinidad and Tobago* (12.147) for people throughout the Americas, HLS Advocates and the Global Justice Center submit this brief in support of the Application of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights (the “Commission Application”) filed by the Inter-American Commission on Human Rights (the “Commission”) on February 26, 2003.

B. Summary of Argument

This brief *amici curiae* addresses and expands upon certain issues set forth in the Commission Application. Specifically, after discussing certain jurisdictional issues, this brief examines the numerous abuses suffered by Mr. Caesar and identifies seven distinct violations by Trinidad and Tobago (“Trinidad” or the “State”) of Article 5 of the American Convention on Human Rights (the “American Convention”).² This brief further contends that Mr. Caesar’s flogging with a cat-o-nine tails, either standing alone or combined with the other abuses suffered, constitutes “torture” under the American Convention and under international law more generally.

Part II of this brief analyzes the issue of jurisdiction and demonstrates that the Inter-American Court of Human Rights (“this Court” or the “Inter-American Court”) has jurisdiction to hear the present case pursuant to Articles 62(3) and 78(2) of the American Convention. Neither the attempts by Trinidad to limit mandatory jurisdiction through its instrument of

² American Convention on Human Rights, *opened for signature* Nov. 22, 1969 (entered into force July 18, 1978).

acceptance in 1991, nor its denunciation of the American Convention in 1998, impedes the Court's jurisdiction over this case.

Part III explores the abuses suffered by Mr. Caesar and demonstrates that at least seven instances of abuse by Trinidad constitute individual and discrete occurrences of "cruel, inhuman, or degrading punishment or treatment" in violation of Article 5 of the American Convention, and that cumulatively, these abuses unquestionably constitute a violation of Article 5. The abuses by Trinidad include the following: (1) subjecting Mr. Caesar to degrading and inhumane detention conditions; (2) failing to provide Mr. Caesar with adequate medical treatment for his ailments, independent of those resulting from his flogging; (3) prolonging the duration of Mr. Caesar's confinement pending his flogging and repeatedly leading him to believe that his flogging was imminent; (4) deliberately exposing Mr. Caesar, prior to his own flogging, to the anguish of those persons who had recently been flogged; (5) subjecting Mr. Caesar to flogging with the cat-o-nine tails; (6) humiliating Mr. Caesar during the administration of his flogging; and (7) failing to provide Mr. Caesar with adequate medical treatment for injuries sustained through the flogging. By addressing each of these abuses separately and finding that each violates Article 5 of the American Convention, this Court can provide clear guidelines governing proper and improper treatment of prisoners, for the benefit of states parties to the American Convention as well as individuals living in those states.

Part IV demonstrates that Trinidad's flogging of Mr. Caesar with a cat-o-nine tails constitutes "torture" under international law, either as a single occurrence or combined with the other abuses suffered by Mr. Caesar.

The Commission Application asserts additional arguments and presents claims for remedy and restitution. This brief joins in those positions, but does duplicate such efforts.

C. Summary of Relevant Facts³

On November 11, 1983 authorities in Trinidad arrested Mr. Caesar and charged him with rape. On February 21, 1986, judicial officials committed him to stand trial but the trial was deferred. Several months later Mr. Caesar went to the Hall of Justice to inquire about his case. He was first told by authorities that his case had not been called, but later informed that a warrant had been issued for his arrest. Unsure of his status, Mr. Caesar continued living normally at the same address. Authorities again arrested Mr. Caesar on September 10, 1991, for failure to appear in court; they incarcerated him at Golden Grove Prison pending his trial.

At his trial on January 10, 1992, Mr. Caesar was convicted of attempted rape and sentenced to 20 years in prison with hard labor, as well as 15 lashes of the cat-o-nine tails under Trinidad's Corporal Punishment (Offenders Over Sixteen) Act of 1953. Mr. Caesar filed an application for leave to appeal this ruling on November 26, 1993, and on February 28, 1996, the Court of Appeal of Trinidad and Tobago refused this application without explanation.

Between September 10, 1991 and February 28, 1996, Mr. Caesar was incarcerated at Golden Grove Prison and subjected to substandard conditions. Prison officials placed him in a hot and crowded cell with four to five men; he slept on the floor on a thin mat, had no toilet facilities and had to use a common "slop pail." Shortly after the Court of Appeal refused his application, Mr. Caesar was transferred to the Port of Spain Prison and spent 1-2 months in that prison's infirmary because he was bleeding heavily and in severe pain as he had developed chronic hemorrhoids. In June 1996, Mr. Caesar was sent to Carrera Convict Prison, where he remained until November 1999. Authorities at Carrera imposed similar hardships upon Mr.

³ This section summarizes the facts pertinent to the arguments set forth in this brief, using information provided in the Commission Application at pages 10 to 17 and in the affidavit of Winston Caesar which accompanies the Application as Annex 4. A more complete statement of the facts in this case is set forth in the Commission Application, and in the affidavit of Mr. Caesar.

Caesar to those he had endured at Golden Grove Prison, forcing him to share a small, hot, and unventilated cell with four men, sleep on a piece of old carpet, and use a common slop pail. Mr. Caesar's health deteriorated significantly during the course of his incarceration. He contracted tuberculosis, and developed hemorrhoids that caused him to bleed so severely that he refrained from using the slop pail for fear of losing consciousness. Although prison officials were aware of his condition, they did not provide him with timely medical attention. In 1992, a doctor told Mr. Caesar that his hemorrhoids required surgery, but the procedure was postponed for almost six years, until January 1998.

In addition to these substandard prison conditions, prison officials subjected Mr. Caesar to severe psychological abuse. On four separate occasions during a period of more than one year prior to his flogging, authorities placed Mr. Caesar in a special cell designated for inmates that were awaiting their punishments. After being taken one-by-one to endure corporal punishment, the inmates were returned to the cell severely injured. As such, Mr. Caesar was forced to witness firsthand the adverse effects the flogging had on the inmates, who often suffered bleeding from their wounds and cried openly. As the only inmate not to be subjected to the punishment, Mr. Caesar would then be returned to his cell without explanation.

On February 5, 1998, almost two years after the confirmation of his sentence and just a few weeks after his hemorrhoids operation, Mr. Caesar received his sentence of 15 lashes of the cat-o-nine tails. This prolonged delay violated Trinidadian law, which specifies that corporal punishment sentences must be carried out within six months of the date of the sentence.⁴ On the day of his flogging, prison officials took Mr. Caesar to the room where he was to be beaten, and

⁴ Corporal Punishment (Offenders Over Sixteen) Act of 1953 of Trinidad and Tobago, Chapter 13:04 Laws of Trinidad and Tobago, art. 6 states, "A sentence of flogging shall be carried out as soon as may be practicable and shall in no case be carried out after the expiration of six months from the passing of the sentence."

told him to take off his clothes. The prison doctor then examined him and told the other officials that Mr. Caesar could be flogged, ignoring Mr. Caesar's attempts to remind the doctor that he had just had surgery. Mr. Caesar was made to lie spread-eagled on a metal contraption known to prisoners as the "Merry Sandy." Prison officials then bound his hands and feet to the contraption and covered his head with a sheet, before whipping him with 15 strokes of the cat-o-nine tails.

The cat-o-nine tails is an instrument consisting of a plaited rope made up of nine knotted thongs of cotton cord approximately 30 inches long. It is designed to bruise and lacerate the skin of the person being whipped, and to cause intense pain. Mr. Caesar's flogging took place in the presence of at least seven men: the prison doctor, the Chief Infirmary Officer at the Port of Spain Prison, a Prison Supervisor, two other men who Mr. Caesar believed to be from the Ministry of National Security, and two prison officers. Mr. Caesar lost consciousness during the course of the flogging, and afterwards required hospitalization for two months. In the infirmary he received painkillers, but no other medication, for the injuries he sustained, and he continues to suffer pain in his shoulders as a result of the flogging. Following his hospitalization he returned to prison, where he remained at least until the taking of his affidavit on October 23, 2002.

II. PRELIMINARY OBJECTIONS

A. This Court Properly Has Jurisdiction Over this Case.

This Court has jurisdiction over the case at bar. Trinidad ratified the American Convention on Human Rights (the “American Convention”) on May 28, 1991, and recognized the compulsory jurisdiction of the Court on the same day. Mr. Caesar was first imprisoned after this date.

B. Trinidad’s Denunciation of the American Convention Does Not Preclude Jurisdiction.

Trinidad’s denunciation of the American Convention effective May 26, 1999, does not preclude this Court’s jurisdiction over this case because all of the violations at issue occurred before the effective date of Trinidad’s denunciation.

In the *Hilaire* case, this Court rejected Trinidad’s preliminary objection to the jurisdiction of the Court, holding:

The facts, to which the instant case refers, occurred prior to the effective date of the State’s denunciation. Consequently, the Court has jurisdiction, under the terms of Articles 78(2) and 62(3) of the Convention, to entertain the present case and render a judgment.⁵

Similarly, the facts giving rise to Mr. Caesar’s petition pre-date the entry into force of Trinidad’s denunciation on May 26, 1999.⁶ Mr. Caesar was convicted on January 10, 1992, and his conviction and sentence were affirmed on February 28, 1996. All four incidences of Mr. Caesar’s forced witness of the impact of flogging and the unjustified, malicious stay of his own corporal punishment (in violation of domestic law) occurred prior to February 5, 1998. He was flogged on February 5, 1998, and he received inadequate medical treatment while hospitalized

⁵ The *Hilaire* Case, Inter-Am. Ct. H.R. (Ser. C) No. 80 at para. 28 (2001) (Preliminary Objections).

⁶ On May 26, 1998, Trinidad notified the Secretary General of the Organization of American States of its denunciation of the American Convention. According to the terms of Article 78 of the Convention, a denunciation by a state party shall have effect one year after the date of notification of the denunciation. See Commission Application at p. 7.

during the two months thereafter. The improper conditions of confinement and the failure to provide proper medical attention all date back to the commencement of the criminal proceedings against Mr. Caesar on January 10, 1992. In sum, all of the abuses addressed in this brief occurred prior to May 26, 1999, the date on which Trinidad's denunciation of the American Convention entered into force.

C. Trinidad's Attempt to Impose Limits on its Instrument of Acceptance Does Not Preclude Jurisdiction.

Trinidad's instrument of acceptance attempted to limit the compulsory jurisdiction of this Court by including an addendum stating that Trinidad only recognized jurisdiction "consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that Judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen."⁷ However, this limitation has been deemed ineffective. The Inter-American Court is empowered by Articles 78(2)⁸ and 62(3)⁹ of the American Convention to exercise compulsory jurisdiction over States Parties with respect to any act that may constitute a violation of the obligations specified therein, when the act occurred prior to the effective date of denunciation. In the *Hilaire* case, this Court made clear that Trinidad cannot limit this Court's jurisdiction by way of limitations that are "incompatible with the object and purpose of the Convention."¹⁰ The Court refused to subordinate the provisions of the Convention to restrictions

⁷ *Hilaire*, Inter-Am. Ct. H.R. (Ser. C) No. 80 at para. 44.

⁸ American Convention on Human Rights, *supra* note 2, art. 62(3): "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction."

⁹ American Convention on Human Rights, *supra*, art. 78(2): "Such denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this 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."

¹⁰ *The Hilaire, Constantine and Benjamin et al.* Case, Inter-Am Ct. H.R. (Ser. C) No. 94 at para. 15 (2002) (Judgment), reaffirming its prior rulings in *Hilaire*, Inter-Am Ct. H.R. (Ser. C) No. 80 at para. 98; The

that would render inoperative the Court’s jurisdictional role, and consequently, the human rights protection system established in the Convention.¹¹ To hold that the State’s Constitution as the Court’s first point of reference, and the American Convention only as a subsidiary parameter, “would cause a fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention.”¹² The same reasoning applies to Mr. Caesar’s case, and this Court is therefore competent according to the terms of Articles 62(3) and 78(2) of the American Convention to hear the present case and to render its judgment.

Benjamin et al. Case, Inter-Am Ct. H.R. (Ser. C) No. 81 at para. 89 (2001) (Preliminary Objections); and *The Constantine et al.* Case, Inter-Am Ct. H.R. (Ser. C) No. 82 at para. 89 (2001) (Preliminary Objections).

¹¹ *Hilaire, Constantine and Benjamin et al.*, Inter-Am. Ct. H.R. (Ser. C) No. 94 at para.19.

¹² *Hilaire*, Inter-Am. Ct. H.R. (Ser. C) No. 80 at para. 93.

III. TRINIDAD SUBJECTED MR. CAESAR TO AT LEAST SEVEN SEPARATE FORMS OF ABUSE, EACH OF WHICH CONSTITUTES AN INDEPENDENT, DISCRETE VIOLATION OF ARTICLE 5 OF THE AMERICAN CONVENTION.

A. For the Benefit of Both States and Prisoners, this Court Should Specifically Identify Each of the Abuses Suffered by Mr. Caesar that Violates Article 5 of the American Convention.

Due to the wide range of abuses committed against Mr. Caesar by Trinidad, the present case affords this Court an opportunity to substantially clarify the scope of Article 5 of the American Convention, ruling on whether certain discrete actions by a state party to the American Convention constitute cruel, inhuman, or degrading punishment. In so doing, the Court can both clarify states' obligations under the Convention and grant prisoners in the Americas (as well as their advocates) a better understanding of detainees' rights under the Convention. Hereafter, for example, both State authorities and prisoners would know whether it is permissible for detained persons to be subjected to, *inter alia*, substandard physical conditions, inadequate medical care, severe psychological suffering, or corporal punishment. Addressing the abuses suffered by Mr. Caesar at this level of detail would mark a significant advance in international jurisprudence regarding the treatment of prisoners, and would lend a valuable degree of transparency to the notion of "humane treatment" guaranteed to detained persons under Article 5 of the American Convention. For these reasons, *amici curiae* strongly urge this Court to individually address the many abuses suffered by Mr. Caesar as potential violations of Article 5, rather than folding these abuses into a totality-of-the-circumstances standard.

B. At Least Seven Separate Forms of Abuse Endured by Mr. Caesar Violated His Right to Humane Treatment Under Article 5 of the American Convention.

As demonstrated by the facts set forth in the Commission Application and its accompanying Affidavit of Winston Caesar, Trinidad is responsible for a series of abuses against Mr. Caesar while he was in detention. In the *Neira Alegria et al.* case, this Court found that:

[E]very person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane treatment. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners.¹³

Considering the treatment Mr. Caesar endured while in detention, it is clear that Trinidad has flagrantly violated its duty to guarantee his rights under Article 5 of the American Convention.

Article 5, the “Right to Humane Treatment” provides, in pertinent part, as follows:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
- ...
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.¹⁴

There can be little argument that the abuses suffered by Mr. Caesar, taken together, constitute cruel, inhuman, or degrading punishment in violation of Article 5 of the American Convention.¹⁵

We further contend, however, that under international law and this Court’s jurisprudence, each of the seven autonomous instances of abuse suffered by Mr. Caesar constitutes an independent, cognizable violation of his right to humane treatment.

¹³ The *Neira Alegría et al.* Case, Inter-Am. Ct. H.R. (Ser. C) No. 13 at para. 60 (1991) (Preliminary Objections).

¹⁴ American Convention on Human Rights, *supra* note 2, art. 5.

¹⁵ *Id.*

1. Trinidad Violated Mr. Caesar’s Article 5 Rights by Subjecting Him to Physical Conditions of Detention that were Degrading and Inhuman.

The physical prison conditions to which Trinidadian authorities subjected Mr. Caesar constitute a violation of the right to humane treatment under Article 5 of the American Convention. In assessing the severity of prison conditions, this Court, the European Court of Human Rights (“ECHR” or “the European Court”), and the Human Rights Committee (the body charged with interpreting and applying the International Covenant on Civil and Political Rights, the “ICCPR Committee”) have considered the cumulative effects of treatment and facilities, paying particular attention to overcrowding, lack of bedding and unsanitary hygienic facilities. Based on such criteria, both this Court and the ICCPR Committee have condemned Trinidad for its consistently poor treatment of prisoners. The physical conditions under which Mr. Caesar was detained are remarkably similar to those for which Trinidad has previously been called to account, and these circumstances of incarceration clearly violated Mr. Caesar’s rights under Article 5 of the American Convention.

This Court recently concluded, on the basis of the evidence offered in the *Hilaire, Constantine and Benjamin et al.* case, that overcrowded, unsanitary conditions and other deficiencies are typical of Trinidad’s prison system.¹⁶ This Court found that such conditions “compel the victims to live under circumstances that impinge on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment”¹⁷ in violation of Article 5. The victims in the *Hilaire, Constantine and Benjamin et al.* case were subjected to grossly overpopulated and unsanitary conditions for sustained periods of time, ranging from four

¹⁶ *Hilaire, Constantine and Benjamin et al.*, Inter-Am Ct. H.R. (Ser. C) No. 94, at para. 84(l)- 84(n).

¹⁷ *Id.* at para. 169.

years to nearly twelve years.¹⁸ Cells measuring 90 square feet held up to 14 prisoners who were sometimes forced to sleep sitting or standing up.¹⁹ The cells were hot and unventilated, and lacked adequate toilets, requiring everyone in the cell to use a single bucket, or “slop pail,” that was emptied only twice a day.²⁰

Similarly, Mr. Caesar for nearly eight years slept on a carpet or thin mat, in a hot, unventilated, and overcrowded cell, and shared a slop pail with several other inmates. Though his cell was not as overcrowded as the almost unimaginable conditions described in the *Hilaire, Constantine and Benjamin et al.* case, Trinidadian authorities nonetheless subjected Mr. Caesar to detention conditions that qualify as inhuman and degrading under the standard articulated in that case. Namely, he was compelled him to live under circumstances that impinged on his physical and psychological integrity and therefore constituted cruel, inhuman and degrading treatment²¹ in violation of Article 5.

This Court’s condemnation of degrading detention facilities in the *Hilaire, Constantine and Benjamin et al.* case is only its most recent statement concerning deficient detention conditions. This Court previously found violations of the right to humane treatment in the *Suárez Rosero* Case, where a detainee was held in a 15-square-meter cell shared with 16 others, obliged to sleep on newspaper, and lacked necessary hygiene facilities. The Court concluded that, “For all those reasons, the treatment to which Mr. Suárez Rosero was subjected may be described as cruel, inhuman and degrading” in violation of Article 5(2).²²

¹⁸ *Id.* at para. 84(1).

¹⁹ *See id.* at para. 77(c).

²⁰ *Id.*

²¹ *See id.* at para. 169.

²² The *Suárez Rosero* Case, Inter-Am Ct. H.R. (Ser. C) No. 35 at para. 91 (1997) (Judgment).

Like Mr. Suárez Rosero, Mr. Caesar was subjected to overpopulated, unsanitary facilities and lacked bedding or a mattress. He slept on a mat on the floor or on a thin carpet in two different prisons over a period of nearly eight years. Prison officials deprived him of even rudimentary toilet facilities, forcing him to endure unhygienic conditions that created significant risks of the spread of disease as well as the constant stench of human feces, thus further contributing to the violation of his right to humane treatment. Like the conditions to which Mr. Suárez Rosero was subjected, Mr. Caesar's detention conditions may accurately be described as cruel, inhuman and degrading in violation of Article 5.

The European Court has found that “[w]hen assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant.”²³ In *Dougoz v. Greece* the ECHR found that “[t]he serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3.”²⁴ The conditions of detention to which Trinidad subjected Mr. Caesar are quite similar to those at the Alexandras police headquarters where the applicant in *Dougoz* was confined from April 1998 to December 1998, except that Mr. Caesar endured such conditions for a much longer period, spending almost eight years without bedding in overpopulated cells at Golden Grove Prison and Carrera Convict Prison. Under the European Court's standards, Mr. Caesar's conditions of confinement clearly qualify as degrading treatment.

The ICCPR Committee has classified such prison conditions as inhuman in several individual communications concerning Trinidad, concluding that the conditions of confinement

²³ *Dougoz v. Greece*, Eur. Ct. H.R., App. No. 00040907/98 at para. 46 (2001) (Judgment) (Merits and Just Satisfaction).

²⁴ *Id.* at para. 48.

in various sites of detention and imprisonment in Trinidad violate Articles 10 and 7 of the International Covenant on Civil and Political Rights (“ICCPR”),²⁵ to which Trinidad acceded on December 21, 1978. For instance, in *Neptune v. Trinidad and Tobago*, the Committee noted that:

[T]he author’s claims that he is sharing a 9 by 6 feet cell with six to nine fellow prisoners, that there are only three beds in the cell, that there is not enough natural light, that he was aired only half an hour once every two/three weeks and that the food is inedible...are not compatible with the requirements of article 10, paragraph 1, of the Covenant, which stipulates that prisoners and detainees shall be treated with humanity and with respect for the inherent dignity of the human person.²⁶

In *Xavier Evans v. Trinidad and Tobago*, Trinidad detained an inmate for five years in “a cell measuring 6 by 9 feet, with no sanitation except for a slop pail, no natural light, being allowed out of his cell only once or twice a week during which he was restrained in handcuffs, and with wholly inadequate food.”²⁷ The ICCPR Committee concluded that that these conditions of detention, taken together, amount to a violation of Article 10, paragraph 1 of the ICCPR, which holds: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”²⁸ The conditions described in *Neptune* and *Xavier Evans* mirror those inflicted upon Mr. Caesar.

²⁵ International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, arts. 7 and 10 (entered into force Mar. 23, 1976). Article 7 states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” Article 10(1) states, “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Trinidad acceded to the First Optional Protocol of the ICCPR (accepting the ICCPR Committee’s competence to receive individual communications from persons subject to Trinidadian jurisdiction) on November 14, 1980. Trinidad denounced the First Optional Protocol on June 27, 2000.

²⁶ *Neptune v. Trinidad and Tobago*, Communication No. 523/1992, U.N. Doc. CCPR/C/57/D/523/1992 at para. 9.1 (1996).

²⁷ *Xavier Evans v. Trinidad and Tobago*, Communication No. 908/2000, U.N. Doc. CCPR/C/77/D/908/2000 at para. 6.4 (2003).

²⁸ International Covenant on Civil and Political Rights, *supra* note 23, art. 10.

The United Nations has promulgated Standard Minimum Rules for the Treatment of Prisoners²⁹ (“U.N. Standard Minimum Rules”) that establish the most fundamental responsibilities of States with regard to those who are detained. This Court has looked to these rules for guidance in assessing the appropriateness of prisoner treatment. In the *Urso Branco Prison* case, for example, this Court deemed it “pertinent and necessary...for conditions at that penitentiary to be in accordance with applicable international standards for protection of human rights.”³⁰ In *Urso Branco* this Court looked to the U.N. Standard Minimum Rules as the “applicable international standards” on a variety of issues related to prison conditions, including its ruling that, “Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments [are] completely prohibited as punishments for disciplinary offences.”³¹

The conditions imposed upon Mr. Caesar by Trinidad plainly violate Rules 10, 12 and 19 of the U.N. Standard Minimum Rules. Rule 10 requires that “all accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health.”³² Rule 10 further establishes that cells shall have “minimum floor space, lighting, heating and ventilation.”³³ Trinidad violated this Rule by subjecting Mr. Caesar to severely overcrowded, unventilated, and hot cells with poor hygienic conditions highlighted by the use of a common slop pail in lieu of a toilet. Moreover, Rule 19 states that, “Every prisoner shall, in

²⁹ United Nations, Office of the High Commissioner for Human Rights, *Standard Minimum Rules for the Treatment of Prisoners*, adopted at the First United Nations Congress on Prevention of Crime and Treatment of Prisoners, held in Geneva in 1955, and adopted by the Economic and Social Council through its resolutions 663C (XXIV) of July 31, 1957, and 2076 (LXII) of May 13, 1977.

³⁰ See, e.g., *The Urso Branco Prison Case*, Inter-Am Ct. H.R. (Ser. E) at fn. 5-8 (August 29, 2002) (Provisional Measures).

³¹ *Id.* at para. 10, quoting *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 29, rule number 31.

³² *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 29, rule 10.

³³ *Id.*

accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.”³⁴ The State also violated this condition by depriving Mr. Caesar of a mattress or bedding. Finally, Rule 12 requires that sanitary installations “be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.”³⁵ The State clearly violated this standard by forcing Mr. Caesar to share an unhygienic slop pail with several other prisoners.

Trinidad has a well-documented history of subjecting its prisoners to poor, often unconscionable prison conditions. The physical detention conditions to which Trinidad subjected Mr. Caesar were no exception to this pattern, and they fall far short of the standards of humane treatment articulated by this Court, the European Court, and the ICCPR Committee, as well as the standards for prisoner treatment established in the U.N. Standard Minimum Rules. The conditions under which the State detained Mr. Caesar failed to ensure respect for his human dignity, and violated his right not to be subjected to cruel, inhuman or degrading treatment under Article 5 of the American Convention.

2. Trinidad Violated Article 5 by Failing to Provide Mr. Caesar with Adequate Medical Treatment for His Ailments, Independent of Those Resulting from His Flogging.

The responsibility of the State for ensuring humane conditions in detention facilities within its jurisdiction has been clearly recognized by this Court, the ECHR, and the ICCPR Committee. Though this Court has not previously been asked to rule on whether failure to provide medical care to prisoners can constitute a violation of Article 5, it follows logically from

³⁴ *Id.*, rule 19

³⁵ *Id.*, rule 12. *See also* rule 15: Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.”

the principle articulated in *Neira Alegría*³⁶ (and from other international jurisprudence) that while Mr. Caesar was in the State's custody it was Trinidad's responsibility to provide him with adequate medical treatment. Trinidad failed to meet this obligation. While incarcerated, Mr. Caesar suffered serious health problems such as tuberculosis and chronic hemorrhoids. His hemorrhoid-related bleeding was so severe that he feared fainting from loss of blood if he used the slop fail, and in 1996 his condition became so critical that he was placed in the infirmary for over a month. Though a doctor recommended surgery in 1992, Mr. Caesar did not receive adequate treatment for his ailments and had to wait six years before finally undergoing surgery on his hemorrhoids in January, 1998. Trinidad's failure to provide timely and effective treatment violated its obligation to ensure humane conditions in its detention facilities, and therefore violated Mr. Caesar's rights under Article 5 of the American Convention.

The European Court of Human Rights has expressly recognized the responsibility of States to provide adequate medical treatment to those in detention. In *McGlinchey and Others v. United Kingdom*, the ECHR held that in order to comply with Article 3 of the European Convention on Human Rights ("European Convention"),³⁷ "a State must ensure that a person is detained in conditions which are compatible with respect for her human dignity...and that, given the practical demands of imprisonment, her health and well-being are adequately secured by, among other things, providing her with the requisite medical assistance."³⁸ In *McGlinchey*, the ECHR found that the United Kingdom contravened the Article 3 prohibition against inhuman and degrading treatment with respect to the victim, by failing to respond adequately to her

³⁶ See *Neira Alegría et al.*, Inter-Am. Ct. H.R. (Ser. C) No. 13 at para. 60.

³⁷ The European Convention on Human Rights, *opened for signature* November 4, 1950, art. 3 states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

³⁸ *McGlinchey and others v. The United Kingdom*, Eur. Ct. H.R., App. No. 00050390/99 at para. 46 (2003) (Judgment) (Merits and Just Satisfaction).

dehydration and severe weight loss; these conditions eventually resulted in the victim's death.³⁹ In the case of *Tas v. Turkey*⁴⁰, the ECHR likewise considered an allegation that a State had breached Article 3 by failing to provide adequate medical treatment to a person in detention. In *Tas*, however, the ECHR ruled that because the victim had received "prompt and effective medical treatment" an Article 3 violation had not occurred.⁴¹ These two cases demonstrate that the ECHR has articulated a clear standard under which a State's failure to provide prompt and effective medical treatment to a detained person constitutes inhuman and degrading treatment. The treatment Mr. Caesar received in the present case was plainly not prompt and effective—Trinidad authorities failed to provide medically necessary surgery for a period of six years, and Mr. Caesar continues to suffer from hemorrhoid-related bleeding. We urge this Court to adopt a standard similar to the ECHR's and, in doing so, to find Trinidad in violation of Mr. Caesar's rights under Article 5 of the American Convention.

In *Linton v. Jamaica*,⁴² the ICCPR Committee found that the failure of a State to provide sufficient medical treatment to prisoners constitutes cruel and inhuman treatment in violation of Article 7 of the ICCPR.⁴³ In *Linton*, the victim had been shot in the hip during an attempt to escape from prison and, as a result of the inadequate medical treatment he received for his injuries, was left handicapped.⁴⁴ The Committee found that "the denial of adequate medical care

³⁹ See *id.* at paras. 57-58.

⁴⁰ *Tas v. Turkey*, Eur. Ct. H.R., App. No. 00024396/94 (2000), (Judgment) (Merits and Just Satisfaction).

⁴¹ *Id.* at para. 76.

⁴² *Linton v. Jamaica*, Communication No. 523/1992, U.N. Doc. CCPR/C/46/D/255/1987, at para. 2.7 (1992).

⁴³ Article 7 of the ICCPR, *supra* note 23, holds: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

⁴⁴ See *Linton v. Jamaica*, Communication No. 523/1992, U.N. Doc. CCPR/C/46/D/255/1987, at para. 2.7 (1992).

after the injuries sustained in the aborted escape attempt of January 1988 constitutes cruel and inhuman treatment within the meaning of article 7.”⁴⁵

In the present case, Trinidad’s failure to provide Mr. Caesar with adequate and timely treatment for his chronic hemorrhoid condition likewise constituted cruel and inhuman punishment. Like the victim in *Linton*, Mr. Caesar endured and continues to endure physical suffering (including heavy bleeding) as a result of the State’s failure to provide him with timely medical care. Moreover, in Mr. Caesar’s case the actions of the State were even more egregious, because his medical ailments were not sustained during an attempt to escape from detention but were rather an ordinary instance of bad health, no doubt exacerbated by unhygienic prison conditions such as the shared slop pail. Whereas the ICCPR Committee went so far as to rule that States must provide adequate medical care to a prisoner even when he is arguably at fault for his own injuries, this Court is simply asked to find that Trinidad was required to treat the medical problems that Mr. Caesar developed as a matter of chance, or as a result of his poor detention conditions.

Trinidad’s failure to provide medical treatment to Mr. Caesar also contradicted the UN General Assembly’s Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the UN’s Standard Minimum Rules for the Treatment of Prisoners. Under Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the State is responsible for ensuring that “medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided

⁴⁵ *Id.* at para. 8.5.

free of charge.”⁴⁶ Furthermore, the UN’s Standard Minimum Rules for the Treatment of Prisoners include a number of relevant provisions:

- Rule 22.2: Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.⁴⁷
- Rule 24: The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures.⁴⁸
- Rule 25.1: [T]he medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.”⁴⁹

The grossly inadequate medical care afforded Mr. Caesar in the present case meets none of these international standards. Presuming this Court does not intend to set a standard for proper treatment of detainees under Article 5 that is lower than the UN’s Standard Minimum Rules, it should find Trinidad’s failure to provide timely and effective medical treatment a violation of Article 5 of the American Convention.

3. Trinidad Violated Article 5 by Prolonging the Duration of Mr. Caesar’s Pre-Flogging Confinement and Repeatedly Leading Him to Believe That He Would Imminently Suffer Corporal Punishment.

The psychological abuse to which Mr. Caesar was subjected during his pre-flogging confinement constitutes inhuman treatment in violation of Article 5 of the American Convention.

⁴⁶ UN General Assembly, 43rd Session, “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment”, Principle 24, adopted by General Assembly resolution 43/173 of 9 December 1988, *available at* http://www.unhcr.ch/html/menu3/b/h_comp36.htm.

⁴⁷ Standard Minimum Rules for the Treatment of Prisoners, *supra* note 29, Rule 22.2

⁴⁸ *Id.*, Rule 24.

⁴⁹ *Id.*, Rule 25.1.

International tribunals have concluded that the mere threat of cruel or inhuman treatment can itself constitute such treatment. Furthermore, in the case of people scheduled to be executed, tribunals have ruled that a prolonged delay in carrying out the punishment can qualify as cruel, degrading, and inhuman treatment. In the present case, Mr. Caesar was subjected to both a prolonged delay in the execution of his corporal punishment and repeated threats that his corporal punishment would imminently be carried out. Trinidad's Court of Appeals confirmed Mr. Caesar's sentence more than two years after the application for leave to appeal was filed, and the flogging occurred a further two years later, in clear violation of Trinidad law.⁵⁰ This illegal period of extended waiting was made more painful by the fact that on four separate occasions prior to his flogging, during a period of over a year, prison officials took Mr. Caesar to the prison location where corporal punishment was administered without telling him whether he was going to receive his punishment. They never informed him of when his own sentence would be applied, and on each of these occasions the other prisoners were flogged while Mr. Caesar was not. By imposing this treatment, Trinidad authorities subjected Mr. Caesar to a prolonged period of mental anguish, induced by the looming threat of his impending corporal punishment and exacerbated by instances in which they deliberately led him to believe that his punishment was imminent. In doing this, Trinidad kept Mr. Caesar in a state of acute psychological distress⁵¹ for an extended period of time.

