



DATE DOWNLOADED: Sat Apr 20 07:47:28 2024

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Antonio Augusto Cancado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L & COMP. L. 5 (2000).

ALWD 7th ed.

Antonio Augusto Cancado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 Tul. J. Int'l & Comp. L. 5 (2000).

APA 7th ed.

Trindade, Antonio Augusto Cancado. (2000). *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*. *Tulane Journal of International and Comparative Law*, 8, 5-48.

Chicago 17th ed.

Antonio Augusto Cancado Trindade, "Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century," *Tulane Journal of International and Comparative Law* 8 (2000): 5-48

McGill Guide 9th ed.

Antonio Augusto Cancado Trindade, "Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century" (2000) 8 Tul J Int'l & Comp L 5.

AGLC 4th ed.

Antonio Augusto Cancado Trindade, 'Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century' (2000) 8 Tulane Journal of International and Comparative Law 5

MLA 9th ed.

Trindade, Antonio Augusto Cancado. "Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century." *Tulane Journal of International and Comparative Law*, 8, 2000, pp. 5-48. HeinOnline.

OSCOLA 4th ed.

Antonio Augusto Cancado Trindade, 'Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century' (2000) 8 Tul J Int'l & Comp L 5

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century

Antônio Augusto Cançado Trindade*

An assessment of the inter-American system of protection of human rights at the dawn of the new century may distinguish five stages of evolution: that of the antecedents of the system; that of the formation of the system (characterized by the solitary and central role of the Inter-American Commission on Human Rights and the progressive expansion of its powers); that of the conventional institutionalization of the system (as from the entry into force, in mid-1978, of the American Convention on Human Rights of 1969); that of the consolidation of the system (marked by the jurisprudential construction of the Inter-American Court of Human Rights, and by the adoption of the two additional Protocols to the American Conventions); and, at last, that of the necessary improvement of the system. The following recommendations are submitted to this effect de lege ferenda, to secure an improved functioning of the mechanism of protection of the American Convention in all stages of the procedure.

The decisions of the Commission on admissibility ought to be pronounced in limine litis, and not reopened before the Court. The files of the cases lodged by the Commission with the Court ought to be carefully prepared, in a way that the Court does not need to reopen the fact-finding already undertaken by the Commission. Moreover, the Commission ought to conceive clear criteria for the renvoi of cases to the Court. The alleged victims (or their legal representatives) should have locus standi in judicio before the Court, as one cannot conceive rights without the legal capacity to vindicate them. Such locus standi is a guarantee of the equality of arms (égalité des armes) and of the due process of law, which allows a better balance between the parties, the exercise of the freedom of expression as well as a better instruction of the cases, the transparency of the process to the benefit of all concerned, and it puts an end to the ambiguity of the current role of the Commission. Such a recognition of the jus standi of the individuals ought to contribute to the necessary "jurisdictionalization" of the procedure under the American Convention, besides crystallizing the international legal personality and capacity of individuals in the ambit of contemporary International Law of Human rights on the American continent.

Une évaluation du système inter-américain de protection des droits de l'homme à l'aube du nouveau siècle peut distinguer cinq étapes d'évolution: celle des antécédents du système; celle de la formation du système (caractérisée par le rôle solitaire et central de la Commission interaméricaine des Droits de l'Homme et l'expansion progressive de ses pouvoirs); celle de l'institutionnalisation conventionnelle du système (à partir de l'entrée en vigueur, au milieu de 1978, de la Convention américaine des Droits de l'Homme de 1969); celle de la consolidation du système (marquée par la construction jurisprudentielle de la Cour interaméricaine des Droits de l'Homme, et par l'adoption des deux Protocoles

* Ph.D. (Cambridge); President of the Inter-American Court of Human Rights; Professor of International Law at the University of Brasília (Brazil); Visiting Professor of International Law at Tulane Law School (Spring 1999); Member of the Board of Directors of the Inter-American Institute of Human Rights (Costa Rica) and of the International Institute of Human Rights (Strasbourg); Associate of the *Institut de Droit International*.

additionnels à la Convention américaine jusqu'ici, ainsi que des Conventions interaméricaines sectorielles); et, enfin, celle de l'amélioration nécessaire du système. Les recommandations suivantes sont présentées de lege ferenda à cet effet, pour assurer un fonctionnement amélioré du mécanisme de protection de la Convention Américaine à l'ensemble des étapes de la procédure.

Les décisions de la Commission sur l'admissibilité devraient être prises in limine litis, et non rouvertes devant la Cour. Les dossiers des affaires soumis par la Commission à la Cour devaient être préparés avec grand soin, de façon à ce que la Cour n'ait pas besoin de rouvrir la détermination des faits (fact-finding) déjà entreprise par la Commission. En plus, la Commission devrait concevoir des critères clairs pour le renvoi des affaires à la Cour. Les prétendues victimes (ou leurs représentants légaux) devraient avoir locus standi in judicio devant la Cour, puisqu'on ne peut concevoir de droits sans la capacité juridique de les revendiquer. Un tel locus standi est une garantie de l'égalité des armes (equality of arms) et d'un procès juste et équitable (due process of law), qui permet un meilleur équilibre entre les parties, l'exercice de la liberté d'expression ainsi qu'une meilleure instruction des affaires, la transparence du procès pour le bénéfice de tous ceux qu'il concerne, et met fin à l'ambiguïté du rôle actuel de la Commission. Une telle reconnaissance du jus standi des individus devrait contribuer à la "juridictionnalisation" nécessaire de la procédure d'après la Convention américaine, tout en cristallisant la personnalité et la capacité juridiques internationales des individus dans le cadre du droit international des Droits de l'Homme contemporain dans le continent américain.

- I. INTRODUCTION.....6
- II. EVOLUTION AND PRESENT STATE OF THE SYSTEM OF PROTECTION..... 7
 - A. Antecedents7
 - B. Formation 8
 - C. Conventional Institutionalization 11
 - D. Consolidation.....16
 - 1. Court's Contentious Jurisdiction..... 18
 - 2. Court's Advisory Jurisdiction26
 - 3. Other International Instruments31
- III. RECOMMENDATIONS *DE LEGE FERENDA* FOR THE IMPROVEMENT OF THE SYSTEM..... 34

I. INTRODUCTION

The idea of a general reassessment of the inter-American system of human rights protection is gathering momentum on the American continent, with the focus on strengthening its mechanism of protection. This has been the *leitmotiv* of three important Seminars convened in the last three years by the Inter-American Court, Commission, and Institute of Human Rights.¹ The end of 1999 marked the twentieth anniversary

1. The first of the three Seminars was cosponsored by the Inter-American Institute of Human Rights and the International Rule of Law Institute of George Washington University, and was held in Washington, D.C., on May 20-22, 1996. It was followed by a Seminar of Experts convened by the Inter-American Commission on Human Rights on December 2-3, 1996, at the

of the Inter-American Court of Human Rights, the thirtieth anniversary of the American Convention on Human Rights, and the fortieth anniversary of the Inter-American Commission on Human Rights. As such there could hardly be a more convenient moment to dwell upon the matter at issue. Any projection as to the future of the inter-American system of human rights protection cannot, however, make abstraction of the experience accumulated in this domain in previous decades.

A reassessment of this regional human rights system requires a clear understanding of its formation and development which, in our view, leads to the identification of five stages in its evolution: the antecedents of the system, the formation of the system (with the gradual expansion of the faculties of the Inter-American Commission on Human Rights), the conventional institutionalization of the system (as from the entry into force of the American Convention on Human Rights), the consolidation of the system (with the case law of the Inter-American Court of Human Rights and the adoption of the two Protocols to the American Convention and of other "sectorial" inter-American Conventions), and the improvement of the system (a stage inaugurated in our days). These stages of evolution and the current state of the system of protection are analyzed in this Article. Furthermore, we² present our recommendations *de lege ferenda* for the improvement of this system at the dawn of the new century.

II. EVOLUTION AND PRESENT STATE OF THE SYSTEM OF PROTECTION

A. *Antecedents*

The 1948 American Declaration on the Rights and Duties of Man,³ accompanied by the 1948 Inter-American Charter of Social Guarantees, represents the starting point of the process of generalization of human rights protection on the American continent. The American Declaration, like the Universal Declaration of Human Rights⁴ of the same year, comprised a wide range of human rights (civil, political,

headquarters of the Organization of American States (OAS) in Washington, D.C. The last of the three Seminars, convened by the Inter-American Court of Human Rights, took place at its headquarters in San José, Costa Rica, on November 22-24, 1999, and was preceded by a dialogue of Ministers of Foreign Affairs of the countries of the American continent on the future of the inter-American human rights system.

2. The author refers to himself in the first person plural throughout this Article, however, all views expressed in this Article are the author's alone.

3. See American Declaration of the Rights and Duties of Man, OAS Res. XXX, International Conference of American States, 9th Conf., OAS Doc. OEA/Ser.L/V/I. 4 Rev. XX (1948).

4. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948).

economic, social, and cultural), aiming at the protection of human beings not only under certain circumstances or in circumscribed sectors as in the past, but in all circumstances and in all areas of human activity. In historical perspective, the following may be considered to have been the major contributions of the 1948 American Declaration to the development of the inter-American system of protection: (1) the conception of human rights as inherent to the human person; (2) the integral conception of human rights (encompassing civil, political, economic, social, and cultural rights); (3) the normative basis of protection vis-à-vis States not parties to the subsequent American Convention on Human Rights;⁵ and (4) the correlation between rights and duties.⁶

In the first stage of the antecedents, the 1948 American Declaration and Inter-American Charter of Social Guarantees were preceded or accompanied by other instruments of varying contents and legal effects, generally oriented to certain situations or categories of rights.⁷ Some instruments were binding, others purely advisory (treaties and resolutions). They formed a complex normative *corpus*, disclosing a diversity of ambits of application (for example, as to its beneficiaries) and paving the way to devising distinct means of implementation. This was to mark the operation of the future inter-American system of human rights protection in the years to follow.

