

THE RULES AND THE REALITY OF PETITION PROCEDURES IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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Like other global and regional systems for the promotion and protection of human rights, the Inter-American system has evolved in norms, institutions and procedures during its six decades of operations, presenting new opportunities and new challenges at each stage of its development. Initially, the States that participated in creating the Organization of American States in 1948 referred briefly to human rights in OAS Charter,² simultaneously adopting the American Declaration on the Rights and Duties of Man (ADRDM)³ some months before the United Nations completed the Universal Declaration of Human Rights. The 1948 ADRDM gave definition to the Charter's general commitment to human rights,⁴ but more than a decade elapsed before the OAS created the seven member Inter-American Commission of Human Rights with a mandate of furthering the observance of human rights among member states.

In 1965, the member States expanded the Commission's competence, allowing it to accept communications, request information from governments, and make recommendations to bring about more effective observance of human rights. The American Convention of Human Rights, signed in 1969, conferred jurisdiction on the IACHR to oversee compliance with the Convention⁵ along with the Inter-American Court of Human Rights, created when the Convention entered into force in 1978. The Court may hear contentious cases involving states that

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² Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 48. The Charter has been amended by several protocols.

³ American Declaration of the Rights and Duties of Man (1948), OAS Gen. Ass. Res. 1591, Doc. No. AG/RES.1591 (XXVIII-O/98)(June 2, 1949).

⁴ See Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention, 10 Inter-Am.Ct.H.R. (Ser.A)(1989).

⁵ American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123; OASTS No. 36, entry into force July 18, 1978 [hereinafter Am. Conv.]

accept its jurisdiction⁶ and may issue advisory opinions at the request of the IACtHR as well as any OAS member State.⁷ The Inter-American system has further expanded its human rights guarantees and the jurisdiction of the IACtHR through the adoption of additional human rights instruments, mentioned below.

The American Convention and its Protocols, other OAS human rights treaties, the Statute⁸ and Rules of Procedure⁹ today give the Inter-American Commission on Human Rights (IACtHR), among other functions, broad subject matter and personal jurisdiction to receive petitions from “any person or group of persons or any nongovernmental entity legally recognized in one or more OAS member states”¹⁰ against an OAS member state, complaining of violations of a right guaranteed by the ADRDM, the Convention and its protocols,¹¹ or the conventions against torture,¹² forced disappearance,¹³ and violence against women.¹⁴ Individuals or groups, in addition to submitting a petition, or as a separate filing without a petition, may ask the Commission to issue a request to a State for precautionary measures to prevent imminent and irreparable harm,¹⁵ or to request provisional measures from the Court in situations of extreme gravity and urgency.¹⁶

⁶ Id. Arts. 61-62

⁷ Id. Art. 64.

⁸ Statute of the Inter-American Commission on Human Rights, O.A.S. Gen. Ass. Res. 447 (IX-0/79), Jan. 1, 1980 [hereinafter IACtHR Statute].

⁹ Rules of Procedure of the Inter-American Commission on Human Rights, August 1, 2013, reprinted in D. SHELTON AND P. CAROZZA, REGIONAL PROTECTION OF HUMAN RIGHTS: BASIC DOCUMENTS (2d edn, OUP 2013), 309 [hereinafter IACtHR Rules]

¹⁰ Id. Art. 23.

¹¹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, O.A.S.T.S. No. 69, OAS doc. OEA/Ser.A/42 (SEPF); Protocol to the American Convention on Human Rights to Abolish the Death Penalty. O.A.S.T.S.No. 73, entry into force August 28, 1991.

¹² Inter-American Convention to Prevent and Punish Torture, O.A.S.T.S. No. 67, entry into force 28 February 1987.

¹³ Inter-American Convention on Forced Disappearance of Persons, O.A.S.T.S.No. A-60, entry into force 28 March 1996.

¹⁴ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, O.A.S.T.S. No. A-61, entry into force 5 March 1995.

¹⁵ IACtHR Rules Art. 25.

¹⁶ Am. Conv. Art. 63(2).

Exercise of the functions and powers given the IACtHR and the I-A Court has not been without controversy, even backlash, at the same time as the number of demands on these bodies to exercise their functions has grown. The transition in many countries of the region from repressive regimes toward democratic governance,¹⁷ coupled with a rise in the number and membership of civil society organizations and greater awareness of internationally-guaranteed human rights¹⁸ have resulted in growing expectations of victims and their representatives that the Inter-American system can address all individual and systemic violations of human rights, including police violence, disappearances, violence against women and sexual minorities, restitution and demarcation of indigenous ancestral lands, discrimination, lack of due process and independence in judicial bodies, attacks on human rights defenders and the media, and other widespread intractable problems in the Hemisphere. The result is a steady growth in the number of petitions brought to the IACtHR,¹⁹ creating an ever-increasing backlog of petitions to be processed,²⁰ long delays, and repeated if not always successful efforts to reform case management.

The backlash to continued monitoring of human rights has come in part because the OAS member States are divided by politics, culture, ideology, economic strength, and willingness to accept scrutiny of their human rights performance.

¹⁷ See, e.g., CECILIA MEDINA QUIROGA, THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM (1988); David Weissbrodt & Maria Luisa Bartolomei, *The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983*, 75 MINN. L. REV. 1010 (1991).

¹⁸ See OAS, Permanent Council, Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American System, for consideration by the Permanent Council, 11, GT/SIDH/13/11/rev.2 (attributing the increased number of petitions and cases to the consolidation of democracy and increased participation in and awareness of the system). In 2013, 70% of the 2061 petitions filed came from five states with numerous and active civil society organizations: Mexico (660), Columbia (328), Peru (201, Argentina (191), and the United States (109). Annual Report of the IACtHR 2013, Ch.II.

¹⁹ In 2002, 979 petitions were filed; by 2013 the number had increased to 2061. Annual Report of the IACtHR 2013, Ch. II.

²⁰ Cases pending decisions on admissibility and merits rose from 976 in 1997 to 1753 in 2013. Annual Report of the IACtHR 2013, Ch. II. Of the 2061 petitions received in 2013, only about 35% (736) were reviewed, leaving 65% pending. Of those reviewed, 123 were accepted for processing, roughly 17% of the those reviewed (and 6% of the total number filed), and 613 were rejected, 83% of those reviewed.

Some States that have been through a transition from military rule or other form of repression and moved towards a more open society assert that they should be less subject to monitoring as a consequence of the transition. Other States allege political motivation or a double standard when they are singled out for attention. States also express concern that cases are presented too long after the events that gave rise to them,²¹ hampering the State's ability to defend itself or remedy any violation that did occur. Procedural delays are troubling,²² as are repetitious cases and other inefficiencies in the processing of petitions and requests for precautionary measures. Equally problematic are issues of legitimacy and the quality of decisions ultimately rendered.

This article describes the Inter-American petition procedures and the issues of legitimacy, transparency, efficiency and effectiveness they raise. In general, the handling of petitions is dictated by the structure and functions of the IACHR as designed by the OAS member States and can only be understood in this context. Moreover, the problems in the petition system cannot be fully separated from other issues, including the procedures used to nominate and elect members of IACHR and I-A Court, concerns about functioning of the OAS generally, and the Anglo-Latin divide that exists in the organization.

The evidence of crisis is readily apparent. A process of “strengthening” the system occupied the political bodies and the IACHR from 2010 through 2013, with attempts made to curtail the functioning and powers of the Commission. Venezuela denounced the Convention effective September 2013; several states failed to appear at recent hearings. Colombia announced in March 2014 that it would not comply with a request for a provisional measure. Earlier, Brazil

²¹ Ariel Dulitzky cites the example of the *Isaza Uribe* case that was at the Commission more than 20 years before an admissibility report was adopted. Ariel Dulitzky, *Too Little, Too Late: The Pace of Adjudication of The Inter-American Commission on Human Rights*, 35 LOY. L.A. INT'L & COMP. L. REV. 131, 134 (2013).

²² A recent study determined that it takes an average of six and a half years from initial submission of a petition to the final merits decision, with four years devoted to reaching a decision on admissibility. Id, at 136. The IACHR only separated admissibility and merits into discrete phases of the petition procedure in 2008.

reacted with hostility and retaliatory actions in response to a precautionary request it received. Efforts are being mounted to created sub-regional bodies that may divert resources and attention from the OAS, perhaps even instituting a competing human rights system. Several States support moving the IACHR out of the United States, ostensibly due to the US failure to ratify Inter-American human rights treaties. As a further sign of weak commitment to the system, despite repeated attempts by the IACHR and I-A Court to obtain the increased financial and human resources needed to exercise their functions, no additional resources have been allocated.

The Functions and Powers of the IACHR

The IACHR, an autonomous organ of the OAS,²³ exists to “promote the observance and defense of human rights and to serve as an advisory body to the Organization.”²⁴ Its functions are generally divided into promotion and protection, a rather artificial distinction because efforts in one domain inevitably impact the other. Certain functions listed in the Statute, article 18, are conferred with respect to all OAS member states. Article 19 adds functions and powers in addressing States Parties to the American Convention, and Article 20 concerns those member States that are not party to the Convention.²⁵

Article 18 by itself confers many mandates: developing awareness of human rights; making recommendations to governments to improve human rights; preparing studies and reports; requesting information of governments; responding to inquiries from governments and providing advisory services to them; preparing and submitting an annual report to the General Assembly, conducting on site observations in a state; and submitting a program-budget to the OAS Secretary-

²³ OAS Charter, supra n. art. 106; IACHR Statute, art. 1; IACHR Rules, art. 1.