This Court, the European Court, and the ICCPR Committee have all recognized that the mere threat of torture or cruel and inhuman treatment can constitute a violation of a victim's right to humane treatment, rising in some cases to the level of torture. In the *Loayza-Tamayo*

⁵⁰ See Corporal Punishment (Offenders Over Sixteen) Act of 1953 of Trinidad and Tobago, *supra* note 4, art. 6, which states, "A sentence of flogging shall be carried out as soon as may be practicable and shall in no case be carried out after the expiration of six months from the passing of the sentence."

⁵¹ See Affidavit of Winston Caesar, paras. 7.3, 7.4, and Commission Application, at p. 15.

case, this Court found that “intimidation with threats of further violence” against a detained person was a violation of the victim’s right to humane treatment under Article 5.⁵² Furthermore, this Court explicitly recognized in the *Cantoral Benavides* case that the threat of serious physical injury is a form of “psychological torture.”⁵³ In the case of *Campbell v. Cosans*, the European Court similarly ruled that merely threatening someone with conduct that is cruel or inhuman can itself constitute cruel or inhuman treatment provided the threat is real and immediate.⁵⁴ The ICCPR Committee reached a similar conclusion in *Miguel Angel Estrella v. Uruguay*, classifying the threat of serious injury as a form of psychological torture.⁵⁵ This Court cited *Campbell* and *Miguel Angel Estrella* in reaching the “conclusion that a true international system prohibiting all forms of torture has been put in place.”⁵⁶ Under this system, both physical and psychological torture are recognized as violations of victims’ human rights, and the mere threat of cruelty may cause sufficient psychological suffering to qualify as inhuman treatment. The psychological suffering inflicted upon Mr. Caesar in the present case clearly rises to this level. By prolonging the pre-flogging detention of Mr. Caesar and repeatedly leading him to believe that his corporal punishment was imminent, Trinidad deliberately caused him tremendous mental anguish.

The jurisprudence of this Court and the European Court clearly establishes that prolonged detention in anticipation of punishment induces mental anguish that rises to the level of cruel, inhuman, and degrading treatment. In the *Hilaire, Constantine and Benjamin et al.* case, this Court found that Trinidad had subjected prisoners to cruel, inhuman and degrading treatment by

⁵² The *Loayza-Tamayo* Case, Inter-Am. Ct. H.R. (Ser. C) No. 33 at para. 58 (1997).

⁵³ See The *Cantoral Benavides* Case, Inter-Am. Ct. H.R. (Ser. C) No. 69 at para. 102 (2000).

⁵⁴ *Campbell v. Cosans*, Eur. Ct. H.R., App. No. 00007511/76 (1982), (Judgment) (Merits).

⁵⁵ *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2, at paras. 8.3 and 10 (1990).

⁵⁶ See *Cantoral Benavides*, Inter-Am. Ct. H.R. (Ser. C) No. 69 at para. 103, citing *Campbell*, *supra* note 54, and *Miguel Angel Estrella v. Uruguay*, *supra* note 55.

forcing them to anticipate punishment over a considerable period of time.⁵⁷ The victims in *Hilaire, Constantine and Benjamin et al.* were detained by the Trinidadian authorities for periods lasting between four years and eleven years and nine months, from the time of their arrest to the resolution of their final appeals.⁵⁸ After the victims were sentenced to death, officials detained them in cells that were very close to the execution chamber, the door of which was adorned by drawings of a figure with a rope around its neck and a message that read, “You have come here to be executed.”⁵⁹ Officials further taunted the prisoners with questions about their favorite meals as part of their last wishes during periodic checks of the prisoners’ weight.⁶⁰ This Court found that this pre-punishment procedure “both terrorizes and depresses the prisoners—others cannot sleep due to nightmares, much less eat.”⁶¹ The constant threat that they may be hanged at any moment “impinge[d] on their physical and psychological integrity and therefore constitute[d] cruel, inhuman and degrading treatment.”⁶² The severe mental anguish to which Mr. Caesar was subjected during his prolonged, illegal pre-flogging confinement similarly amounted to cruel, inhuman and degrading treatment. For two years he lived with the constant threat that he could at any time be subjected to the extreme physical suffering associated with flogging by cat-o-nine tails, a threat made all the more agonizing and real by the State’s unexplained stationing of him in the pre-corporal punishment prison cells on four separate occasions.

⁵⁷ *Hilaire, Constantine and Benjamin et al.*, Inter-Am Ct. H.R. (Ser. C) No. 94, at paras. 168-69.

⁵⁸ *Id.* at para. 84(l).

⁵⁹ *Id.* at para. 77(c).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at para. 169.

Like this Court, the ECHR has also concluded that forcing prisoners to endure prolonged periods of detention awaiting punishment, particularly in the case of executions, causes them to suffer severe mental anxiety in violation of their right to humane treatment. For instance, in *Tyrer v. United Kingdom*, the ECHR concluded that an interval of several weeks between the applicant's conviction and the execution of the punishment subjected the defendant to the severe mental anguish of anticipating the violence he was to have inflicted on him.⁶³ In *Soering v. United Kingdom*,⁶⁴ the European Court concluded that condemned prisoners in the United States are subject to tension-ridden waiting periods that extend for many years prior to execution as a consequence of complex judicial proceedings. The *Soering* Court clarified that "account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the person's mental anguish of anticipating the violence he is to have inflicted on him."⁶⁵ It is the element of *staying* the punishment, and the mental and psychological anguish the stay entails, that was the decisive factor in *Soering*. This Court should, in the present case, likewise focus on the stay of Mr. Caesar's punishment and on the intense psychological distress he suffered as a result of the length and circumstances of this stay.

Though Mr. Caesar suffered corporal, rather than capital, punishment in the present case, the length of his pre-flogging detention and the State's deliberate threats of imminent physical suffering justify extending the above precedents to the treatment inflicted upon him. Indeed, the focus of these legal precedents is on the extent of the psychological suffering that the State inflicts upon the victim; though the type of punishment that the victim is scheduled to endure is relevant, it is by no means the only consideration. In the present case, there can be little doubt

⁶³ *Tyrer v. United Kingdom*, Eur. Ct. H.R., App. No. 00005856/72 at para. 33 (1978), (Judgment) (Merits).

⁶⁴ *Soering v. United Kingdom*, Eur. Ct. H.R., App. No. 00014038/88 (1989), (Judgment) (Merits and Just Satisfaction).

⁶⁵ *Id.* at para. 100.

that Trinidad's actions caused Mr. Caesar excessive mental anguish rising to the level of inhuman treatment. Counting only the time after his last appeal was turned down, Trinidad detained Mr. Caesar for a period of two years while he awaited corporal punishment. During this time, he was on four occasions deliberately subjected to the imminent threat of flogging, an experience which he described in his affidavit as follows, "It was mental torture waiting for my turn and I was shaking...I was subjected to the same thing on 3 further occasions... I suffered mental and emotional torture. I was very frightened every time."⁶⁶ Trinidad not only violated its own corporal punishment legislation by waiting two years (rather than the maximum six months) to flog Mr. Caesar, but State authorities made the delay an especially painful psychological experience. Examined in light of the aforementioned international standards, the circumstances of the stay of Mr. Caesar's punishment clearly give rise to the conclusion that Trinidad violated Article 5 of the American Convention by prolonging the duration of his confinement pending the flogging and repeatedly subjecting him to the real and imminent threat that his corporal punishment was about to take place.

4. Trinidad Violated Article 5 by Repeatedly Exposing Mr. Caesar to the Anguish of the Flogging He Was Sentenced to Suffer.

Exposing Mr. Caesar to the suffering and anguish resulting from flogging by the cat-o-nine tails prior to his own punishment constitutes another independent violation of the right to humane treatment under Article 5, separate from, but related to, the violation related to delay and threats of punishment discussed above. Trinidad severely aggravated the psychological challenges of imprisonment for Mr. Caesar by forcibly exposing him to the suffering of fellow inmates as they were subjected to corporal punishment. On four different occasions he witnessed the consequences of their flogging. He could see their wounds bleeding and hear some of them

⁶⁶ See Affidavit of Winston Caesar, paras. 7.3, 7.4.

crying in pain as he awaited his own flogging. By deliberately placing Mr. Caesar in these situations, the State is responsible for violating his right to humane treatment under Article 5 of the American Convention.

This Court has explicitly recognized psychological torture as a violation of Article 5.⁶⁷ In the *Cantoral Benavides* case, the Court found that a victim of physical torture had also suffered psychological torture, in part because the victim was forced to listen his brother's cries as his brother was beaten by police.⁶⁸ Likewise, the ECHR in the case of *Akkoc v. Turkey* found that a victim's being "forced to listen to the sounds of other persons being ill-treated" contributed to her torture in violation of Article 3 of the European Convention.⁶⁹ In the present case, the deliberate psychological trauma caused Mr. Caesar when Trinidad repeatedly exposed him to the physical anguish of other inmates who were flogged likewise constitutes a violation of Article 5.

The ICCPR Committee has recognized that deliberately exposing detained persons to the anguish of their impending punishments qualifies as cruel and inhuman treatment within the meaning of Article 7 of the ICCPR. In the case of *Linton v. Jamaica*, an inmate who had been sentenced to death was transferred to a death cell and thereafter teased by prison warders who described in detail every stage of his impending execution.⁷⁰ In the view of the ICCPR Committee, the psychological trauma inflicted upon the victim when he was subjected to detailed accounts of his oncoming punishment constituted cruel and inhuman treatment.⁷¹ In the present case, Trinidad prison officials exposed Mr. Caesar not just to descriptions of the flogging he was

⁶⁷ *Cantoral Benavides*, Inter-Am. Ct. H.R. (Ser. C) No. 69, at para. 104.

⁶⁸ *Id.* at paras. 63(f) and 104.

⁶⁹ *Akkoc v. Turkey*, Eur. Ct. H.R., App. Nos. 00022947/93 ; 00022948/93 at paras. 25, 117 (2000) (Judgment) (Merits and Just Satisfaction).

⁷⁰ *Linton v. Jamaica*, Communication No.255/1987, U.N. Doc. CCPR/C/46/D/255/1987, at para. 2.6 (1992).

⁷¹ *Id.* at para. 8.5.

scheduled to endure, but also to the physical scars and suffering of fellow prisoners who had just been lashed. By repeatedly exposing Mr. Caesar to the anguish he would suffer as a result of the flogging, the State deliberately caused him tremendous psychological suffering and violated his rights under Article 5 of the American Convention.

5. Trinidad Violated Article 5 by Subjecting Mr. Caesar to a Flogging by The Cat-O-Nine Tails.

To date, this Court has not considered whether judicially sanctioned corporal punishment, standing alone, is a violation of the American Convention. Other international adjudicative bodies, and many national governments, condemn corporal punishment as a *per se* violation of the right to humane treatment under international law, incompatible with basic human rights standards such as those enshrined in the American Convention. Mr. Caesar's case provides this Court an opportunity to condemn corporal punishment as an independent violation of Article 5.

The European Court and the ICCPR Committee have explicitly classified judicial corporal punishment as a human rights violation. In *Tyrer v. United Kingdom*, the ECHR condemned the practice as constituting “institutionalized violence...permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State” in violation of the European Convention.⁷² Similarly, the ICCPR Committee recently considered corporal punishment in Trinidad and found that it constitutes cruel, inhuman and degrading punishment. In *Boodlal Sooklal v. Trinidad and Tobago*, where the claimant was sentenced to 12 strokes of the birch in connection with a conviction of sexual intercourse and serious indecency with minors, the ICCPR Committee strongly condemned corporal punishment: “[I]rrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman or degrading

⁷² *Tyrer v. United Kingdom*, Eur. Ct. H.R., App. no. 5856/72 at para. 33.

treatment or punishment contrary to article 7” of the ICCPR. The Committee found that “by imposing a sentence of whipping with the birch, the State party has violated the author’s rights under article 7.”⁷³ The ruling affirmed the ICCPR Committee’s view in General Comment 20, that the prohibition on torture and cruel, inhuman, or degrading treatment or punishment contained in Article 7 of the ICCPR “must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.”⁷⁴

The U.N. Special Rapporteur on Torture has also condemned the use of judicial corporal punishment in various countries and has sought the dismissal of sentences involving corporal punishment.⁷⁵ U.N. Special Rapporteur Nigel Rodley has taken the view that:

[C]orporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, *inter alia*, in the Universal Declaration of Human Rights, the ICCPR, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.”⁷⁶

In his 1997 report to the U.N. Human Rights Commission, Mr. Rodley emphasized that he could not accept:

the notion that the administration of such punishments as stoning to death, flogging and amputation—acts which would be unquestionably unlawful in, say, the context of custodial interrogation—can be deemed lawful simply because the

⁷³ *Boodlal Sooklal v. Trinidad and Tobago*, Communication No.928/2000, U.N. Doc. CCPR/C/73/D/928/2000 at para. 4.6 (2000).

⁷⁴ United Nations Human Rights Committee, General Comment 20, Article 7 (44th sess., 1992), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UPDATE: U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 5.

⁷⁵ “Questions of the Human Right of all Persons subjected to any form of detention or imprisonment, in particular: torture and other Cruel, Inhuman or Degrading Treatment or Punishment”, Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights res. 1995/37 B, 10 January 1997, E/CN.4/1997/7.

⁷⁶ *Id.* at part I.A.

punishment has been authorized in a procedurally legitimate manner, *i.e.* through the sanction of legislation, administrative rules or judicial order.... Punishment is, after all, one of the prohibited purposes of torture. Moreover, regardless of which ‘lawful sanctions’ might be excluded from the definition of torture, the prohibition of cruel, inhuman or degrading punishment remains.”⁷⁷

In addition to the broad international support for classifying corporal punishment as cruel and inhuman, there is also a wide and growing consensus among state governments that corporal punishment should be abolished. Since 1997, judicial corporal punishment has been abolished or declared unconstitutional in several countries, including Jamaica, St. Vincent and the Grenadines, South Africa and Zambia. In 1997, South Africa abolished corporal punishment as part of its penal system. Its legislature passed the Abolition of Corporal Punishment Act, repealing the statutory provisions that permitted judicial and other forms of corporal punishment.⁷⁸ Section 1 of the Abolition of Corporal Punishment Act provides that “[a]ny law which authorises corporal punishment by a court of law, including a court of traditional leaders, is hereby repealed to the extent that it authorises such punishment.”⁷⁹ Similarly, Zambia’s legislature enacted an amendment to its Penal Code in 2003. The stated aim of this law was to abolish corporal punishment as an available form of punishment.⁸⁰ In a 1997 ruling, a Jamaican appellate court declared that the law allowing punishments of flogging had lapsed after World War II, and corporal punishment is no longer practiced in that country.⁸¹ The exclusion of

⁷⁷ *Id.*

⁷⁸ Amnesty International 1998 Annual Report on South Africa, *available at* <http://www.amnesty.org/ailib/aireport/ar98/afr53.htm>.

⁷⁹ “Abolition of Corporal Punishment Act,” Act. 33, Reprinted in Government Gazette, Vol. 387, No. 18256, Republic of South Africa, 5 Sept. 1997, *available at* <http://www.gov.za/acts/1997/a33-97.pdf>.

⁸⁰ Penal Code (Amendment) Act, 2003, *available at* <http://www.hurid.org.zm>

⁸¹ Amnesty International 1999 Annual Report on Jamaica, *available at* <http://www.amnesty.org/ailib/aireport/ar99/amr38.htm>.

corporal punishment from different countries' penal systems demonstrates the growing consensus in the international community that corporal punishment is contrary to human dignity. Indeed, a recent study by Amnesty International found that only 31 of the world's 192 countries still provide for judicial corporal punishment by national law; judicially-sanctioned punishments have been carried out in a mere 14 of these countries since 1997.⁸²

The condemnation of corporal punishment, at both international and national levels, is approaching universal. Mr. Caesar's case gives this Court an opportunity to add its voice to the growing international consensus by expressly concluding that flogging by cat-o-nine tails specifically, and judicial corporal punishment more generally, constitute *per se* violations of the right to be free of cruel and inhuman treatment under Article 5 of the American Convention.

6. Trinidad Violated Article 5 by Humiliating Mr. Caesar During the Administration of the Flogging.

The circumstances under which Trinidad administered Mr. Caesar's corporal punishment constitute degrading punishment in violation of Article 5 of the American Convention. Considering facts less severe than those in the present case, international tribunals have held that debasing prisoners through degrading punishment contravenes the standards that preserve their personal dignity and integrity. This Court has yet to address this matter directly in its jurisprudence, and the present case affords the Court an ideal opportunity to condemn as a violation of Article 5 punishments that deliberately aim to humiliate and debase prisoners.

In *Tyrer*, the European Court analyzed whether the circumstances surrounding punishment with three strokes of the birch were "degrading."⁸³ The victim in *Tyrer* was whipped at a police station. Police officers forced the applicant to take down his trousers and underpants

⁸² Amnesty International, "Combating Torture: A Manual for Action" (2000), Section 6.4, *available at* http://www.amnesty.org/resources/pdf/combating_torture/sections/section6-4.pdf.

⁸³ *Tyrer v. United Kingdom*, Eur. Ct. H.R., App. no. 5856/72 at para. 29

and bend over a table.⁸⁴ Two policemen held him while a third flogged him in the presence of the applicant's father and a doctor.⁸⁵ The Court found that "the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of 'degrading punishment.'" ⁸⁶ It reasoned that for a punishment to be "degrading," the humiliation or debasement involved must attain a particular level and the assessment is relative since "it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution."⁸⁷ The ECHR concluded that, "[A]lthough the applicant did not suffer any severe or long-lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity."⁸⁸ In the case of *Polay Campos v. Peru*, the ICCPR Committee likewise focused on the victim's human dignity, specifically addressing the way in which the public nature of a punishment can degrade and debase the person being punished. In *Polay Campos*, the ICCPR Committee concluded that displaying a prisoner to the press in a cage constituted degrading treatment in violation of Article 7 of the ICCPR.⁸⁹

Here, the Trinidad authorities deliberately administered Mr. Caesar's punishment under circumstances that were even more degrading than those in *Tyrer* and *Polay Campos*. They forced Mr. Caesar to strip and lie naked on a metal contraption, after which prison officers tied his hands and feet tightly and covered his head with a sheet. Unclothed and disoriented, he was

⁸⁴ *Id.* at para. 10.

⁸⁵ *Id.*

⁸⁶ *Id.* at para. 35.

⁸⁷ *Id.* at para. 30

⁸⁸ *Id.* at para. 33

⁸⁹ *Polay Campos v. Peru*, Communication No.577/1994, U.N. Doc. CCPR/C/61/D/557/1994 at para. 8.5 (1998).

then flogged with the cat-o-nine tails. Like the victim in *Tyrer*, Mr. Caesar was treated as “an object in the power of the authorities,” and suffered corporal punishment under humiliating circumstances that amounted to degrading punishment. Moreover, like the treatment inflicted upon the victim in *Polay Campos*, Trinidad further debased Mr. Caesar showcasing his punishment before a number of people. Trinidad flogged him in the presence of the prison doctor, two prison officers, the Chief Infirmary Officer, the Prison Supervisor and two other strangers—most of whom played no role in actually administering the corporal punishment. Trinidad thus debased Mr. Caesar in two ways during the course of his flogging: by treating him as an object, solely at the mercy and whim of State power; and by converting his humiliation and objectification into a public spectacle. These circumstances showed a callous disregard for Mr. Caesar’s human dignity and were sufficiently degrading to constitute an independent violation of Trinidad’s obligations under Article 5 of the American Convention.

7. Trinidad Violated Article 5 by Failing to Provide Mr. Caesar with Adequate Medical Treatment for Injuries Sustained During his Flogging.

As Mr. Caesar’s sole source of medical treatment while in prison, the State had an obligation to provide him with medical attention for the injuries that resulted from his flogging. Though his pain was temporarily dulled by the provision of painkillers, the State provided no further medical assistance to Mr. Caesar. Trinidad provided no treatment for his wounds, leaving them slow to heal and susceptible to infection, and to this day Mr. Caesar feels pain in his shoulders as a result of the flogging. Beyond placing him in the infirmary, the State had no regard for Mr. Caesar’s severely weakened state, brought on by the combined effects of his hemorrhoid surgery and his flogging. In failing to provide Mr. Caesar with adequate medical treatment for injuries sustained during the flogging, the State violated his right to humane treatment under Article 5 of the American Convention.

In the case of *Ilhan v. Turkey*,⁹⁰ the European Court found that inadequate medical treatment following physical abuse of a detainee amounted to torture in violation of Article 3 of the European Convention. In that case, agents of the State kicked and beat the detained victim, and struck him with a rifle.⁹¹ They then waited 36 hours before providing him medical treatment, leading the Court to find that, “[h]aving regard to the severity of the ill-treatment suffered by Abdüllatif Ilhan and the surrounding circumstances, including the significant lapse in time before he received proper medical attention, the Court finds that he was a victim of very serious and cruel suffering that may be characterised as torture” in violation of Article 3’s prohibition of torture and inhuman or degrading treatment or punishment.⁹² In the present case, as in *Ilhan*, Mr. Caesar received inadequate medical care in response to injuries inflicted by agents of the State. After flogging him to a state of unconsciousness, Trinidad provided only painkillers as treatment for injuries so serious that they required Mr. Caesar to remain in the infirmary for a period of two months following his punishment.

The ICCPR Committee has found that depriving detainees of medical attention for injuries inflicted by agents of the State amounts to cruel and inhuman treatment. In *Essono Mika Miha v. Equatorial Guinea*,⁹³ the ICCPR Committee considered the case of a former civil servant who had been imprisoned, tortured, deprived of food and water, and denied medical attention for well over one month.⁹⁴ The Committee stated that the victim “was subjected to torture at the prison of Bata, in violation of article 7,” and that, “the denial of medical attention

⁹⁰ *Ilhan v. Turkey*, Eur. Ct. H.R., App. no. 22277/93 (2000) (Merits and Just Satisfaction).

⁹¹ *Id.* at para. 86.

⁹² *Id.* at 87.

⁹³ *Essono Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, U.N. Doc. CCPR/C/51/D/414/1990 (1994).

⁹⁴ *Id.* at paras. 2.4-2.5.

after the ill-treatment in the, or outside the, prison of Bata, amounts to cruel and inhuman treatment within the meaning of article 7.”⁹⁵ In a similar fashion, Trinidad violated Article 5 of the American Convention by failing to provide adequate medical treatment to Mr. Caesar for the injuries sustained during his flogging by agents of the State.

Finally, Trinidad’s failure to provide sufficient medical treatment following Mr. Caesar’s flogging contravenes the U.N. Standard Minimum Rules, which state in relevant part, “The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and *the taking of all necessary measures.*”⁹⁶ It further contravenes Principle 24 of the UN General Assembly’s Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provides that “medical care and treatment shall be provided whenever necessary.”⁹⁷ The persuasive nature of these international norms, combined with that of the aforementioned judgments of the ECHR and the ICCPR Committee, provide substantial weight to the notion that states have an obligation to provide adequate medical treatment to a detained person who has been injured by State agents. We urge this Court to explicitly recognize this obligation, and in doing so, to find that Trinidad violated Mr. Caesar’s rights under Article 5 of the American Convention by failing to provide him adequate treatment following his flogging.

⁹⁵ *Id.* at 6.4.

⁹⁶ Standard Minimum Rules for the Treatment of Prisoners, *supra* note 29, Rule 24 (emphasis added).

⁹⁷ UN General Assembly, “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,” *supra* note 46, Principle 24.

IV. TRINIDAD’S FLOGGING OF MR. CAESAR WITH THE CAT-O-NINE TAILS CONSTITUTES TORTURE AND THEREFORE QUALIFIES FOR EXTRAORDINARY CONDEMNATION UNDER INTERNATIONAL LAW.

Part III(B)(5) of this brief asserted that the flogging of Mr. Caesar constitutes an independent violation of Article 5 on the basis that the flogging violated Mr. Caesar’s right to humane treatment. This section argues in Part A that state-sanctioned flogging by means of the cat-o-nine tails, standing alone, in fact constitutes “torture,” the most severe form of violation governed by Article 5 of the American Convention. Alternatively, flogging exacerbated by certain other inflicted abuses present in this case constitutes torture. Part B of this section argues that, in either case, the classification of Mr. Caesar’s treatment as torture is important because of the distinctions under international law between torture and other forms of cruel, inhuman or degrading treatment.

A. Trinidad’s Flogging of Mr. Caesar with the Cat-O-Nine Tails Constitutes Torture.

1. Torture is Differentiated under International Law from Other Forms of Cruel, Inhuman, or Degrading Treatment.

The UN Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (“Torture Convention”) defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as...punishing him for an act he or a third person has committed.”⁹⁸ The essence of torture, as distinct from other forms of cruel, inhuman and degrading treatment, is (1) the *severity* of the ill-treatment, measured by the ‘intensity test’; and (2) the notion that a special stigma

⁹⁸ United Nations, Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, art. 1(1) (entered into force June 26, 1987). Trinidad has not signed the Torture Convention.

should attach to deliberate inhuman treatment.⁹⁹ In *Ireland v. United Kingdom*, the ECHR concluded that “it was the intention that the [European] Convention, with its distinction between ‘torture’ and ‘inhuman or degrading treatment,’ should by the first of these attach a special stigma to *deliberate* inhuman treatment *causing very serious and cruel suffering.*”¹⁰⁰ Torture is thus distinguished from other forms of cruel, degrading and inhuman treatment as a matter of degree and kind; it is both intentional and more severe.

In the *Loayza Tamayo* case, this Court adopted the “intensity test,” first established in the *Ireland* case, to distinguish between “torture” and “cruel, inhuman and degrading treatment”:

The violation of the right to physical and psychological integrity of persons is a category of violations that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman and degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors.¹⁰¹

The *Loayza Tamayo* case further demonstrates that this Court focuses on both the physical and psychological integrity of the victim in deciding whether a particular instance of cruel and inhuman treatment rises to the level of torture.¹⁰² Simply and unanimously stated by the U.N. General Assembly, such treatment amounts to torture if it is “an aggravated and deliberate form

⁹⁹ See, e.g., *Ireland v. United Kingdom*, Eur. Ct. H.R., App. No. 00005310/71 at para. 167 (1978) (Judgment) (Merits).

¹⁰⁰ *Id.* (emphasis added), citing UN General Assembly Resolution 3452 of 9 December 1975, adopted unanimously. *Ireland* has become the standard and is reiterated in cases of torture and cruel, inhuman, and degrading treatment. See, e.g., *Aktas v. Turkey*, Eur. Ct. H. R. App. No. 24351/94 (2003) at para. 313 (“In determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction... In addition to the severity of the treatment, there is a purposive element, as recognized in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the *intentional* infliction of *severe* pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating”) (emphasis added)).

¹⁰¹ *Loayza Tamayo*, Inter-Am. Ct. H.R. (Ser. C) No. 33 at para. 57, citing *Ireland* at para. 167.

¹⁰² See *id.*

of cruel, inhuman and degrading treatment or punishment.”¹⁰³ Here again, the test for torture is based on two factors: severity and intent.

2. Trinidad’s Flogging of Mr. Caesar, Standing Alone, Meets the Test for Torture Under International Law.

Beyond holding that flogging is a violation of Article 5, this Court should explicitly hold that such flogging amounts to torture under international law. Flogging a prisoner with the cat-o-nine tails is a paradigmatic instance of torture, a repugnant remnant of colonial practices that serves three principal purposes: (1) the pure infliction of physical pain; (2) the degradation and dehumanization of the recipient; and (3) the display of state power to its citizens. Flogging with the cat-o-nine tails is a vicious and deliberate form of punishment that should be labeled “torture” by this Court.

a. Flogging with the Cat-O-Nine Tails is a Particularly Severe form of Cruel and Degrading Punishment as it is Designed to Inflict Maximum Physical Pain and Dehumanize the Victim.

Flogging with the cat-o-nine tails both inflicts severe pain and injury and humiliates and dehumanizes the victim. The principal function of the cat-o-nine tails is to inflict physical pain. In the present case, Mr. Caesar was strapped naked with his legs spread to a metal contraption called the “Merry Sandy.” Once his hands and legs were tightly bound, he was flogged 15 times with the cat-o-nine tails. The cat-o-nine tails—a device consisting of nine knotted cords attached to a handle—is specifically designed to lacerate and bruise the flesh of its victim. Tellingly, Mr. Caesar was flogged in the presence of the prison doctor, Dr. Chen. By providing physician’s oversight of the flogging of prisoners, the prison authorities demonstrated their anticipation that

¹⁰³ U.N. General Assembly, 30th Session, “Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,” adopted by resolution 3452 (XXX) of 9 December 9 1975, art. 1(2).

flogging would inflict a level of pain so severe and threatening to the health of the victim that a physician's presence was necessary.

Beyond the acute physical pain that it inflicts, flogging with the cat-o-nine tails is a dehumanizing and humiliating evocation of slavery in the English-speaking Caribbean. The following passage from "Modernizing Slavery: Investigating the Legal Dimension," recalls that, even at the beginning of the 19th century, flogging and whipping were recognized as a brutal and dehumanizing symbol of the master-slave relationship:

The 1824 Order changed the legal terms for slave labor extraction. It made the use of the whip to coerce labor in the field illegal. The whip—a focus of slave protests and anti-slavery propaganda—symbolized the physical brutality, the barely restricted personal power owners exercised at the workplace, and the archaic nature of the chattel slave system. To limit its use was a first step to introducing modern labor extraction methods and it was recognized as such... The whip embodied the brutality of the system.¹⁰⁴

While some provisions of the Corporal Punishment (Offenders Over Sixteen) Act of 1953 gave Trinidad the right to flog convicts, Trinidad did not exercise this right for decades. The government began practicing corporal punishment in 1993 as part of a trend within English-speaking Caribbean countries—a trend to which human rights groups reacted with vehement opposition.¹⁰⁵ By reinstating not just corporal punishment but the practice of flogging with cat-o-nine tails in particular, Trinidad evoked a singularly dehumanizing remnant of its own past. The State now exercises the same absolute power over the prisoner—and the same disregard for

¹⁰⁴ M. Turner, "Modernizing Slavery: Investigating the Legal Dimension," *New West Indian Guide*, Vol. 73, No.3/4 (1999) (the 1824 Order pertained equally to flogging with the 'cat-o-nine'). See also, S. Emling, "Caribbean Islands Try Flogging To Deter Crime: Rights Groups Object, US Takes No Stand," Cox News Service (17 Feb. 1997), available at <http://www.corpun.com/ttju9702.htm>.

¹⁰⁵ See, e.g., *Trinidad and Tobago: Corporal Punishment*, Amnesty International AI Index: AMR 49/007/2000 (22 June 2000) ("Amnesty International opposes the use of corporal punishment as a violation of the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment guaranteed by Article 5 of the Universal Declaration of Human Rights.")

his humanity—that the master once did over the slave. The resulting assault on the victim’s psychological integrity is perhaps just as vicious as the attack on his physical integrity.

In sum, flogging with the cat-o-nine tails satisfies the first part of the test for torture because it is a particularly severe form of physical and psychological punishment, distinguished from cruel, inhuman and degrading treatment by virtue of its intensity.

b. Trinidad’s Practice of Flogging with the Cat-O-Nine Tails is Deliberate.

There can be no doubt that Mr. Caesar’s flogging was an intentional, premeditated act carried out by agents of the Trinidadian State. Mr. Caesar was sentenced to 15 strokes of the cat-o-nine tails under the Trinidad and Tobago Corporal Punishment (Offenders Over Sixteen) Act of 1953, which provides in its Article 6, “Any male offender, above the age of sixteen years, on being convicted before the High Court of any of the offences mentioned in the Schedule, may be ordered by the Court to be flogged in addition to any other punishment to which he is liable.”¹⁰⁶ On February 5, 1998, prison officials administered Mr. Caesar’s sentence by flogging him 15 times with the cat-o-nine tails. The flogging was a deliberate act, prescribed by the laws of Trinidad and carried out by State agents, and therefore satisfies the second element of the test for torture under international law.

3. Trinidad’s Flogging Of Mr. Caesar, Exacerbated By Other Abuses, Constitutes Torture.

The flogging of Mr. Caesar was exacerbated by other abuses committed by Trinidad. These additional abuses, many of which constitute independent violations of Article 5 of the American Convention as set forth earlier in this brief, include: exposure to the suffering of prisoners subject to flogging; deliberate delay of the flogging; humiliating administration of

¹⁰⁶ Corporal Punishment (Offenders Over Sixteen) Act of 1953 of Trinidad and Tobago, *supra* note 4, art. 6.

flogging; and failure to provide medical treatment. This Court should find that, at the very least, the flogging of Mr. Caesar as aggravated by these circumstances amounts to torture.