B. Formation

In 1959, one decade after the adoption of the American Declaration, the Inter-American Commission on Human Rights was

5. See American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

6. In recent years, the 1948 American Declaration has been referred to, on distinct occasions, by the Inter-American Court of Human Rights, (1) in the first Advisory Opinion (of 1982), for the integration between the universal and regional systems of protection; (2) in the sixth Advisory Opinion (of 1986), in relation to the concept of the common good (Article 32(2) of the American Convention); and (3) in the tenth Advisory Opinion (of 1989), as to the interpretative interaction between the Declaration and the American Convention. On the matter, see generally A.A. Cançado Trindade, *El Sistema Interamericano de Protección de los Derechos Humanos (1948-1995): Evolución, Estado Actual y Perspectivas*, in *DERECHO INTERNACIONAL Y DERECHOS HUMANOS/DROIT INTERNATIONAL ET DROITS DE L'HOMME* 47 (D. Bardonnet & A.A. Cançado Trindade eds., 1996).

7. These instruments were: (1) Conventions on the Rights of Aliens and Naturalized Citizens (1902, 1906, and 1928), Convention on Asylum (1928), and Convention on the Rights of Women (1948); (2) resolutions adopted at inter-American Conferences on various aspects of human rights protection (1938 and 1945); and (3) declarations of inter-American Conferences referring to the subject (1945 and 1948).

created by resolution,⁸ not by treaty, with a mandate originally limited to the promotion of human rights, enjoying a *sui generis* position within the regional system. As an organ of *in loco* investigations of human rights and examinations of alleged violations of human rights, its competence increased. Its enlarged attributions and powers were also to comprise the reporting system (reports of distinct kinds, such as session and annual reports, and reports on specific countries). The 1967 Protocol of Reform of the Organization of American States (OAS) Charter (which entered into force in 1970) finally established the Commission as a main organ of the OAS, and thus endowed it with a conventional basis. This conventional basis has created a duality of functions, namely, vis-à-vis States Parties to the American Convention as well as States not parties to the Convention (as to these latter, on the basis of the OAS Charter and the 1948 American Declaration).

The Inter-American Commission on Human Rights has developed its vast practice through the application of three methods of implementation, namely: the petitioning system (examination of complaints or communications), the reporting system (elaboration of reports on the human rights situations in distinct countries of the region), and the fact-finding system (undertaking of missions of observation *in loco* in various countries).⁹ On several occasions the Commission has called upon OAS member states to incorporate in the texts of their constitutions certain rights and to harmonize their respective legislation with the provisions contained in human rights treaties. In its *Annual Reports*, particularly in recent years, the Commission has related the question of the protection of human rights to its concern with the political organization itself of OAS member

8. See Resolution VIII, of the V Meeting of Consultation of Ministers of External Relations, Aug. 12-18, 1959, OAS Doc. DEA/Ser.C/II.5 at 4 (1959).

9. On the work of the Commission in general, see COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, DIEZ AÑOS DE ACTIVIDADES—1971-1981 (1982); KAREL VASAK, LA COMMISSION INTERAMERICAINE DES DROITS DE L'HOMME (1968); ANNA P. SCHREIBER, THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (A.W. Sijthoff & Leyden eds., 1970); A.A. Cançado Trindade, *The Evolution of the OAS System of Human Rights Protection: An Appraisal*, 25 GER. Y.B. INT'L L. 498 (1982); Claudio Grossman, *Proposals to Strengthen the Inter-American System of Protection of Human Rights*, 32 GER. Y.B. INT'L L. 264 (1989). On the methods of operation of the Commission in general, see A. Aguilar, *Procedimiento que Debe Aplicar la Comisión Interamericana de Derechos Humanos en el Examen de las Peticiones o Comunicaciones Individuales sobre Presuntas Violaciones de Derechos Humanos*, in DERECHOS HUMANOS EN LAS AMÉRICAS—HOMENAJE A LA MEMORIA DE C.A. DUNSHEE DE ABRANCHES (1984); R.K. Goldman, *Uruguay: Amnesty Law in Violation of Human Rights Convention*, 49 REV. INT'L COMM'N OF JURISTS 37 (1992); C. Sepúlveda, *El Procedimiento de Solución Amistosa ante la Comisión Interamericana de Derechos Humanos*, in DERECHOS HUMANOS EN LAS AMÉRICAS—HOMENAJE A LA MEMORIA DE C.A. DUNSHEE DE ABRANCHES 242 (Secretaría General de la OEA) (1984).

states and effective exercise of the representative democracy as a principle enshrined in the OAS Charter.

The observations *in loco* have been undertaken by the Commission either in the course of the examination of communications (so as to determine or prove the facts denounced) or in the investigation of general situations of human rights in given States. Some of those missions became particularly important in different times of the Commission's history, such as those in the case of the *Dominican Republic* (1965-1966), in the armed conflict between *Honduras and El Salvador* (1969), in the case of *Chile* (starting in 1973), and in the *enforced or involuntary disappearances in Argentina* (report of 1979). By the end of the seventies, the Commission had undertaken eleven such missions, a total which had doubled by the end of the eighties. The Commission is certainly one of the human rights international supervisory organs which has made extensive use of *in loco* observation missions.

By the late seventies the Commission had examined more than three thousand individual petitions and communications; by the early nineties that total had surpassed ten thousand communications. Over time, the Commission has adopted resolutions of varying contents according to the cases. Such resolutions have declared that the alleged acts constitute *prima facie* violations of human rights, have recommended a large investigation of what appeared to constitute violations of human rights, have decided to adjourn consideration of the cases until the results of ongoing investigations are known, or have declared that the alleged violations of human rights have not been proved.

In its decisions on individual cases,¹⁰ in its *in loco* observations,¹¹ and in its reports on human rights situations,¹² the Commission

10. For an assessment, see COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, DIEZ AÑOS DE ACTIVIDADES—1971-1981 (1982); BERTHA SANTOSCOY, LA COMMISSION INTERAMÉRICAINNE DES DROITS DE L'HOMME ET LE DÉVELOPPEMENT DE SA COMPÉTENCE PAR LE SYSTÈME DES PÉTITIONS INDIVIDUELLES (1995); M. PINTO, LA DENUNCIA ANTE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS (del Puerto ed., 1993); Christina Cerna, *The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 65 (D. Harris & S. Livingstone eds., 1998).

11. For an assessment, see E. Vargas Carreño, *Las Observaciones in Loco Practicadas por La Comisión Interamericana de Derechos Humanos*, in DERECHOS HUMANOS EN LAS AMÉRICAS—HOMENAJE A LA MEMORIA DE C.A. DUNSHEE DE ABRANCHES 290 (1984); 3 E. MÁRQUEZ RODRÍGUEZ, VISITAS DE OBSERVACIÓN IN LOCO DE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS Y SUS INFORMES, ESTUDIOS BÁSICOS DE DERECHOS HUMANOS 135 (A.A. Cançado Trindade et al. eds., 1995).

12. For an assessment, see references *supra* note 9.

dwelled on topics such as the right to minimal conditions in prisons, the prevalence of judicial guarantees and the due process of law, the characterization of arbitrary detention, the restrictions on death penalty, the requisites of states of emergency and control of suspension of guarantees, the rights to personal freedom and political participation, the presumption of innocence, and the absolute condemnation of torture, among others. The Commission has recently indicated that it would be prepared to also survey economic, social, and cultural rights.

In addition to direct decisions, the Commission has also exercised a preventative function. By virtue of its general recommendations addressed to specific governments or formulated in its reports, changes have been introduced in laws or other provisions which violated human rights. Domestic remedies and procedures have been set up or perfected to ensure the observance of and respect for human rights in the countries of the region.

C. Conventional Institutionalization

The mid-1978 entry into force of the 1969 American Convention on Human Rights¹³ represented the conventional institutionalization of the regional inter-American system of protection, resulting in the determination of competences as well as legal effects in the domestic law of States Parties. Like its European counterpart, the Convention was largely devoted to the protection of civil and political rights. The historical normative gap vis-à-vis economic, social, and cultural rights was to be filled and remedied only in recent years (with the adoption of the 1989 San Salvador Protocol), as the Convention contains only one general provision (Article 26) on the “progressive development” of economic, social, and cultural rights.¹⁴ That Protocol has not yet, however, entered into force. A second Protocol, on the abolition of the death penalty, was adopted in 1990; the two Protocols to date have, in a way, expanded the American Convention system.

The Convention provides for a wide obligation to respect protected rights as well as to ensure their full exercise (Article 1(1)).¹⁵ The scope of this general obligation has been the object of a jurisprudential construction under the Convention, notably from the

13. On the preparatory work of the American Convention, see Organización de los Estados Americanos (OAS), Conferencia Especializada Interamericana sobre Derechos Humanos—Actas y Documentos (San José de Costa Rica), OEA doc. OEA/Ser.K/XVI/1.2, (1969).

14. American Convention, *supra* note 5, art. 29.

15. *Id.* art. 1.

judgments of the Inter-American Court of Human Rights in the *Honduran cases* (merits, 1988-1989).¹⁶ It should be noted that the Convention draftsmen cared to include a provision (Article 29),¹⁷ which contains clear norms of interpretation. Moreover, they expressly discarded an interpretation of the provisions of the Convention which would suppress or limit the enjoyment and exercise of the protected rights under the Convention, the domestic law of States Parties, or other international instruments on human rights. The objective character of the obligations entered into by States Parties as to the protection of human rights is beyond question.

The extent of obligations under the American Convention¹⁸ can be measured by its legal effects in the domestic law of States Party to the Convention. It is acknowledged today that Article 2 of the Convention sets forth the obligation to harmonize national legislation with the provisions of the Convention, a duty which is added to the general obligation under Article 1 of the Convention. Article 2 is not meant to deny the self-executing character of the provisions of the Convention; on the contrary, it singles out the general duty of States Parties to harmonize their domestic law with the Convention, or to incorporate the provisions into their domestic law, in addition to specific duties in relation to each of the protected rights. Moreover, the Convention recognizes the right of everyone to an effective recourse before national courts to protect the rights guaranteed by the Convention, the Constitution, or domestic laws (Article 25, and Article 8 on the right to a fair trial).¹⁹

As the American Convention entered into force, the Inter-American Commission was endowed with a duality of functions, vis-à-vis States Parties, on the basis of the Convention itself, as well as nonparties which were OAS members on the basis of the OAS Charter and the 1948 American Declaration. The Commission has

16. See *Velásquez Rodríguez v. Honduras*, Judgment July 29, 1988, (Ser. C) No. 4 (1988); Inter-Am. Ct. H.R.; *Godínez Cruz v. Honduras*, Judgment Jan. 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989).