²⁴ IACHR Statute, art. 1(1).

²⁵ The division between the States governed by Articles 19 and 20 is generally geographic, linguistic and according to legal traditions; with the exception of Cuba every state not party to the Convention is among the English-speaking common law countries of North America. Only two English-speaking Caribbean countries are currently parties to the Convention.

General. To this is added the petition procedures referred to in Statute Articles 19 and 20, appearing before the I-A Court and requesting it to issue provisional measures; requesting advisory opinions of the Court; preparing and submitting draft protocols and amendments to the Convention. To these statutory mandates must be added the cumulative annual requests from the OAS General Assembly for the IACtHR to undertake particular studies or actions.

The variety of functions and powers conferred, coupled with the limitations of resources and structure discussed below, require the Commission to designate priorities and make choices among countries, themes, and cases. Conflicting pressures come from different stakeholders and create a certain identity crisis at the IACtHR. Petitioners and their representatives often see the IACtHR as serving a judicial function, deciding cases, recommending redress for victims, halting imminently threatened harm, and recommending to governments measures to avoid future violations. States, in contrast, often seek to prioritize advisory and promotional activities, calling for help in building national institutions, laws, and policies; they prefer these non-confrontational approaches to condemnation resulting from decisions on the merits of cases.

The IACtHR and the secretariat also are divided about priorities and the nature of the Commission's work, in particular about the role and purpose of petitions. Some persons consider the petition procedure as the heart of the system, exposing violations and providing redress for victims. Others see it as simply one of the many IACtHR functions, which is an organ that is less a judicial one than a monitoring and compliance body aiming to improve human rights in the region. Cases may not be the most effective way to fulfill this purpose. To some, the adoption of thematic reports containing a summary of standards and jurisprudence, examples of violations, recommendations and best practices, has far greater impact in improving human rights overall than does a decision on an individual case.

Country studies based on visits to the country are another important activity. They can address the entire context in which deficiencies and improvements may be identified, recommendations made, and a constructive dialogue pursued. Since 1961, the IACHR has made 93 country visits, with half a dozen taking place in 2013, in addition to the many working meetings of a single commissioner. Of course, such visits may also reinforce the petition procedure by providing ease of access to individuals seeking to file petitions²⁶ or giving the IACHR an opportunity to gather evidence relevant to a large number of cases. The increased visibility that comes from on site visits also serves indirectly to increase the number of cases filed, by informing the public of the existence and procedures of the system.

The IACHR also holds hearings and working meetings during its sessions, issues press releases, and conducts seminars and training sessions. During its 150th session in April 2014, the IACHR held 55 hearings and 30 working meetings. Notably, only 3 of the 55 hearings were in respect to a pending case; the remaining hearings were thematic or contextual in nature. Also during its sessions or at other time, members of the IACHR meet occasionally with other regional and global human rights bodies and representatives, as well as civil society and representatives of member States and issues press releases.

This broad expanse of functions gives rise to a range of views about the primary function of the IACHR and the role of the petition procedure; these views in turn shape attitudes about the importance of procedural regularity or “judicialization” of the system. On the one hand, many argue for retaining flexibility and an almost ad hoc approach to processing petitions, allowing for maximum negotiating ability and accommodation to the needs and desires of petitioners. On the other hand, many find that the adversarial nature of the petition process, which in many cases leads to proceedings before the Court, argues for procedural regularity,

²⁶ The on site visit of December 2013 to the Dominican Republic by the plenary IACHR plus staff members produced 3994 petitions and communications from individuals.

predictability and consistency in the handling of cases, i.e. a more judicial approach to the petition process. Tension between these two views and disagreement about the proper place of petitions in the overall system partly explain the current lack of coherence in the rules and procedures governing petitions, as well as disagreement about the nature and extent of further needed reforms. In part, the various views of Member States during the “strengthening” process reflected their own disagreement about the purpose and focus of the IACHR.

The Commission

The seven members of the IACHR are elected by the OAS General Assembly to a four-year term, renewable once, from a list of candidates proposed by OAS Member States; Commissioners serve in an individual capacity²⁷ and are intended to be “persons of high moral character and recognized competence in the field of human rights.”²⁸ They are not required to have legal training and Commissioners from other disciplines are elected periodically; views about this arrangement are linked to attitudes about the main role and function of the IACHR: those who emphasize the quasi-judicial nature of deciding petitions are less positive about the service of non-lawyers, as their presence can delay processing or petitions and produce poorly reasoned or decided decisions. For promotional and other functions, however, many perceive the participation of persons from a wide range of backgrounds as highly beneficial. In addition to differences in skills and background, Commissioners vary in their degree of independence and impartiality. Some have held government positions before being nominated and lack real independence.

Until quite recently, the Commission was largely composed of Latin American men, with few women and few representatives from common law, English-

²⁷ Am. Conv. Arts. 34, 36.

²⁸ IACHR Statute art. 2(1).

speaking countries. For a brief two-year period (2012-2014) the IACtHR had a majority of female commissioners, three of them coming from English-speaking, common law countries. Some of those present during this period perceived a noticeable difference in the approach to cases.

Importantly, the Commission is a part-time body that meets in short sessions three times a year. It is rare for a Commissioner to live near the headquarters of the Commission or visit the office when the Commission is not in session. All the Commissioners have full time employment in addition to their Commission duties.

The composition of the IACtHR and its part-time nature have perceptibly affected the attitude of some of the senior attorneys in the secretariat, who have referred to the Commissioners as less qualified, more ideological, and therefore less trustworthy to handle cases than the permanent staff. This attitude is not always unwarranted, but it is too generalized. In any event, it has hampered efforts to obtain Commission direct participation in the processing of cases raising issues of accountability and transparency.

The members of the IACtHR have 0country assignments and thematic rapporteurships. The thematic rapporteurships held by Commissioners focus on particular groups deemed especially vulnerable in the region.²⁹ The assignment of country rapporteurships to each commissioner has limited impact on the petition procedures. Although in theory each commissioner meets during the sessions with the staff attorneys to go over the pending cases concerning the countries and thematic issue for which he or she is responsible, determining priorities and obtaining information about problems, these meetings usually are short briefings

²⁹ The thematic rapporteurships in 2014 are: indigenous peoples, human rights defenders, persons in detention, afro-descendants, women, children, migrant workers, and LBGTI. A special rapporteur on freedom of expression is not a member of the Commission, but a full time official selected by the Commission from among applicants for the position. The special rapporteur works under the mandate of the Commission.

and often end up cancelled due to time pressures. In practice, there is little or no communication between the secretariat and the commissioners about petitions between sessions.

The Secretariat

The American Convention, article 40, specifies that the secretariat for the IACHR “shall be furnished by the appropriate specialized unit of the General Secretariat of the Organization.” The OAS Secretary General appoints the Executive Secretary.³⁰ In other words, the secretariat does not function under the authority of the IACHR,³¹ but under the general policies of the OAS, including for recruitment, promotion, and termination. Some staff attorneys continue in their permanent positions through numerous changes in the composition of the IACHR.

The functions of the Executive Secretariat are extensive: prepare draft reports, resolutions, studies and any other work entrusted by the IACHR or its president; receive and process correspondence, petitions and communications; and request information from parties. The Executive Secretary is assigned to coordinate the work of the secretariat, prepare a draft budget and work program in consultation with the president, report to the Commission at the start of each session on the activities of the secretariat; and implement decision of the Commission and president. In practice members of the secretariat, especially the Executive Secretary, also speak on behalf of the Commission at conferences, meetings, and in interviews with the press, attend workshops, meet with governments and civil society, and engage in fund-raising. Most importantly, as described in detail below, the secretariat has almost sole authority over the processing and drafting of

³⁰ IACHR Rules art. 11. The 2013 revision to the Rules sets forth the procedure by which the IACHR is to identify the best qualified candidate for the position, whose name is then forwarded to the Secretary-General for appointment to a four year term, renewable once.

³¹ The lack of authority over the secretariat is not limited to the IACHR; the European Court of Human Rights and the African Commission similarly depend on the parent organization to provide personnel for the secretariat.

decisions in respect to petitions and cases, as well as applications to and pleadings before the Court.

The secretariat is organized into various units. The Registry, created in 2007, undertakes the initial review of petitions. The Protection group handles all requests for precautionary measures and a Court group is responsible for litigation before the I-A Court. Other attorneys are assigned to one of four regional groups, and are responsible for the States within their region, including processing of petitions and drafting reports. The organization in this manner lends itself to inefficiency and the potential for creeping bias. First, the organizational structure means that every attorney must be able to evaluate claims concerning every right in every declaration and treaty as those may come up in petitions against countries in the regional grouping. While this may be possible, it is less efficient than having subject matter specialization, which can help produce expertise and more consistent jurisprudence. Secondly, the geographic assignment means that some attorneys develop either positive or negative views about particular States in their group. On some occasions, value judgments appear in draft decisions that suggest a certain bias towards the State or its government.