In an oft-cited passage, Judge Zekia of the ECHR discussed the elements that the European Court should consider in determining whether the severity of an instance of ill treatment has been aggravated by other factors that might lead the Court to conclude that the treatment is severe enough to satisfy the first part of the test for torture:

Admittedly the word "torture" included in Article 3 of the Convention is not capable of an exact and comprehensive definition. It is undoubtedly an aggravated form of inhuman treatment causing intense physical and/or mental suffering. Although the degree of intensity and the length of such suffering constitute the basic elements of torture, a lot of other relevant factors had to be taken into account. Such as: the nature of ill-treatment inflicted, the means and methods employed, the repetition and duration of such treatment, the age, sex and health condition of the person exposed to it, the likelihood that such treatment might injure the physical, mental and psychological condition of the person exposed and whether the injuries inflicted caused serious consequences for short or long duration are all relevant matters to be considered together and arrive at a conclusion whether torture has been committed.¹⁰⁷

Applying Judge Zekia's formulation to the case before this Court, it is plain that the severity of Mr. Caesar's flogging was aggravated by its surrounding circumstances, resulting in "inhuman treatment causing intense physical and mental suffering." On four separate occasions prior to his own punishment, Mr. Caesar was deliberately exposed to the immediate effects of flogging on others. On each occasion he was led to believe that his own torture was impending, and forced to witness the anguish of other prisoners after they were subjected to the same

¹⁰⁷ *Ireland v. United Kingdom*, Eur. Ct. H.R., App. No. 00005310/71 at para. A of the separate opinion of Judge Zekia. See also *Selmouni v. France*, Eur. Ct. H.R., App. No. 25803/94 at para. 100 (2000) ("[S]everity'...depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.").

torment he was anticipating with dread. In each instance he was returned to his cell with no explanation, only to continue awaiting his own flogging; this practice exacerbated the psychological impact of Mr. Caesar's detention and of the flogging itself. Among the observers of the flogging was the prison doctor, who was fully aware of Mr. Caesar's medical history and his health condition at the time. Mr. Caesar pleaded with him to take his feeble state into account. But the doctor, like the other prison officers present, ignored these pleas and authorized the flogging.¹⁰⁸ After the flogging, the prison authorities neglected to provide Mr. Caesar with any medical treatment except painkillers, thus contributing to the long-term physical and mental suffering of Mr. Caesar.

In light of these reprehensible additional circumstances this Court should find that the flogging of Mr. Caesar, as exacerbated by surrounding abuses, was sufficiently severe to satisfy the first element of the test for torture under international law. As the flogging was also

¹⁰⁸ The presence of a doctor is in and of itself an egregious violation of medical ethics; it also serves as a painful reminder of the practice of state-sponsored torture that prevailed in Latin America in the recent past. Doctors' involvement in torture, of whatever form and degree, is always contrary to medical ethics. In addition, doctors' involvement in torture is contrary to the Inter-American Convention to Prevent and Punish Torture (Organization of American States, 1985); the Universal Declaration of Human Rights (United Nations, 1948); the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (United Nations, 1988); The Declaration of Geneva (World Medical Association, 1948); the International Code of Medical Ethics (World Medical Association, 1949); and the Resolution on Human Rights (World Medical Association, 1990). According to the "UN Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment":

Principle 1: It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment... Principle 4: It is a contravention of medical ethics for health personnel, particularly physicians... b) *To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments.*

See also, Amnesty International, "Doctors and Torture" (2002), available at <http://web.amnesty.org/library/Index/ENGACT750012002?open&of=ENG-313>.

unquestionably intentional, this Court should find that, in light of its aggravating circumstances, the flogging of Mr. Caesar constituted torture.

B. It is Important That This Court Expressly Hold that the Flogging of Mr. Caesar by Means of the Cat-O-Nine Tails Constituted Torture.

Amici curiae urge this Court to find that the practice of flogging constitutes “torture,” not mere “cruel, inhuman, or degrading treatment,” because more severe legal consequences attach to the prohibition of torture.

1. Classifying Mr. Caesar’s Flogging as Torture Would Make His Treatment a *Jus Cogens* Violation.

One important reason to classify Mr. Caesar’s flogging as torture is that his treatment would then constitute a *jus cogens* violation. Article 53 of The Vienna Convention of the Law of Treaties defines *jus cogens* or a peremptory norm in international law as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”¹⁰⁹ The prohibition of torture has achieved the status of *jus cogens* and as such is absolute. The American Convention, like the entire body of the international law of torture, prohibits torture in absolute terms and makes no provisions for exceptions or derogations therefrom. In its judgment in *Prosecutor v. Furundzija*, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) explicitly recognized the prohibition on torture as *jus cogens*:

[T]he prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency ... This is linked to the fact... that the prohibition on torture is a peremptory norm or *jus cogens*...

¹⁰⁹ Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, art. 53 (entered into force Jan. 27, 1980). *See also* *Nicaragua v. United States*, ICJ Reports 1986 at 100 (affirming *jus cogens* as an accepted doctrine of international law); and JHH Weiler, A. Cassese, M. Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (1989) (discussing recent developments in applying *jus cogens* beyond the law of treaties to the law of state responsibility).

The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.¹¹⁰

The ICTY described, in the strongest possible terms, the widespread international condemnation of torture, stating that, “There exists today universal revulsion against torture... This revulsion, as well as the importance States attach to the eradication of torture, has led to a cluster of treaty and customary rules on torture acquiring a particularly high status in the international, normative system.”¹¹¹

Because the prohibition of torture is *jus cogens*, the prohibition against flogging will become absolute in the event that this Court holds that such flogging in fact constitutes torture. The significance of *jus cogens* norms has been summarized as follows:

[T]he implications of *jus cogens* are those of a duty and not of optional rights... [*Jus cogens*] obligations are non-derogable, in times of war as well as peace. Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the nonapplicability of statutes of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* [obligation ‘flowing to all’] not to grant impunity to the violators of such crimes.¹¹²

¹¹⁰ *Prosecutor v. Furundzija*, ICTY, Case No. IT-95-17/I-T, Judgment, at paras 144, 153 (10 December 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>. See also *Prosecutor v. Delalic*, ICTY, *Mucic et. al.*, Case No. IT-96-21-T, Judgment, at para. 454 (16 November 1998); and *Prosecutor v. Kunarac et. al.*, ICTY, Case. No. IT-96-23-T, Judgment, at para. 466 (22 February 2001)(holding that the prohibition of torture constitutes *jus cogens*). See also *Ireland v. United Kingdom*, Eur. Ct. H.R., App. No. 00005310/71 at para. 163; and *Aktas v. Turkey*, Eur. Ct. H.R., App. No. 24351/94 at para. 310 (2003) (holding that the prohibition of torture is absolute and non-derogable).

¹¹¹ *Prosecutor v. Furundzija*, ICTY, Case No. IT-95-17/I-T at para. 147.

¹¹² M. Cherif Bassiouni, *Accountability for International Law Crimes and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 LAW & CONTEMP. PROB. 63, 65-66 (1996).

If this Court classifies flogging as torture, Trinidad and other states that practice such flogging will thus be barred from invoking state privileges and immunities to uphold the practice. These states will be compelled under international law to take effective measures to stamp out the practice and to punish those administering it, and those individuals responsible for flogging will be prosecutable outside the country where the flogging took place. Moreover, Trinidad's denunciation of the American Convention—currently in effect—will in the future be no defense to its continued practice of flogging.

In sum, the prohibition of torture—as *jus cogens*—supercedes state sovereignty as an absolute and non-derogable international norm. For this reason, if the Court finds that flogging with the cat-o-nine tails (either standing alone or in combination with the other abuses suffered) constitutes torture, this finding will override any state attempt to invoke principles of state sovereignty to justify its practice of sentencing convicts to flogging.

2. Under the Torture Convention, the Classification of Mr. Caesar's Flogging as Torture Has Other Significant Legal Ramifications.

Under the terms of the Torture Convention, states parties to that convention make important commitments with regard to the extradition, expulsion, and *nonrefoulement* of persons who may be subjected to torture. Article 3(1) of the Torture Convention states that, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹¹³ This provision is a reflection of the international community's unconditional condemnation of torture, and an expression of its desire to protect all persons who are threatened with the practice. States parties commit themselves not to transfer persons, for any reason, to a country where they

¹¹³ Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 99, art. 3(1).

may be subject to torture. By classifying flogging as torture, this Court would provide legal protection under the Torture Convention to anyone who is scheduled to be returned, expelled, or extradited to a country where he or she faces a sentence of flogging. In the future, persons facing such a sentence could use this Court's ruling that flogging constitutes torture to argue that they should not be returned to a country where the sentence would be carried out.

V. CONCLUSION

This Court has jurisdiction over the case at bar regarding violations of Article 5 of the American Convention. Neither Trinidad's denunciation of the American Convention nor its attempt to impose limits on its instrument of acceptance preclude jurisdiction.

We urge the Court to find that Trinidad committed seven individual and discrete abuses amounting to "cruel, inhuman, or degrading punishment or treatment" in violation of Article 5 of the American Convention, and that cumulatively, these abuses unquestionably constituted a violation of Article 5.

We further urge the Court to find that Trinidad's flogging of Mr. Caesar with a cat-o-nine tails, either standing alone or combined with the other abuses suffered, constituted torture.

Respectfully Submitted,

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WINSTON CAESAR

v.

REPUBLIC OF TRINIDAD AND TOBAGO

Amicus curiae brief concerning the issue whether judicial corporal punishment constitutes
“cruel, inhuman or degrading punishment”

within the meaning of Article 5 of the American Convention on Human Rights

Submitted by

INTERIGHTS

(THE INTERNATIONAL CENTRE FOR THE LEGAL PROTECTION OF HUMAN
RIGHTS)

Introduction

Amicus curiae is the International Centre for the Legal Protection of Human Rights (INTERIGHTS), an international human rights organisation based in the United Kingdom specialising in the application of international law in domestic and international fora. INTERIGHTS is a registered charity, independent of all ideologies and governments, which works to promote the effective use of international human rights standards and procedures. In pursuit of its goals, INTERIGHTS provides advice on the use of international and comparative law, assists individuals and organisations in bringing cases before appropriate bodies, disseminates information on international and comparative human rights law - through its Bulletin, the Commonwealth Human Rights Law Digest, and databases on international and comparative human rights law (www.interights.org) - and undertakes training and educational programmes for lawyers and judges. A critical aspect of INTERIGHTS' activities involves the filing of *amicus curiae* briefs before national and international courts and tribunals. For twenty years INTERIGHTS has been assisting judges, lawyers, NGOs and victims in cases before national, regional and global tribunals raising issues of general importance concerning the interpretation of fundamental rights. This brief is submitted in the belief that this is one such case.

This *amicus curiae* brief is limited to the question whether judicial corporal punishment constitutes cruel, inhuman or degrading punishment or treatment (CIDPT), in accordance with Article 5 of the American Convention on Human Rights (hereinafter “the American Convention” or the “Convention”). It does not, of course, address the particular facts of the case before the Court.¹ Nor does it address the relevant doctrine and jurisprudence from the Inter-American system, addressed in the Application of the Commission. Rather, the purpose of this brief is to draw to the Court's attention the approach of other international human rights bodies, and national courts, in giving effect to virtually identical provisions of international instruments and national laws in relation to cruel, inhuman or degrading treatment or punishment. It provides information, which it is hoped might assist the Court, in relation to the approach reflected across a growing body of international and national jurisprudence on judicially sanctioned corporal punishment as cruel inhuman and degrading punishment.²

¹ So far as relevant, this brief proceeds on the basis of the “Statement of facts” presented by the Inter-American Commission on Human Rights (hereinafter “the Commission”) in its *Application* to the Court in the present case dated 26 February 2003. *Application of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights in the Case of Winston Caesar v. The Republic of Trinidad and Tobago (12.147)*, 26 February 2003, Part V (pp. 10-12).

² Recent *Amicus* briefs include *Holubová and Others v. the Czech Republic* (2004), *M.C. v. Bulgaria* (2003) and *Nikula v Finland* (2001) before the European Court of Human Rights, *Al Odah v. United States* (2002) and *Tachiona et al v. Mugabe et al* (2003) before the United States Court of Appeals and *Lawrence et al v Texas* (2003) before the US Supreme Court. INTERIGHTS has a broad docket of cases before international bodies, typically including the ECHR, Human Rights Committee of the UN and African Commission on Human and Peoples' Rights. Other briefs are available at <http://www.interights.org/pubs/legalbriefsdefault.asp>.

Structure/Overview of the Brief

The present brief is structured in the following manner. **Section A** introduces the prohibition of cruel, inhuman and degrading treatment and punishment in international law, noting that the prohibition on such treatment or punishment is universal in nature. It is also absolute, and cannot be justified by any exceptional circumstances – including the nature of the crime committed or the aim that punishment pursues - nor by reference to the provisions of internal law. **Section B** notes the need to adopt an evolutive and dynamic approach to the prohibition, in line with changing conceptions of humane treatment within society and the international community more broadly. **Section C** sets out the basic elements of what constitutes cruel, inhuman and degrading punishment and distinguishes it from the suffering and humiliation inherent in and incidental to lawful punishment. **Section D**, which is the heart of the brief, focuses on the jurisprudence of international and national bodies in relation specifically to judicial corporal punishment as cruel, inhuman and degrading punishment.

The conclusion of this brief is that under current international law judicial corporal punishment, by its very nature, constitutes inhuman and degrading punishment. It should be noted that this does not, however, preclude the possibility that, in the circumstances of any particular case, judicial corporal punishment may also amount to torture. As, for example, the United Nations Declaration against Torture notes, torture is “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”³ The characterisation of corporal punishment as torture would depend, essentially, on the Court’s assessment of the severity of the treatment or punishment in light of prevalent circumstances, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. While there is international support for the view that corporal punishment may amount to torture,⁴ the focus of this brief is, however, on judicial corporal punishment as cruel, inhuman and degrading punishment.

Section A The Universal and Absolute Nature of the Prohibition of Cruel, Inhuman or Degrading Punishment or Treatment in International Law

Article 5 of the American Convention on Human Rights provides, in relevant part:

“1. Every person has the right to have his physical, mental, and moral integrity respected. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”

“2. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”

³ Article 1(2).

⁴ See e.g. UN Human Rights Commission, Resolution 1997/38, 11 April 1997, UN Doc. E/CN.4/1997/38, para. 9; Resolution 2001/62, 25 April 2001, UN Doc. E/CN.4/2001/62, para. 5. A number of resolutions of the United Nations Commission on Human Rights for example confirm that “corporal punishment can amount to cruel, inhuman and degrading punishment or even to torture.”

Every international human rights instrument of general scope, whether regional or universal, enshrines provisions similar in content to Article 5 of the American Convention. These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the African Charter on Human and Peoples' Rights and the Arab Charter of Human Rights.⁵

These provisions are supplemented by the prohibition on cruel, inhuman or degrading treatment or punishment in specific international instruments, including Article 16 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides:

“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture [...], when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁶

Cruel, inhuman and degrading treatment or punishment is universally prohibited and condemned. There is extremely widespread subscription to the forementioned treaties and instruments. The prohibition is prevalent throughout national legal systems, reflected in constitutional and legislative provisions and the decisions of national courts (referred to further on in this brief).

Together national and international laws evidence “the almost universal condemnation of the practice of inhuman treatment.”⁷ It is today indisputable that the prohibition of cruel, inhuman and

⁵ Article 5 of the Universal Declaration of Human Rights provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Article 7 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”) provides in part: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the European Convention”) provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 5 of the African Charter of Human and Peoples' Rights provides: “Every individual shall have the right to the respect of the dignity inherent in a human being [...]. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

Article 13 of the Arab Charter of Human Rights provides: “The State parties shall protect every person in their territory from physical or psychological torture, or from cruel, inhuman, degrading treatment. (The State parties) shall take effective measures to prevent such acts; performing or participating in them shall be considered a crime punished by law” (unofficial translation from Arabic).

⁶ See also the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975, Article 2 of which provides in part: “Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights. [...]”

See also Article 3: “No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment.”

⁷ *Prosecutor v. Mucic et al.*, Case No. IT-96-21-T, Judgment of 16 November 1998, para. 517.

degrading treatment found in the above-mentioned international instruments and declarations is paralleled by a customary international law norm of the same content and to the same effect. The prohibition on cruel inhuman and degrading punishment almost certainly falls within the group of principles described by the International Court of Justice in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* as being “so fundamental to the respect of the human person and ‘elementary considerations of humanity’ [...]” that they are “to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of customary international law.”⁸

This prohibition on treatment or punishment that is cruel, inhuman or degrading is absolute. There are no exceptions to the prohibition. As recalled below, there can be no justification or excuse for a violation and no prevailing circumstances, whether in the particular case or in the context of the state more generally, and no provisions of national law, can justify deviation from this norm.

As a matter of treaty law, this is reflected first in the fact that the provisions prohibiting cruel, inhuman or degrading treatment or punishment are not subject to the “clawback” clauses which apply to some other rights, permitting limitations on account of considerations such as public order, national security, public morals and health.⁹ The absolute nature of the prohibition is further confirmed by the fact that none of the above-mentioned instruments provides for derogation in relation to the prohibition on the basis of national emergency.¹⁰ Indeed human rights treaties explicitly exclude from the scope of permissible derogation, *inter alia*, the provisions on torture, inhuman or degrading treatment. The United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for its part, makes explicit that:

“Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”¹¹

The absolute nature of the prohibition of cruel, inhuman and degrading punishment, and the implications thereof, has been repeatedly emphasized by human rights monitoring bodies. The

⁸ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996(I), at p. 257, para. 79. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 157 (unreported, available at: <http://www.icj-cij.org>), given the parallel prohibition in international humanitarian law of inhuman treatment.

⁹ Under the American Convention, for instance, rights and freedoms such as the freedom to manifest one’s religion or belief, freedom of expression, right of assembly or freedom of association, freedom of residence and movement may be subjected to those limitations prescribed by law which are necessary in a democratic society to “protect public safety, order, health, or morals, or the rights or freedoms of others” (see Articles 12(3); 13(2); 15; 16(2); 22(3)). Under the ICCPR similar clauses relate to freedom of movement (Article 12), freedom of conscience and religion (Article 18) and freedom of expression (Article 19).

¹⁰ See, e.g., Article 27(2), American Convention on Human Rights; Article 4(2), International Covenant on Civil and Political Rights; Article 15(2), European Convention of Human Rights.

¹¹ Article 3, United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452 (XXX) of 9 December 1975.

Human Rights Committee has expressly noted that the prohibition of torture and cruel, inhuman and degrading treatment under Article 7 of the International Covenant on Civil and Political Rights:

“[...] allows of no limitation. [E]ven in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. [N]o justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.”¹²

Under the European Convention on Human Rights, the European Court of Human Rights has observed that:

“Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15(2), even in the event of a public emergency threatening the life of the nation.”¹³

The absolute nature of the prohibition on inhuman treatment and its applicability in all circumstances, is apparent also from international humanitarian law (IHL) which make clear that torture, corporal punishment and other measures causing physical suffering are prohibited even in times of armed conflict.¹⁴ The specific reference to the prohibition of corporal punishment in conflict is noteworthy.¹⁵

¹² General Comment No. 20, para. 3. See also Article 3 of the UN Declaration: “[...] Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.” See also Committee against Torture, Summary account of the results of the proceedings concerning the inquiry on Egypt, UN Doc. A/51/44, paras. 180 ff., in particular para. 222.

¹³ *Labita v. Italy* (App. No. 26772/95), *Reports 2000-IV*, para. 119 [GC]. See also *Chahal v. United Kingdom* (App. No. 22414/93), Judgment of 15 November 1996, *Reports 1996-V*.

¹⁴ See Common Article 3 to the Geneva Conventions of 1949, laying down minimum standards of treatment in relation to non-combatants in non-international armed conflicts and prohibiting “violence to life and person, in particular [...] cruel treatment and torture” (para. 1(a)) and “outrages upon personal dignity, in particular humiliating and degrading treatment” (Article 3(1)(c)). See also the grave breaches provisions (Articles 50, First Geneva Convention; Article 51, Second Geneva Convention; Article 130, Third Geneva Convention and Article 147, Fourth Geneva Convention) all of which criminalize “torture or inhuman treatment” and “wilfully causing great suffering or serious injury to body or health.”

¹⁵ In particular, corporal punishment is expressly prohibited by Article 32 of the Fourth Geneva Convention in relation to civilians: “The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of

The position is the same as a matter of customary international law, both as a matter of human rights law and as a matter of international humanitarian law. In the words of the European Court of Human Rights,

“[The] absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of [...] democratic societies [...] and is generally recognised as an internationally accepted standard.”¹⁶

Several consequences flow from the absolute nature of the prohibition which may be worth emphasising in the context of the present case.

First, the absolute nature of the prohibition means that cruel, inhuman or degrading treatment or punishment is impermissible no matter what the circumstances of the particular case, including specifically the victim’s behaviour.¹⁷ Even the most aberrant behaviour on the part of individuals cannot justify, or affect the understanding of what constitutes, such treatment or punishment.¹⁸ As the European Court notes:

“[...] Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and [...] its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question [...].”

Second, there can be no justification for inhuman or degrading punishment on the basis of the protection of other human rights, or for reasons of public order or prevention or repression of crime. Specifically, as held by the European Court in *Tyrer* in relation to the judicial corporal punishment of a juvenile by birching, the fact that a particular punishment may be believed to have a deterrent effect is irrelevant. The Court observed

“[...] a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control. Above all, as the Court must emphasise, it is never permissible to have recourse to punishments which are contrary to Article 3, whatever their deterrent effect may be.”¹⁹

brutality whether applied by civilian or military agents.” An express prohibition of corporal punishment is also contained in the fundamental guarantees provisions of both 1977 Additional Protocols to the Geneva Conventions (AP I, Article 75(2)(iii); AP II, Article 4(2)(a)).

¹⁶ *Soering v. United Kingdom* (Appl. No. 14038/88), Judgment of 7 July 1989, *Series A*, No. 161, para. 88. The absolute nature of the prohibition has been recognized by the ECtHR, *inter alia*, in *Ireland v. the United Kingdom* (Appl. No. 5310/71), Judgment of 18 January 1978, *Series A*, No. 25, para. 163.

¹⁷ *Ibid.* See also Human Rights Committee, *Osbourne v. Jamaica* (Communication No. 759/1997), Views of 13 April 2000, CCPR/C/68/D/759/1997 (2000), para. 9.1.

¹⁸ ECtHR in *Chahal v. United Kingdom* (App. No. 22414/93), Judgment of 15 November 1996, *Reports 1996-V* paras. 73-4.

Third, in accordance with general principles of international law, the provisions of domestic law do not affect the characterisation of measures as inhuman or degrading, and cannot justify the imposition of such measures. As discussed in more detail in Section D.3 below, the fact that a certain kind of treatment or punishment is expressly permitted or provided for by domestic legislation is irrelevant so far as that treatment or punishment violates the prohibition under international law of cruel, inhuman or degrading punishment.

Section B Need for Evolutive Interpretation of the Prohibition on CIDPT in Light of International Standards

International and national jurisprudence indicates that an evolutive and dynamic interpretation of the prohibition of cruel, inhuman or degrading punishment is essential to ensure that it continues to serve its essential protective purpose. The need for a dynamic interpretation applies to all rights within human rights law, but its relevance is particularly apparent as regards concepts such as ‘cruel’, ‘inhuman’ or ‘degrading’ which by their nature attempt to reflect contemporary sensibilities of the relevant community. Developments in circumstances and in attitudes, as reflected *inter alia* in shifting practices and penal policy, should be taken into consideration in assessing what constitutes prohibited punishment. As the prohibition is universal in nature (see Section A above), it is particularly important to have regard to evolving circumstances and attitudes not only domestically or regionally but also internationally. Interpreting the American Convention in light of international and comparative standards will, moreover, ensure that it keeps pace with developments within the international community of which the region forms part.

The need for a dynamic interpretative approach has consistently been recognized by this Court.²⁰ A similar approach is taken by the European Court in relation to the European Convention.²¹ In *Tyrer v. United Kingdom* for example, the European Court of Human Rights stated that, in order to assess the compatibility of corporal punishment with the standards of human rights protection set forth by the European Convention of Human Rights, the Court “cannot but be influenced by the developments and commonly accepted standards in the penal policy” of other states.²² The International Court of Justice for its part has observed that "an international instrument must be

¹⁹ *Tyrer v. United Kingdom* (Appl. No. 5856/72), Judgment of 25 February 1978, *Series A*, No. 26, para. 31. See also the Human Rights Committee, in its Concluding observations on Israel, UN Doc. CCPR/C/79/Add 93 (1998), para. 19, condemning guidelines authorising ‘moderate physical pressure’ to obtain information considered crucial to the protection of life.

²⁰ See, e.g., *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89*, 14 July 1989, *Series A*, No. 10, paras 37-38. See also the Concurring Opinion of Judge Cançado Trindade in *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99*, 1 October 1999, *Series A*, No. 16.

²¹ *Inter alia*, *Marckx v. Belgium* (Appl. No. 6833/74), Judgment of 13 June 1979, *Series A*, No. 31; *Airey v. Ireland* (Appl. No. 6289/73), Judgment of 9 October 1979, *Series A*, No. 32; *Dudgeon v. United Kingdom* (Appl. No. 7525/76), Judgment 22 October 1981, *Series A*, No. 45.

²² *Tyrer v. UK*, para. 31, See also *Soering v. United Kingdom* (*supra*, note 16), para. 102; *Loizidou v. Turkey*, 23 March 1995, *Series A*, No. 310, para. 71.

interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation."²³

Domestic courts, called upon to make similar assessments in the light of constitutionally protected fundamental rights, have stressed the importance of adopting a dynamic approach when interpreting constitutional provisions prohibiting cruel, inhuman and degrading treatment or punishment. The Supreme Court of the United States, for example, called upon to determine the content of the prohibition of cruel and unusual punishment contained in the Eighth Amendment of the Constitution of the United States, noted that:

“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. [T]he words of the Amendment are not precise, and [...] their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”²⁴

The Supreme Court of Namibia noted that the question whether a particular form of punishment authorised by the State should be regarded as cruel, inhuman and degrading punishment inevitably involves a value judgement, but that:

"[...] [this] is however a value judgement which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensibilities of the Namibian people [...], and further having regard to the emerging consensus of values in the civilised international community [...]. This is not a static exercise. It is a continually evolving dynamic. What may have been accepted as a just form of punishment some decades ago may appear to be manifestly inhuman and degrading today. Yesterday's orthodoxy might appear to be today's heresy."²⁵

Section C Defining “Cruel, Inhuman or Degrading Punishment or Treatment” (CIDPT)

C.1 The Basic Elements of CIDPT

The work of international bodies provides considerable and growing jurisprudence on the definition of the concept of cruel, inhuman or degrading treatment or punishment. Human rights treaties, as well as ample jurisprudence of human rights bodies (and increasingly domestic and international

²³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, p. 16, at p. 31.

²⁴ *Trop v. Dulles*, 356 US 86, 100-01 (1958), citing *Weems v. United States*, 217 US 349.

²⁵ *Ex parte Attorney General, Namibia: in Re Corporal Punishment by Organs of State*, 1991(3) SA 76 (Namibia Supreme Court), at 86I-87A.

criminal tribunals), illustrate what may constitute torture and/or cruel, inhuman and degrading treatment or punishment.²⁶ The essential characteristics of CIDPT is that it is treatment or punishment causing suffering of a certain severity, which may be physical or mental in nature.²⁷ A distinguishing feature is conduct that “violate[s] the basic principle of humane treatment, particularly the respect for human dignity.”²⁸ There is no requirement that the conduct is carried out pursuant to any particular purpose.²⁹

The European Commission of Human Rights for example noted that a given treatment or punishment is *inhuman* when it “causes severe suffering, mental or physical, which in the particular situation is unjustifiable.”³⁰ As for *degrading* treatment, this has been defined by the European Court as conduct “such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.”³¹ The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia for its part conducted a thorough analysis of international humanitarian law and human rights law standards on the basis of which it defined *inhuman or cruel* treatment, in the *Celebici* case, as:

“[...] an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”³²

²⁶ On jurisprudence, see, e.g., the decisions of the ECtHR in *Aydin v. Turkey* (App. No. 23178/94), Judgment of 25 September 1997, 25 (1998) EHRR 251, paras 73, 80-7; *Aksoy v. Turkey*, paras 39-40, 61-4; *Selmouni v. France* (App. No. 25803/94), Judgment of 28 July 1990, 29 (2000) EHRR 403 and those of the IACtHR in *Castillo Petruzzi and others v. Peru*, Merits, Judgment of 30 May 1999, IACtHR, *Series C*, No. 52, paras. 192-9. See also *Prosecutor v. Kunarac* and IT-96-23/1 ‘Foca’, Trial Judgment, 22 February 2001 and Appeal Judgment, 12 June 2002; and *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (Trial Judgment), 10 December 1998 and Appeal Judgment, 21 July 2000, in front of the International Criminal Tribunal for the Former Yugoslavia.

²⁷ *Loayza Tamayo Case*, IACtHR, Judgment of 17 September 1997. On death penalty absent rigorous standards of justice as cruel or inhuman treatment, see *Öcalan v. Turkey*, ECtHR, Merits (Appl. No. 46221/99), Judgment of 12 March 2003.

²⁸ *Celibici Judgment*, para. 544; *Prosecutor v. Blaskic*, Case No. IT 95-14-T, Judgment, 3 March 2000, paras. 154-5.

²⁹ In this respect it is noted that contained for example in the United Nations Convention against Torture is the requirement that torture be carried out pursuant to one of a number of listed purposes: Cf. Article 1(1). No such requirement appears in respect of cruel inhuman or degrading treatment or punishment.

³⁰ European Commission of Human Rights, *Denmark v. Greece*, Report of 5 November 1969, *Yearbook of the European Convention on Human Rights* XII (1969), p. 186. (See also D.3 below).

³¹ *Ireland v. the United Kingdom* (*supra*, note 16), para. 167.

³² See *Prosecutor v. Delalic et al. (Celebici case)*, Case No. IT-96-21-T, Judgment of 16 November 1998, para. 543 (in relation to inhuman treatment) and para. 552 (in relation to cruel treatment). This definition has been followed and endorsed in, *inter alia*, *Prosecutor v. Jelešic*, Case No. IT-95-10-T, Judgment of 14 December 1999, para. 41; *Prosecutor v. Blaskic*, Case No. IT-45-14-T, Judgment of 3 March 2000, para. 186; and by the Appeals Chamber in the *Celibici* Appeal Judgment, Case IT-96-21-A, Judgment of 20 February 2001, para. 424. In the *Kunarac* case the crime of outrages upon personal dignity was defined by the Tribunal as: “[...] an intentional act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, committed with the knowledge of the fact the act or the omission could have that effect.” (*Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23-T and IT-96-23/1-T, Judgment of 22 February 2001, para 514).

C. 2 Beyond the Suffering and Humiliation Inherent in Lawful Punishment

A certain element of humiliation and suffering is almost inevitably present in the mere fact that an individual is convicted of a criminal offence and subject to punishment. Thus not every form of judicial punishment can automatically be regarded as “cruel, inhuman or degrading.” As noted by the European Court of Human Rights:

“In fact, in most if not all cases this [element of humiliation and suffering] may be one of the effects of judicial punishment, involving as it does unwilling subjection to the demand of the legal system.”³³

In *Tyrer v. United Kingdom*, in its discussion of the notion of "degrading punishment" under Article 3 of the European Convention, the European Court held that, in order for a punishment to be properly characterised as ‘degrading’, “the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation” inherent in the fact that the individual is being subjected to punishment by the State.³⁴ The same line of reasoning applies, *mutatis mutandis*, to the characterization of a given form of punishment as inhuman or cruel.

Moreover, with regard specifically to corporal punishment, it must be recognized that some international instruments dealing specifically with torture and cruel, inhuman or degrading treatment exclude from the ambit of torture proscribed acts resulting in "pain or suffering arising only from, inherent in or incidental to lawful sanctions."³⁵ However, it is well established that references to ‘lawfulness’ in human rights instruments – including the Torture Convention and general human rights treaties - must be understood by reference not only to the strict provisions of national law but also to principles of international law, including relevant human rights instruments.

As noted by the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment of the UN Commission on Human Rights,

"[...] the ‘lawful sanctions’ exclusion must necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community, such as deprivation of liberty through imprisonment, which is common to almost all penal systems. [...] By contrast, the Special Rapporteur cannot accept the notion that the administration of such punishments as stoning to death, flogging and amputation [...] can be deemed lawful simply because the punishment has been authorized in a procedurally legitimate manner, i.e. through the sanction of legislation, administrative rules or judicial order. To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered

³³ *Tyrer v. United Kingdom* (*supra*, note 19), para. 30.

³⁴ *Ibid.* See also *Campbell and Cosans v. United Kingdom*, para. 28.