17. American Convention, *supra* note 5, art. 29.

18. See generally THOMAS BUERGENTHAL ET AL., PROTECTING HUMAN RIGHTS IN THE AMERICAS—SELECTED PROBLEMS (3d rev. ed., 1990); A.A. Cançado Trindade, *Formación, Consolidación y Perfeccionamiento del Sistema Interamericano de Protección de los Derechos Humanos*, in XVII CURSO DE DERECHO INTERNACIONAL ORGANIZADO POR COMITÉ JURÍDICO INTERAMERICANO (1990), (1991); Edmundo Vargas Carreño, *Algunos Problemas que Presentan la Aplicación y la Interpretación de la Convención Americana sobre Derechos Humanos*, in LA CONVENCION AMERICANA SOBRE DERECHOS HUMANOS 149 (1980); Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439 (1990).

19. American Convention, *supra* note 5, arts. 8, 25.

undertaken its work by making use of the above-mentioned methods of examination of petitions or communications, preparation of distinct kinds of reports, and conduction of *in loco* or fact finding observations. The American Convention also provides for “friendly settlement” on the basis of respect for human rights (Articles 48-50),²⁰ a possibility resorted to in some cases.

It should be recognized that the American Convention confers the right of individual petition or communication to any person in an unqualified manner (Article 44).²¹ This simplified formula has enabled a greater number of people to lodge complaints with the Inter-American Commission. Subsequently, conditions of admissibility are applied paying particular attention to the needs of protection. For example, in the application of the local remedies rule, the Commission has adopted a variety of solutions.²² In the so-called “general cases,” it has dispensed with the exhaustion rule, and has applied presumptions (e.g., nonexistence or ineffectiveness of local remedies) in favour of the alleged victims. This practice demonstrates that in the present context of protection the rule does not have an absolute character and is applied with flexibility.

The Inter-American Court has likewise focused on the extent of the exceptions to the local remedies rule, going beyond the generally recognized exceptions of undue delays and denial of justice (e.g., cases involving indigence and generalized fear in the legal community to legally represent the alleged victims). Furthermore, there has been a focus on the issues of the distribution, or shifting, of the burden of proof with regard to exhaustion and the express or tacit waiver of the local remedies rule.

The Court has applied a criterion of reasonable probability of success in the use of remedies, and in addition has insisted on the need for effective local remedies. For example, in cases of disappearances of persons as a “state practice,” or of negligence or tolerance of public authorities, there is a presumption in favor of the victims, and there is no point in insisting on the application of the exhaustion rule, as there are no remedies to exhaust. More recently, the Court ruled that if the respondent government has failed to invoke the nonexhaustion preliminary objection in the admissibility

20. *Id.* arts. 48-50.

21. *Id.* art. 44.

22. Some solutions are requests for further information, postponement of the examination and decision instead of simple rejection of the complaints, and subsequent reopening of the cases.

proceedings before the Commission, it is estopped from later raising it before the Court.²³

The contributions of both the Commission and the Court have steered this process in the right direction. Those contributions pave the way for developing the application of the local remedies rule with special attention directed toward the overriding needs of protection and the particularities of human rights protection. Moreover, those contributions show that the incidence of the local remedies rule in human rights protection is certainly distinct from its application in the practice of a sacrosanct principle of customary international law, such as diplomatic protection of nationals abroad.

We are in a domain of protection which is fundamentally victim-oriented and concerned with the rights of individual human beings rather than the rights of States. When inserted in human rights treaties, generally recognized rules of international law follow an evolution of their own. However, these rules necessarily suffer a certain degree of adjustment or adaptation, which is dictated by the special character of the object and purpose of those treaties and by the widely recognized specificity of human rights protection.²⁴

Recently, attention has been given to the relationship of the inter-American human rights system with other systems of protection;²⁵ specifically, how to avoid the conflict of competences, the duplication

23. See *Castillo Páez Case*, Preliminary Objections, Judgment Jan. 30, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 23 (1996); *Loayza Tamayo Case*, Preliminary Objections, Judgment Jan. 31, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 25 (1996).

24. See generally A.A. CAÑADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW* (Cambridge University Press 1983); A.A. Cañado Trindade, *El Agotamiento de los Recursos Internos en el Sistema Interamericano de Protección de los Derechos Humanos*, San José, Costa Rica, Inter-American Institute for Human Rights (Series for NGOs, n.1) (1991). On the role of domestic remedies, see H. Fix-Zamudio, *La Protección Judicial de los Derechos Humanos en Latinoamérica y en el Sistema Interamericano*, 8 REVISTA DEL INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS (1988); E. Jiménez de Aréchaga, *La Convención Interamericana de Derechos Humanos como Derecho Interno*, 69/71 BOLETIM DA SOCIEDADE BRASILEIRA DE DIREITO INTERNACIONAL 35 (1987/1989).

25. On the question of their co-ordination, see A.A. Cañado Trindade, *Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)*, 202 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 21 (1987); Dr. Carlos A. Dunshee de Abranches, *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft Inter-American Convention on Human Rights*, INTER-AM. Y.B. ON H.R. 169, 169-213 (1968); H. Gros Espiell, *La Convention Américaine et la Convention Européenne des Droits de l'Homme—Analyse Comparative*, 218 RECUEIL DE COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 175 (1989); Rodolpho Piza, *Co-ordination of the Mechanisms for the Protection of Human Rights in the American Convention with Those Established by the United Nations*, 30 AM. U. L. REV. 167 (1980); A.H. Robertson, *The American Convention on Human Rights and the European Convention: A Comparative Study*, 29 ANNUAIRE EUROPÉEN/EUROPEAN YEARBOOK 50 (1981).

of proceedings, and the diverging interpretation of corresponding provisions of co-existing international instruments by the supervisory organs (petitioning system). In addition, focus has been given to determine how to achieve uniform guidelines concerning the form, contents, and standardization of reports, and how to obtain the regular exchange of information and reciprocal consultations between the supervisory organs (fact-finding system). Insofar as the petitioning system is concerned, the early practice of the Inter-American Commission on Human Rights, prior to the American Convention on Human Rights, disclosed considerable flexibility in its relationship with other procedures, besides abiding by the complainant's freedom of choice of procedures test.

The relevant provisions of the American Convention, (Articles 46(1)(c) and 47(d)),²⁶ were complemented by the guidelines on "duplicity of procedures" found in the Commission's Regulations, which were already in force (Article 39(2)).²⁷ The criteria became the following: the Commission was not to refrain from taking up and examining a complaint when another procedure was limited to an examination of the general situation on human rights in the State and there had been no decision on the specific facts that were the subject of the complaint before the Commission, or was a decision that would not lead to an effective settlement of the denounced violation. Also, the Commission was not to refrain from taking up a complaint when the petitioner or a family member before the Commission was the alleged victim of a violation, and the petitioner in the other procedure was a third party or a nongovernmental organization (NGO) having no mandate from the former.

These were precise guidelines, which, insofar as the petitioning system is concerned, allowed the Commission to proceed with the examination of a case, to the benefit of the alleged victims. As for the system of fact-finding or observations *in loco*, there were examples of the concomitant application of two or more mechanisms of protection. For example, the situation of human rights in *El Salvador* was the object of examination, on the part of a Special Representative of the U.N. Commission on Human Rights, as well as the Inter-American Commission on Human Rights (1982-1985). Likewise, the situation of human rights in *Bolivia* was the object of study both by a Special Envoy of the U.N. Commission on Human Rights and by the Inter-American Commission on Human Rights (1981-1983). The case of

26. American Convention, *supra* note 5, arts. 46(1)(c), 47(d).

27. *See id.* art. 39(2).

enforced or involuntary disappearances in *Argentina* was the object of observations *in loco* on the part of the Inter-American Commission as well as the Working Group of the United Nations (1979-1984). The *Chilean case* was similarly examined at global and regional levels by the *Ad Hoc* Working Group and the Special *Rapporteur* on Chile by the United Nations, the International Labour Organization (ILO) Committee on Freedom of Association, and the Inter-American Commission on Human Rights (observations *in loco* 1974-1979). In sum, the mechanisms of human rights protection at global and regional levels were duly regarded as complementary, and the inter-American system of protection has, of course, been no exception to that.

D. Consolidation

The consolidation of the inter-American system of human rights protection has occurred with the developing case law of the Inter-American Court, the adoption of the two Protocols to the American Convention, and other "sectorial" inter-American conventions.²⁸ Pursuant to the adoption of the American Convention (July 18, 1978), the States Parties elected the first Judges to compose the Court at the VII Special Session of the OAS General Assembly (May 22, 1979). Those Judges first met on June 29-30, 1979, at the OAS headquarters in Washington D.C.; the Court's seat was subsequently installed in San José, Costa Rica, on September 3, 1979. In that same year, the Court's Statute was adopted, and in 1981 a Headquarters Agreement (on the regime of privileges and immunities) was concluded between the Court and the host State, Costa Rica.

Throughout its history, the Inter-American Court has had three different Rules of Procedure pronouncements.²⁹ The original Rules were adopted during its third session (July 30 - August 9, 1980). At that time the Inter-American Court had virtually no experience in the handling of contentious cases. As a model the Court took the Rules, then in force, of the European Court of Human Rights,³⁰ which were

28. See Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Nov. 17, 1988, Resolution AG/RES 907 (XVIII-0/88), *reprinted in* 28 I.L.M. 156 (1989); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, Inter-Am. C.H.R., *reprinted in* 29 I.L.M. 1447 (1990).

29. See generally Rules of Procedure (adopted in the third session, July 30 to Aug. 9, 1980); Second Rules of Procedure (adopted in the twenty-third session, Jan. 9-18, 1991); Third Rules of Procedure (adopted in the thirty-fifth session, Sept. 9-20, 1996).

30. See Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights, E.T.S. No. 005 as amended by Protocol No. 11 (E.T.S. No. 155) of May 11, 1994.

inspired by the Rules of the International Court of Justice (ICJ). However, these rules had been designed to set up the procedure for the *contentieux* between States before the ICJ. They were not always adequate for the settlement of human rights cases where the vast majority of complaints were individuals seeking relief from states (seldom not their own).

Thus, it was not surprising to find the procedure of dividing cases into written and oral phases. The former comprised, as in other international tribunals, such documents as memorial, counter-memorial, reply, and rejoinder,³¹ and the latter comprised the oral hearings before the Court.³² Likewise, it was not surprising to find the distinct phases of preliminary objections, merits, and reparations developing in practice. Thus, the Court was soon faced with the need to gradually adapt its Rules to the nature of the cases it would later be asked to adjudicate.