A Friendly Settlement Group aims to increase the valuable alternative dispute resolution procedure whereby the Commission assists the parties to a case to resolve the pending matter expeditiously and fairly. Creation of the group was coupled with an aim to hire four experienced attorneys to encourage more use of friendly settlements to resolve cases without the prolonged process of a merits determination and possible transmittal of the case to the Court. Friendly settlements are more effective³² than such decisions and lessen the time required for each case. Implementation of the program for the Friendly Settlement Group

³² One study found that compliance rates with friendly settlements was almost double that with Court judgments and five times the rate of compliance with IACtHR decisions. See Fernando Basch et al., *The Effectiveness of the Inter-American System of Human Rights Protection: a Quantitative Approach to its Functioning and Compliance with its Decisions*, 7 SUR. INT'L J. ON H.R. 9 (2010).

has been hampered by the lack of funds to hire experienced settlement attorneys; instead, a small number of existing staff have been moved into the new unit.

The problems of the secretariat are exacerbated by turnover, related to short-term contracts, low morale, and other problems in management. As a result of resignations, leaves of absence, and the failure of the OAS to provide additional permanent positions, the secretariat has become short of staff. While turnover is a problem, long term service can result in a certain resistance to reform and improvement. The response is too often “we have always done it this way” without regard to whether that way continues to be appropriate to the rising caseload and developments in human rights law, as well as the responsibilities of the IACtHR.

With a shortage of staff, the secretariat makes use of consultants, particularly in drafting thematic reports. While there is no inherent problem with doing so, and in fact it is probably necessary to complete some of the priority projects while allowing the secretariat to focus on the petitions, there has been a lack of transparency in the recruitment and selection process, as well as in communications between the consultant and the IACtHR; the IACtHR often learns about the appointment only after it has occurred, without having any possibility to comment on the applicants and their qualifications.³³ One consultant’s completed draft had to be taken over and rewritten when it proved to be error-ridden and unpublishable.

The structure, composition and functioning of the IACtHR human rights system produces two foreseeable problems: efficiency and legitimacy. Inefficiency means the backlog grows, the process slows, and justice is not provided. Lack of legitimacy is a product of the lack of real involvement of the IACtHR in the cases;

³³ The secretariat might comment that this is to avoid possible lobbying or pressure to favor one or another of the candidates for political or other improper motives. If the IACtHR reviews the candidates in a plenary meeting it does not seem likely that this type of pressure would happen.

the “hidden judiciary” has the files, prepares the memos, presents the draft decisions, and the Commission generally spends no more than an hour discussing the matter before largely approving the secretariat draft.

Initial Processing

The requirements for filing a petition are both technical and substantive. Petitioners must supply personal information and the details of the complaint, including efforts to exhaust domestic remedies. The Rules of Procedure, Article 26, make clear that the secretariat is responsible for the study and initial processing of petitions lodged before the Commission. Only if the secretariat has any doubt about whether the submission fulfills the requirements set forth in Rule 28 is it required to consult the Commission. If there is a necessary element omitted in the petition the staff attorney may request the petitioner or representative to provide the missing information.

A 2011 study undertaken by a team at the University of Texas Law School found that only 10% to 13% of new petitions pass the initial scrutiny of the secretariat to be deemed receivable.³⁴ In other words, up to 90% of all petitions sent to the IACtHR are summarily dismissed without any Commission knowledge or oversight. No documentation is kept or data entries made to record the subject matter, states involved, or reason for exclusion. From the perspective of the IACtHR, these communications might well never have been sent. It also does not appear that the petitioner is informed of the reason for the rejection, which might help to cure the defect and allow for a receivable filing.

When after review the petition is found to be among the 10% to 13% that is complete and able to be processed, the secretariat registers the date of receipt and

³⁴ HUMAN RIGHTS CLINIC, UNIV. OF TEXAS SCHOOL OF LAW, MAXIMIZING JUSTICE, MINIMIZING DELAY: STREAMLINING PROCEDURES OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (2011).

sends an acknowledgement to the petitioner. Attorneys for petitioners have complained that even the acknowledgement takes many months or even years to be sent, leaving them uncertain whether the petition has been lost or simply ignored. States have also objected, including before the Court, to the time required for initial processing, arguing that their rights to defense are prejudiced by the passage of time.

Petitions are supposed to be studied in chronological order, but the Commission may expedite processing under circumstances set forth in Article 29, a list that became longer with the 2013 revision to the Rules of Procedure. Indeed, there are so many criteria for expedited consideration that most petitions can fit within one or more of the categories: when the passage of time would deprive the petition of its effectiveness because the alleged victim is older or a child, terminally ill, subject to the death penalty or connected to a precautionary or provisional measure in effect; when the alleged victims are persons deprived of liberty; when the State formally expresses its intention to enter into friendly settlement negotiations; or when the resolution of the petition could address serious structural situations that would have an impact on the enjoyment of human rights or promote legislation or state practices and thus avoid repetitious complaints. Commissioners will sometimes push to expedite particular cases they feel are particularly important and fit within one of the categories. The issue sometimes ends up being discussed in a plenary session when those processing the petition are not in agreement. At the opposite extreme, it is not unknown for cases to be delayed in the secretariat because they are deemed politically sensitive or to outwait a particular commissioner's term.

In practice, the initial processing before a petition is sent to the relevant State may take up to two years. Meanwhile, the backlog increases. To address the problem with initial processing, the secretariat proposed for 2014 that this initial review of petitions be conducted primarily by a new group of interns approved for appointment by the OAS, interns who are not necessarily legally-trained.

Some commissioners have raised the question about why they do not receive petitions when they are initially filed, or at least when the preliminary examination has been completed. The answers range from cost of duplicating and translating files; lack of computer resources;³⁵ concerns about security; to the time required and priorities given other matters. The inability of commissioners to participate in cases from the beginning means they are less well-informed than they should be about the details of cases they must decide.

Precautionary Measures

In receiving and reviewing petitions, or upon the filing of a separate request, the IACtHR, pursuant to Article 25 of its Rules of Procedure, may, at its own initiative or at the request of a party, request that a State adopt precautionary measures concerning serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or a case before the organs of the Inter-American system.

As the number of petitions submitted to the Commission has grown each year, so has the number of requests for precautionary measures: from 265 in 2005 to 400 in 2013, slightly down from the 448 requests filed in 2012.³⁶ During several years the Commission has issued more requests than any other international human rights body. The Commission granted or extended 53 precautionary measures in 1998 and early 1999, 60 in 1999 and early 2000, 52 during the rest of 2000 and 54 during 2001, making a total of 219 measures in just four years. In

³⁵ The secretariat initiated a Petition and Case Management System (PCMS) in 2002, an electronic database to track the progress of petitions and cases, but access to this is not provided to the members of the Commission. In May 2010, the system added a Document Management System to track and file documents filed by either a party or the Commission, linking the documents to the petition or case, but only to petitions and documents filed after June 2010. No resources exist to provide an electronic record of earlier petitions and documents. Although the intention has been stated to eventually make it possible for all petitioners and States to have access to information related to their petition or case, no mention has been made of making the same information available to the IACtHR.

³⁶ Annual Report of the IACtHR 2013, Ch. II, p. 56.

contrast, the IACtHR granted only 26 requests in 2013, the lowest number in 15 years, despite having the third highest number of requests. It is speculative, but quite likely that the fewer favorable responses reflects the “chilling effect” of Brazil’s campaign from 2011 to 2013 against the IACtHR’s use of precautionary measures following the Belo Monte matter.³⁷

The number of precautionary measures is well below the number of individuals protected, because the measures can protect either one person or a group of persons, often covering entire populations or communities.³⁸ The total number of persons protected by precautionary measures is in fact impossible to determine, because sometimes a community is identified without specifying the number of individuals it contains.³⁹ This has been one of the objections of States to the requests issued : they claim it is impossible to protect a group that is neither

³⁷ On April 1, 2011, the IACtHR granted precautionary measures for the members of the indigenous communities of the Xingu River Basin in Pará, Brazil. The request was based on allegations that the life and physical integrity of the beneficiaries was at risk due to the impact of the construction of the Belo Monte hydroelectric power plant. The Inter-American Commission requested that the State of Brazil immediately suspend the licensing process for the Belo Monte Hydroelectric Plant project and stop any construction work from moving forward until the State must (1) conducted free, informed consultations, in good faith, culturally appropriate, and with the aim of reaching an agreement; (2) guaranteed that the indigenous communities have access beforehand to the project's Social and Environmental Impact Study, in an accessible format, including translation into the respective indigenous languages; (3) adopted measures to protect the life and physical integrity of the members of the indigenous peoples in voluntary isolation of the Xingu Basin, and to prevent the spread of diseases and epidemics among the indigenous. This includes any diseases derived from the massive influx of people into the region as well as the exacerbation of transmission vectors of water-related diseases such as malaria. The request was modified on July 29, 2011 after information was received from the State and the petitioners. As a consequence of receiving the request, the State withdrew its OAS ambassador and nominee for the IACtHR, and halted its financial contributions. It also joined other critics of the IACtHR in launching the “strengthening” process to reform the Commission.

³⁸ In a single request involving Paraguay, for example, on August 8, 2001 the Commission requested that precautionary measures be adopted on behalf of 255 minors who had been held at the Panchito López Reeducation Center for Minors (petition 11.666).