³⁵ See Article 1, UN Convention Against Torture.

lawful, as long as the punishment had been duly promulgated under the domestic law of a State. Punishment is, after all, one of the prohibited purposes of torture. Moreover, regardless of which ‘lawful sanctions’ might be excluded from the definition of torture, the prohibition of cruel, inhuman or degrading punishment remains. The Special Rapporteur would be unable to identify what that prohibition refers to if not the forms of corporal punishment referred to here. Indeed, cruel, inhuman or degrading punishments are, then, by definition unlawful; so they can hardly qualify as ‘lawful sanctions’ within the meaning of article 1 of the Convention against Torture.¹⁶⁶

The Special Rapporteur thus makes clear that the mere fact that a particular action is taken in accordance with internal law does not make it ‘lawful’ for these purposes. In accordance with general principles of international law (see D.3 below) internal law cannot insulate action covered by it from any challenge as to its compliance with the human rights obligations of the State. Indeed, in particular cases human rights bodies have repeatedly found that the imposition of certain penalties under domestic law has given rise to a violation.³⁷ The key question is whether the punishment is ‘lawful,’ as opposed to cruel, inhuman and degrading, which must be assessed not only by reference to the prescriptions of national law but according to the relevant international standards, as set out below.

³⁶ Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37, 10 January 1997, UN Doc. E/CN.4/1997/7, para. 8. See also e.g. *Kemmache v. France* (no. 3) (Appl. No. 17621/91), Judgment of 24 November 1994, Series A, No. 296-C, para. 37, illustrating the concept of lawfulness in the context of other rights.

³⁷ See e.g. *Soering v. United Kingdom* (*supra*, note 16); and *Öcalan v. Turkey* (*supra*, note 27). On life imprisonment without any possibility of early release raising an issue under Article 3 of the ECHR, see the Court’s final decision as to admissibility in *Einhorn v. France* (App. No. 71555/01), Admissibility decision, 16 October 2001.

C.3 The ‘Circumstances’ - the Punishment or the Case

As consistently noted by human rights monitoring bodies, in general the assessment of whether treatment or punishment is cruel, inhuman or degrading punishment depends on all the circumstances of the case.³⁸ These include, for instance, the sex, age and state of health of the victim.³⁹ The circumstances such as “the *nature* and context of the [...] punishment, the manner and method of its execution, its duration, its physical or mental effects” will also be relevant factors.⁴⁰ In particular, the “nature, purpose and severity” of the punishment have to be considered in order to establish if it is cruel, inhuman or degrading.⁴¹

However, consistent with the foregoing, certain forms of punishment have, due to their inherent characteristics, come to be viewed as *per se* satisfying the threshold of cruel, inhuman or degrading, irrespective of the particular circumstances of the case. As set out below, international and national jurisprudence suggests that judicially sanctioned corporal punishment is one such punishment.

Section D Judicial Corporal Punishment as Cruel, Inhuman or Degrading Punishment

It is submitted that judicial corporal punishment constitutes *per se* a violation of an individual’s right not to be subjected to cruel, inhuman and degrading treatment or punishment, as contained in Article 5 of the Convention and other international instruments. In brief, this reflects the essential nature and purpose of judicial corporal punishment, namely the imposition of severe physical pain and/or mental anguish by the state which, in the words of some of the national judgments considered below, necessarily ‘strip the recipient of all dignity and self-respect’ and invade the ‘inviolable dignity’ of the human person. Concerns as to the inherent arbitrariness and susceptibility to abuse of corporal punishment also characterise the assessment of such punishment as cruel, inhuman and degrading.

As set out below, the analysis that corporal punishment should at this point in time be considered cruel, inhuman and degrading is supported both by international jurisprudence on corporal punishment, and a discernible trend in national jurisprudence holding that corporal punishment amounts to cruel, inhuman and degrading punishment under national constitutional provisions.

³⁸ See Human Rights Committee, *Vuolanne v. Finland*, 96 ILR 649, at 657. See also European Court of Human Rights, *Soering v. United Kingdom* (*supra*, note 16), para. 100; *Ireland v. the United Kingdom* (*supra*, note 16), para. 162; *Tyrer v. United Kingdom* (*supra*, note 19), para. 30.

³⁹ *Soering v. United Kingdom* (*supra*, note 16), para. 100; *Ireland v. the United Kingdom* (*supra*, note 16), para. 162; *Tyrer v. United Kingdom* (*supra*, note 19), paras. 29 and 30.

⁴⁰ *Ibid.*

⁴¹ In its General Comment on Article 7 of the ICCPR, the Human Rights Committee similarly noted that the characterization of a given form of treatment or punishment as cruel, inhuman or degrading depends on the “nature, purpose and severity of the treatment applied” (para. 4).

D.1 International Standards and Jurisprudence on Corporal Punishment

International human rights bodies have consistently found judicial corporal punishment inconsistent with the obligation of States not to subject individuals under their jurisdiction to cruel inhuman or degrading punishment.

The Human Rights Committee, in its General Comment on the scope of the prohibition of cruel, inhuman and degrading treatment or punishment embodied in Article 7 of the ICCPR, has noted that

“the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime [...]”⁴²

In its country reports, the Committee has ‘reaffirm[ed] its position that corporal punishment is incompatible with article 7 of the Covenant.’⁴³ An analysis of the jurisprudence of the Human Rights Committee in individual cases concerning corporal punishment develops this position and lends strong support to the view that judicially sanctioned corporal punishment by its very nature has to be considered inherently cruel inhuman and degrading *in all circumstances*, regardless of the circumstances of the case or the particular characteristics of the person subjected to such punishment. In *Osbourne v. Jamaica*, for example, the Committee found that, by imposing a sentence of whipping with a tamarind switch, the State party had breached its obligations under Article 7 ICCPR. The Committee stated that:

"Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant."⁴⁴

In *Sooklal v. Trinidad and Tobago*, the Committee found similarly that the punishment of birching provided for by the law of Trinidad and Tobago was contrary to the prohibition of cruel, inhuman and degrading punishment.⁴⁵

The position of the Human Rights Committee in this respect is shared by, *inter alia*, the Special Rapporteur on torture and cruel, inhuman and degrading treatment or punishment of the UN Commission on Human Rights, who has consistently expressed the view that:

⁴² Human Rights Committee, *General Comment No. 20 (Article 7)*, 10 April 1992, para. 5. See also e.g. UN Human Rights Commission, Resolution 1997/38, 11 April 1997, UN Doc. E/CN.4/1997/38, para. 9; Resolution 2001/62, 25 April 2001, UN Doc. E/CN.4/2001/62, para. 5.

⁴³ *Concluding Observations of the Human Rights Committee, Zimbabwe*: 06/04/98, para. 21

⁴⁴ Human Rights Committee, *Osbourne v. Jamaica* (Communication No. 759/1997), Views of 13 April 2000, CCPR/C/68/D/759/1997 (2000), para. 9.1. The Committee has reiterated its condemnation of judicial corporal punishment in a number of other cases: see, e.g., *Higginson v. Jamaica* (Communication No. 729/1998), Views of 28 March 2002, CCPR/C/74/D/792/1998, para. 4.6; *Pryce v. Jamaica* (Communication No. 793/1998), Views of 13 May 2004, CCPR/C/80/D/793/1998, para. 6.2.

⁴⁵ *Sooklal v. Trinidad and Tobago* (Communication No. 928/2000), 2 February 2000, CCPR/C/73/D/928/2000, para. 4.6.

"[...] corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, *inter alia*, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."⁴⁶

Similarly, the European Court of Human Rights in the *Tyrer* case, confronted with instances of judicially sanctioned corporal punishment of a comparatively less serious nature than those at issue in the present case, held that:

"The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State [...]. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. [...] The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender."⁴⁷

The mental suffering that any form of judicial corporal punishment causes to the individual subjected to such punishment, both during the execution of the punishment and in the period which almost necessarily elapses between the sentencing of an individual to corporal punishment and the actual execution of the sentence, is an additional element that leads to the characterisation of corporal punishment as cruel, inhuman and degrading treatment.

In this respect the European Court of Human Rights noted, in *Soering v. United Kingdom*, that in order to assess whether a given punishment is inhuman or degrading

"[...] account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the

⁴⁶ Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37, 10 January 1997, UN Doc. E/CN.4/1997/7, para. 11.

⁴⁷ *Tyrer v. United Kingdom* (*supra*, note 19), para. 33.

punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him."⁴⁸

In the *Tyrer* case, the relevant domestic legislation provided, in a fashion similar to that in the present case, that the punishment could not be carried out more than six months after the passing of the sentence. The Court held that:

"Admittedly, the relevant legislation provides that in any event birching shall not take place later than six months after the passing of sentence. However, this does not alter the fact that there had been an interval of several weeks since the applicant's conviction by the juvenile court and a considerable delay in the police station where the punishment was carried out. Accordingly, in addition to the physical pain he experienced, Mr. Tyrer was subjected to the mental anguish of anticipating the violence he was to have inflicted on him."⁴⁹

Accordingly, during the period of time between the passing of sentence and the imposition of the punishment the individual inevitably experiences mental anguish and feelings of fear in anticipation of the punishment which may *per se* render the punishment at issue cruel, inhuman or degrading.

D.2 The Growing Trend towards Recognition of the Impermissible Character of Judicial Corporal Punishment in Domestic Legal Systems

This section illustrates that the approach of international human rights bodies highlighted above - condemning all forms of judicial corporal punishment as cruel, inhuman or degrading punishment - is increasingly reflected on the national plane. Although a number of countries in the world do still adopt more or less serious forms of judicial corporal punishment within their criminal law systems, there are signs of a clear trend towards the recognition of the inherently inhuman and degrading nature of judicial corporal punishment.

The shifting attitude of the international community towards corporal punishment can be discerned from an analysis of both relevant domestic legislation and the jurisprudence of domestic courts. Although the focus of this brief is on comparative standards as reflected in comparative jurisprudence, it is noteworthy that in the last decade a number of states that until that point still retained corporal punishment have abolished it through legislation. Examples of recent legislative change in other Caribbean and Commonwealth countries include: the *Abolition of Corporal Punishment Ordinance* 1998, Anguilla, the *Corporal Punishment (Abolition) Act* 2000, British Virgin Islands, the *Prisons (Amendment) Law* 1998, Cayman Islands, the *Criminal Law (Amendment) Act (Act No 5 of 2003)*, Kenya, the *Punishment of Whipping Act* 1996, Pakistan (but still permitted for Hadood crimes) and the *Abolition of Corporal Punishment Act* 1997, South Africa. In some cases, where legislation has been enacted only relatively recently, this is the

⁴⁸ *Soering v. United Kingdom* (*supra*, note 16), para. 167.

⁴⁹ *Tyrer v. United Kingdom* (*supra*, note 19), para. 33

culmination of a process involving earlier judicial declarations that such punishment was prohibited under domestic laws and constitutions.

A large number of domestic courts have been called upon to assess the compatibility of laws permitting corporal punishment of convicted criminals with domestic and international standards of protection of fundamental rights. As set out below, many have held that the imposition of corporal punishment, regardless of the circumstances of the case and of the modalities through which it is carried out, constitutes cruel, inhuman and degrading punishment treatment, and represents a form of punishment no longer acceptable in a democratic society.

For example, in *Ex parte Attorney General of Namibia, In re Corporal Punishment by Organs of the State*, the Supreme Court of Namibia called upon to determine whether the infliction of a particular form of corporal punishment (*in casu*, caning in State schools) was contrary to the prohibition of torture and cruel, inhuman and degrading treatment or punishment contained in the Namibian Constitution, went further than the narrow question presented to it and found that *all forms* of corporal punishment, including judicially imposed corporal punishment, were unconstitutional.⁵⁰

The Court held that the prohibition of cruel, inhuman or degrading treatment and punishment contained in international instruments and national legislation “[...] articulate a temper throughout the civilized world which has manifested itself consciously since the second world war”⁵¹ and that:

“[...] there is a strong support for the view that the imposition of corporal punishment on adults by organs of the state is indeed degrading or inhuman and inconsistent with the civilized values pertaining to the administration of justice and the punishment of offenders.”⁵²

Accordingly, the Court held that:

“[...] the imposition of any sentence by any judicial or quasi-judicial authority, authorising or directing any corporal punishment upon any person is unlawful and in conflict with [the prohibition of cruel, inhuman and degrading treatment contained in] the Namibian Constitution.”⁵³

The Court based its finding on, *inter alia*, the following considerations:

⁵⁰ *Ex parte Attorney General of Namibia, In re Corporal Punishment by Organs of the State*, 1991 (3) SA 76 (Namibia Supreme Court), at 95F.

⁵¹ *Ibid.*, at 87B.

⁵² *Ibid.*, at 87C.

⁵³ *Ibid.*, at 95F.

"1. Every human being has an inviolable dignity. A physical assault on him sanctified by the power and authority of the state violates that dignity. His status as a human being is invaded. [...]"

"3. The fact that those assaults on decency are systematically planned, prescribed and executed by an organized society makes it inherently objectionable. It reduces organized society to the level of the offender. It demeans the society which permits it as much as the citizen who receives it. [...]"

"5. It is inherently arbitrary and capable of abuse leaving as it does the intensity and the quality of the punishment substantially subject to the temperament, the personality and idiosyncrasies of the particular executioner of the punishment."

"6. It is alien and humiliating when it is inflicted as it usually is by a person who is a relative stranger to the person punished and who has no emotional bonds with him."⁵⁴

Similarly, the Supreme Court of Zimbabwe, in the case of *State v. Ncube* concerning the constitutionality of a sentence of whipping, observed that "[o]n the few occasions when the constitutionality of whipping had been considered by judges in other countries, there appeared to have emerged judicial unanimity that the whipping of adults or juveniles was both cruel and degrading" and found that judicial corporal punishment constituted "a punishment which in its very nature is both inhuman and degrading." The Court expressed its reasoning in the following terms:

"1. [...] It is a punishment, not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilized world, being incompatible with the evolving standards of decency.

2. By its very nature it treats members of the human race as non-humans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord to him human status.

3. No matter the extent of regulatory safeguards, it is a procedure easily subject to abuse in the hands of a sadistic and unscrupulous prison officer who is called upon to administer it.

⁵⁴ *Ibid.*, at *Ex parte Attorney General, Namibia: in Re Corporal Punishment by Organs of State* (*supra*, note 25), at p. 87D-H.

4. It is degrading to both the punished and the punisher alike. It causes the executioner, and through him society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime in particular and the system of justice in general.’⁵⁵

Although it is recognised that the Zimbabwean government responded to this decision by enacting a constitutional amendment (criticised by the Human Rights Committee as a violation of the prohibition), the potency of the judgement as a statement on the inherently inhuman and degrading nature of the punishment, and international standards in respect of the same, remains unaffected.⁵⁶

In *State v. Williams*, a judgment concerning the constitutionality of juvenile whipping, the Constitutional Court of South Africa noted that:

“[...] over the last thirty years at least, South African jurisprudence has been experiencing a growing unanimity in judicial condemnation of corporal punishment for adults. Criticism of the practice has been consistent and unanimous, it being characterized as ‘punishment of a particularly severe kind ... brutal in its nature... a severe assault upon not only the person of the recipient but upon its dignity as a human being.’ [...] If adult whipping were to be abolished, it would simply be an endorsement by our criminal justice system of a world-wide trend to move away from whipping as a punishment.’⁵⁷

In *Kyamanywa v. Uganda*, the Ugandan Constitutional Court held that the provision of the Penal Code Acts which permitted the imposition of a sentence of corporal punishment on convicted individuals was inconsistent with the prohibition of torture, cruel, inhuman or degrading treatment or punishment contained in Article 24 of the Ugandan Constitution. In particular, the Court held that:

“[Article 24] does not make any distinction between the manner of application of any form of treatment or punishment which falls within the prohibited category. Corporal punishment by its very definition, which is inflicting pain by beating a part of the body, falls squarely within the category prohibited by article 24. It is *by its nature* a cruel inhuman and degrading punishment which amounts to a torture.’⁵⁸

⁵⁵ *State v. Ncube*, 1988 (2) SA 702 (Zimbabwe Supreme Court), at 721H-722D. Gubbay JA, delivering the judgment of the Court.

⁵⁶ *Concluding Observations of the Human Rights Committee, Zimbabwe*: 06/04/98, para. 21 : ‘The Committee is concerned about recent amendments of section 15 of the Constitution which *inter alia* authorize corporal punishment. The Committee reaffirms its position that corporal punishment is incompatible with article 7 of the Covenant.’

⁵⁷ *State v. Williams and Others*, 1995 (3) SA 632 (South Africa Constitutional Court), para. 11, citing *State v. Kumalo* 1965 (4) SA 565 at 574F.

⁵⁸ *Simon Kyamanywa v. Uganda*, Constitutional Reference No. 10/2000, 1 December 2001 (Constitutional Court of Uganda), p. 7.

The High Court of Fiji, in *Naushad Ali v. State*, similarly ruled that the provision providing for corporal punishment in the Fiji Criminal Procedure Code was incompatible with the constitutional prohibition of “cruel, inhuman, degrading or disproportionately severe treatment of punishment”, and therefore unlawful.⁵⁹

In *John Banda v. The People*, corporal punishment was also ruled unconstitutional by the High Court of Zambia.⁶⁰ Justice E.E. Chulu stated:

“Article 15 of the Constitution is couched in very clear and unambiguous language, that no person shall be subjected to torture or to inhuman or degrading punishment or other like treatment. On the contrary, it cannot be doubted that the provisions of [...] the Penal Code which permit the infliction or imposition of corporal punishment on offenders are in total contravention, and conflict with the above provisions of article 15 of the Constitution.”

It is noted that in a limited number of cases national courts have indicated that, as a matter of internal law, judicial corporal punishment had to be considered lawful and that the decision as to whether to abolish judicial corporal punishment was a matter for the national legislator. It is however noteworthy that so far as courts have had regard to international law, they have generally acknowledged that judicial corporal punishment is contrary to the prohibition of cruel, inhuman and degrading punishment contained therein.

In *Pinder v. Regina*, by a majority of 3 to 2,⁶¹ the Court of Appeal of Bahamas was called on to declare unconstitutional corporal punishment. It held that it could not do so due to the ‘saving clauses’ in the Constitution of Bahamas by virtue of which laws that were enacted before the entry into force of the constitution (including those under which the sentence of flogging had been imposed upon the appellant) could not be declared unconstitutional. However, the substance of the Court’s view was clear, with all five members of the Court recognizing that

“There is ... virtual unanimity of opinion in Commonwealth jurisdictions and beyond that the infliction of corporal punishment ... is violative of the fundamental right of a person ... to be protected from such punishment which is regarded as inhuman and degrading or even torture”⁶²

and that a sentence of flogging constituted inhuman and degrading treatment within the meaning of Article 17(1) of the Constitution.

⁵⁹ *Naushad Ali v. State*, Criminal Appeal No. HAA 0083/2001L, 21 March 2002 (Fiji High Court) (unreported).

⁶⁰ *John Banda v. The People*, HPA/6/1998 (High Court of Zambia).

⁶¹ *Pinder v. Regina*, Criminal Appeal No. 60/1997, 29 January 1999 (Bahamas Court of Appeal) (unreported), (Gonsalves-Sabola P, George and Zacca JJA; Carey and Hall JJA dissenting).

⁶² *Ibid.*, p. 1.

The majority of the Judicial Committee of the Privy Council (Lords Millett, Hope and Hobhouse), in considering an appeal from the decision of the Court of Appeal in the above case, while upholding the constitutionality of the provision providing for corporal punishment on the same basis as the Court of Appeal, observed that:

“[...] it is accepted that flogging is an inhuman and degrading punishment and, unless protected from constitutional challenge under some other provision of the Constitution, is rendered unconstitutional by [the provision of the Constitution prohibiting torture and inhuman or degrading treatment or punishment].”⁶³

Incidentally, Lords Nicholls and Hoffman entered a strong dissent to the reasoning of the majority on the interpretation of domestic constitutional law, observing that “flogging is a barbaric form of punishment,”⁶⁴ and that

“The use or, more accurately, the misuse of this type of argument in the interpretation of constitutions led Lord Wilberforce famously to decry the ‘austerity of tabulated legalism’: see *Minister of Home Affairs v Fisher* [1980] AC 319, 328. Never was there a more telling instance of this austerity than in the present case, where the constitutionality of inhuman punishment is said to depend, at least in part, on the inference to be drawn from the niceties of an argument based on redundancy of language. This approach, if adopted, would tragically impoverish the spirit of the Constitution of The Bahamas.”⁶⁵

What is clear from the foregoing is that, as a matter of international law, reflected in international practice of human rights courts and bodies as well as judgments of national courts, judicially sanctioned corporal punishment is condemned as constituting CIDPT.

D.3 Relevance of Internal Law - Distinguishing Suffering ‘Inherent in Lawful Punishment’

Given that the punishment complained of in the present case is, amicus understands, contemplated in the legislation of the Republic of Trinidad and Tobago, this brief emphasise a final point (canvassed above), notably the relationship between domestic law and international human rights obligations in respect of corporal punishment.

The Court is aware of the general principle of customary international law that a State may not rely upon a provision of its internal law as a justification for a breach of its international obligations.

⁶³ *Prince Pinder v. The Queen*, Privy Council Appeal No. 40/2001 (Bahamas), 23 September 2002, [2003] 1 AC 620, para. 5.

⁶⁴ *Ibid.*, para. 66.

⁶⁵ *Ibid.*, para 60.

This incontrovertible principle, affirmed repeatedly by the Permanent Court of International Justice and the International Court of Justice,⁶⁶ embodied in Article 27 of the Vienna Convention on the Law of Treaties and recently restated by the International Law Commission in the Articles on Responsibility of States for Internationally Wrongful Acts,⁶⁷ has been expressly recognized by this Court in its Advisory Opinion on *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*.⁶⁸ Plainly, the state cannot invoke the provisions of domestic law to justify a punishment that violates its international obligations to protect persons from inhuman or degrading punishment.

It was noted above (see Section C.2), that suffering that is ‘inherent in lawful sanctions’ is not considered to fall within, and in the Torture Convention is explicitly excluded from, the prohibition on cruel inhuman or degrading treatment. Even when a similar "exclusion clause" is not expressly contained in the relevant provisions of international instruments, the European Court’s jurisprudence highlighted above indicates that the imposition of suffering or humiliation that is no more than that inherent in - or incidental to - the imposition of any lawful punishment is insufficient to constitute CIDPT. However, consistent with the principles set out above, the key question is not simply ‘lawfulness’ according to the provisions of domestic law. As the *Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment* of the UN Commission on Human Rights has clarified,

"[...] the ‘lawful sanctions’ exclusion must necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community, such as deprivation of liberty through imprisonment, which is common to almost all penal systems. [...]"

Regard must therefore be had to international law in determining lawfulness. To interpret the ‘lawfulness’ provisions otherwise, and permit a state by way of internal legislation to avoid international obligations, would be to gut the prohibition on torture and cruel, inhuman and degrading treatment of meaning and effect. The jurisprudence highlighted in this Brief makes clear that judicial corporal punishment is not a ‘lawful’ sanction under international law and is increasingly rejected as an abhorrent violation of human rights by the international community. Its lawfulness, or not, under domestic law is immaterial.

To the extent that this issue is germane to the present case the Court may be minded to adopt an approach similar to that of the Special Rapporteur, highlighted above, or the Human Rights Committee which, in a case concerning the lawfulness of corporal punishment, stated that:

⁶⁶ See eg *The S.S. Wimbledon*, *Greco-Bulgarian “Communities,” Free Zones of Savoy and the District of Gex* and *Elettronica Sicula* cases.

⁶⁷ Article 3, *Articles on Responsibility of States for Internationally Wrongful Acts*. See also the ILC’s Commentaries to Article 3.

⁶⁸ *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*, 9 December 1994, *Series A*, No. 14, para. 35.

"The State party has contested the claim by stating that the domestic legislation governing such corporal punishment is protected from unconstitutionality by [the Constitution of the State Party]. The Committee points out, however, that *the constitutionality of the sentence is not sufficient to secure compliance also with the Covenant. The permissibility of the sentence under domestic law cannot be invoked as justification under the Covenant.*"⁶⁹

Conclusion

This brief has demonstrated that judicially sanctioned corporal punishment, of the sort at issue in the case presently before the Court, amounts to an inhuman and degrading form of punishment, prohibited by treaty and customary law. There can be no justification or excuse for such punishment, whatever the circumstances of the particular case, the situation in the particular state, or the provisions of internal law. Judicially sanctioned corporal punishment is the subject of harsh and unequivocal condemnation at the international - and increasingly at the national constitutional - level. The Court is urged in its important judgment to adopt an approach in line with the international law and practice outlined in this brief, which *amicus curiae* hereby humbly submits.

On behalf of INTERIGHTS:

Helen Duffy, Legal Director

Silvia Borelli, Research Assistant

Date

⁶⁹ Human Rights Committee, *Osbourne v. Jamaica*, para. 9.1 (emphasis added).



INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

REPORT N° 95/00*

CASE 11.445

ANGELO JAVIER RUALES PAREDES

ECUADOR

October 5, 2000

I. SUMMARY

1. On November 8, 1994, Angelo Ruales Paredes (hereinafter “the petitioner”) lodged a petition with the Inter-American Commission on Human Rights (hereinafter “the Commission” or the “IACHR”) against the Republic of Ecuador (hereinafter “the State”) denouncing the violation of the following rights enshrined in the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”): the right to humane treatment (Article 5), personal liberty (Article 7), a fair trial (Article 8), and judicial protection (Article 25), in violation of the obligations in Article 1(1) to the detriment of the petitioner.

2. On June 11, 1999, the parties reached a friendly settlement in this case. This report presents a brief account of the facts and the text of the settlement agreement, pursuant to Article 49 of the Convention.

II. FACTS

3. At 8:00 p.m. on July 3, 1993, the petitioner, 21 years of age, was detained by Agent Palacios near the coliseum in Ibarra, province of Imbabura, where he was caught stealing accessories from the vehicle of the Provincial Chief of the Crime Investigation Office (OID) of Ibarra, Lieutenant Colonel Raúl Ruiz. Lieutenant Colonel Ruiz ordered that the petitioner be investigated, and the latter was brought in to the Ibarra police station.

4. At the station, the petitioner was tortured during interrogation. He was forced to remain in a tripod position and to flex, and was submerged in a pool. He was also sprayed with gas and pulled by the genitals with his shoelace. Police health personnel had to suture the resulting wound.

5. In the days following his detention, the petitioner, writing on cigarette paper, made known his injury and his lack of communication with his family. The petitioner’s family sent a physician to examine him; however, the physician was not allowed to see him. The situation became public knowledge, and an investigation of the torture was launched. The police officers accused of torturing him are Rafael Lahuasi, Luis Ernesto Cocha, and Fernando Delgado. These officers admitted to the judge that they subjected the petitioner to acts of physical aggression.

6. The petitioner requested that the events be investigated and the perpetrators punished. He also said that even though Article 145 of the Penal Code of the

Police punishes offenders who commit torture with six to nine years in prison, the accused officers were detained for merely six months and then returned to duty.

III. PROCESSING BY THE COMMISSION

7. On November 8, 1994, the Commission received the petition for this case, which was opened on March 13, 1995. Processing of the case proceeded in keeping with the Commission's Regulations.

8. On January 7, 1999, the Commission invited the parties to engage in friendly settlement procedure, and on January 30, 1999 the petitioner accepted that proposal. The Commission Rapporteur at that time, Dr. Carlos Ayala Corao, traveled to Ecuador to facilitate the procedure. The friendly settlement agreement was signed on June 11, 1999.

IV. FRIENDLY SETTLEMENT

9. The Friendly Settlement Agreement signed by the parties and the IACHR Rapporteur reads as follows:

FRIENDLY SETTLEMENT AGREEMENT

I. BACKGROUND

The Ecuadorian State, through the Office of the Attorney General, with a view to promoting and protecting human rights and given the great importance of the full observance of human rights at this time for the international image of our country, as the foundation of a just, dignified, democratic, and representative society, has decided to take a new course in the evolution of human rights in Ecuador.

The Office of the Attorney General has initiated conversations with all persons who have been victims of human rights violations, aimed at reaching friendly settlement agreements to provide reparations for the damages caused.

The Ecuadorian State, in strict compliance with the obligations it acquired upon signing the American Convention on Human Rights and other international human rights law instruments, is aware that any violation of an international obligation that has caused damages triggers the duty to make adequate reparations--monetary reparations and criminal punishment of the perpetrators being the most just and equitable form. Therefore the Office of the Attorney General and Mr. Angelo Ruales Paredes, each of their own right, have reached a friendly settlement, pursuant to the provisions of Articles 48(1)(f) and 49 of the American Convention on Human Rights and Article 45 of the Regulations of the Inter-American Commission on Human Rights.

II. THE PARTIES

The following persons were present at the signing of this Friendly Settlement Agreement:

- a. Dr. Ramón Jiménez Carbo, Attorney General of the State, as

indicated in his appointment and certificate of office, which are attached as qualifying documents;

- b. Mr. Angelo Javier Ruales Paredes, citizenship document No. 100205510-9; a copy of that document is also attached as a qualifying document.

III. STATE RESPONSIBILITY AND ACCEPTANCE

The Ecuadorian State acknowledges its international responsibility for having violated the human rights of Mr. Angelo Javier Ruales Paredes enshrined in Article 5 (right to humane treatment), Article 7 (right to personal liberty), Article 8 (a fair trial), Article 25 (judicial protection), and the general obligation set forth in Article 1(1) of the American Convention on Human Rights and other international instruments, since the violations were committed by State agents and could not be disproved by the State, thus giving rise to State responsibility.

Given the above, the Ecuadorian State accepts the facts in case No. 11.445 before the Inter-American Commission on Human Rights and undertakes the necessary reparatory steps to compensate the victims, or their successors, for the damages caused by those violations.

IV. COMPENSATION

In view of the foregoing, the Ecuadorian State, through the Attorney General, as the sole judicial representative of the Ecuadorian State, pursuant to Article 215 of the Constitution of Ecuador, enacted in Official Register No. 1 and in force since August 11, 1998, is awarding Mr. Angelo Javier Ruales Paredes lump-sum compensatory damages of fifteen thousand US dollars (US\$15,000) or the equivalent in local currency, calculated at the exchange rate in effect at the time the payment is made, to be paid from the National Budget.

This compensation covers the consequential damages, loss of income, and moral damages suffered by Mr. Angelo Javier Ruales Paredes, as well as any other claims of Mr. Angelo Javier Ruales Paredes or his family members regarding the subject of this agreement, under domestic and international law, and is chargeable to the National Budget. To this end, the Office of the Attorney General will notify the Ministry of Finance, for it to carry out this obligation within 90 days of the signing of this document.

V. PUNISHMENT OF THE PERSONS RESPONSIBLE

The Ecuadorian State pledges to bring civil and criminal proceedings and pursue administrative sanctions against those persons who are alleged to have participated in the violation in the performance of State functions or under the color of public authority.

The Office of the Attorney General pledges to encourage the general prosecutor (*Fiscal General del Estado*), the competent judicial organs, and public agencies or private institutions to contribute legal evidence to determine the liability of those persons. If admissible, the action will be subject to the constitution and

laws of the Ecuadorian State.

VI. RIGHT TO SEEK INDEMNITY

The Ecuadorian State reserves the right to seek indemnity, pursuant to Article 22 of the Constitution of the Republic of Ecuador, from those persons found responsible for human rights violations through a final judgment handed down by the country's courts or when administrative liability is found, in keeping with Article 8 of the American Convention on Human Rights.

VII. TAX EXEMPTION AND DELAY IN COMPLIANCE

The payment made by the Ecuadorian State to the other party to this agreement is not subject to any current or future taxes, except for the 1% tax on capital flows.

In the event that the State is delinquent for over three months from the date on which the agreement is signed, it must pay interest on the amount owed, corresponding to the current bank rate of the three largest banks in Ecuador for the duration of its delinquency.

VIII. REPORTING

The Ecuadorian State, through the Office of the Attorney General, agrees to report every three months to the Inter-American Commission on Human Rights on compliance with the obligations assumed by the State in this friendly settlement agreement.

In keeping with its consistent practice and obligations under the American Convention, the Inter-American Commission on Human Rights will oversee compliance with this agreement.

IX. LEGAL BASIS

The compensatory damages that the Ecuadorian State is awarding to Mr. Angelo Javier Ruales Paredes are provided for in Articles 22 and 24 of the Constitution of the Republic of Ecuador, for violation of the Constitution, other national laws, and the norms in the American Convention on Human Rights and other international human rights instruments.

This friendly settlement is entered into on the basis of respect for the human rights enshrined in the American Convention on Human Rights and other international human rights instruments and of the Ecuadorian Government's policy of respect for and protection of human rights.

X. NOTIFICATION AND CONFIRMATION

Mr. Angelo Javier Ruales Paredes specifically authorizes the Attorney General to notify the Inter-American Commission on Human Rights of this Friendly Settlement Agreement, so that the Commission may confirm and ratify it in its

entirety.

XI. ACCEPTANCE

The parties to this agreement freely and voluntarily express their conformity with and their acceptance of the content of the preceding clauses and state for the record that they hereby bring to a close the dispute before the Inter-American Commission on Human Rights over the international responsibility of the State for violating the rights of Mr. Angelo Javier Ruales Paredes.

V. DETERMINATION OF COMPATIBILITY AND COMPLIANCE

10. The Commission determined that the settlement agreement transcribed above is compatible with the provisions of Article 48(1)(f) of the American Convention.