The second Rules of Procedure were adopted during the XXIII ordinary period of sessions (January 9-18, 1991) and were amended on three subsequent occasions.³³ Further changes in procedure, in an effort to perfect it and render it more agile (as required by human rights cases), have been introduced by means of resolutions adopted by the Court on specific points. Those resolutions were subsequently incorporated into the amended Rules of Procedure. Two recent resolutions, the first on the composition of the Court in cases in the phase of reparations and supervision of compliance with its judgments (September 19, 1995), and the second on the presentation of evidence (February 2, 1996), are illustrative of the types of resolutions spoken to above.

The first resolution determined that all issues related to reparations and the supervision of compliance with the Court's judgments were to fall to the Judges serving in the Court when it decided those matters. In the event a public hearing had already taken place, the Judges present at the hearing would decide the issues. The second resolution held that the evidence was to be presented with the complaint (*demanda*). Both resolutions were clearly intended to rationalize and simplify the procedure, mindful of the specificity of human rights cases and the need to render proceedings less cumbersome and more expeditious.

31. See Rules of Procedure of the Inter-American Court of Human Rights, arts. 26-31 (1980) [hereinafter Rules of Procedure—1980] (on written proceedings).

32. *Id.* arts. 32-33 (on oral proceedings).

33. Further amendments were on January 25, 1993, July 16, 1993, and December 2, 1995, respectively.

These changes have been incorporated into the Court's third Rules of Procedure, adopted during the XXXIV ordinary period of sessions (September 9-20, 1996) and entered into force on January 1, 1997. Under the new Rules, evidence is to be presented effectively with the complaint, and only under exceptional circumstances in other phases.³⁴ This is to avoid an indefinite prolonging of the evidentiary proceedings. By and large, the successive procedural acts appear, at last, regulated in a logical order (under Title II, general rules of procedure in chapter I, written and oral proceedings in chapters II and III, and handling of evidence in chapter IV).

The Court took into account the experience it accumulated in practice in the settlement of contentious cases to arrive at the current rules. A couple of examples may be singled out in this connection. The provision on presentation of the complaint (*demanda*) before the Court is clearer and simplified so as to avoid difficulties raised in practice.³⁵ Another illustration lies in the provision on acceptance of responsibility by the respondent State (*allanamiento*),³⁶ a debatable issue on which the Court has gathered some experience in recent cases.³⁷ The third Rules of Court (Article 23) took a significant step forward in providing that in the reparations proceedings, "the representatives of the victims or their relatives may present their own arguments and evidence in an autonomous way."³⁸ In our view, there are compelling reasons for granting the alleged victims *locus standi in judicio* before the Court in all phases of the proceedings; after all, the recognition of the international personality and full procedural legal capacity of the human being is essential in the present domain of human rights protection.

1. Court's Contentious Jurisdiction

The American Convention on Human Rights confers adjudicatory, as well as advisory, functions³⁹ upon the Inter-American Court of

34. See Rules of Procedure of the Inter-American Court of Human Rights, art. 43 (1996) [hereinafter Rules of Procedure—1996].

35. E.g., *Paniagua Morales v. Guatemala*, Judgment Mar. 8, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 37 (1998); see also Rules of Procedure—1996, *supra* note 34, art. 26.

36. See Rules of Procedure—1996, *supra* note 34, art. 52(2).

37. See *Aloeboetoe v. Suriname*, Judgment Dec. 4, 1991, Inter-Am. Ct. H.R. (Ser. C) No. 11 (1994); *El Amparo v. Venezuela*, Judgment Jan. 18, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 19 (1995); *Garrido and Baigorria Case*, Judgment Feb. 2, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 26 (1996) (dealing with Argentina).

38. Rules of Procedure—1996, *supra* note 34, art. 23.

39. See Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1 (1985); Maximo Cisneros Sanchez, *Algunos Aspectos de la Jurisdicción Consultiva de la Corte Interamericana de Derechos Humanos*, in LA CORTE

Human Rights. The first involves the Court's power to adjudicate contentious cases relating to charges that a State Party has violated the Convention. The contentious jurisdiction of the Court comprises all cases, submitted by either the Inter-American Commission on Human Rights or by a State Party (Article 61(1) of the American Convention), provided that the States Parties to the case have recognized its jurisdiction, by either special declaration pursuant to Article 62(1) and (2) of the American Convention, or by special agreement pursuant to Article 62(3). The declaration of acceptance of the Court's jurisdiction, presented to the OAS Secretary General, may be made unconditionally, or on condition of reciprocity, for a specified period, or for specific cases (Article 62(2)).⁴⁰

The Court's contentious jurisdiction covers cases concerning the interpretation and application of the provisions of the American Convention by virtue of Article 62(3).⁴¹ As some of these provisions refer to other treaties (Articles 29, 46(1)(c), and 75),⁴² such issues may be taken into account, despite the fact that the Court's competence *ratione materiae* is for contentious cases, and in principle, limited to the American Convention. For a case to be heard by the Court, it is necessary that the procedures set forth in Articles 48 and 50⁴³ of the

INTERAMERICANA DE DERECHOS HUMANOS—ESTUDIOS Y DOCUMENTOS 53 (1985); A.A. Cançado Trindade, *El Sistema Interamericano de Protección de los Derechos Humanos (1948-1995): Evolución, Estado Actual y Perspectivas*, in DERECHO INTERNACIONAL Y DERECHOS HUMANOS/DROIT INTERNATIONAL ET DROITS DE L'HOMME 47 (D. Bardonnnet & A.A. Cançado Trindade eds., 1996). On other aspects of the Court's faculties, see A.A. Cançado Trindade, *Formación, Consolidación y Perfeccionamiento del Sistema Interamericano de Protección de los Derechos Humanos*, in XVII CURSO DE DERECHO INTERNACIONAL ORGANIZADO POR EL COMITÉ JURÍDICO INTERAMERICANO (1990), (1991); Christina M. Cerna, *The Structure and Functioning of the Inter-American Court of Human Rights (1979-1992)*, BRIT. Y.B. INT'L L. 135 (1992); Juan E. Méndez & Jose Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507 (1990); F.O. Salvioli, *Algunas Reflexiones sobre la Indemnización en las Sentencias de la Corte Interamericana de Derechos Humanos*, in 3 ESTUDIOS BÁSICOS DE DERECHOS HUMANOS 145 (A.A. Cançado Trindade et al. eds., 1995).

40. See American Convention, *supra* note 5, art. 62(2). Among these modes of acceptance of the Court's jurisdiction, set forth in Article 62(2) of the Convention, it is rather surprising to find the condition of reciprocity, which, in practical terms, could only be resorted to in inter-State cases (never brought before the Court until the present time), but not in cases referred to it by the Commission. Moreover, considerations of reciprocity have proven utterly inadequate in the present domain of protection, where they have been gradually overcome by the notion of collective guarantee and considerations of common or general "public interest" or *ordre public*. On the erosion of reciprocity and the prominence of considerations of *ordre public* in the domain of the international protection of human rights, see A.A. CANÇADO TRINDADE, A PROTEÇÃO INTERNACIONAL DOS DIREITOS HUMANOS—FUNDAMENTOS JURÍDICOS E INSTRUMENTOS BÁSICOS 10 (Saraiva ed., 1991).

41. See American Convention, *supra* note 5, art. 62(3).

42. See *id.* arts. 29, 46(1)(c), 75.

43. See *id.* arts. 48, 50, 61(2).

Convention have been duly completed (Article 61(2)).⁴⁴ Of the twenty-five present States Parties to the American Convention at present,⁴⁵ twenty-one have accepted the jurisdiction of the Court for contentious cases.⁴⁶

The basis of the Court's compulsory jurisdiction provides yet another illustration of the unfortunate lack of automatism of international jurisdiction. The inter-American system of human rights protection will advance considerably the day all OAS member states become Parties to the American Convention (and its two Protocols) and unconditionally accept the Court's jurisdiction without reservation.

The Court's decision, in the exercise of its adjudicatory function, are binding on all those States which recognize the Court's contentious jurisdiction as obligatory. The Convention provides that the Court must give reasons for its judgment, which are final and not subject to appeal, and notify the parties to the case (Articles 66(1), 67, and 69, respectively).⁴⁷ If the judgment does not represent in whole, or in part, the unanimous opinion of the Judges, any Judge is entitled to attach his dissenting or separate opinion (Article 66(2)).⁴⁸ The Court has the power to rule that the injured party be ensured the enjoyment of the right that has been violated and order reparations due, as appropriate. In case of disagreement as to the meaning and scope of the judgment, the Court is to interpret it at the request of a party.⁴⁹ Reparation judgments may be executed in the State concerned, in accordance with the domestic procedure governing the execution of judgments against the State (Article 68(2)).⁵⁰

44. It may be recalled in this connection that, in the matter of *Viviana Gallardo*, the Court declared inadmissible the request of the Costa Rican government, which had formally renounced the proceedings before the Commission, as those proceedings not only assured the institutional integrity of the system of protection provided for in the Convention, but also were established not in the exclusive interest of the State, but as a safeguard of the individual rights of the victims. See *Viviana Gallardo v. Costa Rica*, Inter-Am. Ct. H.R. 12, OEA/Ser.L/V/III.7, doc. 13 (1981), reprinted in 20 I.L.M. 1424 (1981).

45. The 25 State Parties to the American Convention are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela at the end of 1999.

46. The 21 accepting Court jurisdiction for contentious cases are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.

47. See American Convention, *supra* note 5, arts. 66(1), 67, 69.

48. See *id.* art. 66(2).

49. This is providing that the request is made within 90 days from the date of notification of the judgment. See *id.* art. 67.

50. See *id.* art. 66(2).

In the exercise of its adjudicatory function as the judicial organ of the inter-American system of protection, the Court has heard, or taken cognizance of, thirty-five contentious cases,⁵¹ some of which are still pending. In these cases, the Court has delivered sixty-one Judgments relating to preliminary objections, competence, merits, reparations, and interpretation of judgments.⁵² Generally, the cases before the Court have evolved, pursuant to the relevant provisions of the American Convention as well as the Court's Statute and Rules of Procedure, into the distinct phases of preliminary objections, merits, reparations, supervision of compliance with judgments, and interpretation of judgments.