³⁹ For example, on June 4, 2001, the IACtHR granted precautionary measures on behalf of Kimi Domicó, Uldarico Domicó, Argel Domicó, Honorio Domicó, Adolfo Domicó, Teofan Domicó, Mariano Majore, Delio Domicó, Fredy Domicó, and “other [unnamed] members of the Embera Katio indigenous community of Alto Sinú” who had been abducted from the community’s main town and neighboring areas. The State was asked, as a matter of urgency, to take the steps necessary to clarify the whereabouts of these persons and to protect their lives and persons; to take the steps needed to protect the other members of the Embera Katio indigenous community of Alto Sinú, working in collaboration with the petitioners; and to investigate, judge, and punish those responsible for the attacks perpetrated against the community. After the State replied, the parties continued to submit information and comments in connection with these precautionary measures.

identified nor easily identifiable. The 2013 revision to the Rules specifies now that “precautionary measures may protect persons or groups of persons, as long as the beneficiary or beneficiaries may be determined or determinable through their geographic location or membership in or association with a group, people, community or organization.”⁴⁰

While the Commission probably has authority to accept complaints on behalf of identifiable members of a group,⁴¹ the Inter-American Court of Human Rights has taken a narrow view on this issue when presented with requests for provisional measures by the Commission.⁴² The Court has insisted on the names of specific persons before granting the requested measures.⁴³ Most recently, in the case of *Haitians and Haitian-origin Dominicans v. Dominican Republic*,⁴⁴ the Court stated that “this Court deems it indispensable to identify individually the persons in danger of suffering irreparable damage, for which reason it is not feasible to order provisional measures without specific names, for protecting generically those in a given situation or those who are affected by certain measures; however, it is possible to protect individualized member of a community.”⁴⁵

In addition to spelling out more clearly the criteria for precautionary measures, the 2013 Rules changes further “judicialize” the procedure by insisting on a reasoned decision with a published vote of the Commissioners, and set forth the procedure for lifting, prolonging, or amending the request. The new Rule also

⁴⁰ IACtHR Rules, art. 25(3).

⁴¹ Convention, art. 44 provides that “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.” Commission Rule of Procedure art. 23 uses similar language with respect to petitions brought under the American Declaration. While the petition must be signed by the individual lodging the complaint, nowhere is it required that the victims be identified by name. See Rules of Procedure, art. 28.

⁴² Convention Art. 63(2) authorizes the Court to adopt provisional measures “with respect to a case not yet submitted to the Court,” at the request of the Commission.

⁴³ See, inter alia, Alvarez et al. Case, Provisional Measures, Order of Jan. 21, 1998, Ser. E, No. 2; Digna Ochoa and Placido et al. Case, Provisional Measures, Order of Nov. 17, 1999, Ser. E, No. 2.

⁴⁴ Order of 18 Aug. 2000, HRLJ 399 (2001).

⁴⁵ Id. Para. 8

indicates that a decision by the Court not to grant provisional measures will have the effect of terminating and IACtHR measures previously granted.

In practice, precautionary measures are almost always handled by a staff attorney reviewing and then communicating by email a summary of the request and response of the government, if any, to members of the Commission, along with a recommendation on whether the request should be granted or not. One innovation that may or may not be continued was adopted in 2011, requiring that any request for precautionary measures be transmitted in its original form immediately to the country rapporteur. Recommendations of the protection unit are almost always followed by the Commission.

Admissibility

Once a petition is registered and sent to the State in question, the State is supposed to send its response within three months from the date of transmittal. This time limit is not enforced. The rules provide for extensions of four months when requested by the State. In fact, there are often multiple exchanges of pleadings between the parties over many years before a petition is deemed ready for a decision on admissibility. None of the information is automatically transmitted to the Commissioners, even to the country rapporteur or relevant thematic rapporteur. The 2009 revisions to the Rules of Procedure provided for the creation of a Working Group on Admissibility, a provision retained in the 2013 reform, Article 35. The Working Group is supposed to be composed of three or more Commissioners who are to study between sessions the admissibility of petitions and make recommendations to the plenary. It does not appear that such a group has ever been established; instead, the secretariat prepares draft reports on admissibility and inadmissibility for presentation to the plenary during regular sessions. In large measure, the Commission appears to have little time to scrutinize the secretariat's decisions on the admissibility and merits of petitions.

It also must sometimes press hard to overcome resistance by staff attorneys to changing conclusions already reached.

As general matter, there are legitimacy concerns because the Commissioners rarely if ever see the original petitions and they are not given copies of the pleadings and evidence to evaluate independently. They receive draft dispositions prepared by attorneys (or interns) in the secretariat. Often the Commission receives these the same day or at most a few days prior to the discussion scheduled on the matter. The reason usually given is that translations have not been completed in time for distribution earlier. Translation is a constant problem, not simply in timing, but in the quality of translations that are done. There are certainly very skilled translators, but not enough of them and others who are brought in often return quite flawed documents.

In preparing admissibility drafts, the secretariat sometimes appears to take a “kitchen sink” approach to the matter, without regard to the rights invoked by those who filed the petition. Having the legal staff assist in identifying the violations that emerge from the facts can no doubt benefit applicants who have no representation and are unfamiliar with the system, but experienced and knowledgeable NGOs very often represent clients concerned with a specific issue in respect to a guaranteed right. Despite this, admissibility drafts are presented listing any and all rights that, even tangentially, might possibly be deemed raised by the facts alleged. The staff attorneys will also add victims to those listed in the petition. The results are sometimes very far removed from the core issues in a petition and can distract or detract from the egregiousness of the conduct at the heart of the matter (a genocidal massacre alleged to violate freedom of assembly, for example, or dismissal of an army officer without a proper hearing deemed to affect the “honor and reputation” of his aunt due to hostility from the neighbors). In fact, the past overuse of *jura novit curia* has not infrequently undermined the coherence and impact of some decisions and added to the delays in proceedings.

The principle *jura novit curia* (the court knows the law) signifies in general the judicial power to address a case based on a law or legal theory not presented by the parties.⁴⁶ To some, its application represents the legal aspect of justice because it ensures that a party will not lose a case simply because of a failure to invoke the correct legal ground.⁴⁷ It may also be linked the concept to notions of equity whereby the court can recognize rights that an applicant or petitioner may not have invoked and may not even be aware pertain to the issues before the court.⁴⁸

Use of *jura novit curia* is more widespread in civil law jurisdictions than in those systems based on the common law. F.A. Mann suggested, in fact, that in continental legal systems the principle *requires* a judge to apply the appropriate legal rules to the facts presented to the court by the parties and if necessary engage in its own legal research in order to identify the pertinent rules. Mann contrasted this system with those of the common law, in which the judge relies on

⁴⁶ M. Damaška, *The Faces of Justice and State Authority*, (Yale University Press: New Haven, 1986) at 116. Another author calls the adage a "presumption" that the court knows the law. J. R. Fox, *Dictionary of International and Comparative Law* (Oceana Publishing Inc:Dobbs Ferry, New York, 1992. ("This maxim controls the manner in which the International Court handles questions of international law. As a consequence, the court is not restricted to the law presented by the parties, but is free to undertake its own research.") Fox does not mention another general principle of law: that all subjects of a legal system are presumed to know the law and ignorance of the law is no defense. How this general knowledge differs from the presumed knowledge of the judge is unexamined.

⁴⁷ Sophie Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* (Oxford: OUP, 2004). See also B. Miller, "Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard", (2002) 39 *San Diego L.R.* 1253 at 1256 (describing the practices of appellate courts in the United States when they find a point of law has been wrongly stated or omitted by the parties, practices that range from ignoring the issue or deeming it waived to noting the issue and remanding the case for consideration of it, requesting supplemental briefing or deciding the issue without briefing.)

⁴⁸ *Black's Law Dictionary*, 6th ed. (West Publishing: St Paul, 1991) at 852 translates the principle as ""the court knows the law; the court recognizes rights." Douglas Brooker notes that the second part of this definition may support the creation of equitable remedies: "The translation the 'court recognises rights' and its association with the maxim 'no wrong without a remedy,' . . . invalidates a defence based on the absence of law by legitimising a decision based on a judge-created rule imposed *ex post facto* to remedy a wrong, notwithstanding no law was breached. The factual wrong alleged in this application of *jura novit curia* is found by a court nonetheless as sufficiently egregious to justify 'recognising' protection from the wrong as a 'right' leading to the provision of a remedy in equity." Douglas Brooker, "Va Savoir! - The Adage *Jura Novit Curia*" in *Contemporary France*," 845 bepress Legal Series at 9 (Nov. 17 2005), available at <http://law.bepress.com/expresso/eps/845>

the submissions advanced by counsel for the parties, who frame the issues as they deem are best suited to advance their client's claims and interests. According to Mann, "perhaps the most spectacular feature of English procedure is that the rule *curia novit legem* has never been and is not part of English law."⁴⁹ In an opinion submitted to the European Court of Justice, Advocate General Francis Jacobs contended that the differences between the systems had been exaggerated: "Civil law courts, *jura novit curia* notwithstanding, may not exceed the limits of the case as defined by the claims of the parties and may not generally raise a new point involving new issues of fact. A common law court, too, will *sua sponte* take a point which is a matter of public policy; it will, for instance, refuse to enforce an illegal contract even if no party raises this point."⁵⁰

The European Court of Human Rights has decided more than 10,000 matters since its creation. It has rarely applied *jura novit curia*, although it accepts that it can, in principle, do so.⁵¹ In its jurisprudence, it has referred to *jura novit curia* in only 32 cases, with many references found in dissenting opinions⁵² or inadmissibility decisions.⁵³ Other judgments or decisions simply refer to

⁴⁹ F. A. Mann, "Fusion of the Legal Professions?" *Law Quarterly Review* 1977, 367 at 369. Mann was critical of a decision of the European Commission of Human Rights [Application 3147/67, Yearbook of Human Rights or Collection of Decisions 27, 119] which stated, "it is a generally recognised principle of law that it is for the court to know the law (*jura novit curia*)...the practice of the German courts whereby the parties are not necessarily invited to make oral submissions on all points of law which may appear significant to the courts does not constitute an infringement of 'fair hearing' within the meaning of [Article 6 of the European Convention on Human Rights]."

