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# The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System

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# The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System

ESSAY

Dinah Shelton<sup>†</sup>

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## Abstract

In this Essay, Professor Dinah Shelton draws on her personal experience as a member of the Inter-American Commission on Human Rights to discuss the underlying causes of a “crisis of commitment” to the Inter-American system of human rights. Shelton traces the roots of this crisis in large part to the Inter-American petition procedures. Giving an in-depth account of the structure of the Inter-American Commission on Human Rights and the details of the petition procedures, Shelton explores the issues of legitimacy, transparency, effectiveness, and efficiency raised by various aspects of the petitioning process, and discusses the various ways in which these issues in the petition process contribute to the broader crisis of the system’s authority. She ultimately concludes with a series of proposed reforms—ranging from radical to relatively simple—for improving the structure and procedures of the Inter-American Commission on Human Rights, with a view toward restoring the credibility of human rights protections in the Americas.

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I would like to thank Paolo Carozza and Doug Cassel for their collaboration over the years, for organizing the Notre Dame conference on the future of the Inter-American system, and for inviting me to participate.

## I INTRODUCTION

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 (OAS) in 1948 referred briefly to human rights in the OAS Charter,<sup>1</sup> simultaneously adopting the American Declaration on the Rights and Duties of Man (ADRDM),<sup>2</sup> some months before the United Nations completed the Universal Declaration of Human Rights.<sup>3</sup> The 1948 ADRDM gave definition to the Charter's general commitment to human rights,<sup>4</sup> but more than a decade elapsed before the OAS created the seven member Inter-American Commission of Human Rights (IACHR), 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 Convention along with the Inter-American Court of Human Rights (the Court), created when the Convention entered into force in 1978.<sup>5</sup> The Court may hear contentious cases involving states that accept its jurisdiction,<sup>6</sup> and may issue advisory opinions at the request of the IACHR as well as any OAS member state.<sup>7</sup> The Inter-American system has further expanded its human rights guarantees and the jurisdiction of the IACHR through the adoption of additional human rights instruments.

Today, the American Convention and its protocols, other OAS human rights treaties, the Statute of the IACHR,<sup>8</sup> and the Rules of Procedure,<sup>9</sup> give the IACHR

<sup>1</sup> Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2416, 119 U.N.T.S. 48. The Charter has been amended by several protocols.

<sup>2</sup> Ninth International Conference of American States, *American Declaration of the Rights and Duties of Man* (June 2, 1949), reprinted in SECRETARIAT OF THE INTER-AM. COURT OF HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 19 (Feb. 2012 ed. 2012) [hereinafter BASIC DOCUMENTS].

<sup>3</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>4</sup> See Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10 (July 14, 1989).

<sup>5</sup> American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978).

<sup>6</sup> *Id.* arts. 61, 62.

<sup>7</sup> *Id.* art. 64.

<sup>8</sup> O.A.S. G.A. Res. 447 (IX), Statute of the Inter-American Commission of Human Rights (Oct. 31, 1979) [hereinafter IACHR Statute], reprinted in BASIC DOCUMENTS, *supra* note 2, at 133.

<sup>9</sup> Inter-Am. Comm'n on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, at 4–17 (Mar. 18, 2013), reprinted in Inter-Am. Commission on Human Rights, Rules of Procedure of the Inter-American Commission on Human Rights, <http://www.oas.org/en/iachr/mandate/Basics/RulesIACHR2013.pdf> (last visited June 25, 2015) [hereinafter IACHR Rules].

numerous functions to promote and protect human rights. Among these mandates, the Commission has broad subject matter and personal jurisdiction to receive petitions from “any person or group of persons or nongovernmental entity legally recognized in one or more OAS member states.”<sup>10</sup> The petitions may be filed against any OAS member state complaining of violations of a right guaranteed by the ADRDM, the Convention and its protocols,<sup>11</sup> or the conventions against torture,<sup>12</sup> forced disappearance,<sup>13</sup> and violence against women.<sup>14</sup> Individuals or groups, in addition to submitting a petition, or as a separate filing without a petition, may ask the IACHR to issue a request to a state for precautionary measures to prevent imminent and irreparable harm,<sup>15</sup> or to request provisional measures from the Court in situations of extreme gravity and urgency.<sup>16</sup>

Exercise of the functions and powers given to the IACHR and the Court has not been without controversy, even backlash. At the same time, the number of demands on these bodies to exercise their functions has grown. Many countries of the region have experienced or are undergoing transition from repressive regimes toward democratic governance.<sup>17</sup> Such transitions, coupled with a rise in the number and membership of civil society organizations, and greater awareness of internationally-guaranteed human rights,<sup>18</sup> have resulted in growing expectations from victims and their representatives that the Inter-American system can address all individual and systemic violations of human rights. The list of claims includes police violence, disappearances, violence against women and

<sup>10</sup> *Id.* art. 23.

<sup>11</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69 (entered into force Aug. 28, 1991), *reprinted in* BASIC DOCUMENTS, *supra* note 2, at 77; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. No. 73, *reprinted in* BASIC DOCUMENTS, *supra* note 2, at 91.

<sup>12</sup> Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67 (entered into force Feb. 28, 1987), *reprinted in* BASIC DOCUMENTS, *supra* note 2, at 95.

<sup>13</sup> Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, O.A.S.T.S. No. 68 (entered into force Mar. 28 1996), *reprinted in* BASIC DOCUMENTS, *supra* note 2, at 105.

<sup>14</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, June 9, 1994, 33 I.L.M. 1534 (entered into force Mar. 5, 1995), *reprinted in* BASIC DOCUMENTS, *supra* note 2, at 115.

<sup>15</sup> IACHR Rules, *supra* note 9, art. 25.

<sup>16</sup> American Convention on Human Rights, *supra* note 5, art. 63(2).

<sup>17</sup> *See, e.g.,* CECILIA MEDINA QUIROGA, *THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM* (1988); *see also* David Weissbrodt & Maria Luisa Bartolomei, Essay, *The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976–1983*, 75 MINN. L. REV. 1009 (1991).