Preliminary objections have been raised in most, but not all, contentious cases before the Court. Proceedings in this phase have been regarded as *not* suspending the proceedings on the merits, although a decision on the merits was delayed. It has taken the Court

51. Besides the matter of *Viviana Gallardo v. Costa Rica*, Inter-Am. Ct. H.R. 12, OEA/Ser.L/V/III.7, doc. 13 (1981), reprinted in 20 I.L.M. 1424 (1981), the contentious cases are *Velásquez Rodríguez v. Honduras*, Judgment July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988); *Godínez Cruz v. Honduras*, Judgment Jan. 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989); *Fairén Garbí and Solís Corrales Case*, Judgment Mar. 15, 1989, Inter-Am. Ct. H.R., (Ser. C) No. 6 (1989); *Cayara Case*, Preliminary Objections, Judgment Feb. 3, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 14 (1993); *Aloeboetoe Case*, Judgment Dec. 4, 1991, Inter-Am. Ct. H.R. (Ser. C) No. 11 (1991) (Suriname); *Gangaram Panday Case*, Preliminary Objections, Judgment Dec. 4, 1991, Inter-Am. Ct. H.R. (Ser. C) No. 12 (1991) (Suriname); *Maqueda Case*, Judgment Jan. 17, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 18 (1995) (Argentina); *El Amparo Case*, Judgment Jan. 18, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 19 (1995) (Venezuela); *Neira Alegria Case*, Judgment Jan. 19, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 20 (1995) (Peru); *Caballero Delgado and Santana Case*, Preliminary Objections, Judgment Jan. 21, 1994, Inter-Am. Ct. H.R. (Ser. C) No. 17 (1994) (Colombia); *Garrido and Baigorria Case*, Judgment Feb. 2, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 26 (1996) (Argentina); *Genie Lacayo Case*, Judgment Jan. 29, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 30 (1997) (Nicaragua); *Castillo Páez Case*, Preliminary Objections, Judgment Jan. 30, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 24 (1996) (Peru); *Loayza Tamayo Case*, Preliminary Objections, Judgment Jan. 31, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 25 (1996) (Peru); *Paniagua Morales Case*, Preliminary Objections, Judgment Jan. 25, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 23 (1996) (Guatemala); *Blake Case*, Judgment Jan. 24, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 36 (1998) (Guatemala); *Suárez Rosero Case*, Judgment Nov. 12, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 35 (1997) (Ecuador); *Benavides Cevallos Case*, Judgment June 19, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 38 (1998) (Ecuador); and *Cantoral Benavides Case*, Preliminary Objections, Judgment Sept. 3, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 40 (1998) (Peru). Citations for the remaining cases have been omitted: *Durand and Ugarte Case* (Peru), *Bámaca Velásquez Case* (Guatemala), *Villagrán Morales Case* (Guatemala), *Castillo Petruzzi Case* (Peru), *Cesti Hurtado Case* (Peru), *Baena Ricardo Case* (Panama), *Mayagna Awás Tingni Case* (Nicaragua), and *Las Palmeras Case* (Colombia); and, at the initial phase of proceedings, *Olmedo Bustos Case* (Chile), *Cantos Case* (Argentina), *Ivcher Bronstein Case* (Peru), *Tribunal Constitucional Case* (Peru), *Hilaire Case* (Trinidad and Tobago), *Aguilera La Rosa Case* (Venezuela), and *Trujillo Oroza Case* (Bolivia).

52. See Organization of American States (OAS), *The Inter-American Court and the Inter-American System of Human Rights: Projections and Goals*, at 7, OAS Doc. OEA/Ser.G-CP/CAJP-1130 (1996) (by Court's Secretariat) (end of 1999).

an average of twenty-eight months to deliver a judgment on the merits, beginning with the lodging of the application with the Court until the final decision on the merits (written proceedings and oral hearings).⁵³ In the practice of the Court, deliberations have been taken in one session, normally following the one in which the last hearing on the merits was held, and the judgment has been delivered shortly thereafter.

Reparations can be ordered in a judgment on the merits;⁵⁴ in practice however, given the need to examine further elements, the Court has reserved that decision for a subsequent phase in the great majority of cases. As a result of a Judgment in 1996,⁵⁵ the Court has standardized the elements taken into account in order to deliver its decisions on reparations. It has taken an average of sixteen months for such judgments to be delivered.⁵⁶ In general, the Court has reserved for itself the faculty of supervising compliance with the reparation judgments.⁵⁷ Interpretation of judgments, a possibility foreseen in the American Convention,⁵⁸ has been undertaken on six occasions.⁵⁹

In its Judgments on the merits of contentious cases, the Court has considered such basic human rights set forth in the American Convention as the right to life, the right to personal integrity, the right to personal liberty, the right to a fair trial, the right to judicial

53. *Id.* at 10.

54. *See, e.g., Gangaram Panday v. Suriname*, Judgment Jan. 21, 1994, Inter-Am. Ct. H.R. (Ser. C) No. 16 (1994); *Genie Lacayo v. Nicaragua*, Judgment Jan. 29, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 30 (1997).

55. *See Neira Alegria v. Peru*, Reparations, Judgment Sept. 19, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 29 (1996).

56. OAS Doc., *supra* note 52, at 11.

57. *See Aloeboetoe Case*, Reparations, Judgment Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15 (1993). On the Court's retaining jurisdiction, *see also Maqueda Case*, Resolution, Judgment Jan. 17, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 18 (1995). It should not pass unnoticed that on September 10, 1996, the Court adopted a resolution in *Velásquez Rodríguez and Godínez Cruz*, *supra* note 51 (the so-called *Honduran cases*, decided in the late eighties), in which it found that the State of Honduras had at last complied with the ordered reparations, thus putting an end to the proceedings.

58. *See American Convention*, *supra* note 5, art. 67.

59. *E.g., Velásquez Rodríguez v. Honduras*, Interpretation of Compensatory Damages, Judgment Aug. 17, 1990, Inter-Am. Ct. H.R. (Ser. C) No. 9 (1990); *Godínez Cruz v. Honduras*, Interpretation of Compensatory Damages, Judgment Aug. 17, 1990, Inter-Am. Ct. H.R. (Ser. C) No. 10 (1990); *El Amparo Case*, Judgment Apr. 16, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 46 (1997); *Loayza Tamayo Case*, Reparations, Judgment Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 42 (1998); *Suárez Rosero Case*, Reparations, Judgment Jan. 20, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 44 (1999); and *Blake Case*, Reparations, Judgment Jan. 22, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 48 (1999). In the case of *Genie Lacayo*, Judgment Jan. 29, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 30 (1997), there was a judgment on revision, rather than on interpretation.

protection, and the right to equal protection before the law.⁶⁰ In relation to the case law of contentious cases of the Inter-American Court to date, the contribution of eight of its judgments may be singled out as being particularly significant. Such judgments include that of the merits in cases of *Velásquez Rodríguez* (1988) and *Godínez Cruz* (1989) concerning Honduras, the judgment on reparations in the *Aloeboetoe* case (1993) concerning Suriname, the judgments on the merits in the cases of *Loayza Tamayo* (1997) and *Castillo Páez* (1997) concerning Peru, the case of *Suárez Rosero* (1997) concerning Ecuador, and more recently (in the course of 1998), the judgment on preliminary objections in the *Castillo Petruzzi v. Peru* case and the judgment on reparations in the *Loayza Tamayo* case.⁶¹

In the first two cases, the contribution of the Court consisted of pointing out the threefold duty of States to prevent, investigate, and punish the violations of protected rights, as well as to provide redress. The Court linked the substantive provisions on violated rights to the general obligation under Article 1(1) to *respect* and *ensure* the exercise of the rights provided for in the Convention. In other cases, this link has been systematically invoked by both the Court and the Commission.

The next step forward would appear to be a similar exercise in combining the substantive provisions on violated rights with the general obligation under Article 2 to harmonize domestic law with the American Convention. Indicative of this next goal of harmonization, in the *Aloeboetoe* case, the contribution of the Court consisted of having placed the reparations for the violations of the protected rights

60. See American Convention, *supra* note 5, arts. 4-5, 7-8, 24-25. In the future, it is expected that the Court will have the occasion to pronounce on a series of other rights under the American Convention, namely the right to juridical personality (Article 3), the right to be free from slavery or involuntary servitude or forced or compulsory labour (Article 6), the freedom from *ex post facto* laws (Article 9), the right to compensation (Article 10), the right to privacy (Article 11), the freedom of conscience and religion (Article 12), the freedom of thought and expression (Article 13), the right of reply or correction (Article 14), the right of assembly (Article 15), the freedom of association (Article 16), the rights of the family (Article 17), the right to a name (Article 18), the rights of the child (Article 19), the right to nationality (Article 20), the right to property (Article 21), the freedom of movement and residence (Article 22), and the right to participate in the conduct of public affairs (political rights) (Article 23). *Id.* arts. 6, 9-23.

61. See *Velásquez Rodríguez v. Honduras*, Judgment Aug. 17, 1990, Inter-Am. Ct. H.R. (Ser. C) No. 10 (1990) (merits); *Godínez Cruz v. Honduras*, Judgment Aug. 17, 1990, Inter-Am. Ct. H.R. (Ser. C) No. 10 (1990) (merits); *Aloeboetoe Case*, Judgment Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15 (1993) (on reparations); *Loayza Tamayo Case*, Judgment Sept. 19, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997) (merits); *Castillo Páez Case*, Judgment Nov. 3, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 34 (1997) (merits); *Suárez Rosero Case*, Judgment Nov. 12, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 35 (1997) (merits); *Castillo Petruzzi Case*, Judgment Sept. 4, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 41 (1998) (preliminary objections); *Loayza Tamayo Case*, Judgment Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 42 (1998) (reparations).

within the social context in which these rights apply.⁶² That social context included sensibly taking into account the cultural practices in the community of the *Saramacas* (Maroons) in Suriname.

In the *Loayza Tamayo*⁶³ case, the Court declared that the Peruvian decrees that typified the delicts of terrorism and “*traición a la patria*,” were incompatible with Article 8(4) of the Convention: specifically, they were in breach of the principle of *non bis in idem* set forth therein. This was the first time that the Court held, in a contentious case, that provisions of domestic law were incompatible with the American Convention. Quite significantly, some days after the Court’s judgment, the Peruvian government duly complied with the Court’s order to release the prisoner, María Elena Loayza Tamayo; moreover, it announced its decision to put an end to the so-called tribunals of “faceless judges” (“*jueces sin rostro*”) in Peru. This case is thus bound to become a *cause célèbre* of transcendental importance in the history of the international protection of human rights on the American continent.