⁵⁰ Opinion of Advocate General Jacobs in the European Court of Justice cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, [1995] E.C.J. Rep. I-04705, paras. 34-35.

⁵¹ *Scoppola v. Italy* (No. 2), *Reports of Judgments and Decisions* (hereinafter *Reports*) 1998-I (GC) 2009 at 15. See also *Powell & Raynor v. UK*, Feb 21, 1990, 172 Eur. Ct. H.R. (Ser. A) at para. 29 ("The Court is the master of the characterization to be given in law to the facts submitted to its examination.")

⁵² *Case of Hermi v. Italy*, *Reports* 2006-XII (GC) (dissenting opinion of Judge Zupančič concerning the role of judges and prosecutors in criminal cases); *Case of Akdivar and Others v. Turkey*, *Reports* 1996-IV (GC) (dissenting opinion of Judge Golkulu referring to *jura novit curia* in reference to exhaustion of local remedies); *Case of McFarlane v. Ireland*, judgment of Sept. 10, 2010 (GC) (dissenting opinion of Judge Lopez Guerra on exhaustion of local remedies).

⁵³ See: *Case of Pentiacova and 48 Others v. Moldova*, inadmiss. dec. Jan. 4, 2005; *Case of Nelissen v. The Netherlands*, April 5, 2011 (Third Section).

domestic courts' application of the principle,⁵⁴ sometimes as a result of efforts by creative lawyers to avoid the European Court's jurisprudence on exhaustion of local remedies.⁵⁵ Representatives of applicants to the European Court have argued unsuccessfully that they should not have to present the same violations to local courts because the principle *jura novit curia* means that the domestic judges should know and apply the European Convention without a party invoking it.⁵⁶ Thus, the applicant's failure to invoke the Convention in substance should not be deemed non-exhaustion of local remedies. The Court has consistently rejected this argument.

In its rare applications of *jura novit curia* the European Court insists on the right of the parties to be heard and normally will accept the applicant's characterization of a case. The Court also maintains a focus on the main issue(s) raised, often deciding that it is unnecessary to examine other alleged violations, even when raised by the applicant.⁵⁷ Finally, the European Court has consistently held that

⁵⁴ *Case Of Eskelinan and others v. Finland*, August 8, 2006 (Fourth Section); *Case of Tarnawczyk v. Poland*, Dec. 7, 2010 (Fourth Section); *Turek v. Slovakia*, Dec. 14, 2004 (Fourth Section); *Case of Juha Nuutinen v. Finland*, April 24, 2007 (Fourth Section); *Case of Marcic and 16 Others v. Serbia*, October 30, 2007 (Second Section); *Hellborg v. Sweden*, Adm. dec. Nov. 30, 2004; *Jusufoski v. "The Former Yugoslav Republic Of Macedonia"*, Inadm. dec. March 31, 2009; *AGRO-B SPOL. S R.O. v. The Czech Republic*, Inadm. dec. Feb. 1, 2011 (Fifth Section). In the *Case of Kononov v. Latvia*, April 24, 2008 (Third Section), the Court looked to its power to review the judgments of domestic authorities' when it is not the domestic legislation but the Convention itself which expressly refers to the domestic law. The court noted that in such cases, a failure to comply with the domestic legislation may in itself entail a violation of the Convention. Accordingly, by virtue of the *jura novit curia* principle the Court could and should exercise a power to review whether the law has been complied with. See also, *Benham v. the United Kingdom*, June 10, 1996, *Reports* 1996-III 753, § 41, and *Gusinskiy v. Russia*, May 19, 2004 *Reports* 2004-IV, para. 66.

⁵⁵ The Court's case law requires an applicant to "plead in substance" before domestic courts the same violations of law (notably violation of the European Convention) later presented in Strasbourg. *Van Oosterwijck v. Belgium*, Nov. 6, 1980, 3 EHRR 557 (1981), para. 34; *Cardot v. France*, March 19 1991, 13 EHRR 853 (1991).

⁵⁶ *W. v. Austria*, inadm. dec. July 13, 1988; *Case of Lelas v. Croatia*, May 20, 2010 (First Section); *X. v. Federal Republic of Germany*, Comm. adms. dec. Dec. 16, 1982; *Case of Van Oosterwijck v. Belgium*, 40 Eur. Ct.H.R. (1979). (Applicant argued that the Belgian courts were bound by the principle *jura novit curia* to apply the Convention even though he had not requested them to do. "The Court is not persuaded by this argument. The fact that the Belgian courts might have been able, or even obliged, to examine the case of their own motion under the Convention cannot be regarded as having dispensed the applicant from pleading before them the Convention or arguments to the same or like effect." Id., para. 39)

⁵⁷ Thus, if the European Court finds a right violated, such as freedom from inhuman or degrading treatment or freedom of expression, it rarely examines the issue of discrimination in addition to

the failure to succeed in domestic courts does not necessarily mean denial of access to justice or lack of due process in the local venues.⁵⁸ Only once in its history has the Court added ECHR article 13 through application of *jura novit curia*. Its record in this respect is in sharp contrast to the practice of the IACtHR and I-A Court which have made extensive use of *jura novit curia*. In *Hilaire*, the I-A Court invoked the ICJ precedents in stating that it had not only the right but also the obligation to find a violation of any provision of the American Convention on Human Rights⁵⁹ found to be applicable.⁶⁰ The Court's approach, particularly during its most activist phase in the early 2000s, influenced the Commission, to increasingly use *jura novit curia* until the end of the decade.⁶¹

Many reasons might explain such an extensive use of the principle. First, petitioners might be unfamiliar with the system and not represented by legal counsel. In such instances, petitions might not refer to any specific right in the American Declaration or an applicable treaty, or may refer to non-applicable instruments.⁶² As neither the Convention⁶³ nor the Commission's Rules of

that of the specific violation. The court seems to do so only when the applicant introduces sufficient evidence that the violation was specifically motivated by discrimination. Compare, e.g. *Arslan v. Turkey* [GC] July 8, 1999 and *Nachova and Others v. Bulgaria* [GC], July 6, 2005, *Reports 2005-VII*.

⁵⁸ See, e.g. *Silver v. UK*, 61 ECHR (ser. A); 13 EHRR 582 (1983).

⁵⁹ 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)[hereinafter American Convention].

⁶⁰ *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, 94 Inter-Am. Ct. H.R. (ser. C) (2002), para. 107, 187.

⁶¹ The 2006 Annual Report of the Commission included 56 admissibility reports and 8 merits determinations. At the admissibility stage, the Commission used *jura novit curia* in just under half (48%) of the reports declaring a matter admissible. In 2010, the IACtHR decided in favor of the admissibility of 74 cases; in 38 of them it added rights and/or victims to the claim presented by the petitioners, amounting to more than 50% of admissible petitions being altered through the use of *jura novit curia*.

⁶² Report N° 95/06 Petition 92-04 (Adm) *Jesús Tranquilino Vélez Loor v. Panama*. The petition alleged violation by the Panamanian State of Articles 5, 7, 8, 10, 21, and 25 of the American Convention on Human Rights in conjunction with Article 1.1, and Articles 1, 2, 3, 7, 8, 9, 10, and 11 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The Commission declared the case admissible under Articles 1.1, 2, 5, 8, 21, and 25 of the American Convention, but substituted for the Torture Declaration Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. See also Report N° 35/06 Petition 1109-04 (Adm) *Jorge, Jose And Dante*

Procedure⁶⁴ require reference to specific rights that may have been violated by the alleged facts, it becomes the task of the Commission to determine admissibility in reference to guaranteed rights.⁶⁵ It does not appear to make a difference, however, that the petitioner has legal representation, even when the representative is an experienced and knowledgeable litigant before the Inter-American bodies and can be expected to frame allegations to present the petitioner's best case.

Second, the use of *jura novit curia* could reflect a broad view of the Commission's function to monitor and promote compliance with the full range of human rights through the case system. Unlike in the United Nations human rights treaty system, the Inter-American system does not require periodic reporting by states; the case system is one of the main avenues through which the Commission becomes aware of violations occurring in OAS member states and can recommend to them not only redress, but also measures to ensure non-repetition of violations. This does not explain, however, the huge discrepancy between the practice of the European Court and that of the Inter-American bodies.

Peirano Basso v. Uruguay in which petitioners invoked Articles 5(1) and (2), 7(1) and (3), 8(1), 9, 24, 25 and 29 of the American Convention on Human Rights in conjunction with Article 1(1) of the same Convention. The petitioners further alleged violations of Articles II, XVIII, XXV and XXVI of the American Declaration on the Rights and Duties of Man, and Articles 1, 2, 6 and 8 of the Inter-American Convention on the Prevention and Punishment of Torture; articles 9, 14 and 26 of the International Covenant on Civil and Political Rights, and Article 26 of the Vienna Convention on the Law of Treaties, and the United Nations Minimum Standards for the Treatment of Prisoners. The Commission admitted the case only on alleged violations of American Convention articles 7, 8, 9, and 25.