11. On June 15, 1999, the Police District Court upheld on appeal the three-year prison sentence for officers Luis Ernesto Cocha Tulcán and Rafael Lahuasi Aldas for torture. Officer Fernando Delgado Arias was acquitted in 1997, when his involvement in the events investigated was disproved. In the second appeal on November 8, 1999, the Court of Justice of the National Police upheld all parts of the judgment being appealed and dismissed the officers from the National Police.

12. The State complied with one very important obligation—it punished the perpetrators--however it has yet to fulfill its commitment to compensate the petitioner.

VI. CONCLUSIONS

13. The Commission reiterates its appreciation to the Ecuadorian State for its willingness to resolve the case through compensatory measures, including measures needed to punish the perpetrators of the alleged violation. The IACHR also reiterates its appreciation to the petitioner for accepting the terms of this friendly settlement agreement.

14. The IACHR will continue to monitor compliance with Ecuador's commitment to pay compensatory damages, which it has not done to date.

15. The IACHR confirms that the friendly settlement mechanism set forth in the American Convention allows for a non-contentious end to individual cases and has proved, in cases involving different countries, to be an important vehicle for settling alleged violations that can be used by both parties (the petitioner and the State).

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To acknowledge that the State punished those responsible for the violation but has failed to pay the US\$15,000 in compensation.

2. To urge the State to take the necessary steps to fulfill the pending commitment regarding payment of the compensation.

3. To continue to monitor and supervise compliance with the friendly settlement agreement and, in this context, to remind the State, through the Office of the

Attorney General, of its commitment to report to the IACHR every three months on compliance with the obligations assumed (by the State) under this friendly settlement.

4. To publish this report and include it in the Commission's Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., October 5, 2000. (Signed) Hélio Bicudo, Chairman; Claudio Grossman, First Vice-Chairman; Juan Méndez, Second Vice-Chairman; Commissioners: Marta Altolaguirre, Robert K. Goldman, and Peter Laurie.

[Table of Contents | Previous | Next]

* Dr. Julio Prado Vallejo, an Ecuadorian national, did not participate in the discussion of the case, pursuant to Article 19 of the Commission's Regulations.



REPORT N° 19/03[1]
 CASE 11.725
 COMPLIANCE AGREEMENT
 CARMELO SORIA ESPINOZA
 CHILE
 March 6, 2003

I. SUMMARY

1. On February 15, 1997, the Inter-American Commission on Human Rights (hereafter the Commission or the IACHR) received a petition accusing the State of Chile (hereafter the Chilean State or Chile) of violating the petitioners' right to justice for its failure to investigate the death of Carmelo Soria Espinoza. Following proceedings before the IACHR, on November 19, 1999, the Commission published report 133/99 in which it found that the State of Chile had violated Articles 1, 2, 8 and 25 of the American Convention on Human Rights (hereafter the American Convention), and made certain recommendations.

2. On January 21, 2003, the Commission received a commitment signed by the State to comply with the recommendations of the IACHR, as well as a statement on the part of the petitioners accepting that commitment. In this report, the Commission reproduces the contents of both documents, ratifies the terms of the agreement, and urges the State to comply with the recommendations formulated by the IACHR in its report 133/99.

II. FACTS OF THE CASE

3. Mr. Carmelo Soria Espinoza, 54 years of age and of dual Spanish and Chilean nationality, was working as chief of the editorial and publications section of the Latin American Demographic Center (CELADE) in Chile. CELADE is an agency of the Economic Commission for Latin America and the Caribbean (ECLAC) and part of the United Nations (UN) system. Accordingly, Mr. Soria had the status of international official. On July 14, 1976, as he was leaving work, he was kidnapped by security agents of the *Dirección de Inteligencia Nacional* (DINA) and subsequently murdered. His body and car were left in a stream. The Chilean courts determined that State agents participated in the crime and their identities were established. However, pursuant to Decree Law N° 2.191, known as the self-amnesty law, criminal prosecution was dismissed, allowing the crime committed by these agents to go unpunished.

III. PROCEEDINGS BEFORE THE COMMISSION

4. On February 15, 1997, Carmen Soria González Vera, the victim's daughter, assisted by the attorney Alfonso Insunza Bascuñán, filed a petition with the Commission, dated January 31, 1997. The petitioners accuse the State of violating the right of access to justice in the case of Mr. Carmelo Soria Espinoza and they request that the Commission declare the Amnesty Law incompatible with the obligations of Chile under the American Convention. On February 24, 1997, the Commission transmitted the petition to the State, thereby initiating the corresponding proceedings in accordance with the rules of procedure of the IACHR.

5. Upon completion of proceedings, on May 5, 1999, the Commission adopted Report 79/99 on the present case, based on Article 50 of the American Convention. In that report, the Commission recommended that the State establish the responsibility of the persons identified as guilty of the murder of Carmelo Soria Espinoza by due process of law; that it comply with the provisions of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, in order for human rights violations committed against international officials entitled to international protection to be appropriately investigated and to effectively punish those responsible, or that otherwise the Chilean State must accept the authorization of universal jurisdiction for such purposes; that it repeal Decree Law N° 2.191 enacted in 1978 in order that human rights violations committed by the *de facto* military government may be investigated and punished; and that it make reparations to the victim's family for physical and non physical damages, including moral damages.

6. The report was transmitted to the Chilean State with the pertinent recommendations, giving the State two months from the date of transmission to report on its compliance. The Chilean State submitted its observations on September 29, 1999. On October 18, 1999, the Commission approved Report 110/99, pursuant to Article 51 of the Convention, and transmitted it to the State with a period of one month to present information on its compliance with the recommendations. On November 19, 1999, the Commission decided to publish the above-mentioned report.

7. On January 21, 2003, the Commission received a commitment signed by the State to comply with the recommendations of the IACHR, as well as a statement by the petitioners accepting that commitment.

IV. COMMITMENTS SIGNED BY THE PARTIES

8. The commitment signed by the State reads as follows:

In order to comply with the recommendations established by the Inter-American Commission on Human Rights (IACHR) in its report 133/99, in the case of reference (case 11.725), the Government of Chile is pleased to submit the following proposal of compliance, prepared in accordance with the rules accepted before that body.

The proposal incorporates both material and symbolic aspects consistent with the spirit and the possibilities of the government to provide a satisfactory solution to the affected party.

I. Background:

1. In its report 133/99, the IACHR concluded, after analyzing the judgment of May 24, 1996, by the Supreme Court of Justice of Chile, that agents of the State "violated, in the case of Carmelo Soria Espinoza, the right to personal liberty, the right to life, and the right to personal integrity enshrined in Article I of the American Declaration of the Rights and Duties of Man". The Commission concluded that the judicial dismissal of criminal proceedings initiated concerning the detention and disappearance of Carmelo Soria Espinoza affected the petitioners' right to justice, and that consequently the Chilean State violated its international commitments enshrined in Articles 8 and 25, 1(1) and 2 of the American Convention.

The Commission added that Decree Law 2.191 is incompatible with the American Convention, ratified by Chile in 1990, and that consequently the judgment of the Supreme Court of Chile declaring the Amnesty Law constitutional and of mandatory application violated Articles 1(1) and 2 of the Convention,

The Commission further declared that the Chilean State has not complied with Article 2 of the American Convention, in that it has not adapted its domestic laws to the provisions of the Convention.

The Commission also considered that the State has failed to comply with the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons as a result of having adopted the Amnesty Law and because its competent organs for the administration of justice failed to punish the crimes committed against Carmelo Soria Espinoza.

2. The IACHR recommended that the Chilean State take the following measures:

- To establish the responsibility of the persons identified as guilty of the murder of Carmelo Soria Espinoza by due process of law, in order for the parties responsible to be effectively punished and for the family of the victim to be effectively ensured the right to justice, enshrined in Articles 8 and 25 of the American Convention.
- To comply with the provisions of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, in order for human rights violations, committed against international officials entitled to international protection, such as the execution of Mr. Carmelo Soria Espinoza in his capacity as an officer of ECLAC, to be appropriately investigated and to effectively punish those responsible. Should the Chilean State consider itself unable to fulfill its obligation to punish those responsible, it must, consequently, accept the authorization of universal jurisdiction for such purposes.
- To adapt its domestic legislation to reflect the provisions contained in the American Convention on Human Rights in such a way that Decree Law No. 2.191 enacted in 1978 be repealed, in order that human rights violations committed by the *de facto* military government against Carmelo Soria Espinoza may be investigated and punished.
- To adopt the necessary measures for the victim's family members to receive adequate and timely compensation that includes full reparation for the human rights violations established herein, as well as payment of fair compensation for physical and non physical damages, including moral damages.

3. The family of Mr. Carmelo Soria Espinoza has declared its interest in concluding judicial proceedings initiated before the Chilean courts to pursue the extracontractual liability of the State.

II. Objectives and scope of the Chilean government's proposal for compliance with the recommendations:

The proposal that the Government of Chile submits to the Inter-American Commission on Human Rights is an agreement between the parties (government and petitioners), that has the following objectives:

- To put an end to international action, in particular the measures adopted by the Commission pursuant to the recommendations contained in Report 133/99.
- To lay the basis for terminating judicial proceedings to pursue the extracontractual liability of the State for the death of Carmelo Soria, in the case "*Soria con Fisco*" ("*Soria vs the State Prosecutor*") now before the Fourth Civil Court of Santiago under case N° C-2219-2000.
- To obviate further judicial action for State liability, whether in connection with action of its agents or for physical or non physical damages, including moral damages.

III. Elements of the compliance proposal:

- a) The family of Mr. Carmelo Soria Espinoza (hereafter the petitioner) will terminate action before the Inter-American Commission on Human Rights and expressly declares that all the recommendations contained in the Commission's report 133/99 have been complied with.
- b) The petitioner accepts the symbolic reparation measures offered by the State of Chile, consisting of:
 - A public declaration by the Government of Chile recognizing the responsibility of the State, through the action of its agents, for the death of Mr. Carmelo Soria Espinoza.
 - That same declaration offers to erect a monument of remembrance to Mr. Carmelo Soria Espinoza in a location designated by his family in Santiago.
- c) The petitioner will desist from the suit for extracontractual liability of the State, in the case "*Soria con Fisco*" now before the Fourth Civil Court of Santiago under case N° C-2219-2000, declaring that it agrees to terminate judicial proceedings initiated, that the reparations agreed before the Inter-American Commission on Human Rights are all that will be demanded of the State and that, consequently, the family will not pursue further judicial action for State liability, whether in connection with action of its agents or for physical or non physical damages, including moral damages. An authenticated copy of the judicial decision approving the withdrawal of action must be presented before the Commission by the petitioner, for purposes of demonstrating compliance with this agreement.
- d) The State of Chile undertakes to pay a single lump sum of one million five hundred thousand United States dollars as compensation to the family of Mr. Carmelo Soria Espinoza, which payment will be made *ex gratia* through the offices of the Secretary General of the United Nations, by virtue of an agreement to be signed between the Government of Chile and the United Nations.
- e) The Government of Chile declares that Mr. Carmelo Soria Espinoza had the status of an international official of the United Nations, assigned to the Economic Commission for Latin America, ECLAC, as a senior staff member, and that he therefore had the status of a senior international staff official.
- f) The Government of Chile will present before the Courts of Justice of Chile an application to reopen criminal proceedings that were initiated to prosecute those who killed Mr. Carmelo Soria Espinoza.

The proposals presented by the Government of Chile to comply with the recommendations of the Inter-American Commission on Human Rights have the sole objective of putting an end to the dispute that currently exists between the Chilean State and the family of Mr. Carmelo Soria Espinoza, expressed in case 11.725.

9. The commitment signed by the petitioner, and addressed to the IACHR, declares:

We, Carmen Soria González Vera, assisted by the attorney Alfonso Insunza Bascuñan, respectfully declare before you:

We are aware of the proposal for compliance with the recommendations of Report 133/99 presented by the Government of Chile to the Commission, and we expressly understand it in all its parts, which read textually as follows:

- a) The family of Mr. Carmelo Soria Espinoza (hereafter the petitioner) will

terminate action before the Inter-American Commission on Human Rights and expressly declares that all the recommendations contained in the Commission's report 133/99 have been complied with.

- b) The petitioner accepts the symbolic reparation measures offered by the State of Chile, consisting of:
- A public declaration by the Government of Chile recognizing the responsibility of the State, through the action of its agents, for the death of Mr. Carmelo Soria Espinoza.
 - That same declaration offers to erect a monument of remembrance to Mr. Carmelo Soria Espinoza in a location designated by his family in Santiago.
- c) The petitioner will desist from the suit for extracontractual liability of the State, in the case "*Soria con Fisco*" now before the Fourth Civil Court of Santiago under case N° C-2219-2000, declaring that it agrees to terminate judicial proceedings initiated and that the reparations agreed before the Inter-American Commission on Human Rights are all that will be demanded of the State and that, consequently, the family will not pursue further judicial action for State liability, whether in connection with action of its agents or for physical or non physical damages, including moral damages. An authenticated copy of the judicial decision approving the withdrawal of action must be presented before the Commission by the petitioner, for purposes of demonstrating compliance with this agreement.
- d) The State of Chile undertakes to pay a single lump sum of one million five hundred thousand United States dollars as compensation to the family of Mr. Carmelo Soria Espinoza, which payment shall be made *ex gratia* through the offices of the Secretary General of the United Nations, by virtue of an agreement to be signed between the Government of Chile and the United Nations.
- e) The Government of Chile declares that Mr. Carmelo Soria Espinoza had the status of an international official of the United Nations, assigned to the Economic Commission for Latin America, ECLAC, as a senior staff member, and that he therefore had the status of a senior international staff official.
- f) The Government of Chile will present before the Courts of Justice of Chile an application to reopen criminal proceedings that were initiated to prosecute those who killed Mr. Carmelo Soria Espinoza.

With respect to this proposal, we express our absolute conformity and acceptance, because it complies with the recommendations of the Commission's Report 133/99.

THEREFORE:

We request the Executive Secretary to accept in full the proposal of the Chilean government on compliance with Report 133/99.

VI. CONCLUSIONS

10. The Inter-American Commission recognizes the willingness of the Chilean State to resolve this case by complying with the recommendations contained in Report 133/99, including payment of compensation for damages suffered, and prosecution and punishment of those responsible for the death of Carmelo Soria.

11. In accordance with its powers under the Convention and its Rules of Procedure, the Commission will continue to monitor compliance with the recommendations in

that report.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To take note of the terms of the commitment assumed by the State of Chile and accepted by the petitioners in the present case.
2. To welcome the willingness shown by the government to comply with the recommendations of the IACHR.
3. To urge the State to take the measures necessary to comply with pending commitments.
4. To continue monitoring compliance with the agreement reached by the parties and the recommendations made by the Commission.
5. To make public this report and to include it in the Annual Report to the General Assembly of the OAS.

Given and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington D.C., on March 6, 2003. (Signed): Marta Altolaguirre, President; Clare Kamau Roberts, Second Vice-President; Robert K. Goldman, Juan Méndez, Julio Prado Vallejo and Susana Villarán, Commissioners

[1] In conformity with Article 17(2)(a) of the Rules of Procedure of the IACHR, Mr. José Zalaquett, the First Vice-Chairman of the Commission and a national of Chile, did not participate in the discussion or voting on this case.



REPORT N° 69/03
PETITION 11.807
FRIENDLY SETTLEMENT
JOSÉ ALBERTO GUADARRAMA GARCÍA
MEXICO
October 10, 2003

I. SUMMARY

1. On August 25, 1997, the Inter-American Commission on Human Rights ("the Inter-American Commission" or "the IACHR") received a communication from the Center for Justice and International Law and Christian Action for the Abolition of Torture ("CEJIL" and "ACAT"; hereinafter jointly "the petitioners") claiming that Mr. José Alberto Guadarrama García was abducted on March 26, 1997, in the town of Emiliano Zapata, Morelos state, by a group of four armed individuals who got out of a vehicle while he was waiting for a bus on the street, in the company of his mother, Elvira García Avelar. The petitioners report that Mr. Guadarrama García's mother identified José Luis Velásquez Beltrán, an officer of the judicial police, as one of the individuals who had abducted her son and reported the incident to the Public Prosecution Service that same day. She was later told that the officer in question belonged to the Antikidnapping Group, and that he had already given a statement; however, he was never brought before Mrs. García Avelar for her to identify him, and he continued his regular employment. On April 11, 1997, the Morelos authorities reported that Mr. Velásquez Beltrán had left his job; and, although a warrant for Velásquez Beltrán's arrest was later issued, to date he has not been detained.

2. The complaint alleges that the United Mexican States ("the State") is internationally responsible for violating the following rights protected by the American Convention on Human Rights ("the American Convention"): the right to life (Article 4), to humane treatment (Article 5), to personal liberty (Article 7), to a fair trial (Article 8), to privacy (Article 11), and to judicial protection (Article 25). The petition also claims that the State violated the general obligation of respecting and ensuring those rights set forth in Article 1(1) of the American Convention.

3. The parties signed an agreement containing the ground rules for beginning a friendly settlement procedure on October 30 1999, and they reached a final friendly settlement agreement on February 27, 2003. In this report, adopted under Article 49 of the American Convention, the IACHR summarizes the allegations, describes the agreement reached by the parties, and resolves to publish it.

II. PROCESSING BY THE IACHR

4. On September 30, 1997, the Inter-American Commission conveyed the relevant parts of the complaint to the Mexican State and asked it to furnish the corresponding information. The State's reply was forwarded to the parties, and the exchange of information and comments described in the American Convention and in the Commission's Rules of Procedure began. On October 7, 1997, the petitioners requested precautionary measures on behalf of the mother of José Alberto Guadarrama García, who had received threats following a press conference at which she revealed that a complaint had been lodged with the IACHR; these precautionary measures were granted on October 17, 1997.

5. Following the hearing on the case held on October 16, 1998, the Inter-American Commission suggested to the Mexican State the text of an agreement pursuant to Article 48(1)(f) of the American Convention. The State sent its comments on the draft agreement on October 20, 1998, and the Inter-American Commission forwarded it to the petitioners on October 26. After the agreement was signed on October 30, the parties and the Inter-American Commission held numerous meetings and hearings, which are listed below (Section IV: Compliance with the Agreement).

III. FRIENDLY SETTLEMENT AGREEMENT

6. The agreement signed on October 30, 1998, setting the bases for the friendly settlement, reads as follows:

ONE

This friendly settlement agreement in the case of José Alberto Guadarrama García, No. 11.807, currently being processed by the Inter-American Commission on Human Rights ("the Commission" or "the IACHR"), is entered into by and between the United Mexican States ("the State" or "Mexico") and the organizations representing the victim's family in the processing of this case before the IACHR: Christian Action for the Abolition of Torture (ACAT) and the Center for Justice and International Law (CEJIL) (hereinafter "the petitioners").

TWO

The parties agree to begin a friendly settlement procedure in Case No. 11.807, which deals with the forced disappearance of José Alberto Guadarrama García, under investigation by the Office of the Attorney General for Justice of Morelos state ("the PGJM"). This friendly settlement procedure will be assisted by, in representation of the State, the Ministry of Foreign Affairs, the Ministry of the Interior, the Office of the Attorney General of the Republic, and the National Human Rights Commission, through the regular monitoring of the PGJM's investigations, in accordance with their respective legal powers. The petitioners will be represented by the Guadarrama García family, ACAT, and CEJIL, who will participate in the procedure.

THREE

The objectives of the friendly settlement procedure are the following:

- a. Arresting José Luis Velásquez Beltrán, pursuant to the judicial arrest warrant already issued.
- b. Identifying all those who plotted and carried out the crimes committed against José Alberto Guadarrama García.
- c. Prosecuting all the plotters and perpetrators, so they can be duly punished by the competent judicial authorities.
- d. Locating José Alberto Guadarrama García.

- e. Providing the Guadarrama García family with redress, compensation, and reparations for the incident, to which end the State and the petitioners may agree on the source and terms of compensation for the relatives of Mr. José Alberto Guadarrama García, without prejudice to the legal action they may be required to pursue in accordance with Mexican law.

FOUR

The parties will provide the IACHR with regular reports on the pursuit of the objectives set forth in Paragraph Three of this agreement.

FIVE

The deadline for meeting the objectives of this agreement shall be February 13, 1999, the date on which the IACHR's next regular session is to begin and during which a hearing, to be attended by the parties, may be convened. This deadline may be extended by the IACHR, in light of the contributions furnished by the parties.

SIX

In accordance with Article 48(1)(f) of the American Convention on Human Rights, the IACHR shall oversee this procedure until such time as the objectives set forth in this agreement have been met in full.

IV. COMPLIANCE WITH THE AGREEMENT

7. The petitioners and the State reported, respectively, on November 3 and 13, 1998, about their progress in complying with these points and the meetings they had held in Mexico. On December 1, 1998, a friendly settlement meeting was held at the headquarters of the Mexican Ministry of Foreign Affairs in Mexico City, attended by representatives of the parties, the chairman of the Inter-American Commission at that time, and the Executive Secretariat lawyer responsible for the case. At that meeting, the parties agreed to continue their implementation of the agreement and to report back to the IACHR prior to its February 1999 session.

8. On March 1, 1999, a meeting was held at the headquarters of the Inter-American Commission for following up on the friendly settlement agreement in the case at hand. On that occasion, the parties reported on the steps taken as a part of that procedure. On March 16 and May 6, 1999, the State and the petitioners held meetings in Mexico to deal with the case; they reported on those events on June 9, 1999.

9. On October 4, 1999, a working meeting attended by the parties was held at the Inter-American Commission's headquarters. On that occasion the Commission agreed to locate an independent expert to conduct an expert analysis of the skull found on April 27, 1997, in Jojutla, Morelos, in order to determine whether or not it belonged to Mr. Guadarrama García. The petitioners wrote to the IACHR on November 12, 1999, with respect to this matter and, on November 29, 1999, the Inter-American Commission presented experts Robert Kirschner and Robert Bux with the proposal. The former wrote on January 13, 2000, to say that he agreed to carry out the expert analysis, and this fact was reported to the IACHR.

10. On March 9, 2000, the Inter-American Commission informed the Mexican State that Dr. Robert Kirschner, an expert at the University of Chicago's Center for International Studies, had agreed to review the evidence available in Case 11.807 relating to the identification of Mr. Guadarrama García. In the same letter it asked for high-quality copies of the victim's dental records and the technical laboratory documents describing the DNA tests. On May 5, 2000, the Mexican State reported that it had sent Dr. Kirschner "the expert studies carried out by Mexican agencies on the remains allegedly belonging to Mr. Guadarrama García." Dr. Kirschner submitted his report to the Inter-American Commission on September 16, 2000. In it he stated that: "While many of the findings in these reports are consistent

[with] a positive identification, there are both contradictory results and uncertainty in the DNA testing that preclude positive identification at this time.”^[1]

11. On October 11, 2000, another working meeting was held at Commission headquarters, which studied the current level of compliance with the friendly settlement agreement. On that occasion the State agreed that it would ask the Office of the Attorney General for Justice in the Mexican Federal District (PGJDF) about the possibility of the mitochondrial DNA analysis being performed in that country, and, if the reply was negative, to study the possibility of entrusting the test to an “external independent expert.”

12. On February 26, 2001, during the Inter-American Commission’s 110th session, another working meeting was held in connection with Case 11.807. The State accepted Dr. Kirschner’s presence at the independent expert analysis to be performed in Mexico City and reported that the skull had already been handed over to the PGJDF. The petitioners agreed to take charge of the logistic arrangements and the expert’s traveling expenses. The representatives of the government of Morelos in attendance at the meeting agreed with the petitioners that they would continue to work together “to exhaust the investigation of the case” and that they would meet again in Morelos at a later date.

13. On February 27, 2001, the IACHR informed Dr. Kirschner of the invitation the parties had extended for him to attend the PGJDF’s procedure and asked him to propose a date. The petitioners told the Inter-American Commission that they had spoken with the expert on the telephone, and that he had explained that “although he was qualified to review the results of the expert analysis, he was not an expert in DNA studies; he therefore recommended they contact other university professors with expertise in the field, such as Dr. Mary Claire King of the University of Seattle,” to attend the aforesaid procedure.^[2] In response to that proposal, in a communication of March 16, 2001, the Mexican State noted that “it had no problem whatsoever with Dr. Mary Claire King attending the expert analysis and reviewing its results.”

14. The petitioners reported on May 8, 2001, that they had been unable to locate Dr. King, and had therefore contacted Dr. Luis Fonderbrider of the Argentine Forensic Anthropology Team. The petitioners suggested holding a meeting with Dr. Fonderbrider during a trip he was to make to Mexico City in May 2001 to participate in technical activities with the Office of the High Commissioner of the United Nations. On May 29, 2001, a letter was received from the Mexican State in which it stated “its complete willingness” to attend the proposed meeting with Dr. Fonderbrider.

15. In addition, the petitioners presented the government of Morelos with a proposal for compensation; in response, the government asked them for an additional 45 days in which to present its reply, as noted in the communication from the Mexican State dated July 20, 2001. On November 14, 2001, another working meeting attended by the parties in this case was held during the Inter-American Commission’s 113th session. On November 23, 2001, the Mexican State and the petitioners met at the headquarters of that country’s Ministry of Foreign Affairs:

The meeting studied the compensation proposal submitted by the petitioners. For each item, the Office of the Attorney General offered its counterproposal, in accordance with the guidelines of the inter-American human rights system.

With respect to the compensation, the Office of the Attorney General said it could deposit the amount in a lump sum within five working days following its acceptance by the petitioners, or it could create a trust fund whereby the Guadarrama family would receive regular payments of money.

The petitioners noted that they would reply to the Attorney General’s offer no

later than the following week, after discussing it with the rest of the Guadarrama family.

The petitioners remarked that the next meeting could discuss the issue of the scholarship they had requested on behalf of one of Mrs. Elvira García Avelar's grandchildren, that they would make a specific proposal in that regard, and that the same meeting would readdress the question of the symbolic redress.^[3]

16. The petitioners submitted their compensation proposal; this was answered by a State counterproposal "based on the guidelines set down by the inter-American system," which the petitioners accepted.^[4] On March 1, 2002, the victim's family was awarded the amount of MXN \$1,083,957.00 (one million, eighty-three thousand, nine hundred and fifty-seven Mexican pesos) to cover consequential damages, future losses, and nonmaterial damages. On October 18, 2002, another working meeting with the parties in this case was held at the Inter-American Commission's headquarters.

17. The Mexican State sent a communication on December 23, 2002, summarizing the formalities pursued during the friendly settlement procedure and noting that a meeting had been held with the petitioners in Mexico City on December 4, 2002. In that note the State emphasized its position regarding its compliance with the points of the agreement, including the steps taken to complete the arrest of José Luis Velásquez Beltrán and all the plotters and perpetrators of the crimes committed against José Alberto Guadarrama García as set forth in Preliminary Inquiry No. EZ/089/97-03.^[5] In spite of this, the State explains that at the time it was unable to sign an agreement of compliance with the procedure on account of differences with the petitioners regarding the publication of its recognition of responsibility for the facts of this case^[6]. Based on this, the State holds that the matter is closed and asks the Inter-American Commission to issue the deed of compliance with the friendly settlement of the case.

18. On February 6, 2003, the State submitted a communication enclosing copies of the newspapers published in Morelos with the recognition of responsibility signed by the governor of the state.^[7] The State added that it was "studying the possibility of issuing a "specific press release from the Ministry of Foreign Affairs" with the aforesaid public recognition of responsibility and that the local authorities would continue their investigations to locate José Luis Velásquez Beltrán and would report back regularly to José Alberto Guadarrama García's family on the case's progress. The State repeated its request that the agreement of compliance with the friendly settlement in this case be issued and that the Inter-American Commission "acknowledge the political willingness with respect to human rights displayed by the government of Morelos state."

19. On February 26, 2003, the parties once again went to the headquarters of the Inter-American Commission and held a working meeting at which they reviewed all the steps taken during the friendly settlement procedure and discussed the points for the signing of a final agreement.

V. FINAL FRIENDLY SETTLEMENT AGREEMENT

20. On February 27, 2003, at the IACHR's headquarters, a document called "Final Friendly Settlement Agreement" was signed. In it, the parties agreed as follows:

This agreement is signed, on the one hand, by Christian Action for the Abolition of Torture (ACAT) and the Center for Justice and International Law (CEJIL) (hereinafter "the petitioners"), representing the Guadarrama García family, and, on the other, the Mexican State (hereinafter "the State"), represented by the Ministry of Foreign Affairs.

Background

The petitioners and the State signed a friendly settlement agreement in the present case on October 30, 1998, the objectives of which were defined in section three of the agreement.

The petitioners and the State have held numerous working meetings in order to make progress with the different points contained in that agreement.

The parties recognize the efforts made by the different players in pursuing compliance with the stated objectives, in consideration whereof they execute this final friendly settlement agreement, taking into consideration the following actions:

- (a) The identification of a portion of Mr. José Alberto Guadarrama García's remains has been possible through the different expert analyses conducted in Mexican institutions and by the Argentine Forensic Anthropology Team.
- (b) Several agents of the State who participated in the abduction and subsequent killing of Mr. José Alberto Guadarrama García have been charged and arrested and are being prosecuted.
- (c) The Guadarrama García family has received compensation in accordance with criteria established by the inter-American system for the protection of human rights.
- (d) The Mexican Federal Government and the government of Morelos state have extended a public recognition of their responsibility in the facts of this matter.

As agreed at the working meeting held at IACHR headquarters on February 26, 2003, the State will carry out an analysis of the declaration referred to by the petitioners on that occasion and will report back to the IACHR as appropriate.

The State also agrees to continue pursuing the formalities necessary to serve the arrest warrant that is still pending.

VI. CONCLUSIONS

21. The Inter-American Commission has closely followed the development of the friendly settlement reached in this case. The information above shows that the agreement has been implemented according to the terms of the American Convention.

22. During its processing, the parties made considerable efforts to pursue the agreement's different items. The IACHR warmly applauds the contributions of all the individuals who made this friendly settlement possible, and it holds the direct and active participation of the representatives of Morelos state to be highly positive, in accordance with the terms of Articles 1, 2, and 28 of the American Convention. In addition to the specific achievements attained in this case, that attitude is sure to set an excellent example for the authorities of other regions and countries.

23. Based on the foregoing factual and legal considerations,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To approve the friendly settlement agreement signed by the parties on October 30, 1998, together with the final friendly settlement agreement signed on February 27, 2003.
2. To monitor the points of the agreement that have not been met in full.
3. To publish this report and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 22nd day of the month of October, 2003. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Robert K. Goldman and Julio Prado Vallejo, Commissioners.

[1] The report ends with the following paragraphs:

Conclusions

Based on the available evidence, excluding DNA testing, the results of the forensic investigation into the identity of the skull thought to be that of Jose Alberto Guadarrama Garcia are highly consistent with such an identification. This is based primarily on comparison of the antemortem and postmortem dental x-rays, supplemented by the testimony of Sr. Guadarrama Garcia's dentist, Dra. Bustos Hernandez. In addition, other anthropologic findings in this case are consistent with such an identification. However, the contradictory and incomplete results from the DNA testing prevent positive identification with 100% certainty, which is the standard in forensic cases. This uncertainty must be resolved.

Recommendations:

1. The DNA testing should be repeated by an independent, highly skilled forensic DNA laboratory capable of performing mitochondrial DNA analysis.
2. If available, a molar tooth should be used as the source for the DNA, since tissue from the root of a tooth is more likely to yield DNA that is not degraded or contaminated.
3. Mitochondrial DNA analysis should be performed. It is less likely to be degraded than nuclear DNA, and because it is maternally inherited (i.e., only from one's mother), the issue of paternity does not arise.

Report of Dr. Robert H. Kirschner, Departments of Pathology and Pediatrics, and the Human Rights Program, University of Chicago, September 16, 2000, p. 3.

[2] Petitioners' submission, March 9, 2001.

[3] Minutes of the working meeting of November 23, 2001, submitted as an appendix to the State's communication of November 30, 2001.

[4] State's submission, December 23, 2002, p. 2.

[5] The State explains:

The investigations yielded results sufficient to indicate the probable responsibility of Gilberto Domínguez Romero, Francisco Peña Hernández, Armando Martínez Salgado, and José Luis Velásquez Beltrán, who were referred to the local courts for the crimes of abducting and murdering José Alberto Guadarrama García (and, with respect to the last named criminal, as has already been stated, no information is available about his legal situation).

State's submission, December 23, 2002, p. 1.

[6] The State explains that the petitioners "demanded, in addition to what had already been agreed upon and accepted by the representatives of the Mexican government, the publication of said public recognition in a national daily newspaper." The State reported that it had chosen to "comply with what had previously been accorded: to wit, two publications in the top selling dailies in Morelos state, with the comments thereon made by the petitioners." *Ibid.*, p. 3.