<sup>18</sup> *See* Rep. of the Special Working Group to Reflect on the Workings of the Inter-Am. Comm’n on Hum. Rts. with a View to Strengthening the Inter-Am. Sys. for Consideration by the Permanent Council, O.A.S. Doc. OEA/Ser.G./GT/SIDH-13/11 rev. 2 (Dec. 13, 2011) (attributing the increased number of petitions and cases to the consolidation of democracy and increased participation in and awareness of the system); Annual Rep. of the Inter-Am. Comm’n on Hum. Rts., ch. 2, O.A.S. Doc. OEA/Ser.L./V/II, doc. 50 corr. 1 (2013) [hereinafter 2013 Annual Report]. In 2013, seventy percent 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).

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 IACHR,<sup>19</sup> creating an ever-increasing backlog of petitions to be processed,<sup>20</sup> long delays, and repeated efforts, if not always successful, 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 unwillingness to accept scrutiny of their human rights performance. Some states assert that they should be less subject to monitoring because they have been through the transition from military rule or other forms of repression and have moved towards a more open society. 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,<sup>21</sup> hampering the State's ability to defend itself or remedy any violation that did occur. Procedural delays are troubling,<sup>22</sup> as are repetitive 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 essay describes the Inter-American petition procedures and the issues of legitimacy, transparency, efficiency, and effectiveness that 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 the 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 IACHR.<sup>23</sup>

<sup>19</sup> 2013 Annual Report, *supra* note 18, ch. 2. In 2002, 979 petitions were filed. By 2013 the number had increased to 2061.

<sup>20</sup> *Id.* Cases pending decisions on admissibility and merits rose from 976 in 1997 to 1753 in 2013. Of the 2061 petitions received in 2013, only about thirty-five percent (736) were reviewed, leaving sixty-five percent pending. Of those reviewed, 123 were accepted for processing, roughly seventeen percent of those reviewed (and six percent of the total number filed), and 613 were rejected, eighty-three percent of those reviewed.

<sup>21</sup> 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) (noting the *Isaza Uribe* case, which was at the Commission more than twenty years before an admissibility report was adopted).

<sup>22</sup> *Id.* at 136 (determining 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).

<sup>23</sup> See generally DINAH L. SHELTON, *ADVANCED INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW* (2014) (discussing and analyzing the controversies discussed in this paragraph); Douglas Cassel, *Regional Human Rights Systems and State Pushback: The Case of the Inter-American Human Rights System (2011–2013)*, 33 HUM. RTS. L.J. 1, 1–9 (2013).

Venezuela denounced the Convention effective September 2013, and 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 reacted with hostility and retaliatory actions in response to a precautionary request it received. Efforts are being mounted to create 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 United States' 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 the Court to obtain the increased financial and human resources needed to exercise their functions, no additional resources have been allocated.

## II THE FUNCTIONS AND POWERS OF THE IACHR

The IACHR, an autonomous organ of the OAS,<sup>24</sup> exists to “promote the observance and defense of human rights and to serve as an advisory body to the Organization.”<sup>25</sup> 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 Article 18 of the IACHR Statute are conferred with respect to all OAS member states.<sup>26</sup> Article 19 adds functions and powers in addressing state parties to the American Convention, and Article 20 concerns those member states that are not party to the Convention.<sup>27</sup>

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-General.<sup>28</sup> To this is added the petition procedures referred to in Articles 19 and 20: appearing before the Court and requesting it to issue provisional measures, requesting advisory opinions of the Court, and preparing and submitting draft protocols and amendments to the Convention.<sup>29</sup> To these statutory mandates must also be added the cumulative annual requests from the OAS General Assembly for the IACHR to undertake particular studies or actions.

The numerous functions and powers conferred, without providing adequate resources and staff, require the IACHR to designate priorities and make choices

<sup>24</sup> Charter of the Organization of the American States, *supra* note 1, art. 106; IACHR Statute, *supra* note 8, art. 1; IACHR Rules, *supra* note 9, art. 1.

<sup>25</sup> IACHR Statute, *supra* note 8, art. 1(1).

<sup>26</sup> *Id.* art. 18.

<sup>27</sup> *Id.* arts. 19, 20. 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.

<sup>28</sup> *Id.* art. 18.

<sup>29</sup> *Id.* arts. 19, 20.

among countries, themes, and cases. Not every request for a country visit can be accepted nor more than a small minority of requests for a hearing be granted so long as the IACHR remains a part-time body with a small budget and staff. Conflicting pressures come from different stakeholders and create a certain identity crisis at the IACHR. Petitioners and their representatives often see the IACHR 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 IACHR and the secretariat also are divided about priorities and the nature of the IACHR's work, in particular about the role and purpose of petitions. Some persons consider the petition procedure the heart of the system, exposing violations and providing redress for victims. Others see it as simply one of the many IACHR functions, which is less a judicial organ 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 ninety-three 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 petitions,<sup>30</sup> or giving the IACHR an opportunity to gather evidence relevant to a large number of cases. The increased visibility that comes with 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 fifty-five hearings and thirty working meetings. Notably, only three of the fifty-five hearings were in respect to a pending case; the remaining hearings were thematic or contextual in nature. Also during its sessions or at other times, 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 issue 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 "judi-

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<sup>30</sup> 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.

cialization” 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, and argue for procedural regularity, predictability and consistency in the handling of cases, that is, a more judicial approach to the petition process. Tension between these two views and the 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.

### III 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 capacity,<sup>31</sup> and are intended to be “persons of high moral character and recognized competence in the field of human rights.”<sup>32</sup> 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 backgrounds, 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 IACHR was largely composed of Latin American men, with few women and few representatives from common law, English-speaking countries. For a brief two-year period (2012–2014), the IACHR 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 IACHR 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 IACHR or visit the office when the IACHR is not in session. All of the commissioners have full-time employment in addition to their IACHR duties.

The composition of the IACHR and its part-time nature have perceptibly affected the attitude of some of the senior attorneys in the secretariat, who have

<sup>31</sup> American Convention on Human Rights, *supra* note 5, arts. 34, 36.