In its judgment on the merits in the *Castillo Páez*⁶⁴ case, the Court, in contrast with its previous decisions on Article 25 (in combination with Article 1(1)) of the Convention, elaborated, for the first time, on the right to an effective remedy under Article 25 of the Convention. The Court in its own words, stated that the provision of Article 25 “on the right to an effective remedy before the competent national judges or tribunals constitutes one of the basic pillars, not only of the American Convention, but of the rule of law (*État de Droit, Estado de Derecho*) itself in a democratic society in the sense of the Convention.”⁶⁵ The Court further related Article 25 to the general obligation of Article 1(1) of the American Convention.

In the *Suárez Rosero*⁶⁶ case, the Court took a significant step further: it declared that Article 114 bis of the Ecuadorean Penal Code, which deprived all persons in detention under the Anti-Drug Law of certain judicial guarantees (as to the length of detention), constituted a *per se* violation of Article 2—in combination with Article 7(5)—of the American Convention, irrespective of whether

62. See *Aloeboetoe v. Suriname*, Judgment Dec. 4, 1991, Inter-Am. Ct. H.R. (Ser. C) No. 11 (1994).

63. See *Loayza Tamayo v. Peru*, Judgment Sept. 19, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997).

64. See *Castillo Páez v. Peru*, Judgment Nov. 3, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 34 (1997).

65. See American Convention, *supra* note 5, art. 25.

66. See *Suárez Rosero v. Ecuador*, Judgment Nov. 12, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 35 (1997) (merits).

that norm of the Penal Code had been applied in the present case. This was the first time that the Court established a violation of Article 2 of the Convention by the existence *per se* of the provision of Article 114 bis of the Ecuadorean Penal Code. In its view, Ecuador had not taken adequate measures in domestic law to render effective the right contemplated in Article 7(5) of the Convention. More recently in the *Castillo Petruzzi*⁶⁷ case, the Court upheld the right of individual petition (challenged by the respondent State) in the circumstances of the case. In its judgment in the *Loayza Tamayo*⁶⁸ case, the Court accepted the concept of project of life (*proyecto de vida*), linked to satisfaction, among other measures of reparation.

Also deserving of special mention are the recent judgments of the Court in the *Blake* case,⁶⁹ where it found Guatemala in breach of Articles 8(1) and 5 (in combination with Article 1(1)) of the American Convention; the legal issue raised therein in relation to the limitation *ratione temporis* of the Court's competence touched the very basis of its contentious jurisdiction. Likewise, its fifteenth Advisory Opinion (of 1997),⁷⁰ touched the very foundations of its advisory jurisdiction. Despite the change in the position of the requesting State, Chile, in effect withdrawing the request for an Opinion, the Court decided to retain jurisdiction over the matter. In the case of *Benavides Cevallos v. Ecuador* (1998),⁷¹ a friendly settlement was reached before the Court, satisfactory to all concerned.⁷²

Besides the exercise of its contentious function, the Court has ordered (under Article 63(2) of the American Convention) *provisional or interim measures of protection* in cases of extreme gravity and urgency and in order to avoid irreparable damage to persons.⁷³ This

67. See *Castillo Petruzzi Case*, Preliminary Objections, Judgment Sept. 4, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 41 (1998).

68. See *Loayza Tamayo Case*, Reparations, Judgment Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 42 (1998).

69. See *Blake Case*, Judgment Jan. 24, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 36 (1998) (merits); *Blake Case*, Judgment Jan. 22, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 48 (1999) (reparations).

70. Advisory Opinion OC-15/97 of Nov. 14, 1997, Inter-Am. Ct. H.R. (Ser. A) No. 15 (1997).

71. See *Benavides Cevallos v. Ecuador*, Judgment June 19, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 38 (1998).

72. Another case of a friendly settlement reached before the Court was *Maqueda v. Argentina*, Judgment Jan. 17, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 18 (1995).

73. See generally the provisional or interim measures of protection ordered in the cases of *Velásquez Rodríguez*, *Godínez Cruz*, and *Fairén Garbi and Solís Corrales*, (concerning Honduras 1988); *Bustios-Rojas*, (concerning Peru 1990-1991); *Chunimá*, (concerning Guatemala 1991-1992); *Reggiardo Tolosa*, (concerning Argentina 1993-1994); *Colotenango* (concerning Guatemala, 1994-1996); *Caballero Delgado and Santana* (concerning Colombia, 1994); *Carpio*

has occurred in pending cases as well as cases which have not yet been submitted to it, upon request of the Commission. Protective measures have been ordered in situations implying an eminent threat to life or serious physical or mental harm. In practice, the Court has not required a substantial demonstration from the Commission that the facts are true, but rather, has proceeded on the basis of a reasonable presumption that the facts are true.⁷⁴

The Court has recently published a *Compendium* reproducing all interim measures adopted in the period ranging from 1987 to 1996.⁷⁵ The granting of provisional measures of protection is assuming an increasingly greater importance in the contemporary practice of the Court. Until now, the Court has ordered more than thirty such measures. The growing use of provisional or interim measures of protection is a reassuring development. The granting of those measures has increasingly become an important aspect of the contemporary case law of the Court. The emergency relief the Court has secured and indeed the lives that it has saved has clearly established the preventative function of the international protection of human rights.

2. Court's Advisory Jurisdiction

In addition to the adjudicatory function, the Inter-American Court is also endowed with an advisory function. By virtue of Article 64(1) of the American Convention, OAS member states (whether or not they have ratified the American Convention) may consult the Court regarding the interpretation of the Convention itself or of other treaties concerning the protection of human rights in the American States.

Nicolle (concerning Guatemala, 1995-1996); *Blake* (concerning Guatemala, 1995); *Alemán Lacayo* (concerning Nicaragua, 1996); *Vogt* (concerning Guatemala, 1996); *Serech and Saquic* (concerning Guatemala, 1996); *Loayza Tamayo* (concerning Peru, 1996); among others. In only the cases of *Peruvian Prisons* (1992) and *Chipoco* (also concerning Perú, 1992), those measures were not ordered by the Court. In yet another case, that of *Suárez Rosero* (concerning Ecuador, 1996), given the change of circumstances, the Court decided to lift the urgent measures ordered previously. Before ordering interim measures of protection, the Court verifies that the States, as obligatory have recognized (under Article 62(2) of the Convention) its contentious jurisdiction.

74. For studies on the matter, see Thomas Buergenthal, *Medidas Provisórias na Corte Interamericana de Direitos Humanos*, 84/86 BOLETIM DA SOCIEDADE BRASILEIRA DE DIREITO INTERNACIONAL 11 (1992-1993); D. Cassel, *A United States View of the Inter-American Court of Human Rights*, in *THE MODERN WORLD OF HUMAN RIGHTS—ESSAYS IN HONOUR OF THOMAS BUERGENTHAL* 209, 220-22 (A.A. Cançado Trindade ed., 1996); J.M. Pasqualucci, *Medidas Provisionales en la Corte Interamericana de Derechos Humanos: Una Comparación con la Corte Internacional de Justicia y la Corte Europea de Derechos Humanos*, 19 REVISTA DEL INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 47 (1994).

75. See CORTE INTERAMERICANA DE DERECHOS HUMANOS, SERIE E: MEDIDAS PROVISIONALES—N. 1: COMPENDIO 1987-1996, at 1 (1996).

Likewise, the organs listed in Chapter X of the OAS Charter may also consult the Court, within their respective spheres of competence.

In practice, the only organ which has done so to date has been the Inter-American Commission on Human Rights, which has requested advisory opinions from the Court on five occasions. Furthermore, Article 64(2) of the Convention allows the Court to deliver, at the request of a member state of the OAS (irrespective of whether it has ratified the Convention or not), advisory opinions on the compatibility of any of its domestic laws with the American Convention or other treaties concerning human rights protection in the American States.

The Inter-American Court is thus vested with a particularly wide advisory jurisdiction, "more extensive than that enjoyed by any other international tribunal in existence today."⁷⁶ In addition to the Commission, OAS member states have also made use of requesting advisory opinions from the Court.⁷⁷ In the exercise of its advisory jurisdiction, the Court has invited all OAS member states, as well as the organs concerned, to submit their written observations on the subject of the requested opinion: as of 1996, twenty-one States and six OAS organs had presented their viewpoints.⁷⁸

By means of *amici curiae*, the Court has secured a considerable amount of participation by academic institutions, nongovernmental organizations, and individuals in advisory proceedings.⁷⁹ Once written observations are presented, the Court sets a date for a public hearing on further observations that OAS member states and OAS organs may wish to make. By this time, the Court has carefully considered what effects the requested opinions may have on protected rights and the inter-American regional system as a whole and whether the request falls under its advisory function.⁸⁰ Only then will the Court deliver the opinion; this process has, so far, had an average

76. See Advisory Opinion OC-1/82, "Other Treaties" Subject to the Advisory Jurisdiction of the Court 29 (1982).

77. The following countries have requested advisory opinions: Costa Rica (four times), Uruguay (three times, including one request together with Argentina), Colombia, and Peru and Argentina (once, each). Also a fifteenth request, now pending before the Court, has been made by Chile.

78. See OAS Doc., *supra* note 52, at 13-14.

79. A total of 41 *amici* until the end of 1996. See also OAS Doc., *supra* note 52, at 14-15.

80. On only one occasion so far has the Court decided not to answer a request for an advisory opinion, as it could in the circumstances deviate the contentious jurisdiction and negatively affect the human rights of those who have formulated complaints before the Commission (twelfth Opinion, of 1991).

duration of ten months.⁸¹ The Court has been attentive to, and has drawn on, the distinct nature of its adjudicatory⁸² and advisory functions.

In its sixteen Advisory Opinions delivered to date,⁸³ the Court has stressed the specificity of the instruments of international protection of human rights, the interaction between the distinct systems of protection at regional and global levels, and the extensive interpretation of the exercise of its advisory jurisdiction. The Court has dismissed the possibility of an alleged interest on the part of reserving States in postponing the entry into force of the Convention (first and second Opinions, of 1982). In outlining the unique character of its wide advisory function, it has explained the limitations imposed by the Convention on the death penalty, towards its "final suppression" (third Opinion, of 1983). It has added that its wide advisory function enables it to deliver an advisory opinion not only on laws in force, but also on draft legislation (fourth Opinion, of 1984).