[7] After summarizing the facts of the case and the steps taken in compliance with the friendly settlement agreement, the publication, signed by Mr. Sergio Alberto Estrada Cajigal Ramírez, Governor of the state of Morelos, reads as follows:

We have thus worked to build a different, open government, one that always acts within the legal framework prevailing in the state. In this way we are preventing, fighting, and punishing acts of corruption and impunity and, at the same time, we are designing government practices that are helping us regain credibility and society's trust. In order to assume our responsibilities, the government of the state is meeting the commitments it has acquired, aware that a democratic government that does not respect the basic rights of all humans is an unthinkable proposition.

"Public Recognition in the Case of José Alberto Guadarrama García," paid announcement published in "*La Unión de Morelos*" and "*Ahora Morelos Semanal*," Morelos, Mexico, January 12, 2003.



REPORT N° 105/05
 PETITION 11.141
 FRIENDLY SETTLEMENT
 VILLATINA MASSACRE
 COLOMBIA
 October 27, 2005

I. SUMMARY

1. On March 12, 1993, the Inter-American Commission on Human Rights (hereinafter the Commission) received a petition presented by the Héctor Abad Gómez Human Rights Committee, today known as the Interdisciplinary Group for Human Rights (*Grupo Interdisciplinario por los Derechos Humanos—GIDH*) (hereinafter the petitioners), against the Republic of Colombia (hereinafter the State, the Colombian State or Colombia) for violation of the right to life (Article 4), the right to human treatment (Article 5), and the rights of the child, as well as the generic obligation to respect and guarantee the rights recognized in the American Convention on Human Rights (hereinafter the American Convention) to the detriment of the following children: 8-year-old Johana Mazo Ramírez, 17-year-old Johny Alexander Cardona Ramírez, 17-year-old Ricardo Alexander Hernández, 15-year-old Giovanny Alberto Vallejo Restrepo, 17-year-old Oscar Andrés Ortiz Toro, 16-year-old Ángel Alberto Barón Miranda, 17-year-old Marlon Alberto Álvarez, 17-year-old Nelson Duban Flórez Villa, and Mauricio Antonio Higuita Ramírez, a 22-year-old young man (hereinafter the victims).

2. On July 29, 2002, the Colombian State and petitioners, through the good offices of the CIDH, agreed to sign a friendly settlement agreement in conformity with the procedure set forth in Articles 48 and 49 of the American Convention. After monitoring material compliance with the terms of the agreement, the IACHR adopted a report in accordance with Article 49 of the American Convention in which it describes the friendly settlement process and the joint efforts of the parties to remedy the damage that was caused, in the light of the State's recognition of its responsibility and the purpose and objective of the American Convention.

II. SUBMITTAL OF PETITION TO THE COMMISSION AND PROCESS OF REACHING A FRIENDLY SETTLEMENT

3. On April 8, 1993, the Commission processed the petition submitted by the GIDH, under Case No. 11.141, in accordance with the instructions of the Rules of Procedure in force up to April 30, 2001. On September 7, 1995, in the framework of the Commission's 90th session, the parties initiated a process to reach a friendly settlement in conformity with the provisions of Article 48(f) of the American Convention. As a result of the exchange, the parties signed an understanding envisaging the establishment of a Committee to Promote the

Administration of Justice (hereinafter the Promotion Committee) for this and other cases.^[1]

4. The mandate of the Promotion Committee consisted of: (1) advocating due process of law in the performance of judicial and disciplinary actions; (2) identifying evidence on the events being dealt with and promoting their processing by the judiciary; (3) promoting the protection of witnesses and, if necessary, and judiciary and disciplinarian officers that conduct the investigations; (4) supporting not only the due exercise of the right of trade unions to defense but also the rights and activities of the civil party; (5) promoting, when deemed advisable for the investigative work, the transfer of proceedings to another jurisdiction and the creation of special units of the Office of the Prosecutor and the Technical Investigation Unit; (6) advocating the reparation of damages produced by the events being dealt with; (7) submitting a report to the IACHR in its next regular session on the exercise of the functions set forth in the previous items and on the results of the respective negotiations, indicating the factors that, in its judgment, might have exerted an impact on the success or failure of the above.

5. The Promotion Committee submitted its final report on February 23, 1996 at a meeting held in the framework of the Commission's 91st regular session. In its report, the Promotion Committee formulated a series of recommendations on the case and on other general issues. In general, it pointed out that:

The Committee as a whole has indicated that theoretically full reparation to victims of severe violations of human rights should envisage the following: (1) prevention of violations, investigation of the facts, identification, trial, and punishment of those responsible; (2) restitution, if possible, of the violated right; (3) compensation to the victims, understood in the broad sense of the term, such as compensations for material and moral damages; (4) reparation for the consequences produced by the violation in the communities that the victims belong, or belonged, to, by means of economic, social, and cultural actions.^[2]

The Promotion Committee recommended that the State should recognize its responsibility for the Villatina case to the Commission and issued a series of recommendations on the adoption of measures of promotion, especially those involving criminal, disciplinary and administrative proceedings, in order to establish the facts and individual responsibilities. It also agreed that a series of measures should be adopted to ensure individual and social reparation and to commemorate the victims.^[3]

6. On February 23, 1996, the parties agreed to continue with the friendly settlement process for which purpose they established a Follow-up Committee to monitor the recommendations made by the Promotion Committee (hereinafter the Follow-up Committee). The mandate of the Follow-up Committee, set forth in a document of understanding consisted of: (a) looking for, gathering, centralizing, and transmitting to the Inter-American Commission on Human Rights information on the measures agreed upon to develop the functions of the Promotion Committee; b) presenting periodical reports to the Inter-American Commission on Human Rights on the development of these functions and the result of these functions; (c) reporting to the Inter-American Commission on Human Rights, whenever necessary, about the obstacles that it encounters in the exercise of its functions; (d) submitting a report to the Inter-American Commission on Human Rights at its next regular session on the exercise of the functions it was entrusted with and on the results of its negotiations, with an indication of the factors that, in the judgment of the Committee, would have led to the success or failure of these functions.

7. The Follow-up Committee submitted its evaluation on compliance with the recommendations formulated by the Promotion Committee on October 7, 1997 at the Commission's 97th session. In this evaluation, the Follow-up Committee indicated that,

although there was progress in applying disciplinary sanctions on the State agents involved in the massacre and in determining social reparations, the Commission should continue with the procedure envisaged in Article 50 of the Convention. In view of this situation, on October 16, 1997, the Commission issued a resolution whereby it evaluated and adopted the general recommendations included in the report of the Follow-up Committee and urged the parties to inform, by December 1, 1997, whether they were willing to continue the friendly settlement process or not.

8. On January 2, 1998, the State expressly acknowledged its international responsibility for Case 11.141 and accepted responsibility for the involvement of its agents in the death of the victims. On July 29, 1998, the President of the Republic publicly recognized the State's responsibility for the action or neglect of public servants in the events of Villatina^[4] and handed to the families of each victim a document as a testimony of moral redress and atonement.

9. Despite the efforts made by the parties to promote the friendly settlement process, on October 5, 1998, they decided to terminate it, because most of the agreements drawn up during the different stages of the negotiations failed to be met. During the hearing held in the framework of the Commission's 100th session, the State and the petitioners agreed to request the Commission to rule on the substance of the case with due recognition of the partial implementation of the recommendations made by the committees established in the framework of the attempt to reach a friendly settlement. On March 2, 1999, at the hearing held in the framework of the Commission's 102nd session, the parties reported on the status of the compliance with the agreements drawn up in the framework of the Follow-up Committee.

10. On November 16, 2001, the Commission approved Report No. 123/01 pursuant to Article 50 of the American Convention and duly notified the State of this approval. In its report, the Commission establishes its competence to rule in the matter, refers to the attempt to reach a friendly settlement, and reviews the State's responsibility for violation of Articles 4, 8, 25, and 1(1) of the American Convention in the light of its recognition of its responsibility. Likewise, in its *Report 123/01*, the Commission expressed its recognition of the effort made by the petitioners and the Colombian State to resolve the case by a friendly settlement process and regrets that this process has failed due to noncompliance with the commitments that were made to ensure justice and social reparation by historically commemorating the victims. In view of the information that was gathered during this process, recognition of responsibility by the Republic of Colombia, and the preceding considerations, the Commission concludes that the Colombian State is responsible for the violation of the right to life of the children Johanna Mazo Ramírez, Johny Alexander Cardona Ramírez, Ricardo Alexander Hernandez, Giovanni Alberto Vallejo Restrepo, Oscar Andrés Ortiz Toro, Ángel Alberto Baron Miranda, Marlon Alberto Alvarez, and Nelson Duban Florez Villa and its obligation to provide them special protection by virtue of their status as children pursuant to Articles 4(1) and 19 of the American Convention, as well as the right to life and personal integrity of the young man Mauricio Antonio Higuera Ramírez, as set forth in Article 4(1) of the same Convention. Likewise, the Colombian State has failed to fulfill its obligation to duly provide for the right to fair trial and legal protection for the victims and their families pursuant to Articles 8 (1) and 25 of the American Convention and its obligations to safeguard the guarantee provided in Article 1 (1) of the same Convention.^[5]

11. On February 25, 2002, in view of the recommendations made by the IACHR, the Government of Colombia expressed its willingness to start up talks again with the petitioners in order to make progress in reviewing those commitments that have not as yet been met and to proceed with their implementation, as well as coordinate those aspects where, regarding this topic, there are differences between the parties. On February 26, 2002, the representatives of the State and the petitioners signed a document in which they testify to the intention of restarting the process of friendly settlement, on the basis of the following terms:

1. The parties agree to review the current status of the criminal investigations and to analyze the issue of the right to protection and fair trial and to include the results, in the light of the considerations of the Promotion Committee and Report 123/01, as part of the Agreement.
2. As for individual compensation for the persons who have not yet received it, the Government pledges to analyze once again the applicability of Law 288 of 1996.
3. As for social reparation, the parties agree to promote negotiations along the adequate channels to:
 - a) build a monument of atonement;
 - b) implement a new productive project that is operational and profitable;
 - c) place a memorial plaque of the Villatina health center; and
 - d) implement a nonformal education project.

The activity stemming from the document of February 26, 2002 led the parties to renew their intention to reach a friendly settlement pursuant to Article 49 of the American Convention.

12. Finally, on July 29, 2002, the parties signed a friendly settlement agreement in which a series of commitments specified below was established. Since then, the parties, with the good offices and supervision of the IACHR have made joint efforts to fulfill the commitments that were made to remedy the damage caused.

III. THE FACTS OF CASE 11.141: THE VILLATINA MASACRE

13. On November 15, 1992, at about 8:30 p.m., while several inhabitants of the barrio of Villatina in the city of Medellín were returning home from a religious service, about 12 men in three privately owned cars and carrying firearms used exclusively by security forces stopped at a street corner in the district, got out of their cars, ordered the children and young people who were there to lie down on the ground, and opened fired on them. As a result the following children died: 8-year old Johanna Mazo Ramírez, who had a leg in a cast because of a recent accident, Johnny Alexander Cardona Ramírez, Ricardo Alexander Hernández, Giovanny Alberto Vallejo Restrepo, Oscar Andrés Ortiz Toro, Ángel Alberto Barón Miranda, Marlon Alberto Álvarez, and Nelson Duban Flórez Villa, all of who were between 15 and 17 years of age, and the young man Mauricio Antonio Higueta Ramírez, who was 22 years of age.

14. The attack against the children and young people came to a halt when a National Army patrol arrived on the scene, which triggered a brief confrontation without any deaths or arrests. The child Nelson Dubán Flórez Villa at first survived the assault and was transferred alive to the closest Intermediate Health Unit, where he eventually died. While he was being carried to the health care center, Nelson pointed out that he had recognized among the killers members of the National Police Force, companions of one of his relatives. The testimony of those who accompanied Nelson is consistent with the ballistic tests, which indicate that the bullets used in the massacre belonged to the Departmental Police Force and the National Army.

IV. THE FRIENDLY SETTLEMENT AGREEMENT

15. On July 29, 2002, the representatives of the State and the petitioners signed a friendly settlement agreement. This document accepts the terms of the agreement signed on May 27, 1998 in a first attempt to reach a friendly settlement in this matter. The agreement recognizes the State's responsibility for violation of the American Convention, the right to fair trial, and individual reparation to the families of the victims, as well as a social reparation

element with health and education components and a productive project. The Report envisages the installation of a park with a monument in the city of Medellín to serve as a historical commemoration of the victims. Likewise, the Commission observes that the provisions of the agreement reflect the recommendations of the Committee to Promote the Administration of Justice, as well as those included in Report No. 123/01 of the Commission.

16. The agreement includes a mechanism to monitor fulfillment of the commitments, which consists of informing the Commission jointly at each regular session on the progress achieved, without detriment to ongoing information and communication that the parties will maintain during the implementation of the commitments, through periodical meetings that make it possible to conduct a specific follow-up of its implementation.

17. Before providing a detailed report of the commitments that were made in the agreement of July 29, 2002 and their degree of fulfillment, the Commission wishes to express its satisfaction at the terms of this agreement and to express its sincere appreciation to the parties for their efforts in reaching a friendly settlement based on the purpose and objective of the American Convention.

A. Recognition of responsibility and right to justice

18. In the friendly settlement agreement, the State recognized international responsibility for violating the American Convention in the following terms:

The State reiterates the contents of its communication of January 2, 1998 addressed to the Commission and publicly announced by the President of the Republic on July 29, 1998, recognizing its responsibility for the violent events in which the following children were killed: 8-year-old Johanna Mazo Ramírez, 17-year-old Johnny Alexander Cardona Ramírez, 17-year-old Ricardo Alexander Hernández, 15-year-old Giovanny Alberto Vallejo Restrepo, 17-year-old Oscar Andrés Ortiz Toro, 16-year-old Angel Alberto Barón Miranda, 17-year-old Marlon Alberto Álvarez, 17-year-old Nelson Duban Flórez Villa, and the 22-year-old young man Mauricio Antonio Higuera Ramírez; and therefore, in the framework of the Inter-American Convention on Human Rights, it accepts its responsibility for these serious crimes.

19. As for the right to justice of the victims, their families, and society, the agreement provides that:

Taking into account that the criminal investigation for the serious crimes that led to the death of the children, previously remained under investigation for more than two years, the Committee to Promote the Administration of Justice was instructed, among other things, to guarantee due process of law in the performance of the judicial and disciplinary proceedings, as well as to identify evidence and promote its processing in the judiciary.

Despite the efforts made by the Follow-up Committee to monitor the recommendations made by the Promotion Committee, the investigations conducted in the criminal courts of law were not an effective mechanism to secure justice and to avoid the atrocious crime from remaining unpunished.

Partly because various pieces of evidence that were recommended by the Promotion Committee did not yield the results that they could have produced if they had been processed on time and in part because irregularities appeared, as pointed out by the Follow-up Committee itself^[6] and the Surveillance Unit of the Office of the Attorney General of the Nation.^[7]

On the basis of a review of the current status of the investigations, it was found that, although on November 14, 1994 the Office of the Prosecutor General of the Nation confirmed the first-instance decision of the Office of the Prosecutor in Charge of Human Rights whereby an order was issued to dismiss the three active members of the National Police Force for their participation in the massacre of the children, the Fourth Specialized Criminal Trial Court of Medellín issued a judgment of acquittal on April 30, 2002 in the proceedings that had been filed against one of these persons for covering up the crime. This judgment is now being appealed with the Superior Court of Medellín.

Because of the above, the Government and the petitioners adopted as part of the agreement the review on "Judicial Protection and Guarantees" that the Inter-American Commission made in its Report No. 123/01 of November 2001, which points out, among other matters:

54. Article 25 of the American Convention establishes the obligation of States to guarantee access to justice and to provide due judicial protection to persons under their jurisdiction." (...)

55. The American Convention obliges the States to prevent, investigate, identify, and punish the perpetrators of, and those covering up, violations of human rights, especially when they affect the fundamental rights such as life. In those cases where the violation of a protected right has as a consequence the committing of a criminal act in the framework of domestic law, the victims or their families are entitled to have a regular court, rapidly and effectively, identify those responsible, try them, punish them accordingly, and effectively enforce the punishment.

56. As indicated by the Inter-American Court:

"Article 25, with respect to Article 1 (1), obliges the State to guarantee all persons access to the administration of justice and, in particular, to simple and prompt recourse so that those responsible for the violations of human rights can be tried and the damaged suffered can be compensated for. As indicated by this Court, "Article 25 is one of the fundamental pillars not only of the American Convention but also of the rule of law in a democratic society according to the Convention."^[8]

The contents of Article 25 are closely related to Article 8(1) which enshrines the right of all persons to be heard in a fair trial and within a reasonable amount of time by an independent and impartial judge or court and grant to the family of the victims the right to have the death of their loved ones effectively investigated by the authorities, that legal proceedings be brought against those responsible, that they be punished accordingly, and that damages suffered be repaired.^[9]

(...) in the present case, despite ballistic evidence, the testimony of the child Nelson Duban Flórez before his death, the testimonies of those living in Villatina and the State's own recognition of responsibility, almost one decade has elapsed without those responsible being brought to trial or punished.
(...)

58. In the present case, the delay has not only deprived the families of the victims of an effective action to obtain justice and reparation for a decade, it has also contributed to undermining the possibility of bringing those responsible to trial on the basis of existing evidence and continues to generate risks for the lives of the witnesses and the families of the victims.

(...)

62. In view of these considerations, it should be concluded that, in the present case, the State has not secured the necessary means to fulfill its obligation to investigate the extra-judicial execution of the victims, to bring to trial and punish those responsible, and to provide reparation to the families of the victims. The execution of the victims in the present case remains unpunished, which, as indicated by the Court, "promotes the chronic repetition of violations of human rights and the total defenselessness of the victims and their families.

On the basis of the above, the State recognized that, despite the results of the disciplinary investigations, it has not fulfilled its obligation to provide due judicial guarantees and protection to the victims and their families pursuant to the provisions of Articles 8 (1) and 25 of the American Convention and expressed its will to continue investigating the facts that would enable them to identify, bring to trial, and punish those responsible.

B. Measures to repair the damage caused to the victims and their families

20. As part of the measures for full reparation, the agreement includes measures aimed to repair the damage individually and collectively in its different aspects. As for pecuniary compensation, the agreement points out that:

Considering that the Government of Colombia recognized its international responsibility for the serious crimes committed on November 15, 1992, the National Police Force, in compliance with the recommendations of the Promotion Committee, reached an agreement with the families of the victims who filed timely proceedings for compensation for damages with the Administrative Court of Antioquia. This conciliation was approved by means of a ruling issued on March 12, 1998.

Taking into account that the Inter-American Commission on Human Rights, in Report 123/01, declared that the State was responsible and made recommendations, which include that of :

"2. Providing full reparation to the families of the victims in conformity with the commitments made for compensation (...) during the attempt to reach a friendly settlement."

Taking into account also that the Rapporteur for Colombia of the Inter-American Commission on Human Rights addressed the Minister of Foreign Affairs last May 16th and indicated that this recommendation comes under Law 288, for those who, according to what was ascertained during the proceedings with the Commission, did in fact suffer damages as a consequence of the events that took place in Villatina in November 1992.

The Government of Colombia, as a result, through the Committee of Ministers established by Law 288 of 1996, ruled that the matter was with merit by means of Resolution 06/02 for compliance with Report No. 123/01 of the Inter-American Commission on Human Rights, in the terms and for the purposes of Law 288 of 1996; so that, according to the Committee, there are the factual and legal grounds as envisaged in the Political Constitution and in applicable international treaties.

In this regard, the Government, in addition to enforcing Law 288 of 1996, by means of the corresponding proceedings, pledges to estimate the amounts for the reparation of damages, applying for this purpose the parameters that were

used in the case of Trujillo, in view of the commitments made in the Promotion Committee,^[10] recognition of the State's responsibility, the Commission's recommendations, and precedents of law.

Resolution number 06/02 of July 22, 2002 of the Committee of Ministers established by Law 288 of 1996 and the commitment of the Director General of the National Police Force to estimate by conciliation the amounts of the compensations for the families of the victims who have not been fully compensated are part of the present friendly settlement agreement.

The Commission has learned that substantial progress has been made in the process of estimating and paying the compensatory amounts due to the families of the victims.

21. As for the measures of collective reparation involving health, the agreement points out that:

We the parties agreed, in February 1996, on the development of a project aimed to improve basic health care for the inhabitants of Villatina, which has been materialized with the building of the Health Center that is currently functioning in the neighborhood.

As part of the obligation of the Colombian State to commemorate the victims and make moral amends and provide reparations to their families, the State pledged to place a memorial plaque in the Health Center, which shall be installed prior to the next regular session of the Inter-American Commission on Human Rights, with the following text:

"This Health Center was built in memory of 8-year-old Johanna Mazo Ramírez de 8 años, 15-year-old Giovanni Alberto Vallejo Restrepo, 17-year-old Johnny Alexander Cardona Ramírez, 17-year-old Ricardo Alexander Hernández, 17-year-old Oscar Andrés Ortiz Toro, 16-year-old Angel Alberto Barón Miranda, 17-year-old Marlon Alberto Álvarez, 17-year-old Nelson Duban Flórez Villa, and 22-year-old Mauricio Antonio Higuera Ramírez, who died on November 15, 1992 in the district of Villatina in Medellín.

The Colombian Government publicly recognized its responsibility to the OAS Inter-American Commission on Human Rights and to Colombian society for the violation of human rights in these serious crimes, chargeable to agents of the State. Likewise, it expressed its feelings of solidarity and condolences to the families of the victims.

This action of moral redress and atonement will not be enough to ease the pain that this crime has caused, but it is an obligation of the State, a fundamental step to do justice and so that crimes of this nature do not occur again.

Medellín, (date)"

The plaque will not bear the name of any national, departmental or municipal authority and will be installed during a public ceremony attended by representatives of the National Government and local government, the families of the victims, and the petitioners.

The Commission has learned that measures aimed at installing the plaques to the memory of the victims in the health center have been taken.

22. Regarding the collective reparation measures related to education, the agreement

points out that:

In fulfillment of the commitments made in February 1996, the Government of Colombia pledged to remodel the San Francisco de Asís Primary School so that it could also provide basic secondary education services. This project has been developed gradually since 1999, as a result of which the physical premises have been satisfactorily refurbished and classes have been gradually opened.

The Government of Colombia, in compliance with the recommendations contained in Report 123/01 of the Inter-American Commission, pledges to continue without interruption the process of opening grades up to eleventh grade.

23. Regarding the collective reparation measures involving the implementation of a productive project, the agreement establishes that the parties agreed to start up a new project on the basis of the following terms:

The parties agreed in February 1996 that the National Government would draw up, submit, and promote among public institutions in charge of this matter, along with the respective feasibility study, a project for creating jobs especially aimed at the neighborhood's young people. Afterwards, at the request of the families of the victims, it was determined that the project would be aimed at the affected families and a process started up to install a center for storing building materials, which ended up by being grocery store.

In the development of the productive project of the storage center, administrative irregularities seem to have occurred and they need to be clarified through the corresponding legal mechanisms so that the competent authorities can determine what occurred and, if the facts warrant it, those found to be responsible can be punished.

Because of the above, the parties agreed to start up a new productive project, taking into account the factors that led to the failure of the previous one. At the suggestion of the Secretary of Government of Medellín, we the parties have agreed to include the new productive project in the PARE Program headed by the Archdiocese of Medellín.

On May 29, the petitioners informed the Government that the families of the victims had indicated their decision to implement a project aimed at setting up and running a sewing shop.

On the basis of this information, the Administrative Department of the Office of the President and National Planning confirmed that resources had been obtained to implement this project. In addition, the DAPRE specified that it would carry out the due and necessary legal procedures so that it would be that central entity that would give the money to the Archdiocese of Medellín and would oversee the agreement drawn up for this purpose. It was also agreed that both the movables and real estate assets that the Municipality of Medellín had purchased for the previous project would be for the sewing shop.

On July 22, the Ministry of Foreign Affairs, the Administrative Department of the Office of the President of the Republic, and the Interdisciplinary Group for Human Rights met with the Archdiocese of Medellín and some of the mothers of the victims to discuss the terms whereby the PARE Program will serve as a support for the implementation of the productive project chosen by the community. At this meeting, the Archdiocese accepted to collaborate and granted the parties the means within its reach to fulfill the commitments as

specified by the petitioners and the Government.

Taking into account that one of the commitments acquired by the Government in the framework of the friendly settlement was to draw up and implement a nonformal education program aimed at the community and that this commitment has still not been implemented, we the parties have agreed that the initial phase of the productive project, that is, the one involving participatory planning, in which the mothers of the victims receive training on community projects and participate in the formulation of their own projects, shall be funded without the involvement of resources allocated for the project by the National Government. Regarding this, the Government has reached a solution by involving the collaboration of the FIEL Institute in the city of Medellín, which has expressed its readiness to take up this first stage in coordination with the Archdiocese of Medellín.

Finally, the parties agree that the petitioners to the IACHR, representatives of the families of the victims, will be able to supervise at any time implementation and execution of the productive project.

On August 13, 2004, the petitioners reported that, at the end of the year 2003, when the Productive Project was starting up commercial production and about 30% of the funds given to the UNDP had still not been implemented, the National Government ordered reimbursement of these funds to the General Department of the National Treasury.^[11] The petitioners claim that, because of this measure, the company came to a standstill, several of the obligations that were accepted failed to be fulfilled, and the premises that had been remodeled had to be returned to their owner for default. On August 17, 2004, the Commission requested information from the State on compliance with item (c) of the friendly settlement agreement signed on July 29, 2002 and granted a 15-day deadline for the State to reply. On September 23, 2004, the State presented its communication to the Commission in which it recognized that, at the request of the Ministry of Finance and Public Credit, it was necessary to reimburse 30 million pesos to the National Treasury, adding that, thanks to efforts by the Presidential Program of Human Rights and International Humanitarian Law, 40 million pesos had been allocated to replace the amount that was repaid to the State.^[12]

24. On March 01, 2005, the Colombian State and the petitioners presented to the IACHR a joint report from February 17, 2005, informing about the contents of the commitments implementation concerning the support to the productive project, including the payment of damages for the standstill above mentioned. Likewise, in that document both parties required the approval and publication of the friendly settlement agreement, in accordance of Article 49 of the American Convention.^[13]

25. As for the collective reparation measures to commemorate the victims, the agreement established that:

The National Government and the petitioners wish to reiterate, in this friendly settlement agreement, that the purpose of building a work of art is to commemorate the children, as well as make moral amends and provide reparations to the families of the victims. Therefore, any project that is developed in this direction should count on the support and interest of the community, the families, and the petitioners to IACHR.

The parties recognized that, in the first stage of looking for a friendly settlement, conditions were suitable for implementing and erecting a monument, including the corresponding budget appropriations, but for different administrative reasons that should be the target of an investigation by the competent authorities, they decided that the project could not be carried out.

Because of the above, after identifying the matters that prevented this commitment from being fulfilled in the past, we the parties agree to define the following items regarding the building of the monument, after the National Government discussed it with the Municipality of Medellín:

(1) The monument will be built in one of the three parks of the city of Medellín: Parque del Periodista (Maracaibo & Girardot), Parque San Antonio (Av. Oriental) or Plazuela del Teatro Pablo Tobón Uribe (Av. La Playa). The Municipality of Medellín shall choose from among these alternatives. The Office of the Mayor of Medellín, in turn, has five days as of the date of the signing of the inter-administrative agreement to obtain the necessary permits issued by Municipal Planning.

(2) The petitioners and the Office of the Mayor of Medellín shall each submit two names of artists to invite them to present proposals, in accordance with the terms of reference that the Administrative Department of the Office of the President will be providing in due time.

(3) The parties agreed that the petitioners would have the right to suggest some parameters in the terms of reference for hiring the artist. In conformity with the above, the petitioners have requested that the following be taken into account: a) that the work of art be made of bronze, b) that the work of art be comprised of 9 elements which should be clearly identifiable as the 9 victims, c) that the project include the complete remodeling of the public space that will be used, and d) that the artist have some personal or professional experience in the field of human rights or in similar or related areas. The parties agree that the Ministry of Foreign Affairs shall transmit to the DAPRE the suggestions of the petitioners, which shall be taken into account in due time, as part of the contracting process.

(4) The contracting process will be conducted directly by the Administrative Department of the Office of the President, which will also supervise implementation of the contract, without detriment to the collaboration of the Ministry of Foreign Affairs and the petitioners in the latter activity. In this hiring process, on the basis of what was agreed, a proposal evaluation committee will be set up with the participation of a person designated by the Ministry of Foreign Affairs, one by the petitioners in coordination with IACHR, and one by the Office of the President of the Republic.

The National Government confirms that the resources that were earmarked to build the monument commemorating the killed children have been approved and appropriated.

As for the text that should appear on the plaque of the monument, we the parties have agreed on the following:

"To the memory of Johanna Mazo Ramírez (8 years old), Giovanni Alberto Vallejo Restrepo (15 years old), Johny Alexander Cardona Ramírez (17 years old), Ricardo Alexander Hernández (17 years old), Oscar Andrés Ortiz Toro (17 years old), Angel Alberto Barón Miranda (16 years old), Marlon Alberto Álvarez (17 years old), Nelson Duban Flórez Villa (17 years old) and Mauricio Antonio Higuera Ramírez (22 years old), killed on November 15, 1992, in the district of Villatina in Medellín.

The Colombian Government recognized its responsibility to the Inter-American Commission on Human Rights of the OAS and to Colombian society for the

violation of human rights in this serious crime, chargeable to State agents.

This monument is a way to commemorate the victims, make moral amends and express atonement to the families, and although it is not enough to ease the pain produced by this action, it has become a fundamental step for justice to be done and to remind Colombians that crimes of this nature cannot be repeated.

Medellín, (date)."

The plaque will not bear the name of any national, departmental, or municipal authority and it will be installed during a public ceremony attended by representatives of the National Government and local government, the families of the victims, and the petitioners.

As for the implementation of this measure, the Commissioner at that time, Robert K. Goldman, who was a member of the jury to select the project of the monument envisaged in the agreement, expressed his viewpoint on the different proposals on the basis of the terms of reference issued by the Administrative Department of the Office of the President of the Republic of Colombia on December 30, 2002. Likewise, on May 12, 2003, the Commission requested the good offices of the Mayor of Medellín to speed up the negotiations that had yet to be done. Finally, on July 13, 2004, the ceremony to unveil the monument was held in the Plaza del Periodista in the city of Medellín. The ceremony was attended by the mothers of the victims, the Archdiocese of Medellín, the Vice-President of the Republic, the Minister of Defense, the Director of the National Police Force, authorities from the Office of the Mayor of Medellín, the petitioners in case 11.141 and the IACHR, represented by Commissioner Susana Villarán^[14]—who replaced Robert K. Goldman as rapporteur for Colombia in January 2004—and the Executive Secretary, Santiago Cantón.

26. The agreement envisages its publication and distribution on the basis of the following terms:

Taking into account that the present Friendly Settlement Agreement contributes substantially to full reparation for the victims of the violations of human rights, and constitutes as well a mechanism to promote in the future the speedy, timely, and effective implementation of judicial investigations to prevent crimes of this nature to remain unpunished, we the parties agree that the National Government shall publish and disseminate, in coordination with the petitioners, five hundred copies of the complete text of the agreement, including the documents that are part of it and its annexes.

In view of the characteristics of the agreement and the joint work of the parties to agree on its terms in conformity with the purpose and objective of the rights protected in the American Convention, the Commission highlights the importance of this commitment and its fulfillment.

V. CONCLUSIONS AND RECOMMENDATIONS

27. On the basis of the preceding considerations and by virtue of the procedure set forth in Articles 48(1)(f) and 49 of the American Convention, the Commission wishes to reiterate its satisfaction at the signing of the friendly settlement agreement in the present case, its compatibility with the purpose and objective of the American Convention, and also to highlight the efforts of the parties to reach an agreement and implement it.

28. The Commission wishes to highlight the State's fulfillment of the substantive part of the commitments made in the agreement. At the same time, it calls upon the State to continue to fulfill the remaining commitments that were made and to cooperate in the corresponding follow-up process.

29. By virtue of the considerations and conclusions set forth in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To approve the terms of the friendly settlement agreement signed on July 29, 2003.
2. To urge the State to take the necessary measures to fulfill the commitments that are pending, particularly the obligation to provide the right to a fair trial and judicial protection to the victims and their families according to Article 8(1) and 25 of the American Convention by continuing with the facts investigation, which will allow to identify, judge and sanction those responsible.
3. To continue supervising the fulfillment of the commitments made to ensure a historical commemoration of the victim and access to justice.
4. To publish the present report and include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in Washington, D.C., on the 27th day of October 2005. Signed: Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Commissioners Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez and Florentín Meléndez.

[1] Committee to Promote the Administration of Justice in the cases of Los Uvos, Caloto, and Villatina. See Reports 35/00 and 36/00 in the Annual Report of the IACHR 1999.

[2] Friendly Settlement Agreement of July 29, 2002, paragraph 8.

[3] These measures included the development of education, health, and job creation projects, as well as designing and installing a work of art to commemorate the victims.

[4] Remarks by the President of the Republic in the Public Announcement of the Recognition of the State's Responsibility for the violent crimes committed in Villatina, Caloto, Los Uvos, and the cases of Roison Mora and Faride Herrera.