<sup>32</sup> IACHR Statute, *supra* note 8, art. 2(1).

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 direct participation of the IACHR in the processing of cases raising issues of accountability and transparency.

The members of the IACHR have country assignments and thematic rapporteurships. The thematic rapporteurships held by commissioners focus on particular groups deemed especially vulnerable in the region.<sup>33</sup> 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 issues for which he or she is responsible, determining priorities, and obtaining information about problems, these meetings usually are short briefings 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.

#### IV 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.”<sup>34</sup> The OAS Secretary General appoints the Executive Secretary.<sup>35</sup> In other words, the secretariat does not function under the authority of the IACHR,<sup>36</sup> 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 IACHR at the start of each session on the activities of the secretariat, and implement decisions of the IACHR and President. In practice, members of the secretariat, especially the Executive

<sup>33</sup> The thematic rapporteurships in 2014 were: indigenous peoples; human rights defenders; persons in detention; African descendants; women; children; migrant workers; and LGBTI. A special rapporteur on freedom of expression is not a member of the IACHR, but a full time official selected by the IACHR from among applicants for the position. The special rapporteur works under the mandate of the IACHR.

<sup>34</sup> American Convention on Human Rights, *supra* note 5, art. 40.

<sup>35</sup> IACHR Rules, *supra* note 9, 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.

<sup>36</sup> 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.

Secretary, also speak on behalf of the IACHR at conferences, meetings, and in interviews with the press, attend workshops, meet with governments and civil society, and engage in fundraising. Most importantly, as described in detail below, the secretariat has almost sole authority over the processing and drafting of 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 unit handles all requests for precautionary measures, and a Court group is responsible for litigation before the Court. Other attorneys are assigned to one of four regional groups, and are responsible for the states within their region, including the processing of petitions and drafting reports. In this manner, the organization 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. Second, 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 IACHR 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 effective than such decisions and lessen the time required for each case.<sup>37</sup> Implementation of the program for the Friendly Settlement Group 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 also 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 IACHR.

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<sup>37</sup> One study found that compliance rates with friendly settlements were almost double that with Court judgments and five times the rate of compliance with IACHR 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 HUM. RTS. 9 (2010).

With a shortage of staff, the secretariat makes use of consultants, particularly in drafting thematic reports. There is no inherent problem in doing so; in fact, it is probably necessary to complete some of the priority projects while allowing the secretariat to focus on the petitions. However, there has been a lack of transparency in the recruitment and selection process, as well as in communications between the consultant and the IACHR: The IACHR often learns about the appointment only after it has occurred, without having any opportunity to comment on the applicants and their qualifications.<sup>38</sup> For example, 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 IACHR human rights system produces two foreseeable problems: inefficiency and illegitimacy. 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 IACHR in the cases; the "hidden judiciary" has the files, prepares the memos, presents the draft decisions, and the IACHR generally spends no more than an hour discussing the matter before largely approving the secretariat draft.

## V 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 IACHR.<sup>39</sup> 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 IACHR.<sup>40</sup> 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 School of Law found that only ten to thirteen percent of new petitions pass the initial scrutiny of the secretariat and are deemed receivable.<sup>41</sup> In other words, up to ninety percent of all petitions sent to the IACHR are summarily dismissed without any Commission knowledge or oversight. No documentation is kept or data entries made to record the subject matter, the states involved, or the reason for exclusion. From the perspective of the IACHR, these communications might as well never have been sent. It also does not appear that the petitioner is informed of

<sup>38</sup> 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 IACHR reviews the candidates in a plenary meeting, however, it does not seem likely that this type of pressure would be a problem.

<sup>39</sup> IACHR Rules, *supra* note 9, art. 26.

<sup>40</sup> *Id.*

<sup>41</sup> HUMAN RIGHTS CLINIC, UNIV. OF TEX. SCH. OF LAW, MAXIMIZING JUSTICE, MINIMIZING DELAY: STREAMLINING PROCEDURES OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (2011), [http://www.utexas.edu/law/clinics/humanrights/work/Maximizing\\_Justice\\_Minimizing\\_Delay\\_at\\_the\\_IACHR.pdf](http://www.utexas.edu/law/clinics/humanrights/work/Maximizing_Justice_Minimizing_Delay_at_the_IACHR.pdf).

the reason for the rejection, though doing so might help to cure the defect and allow for a receivable filing.

After review, when the petition is found to be among the ten to thirteen percent that is complete and able to be processed, the secretariat registers the date of receipt and 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 as to whether the petition has been lost or simply ignored. States have also objected to the time required for initial processing, and have even argued to the Court 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.<sup>42</sup> Indeed, there are so many criteria for expedited consideration that most petitions can fit within one or more of the categories: (1) 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; (2) when the alleged victims are persons deprived of liberty; (3) when the State formally expresses its intention to enter into friendly settlement negotiations; or (4) 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 wait out 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 in 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 questions 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,<sup>43</sup> and concerns about security, to the time

<sup>42</sup> IACHR Rules, *supra* note 9, art. 29.

<sup>43</sup> 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 IACHR.

required and priorities given other matters. The inability of commissioners to participate in cases from the beginning means that they are less informed than they should be about the details of cases they must decide.

## VI PRECAUTIONARY MEASURES

In receiving and reviewing petitions, or upon the filing of a separate request, the IACHR, 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.<sup>44</sup> As the number of petitions submitted to the IACHR 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.<sup>45</sup> Within several years, the Commission has issued more requests than any other international human rights body. The Commission granted or extended fifty-three precautionary measures in 1998 and early 1999, sixty in 1999 and early 2000, fifty-two during the rest of 2000, and fifty-four during 2001, making a total of 219 measures in just four years. In contrast, the IACHR granted only twenty-six requests in 2013, the lowest number in fifteen 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 IACHR’s use of precautionary measures following the Belo Monte matter.<sup>46</sup>

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.<sup>47</sup> The total number

<sup>44</sup> IACHR Rules, *supra* note 9, art. 25.