⁶³ Convention, *supra* n. ,arts. 46-47 set forth the admissibility requirements.

⁶⁴ Rules of Procedure of the Inter-American Commission on Human Rights, Approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009, reprinted in *Basic Documents Pertaining To Human Rights In The Inter-American System*, OAS/Ser.L/V/1.4 rev. 13
30 June 2010.

⁶⁵ See, e.g. Report N° 87/06 Petition 668-05 (Adm) *Carlos Alberto Valbuena And Luis Alfonso Hamburger Diazgranados v. Colombia*; Report N° 88/06 Petition 1306-05 (Adm) *Nueva Venecia Massacre v. Colombia*: "The Commission considers that the facts the petitioner is reporting regarding the alleged violation of the right to life, the right to humane treatment, the right to a fair trial and the right to judicial guarantees could tend to establish violations of the rights protected under articles 4, 5, 8.1 and 25 of the American Convention, in combination with Article 1.1 thereof." See also Report N° 15/06 Petition 618-01 (Adm) *María Emilia González, Paula Micaela González, and María Verónica Villar v. Argentina*; Report N° 48/06 Petition 12.174 (Adm) *Israel Gerardo Paredes Costa v. Dominican Republic*.

A third factor promoting extensive use of *jura novit curia* may be a negative view by the Commission and the Court of the judicial systems of many countries in the hemisphere. In both 2006 and 2010, the Commission most frequently added Convention arts. 8 (due process)⁶⁶ and 25 (access to justice)⁶⁷ through the use of *jura novit curia*.⁶⁸ Unlike the European Court, the IACtHR seems more willing to assume a deprivation of due process and/or access to justice when the petitioner did not receive a remedy in the domestic courts. When petitioners have alleged violation of arts. 8 and 25, alone or in connection with other rights, the Commission has been less likely to have recourse to *jura novit curia*.⁶⁹

⁶⁶ Article 8(1) provides: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established 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.” Paragraph 2 contains fair trial guarantees for criminal prosecutions. American Convention on Human Rights, concluded at San José, Nov. 22, 1969, entered into force, July 18, 1978, 1144 U.N.T.S. 123; O.A.S.T.S. 36, art. 8(1). For petitions in which article 8 was added, see, e.g. Report Nº 84/06 Petition 1068-03 (Adm) *Neusa Dos Santos Nascimento And Gisele Ana Ferreira v. Brazil*; Report Nº 23/06 Petition 71-03 (Adm) *Union Of Ministry Of Education Workers (Atramec) v. El Salvador*; Report Nº 27/06 Petition 569-99 (Adm) *Jacobo Arbenz Guzman v. Guatemala*.

⁶⁷ Article 25, entitled “judicial protection,” expresses the right to a remedy: “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.” Id., art. 25. For cases adding art. 25, often in connection with art. 8, see, e.g.: Report Nº 123/06 Petition 997-03 (Adm) *Alicia Barbani Duarte, Maria Del Huerto Breccia, et al. (Depositors Of The Banco De Montevideo) v. Uruguay* (adding Articles 8 and 25 in case concerning bank fraud); Report Nº 96/06 Petition 4348-02 (Adm) *Jesús Mohamad Capote, Andrés Trujillo et al. v. Venezuela* (“Although the petitioners did not make any express allegations to that effect, in application of the principle of *jura novit curia* the Commission finds that the facts recounted in connection with the alleged delay and lack of due diligence may tend to establish a violation of the rights to a fair trial and to judicial protection, recognized in articles 8, 25 and 1.1 of the American Convention, to the detriment of the alleged victims and their next of kin.”); Report No. 178/10 Petition 469-05 (Adm) *Victoria Jimenez Morgan and Sergio Jimenez v. Costa Rica*; Report No. 2/10 Petition 1011-03 (Adm) *Fredy Marcelo Núñez Narango et al. v. Ecuador*; Report No. 106/10 Petition 147-98 (Adm) *Oscar Muelle Flores v. Peru*.

⁶⁸ See, e.g., Report No. 127/10 Petition P-1454-06 (Adm), *Thalita Carvalho De Mello and others v. Brazil* (adding by *jura novit curia* possible violations of Convention Articles 5.1 and 8 with respect to the family members of the alleged victims); Report No. 47/10, Petition 1325-05 (Adm) *Estadero “El Aracatazzo” Massacre v. Colombia*; Report No. 124/10 Petition 11.990 (Adm) *Oscar Orlando Bueno Bonnet et al. Colombia*.

⁶⁹ Violation of Convention articles 8 and 25, as well as other rights, were alleged in 33 of 36 matters in 2006. In none of these cases did the Commission apply *jura novit curia*. See e.g., Report Nº 16/06 Petition 619-01 (Adm), *Eugenio Sandoval v. Argentina*; Report Nº 81/06 Petition 394-02 (Adm), *Persons Deprived Of Freedom at Urso Branco Prison, Rondônia v. Brazil*; Report Nº 83/06 Petition 641-03 (Adm), *Manoel Luiz Da Silva v. Brazil*; Report Nº 20/06 Petition 458-04 (Adm) *Omar Zúñiga Vásquez and Amira Isabel Vásquez De Zúñiga v. Colombia*; Report 55/06

Fourthly, as in Europe, one may also infer concern to ensure that like situations result in similar decisions, providing equality of treatment to petitioners and governments. Thus, forced disappearance and torture cases are usually deemed to involve the same set of rights under the Convention(s), irrespective of the rights invoked by the petitioner.⁷⁰ In cases of forced disappearances, for example, the Commission normally adds Convention art. 3 (right to juridical personality),⁷¹ based on the Court's jurisprudence,⁷² as well as other rights and other Conventions.⁷³

Petition 12.380 (Adm), *Members of José Alvéar Restrepo Lawyers' Collective v. Colombia*; Report N° 21/06 Petition 2893-02 (Adm) *Workers Belonging to the "Association Of Fertilizer Workers" (Fertica) Union v. Costa Rica*; Report N° 24/06 Case 10.720 (Adm), *El Mozote Massacre v. El Salvador*; Report N° 58/06 Petition 1083-05 (Adm) *Erwin Haroldo Ochoa López and Julio Armando Vásquez Ramírez v. Guatemala*; Report N° 65/06 Petition 81-06 (Adm) *Jimmy Charles v. Haiti*; Report N° 29/06 Petition 906-03 (Adm) *Garífuna Community of "Triunfo De La Cruz" and its Members v. Honduras*; Report N° 118/06 Petition 848-04 (Adm) *Angel Pacheco León v. Honduras*; Report N° 31/06 Petition 1176-03 (Adm) *Silvia Arce et al. v. Mexico*; Report N° 34/06 Petition 875-03 (Adm) *Rita Irene Wald Jaramillo et al. v. Panama*; Report N° 36/06 Petition 577-05 (Adm) *Francisco Usón Ramírez v. Venezuela*; Report N° 37/06 Petition 562-03 (Adm) *Sebastián Echaniz Alcorta and Juan Víctor Galarza Mendiola v. Venezuela*; Report N° 38/06 Petition 549-05 (Adm) *Mercedes Chocron Chocron v. Venezuela*; Report N° 39/06 Petition 73-03 (Adm) *Carlos Rafael Alfonzo Martínez v. Venezuela*; Report N° 60/06 Petition 406-05 (Adm) *Maria Cristina Reverón Trujillo v. Venezuela*.

⁷⁰ With respect to disappearances, the Commission has followed a general practice of finding violations of Article 3, 4, 5, 7, 8, and 25, in relation to Articles 1.1 and 2; as well as Articles I and III of the Inter-American Convention on Forced Disappearance of Persons. See, e.g. Report No. 76/10 Petition 11.845 (Adm), *Jeremías Osorio Rivera Et Al. Peru*.

⁷¹ See, e.g. Report No. 123/10 Case 11.144 (Adm) *Gerson Jairzinho González Arroyo and others v. Colombia*; Report No. 70/10 Petition 11.587 (Adm) *César Gustavo Garzón Guzmán v. Ecuador*, (adding articles 3, 5, and 7 as well as article 1 of the Forced Disappearances Convention); Report No. 141/10 Petition 247-07 (Adm) *Luis Eduardo Guachalá Chimbó v. Ecuador*; Report No. 107/10 Petition 1138-04 (Adm) *Patricia Emilie Cuellar Sandoval and others v. El Salvador*; Report No. 147/10 Petition 497-03 (Adm) *Jesús Ángel Gutierrez Olvera v. Mexico*.

⁷² In the seminal judgment *Velasquez Rodriguez v. Honduras*, 4 Inter-Am.Ct.H.R. (ser. C) (1988), the Inter-American Court signaled a broad approach to the phenomenon of forced disappearances, stating: “The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion. . . . The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee.” Id. at paras. 150, 155.