[5] IACHR Report 123/01, Case 11.141 Villatina Massacre, Colombia, November 16, 2001, paragraph 66.

[6] Report of the Follow-up Committee to monitor the recommendations of the Promotion Committee: *"The Promotion Committee (sic) views with concern the various obstacles that prevented observance of the recommendation made to the Attorney General's Office regarding the procedure of suspect identification in a police lineup, which jeopardized the witnesses that were going to participate in it and that could prevent the individuals responsible for the massacre from being identified."*

[7] Evaluation Report 374/96V of September 30, 1997 of the Surveillance Office of the Attorney General of the Nation: *"In this precarious state of evidence, with official letter D5-1886 of October 3, 1995 the proceeding filed under No. 10.458 of the REGIONAL OFFICE OF THE PROSECUTOR GENERAL OF MEDELLÍN to the NATIONAL HUMAN RIGHTS UNIT, is forwarded concluding without a doubt that both the Regional Attorney General(s) competent in the case and the CTI agents of the Region of Medellín were responsible for almost two years of dereliction of duty, during which time the prior proceedings filed under No. 10.458 were issued from the regional office with extensions of time for testing evidence and would come from the CTI without any action having been taken."*

[8] IAHR Court, *Case of Loayza Tamavo*, Reparations, Judgment of November 27, 1998, paragraph 169.

[9] IAHR Court, *Case of Durand & Ugarte*, Judgment of August 16, 2000, paragraph 130.

[10] According to which: *"The Committee is pleased to note the statement drawn up by the parties in the contentious-administrative proceedings corresponding to the cases of Los Uvos, Caloto, and Villatina, for their wish to strive for conciliation in these cases and their willingness to actively promote the signing of these respective conciliatory agreements. The Committee urges them to sign such agreements. In addition, it invites them to take into account, in the efforts to draw them up, the evidence and information known by the Committee itself and collected by any judicial or disciplinary instance or received by the Committee or by the parties from any other source. It also suggested to the parties that, in the signing of these agreements, they apply the parameters that were followed in the conciliation of the case of the so-called Violent Events of Trujillo "made with the Council of State."*

[11] Communication of the Interdisciplinary Group for Human Rights of August 13, 2004. This situation supposedly stemmed from Law 848 of November 12, 2003, which decreed the Budget of Revenues and Capital Resources

and the Law of Appropriations for the fiscal year extending from January 1st to November 31, 2003.

[12] *Communication DDH 48043 of the Ministry of Foreign Affairs of the Republic of Colombia* of September 23, 2004. It clarifies that, because the contract with UNDP ended on June 30, 2004, the Office of the President has been obliged to implement directly the resources and indicates that it expects to sign contracts for the implementation of available resources during the last week of September 2004. The State has indicated that the resources available in the amount of the 40 million will be disbursed as follows: 30 million pesos for a contract to be signed with Mercaferro EAT, a company comprised of mothers (for inputs and maintenance) and 10 million pesos for a supervision contract to exercise control and surveillance over the project.

[13] "Joint Report about the development of pending commitment of the friendly settlement agreement. Case Villatina (11.141) in study before the Interamerican Commission on Human Rights" dated on February 17, 2005, signed by the Minister of Foreign Affairs, Carolina Barco, the Interdisciplinary Group for Human Rights and the Colombian Commission of Jurists.

[14] At the ceremony, Commissioner Villarán stated: "On November 15, 1992, in the barrio of Villatina Caycedo, here in Medellín, members of the National Police Force executed the children Johana Mazo Ramírez, who was 8 years old, Jhonny Alexander Cardona Ramírez who was 17, Ricardo Alexander Hernández who was also 17, Giovanny Alberto Vallejo Restrepo who was 15 years old, Oscar Andrés Ortiz Toro who was 17 years old, Angel Alberto Barón Miranda who was 16 years old, Marión Alberto Álvarez who was 17 years old, Nelson Duban Florez Villa who was 17 years old, and the young man Mauricio Antonio Higueta Ramírez, who was 22 years old. Most of these children belong to a group called "Builders of the Future." The future was violently taken away from them, they died before their time, and thus their dreams and life ambitions were cut down. In 1995, the representatives of the victims met with the government at an IACHR session to pave the way for a friendly settlement that culminated in the establishment of a Committee to Promote the Administration of Justice, which was set up in this city on September 29, 1995. Various years passed, agreements on justice and reparation were signed. It was not easy, it was not just matter of having the Colombian State recognize its international responsibility, which was done publicly by the President of the Republic on July 29, 1998. Not all the agreements materialized and the friendly settlement process ended in 1998. In November 2001, our Commission issued a report with very concrete recommendations: among them, guarantees for an investigation that would identify, try, and convict the perpetrators, full reparation for the families, and the pronouncement of guarantees that actions as atrocious as this one would never occur again. In 2002, the friendly settlement was taken up again on the basis of the State's responsibility, the right to justice, individual reparation, social reparation in health, education, a productive project and a monument that we are unveiling today. I repeat, it has not been an easy going, but today the Commission congratulates itself for having fulfilled the mission that was entrusted to it by the American Convention on Human Rights. And it does so to recall that it has no meaning other than that of remembering these children to the heart of this society. It is also doing it to send a message through this monument: it involves human beings, children that the State should have provided special protection to and did not. On the contrary, it violated their right to life, denied their families for a long time their right to justice and reparation, adding defenselessness to the pain of an irreparable loss. The message is that, as of today, the children of Medellín will be effectively and especially protected. The IACHR is happy that both the families and the government have trusted in international mechanisms for the protection of human rights and have found effective solutions despite the difficulties that were encountered on the way. Nine persons, eight of them children, were executed. We should not be counting them, each one is unique and impossible to duplicate. When we refer to the victims, we should not count them, out of respect for their inherent dignity and humanity, we should only recite their names and by doing so return them symbolically to the lives of their families and to society as a whole. May this be the occasion to redouble our commitment to life and long-lasting peace for this dearly beloved people of Colombia. We owe it to Johana, to Jhonny, to Ricardo, to Giovanny, to Oscar, to Ángel, to Marion, to Nelson, and to Mauricio. "Remarks by Commissioner Susana Villarán at the unveiling of the monument erected to the memory of the victims of the Villatina massacre," Medellín, September 13, 2004.



INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

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)

The United States rejects Commission Report 85/00 of October 23, 2000, in its entirety. The United States respectfully requests that the Commission publish the following Response of the United States in the next Annual Report of the Commission, if Report 85/00 is published.

INTRODUCTION

In response to the petition of April 10, 1987 in the above-referenced case, the United States has submitted four lengthy and detailed written filings to the Commission dated:

October 9, 1987

January 19, 1988

July 29, 1988

March 22, 1999

In addition, the United States has participated vigorously in hearings before the Commission, notwithstanding the Commission's disregard for the consistently stated objections of the United States to the convening of those hearings and to the Commission's overall manner of proceeding in this case.

More than thirteen years after the petition against the United States Government was filed in this case, the Commission issued Report 85/00 on October 23, 2000 setting forth the following conclusions:

1. The Status Review and Cuban Review Plans do not constitute effective domestic remedies within the meaning of Article 37 of the Commission's Regulations, and, therefore, their continuing availability to Petitioners does not bar consideration by the Commission of their claims.
2. The United States has violated Articles I, II, XVII, XVIII, and XXV of the American Declaration of the Rights and Duties of Man.

In accordance with these conclusions, the Commission proceeded to make the following recommendations to the United States in Report 85/00:

1. For all Petitioners remaining in custody, status reviews should be conducted "as soon as is practicable" to ascertain the "legality" of their detentions under "the applicable norms of the American Declaration."
2. Laws, procedures, and practices should be reviewed to ensure that all aliens who are detained, including aliens who are considered "excludable" under immigration laws, are afforded full protection "of all of the rights established in

the American Declaration, in particular Articles I, II, XVII, XVIII, and XXV.”

For the United States, the objectionable nature of the Commission’s handling of this case was most recently demonstrated by the Commission’s April 4 decision (communicated to the United States in a letter of April 9, 2001) to publish its report without the courtesy of further consultations and coordination with the United States. This action was taken by the Commission notwithstanding its knowledge that the United States had for several months been carrying out in good faith the very difficult task of attempting to compile complete and accurate factual information on the most relevant individual cases identified either by the Commission in its report or in recent submissions to the Commission.^[1]

Moreover, in its January 29, 2001 extension request letter, the United States alerted the Commission to the fact that its consideration of this case might be barred by its own Rules of Procedure, specifically the article on Duplication of Procedures (Article 33 in the Rules effective on May 1, 2001).

Since the United States has now determined that Article 33 does indeed bar Commission consideration of this case, the Commission could have avoided embarrassment and damage to its credibility by delaying publication of Report 85/00 until after consideration of the forthcoming United States response, or at least by inquiring of the United States as to the substance of the claimed duplication.

For the record, the United States did request an extension of time to reply, but was granted only a short extension by the Commission. In the view of the United States, the Commission’s arbitrary and heavy-handed procedural conduct throughout this case raises very serious questions concerning the Commission’s impartiality.

From the outset of this case, more than a decade ago, to the present, it is the position of the United States Government that the written submissions of the United States and its presentations at hearings of the Commission have established overwhelmingly that the Commission should immediately have declared the petition inadmissible or, in the alternative, should have promptly dismissed it if the petition were somehow found admissible.

SUMMARY OF RESPONSE

Article I. 1. The United States disagrees with the conclusions of the Commission in this case, rejects the Commission’s conclusions, and requests that the Commission withdraw, and refrain from publishing, Report 85/00.

2. With regard to each implication or direct assertion in the Commission’s report that the American Declaration of the Rights and Duties of Man itself accords rights or imposes duties, some of which the United States has supposedly violated, the United States reminds the Commission that the Declaration is no more than a recommendation to the American States. Accordingly, the Declaration does **not** create legally binding obligations and therefore **cannot** be “violated.”

3. With regard to the substantive legal and policy aspects of this case, the United States maintains all of the points made repeatedly to the Commission in the four major written submissions cited above, and during hearings before the Commission in this case. The United States will not reiterate all of those points in full here, but asserts the continuing validity of all points previously made, and refers the Commission to the record in this case.

The United States will emphasize in this submission, as concisely as possible, certain fundamental and irrefutable arguments by the United States that should have been decisive in persuading the Commission to find the petition

inadmissible, or to dismiss it, long ago. Regrettably, the Commission failed to give adequate weight to these points, which, to say the least, are not reflected or adequately acknowledged in the Commission's report.

4. With regard to the facts of as many as possible of the individual cases mentioned either in the Commission's Report or the March 22, 1999 submission of the United States, updated reports are set forth in the Addendum to this Response.

5. From a review of the Commission's Report, it is the impression of the United States that virtually the entire decision rests on, or flows from, the Commission's unsupported and insupportable assertion that there exists in international human rights law a rebuttable presumption that everyone has a right to freedom, in whatever country he is located and no matter what his legal or immigration status in that country. The Commission cites no legally binding international instrument to which the United States is a Party or any other source of widely accepted or respectable authority for this proposition. In fact, the Commission has fashioned this so-called international human right out of whole cloth. No such right exists.

6. In addition to the arguments previously made for a finding of inadmissibility or dismissal of the petition, the United States wishes to inform the Commission that the petition duplicates the work of the United Nations Commission on Human Rights, and therefore must be dismissed in accordance with Article 33 of the Commission's regulations.

In particular, Article 33 provides that the Commission shall not consider a petition if its subject matter "essentially duplicates" a petition "already examined and settled by another international governmental organization of which the State concerned is a member." The issues raised by the petition in this case and the petitions (or "communications") submitted to the UN Commission on Human Rights in a so-called 1503 process case resolved on April 7, 1997 are essentially identical in all significant respects. This is particularly true with respect to the issues of detention of Mariel Cubans and their claim to have a right to be admitted into the United States.

If this Duplication of Procedures prohibition against Commission action has any meaning whatsoever, the exceptions stated in Article 33 cannot be interpreted (or in any way "stretched") to apply in this case. In short, Article 33 applies to this case, and the Commission is barred from further consideration of the petition.

The United States has not raised the duplication issue previously because, like this Commission's process, the 1503 process of the United Nations is confidential. Consequently, the United States did not wish to mention the 1503 proceedings of 1997 in this case at all.

In addition, however, the United States also did not do so because the United States considered it unnecessary. The United States could not have imagined that the Commission would not only disregard the case for inadmissibility and dismissal, but would purport to create international human rights that do not exist, and never have.

At this stage, therefore, the United States has no choice but to invoke Article 33 and to inform the Commission that a superior body, the United Nations Commission on Human Rights, voted on April 7, 1997 to discontinue consideration of a Mariel Cuban case that "essentially duplicates" (using the key term in Article 33) the petition in this case. The margin of decision by the UN

Commission on Human Rights was 45 to 2, with 4 abstentions.

7. The most relevant provision of international (treaty) law binding upon the United States is Article 12, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR), which declares:

“Everyone **lawfully** within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” (emphasis added)

However, this right and the right to leave any country, including one’s own, are subject to the potential restrictions set forth in paragraph 3, even for those lawfully in a State’s territory. Those restrictions must be provided by law and be consistent with the other rights recognized in the ICCPR, but nevertheless give the State broad authority and discretion, since restrictions may be based on national security, public order, public health or morals, or the rights and freedoms of others. Only paragraph 4 of Article 12 articulates a right that is absolute and can fairly be considered customary international law:

“No one shall be arbitrarily deprived of the right to enter his own country.”

It is exclusively Cuba’s failure to respect this international norm that has placed the petitioners in the situation about which they complain, not any act or omission by the United States. The fact that Cuba has not submitted to the jurisdiction of this Commission does not justify the Commission focusing its attention on the only other available target in this case, the United States.

8. With regard to Article 12(1) of the ICCPR cited above, it is unchallenged that petitioners have never been lawfully in the territory of the United States. Their presence has been unlawful from the outset. Put differently, they have never had a lawful basis for being in the United States. It is absurd to claim that people who have no legal right to be in a country, whose presence there is not lawful, and who have unquestionably shown that they pose a danger to the community, nevertheless somehow have a right to be at liberty in that country, or at the very least enjoy a rebuttable presumption in favor of being at liberty.

GENERAL DISCUSSION

The petitioners are approximately 367 Cuban nationals who arrived in the United States in 1980. Many of them were taken from Cuban jails and sent here during the mass exodus of more than 125,000 undocumented aliens who illegally came to this country when Fidel Castro opened the Port of Mariel to Cubans who wanted to leave that country (“Mariel Cubans”).

The petitioners claim that they are entitled to be admitted into the United States, despite their serious and repeated violations of this country’s criminal laws, and despite the sovereign right of the United States, shared by all other nations, to regulate its borders. They also aver that they are being unlawfully detained, although few of the petitioners are even in custody at this time. All of the petitioners have been paroled into the United States one or more times, and the vast majority presently enjoy that status, many having been released after committing new crimes even while their petition was pending before this Commission.

As noted above, the United States has previously responded in detail to the Petition, and reiterates its consistent position, restated in recent correspondence, and in the four major submissions previously cited that: (1) the Petition is inadmissible because Petitioners failed to exhaust their domestic remedies and the Petition fails to raise any significant issue

under the American Declaration of the Rights and Duties of Man (“American Declaration”), or any other rule of international law; and (2) it fails to articulate any ground for action by this Commission because the detention of criminal aliens lawfully denied admission to the United States is not inconsistent with, and does not “violate,” any provision of the American Declaration, which as a non-binding instrument **cannot** be “violated” in any event.

The Commission's Report (at ¶ 249) acknowledges the serious problems forced upon the United States by the unprecedented influx of the undocumented aliens who illegally traveled to this country in the 1980 Mariel boatlift, compounded by the continuing, unreasonable and unlawful failure of the Government of Cuba to accept the return of all of its nationals. The Report also acknowledges the extraordinarily generous treatment by the United States afforded to the Mariel Cubans, the vast majority of whom have been extended the opportunity for lawful status in this country and, for many, citizenship through a variety of legislative acts.

Likewise, the United States' treatment of the petitioners---inadmissible aliens who committed violent and other serious new crimes in the United States **after** their arrival in the Mariel boatlift--can also only be characterized as generous. The Report's conclusions that the petitioners have been subjected to arbitrary detention or unfairly burdened by inadequate custody review procedures cannot be reconciled with the facts of petitioners' own cases. Most have been released within the United States, despite their clear ineligibility to enter or reside lawfully in this country, and despite the dangerous criminal conduct with which they have repaid this extraordinary hospitality. The Report's conclusion that the fundamental authority of the United States to exclude dangerous aliens is somehow diminished, or that it is compelled by Cuba's irresponsible and unlawful actions to assume the risk of hosting dangerous aliens in its communities, is not supported by any article of the American Declaration. Indeed, the suggestion that such aliens are presumptively entitled to liberty because of the unlawful failure or refusal of their own government to honor its obligations to its nationals, and irrespective of such aliens' individual failure or refusal to comply with the host country's civil and criminal laws, squarely conflicts with several provisions of the same instrument, including Articles VIII, XIX, XXVII, XXIX, XXXIII.

At best, as mentioned above, the Report suggests a heretofore unknown rule of international law, to which no nation subscribes.

In addition to the discussion that follows in response to some of the Report's findings, the United States incorporates by reference here, and respectfully refers the Commission to, its previous responses in opposition to this petition. This exhaustive and informed analysis clearly demonstrates that the actions of the United States in relation to the uninvited and inadmissible aliens who arrived here during the Mariel boatlift have been, and continue to be, entirely consistent with domestic and international law. These actions fully respect the human rights of the petitioners and other Mariel Cubans, all of whom have access to a variety of administrative procedures and independent judicial review to ensure that they are treated justly and humanely.

Moreover, in that the United States continues in its efforts to persuade the Government of Cuba to repatriate Mariel Cubans who cannot or will not live lawfully in the United States, the United States finds the Report (and the decision to publish it) particularly objectionable because of its potential to affect adversely and impermissibly ongoing diplomatic initiatives by the United States to resolve the current impasse with Cuba about repatriation of individuals such as petitioners, as well as efforts by officials of both governments to deter future illegal migration.

The Report's irresponsible assertion that, once here, even illegal migrants are entitled to liberty in the United States, can only encourage further unlawful, inherently dangerous attempts to migrate to the United States, with more loss of life in the process. Without justification, the Commission's Report also represents an inappropriate and significant

intrusion into United States domestic matters, in that it has the potential to hamper, if not actually undermine, efforts by the United States to promote orderly immigration and contain serious concerns related to the illegal presence and removal of dangerous criminal aliens.

Subsequent events, including recent decisions of the United States Supreme Court, among them Zadvydas v. Davis, 533 U.S. ___, 121 S. Ct. 2491 (2001), and the September 11 terrorist attacks in New York and Washington, D.C., underscore the validity of the objections of the United States to the Commission's Report.

These events clearly demonstrate that foreign nationals, including criminal aliens, are afforded meaningful avenues of judicial review in the United States, and provide additional grounds that should compel the Commission to withdraw its novel suggestion, to which no nation subscribes, that one country can force another to admit undesirable or dangerous aliens.

SPECIFIC REPLY POINTS

I. THE CONTINUED DETENTION OF MARIEL CUBANS WHO HAVE NO RIGHT TO ENTER THE UNITED STATES DOES NOT VIOLATE INTERNATIONAL LAW.

A. A State Has No Obligation Under International Law

To Admit Aliens Into Its Territory Whose Presence
It Deems To Be Harmful

The detention of dangerous aliens who have committed serious crimes or who otherwise pose a danger to themselves or the community is a lawful exercise of the sovereign authority of the United States to regulate the entry and presence of aliens within its borders. It is well settled in international law that a State has no obligation to admit aliens into its territory whose presence is not in its national interests or is potentially harmful to its public safety. Rather, every nation enjoys the fundamental sovereign power, essential to self-preservation, to forbid the entrance of foreigners, and to admit them only under such conditions as it may see fit.

There certainly is no known principle of international law, let alone any binding obligation, that compels one nation to accept the dangerous criminals of another, even when they have been expelled and effectively exiled by their own government. A sovereign State has the right to protect its society, and to do so through the exclusion of aliens from its territory, for economic, political, social and other reasons it deems critical to the well-being of its citizens and lawful residents.^[2]

In fact, the only internationally recognized right that is being violated (under customary international law for non-Parties to the International Covenant on Civil and Political Rights such as Cuba) in the petitioners' cases is the right of everyone to return to his country of nationality. As noted above and repeatedly in previous submissions, this right is being violated by the Government of Cuba, not the United States.^[3] The United States reiterates that the petitioners' complaint and the Commission's concerns should be addressed to Cuban officials, not the United States.

No reasonable reading of the American Declaration in general or the particular articles cited in the Report contradicts these principles, or supports the conclusion that an alien has a presumptive right to liberty in any country other than his own, or the contention that a foreign government may effectively dictate the admission of its undesirable and dangerous citizens by unlawfully expelling and exiling them to another State.

As exhaustively demonstrated in the previous submissions by the United States in this matter, detention of dangerous, illegal migrants does not violate international human rights

law or any other universally accepted principle of international law. Instead, detention is a recognized, legitimate means, under both domestic and international law, of enforcing a State's inherent sovereign right and power to regulate immigration into its territory.

Nonetheless, detention is neither the goal of United States immigration law, nor the only means of enforcement when an alien cannot be promptly returned to his own or a third country. Less restrictive alternatives are permitted under the immigration statute, including discretionary parole or other supervised release into the community to await repatriation. Such alternatives, however, are reasonably conditioned upon the lawful conduct of the alien when released. Where less restrictive measures have proved unworkable, or inadequate to prevent the resumption of violent or recidivist criminal conduct, detention is an appropriate means of enforcement in order to prevent the very harm to which the regulation of immigration is addressed.

Court rulings that have sustained the authority of the Attorney General under the immigration laws to detain Mariel Cubans who are lawfully excluded, but who are stranded here by the human rights violations and otherwise unlawful actions of their own government, and who cannot be safely released into the community, are not inconsistent with the American Declaration. The articles cited in the Report do not define liberty in abstract or absolute terms, but must be understood in light of the competing right of a State to restrain individual liberties. They do not purport to guarantee admission or release of aliens lawfully excluded under that State's existing laws. (See U.S. submission Jan. 19, 1988).

The Supreme Court of the United States has found detention to be lawful when there is a reasonable apprehension of harm to the community by aliens who have been denied admission and are awaiting their removal to another country.^[4] The Court also held that the Government's objective of protecting the community from the threat of harm posed by aliens lawfully denied admission to the United States is a legitimate objective that outweighs the aliens' interest in securing release from detention.^[5]

The United States accordingly disagrees with the Report's finding (at ¶ 216) that the detention of the petitioners "violates" the American Declaration, particularly in view of the fact that the Declaration **cannot** be violated, as explained above. The United States reiterates that the Declaration does not establish binding legal obligations that can be violated by anyone.

Even if the Declaration were a legally binding instrument, the United States would not be in violation of it. None of the articles cited, including Articles I and XXV of the Declaration, can be construed to suggest that criminal or other undesirable aliens must be admitted to any country they choose, or to dilute the authority of the country to which their own government has unlawfully expelled them to enforce its own laws or promote those interests protected through the regulation of immigration.

The petitioners – -aliens who have never been eligible for admission to the United States, and have been ordered excluded based on their convictions of serious crimes – - cannot force the United States to admit or release them into its territory. Neither the intransigence of their own government, nor the petitioners' illegal presence in this country, changes this analysis or confers on them the entitlement they claim to be at liberty in American society.

Just as the Declaration does not create legal duties, it cannot create rights. The United States nonetheless has provided generous alternatives to detention through the immigration parole statute. Insofar as the government of Cuba has refused, in violation of international law and basic principles of human rights, to accept the return of its citizens, however, it has left the United States with no reasonable alternative except to detain those who pose an unacceptable risk to the communities into which they would be released.

Nor can even an expansive reading of Articles I and XXV displace competing State interests or existing procedures of law in the circumstances presented here. The Supreme Court of the United States has held that, because the alien's presence in this country is illegal, an alien denied admission likewise lacks an enforceable right to be released into the United States, where such release would pose an unacceptable risk of harm to society.^[6] The petitioners remain in this country only because their orders of exclusion have not yet been effectuated. At most, they are entitled to a proportionate, constitutionally adequate procedure for determining whether they should be detained or released pending efforts to secure their repatriation, or further consideration for release. The current custody review procedures meet or exceed this standard.^[7]

The petitioners have not established that they have been denied adequate administrative or judicial process. Rather, all of the petitioners have been released or paroled into the United States one or more times under the very procedures they label inadequate. That parole afforded each of them an opportunity to reside in society, and was forfeited because of the aliens' own unlawful conduct, including violations of the conditions under which they were released to the community by their commission of additional, serious and violent crimes in this country.

Nonetheless, if detained, they are afforded automatic, periodic and meaningful opportunities, at least annually, under the comprehensive immigration parole review procedures for Mariel Cubans established at 8 Code of Federal Regulations § 212.12 (2000), to seek further release within the United States.

These procedures are separate from and in addition to administrative hearings and appeals afforded every alien to determine whether he is eligible to enter or remain in the United States. The allocation of proof under the regulations, moreover, is consistent with the statutory and constitutional allocation of proof applicable to any alien who seeks to be admitted even temporarily into the United States.^[8] As evidenced by the petitioners' own cases, and those of the thousands of other Mariel Cubans who have been paroled under 8 C.F.R. § 212.12 (none of whom has a lawful right to resume their illegal presence in this country, but many of whom have been approved for parole into the United States multiple times), these procedures are clearly sufficient.

Mariel Cubans also have access to judicial oversight of their administrative proceedings, including habeas corpus proceedings to test the legality of their detention and to insure that they are not detained in violation of the Constitution, laws, or treaties of the United States.^[9] Importantly, they are also guaranteed the same rights under law, including the Fifth and Sixth Amendments of the Constitution, as a citizen or any other criminal defendant, before they can be convicted of or punished for a crime.

In providing these procedures, the United States has complied with its obligations under international law to protect the liberty interest of every foreign national on its soil.^[10] It is not, as the Report acknowledges, required to treat citizens and aliens identically in every context. In particular, nothing in the American Declaration or any other rule of international law confers on aliens an absolute right to reside in a country to which they have not been lawfully admitted, or even a qualified right to be released from immigration custody when their release poses an unacceptable danger or risk of harm to the interests of that country. Again, the Commission therefore erred in finding such a right to exist, and the continued detention of the petitioners to be arbitrary or otherwise objectionable under the American Declaration.

B. The Detention of Excludable Mariel Cuban

Aliens Pending Their Removal Does Not Violate Principles of Equal Protection.

The detention of the Mariel Cubans is consistent with Article II of the American Declaration and its principle of equal protection under the law. Immigration detention, particularly in light of the comprehensive custody review procedures for Mariel Cubans in 8 C.F.R. § 212.12, is reasonable and proportional to the governmental objectives of promoting orderly immigration, protecting the community, and insuring enforcement of immigration laws. These objectives require the exclusion of criminal aliens who have no legal claim or other right to live in American society.

Detention for the purpose of enforcing the immigration laws that require the exclusion of inadmissible criminal aliens is not arbitrary, punitive, or in violation of due process.^[11] Before they are ordered excluded from the United States, aliens in the petitioners' circumstances are afforded full hearings before an immigration judge, in which they may be represented by counsel, confront the immigration charges against them, proffer evidence in rebuttal, apply for such relief or protection from removal for which they may be eligible, and submit any other relevant information in support of their applications for admission. They also may appeal adverse orders of the immigration court to the Board of Immigration Appeals, and have the same opportunity for judicial review of their immigration orders as do other similarly situated aliens.^[12]

In addition, if detained, the Mariel Cubans are afforded, in separate administrative proceedings, automatic, periodic reconsideration for parole from custody under the comprehensive procedures at 8 C.F.R. § 212.12. These reviews, during which they may be assisted by counsel or other representatives, provide Mariel Cubans with individualized determinations based on the relevant facts of their particular cases, including any information submitted or developed during annual, face-to-face personal interviews with the review panels.

At the end of each review, the aliens are given a written decision, translated into Spanish, explaining the decisions in their individual cases, and providing reasons for the decisions. Importantly, while an alien's criminal record may have immigration consequences, immigration proceedings are not criminal proceedings, but are civil proceedings. An alien in the United States who is accused of a crime is afforded the same statutory and constitutional safeguards as any other defendant arrested or tried for a crime. Immigration officials do not retry or otherwise go behind the findings or conviction records of the criminal courts. Mariel Cubans nonetheless may test the legality of their immigration detention in federal court by petitioning for writs of habeas corpus.

As demonstrated, here and in previous submissions in response to the petitioners' complaint, detention is recognized by nations as a permissible means of enforcing a state's inherent power to regulate immigration. U.S. immigration law, however, does not mandate detention in every instance of unlawful migration, but authorizes the Attorney General to release aliens in lieu of detention when appropriate pending removal proceedings and repatriation.^[13] The Attorney General, relying on his statutory immigration parole authority, has unquestionably and generously exercised his discretion with respect to Mariel Cuban criminals who cannot be promptly repatriated. Parole under 8 U.S.C. § 1182(d)(5) is not a lawful admission to this country, and therefore does not change the alien's legal status from that of an applicant for admission.^[14] It nonetheless permits an alien not lawfully present in the United States to reside in the community, and to enjoy many of the same benefits (and obligations) of residence in this country, pending proceedings to determine if he is admissible, and pending arrangements to enforce his departure if he is not.^[15]

The statute provides for the temporary, conditional parole of inadmissible aliens "only on a case-by-case basis for urgent humanitarian reasons or for significant public benefit."^[16] These concerns generally include public safety and risk of flight to avoid removal.^[17] The special regulations for Mariel Cubans are fully cognizant of the aliens' unique circumstances,

and as such allow release of aliens who would normally be removed rather than paroled into the United States. For the same reasons, the regulations at

8 C.F.R. § 212.12 speak to related concerns, including an alien's own welfare once he is released into the community, and the likelihood that he may resort to new criminal conduct if he is released without such basic resources as housing and income.

The regulations thus reasonably condition release on the availability of a sponsor, and on the alien's willingness to agree to other reasonable limits, such as complying with civil and criminal laws, or the rules of any transitional halfway house program to which he may initially be released, and subsequent periodic reporting to immigration authorities to ascertain his whereabouts and renew his employment authorization. The Report's implicit criticism of the sponsorship requirement is shortsighted from both the perspective of the petitioners and the United States.

The Report also erred as a matter of law in concluding that Mariel Cubans are subject to detention solely because of their status as inadmissible or excludable aliens. See Report at ¶ 241. This finding is based on the Commission's belief that the United States relies on a legal "fiction" to justify detention of excludable aliens at the border, while deportable aliens are allowed to go free within the United States.^[18] See Report at ¶ 233. The petitioners, and Cubans in general, are in no way discriminated against by the United States in the enforcement of the immigration laws. The relevant U.S. immigration law applies to all similarly situated aliens, and all dangerous, illegal aliens are liable to detention for purposes of enforcing the immigration laws, irrespective of their nationality, or their prior immigration status.

Contrary to the Report's finding, the so-called "entry doctrine" is consistent with basic due process principles, and international law. The doctrine recognizes that aliens who have been admitted and have lawfully resided in the United States are entitled to additional procedural protections before they may be deprived of that status, and the expectancies that go with it, and expelled from the United States.^[19] Neither prior admission nor illicit entry, however, entitles aliens to be free of detention contrary to the interests of the United States pending their removal.^[20]

The Supreme Court has construed the immigration statute to implicitly limit under certain circumstances the duration of post-order detention of aliens who have been admitted to the United States.^[21] The Court, however, has not found any statutory, constitutional, or other rule of law under which other nations could in effect force this country to accept or even temporarily host dangerous aliens by sending such individuals here and refusing to take them back.^[22]

Even then, as demonstrated by the petitioners' own cases, the parole statute and regulations permit the release of inadmissible aliens within the United States, despite their unlawful arrival or presence. The United States' treatment of the petitioners thus conforms with and indeed exceeds this country's obligations under international law,^[23] and is fully consistent with the Declaration.