<sup>45</sup> 2013 Annual Report, *supra* note 18, at 56.

<sup>46</sup> On April 1, 2011, the IACHR 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 were at risk due to the impact of the construction of the Belo Monte hydroelectric power plant. The Inter-American Commission requested that Brazil immediately suspend the licensing process for the Belo Monte Hydroelectric Plant project and stop any construction work from moving forward until the state: (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 IACHR, and halted its financial contributions. It also joined other critics of the IACHR in launching the “strengthening” process to reform the Commission.

<sup>47</sup> For example, in a single request involving Paraguay 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. *See* Annual Rep. of the Inter-Am. Comm’n on

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.<sup>48</sup> This has been one of the objections of states to the requests issued: They claim that it is impossible to protect a group that is neither 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.”<sup>49</sup>

While the IACHR probably has authority to accept complaints on behalf of identifiable members of a group,<sup>50</sup> the Court has taken a narrow view on this issue when presented with requests for provisional measures by the Commission.<sup>51</sup> The Court has insisted on the names of specific persons before granting the requested measures.<sup>52</sup> Most recently, in the case of *Haitian and Haitian-Origin Dominican Persons in the Dominican Republic*,<sup>53</sup> the Court stated:

[T]his 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 members of a community.<sup>54</sup>

Hum. Rts., O.A.S. Doc. OEA/Ser.L./VII.114, doc. 5 rev., ch. 3, ¶ 48 (2001).

<sup>48</sup> For example, on June 4, 2001, the IACHR 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.

<sup>49</sup> IACHR Rules, *supra* note 9, art. 25(3).

<sup>50</sup> American Convention on Human Rights, *supra* note 5, art. 44 (providing that “[a]ny 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* IACHR Rules, *supra* note 9, art. 28.

<sup>51</sup> American Convention on Human Rights, *supra* note 5, art. 63(2) (authorizing the Court to adopt provisional measures “with respect to a case not yet submitted to the Court,” at the request of the Commission).

<sup>52</sup> *See, e.g.,* Álvarez v. Colombia, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (ser. E) No. 2 (Jan. 21, 1998); Digna Ochoa y Plácido Regarding Mexico, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (ser. E) No. 2 (Nov. 17, 1999).

<sup>53</sup> *Haitian and Haitian-Origin Dominican Persons in the Dominican Republic*, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (ser. E) (Aug. 18, 2000) [hereinafter *The Haitian Case*].

<sup>54</sup> *Id.*, “Considering,” ¶ 8.

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 indicates that a decision by the Court not to grant provisional measures will have the effect of terminating any IACHR 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.

## VII 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, or 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.<sup>55</sup> The Working Group is supposed to be composed of three or more commissioners who are to study the admissibility of petitions between sessions 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 IACHR appears to have little time to scrutinize the secretariat’s decisions on the admissibility and merits of petitions. The Court also must sometimes press hard to overcome staff attorneys’ resistance to change 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 as, 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 earlier distribution. Translation is a constant problem, not simply in timing, but in the quality of translations. There are certainly

<sup>55</sup> IACHR Rules, *supra* note 9, art. 35.

very skilled translators, but not enough of them; and others who are brought in that 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. However, experienced and knowledgeable non-governmental organizations (NGOs) very often represent clients concerned with a specific issue involving a guaranteed right. Despite this, admissibility drafts are presented, listing any and all rights that, even tangentially, might possibly be 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* (the court knows the law) has not infrequently undermined the coherence and impact of some decisions and added to the delays in proceedings.

The principle *jura novit curia* generally signifies the judicial power to address a case based on a law or legal theory not presented by the parties.<sup>56</sup> 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.<sup>57</sup> It may also be linked to notions of equity, whereby the court can recognize rights that an applicant or petitioner may not have invoked or may have not even been aware pertain to the issues before the court.<sup>58</sup>

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<sup>56</sup> MIRJAN R. DAMŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 116 (1986). Another author calls the adage a “presumption” that the court knows the law. JAMES R. FOX, *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* (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.

<sup>57</sup> SOFIE GEEROMS, *FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS* (2004). See also Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 *SAN DIEGO L. REV.* 1253, 1256 (2002) (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).

<sup>58</sup> *Black’s Law Dictionary* translates the principle as “the court knows the law; the court recognizes rights.” *BLACK’S LAW DICTIONARY* 852 (6th ed. 1990). 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

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 the submissions advanced by counsel for the parties, who frame the issues as they deem best suited to advance their clients' 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."<sup>59</sup> 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.<sup>60</sup>

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.<sup>61</sup> In its jurisprudence, it has referred to *jura novit curia* in only thirty-two cases, with many references found in dissenting opinions,<sup>62</sup> or inadmissibility decisions.<sup>63</sup> Other judgments or decisions simply refer

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egregious to justify "recognising" protection from the wrong as a "right" leading to the provision of a remedy in equity.

Douglas Brooker, *Va Savoirit: The Adage Jura Novit Curia in Contemporary France* (pt. 1), 47 (Bepress Legal Series, Working Paper No. 845, 2005), <http://law.bepress.com/expresso/eps/845>.

<sup>59</sup> F.A. Mann, *Fusion of the Legal Professions?*, 93 LAW Q. REV. 367, 369 (1977). Mann was critical of a decision of the European Commission of Human Rights, which stated, "it is a generally recognised principle of law that it is for the court to know the law (*jura novit curia*) . . . the established 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 the principle of 'fair hearing' within the meaning of [Article 6 of the European Convention on Human Rights]." *X & Co. (Eng.) v. Germany*, App. No. 3147/67, Eur. Comm'n H.R. (1968), <http://hudoc.echr.coe.int/eng?i=001-3046>.

<sup>60</sup> Case C-430/93, *Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten*, 1995 E.C.R. I-4705, ¶¶ 34-35.

<sup>61</sup> *Scoppola v. Italy* (No. 2), 51 Eur. H.R. Rep. 12 (2009); *see also Powell v. United Kingdom*, 172 Eur. Ct. H.R. (ser. A) ¶ 29 (1990) ("The Court is the master of the characterization to be given in law to the facts submitted to its examination.").