In examining freedom of thought and expression, the Court has warned that compulsory membership in an association of journalists, to the extent that it hinders the access of any person to the "full use" of the means of social communication, is incompatible with Article 13 of the American Convention (fifth Opinion, of 1985). In addition, the Court has determined that the word "laws" in Article 30 of the Convention means a juridical norm of a general character. This norm reflects the "general welfare," emanated from the legislative organs

81. See OAS Doc., *supra* note 52, at 16.

82. See Advisory Opinion OC-3/83, Restrictions to the Death Penalty 70-74 (1983).

83. They are: first Advisory Opinion (of 1982), on "Other Treaties" Subject to the Advisory Jurisdiction of the Court; second Advisory Opinion (of 1982), on The Effect of Reservations on the Entry into Force of the American Convention on Human Rights, third Advisory Opinion (of 1983), on Restrictions to the Death Penalty; fourth Advisory Opinion (of 1984), on Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica; fifth Advisory Opinion (of 1985), on Compulsory Membership in an Association of Journalists; sixth Advisory Opinion (of 1986), on The Word 'Laws' in Article 30 of the American Convention on Human Rights; seventh Advisory Opinion (of 1986), Enforceability of the Right to Reply or Correction; eighth Advisory Opinion (of 1987), on Habeas Corpus in Emergency Situations; ninth Advisory Opinion (of 1987), on Judicial Guarantees in States of Emergency; tenth Advisory Opinion (of 1989), on 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; eleventh Advisory Opinion (of 1990), on Exception to the Exhaustion of Domestic Remedies; twelfth Advisory Opinion (of 1990), on Compatability of Draft Legislation with the American Convention on Human Rights; thirteenth Advisory Opinion (of 1991), on Certain Attributes of the Inter-American Commission on Human Rights; fourteenth Advisory Opinion (of 1994), on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention; fifteenth Advisory Opinion (of 1997), on Reports of the Inter-American Commission on Human Rights; and sixteenth Advisory Opinion (of 1999), on Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law.

constitutionally foreseen and democratically elected, and is elaborated according to the procedure for law-making established by the Constitutions of States Parties (sixth Opinion, of 1986). The Court has also said that the fact that an article which refers itself to the law is not sufficient to lose direct applicability. The Court has further observed that Article 14(1) of the Convention is directly applicable *per se* (seventh Opinion, of 1986).

The Court has held that the remedies of *amparo* and *habeas corpus* cannot be suspended in accordance with Article 27(2) of the Convention, as they constitute “indispensable judicial guarantees” to the protection of the recognized rights. Furthermore, the constitutional and legal provisions of the States Parties which authorize, explicitly or implicitly, the suspension of the remedies of *amparo* or *habeas corpus* in situations of emergency are “incompatible” with the international obligations which the Convention imposes upon those States. Domestic remedies before competent and independent tribunals should not only be formally accessible, but also effective and adequate. Moreover, due process (Articles 8 and 25) is applicable to “all judicial guarantees” referred to in the Convention, even under the regime of suspension regulated by its Article 27, which is also subject to a control of legality (closely related to democracy itself), so as to preserve the rule of law (eighth and ninth Opinions, of 1987).

The Court has held that its advisory function also encompasses the rendering of advisory opinions on the interpretation of the 1948 American Declaration on the Rights and Duties of Man in relation to the human rights provision of the OAS Charter and the American Convention on Human Rights, as well as other treaties concerning the protection of human rights in the American States (tenth Opinion, of 1989). The Court has, moreover, given definition to the extent of the exceptions to the requirement of exhaustion of local remedies (under Article 46 of the Convention). This is now to be approached in a more flexible way than in other contexts, in light of the specificity of the international protection of human rights and the presumptions operating in favour of the alleged victims. The prerequisite according to the Court does not apply if, by reason of indigence or generalized fear of legal representation, a complainant is unable to exhaust or utilize local remedies necessary to protect a right guaranteed by the Convention (eleventh Opinion, of 1990).

The Court has held that the Inter-American Commission is competent under Articles 41 and 42 of the Convention to determine whether or not a norm of domestic law of a State Party violates the

obligations incumbent upon the state under the American Convention. However, the Court is not competent to determine whether that norm contradicts the domestic law of that State (thirteenth Opinion, of 1993). The Court has further maintained that the adoption, as well as the application of a domestic law, contrary to the obligations under the Convention, is a violation of the international responsibility of that State. If an act pursuant to the application of such a law is an international crime, it generates international responsibility, not only of the State, but also of the officials or agents who executed that act (fourteenth Opinion, of 1994). The individual responsibility of individuals remains to be determined in cases of violation of nondegenerable rights (e.g., the right to life, the right not to be subjected to torture or slavery, and the right not to be incriminated by means of retroactive application of penalties).

In its fifteenth Advisory Opinion, of 1997, concerning the interpretation of Article 51 of the American Convention on Human Rights, the Court held that the Commission is not entitled to modify the opinions, conclusions, and recommendations sent to the State at issue, except in exceptional circumstances (pointed out in paragraphs 54-59 of the Opinion). Furthermore, under no circumstances can a third report be rendered by the Commission, as the American Convention contemplates only the reports under its Articles 50 and 51, respectively. In its recent and most important Advisory Opinion (sixteenth Opinion, of 1999), the Court held that Article 36 of the 1963 Vienna Convention on Consular Relations recognizes the individual rights of a detained foreigner, including the right to information on consular assistance. The Court linked such right to information on consular assistance to the evolving guarantees of due process of law. The Court further explained that the nonobservance of that right in cases of imposition of the death penalty amounts to an arbitrary deprivation of the right to life itself (in the terms of Article 4 of the American Convention on Human Rights and Article 6 of the International Covenant on Civil and Political Rights), with all the consequences inherent in a violation of that kind.⁸⁴ As can be seen, the Court's Advisory Opinions have helped to shed light on some of the central issues to the operation of the inter-American system of human rights protection.

84. That is, those pertaining to the international responsibility of the State and to the duty of reparation.

3. Other International Instruments

Two additional protocols to the American Convention on Human Rights have been adopted to date. They include: the Protocol on Economic, Social, and Cultural Rights (of 1988), and the Protocol on the Abolition of Death Penalty (of 1990). As to the 1988 Protocol, the old dichotomy between civil and political rights and economic, social, and cultural rights (which found expression in the two U.N. Covenants on Human Rights) also left its trace in the inter-American system of protection of human rights. The 1969 American Convention on Human Rights was to cover only civil and political rights, and contain one provision (Article 26) on the “progressive realization” of economic, social, and cultural rights. If, during the preparatory work of the American Convention, the projects submitted by Chile and Uruguay in 1965 and by the Inter-American Council of Jurists six years later had been adopted, the economic, social, and cultural rights would have been included in the American Convention. Thus, in spite of the existence of the 1948 Inter-American Charter of Social Guarantees, there remained a historical gap in the inter-American system of protection with regard to economic, social, and cultural rights.

The gradual overcoming of the old dichotomy was inaugurated during its reassessment by the 1968 Teheran Proclamation and followed by the landmark United Nations General Assembly resolution 32/130, of 1977. Both decisions advocating the interrelatedness or indivisibility of all human rights resulted in prompt repercussions on the American continent. The Inter-American Commission on Human Rights, which had taken account of the situation concerning economic, social, and cultural rights in some Latin American countries (e.g., reports on *El Salvador*, 1978, and *Haiti*, 1979), acknowledged, in its *Annual Report* of 1979-1980, the “organic relationship” between civil and political rights and economic, social, and cultural rights. The stage was set for the next step, i.e., the preparation of an international instrument for the protection of economic, social, and cultural works. Such work, initiated in 1982, culminated in the 1988 adoption of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador).

The 1988 Protocol opened many new courses of action. It contemplated (Article 19(6)) the application of the system of individual petitions or communications (regulated by Articles 44-51 and 61-69 of the American Convention) to the right of association and trade union freedom (Article 8(1)(a)) and the right to education

(Article 13). Furthermore, it provides for the formulation, by the Inter-American Commission, of such observations and recommendations as it may deem pertinent concerning the situation of economic, social, and cultural rights enshrined in the Protocol (Article 19(7)).⁸⁵ Such measures disclose a new perspective for the protection of those rights.⁸⁶

The 1990 Protocol to the American Convention, pertaining to the abolition of the death penalty, constitutes a step forward in relation to the provisions of Article 4(2) to 4(6) of the American Convention. Article 1 of the Protocol determines that the States Parties will not apply the death penalty in their territory to any person subject to their jurisdiction. The Protocol gives a new impetus to the abolition of the death penalty, as expressly acknowledged in its preamble. The Protocol does not permit reservations, and makes exception only for the pertinent provisions of domestic law applicable in wartime, thus paving the way for the largest possible number of ratifications by States of the region.

The contemporary inter-American system of human rights protection is not exhausted in the American Convention on Human Rights and its two Protocols. Four new Inter-American Conventions are to be added, directed toward the protection of human rights of certain persons, or in given situations, which could thereby be called "sectorial." The Inter-American Convention to Prevent and Punish Torture (adopted one year after the U.N. Convention, and two years before the European Convention, on this matter)⁸⁷ establishes individual responsibility for the crime of torture (Article 3) and the

85. For a study of the San Salvador Protocol of 1988, see generally A.A. CAÑADO TRINDADE, *LA CUESTIÓN DE LA PROTECCIÓN INTERNACIONAL DE LOS DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES: EVOLUCIÓN Y TENDENCIAS ACTUALES* (1992); A.A. Cañado Trindade, *La question de la protection internationale des droits économiques, sociaux et culturels: évolution et tendances actuelles*, 94 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 913 (1990).

86. While the San Salvador Protocol waits for the eleventh ratification to enter into force, Article 42 of the American Convention opens a possibility of action: it provides that States Parties to the Convention are to transmit to the Inter-American Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council (CIES) and the Inter-American Council for Education, Science and Culture (CIECC), so as to enable the Commission to watch over the promotion of the rights ensuing from the economic, social, educational, scientific, and cultural norms or provisions of the amended OAS Charter. In fact, the Commission's *Annual Reports*, from 1991, began to contain indications revealing closer attention on the part of the Commission to the situation of economic, social, and cultural rights in the American States.