⁷³ E.g. “In accordance with the principle of *jura novit curia*, the IACtHR also rules these petitions admissible with respect to possible violations of Articles 3 (for the allegedly disappeared victims), 7 (for all alleged victims), 19 (for the alleged victims who were children at the time of the facts) and 24 (for all alleged victims) of the American Convention, to the detriment of the respective alleged victims; Articles 5.1 and 8 of the American Convention, to the detriment of the family members of the alleged victims and the surviving alleged victim. . . . Moreover, also by virtue of the principle of *jura novit curia*, the Inter-American Commission declares these petitions

Finally, the Court has substantially influenced the Commission's use of *jura novit curia*, for example, in routinely adding Convention arts. 1 and 2, which contain the general obligations of states parties.⁷⁴ The Commission may substitute one of these generic obligations⁷⁵ for another⁷⁶ or add to the obligations invoked by the petitioner.⁷⁷

One use of *jura novit curia* is to add rights and obligations from other relevant Inter-American treaties, if the petitioner fails to refer to them.⁷⁸ In the *Case of Heliodoro-Portugal v. Panama*⁷⁹ neither the Commission nor the victim's representatives alleged a failure to comply with the provisions of the Inter-American Convention on Forced Disappearance of Persons,⁸⁰ which Panama had ratified on February 28, 1996, instead basing the decision exclusively on the American Convention. Citing the *jura novit curia* principle, the Court decided to rule not only with regard to Article 7 of the American Convention, but also with regard to the provisions of the Forced Disappearance Convention. Following the Court's initiative, in cases involving disappearances, torture, or violence against women, the IACtHR began adding the specific specialized treaty on those topics

admissible with regard to Articles 1, 6, 7 and 8 of the Inter-American Convention to Prevent and Punish Torture. “Roberto Carlos Pereira de Souza et al, Report No. 126/10.

⁷⁴ Sometimes only these articles are added. See, e.g. Report No. 71/10 Petition 691-04 (Adm.) *Omar Francisco Canales Ciliezar v. Honduras* (admitting the case on articles 8 and 25, adding articles 1.1 and 2 pursuant to *jura novit curia*.)

⁷⁵ Report N° 80/06 Petition 62-02 (Adm) *Members of The Indigenous Community of Ananas et al. v. Brazil*.

⁷⁶ Report N° 30/06 Petition 2570-02 (Adm) *Nasry Javier Ictech Guifarro v. Honduras*; Report N° 32/06 Petition 1175-03 (Adm) *Paloma Angélica Escobar Ledezma Et Al.Mexico*, para. 39 (“under the principle of *jura novit curia*, the Inter-American Commission will analyze claims addressing Article 2 of the American Convention.”)

⁷⁷ Report N° 59/06 Petition 799-04 Admissibility *Alejandro Fiallos Navarro v. Nicaragua* (“The Commission, invoking the principle of *jura novit curia*, will analyze the possible violations in conjunction with the general obligations set out in Articles 1 and 2 of the American Convention.” Para. 51).

⁷⁸ Unlike the U.N. system, the Inter-American continues to have a single monitoring commission for all of its treaties, rather than creating a separate treaty body for each major agreement.

⁷⁹ *Case of Heliodoro-Portugal v. Panama*, 186 Inter-Am.Ct.H.R. (ser. C) (2008), paras. 105-113.

⁸⁰ Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M.1429 (1994), entered into force March 28, 1996.

as well.⁸¹ The practice has amounted thus far to a mere formality, because neither the IACtHR nor the Court has analyzed the provisions of the additional treaty or indicated why the facts demonstrate it has been violated. It seems to be taken for granted that the provisions mean exactly the same as the articles of the American Convention.

The Court excludes the presentation of new facts once a case has been submitted to it by the AICtHR,⁸² but the Court holds that the petitioners may invoke new rights because “they are the *titulaires* of all the rights set forth in the American Convention, and not to admit [newly invoked rights] would be an undue restriction to their condition of subjects of the International Law of Human Rights.”⁸³ Judge Cancado-Trindade argued at great length in favour of liberal recourse to *jura novit curia* to accept new arguments and issues presented by petitioners late in the litigation, characterizing the matter as an issue of access to justice.⁸⁴ Thus, for about a decade the Court repeatedly permitted petitioners to raise new issues and claims,⁸⁵ including for new victims.⁸⁶ The Court’s posture is not defensible, given the lengthy time and multiple stages of proceedings before the Commission,

⁸¹ See Report No. 64/10 Petition 245-05 (Adm) *Juan Carlos Jaguaco Asimbaya v. Ecuador*, adding articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture; Report No. 72/10 Petition 161-01 (Adm) *Irineo Martínez Torres and Candelario Martínez Damián v. Mexico*, adding Article 24 of the American Convention and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 67 O.A.S.T.S. 13.

⁸² Id., paras. 153-154

⁸³ Id., para. 155.

⁸⁴ Separate Opinion of Judge Antonio Cancado-Trindade, para 21 “The criterion adopted by the Court in the present Judgment in the case of the *Five Pensioners versus Peru* correctly considers that one cannot hinder the right of the petitioners of access to justice at international level, which finds expression in their faculty to indicate the rights which they deem violated. The respect for the exercise of that right is required from the States Parties to the Convention, at the level of their respective domestic legal orders, and it would not make any sense if it were denied in the international procedure under the Convention itself. The new criterion of the Court clearly confirms the understanding whereby the process is not and end in itself, but rather a means of realization of Law, and, ultimately, of justice.”

⁸⁵ *Case of the Moiwana Community v. Suriname*, *supra* n. 93 at para. 91.

⁸⁶ In the *Case of Myrna Mack-Chang v. Guatemala*, 101 Inter-Am. Ct. H.R., (ser. C) (2003), para. 223-25 the representatives of the next of kin of the victim asked the Court to find a violation of Article 5 of the American Convention to the detriment of the next of kin. The Inter-American Commission did not allege such a violation. See also, *Case of Ximenes-Lopes v. Brazil*, 149 Inter-Am. Ct. H. R. (2006) para. 156 (pointing out that the next of kin of the victims of violations of human rights may be victims themselves and adding additional victims to the proceeding).

where the petitioners are entitled, as before the Court, to have legal representation. The Court has never indicated why petitioners should not be estopped from raising additional rights violations if they fail to litigate them before the Commission, giving both the state and the Commission the opportunity to assess the merits of the claim and provide a full record to the Court. In many legal systems, procedural default attaches at the end of first instance proceedings and litigants are then deemed to have waived any rights they have failed to invoke. International courts apply the doctrine of waiver to state defenses like exhaustion of remedies and there appears to be no compelling reason to justify a different rule for petitioners. The Court has indeed held that some late claims are time barred – but in the same sentence agreed it would consider them under *jura novit curia*, a practice that at the least seems to flout the Court’s rules of procedure.⁸⁷

Aside from its deficiencies in procedural regularity, the Court’s approach makes no sense from the perspective of limited judicial resources. The current practice means the Court often faces new allegations late in the proceedings without a solid body of evidence or legal arguments from the parties.⁸⁸ Having issues fully litigated before the Commission should provide the Court a better record; moreover, requiring the full presentation of a case before the Commission could induce more friendly settlements and compliance, lessening the burden on the

⁸⁷ *Case of Maritza Urrutia v. Guatemala*, 103 Inter-Am. Ct. H.R. (ser. C) (2003), para. 140 (adding Article 19, rights of the child, on behalf of the son and nephew of the victim based on a request by the representatives of the victims in their brief with final arguments. The Court called this allegation time-barred, but then decided to examine, based on the *jura novit curia* principle.) The Court took the same approach in the *Case of the Girls Yean and Bosico v. Dominican Republic*, 130 Inter-Am. Ct. H.R. (ser. C) (2005) and the *Case of Ximenes-Lopes v. Brazil*, 149 Inter-Am. Ct. H. R. (2006), para. 155.

⁸⁸ *Case of García-Asto and Ramírez-Rojas v. Peru*, 137 Inter-Am. Ct. H.R. (ser. C) (2005) In written arguments, the Commission pointed out that the victim’s representatives referred for the first time in the proceedings before the Court to a new issue: the “bodily and psychological harassment and coercion” inflicted on the petitioners. (para. 68) The representatives responded that “the particulars detailed by the [alleged victims] in the brief of requests, arguments, and evidence, refer[red] to the facts mentioned in a general way in the application filed by the Commission.” Para. 71. The Court recalled its own ability to apply the *jura novit curia* principle but stressed that, with regard to rights claimed for the first time by the representatives of the alleged victims and/or their next of kin, the legal arguments must be based upon the facts set out in the application.

Court. Given the length of time required for petitions to proceed through the Commission from initial filing to a merits determination, petitioners would be hard-pressed to argue they would be disadvantaged by a rule requiring that they present all their allegations and legal arguments first to the Commission.

A different situation arises if the petitioners raise an issue and the Commission decides against admissibility or finds no violation on the merits.⁸⁹ No doubt the Court can review such decisions, but it does not need *jura novit curia* for this purpose.⁹⁰ The Court could apply *jura novit curia* correctly in the rare instance that it determines that the petitioners, the Commission and the State have all missed a relevant legal issue; this will normally arise if the case presents an issue of first impression or the Court is aims to extend its jurisprudence.⁹¹

Granting the utility if not the necessity of the principle, the use of *jura novit curia* should be supported by a reasoned decision, explaining why rights or treaties have been added or substituted for those invoked by the petitioners. Any perceived additional victims should be informed of the right to bring their own petition and should not be added to the one under consideration thereby diluting attention to claims of the primary victim. The decision to modify cases through *jura novit curia* should be taken as early as possible in the proceedings, normally at the admissibility stage, giving both parties an opportunity to present legal arguments and facts relevant to the newly-included rights. New claims should not be asserted by any parties late in the litigation.

⁸⁹ In fact in the *Five Pensioners Case*, petitioners had raised an alleged violation of Article 25 in the original petition, but the Commission did not determine the existence of the alleged violation. Thus, the Commission agreed that the Court could examine the matter. Para. 102

⁹⁰ *Case of the Moiwana Community v. Suriname*, 124 Inter-Am.Ct. H.R. (ser. C) (2005), para. 60. (“the Commission’s assessment with respect to alleged violations of the American Convention is not binding upon the Court.”).