<sup>62</sup> *Hermi v. Italy*, 2006-XII Eur. Ct. H.R. 91, 126 (Zupančič, J., dissenting) (concerning the role of judges and prosecutors in criminal cases); *Akdivar v. Turkey*, 1996-IV Eur. Ct. H.R. 1192 (Golkulu, J., dissenting) (referring to *jura novit curia* in reference to exhaustion of local remedies); *McFarlane v. Ireland*, App. No. 31333/06, Eur. Ct. H.R. (2010) (Lopez Guerra, J., dissenting) (on exhaustion of local remedies), <http://hudoc.echr.coe.int/eng?i=001-100413>.

<sup>63</sup> *See Pentiacova v. Moldova*, 2005-I Eur. Ct. H.R. 357; *Nelissen v. The Netherlands*, App. No. 6051/07, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-104357>.

to domestic courts' application of the principle,<sup>64</sup> sometimes as a result of efforts by creative lawyers to avoid the European Court's jurisprudence on exhaustion of local remedies.<sup>65</sup> 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.<sup>66</sup> Thus, the applicant's failure to invoke the Convention in substance should not be deemed non-exhaustion of local remedies. The European Court has consistently rejected this argument.

In its rare applications of *jura novit curia*, the European Court has insisted on the right of the parties to be heard, and normally will accept the applicant's characterization of a case. The European Court also maintains a focus on the main issues raised, often deciding that it is unnecessary to examine other alleged violations, even when raised by the applicant.<sup>67</sup> Finally, the European Court has consistently held that 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.<sup>68</sup> Only once in its history has the European Court added ECHR Article 13 through

<sup>64</sup> Eskelinen v. Finland, 45 Eur. H.R. Rep. 1 (2006); Tarnawczyk v. Poland, App. No. 27480/02, Eur. Ct. H.R. (2010), <http://hudoc.echr.coe.int/eng?i=001-102119>; Turek v. Slovakia, 44 Eur. H.R. Rep. 43 (2004); Nuutinen v. Finland, 34 Eur. H.R. Rep. 15 (2007); Marčić v. Serbia, App. No. 17556/05, Eur. Ct. H.R. (2007), <http://hudoc.echr.coe.int/eng?i=001-83006>; Hellborg v. Sweden, 45 Eur. H.R. Rep. 3 (2004); Jusufoski v. Former Yugoslav Republic of Macedonia, App. No. 32715/04, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng?i=001-92346>; AGRO-B SPOL. S R.O. v. Czech Republic, App. No. 740/05, Eur. Ct. H.R. (2001), <http://hudoc.echr.coe.int/eng?i=001-103573>. In *Kononov v. Latvia*, the Court looked to its power to review the judgments of domestic authorities when it is not the domestic legislation, but the Convention itself, that 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. *Kononov v. Latvia*, App. No. 36376/04, Eur. Ct. H.R. (2008), <http://hudoc.echr.coe.int/eng?i=001-87934>, *aff'd*, 2010-IV Eur. Ct. H.R. 35; *see also* Benham v. United Kingdom, 1996-III Eur. Ct. H.R. 753, ¶ 41; Gusinskiy v. Russia, 2004-IV Eur. Ct. H.R. 129, ¶ 66.

<sup>65</sup> 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*, 3 Eur. H.R. Rep. 557, ¶ 34 (1981); *Cardot v. France*, 13 Eur. H.R. Rep. 853 (1991).

<sup>66</sup> *W v. Austria*, App. No. 10757/84, 56 Eur. Comm'n H.R. Dec. & Rep. 36 (1988); *Lelas v. Croatia*, App. No. 55555/08, Eur. Ct. H.R. (2010); *X v. Germany*, App. No. 9228/80, 11 Eur. Comm'n H.R. Dec. & Rep. 132 (1982). In *van Oosterwijck*, 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 so. "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." *Van Oosterwijck v. Belgium*, App. No. 7654/76, 3 Eur. H.R. Rep. 581, ¶ 39 (1979).

<sup>67</sup> 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 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 Arslan v. Turkey*, 31 Eur. H.R. Rep. 9 (1999) *with* *Nachova v. Bulgaria*, 2005-VII Eur. Ct. H.R. 1.

<sup>68</sup> *See, e.g., Silver v. United Kingdom*, 5 Eur. H.R. Rep. 347 (1983).

application of *jura novit curia*. Its record in this respect is in sharp contrast to the practice of the IACHR and the Inter-American Court, which have made extensive use of *jura novit curia*. In *Hilaire*, the Inter-American Court invoked the International Court of Justice (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 Rights found to be applicable.<sup>69</sup> The Inter-American 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.<sup>70</sup>

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.<sup>71</sup> As neither the Convention,<sup>72</sup> nor the Commission's Rules of Procedure,<sup>73</sup> requires reference to specific rights that may have been violated by the alleged facts, it becomes the task of the IACHR to determine admissibility in reference to guaranteed rights.<sup>74</sup> It does not appear to make a difference, however, that the petitioner has legal representation, even when the representative

<sup>69</sup> American Convention on Human Rights, *supra* note 5; *Hilaire v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶¶ 107, 187 (June 21, 2002).

<sup>70</sup> 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 IACHR 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*.

<sup>71</sup> In *Vélez Loor v. Panama*, the petition alleged violation by Panama 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. *Vélez Loor v. Panama*, Petition 92-04, Inter-Am. Comm'n H.R., Report No. 95/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *see also* *Peirano Basso v. Uruguay*, Case 12.553, Inter-Am. Comm'n H.R., Report No. 86/09, OEA/Ser.L./V/II, doc. 51 corr. 1 (2009). In *Peirano Basso*, petitioners invoked Articles 5(1) and 5(2), 7(1) and 7(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; 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; 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.

<sup>72</sup> American Convention on Human Rights, *supra* note 5, arts. 46, 47 (setting forth the admissibility requirements).