There also is no evidence that the United States has used its detention authority under civil immigration law to punish or mistreat the petitioners or other Mariel Cubans. All classes of aliens are protected under the Fifth and Fourteenth Amendments of the United States Constitution against inhumane and punitive treatment that violates recognized human rights, and the courts are open to any who protest the legality or conditions of their confinement.^[24] Furthermore, the procedures governing the detention of Mariel Cubans, which are discussed further below, are similar to the procedures governing the detention of other groups of aliens.^[25]

In a related point, the United States also objects to the Report's reference (at ¶ 251) to its "on site visits in this matter," and challenges the Commission's resulting conclusion that detained Mariel Cubans are not provided the same "programs of reform and rehabilitation" that are available to sentenced criminal offenders. This comment again fails to distinguish between the State's interests in criminal and immigration law, including its greater obligations to its own citizens and lawful residents, both those who are leaving prison, and those who live in the communities to which sentenced offenders will necessarily return upon their release from prison.^[26]

Further, the noted concern is an inaccurate description of the resources that are available to Mariel Cuban detainees, particularly those who are housed in Federal Bureau of Prisons ("Bureau") facilities. In such facilities, detainees are permitted (but, unlike sentenced inmates, cannot be required) to work, and likewise are encouraged to participate in available educational programs. The vast majority of detainees are housed in the general population, are involved in work and educational programs with other inmates and detainees, and are allowed to move about the institution independently.^[27]

In addition, the Bureau funds and/or staffs a number of programs solely directed to Mariel Cubans, including a comprehensive residential substance abuse treatment program at Englewood, Colorado, for detainees who are approved for immigration parole, and it oversees the placement of detainees in halfway house programs established for Mariel Cuban parolees and other similar programs willing to accept or sponsor parolees upon their initial release from custody.^[28]

The Bureau also expends significant resources to address such special needs presented by this population, providing bilingual staff and educational services, including English as a Second Language, high school equivalency degree programs, general educational development, drug education and behavior therapy, as well as thorough medical care, and counseling and occupational therapies to Mariel Cubans diagnosed with significant mental health problems.

In this respect, again, the Report's observations cannot be reconciled with its apparent criticism of 8 C.F.R. § 212.12(f), regarding the halfway house and sponsorship requirements when an alien is paroled. The halfway house programs provide paroled Mariel Cubans with housing, health, counseling, employment and other vital services critical to their successful transition from institutional to community living. Aliens released directly to their own custody or even to that of their families rarely access comparable resources. In short, the American Declaration neither contemplates that a government will release dangerous criminal aliens into its communities, nor does it question the authority of the United States in this case to determine how best to allocate its resources and where to spend them in its efforts to address the complex and difficult problems related to the release of criminal aliens who should but cannot be removed from its territory.

Accordingly, there is no basis for the Commission's finding (at ¶ 241) that the treatment of excludable Mariel Cubans is discriminatory and denies them equal protection of the law.

The treatment of the Mariel Cubans subject to detention has been both responsible and humanitarian, as well as reasonable and proportionate in relation to the Government's interests.

The detention is not an end in itself, but rather it is to ensure that the Attorney General is able to fulfill his statutory authority to exclude or decline admission to dangerous aliens whose illegal presence is not in the public interest. The United States does not accept the proposition that it has an obligation or a duty under its own laws or the American Declaration to admit individuals whom no other country, including the petitioners' country of

origin, is willing to accept, simply because such persons have managed illegally to arrive or remain in the United States. Nevertheless, it affords the petitioners procedures that are clearly fair, adequate and effective, and substantially identical to the process afforded other similarly situated aliens, through which they may obtain (and have obtained) their release.

For these reasons, the detention of the petitioners does not deny them equal protection under domestic or international law. While a different, perhaps even more generous policy might be possible, the Commission should refrain from attempting to impose a different policy choice in the form of recommendations that not only discount the sound policy and procedures already in place, but would impair the inherent authority of the United States to protect its borders, and enable foreign governments to compel this country to admit undesirable aliens by the simple expedient of sending them here and refusing to take them back.^[29] The Report's cursory treatment of the latter, sensitive issue in particular is unpersuasive and irresponsible, and suggests a view not shared by the United States or other nations.

II. THE PETITIONERS' DESIRE FOR LIBERTY IN THE UNITED STATES IS SUFFICIENTLY PROTECTED BY PAROLE REVIEW PROCEDURES THAT PROVIDE A REGULAR AND MEANINGFUL OPPORTUNITY TO SEEK RELEASE FROM DETENTION.

A. The United States Already Provides Significant Custody Redeterminations for Mariel Cuban Detainees.

The Cuban Review Plan at 8 C.F.R. § 212.12 is described in detail in the previous submissions of the United States (*see, e.g.*, July 28, 1988 Submission, at 8-11). Through the comprehensive procedures and extensive, individualized review available under Section 212.12, the Cuban Review Plan serves its purpose of providing an effective, and humanitarian, resolution to a longstanding, complex problem that implicates sensitive foreign relations as well compelling domestic concerns. The review procedures allow the Attorney General to identify Mariel Cubans who can be paroled without posing an unacceptable risk to the community. The effectiveness of this effort is absolutely demonstrated by the release of literally thousands of detained Mariel Cubans since the current review procedures were implemented beginning in 1987, and by the significant overall reduction of the number of Mariel Cubans held in detention today.^[30]

Even when parole has been determined to be against the public interest in an individual case, detention of excludable Mariel Cubans has never been properly characterized as unlawful or even "indefinite." The United States has constantly sought the agreement of Cuba, consistent with that government's obligations under international law, to accept the return of those detainees who have serious criminal records or severe mental problems. Like every other criminal alien who is lawfully removed from the United States, where possible and appropriate, this country promptly removes Mariel Cuban detainees who can be repatriated to Cuba.^[31] In addition, the United States has always been willing to permit any detained Mariel Cuban who could obtain admission to a third country to depart.^[32] The evident unwillingness of third countries to accept these detainees further illustrates the reasonableness of the United States' position and its unwillingness to release all of them into the community.

For those who cannot be repatriated, the Attorney General's custody review procedures provide automatic, periodic reconsideration for release, and clear guidelines for the exercise of his discretion under the regulations. When properly viewed in this light, such detention is neither indefinite nor unlawful, but subject to periodic reconsideration, affording at minimum an annual opportunity to demonstrate that release on immigration parole would not be contrary to the public safety or interest.

Indeed, although an alien's parole may be revoked under these regulations because he has violated the conditions of his release, the Attorney General may (and often does) decline to resume custody, if he determines, upon review of the alien's particular case, including the nature and severity of the violation, that on balance revocation is not warranted.^[33]

B. The Cuban Review Plan Meets Prevailing

Standards of Fairness and Impartiality.

The United States disagrees with the Commission's finding (at ¶¶ 220-230) that the Cuban Review Plan at 8 C.F.R. § 212.12 is procedurally deficient. The United States also, of course, rejects any assertion that it "violates" Article XXV of the American Declaration, which cannot be violated as discussed above. Article XXV merely requires that a deprivation of liberty be in accordance with "procedures established by pre-existing law," and that detainees be given a right of judicial review of the legality of detention in a court of law. *Id.* at 17. It does not disturb or address the grounds of exclusion, burden of proof, delegation of authority, or frequency of custody reviews under the immigration statute. The Report's assessment of these factors are not supported by the articles it cites, and reflect a flawed analysis of U.S. law and the extant custody review procedures applicable to Mariel Cubans.^[34]

The review procedures at Section 212.12 allow the Attorney General to identify and release Mariel Cubans who can be paroled without posing an unacceptable risk to the community. As a remedy from the petitioners' perspective, and that of other Mariel Cubans, the Cuban Review Plan speaks for itself. As noted, it cannot be disputed that thousands of detained Mariel Cubans have been released since the current review procedures were implemented beginning in 1987, and that there has been a significant overall reduction of the number of Mariel Cubans held in detention today.^[35]

1. The American Declaration does not require the United States to implement additional, trial-like procedures.

The Cuban Review Plan is entirely consistent with basic principles of due process and with the balance of interests to be accommodated. In one of its most significant decisions on procedural due process, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the United States Supreme Court provided a balancing test for determining the sufficiency of a particular procedure for purposes of due process. While *Mathews* may be drawn from non-immigration jurisprudence, its approach would not require additional procedures even if applicable here:

Due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Here, the balance clearly tips in favor of assuring fairness without exhaustive, adversarial proceedings.^[36] The private interest at stake is the desire of criminal aliens who have been ordered excluded and who have no right to be released within the United States while they await repatriation. That interest must be balanced against the Government's countervailing obligation to protect the public welfare and its absolute sovereign right to control the presence of aliens within its territory. When both of these interests are properly weighed, it becomes clear that the risk of wrongful detention is minimal, for under neither domestic nor international law do aliens illegally present in the United States enjoy an unhampered right to be members of American society despite their lawful exclusion.

On the other hand, the Government's interests in detention are weighty. The United

States is already providing automatic, periodic, time-consuming and individualized consideration to Mariel Cubans who seek parole. Furthermore, the Cuban Review Plan focuses on the difficult task of predicting future conduct if released, not on retribution for past conduct.

The Plan nonetheless meets if not exceeds the provisions of the American Declaration, in that it features many of the protections required by civil proceedings in general, and immigration proceedings in particular, such as the right to legal representation by counsel at no expense to the government, the right to present evidence in support of the aliens' suitability for parole, the opportunity to review and rebut any adverse evidence against them, and the right to judicial review of the legality of their detention by habeas corpus proceedings. No additional procedures are contemplated by Article XXV of the American Declaration, under Mathews, or any other domestic or international standard of due process.

2. The existing custody review procedures for Mariel Cubans state the grounds for detention and release with sufficient clarity.

The United States also disagrees with the Report's finding that the immigration statute and present parole review procedures do not identify the particular grounds for detention. Ample notice of the factors for decision making in this realm is provided to the Mariel Cubans and all other aliens by the statute and implementing regulations, including the events that will require an alien's exclusion or expulsion from the United States, and the scope of the Attorney General's detention and release authority. The principles stated in the American Declaration do not suggest more; they do not suggest that the United States should admit dangerous criminal aliens, or adopt a precise formula essentially eliminating discretion or prescribing an entitlement to release of such aliens within its borders.

The regulations published at 8 C.F.R. § 212.12 provide in general that Mariel Cuban detainees may be granted immigration parole when it is not contrary to the public interest. Specifically, the regulations provide that parole may be granted if the alien is presently non-violent, is likely to remain non-violent, is not likely to pose a threat to the community following his release, and is not likely to violate the conditions of his parole.^[37] The regulations also provide guidance by setting forth specific factors relevant to making this determination, including the detainee's: criminal history; psychiatric and psychological history; disciplinary infractions while in detention; participation in work, educational and vocational programs; ties to the United States including family ties; and any other information probative of a particular detainee's ability to adjust to life in a community, and not abscond, engage in future acts of violence or criminal activity, or violate the conditions of parole.^[38] Detainees are also regularly counseled regarding the program.

These procedures afford more than sufficient guidance to Mariel Cubans regarding the conditions they should meet in order to obtain parole, and the opportunity to show that they have done so, and accordingly merit parole. The result is not arbitrary, even insofar as it takes into account historical or other facts that may not be within the power of an individual to change.

Rather, it affords the detainees individualized consideration of the facts or combination of facts presented each time their specific cases are reviewed. An alien with a serious criminal history may be approved for release if, for example, his present review reflects a combination of such facts as favorable institutional adjustment, participation in educational or work programs, or other evidence of rehabilitation, and community support.

No regulation, particularly one that is directed at assessing likely future conduct, can exhaustively list every possible factor that may be relevant in a particular case to the exclusion of all others, and the instant regulation necessarily preserves the Attorney General's authority to weigh external factors, domestic and foreign, in assessing an alien's need or

suitability for release within the United States.^[39]

These procedures are applied uniformly to all detainees, to ensure fairness and consistency in the decision-making process. The review given to each detainee is an individualized determination of his suitability for release, including an assessment of his danger to the community. Each determination is subject to several layers of review, in order to insure that the detainees receive full and fair consideration for parole. Further, by centralizing the final layer of review, the regulations promote consistency in parole determinations. These provisions, plus the expertise of the senior officers assigned to the Cuban Review Plan, the product of particularized training and years of experience administering the program, adequately safeguard against the generally unsupported and unfair charges of ambiguity, inconsistency, and speculation leveled by the Report (see, e.g., ¶¶ 222, 224).^[40]

Moreover, contrary to the Report's findings (at ¶¶ 219-222), the procedures do not create a presumption against release leading to the denial of parole in most cases. This conclusion is unsupported by the record before the Commission, and contradicted by the facts of the petitioners' own releases on parole, and the sheer number of other Mariel Cubans who have been paroled into the United States, one or more times depending on their personal conduct, since their arrival in 1980. While the immigration statute expresses Congress's clear preference for removal and detention pending removal of potentially dangerous aliens, it also includes the exception of discretionary parole or release for those cases in which removal cannot be promptly enforced. The parole regulations for Mariel Cubans provide a vehicle for release, require a case-by-case review of the custody status of each detainee, and a decision based on updated and accurate information provided by and about the detainee in the course of his case review.

3. The regulations lawfully place the burden of proof on an alien who seeks parole within the United States.

The custody review procedures are not deficient because they place the burden on Mariel Cuban detainees to demonstrate that they merit release. See Report at ¶¶ 220, 228. This allocation of the burden of proof is consistent with the immigration statute specifically, with civil proceedings generally, and with the discretionary nature of the benefit sought. The Report's conclusion to the contrary is based on its incorrect conclusion that the petitioners are being deprived of a right to liberty, irrespective of the interests and laws to the contrary of the host nation in which they find themselves. See Report at ¶ 215; but see Section I A, supra. Importantly, while all of the petitioners are criminal aliens, and thus inadmissible to the United States, their complaint does not concern their criminal proceedings, or the statutory and constitutional safeguards afforded them during their criminal trials.

Rather, it concerns their desire to reside in a territory other than their own. The result suggested here, by the Commission's Report, would require an extraordinary reversal of law. Neither the American Declaration, nor any rule of international law, contemplates such a result. The onus is clearly and reasonably upon the alien who seeks to reside abroad to prove to the satisfaction of the foreign state that he merits the privilege he desires, or at the very least that his liberty within that country will not be harmful to its society.

The United States has a fundamental obligation to protect its own citizens and lawful residents, an obligation that clearly outweighs the petitioners' narrow interest, or desire to be enlarged despite their lawful exclusion from the United States, and commission of serious crimes when previously accorded the same privilege.^[41]

Nor are the petitioners or other Mariel Cubans materially prejudiced by the allocation of proof in their administrative custody reviews. They perhaps know better than anyone else the extent of their criminal conduct in this country and elsewhere, and they are afforded the

opportunity during the review process -- in personal interviews, through written submissions, and with the assistance of their representatives -- to inform the panel of their accomplishments or any other facts which support their request for parole. Again, as clearly evidenced by the facts of the petitioners' own cases, the Report's findings also lack empirical support.

Clearly, the existing procedures are not so onerous as to prevent the petitioners from being able to satisfy their burden of proof, as evidenced by the release determinations in their favor.

4. The parole authority is properly vested in the Attorney General and his delegates.

Nor are the immigration parole review procedures for Mariel Cubans deficient simply because they commit the ultimate decision-making authority to the Attorney General. See Report at ¶¶ 217-225. The return of dangerous aliens to American society despite their lawful exclusion from the United States, or their crimes in this country when previously released, is by nature an exercise of discretion on the part of the sovereign.

Congress has committed that discretion to the Attorney General, the executive official charged with administering the immigration laws. This congressional delegation of authority is permissible under the U.S. Constitution and does not violate due process or international law. The simple combination of investigative and adjudicative functions under one agency does not, without more, violate any standard of due process. Further, the administrative decision-makers, the Attorney General and his delegates, are entitled to a presumption of honesty and integrity in carrying out their statutory and regulatory duties.^[42] There has been no showing that this complex and difficult program has been operated under any lesser standard.

Although discretionary, the exercise of the Attorney General's detention and parole authority is guided by the statutory and regulatory criteria published at 8 C.F.R. § 212.12, which prescribe the procedures for conducting custody determinations, the relevant factors to be weighed in the case reviews, the conditions for release within the United States, and the circumstances under which the aliens may be returned to custody. These guidelines are applied uniformly to all Mariel Cubans liable to detention in the United States, and insure consistency in the decision-making process.

Contrary to the Commission's Report (at ¶¶ 213, 218), a trial or a full-blown adversarial hearing is not required or even practicable to determine if discretionary immigration parole is warranted in a particular case. Again, the extant procedures have resulted in the parole of most of the petitioners, and greatly reduced the number of Mariel Cubans taken or retained in custody. There is no reason to believe that an administrative judge or the numerous federal courts would make better or more consistent judgments about the likelihood that a detainee could successfully integrate into the community, or that the additional burdens on the courts, and the attendant delays for the petitioners as well as other criminal and civil litigants, would result in additional releases or better safeguard public safety and order.

Indeed, such measures as have been implemented, including extensive training to officers involved in the review process, and centralizing the final layer of decision-making, have demonstrably safeguarded prompt, uniform decision making, and promoting the development of necessary expertise.

Lastly, the American Declaration does not compel the United States to vest the parole authority in the judicial branch. As a non-binding instrument, the Declaration cannot oblige the United State to invest individuals with an overriding right to liberty or otherwise diminish the authority of the United States to exclude undesirable criminal aliens.

Further, the principles contained in Article XXV of the Declaration, specifically, do not suggest that detained Mariel Cubans should be given trials or adversarial hearings before law judges to determine whether or not they should be released into U.S. society. At most, they suggest that they be allowed to contest the legality of their detention before a judge, a procedure which they already have under this country's law. Any further decision whether to release or detain Mariel Cubans properly is a matter of discretion for the United States.

5. The regulations provide for prompt, periodic reconsideration of detention status.

Custody reviews under 8 C.F.R. § 212.12 are not so infrequent as to make detention arbitrary. See Report at ¶¶ 229, 230. The existing procedures provide Mariel Cubans with automatic, periodic reconsideration for immigration parole at least annually. In addition, the regulations permit the scheduling of reviews at shorter intervals where warranted by a detainee's particular case, or because of a material change in his circumstances in the interim. [43]

Further, the review process itself is a complex undertaking that occurs over a period of weeks or even months from the time the interviews are first scheduled, requires numerous time-consuming steps, commits significant personnel and resources, and affects all of the responsible agencies.

The current procedures themselves are far from cursory; each case is reviewed by a panel of senior officers, who also conduct a personal interview with the alien, and prepare a written report with their findings and recommendation. That report is forwarded to the Director of the Cuban Review Plan, and again reviewed before a decision is rendered by the Associate Commissioner for Enforcement. [44] Before this process even occurs, time must be allowed for arrangements with the institutions where the detainees are located and the panel interviews conducted, for the selection and travel of the panel members, for notice to the detainees ahead of time, as well as for providing necessary records to the reviewing officers, and for inspection by the detainees and their representatives.

The Commission's Report does not appear to consider the extent of the process involved, nor does it explain how the additional burdens of requiring more frequent custody reviews in every case would materially improve the decision making process.

6. The petitioners are afforded an effective right to judicial review of the legality of their detention.

The United States also disagrees with the Report insofar as it finds (at ¶¶ 232-235) that the judicial review procedures available to Mariel Cubans are too limited in nature and scope to be effective. As have other detained Mariel Cubans, the petitioners may test the legality of their detention by filing petitions for writs of habeas corpus in federal court under 28 U.S.C. § 2241.

There is no time limit for judicial review under the habeas corpus statute, and the scope of review is sufficiently broad to reach constitutional and statutory challenges to a petitioner's custody. A court may order the release by writ of habeas corpus to any individual detained in violation of the Constitution, laws or treaties of the United States. [45]

Judicial review of immigration detention is therefore not limited to determining whether the detaining officials have complied with the procedures, as the Report found, but also extends to the legality of the detention itself. The scope of review may nonetheless vary with the nature of the right at issue.

Under our system of government, reviewing courts owe substantial deference to the Legislative and Executive Branches with respect to matters involving, in particular, foreign

relations, including the formulation, administration and enforcement of immigration policy.^[46] The Commission's apparent view (at ¶ 233) that judicial review cannot be effective unless the United States recognizes an obligation to admit all excludable Mariel Cubans into this country is simply wrong. Under neither domestic nor international law do aliens illegally present in the United States enjoy an unhampered right to liberty, irrespective of their crimes or potential for harm to others.^[47]

Notwithstanding the Commission's report, the courts of the United States have engaged not in limited review of the authority for the petitioners' custody, but in thorough, exhaustive examination of the custody challenges brought by detained criminal aliens, including Mariel Cubans, on statutory, constitutional, and international law grounds.

The majority of courts have held that under the existing Cuban Review Plan sufficient procedures are in place for excluded Mariel Cubans who seek release within the United States pending continued efforts to return them to Cuba. Any further doubt about the sufficiency of the procedures is contradicted by the fact that the vast majority of Mariel Cubans were paroled under the immigration parole statute at 8 U.S.C. § 1182(d)(5)(A), and thousands more have been released from immigration custody pursuant to the current custody review procedures since the instant Petition was filed in 1987, many of them more than once.

The only petitioners who are now detained have engaged in serious, violent, and/or repeated criminal conduct when paroled into the United States. They are nonetheless reconsidered every year to determine if they can again be paroled into the community under 8 C.F.R. § 212.12. In light of their criminal conduct when previously released, including such offenses as manslaughter, assault, drug offenses, and sexual crimes against children, the revocation or denial of immigration parole pending repatriation to Cuba, or further reconsideration for release into the United States in a year's time, is eminently reasonable.

7. The petitioners are not excused from continuing to exhaust available domestic remedies.

The United States further disagrees with the Commission's conclusion that exhaustion of domestic remedies would be futile. See Report at ¶ 212. The petitioners cannot demonstrate that they fall under any of the four exceptions to the exhaustion requirement set forth in the Regulations of the Commission because they have been given full access to the Mariel Cuban parole procedures.

If indeed still detained, the petitioners should not be excused from their continuing duty to exhaust those procedures that afford them a new opportunity to seek release every year.

At most, due process guarantees the petitioners fair and effective procedures by which they may seek to be released temporarily while awaiting their removal. The United States has established such procedures.

The regulations at 8 C.F.R. § 212.12 afford a comprehensive, effective and humane process under which Mariel Cubans who have failed to gain admission to this country are nonetheless able to obtain meaningful consideration for release, even after they have engaged in further dangerous criminal conduct that has injured this country and its lawful population.^[48] Exhaustion here cannot be characterized as futile, when compared to cases of the petitioners and other Mariel Cubans who have been released after undergoing some form of custody review procedures.

In view of the generous procedural protections afforded to the Mariel Cubans that permit them an opportunity to seek release from detention every year, it cannot be said that their detention has become indefinite or arbitrary. On the contrary, the periodic review of

their detentions, coupled with an opportunity for judicial review of any adverse decisions, provide the petitioners with a more than adequate process that they must exhaust before seeking relief from the Commission.

For these reasons, the United States also disagrees with the Commission's finding at ¶ 189 that the petitioners have fully pursued and exhausted their domestic remedies.

[1] The updated record information about the petitioners that was secured is attached (Addendum). This record survey both refutes any claim that Mariel Cubans with minor infractions or insignificant criminal records are being detained, and demonstrates that the existing procedures in the Cuban Review Plan provide the petitioners with an effective vehicle for release. All of the petitioners, and all other Mariel Cubans presently in custody, have been paroled one or more times since their arrival. Of the original 367 petitioners, less than 20 appear to be in custody at this time and, of those paroled, most were released under the current procedures between 1987-89, and have not returned to custody.

[2] See, e.g., Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

[3] See, e.g., Universal Declaration of Human Rights, Article 13.

[4] See Shaughnessy v. Mezei, 345 U.S. 206, 210, 215-216 (1953).

[5] See Zadvydas, 121 S. Ct. at 2495, 2500-01, 2502.

[6] Mezei, 345 U.S. at 215-216; see also Zadvydas, 121 S. Ct. at 2500, 2502; Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc), cert. denied, 516 U.S. 976 (1995) (alien denied admission lacks constitutional right to parole into the United States).

[7] See, e.g., Ngo v. INS, 192 F.3d 390 (3d Cir. 1999); Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984).

[8] See, e.g., 8 U.S.C. 1225(b)(2)(A), 1361 (Supp. IV 1998).

[9] See Zadvydas, 121 S. Ct. at 2497 ("[T]he primary federal habeas corpus statute, 28 U.S.C. 2241, confers jurisdiction upon the federal courts to hear these cases," citing 8 U.S.C. 2241(c)(3), which "authoriz[es] any person to claim in federal court that he or she is being held 'in custody in violation of the Constitution or laws [or treaties] of the United States.'").

[10] Indeed, the United States has struck an exemplary balance between its own rights and obligations to its own citizens and the desire of the Mariel Cubans to live in the United States. Of the 125,000 Mariel Cubans who came to this country in 1980 without any legal right to enter, approximately 123,000 were promptly released into the community, including aliens who admitted to having criminal records in Cuba, and all but a very few were eventually paroled. The vast majority have become productive, law abiding members of their communities and have become eligible for U.S. citizenship. See October 9, 1987 Submission, at 4.

[11] See, e.g., Alvarez-Mendez v. Stock, 941 F.2d 956 (9th Cir. 1991), cert. denied, 506 U.S. 842 (1992).

[12] See Section 106(b) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(b) (1994), amended by Section 309(c)(4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and replaced by the procedures in amended Section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252 (Supp. IV 1998). Criminal aliens disqualified for judicial review under these statutory provisions may nonetheless challenge their removal by petition for writ of habeas corpus. See, e.g., INS v. St. Cyr, 121 S. Ct. 2271 (2001).

[13] See, e.g., Leng May Ma v. Barber, 357 U.S. 185 (1958); Kaplan v. Tod, 267 U.S. 228 (1925) (discussed in Zadvydas, 121 S. Ct. at 2500).

[14] Id.

[15] See, e.g., Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985).

[16] Prior to amendment in 1996, the statute permitted parole for "emergent reasons" or where release is "strictly in the public interest." See 8 U.S.C. 1182(d)(5)(A) (1994, Supp. IV 1998).

[171] 8 C.F.R. §§ 212.5, 241.4 (2000).

[181] The definition of "entry" was replaced in 1996 by Congress with a definition of "admission" when it amended 8 U.S.C. 1101(a)(43).

[191] See Landon v. Plasencia, 459 U.S. 21, 32 (1982).

[201] See Reno v. Flores, 507 U.S. 292, 305-6 (1993); Carlson, 342 U.S. 524.

[21] Zadvydas, 121 S. Ct. at 2502-05.

[22] Id. at 2500, 2502; Mezei, 345 U.S. at 215-16.

[23] See ICCPR, art. 12, ¶ 1 ("Everyone **lawfully** within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his

residence.") (emphasis added).

[241] See, e.g., Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987).

[251] Compare 8 C.F.R. § 212.12 (2000) (Cuban Review Plan) with 8 C.F.R. 241.4 (2000) (post-order custody review procedures for other aliens).

[261] See, e.g., Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.), cert. denied, 479 U.S. 889 (1986).

[271] Highly secure placements are ordinarily reserved for detainees who have physically attacked and injured prison staff, other inmates, or other detainees. All detainees are housed in the least restrictive setting possible, taking into account their criminal and institutional behavioral histories, and all detainees housed in the secure units are evaluated on a regular basis for placement in less restrictive housing. Mariel Cubans in local and state contract facilities who are denied immigration parole are referred to the Bureau for placement.

[281] Many of these functions were performed by the United States Public Health Service and the Department of Justice's Community Relations Service before they were consolidated under the Bureau.

[291] See Jean, 727 F.2d at 975.

[301] To date, approximately 7,300 Mariel Cubans have been paroled by the Plan.

[311] See, e.g., Joint Communique Between the United States of America and Cuba, T.I.A.S. No. 11057, available at 1984 WL 161941 (signed at New York, December 14, 1984, with Minute on Implementation), under which agreement the United States has repatriated 1530 Mariel Cubans.

[321] See, e.g., Alvarez-Mendez v. Stock, 746 F. Supp. 1006, 1010 (C.D. Cal. 1990), aff'd, 941 F.2d 956 (9th Cir. 1991), cert. denied, 506 U.S. 842 (1992).

[331] As noted in our March 22, 1999 Submission, at 7, between June 1994-December 1998, detainees were reviewed for 3,948 Mariel Cubans whose immigration parole was subject to revocation because of criminal activity in this country. Parole was not revoked in approximately half (1,972) of those cases given the nature of the crimes and other relevant factors in each case. In nearly 38% of such cases so considered for parole revocation between January-October 1998, the aliens had been paroled since 1988.

[341] The Commission found, in particular, that the Plan (1) fails to identify with particularity the grounds for detention; (2) places the burden on the detainee to justify release; (3) gives too much discretion in the Attorney General; and (4) fails to provide for detention reviews at reasonable intervals.

[351] The majority (123,000) of the Mariel Cubans were paroled under 8 U.S.C. § 1182(d)(5)(A) shortly after their arrival in 1980. Another 2,040 were released under the Attorney General's Status Review Plan, which was adopted in 1981, when Cuba's refusal to allow repatriation created the undesirable possibility of prolonged detention for the small number (1,800) who were not initially paroled because their criminal backgrounds or serious medical and psychiatric problems posed an unacceptable risk to the community. The Attorney General's Status Review Plan was terminated in February 1985, in the expectation that the Cubans then in detention would be repatriated to Cuba under the terms of the agreement reached between the two governments in December 1984. In May 1985, however, Cuba unilaterally suspended the 1984 agreement for unrelated reasons after only 201 Mariel Cubans had been repatriated to Cuba. Between 1985 and promulgation of the current review procedures in 1987, approximately 1,300 Mariel Cubans were paroled under normal immigration procedures that are applicable to all aliens. Approximately 7300 excludable Mariel

Cubans have been paroled under the current procedures. See March 22, 1999 Submission, at 15-16.

[361] Cf. INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984).

[371] 8 C.F.R. § 212.12(d)(2).

[381] 8 C.F.R. § 212.12(d)(3).

[391] See Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1986); Fernandez-Roque, 734 F.2d 576.

[401] Indeed, it is the job of the agencies to interpret and give meaning to the statutes enacted by Congress that it administers. See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 843 (1984).

[411] See Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952) (holding that an alien's unlawful presence in the United States is only a "matter of permission and tolerance;" as such, matters relating to his expulsion are to be left to the discretion of the Attorney General).

[421] See Withrow v. Larkins, 421 U.S. 35, 47, 56-58 (1975); see also Marcello v. Bonds, 349 U.S. 302, 311, 312-13 (1955) (holding that immigration officials' dual adjudicatory and prosecutorial functions did not strip immigration hearings of fairness and impartiality as to make the procedure violative of due process).

[431] 8 C.F.R. § 212.12(g)(3).

[441] See 8 C.F.R. § 212.12(b), (d).

[45] Zadvydas, 121 S. Ct. at 2497.

[461] See, e.g., Mathews v. Diaz, 426 U.S. 67 (1976); see also INS v. Aquirre-Aquirre, 119 S. Ct. 1439, 1445 (1999); INS v. Rios-Pineda, 471 U.S. 444, 451-52 (1985).

[471] See Mathews, 426 U.S. 67; Mezei, 345 U.S. 206.

[481] See, e.g., Barrera, 44 F.3d at 1448-50.



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REPORT ON TERRORISM AND HUMAN RIGHTS

Preface

Executive Summary

I. INTRODUCTION

- A. Purpose and Context of the Report
- B. Terrorism in the Context of International Law
- C. Methodology

II. LEGAL FRAMEWORK FOR COMMISSION'S ANALYSIS

- A. The International Law Against Terrorism
- B. International Human Rights Law
- C. International Humanitarian Law

III. NORMS AND PRINCIPLES OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW APPLICABLE IN TERRORIST SITUATIONS

- A. Right to Life
 - 1. International Human Rights Law
 - 2. International Humanitarian Law
 - 3. The Right to Life and Terrorism
- B. Right to Personal Liberty and Security
 - 1. International Human Rights Law
 - 2. International Humanitarian Law
 - 3. Right to Personal Liberty and Security and Terrorism
- C. Right to Humane Treatment
 - 1. International Human Rights Law

- 2. International Humanitarian Law
 - 3. The Right to Humane Treatment and Terrorism
- D. Rights to Due Process and to a Fair Trial
- 1. International Human Rights Law
 - 2. International Humanitarian Law
 - 3. Rights to Due Process and to a Fair Trial and Terrorism
- E. Right to Freedom of Expression
- 1. International Human Rights Law
 - 2. International Humanitarian Law
 - 3. The Right to Freedom of Expression and Terrorism
- F. The Obligation to Respect and Ensure, Non-Discrimination and the Right to Judicial Protection
- 1. International Human Rights Law
 - 2. International Humanitarian Law
 - 3. The Obligation to Respect and Ensure without Discrimination, the Right to Judicial Protection and Terrorism
- G. Other Fundamental Rights
- 1. Rights to Freedom of Assembly, Association, and Conscience and Religion
 - 2. Rights to Property and Privacy
 - 3. Right to Participate in Government
- H. Migrant Workers, Asylum-Seekers, Refugees and other Non-Nationals
- 1. Right to Personal Liberty and Security
 - 2. Right to Humane Treatment
 - 3. Right to Due Process and to a Fair Trial
 - 4. Obligation to Respect and Ensure, Non-Discrimination and the Right to Judicial Protection

IV. RECOMMENDATIONS

- ANNEX I - IACHR Resolution on Terrorism and Human Rights
- ANNEX II - Table of OAS Member State Participation In Human Rights and Humanitarian Law Treaties
- ANNEX III - Inter-American Convention Against Terrorism, adopted and opened for signature by OAS General Assembly Resolution AG/RES. 1840 (XXXII-O/02)
- ANNEX IV - OAS General Assembly Resolution AG/RES. 1906 (XXXII-O/02), "Human Rights and Terrorism"