⁹¹ In *Sawhoyamaxa v. Paraguay*, the Court made use of *jura novit curia* to announce a new doctrine on the right to juridical personality (Article 3 of the Convention). This method of developing the jurisprudence is not entirely misplaced, since litigants will often focus on litigating established standards rather than arguing for a new principle. This approach was also followed in the *Case of the Ituango Massacres v. Colombia*, 148 Inter-Am. Ct. H.R. (ser. C) (2006)(expanding the interpretation of Article 11(2) on the right to a home). See also *Case of Kimel v. Argentina*, 177 Inter-Am.Ct. H.R. (ser. C) (2008).

The due process rights of the parties means no decision should be based on a legal theory that the parties have not had an opportunity to argue or been notified will be part of the judgment. Such a practice may be rightly perceived to conflict with the parties' right to be heard (*audiatur et altera pars*).⁹² Moreover, broad application of *jura novit curia* overrides the parties' authority (at least in private law) to decide the subject and aims of the litigation.⁹³ Applicants may perceive a reformulation of their claims as diminishing their right of access to justice, placing the tribunal's own interests or concerns above their own. Finally, the IACtHR and IA Court must give attention to the legitimacy of their process. Legitimacy may be questioned when the decision-maker introduces a point of law that permits one party to succeed on the basis of a claim that, absent the tribunal's intervention, would not have been part of the case. The losing side may well perceive bias in the outcome.

Merits

A petition found admissible by the IACtHR becomes a case after the admissibility report is adopted. Although admissibility and merits can be considered together, this is rarely done and States in particular object to the practice of merging the two. As with admissibility, time limits are set in the Rules for submission of pleadings and evidence, but as with admissibility, these are rarely complied with or enforced.

⁹² Instances where common law judges have used *jura novit curia* in this manner have led to reversal and criticism by appellate courts. In *Hadmore Productions v. Hamilton* [1983] A.C. 191 the House of Lords overturned Lord Denning's judgment in the Court of Appeal, [(1981) 2 All E.R. 724] because he had researched and used in the case a passage from a source which, at the time, both courts and parties were not allowed to use. Lord Diplock described this as a breach, "of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him this is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is." Id. at 233.

⁹³ Consequently, a court judgment should normally stay within the bounds established by the pleadings and arguments of the parties reflected in the adage *ne aeat judex ultra et extra petitum partium*. Damaška, supra note 2 at 160, n.22. Roland & Boyer, *Adages du droit français* 4th (Lituc: Paris, 1999) at 521; Cornu, G. Cornu, *Vocabulaire juridique*, 4th (Quadrige/PUF: Paris, 2003) at 308.

Hearings can be held on the merits of cases, but rarely are. More common are private working meetings between the parties with the country rapporteur and the staff attorney. In rare cases, cases may be discussed during on site visits, but more often those visits are occasion for collection of new petitions.

Two of the three annual IACtHR sessions include a week set aside for public hearings and all three sessions involve days devoted to administrative matters, urgent issues, reports from the secretariat, and occasional meetings with the political bodies and government representatives. Normally fewer than five days a session are spent in discussing draft decisions on admissibility, the merits, archiving of petitions, and precautionary measures. There is little time for deliberation or careful consideration of the cases; most importantly, the IACtHR does not know what arguments were made by the parties or what evidence was submitted apart from what is contained in the presentation by the staff attorney. Without having the files and the pleadings it is very difficult for the Commission to challenge the characterization presented, except on matters of international law when obvious errors are spotted. Objections to the draft are sometimes rejected on the basis that the draft reflects the views of the Court, despite the independent decision-making function of the Commission.

Taking a case to the Court

The Court has increasingly limited the time available to the Commission to present a case in hearings, despite the independent role the Commission plays. While victims are concerned with redress, the Commission's focus is on compliance and non-repetition. The time currently allotted to the Commission for each case is 15 minutes of oral argument.

Conclusions: Options for the future

The two issues of legitimacy and efficiency/effectiveness require separate but perhaps mutually reinforcing measures. The former involves ensuring independent and expert Commissioners have greater involvement in cases and that more cases present opportunities for the parties to be heard in person. Although such measures taken in isolation could increase the delays in processing cases, if they are part of a reform focused on repetitious cases and those where there is clear precedent, increasingly legitimate procedures could also alleviate inefficiencies and delays. Several alternatives are briefly mentioned here.

The most radical change that might be made would be to transfer all petition proceedings concerning States parties to the Convention to the Court, leaving the Commission to oversee non-Parties, and to focus on what it does best: country and thematic reports, attention to gross and systematic violations, on site visits and promotional activities, including standard-setting. Such a change would add to the burden of the Court, but would shorten the time for consideration of petitions and reinforce the strengths of each institution. In such a system, the Commission should still have the right to appear in cases before the Court to present the context in the country and recommendations about reparations.

A more limited proposal would have the Commission continue to do the initial processing and admissibility of cases, transmitting those deemed admissible to the Court for a decision on the merits. This would lessen the time necessary to reach a decision on the merits, while preserving a role for the Commission in all cases submitted, ensuring that it maintains an overview of the situation throughout the hemisphere. The main objection here, as it would be to the first proposal, is that it does not solve the problem of managing the caseload, it simply transfers it from one institution to another within the same system. Either of these proposals would likely shorten the time for case processing, however, by avoiding two reviews of cases on the merits, one by the Commission and a second by the Court.

If all cases are kept within the Commission, clearly some reform is needed to handle them expeditiously. In this respect, the initial processing could include a case weighting system more enhanced than the current system of identifying those cases which should receive expedited treatment. A more nuanced treatment would include identifying those cases that raise similar issues involving the same country (repetitious cases) further divided into those similar cases raising new issues of interpretation and those for which clear precedent exists. The latter, screened cases could be all processed together, although not as a single case. They would be prepared with short memoranda using identical dispositive language, no hearings, and disposed of by a three or four member panel of Commissioners. Based on experience with such a system, it can be estimated that two such panels sitting during a day could decide upwards of 100 cases, if sufficient petitions meet the criteria for screening. Such a system exists in many domestic courts and is an efficient, expeditious way to handle repetitive cases raising no new issues (on a scale of 1 to 10, these are usually rated 1-3 on which basis they are deemed screening cases and handled in this manner).

Repetitious cases from the same country, but raising a new legal issue or issues could be handled through a “pilot” judgment procedure akin to that of the European Court of Human Rights or by joining them into a single case. The existence of new issues suggests that a hearing would be appropriate, perhaps on site if there are facts at issue. All cases should focus on the key issues, leaving aside peripheral matters not germane to the most significant violations. The Court has in fact, rejected making findings on such marginal matters in its judgments. The Court is correct.

More complex matters and new matters should be processed and decided by the plenary Commission, for which each member should receive the petition and the pleadings of the parties. For this, it would be useful to have a full time Commission, but the political will and consensus among members of the OAS is absent in this respect. The large majority of States are unwilling to reopen the

Convention. Representatives of other stakeholders express concern that it would be difficult to attract good candidates to a four-year full time position. The recent experience of some states in the European system, where it has proved difficult to attract well-qualified candidates to serve as judge on the European Court, gives some support to this concern. On the other hand, it has not always been possible to identify good candidates for the part time Commission. At the least, for legitimacy and efficiency purposes, the president of the Commission should become a fulltime position, with the executive secretary becoming more of an administrator of the secretariat. This change should be accompanied by a more rigorous selection process for the presidency and revised rules of procedure to provide in more detail the scope of the president's functions, as well as those of the secretariat.

Internally, the secretariat could and should be reorganized in large part along thematic lines, rather than in geographic units. The workload could be divided into high and low volume subjects and the thematic and country rapporteurs on the Commission would work with the appropriate unit. Another alternative, with or without some of the above, would be to divide the staff attorneys among the commissioners as law clerks working directly with the individual commissioner.

All petitions once registered and all pleadings should be sent to the relevant rapporteur(s), if not to the full Commission. This will require a much greater budget for translation and electronic databases of all the materials. It also means more time necessary for the Commission with an increased honorarium.

Reforms are clearly needed; the present system for handling petitions does not serve the Commission or the parties well. Too much time is consumed before decisions on admissibility and the merits. This prejudices the outcome of cases, particularly where facts are at issue and the passage of time leaves the Commission with little more than "dueling narratives" about what happened years previously. Victims of sexual violence, extrajudicial killings and other attacks on

personal security may be particularly disadvantaged due to the absence of forensic evidence and adequate domestic investigations. In such instances, the Commission should give greater attention to determining when to shift the burden of proof, what standard of proof is adequate, and how much weight to give credibility of the witnesses and the State authorities. More time for hearings in cases, assuming the Commission retains jurisdiction over all of them, could assist in fact-finding, if the hearings are properly prepared and conducted.

Compliance is linked to legitimacy and credibility. At present the IACtHR system of processing cases needs to reinforce its legitimacy and credibility, both linked to efficiency but also posing broader issues. It is also important to emphasize that the IACtHR does many things right and it is often the proper exercise of its functions that generates the greatest criticism. States do not like to be criticized and do not like to lose cases. When proposals for reform are made they should always be with the aim of true strengthening of the system and not its demise or weakening.