<sup>73</sup> IACHR Rules, *supra* note 9.

<sup>74</sup> *See* *Valbuena v. Colombia*, Petition 668-05, Inter-Am. Comm'n H.R., Report No. 87/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *see also* *Nueva Venecia Massacre v. Colombia*, Petition 1306-05, Inter-Am. Comm'n H.R., Report No. 88/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006), which stated:

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

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 IACHR's function to monitor and promote compliance with the full range of human rights through the case system. Unlike 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 IACHR 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.

A third factor promoting extensive use of *jura novit curia* may be a negative view by the IACHR and the Inter-American Court of the judicial systems of many countries in the hemisphere. In both 2006 and 2010, the IACHR most frequently added Convention Articles 8 (due process),<sup>75</sup> and 25 (access to justice),<sup>76</sup> through the use of *jura novit curia*.<sup>77</sup> Unlike the European Court, the

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.

*Id.* ¶ 33. See also *González v. Argentina*, Petition 618-01, Inter-Am. Comm'n H.R., Report No. 15/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Paredes Costa v. Dominican Republic*, Petition 12.174, Inter-Am Comm'n H.R., Report No. 48/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006).

<sup>75</sup> American Convention on Human Rights, *supra* note 5. 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.

*Id.* Paragraph 2 contains fair trial guarantees for criminal prosecutions. For petitions in which Article 8 was added, see, e.g., *Dos Santos Nascimento v. Brazil*, Petition 1068-03, Inter-Am. Comm'n H.R., Report No. 84/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Union of Ministry of Education Workers (ATRAMEC) v. El Salvador*, Petition 71-03, Inter-Am. Comm'n H.R., Report No. 23/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Arbenz Guzmán v. Guatemala*, Petition 569-99, Inter-Am. Comm'n H.R., Report No. 27/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006).

<sup>76</sup> American Convention on Human Rights, *supra* note 5. Article 25, entitled "Judicial Protection," expresses the right to a remedy:

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(1). For cases adding Article 25, often in connection with Article 8, see, for example, *Barbani Duarte v. Uruguay*, Petition 997-03, Inter-Am. Comm'n H.R., Report No. 123/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006) (adding Articles 8 and 25 in case concerning bank fraud); *Mohamad Capote v. Venezuela*, Petition 4348-02, Inter-Am. Comm'n H.R., Report No. 96/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006). In *Mohamad Capote*, the Commission stated:

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,

Inter-American Court seems more willing to assume a deprivation of due process or access to justice when the petitioner did not receive a remedy in the domestic courts. When petitioners have alleged violation of Articles 8 and 25, alone or in connection with other rights, the IACHR has been less likely to use *jura novit curia*.<sup>78</sup>

Fourth, as in Europe, one may also infer concern with ensuring that like situations result in similar decisions, providing equality of treatment to petitioners and governments. For example, forced disappearance and torture cases are usually deemed to involve the same set of rights, irrespective of the rights invoked by the petitioner.<sup>79</sup> In cases of forced disappearances, the IACHR normally adds

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25 and 1(1) of the American Convention, to the detriment of the alleged victims and their next of kin.

*Mohamad Capote*, Report No. 96/06, ¶ 85; *see also* *Jimenez Morgan v. Costa Rica*, Petition 469-05, Inter-Am. Comm'n H.R., Report No. 178/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010); *Núñez Naranjo v. Ecuador*, Petition 1101-03, Inter-Am. Comm'n H.R., Report No. 2/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010); *Muelle Flores v. Peru*, Petition 147-98, Inter-Am. Comm'n H.R., Report No. 106/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010).

<sup>77</sup> *See, e.g.*, *Carvalho de Mello v. Brazil*, Petition 1454-06, Inter-Am. Comm'n H.R., Report No. 127/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010) (adding by *jura novit curia* possible violations of Convention Articles 5.1 and 8 with respect to the family members of the alleged victims); *Estadero "El Aracatazzo" Massacre v. Colombia*, Petition 1325-05, Inter-Am. Comm'n H.R., Report No. 47/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010); *Bueno Bonnet v. Colombia*, Petition 11.990, Inter-Am. Comm'n H.R., Report No. 124/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010).

<sup>78</sup> Violation of Convention Articles 8 and 25, as well as other rights, were alleged in thirty-three of thirty-six matters in 2006. In none of these cases did the Commission apply *jura novit curia*. *See, e.g.*, *Sandoval v. Argentina*, Petition 619-01, Inter-Am. Comm'n H.R., Report No. 16/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Persons Deprived of Freedom at Urso Branco Prison v. Brazil*, Petition 394-02, Inter-Am. Comm'n H.R., Report No. 81/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Da Silva v. Brazil*, Petition 641-03, Inter-Am. Comm'n H.R., Report No. 83/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Zúñiga Vásquez v. Colombia*, Petition 458-04, Inter-Am. Comm'n H.R., Report No. 20/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Members of José Alvéar Restrepo Lawyers' Collective v. Colombia*, Petition 12.380, Inter-Am. Comm'n H.R., Report No. 55/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Workers Belonging to the "Association of Fertilizer Workers" (FERTICA) Union v. Costa Rica*, Petition 2893-02, Inter-Am. Comm'n H.R., Report No. 21/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *El Mozote Massacre v. El Salvador*, Case 10.720, Inter-Am. Comm'n H.R., Report No. 24/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Ochoa López v. Guatemala*, Petition 1083-05, Inter-Am. Comm'n H.R., Report No. 58/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Charles v. Haiti*, Petition 81-06, Inter-Am. Comm'n H.R., Report No. 65/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Garífuna Cmty. of "Triunfo de la Cruz" v. Honduras*, Petition 906-03, Inter-Am. Comm'n H.R., Report No. 29/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Pacheco León v. Honduras*, Petition 848-04, Inter-Am. Comm'n H.R., Report No. 118/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Arce v. Mexico*, Petition 1176-03, Inter-Am. Comm'n H.R., Report No. 31/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Wald Jaramillo v. Panama*, Petition 875-03, Inter-Am. Comm'n H.R., Report No. 34/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Usón Ramírez v. Venezuela*, Petition 577-05, Inter-Am. Comm'n H.R., Report No. 36/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Echaniz Alcorta v. Venezuela*, Petition 562.03, Inter-Am. Comm'n H.R., Report No. 37/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Chocrón Chocrón v. Venezuela*, Petition 549-05, Inter-Am. Comm'n H.R., Report No. 38/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Alfonzo Martínez v. Venezuela*, Petition 73-03, Inter-Am. Comm'n H.R., Report No. 39/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); *Reverón Trujillo v. Venezuela*, Petition 406-05, Inter-Am. Comm'n H.R., Report No. 60/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006).

<sup>79</sup> With respect to disappearances, the Commission has followed a general practice of finding

Convention Article 3, the right to juridical personality,<sup>80</sup> based on the Court's jurisprudence,<sup>81</sup> as well as other rights and other Conventions.<sup>82</sup>

Finally, the Court has substantially influenced the IACHR's use of *jura novit curia*, for example, in routinely adding Convention Articles 1 and 2, which contain the general obligations of state parties.<sup>83</sup> The IACHR may substitute one of these generic obligations for another,<sup>84</sup> or add to the obligations invoked by the petitioner.<sup>85</sup>

violations of Articles 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.*, Osorio Rivera v. Peru, Petition 11.845, Inter-Am. Comm'n H.R., Report No. 76/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010).

<sup>80</sup> *See, e.g.*, González Arroyo v. Colombia, Case 11.144, Inter-Am. Comm'n H.R., Report No. 123/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010); Garzón Guzmán v. Ecuador, Petition 11.587, Inter-Am. Comm'n H.R., Report No. 70/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010) (adding Articles 3, 5, and 7, as well as Article 1 of the Forced Disappearances Convention); Guachalá Chimbó v. Ecuador, Petition 247-07, Inter-Am. Comm'n H.R., Report No. 141/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010); Cuellar Sandoval v. El Salvador, Petition 1138-04, Inter-Am. Comm'n H.R., Report No. 107/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010), Gutierrez Olvera v. Mexico, Petition 497-03, Inter-Am. Comm'n H.R., Report No. 147/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010).

<sup>81</sup> In the seminal judgment *Velásquez-Rodríguez*, 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.

*Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 150, 155 (July 29, 1988).

<sup>82</sup> For example:

In accordance with the principle of *jura novit curia*, the IACHR 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 admissible with regard to Articles 1, 6, 7 and 8 of the Inter-American Convention to Prevent and Punish Torture.

*De Souza v. Brazil*, Petition P-1448-06, Inter Am. Comm'n H.R., Report No. 126/10, OEA/Ser.L./V/II, doc. 5 rev. 1, ¶ 3 (2010).

<sup>83</sup> Sometimes only these articles are added. *See, e.g.*, Canales Ciliezar v. Honduras, Petition 691-04, Inter Am. Comm'n H.R., Report No. 71/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010) (admitting the case on Articles 8 and 25, adding Articles 1(1) and 2 pursuant to *jura novit curia*).

<sup>84</sup> Members of the Indigenous Cmty. of Ananas v. Brazil, Petition 62-02, Inter Am. Comm'n H.R., Report No. 80/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); Ictech Guifarro v. Honduras, Petition 2570-02, Inter Am. Comm'n H.R., Report No. 30/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1 (2006); Escobar Ledezma v. Mexico, Petition 1175-03, Inter Am. Comm'n H.R., Report No. 32/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1, ¶ 39 (2006) ("under the principle of *jura novit curia*, the Inter-American Commission will analyze claims addressing Article 2 of the American Convention").

<sup>85</sup> *Fiallos Navarro v. Nicaragua*, Petition 799-04, Inter Am. Comm'n H.R., Report No. 59/06, OEA/Ser.L./V/II.127, doc. 4 rev. 1, ¶ 51 (2006) ("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.").

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.<sup>86</sup> In the case of *Heliodoro-Portugal v. Panama*,<sup>87</sup> neither the IACHR nor the victim's representatives alleged a failure to comply with the provisions of the Inter-American Convention on Forced Disappearance of Persons, which Panama had ratified on February 28, 1996.<sup>88</sup> Instead, they based 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 IACHR began adding the specific specialized treaties on those topics as well.<sup>89</sup> The practice has amounted thus far to a mere formality, because neither the IACHR 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 thing 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 IACHR.<sup>90</sup> But the Court holds that the petitioners may invoke new rights because, "they are the holders of all the rights embodied in the American Convention and, if this were not admissible, it would be an undue restriction o[n] their condition [as] subjects of international human rights law."<sup>91</sup> Judge Cançado Trindade argued at great length in favor of liberal recourse to *jura novit curia*, and proposed that the Court accept new arguments and issues presented by petitioners late in the litigation, characterizing the matter as an issue of access to justice.<sup>92</sup> Thus, for about a decade, the Court repeatedly per-

<sup>86</sup> 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.

<sup>87</sup> *Heliodoro-Portugal v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶¶ 105–13 (Aug. 12, 2008).

<sup>88</sup> Inter-American Convention on Forced Disappearance of Persons, O.A.S.T.S. No. 68 (June 9, 1994) (entered into force Mar. 28, 1996).

<sup>89</sup> See *Jaguaco Asimbaya v. Ecuador*, Petition 245-05, Inter-Am Comm'n H.R., Report No. 64/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010) (adding Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture); *Martínez Torres v. Mexico*, Petition 161-01, Inter-Am Comm'n H.R., Report No. 72/10, OEA/Ser.L./V/II, doc. 5 rev. 1 (2010) (adding Article 24 of the American Convention and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture).

<sup>90</sup> "Five Pensioners" v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98, ¶¶ 152–53 (Feb. 28, 2003).

<sup>91</sup> *Id.* ¶ 154.

<sup>92</sup> *Id.* at ¶ 21 (Cançado Trindade, J., concurring):

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,

mitted petitioners to raise new issues and claims,<sup>93</sup> including for new victims.<sup>94</sup> The Court's posture is not defensible given the lengthy time and multiple stages of proceedings before the IACHR where the petitioners are entitled 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 IACHR, giving both the state and the IACHR the opportunity to assess the merits of the claim and to 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 it also stated that it would consider them under *jura novit curia*, a practice that at the least seems to flout the Court's rules of procedure.<sup>95</sup>

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.<sup>96</sup> Having issues fully litigated before the IACHR should provide the Court with a better record. Moreover, requiring the full presentation of a case before the IACHR

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but rather a means of realization of Law, and, ultimately, of justice.

*Id.* (footnote omitted).

<sup>93</sup> *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 91 (June 15, 2005).

<sup>94</sup> In *Mack Chang v. Guatemala*, 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. *Mack Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶¶ 223–25 (Nov. 21, 2003). See also *Ximenes-Lopes v. Brazil*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 156 (July 4, 2006) (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).

<sup>95</sup> In *Maritza Urrutia v. Guatemala*, the Court added 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. *Maritza Urrutia v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 140 (Nov. 27, 2003). The Court took the same approach in the *Girls Yean and Bosico* and *Ximenes-Lopes*. *Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005) (called *Yean and Bosico Children* in some sources); *Ximenes-Lopes*, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 155.

<sup>96</sup> In writing arguments in *García-Asto v. Peru*, 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. 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." *García-Asto v. Peru*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 137, ¶¶ 68, 71 (Nov. 25, 2005). 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.

could induce more friendly settlements and compliance, lessening the burden on the Court. Given the length of time required for petitions to proceed through the IACHR from initial filing to a merits determination, petitioners would be hard-pressed to argue that they would be disadvantaged by a rule requiring that they present all of their allegations and legal arguments first to the IACHR.

A different situation arises if the petitioners raise an issue and the IACHR decides against admissibility or finds no violation on the merits.<sup>97</sup> No doubt the Court can review such decisions, but it does not need *jura novit curia* for this purpose.<sup>98</sup> The Court could apply *jura novit curia* correctly in the rare instance where it determines that the petitioners, the IACHR, 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 aims to extend its jurisprudence.<sup>99</sup>

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.

The due process rights of the parties require that no decision should be based on a legal theory that the parties have not had an opportunity to argue or have not 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*).<sup>100</sup>

<sup>97</sup> In "*Five Pensioners*," 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. "*Five Pensioners*," Inter-Am. Ct. H.R. (ser. C) No. 98, ¶ 102.

<sup>98</sup> *Moiwana Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 60 ("The Commission's assessment with respect to alleged violations of the American Convention is not binding upon the Court.").

<sup>99</sup> See *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006). In *Sawhoyamaya Indigenous Community*, 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 *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006) (expanding the interpretation of Article 11(2) on the right to a home); see also *Kimel v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177 (May 2, 2008).

<sup>100</sup> Instances where common law judges have used *jura novit curia* in this manner have led to reversal and criticism by appellate courts. In *Hadmor Productions*, the House of Lords overturned Lord Denning's judgment in the Court of Appeal, 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." *Hadmor Prods. v. Hamilton*, [1983] 1 AC 191 (HL) 233, *rev'g* [1981] 2 All ER 724.

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.<sup>101</sup> 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 IACHR and the 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.

### VIII MERITS AND TIME LIMITS

A petition found admissible by the IACHR 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 limitations are rarely complied with or enforced.

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 instances, cases may be discussed during on-site visits, but more often these visits are occasions for the collection of new petitions.

Two of the three annual IACHR 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 IACHR does not know what arguments the parties made 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 IACHR 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 IACHR.

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

<sup>101</sup> Consequently, a court judgment should normally stay within the bounds established by the pleadings and arguments of the parties reflected in the adage *nea eat judex ultra et extra petita partium*. DAMŠKA, *supra* note 56, at 160 n.22; LAURENT BOYER & HENRI ROLAND, ADAGES DU DROIT FRANÇAIS [ADAGES OF FRENCH LAW] 501 (Litec 4th ed. 1999); GÉRARD CORNU, VOCABULAIRE JURIDIQUE [JURIDICAL VOCABULARY] 308 (4th rev. ed. 2003).

## IX CONCLUSIONS: OPTIONS FOR THE FUTURE

The issues of illegitimacy, inefficiency, and ineffectiveness require separate but perhaps mutually reinforcing measures. Legitimacy requires ensuring that 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 state parties to the Convention to the Court. This would leave the IACHR 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 IACHR should still have the right to appear in cases before the Court to present the country context and recommendations about reparations.

A more limited proposal would have the IACHR 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 IACHR 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 IACHR and a second by the Court.

If all cases are kept within the IACHR, 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 that 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 screened cases could all be 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 and expeditious way to handle repetitive cases raising no new issues. On a scale of one to ten, these cases are usually rated between one and three, on which basis they are deemed screening cases and are handled in this manner.

Repetitious cases from the same country, but raising a new legal issue or is-

sues, 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 European Court has in fact rejected making findings on such marginal matters in its judgments; and they correct in doing so.

More complex matters, as well as new matters, should be processed and decided by the plenary IACHR, for which each member should receive the petition and the pleadings of the parties. To carry this out, it would be useful to have a full-time IACHR, 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 judges 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 IACHR. At the least, for legitimacy and efficiency purposes, the President of the IACHR should become a full-time 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 IACHR 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 rapporteurs, if not to the full IACHR. This will require a much greater budget for translation and electronic databases of all the materials. It also means that more time is necessary for the IACHR with an increased honorarium.

Reforms are clearly needed. The present system for handling petitions does not serve the IACHR or the parties well. Too much time is consumed before decisions on admissibility and the merits are made. This prejudices the outcome of cases, particularly where facts are at issue and the passage of time leaves the IACHR 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 IACHR 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 to the credibility of the witnesses and the state authorities. More time for hearings in cases, assuming the IACHR 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 IACHR 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 IACHR 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 strengthening of the system, and not with its demise or weakening.