87. For a comparative study, see H. Gros Espiell, *Las Convenciones sobre Tortura de las Naciones Unidas y de la Organización de los Estados Americanos*, in *XIV CURSO DE DERECHO INTERNACIONAL ORGANIZADO POR EL COMITÉ JURÍDICO INTERAMERICANO 221-42* (Washington, D.C., OAS General Secretariat 1987).

obligations of States Parties to prevent and punish torture in their jurisdiction (Articles 6-8 and 11-14). To these obligations it also adds the duty of suitable compensation for victims of torture (Article 9). The mechanism of international supervision (Article 17) consists of the submission of information on legislative, judicial, administrative, or other measures States Parties adopt in application of the Convention to the Inter-American Commission of Human Rights. The Commission, in turn, will “endeavor” to analyze the existing situation in its *Annual Reports*. This Convention is the weakest mechanism of the three existing Conventions against torture.

The Inter-American Convention on Forced Disappearance of Persons, adopted in 1994, had its preparatory work⁸⁸ marked by a prolonged debate as to whether the forced disappearance of persons should be considered a crime against humanity or whether such denomination should correspond only to its systematic practice.⁸⁹ The latter view prevailed. The Convention provides for the principle of individual responsibility in the crime of forced disappearance as does the Inter-American Convention against Torture, the 1948 Convention against Genocide, and the 1973 Convention against Apartheid. Besides the individual responsibility of the perpetrators, and the international responsibility of the State, the new Convention sets forth other legal consequences for the crime of forced disappearance of persons⁹⁰ as an international crime (Article II). These consequences include universal jurisdiction and the obligation to extradite or judge those responsible for the crime; the obligation not to grant political asylum to those responsible for the crime; and the imprescriptibility of the action, the obligation of the States to investigate and punish

88. See Organización de los Estados Americanos (OAS)/Consejo Permanente, Informe del Presidente del Grupo de Trabajo Encargado de Analizar el Proyecto de Convención Interamericana sobre Desaparición Forzada de Personas, doc. OEA/Ser.G/CP/CAJP/925/93/rev.1, (Jan. 25, 1994), at 1-49; OAS, Informe de la Comisión de Asuntos Jurídicos y Políticos acerca del Proyecto de Convención Interamericana sobre Desaparición Forzada de Personas, doc. OEA/Ser.G/CP/doc.2458/94, (Feb. 22, 1994), at 1-65; OAS, *Report of the Permanent Council on the Draft Inter-American Convention on Forced Disappearance of Persons*, doc. OEA/Ser.P/ AG/doc.3072/94 (Apr. 29, 1994) at 1-56.; doc. OEA/Ser.P/AG/doc.2821/92 (Apr. 22, 1992) at 1-22.

89. On gross violations of human rights and the inter-American system of human rights protection, see generally C. MEDINA QUIROGA, *THE BATTLE OF HUMAN RIGHTS—GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM* (Dordrecht, Nijhoff 1988). See also G. Peytrignet, *Acción Humanitaria Convencional y Extraconvencional del CICR en América Latina: Evaluación y Proyecciones*, in *NUEVAS DIMENSIONES EN LA PROTECCIÓN DEL INDIVIDUO* 143-50 (J. Irigoín ed., 1991); H. HEY, *GROSS HUMAN RIGHTS VIOLATIONS: A SEARCH FOR CAUSES* (Dordrecht, Nijhoff 1995).

90. See *Blake Case*, Judgment July 2, 1996, Inter.-Am. Ct. H.R. (Ser. C) No. 27 (1996) (preliminary objections) (separate opinion of Judge A.A. Cançado Trindade).

those responsible for the crime, the inadmissibility of the excuse of obedience to superior orders, and the inadmissibility of benefiting from the condition of being a member of the Executive or Legislative power from which impunity may result from acts constitutive of forced disappearance of persons. As to its international supervision, the Convention refers to the procedures of the Inter-American Commission and Court of Human Rights (Articles XIII-XIV).

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (*Convention of Belém do Pará*), also adopted in 1994, covers the subject in both public and private ambits (Articles 1 and 3), encompassing civil, political, economic, social, and cultural rights (Articles 4, 5, and 6). It adds the mechanisms of international supervision, including the system of reporting to the Inter-American Commission on Women (Article 10) and referral to the procedures of the Inter-American Commission and Court of Human Rights (Articles 11-12), to the obligations of States Parties (Articles 7-8); taking into consideration the "situation of vulnerability to violence" which women may suffer (Article 9).

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, adopted at the OAS General Assembly of Guatemala in 1999, is the fourth and most recent of the inter-American "sectorial" Conventions. This Convention provides for a series of measures to be adopted by the States Parties. Those measures include: the prevention and elimination of all forms of discrimination against persons with disabilities and to promote their full integration into society (Articles II-V). The Convention further provides for the establishment of a supervisory committee, which is to examine periodic reports that are submitted by the States Parties (Articles VI).

III. RECOMMENDATIONS *DE LEGE FERENDA* FOR THE IMPROVEMENT OF THE SYSTEM

Despite the undeniable advances of the inter-American system of protection of human rights in this half-century (1948-1999), there still remains a long way to go. Until the early eighties, attention was turned mainly to gross and massive violations of human rights (e.g., practice of torture, enforced or involuntary disappearances of persons, inhuman or degrading treatment or punishment, and illegal or arbitrary detentions) committed by oppressive regimes. Nowadays, there appears to be a diversification in the sources of violations of human rights (e.g., those perpetrated by clandestine groups, or groups of exterminators, or those

crimes perpetrated in inter-individual relations, or those resulting from corruption and impunity). To this phenomenon, which stresses in particular the relevance of the preventive dimension of human rights protection, one ought to add the problems of human rights which do not necessarily result from political confrontation or repression, but appear rather as endemic and chronic problems of the social *milieu* of Latin American countries. This includes aggravated income inequities and the growing socio-economic disparities. It is necessary to equip the inter-American system of protection, within the possibilities and parameters of its mandate, so as to enable it to face these new violations of human rights.

The work of international protection has been transformed in the sense that today there is a need to confront violations of human rights in the context of the so-called democratic "transition" or "consolidation." This requires a systemic or global outlook of human rights, encompassing the protection of the person in all domains of human activity (civil, political, economic, social, and cultural). If one looks toward the future, one should also contemplate that special emphasis needs to be placed, in the interior of the States, upon the role of public organs, in particular the Judiciary, in the protection of human rights. In this respect additional resources are needed so that such national organs may fully exercise the functions (e.g., the duty of investigation) conferred upon them by human rights treaties such as the American Convention (e.g., the guarantee of access to justice and the right to an effective local remedy before national tribunals).

The incorporation of international norms of human rights protection into the domestic law of the States of the region is paramount today. The contemporary Constitutions of Latin American countries, in growing number, contain express references (in the form of a *renvoi*) to the rights safeguarded under treaties and conventions on human rights protection to which the State at issue is a party.⁹¹ It is necessary to give practical expression to the present-day coincidence of purpose of international law and internal public law as to the protection of the human being. The consequences of this reassuring coincidence of purpose between international law and municipal law still remain juridically unexplored to date.

Today, we have entered a new stage in the evolution of the inter-American system of protection: that of its strengthening. With this

91. See BRAZIL CONST. art 5(2) (1988); CHILE CONST. art. 5(II) (1989); COLUMBIA CONST. art. 93 (1991); ARGENTINA CONST. art. 75(22) (1994); PERU CONST. art. 105 (1978, 1993); see also GUATEMALA CONST. art. 46 (1985); NICARAGUA CONST. art. 46 (1987).

objective in mind, we proceed in a constructive spirit; our thoughts and personal recommendations *de lege ferenda*. In our view, there is room for improvement in several aspects of the contemporary operation of the mechanism of the American Convention on Human Rights. To begin with, insofar as the composition of the two supervisory organs is concerned, besides the strict observance of the requisites set forth in the American Convention, there is a need to establish a clear regime of incompatibilities. These incompatibilities should be expressly defined (e.g., avoiding undue accumulation of professional activities), for the members of both organs (Inter-American Commission and Court), as an additional safeguard of the total independence and impartiality of those organs. As to their conditions of work, precarious in our days, it is quite necessary that considerable additional resources (human and material) are attributed to the Commission and the Court, so that they may, preferably on a permanent basis, fully exert their functions and satisfy the increasingly varied demands of protection.

In its twenty years of existence (1979-1999), the Court has held forty-six regular sessions⁹² and twenty-three special sessions.⁹³ For its deliberations,⁹⁴ until 1996, the Court has met, on average, three times

92. The sessions and dates are: I, 03-14.09.1979; II, 10-26.01.1980; III, 30.07 to 09.08.1980; IV, 15-22.01.1981; V, 16-25.07.1981; VI, 28.06 to 03.07.1982; VII, 16.09 to 02.10.1982; VIII, 28.02 to 04.03.1983; IX, 01-15.09.1983; X, 09-20.01.1984; XI, 01-09.10.1984; XII, 14-25.01.1985; XIII, 02-06.09.1985; XIV, 13-21.01.1986; XV, 28.04 to 10.05.1986; XVI, 24-30.01.1987; XVII, 28.09 to 09.10.1987; XVIII, 11-22.01.1988; XIX, 18-28.07.1988; XX, 23-27.01.1989; XXI, 10-14.07.1989; XXII, 06-10.08.1990; XXIII, 09-19.01.1991; XXIV, 02-14.12.1991; XXV, 13-15.01.1992; XXVI, 22.06 to 09.07.1992; XXVII, 22.01 to 05.02.1993; XXVIII, 05-16.07.1993; XXIX, 10-21.01.1994; XXX, 16.11 to 11.12.1994; XXXI, 16-18.01.1995; XXXII, 11-23.09.1995; XXXIII, 22.01 to 02.02.1996; XXXIV, 09-20.09.1996; XXXV, 27.01 to 07.02.1997; XXXVI, 12-19.04.1997; XXXVII, 06-24.09.1997; XXXVIII, 31.10 to 15.11.1997; XXXIX, 19-21.01.1998; XL, 08-19.06.1998; XLI, 23.08 to 06.09.1998; XLII, 16-27.11.1998; XLIII, 18-29.01.1999; XLIV, 24.05 to 04.06.1999; XLV, 16.09 to 02.10.1999; and XLVI, 08-19.11.1999.

93. The sessions and dates are: I, 16-18.06.1980; II, 09-14.11.1981; III, 25.07 to 05.08.1983; IV, 04-14.11.1985; V, 25-29.08.1986; VI, 08-26.06.1987; VII, 16-20.01.1989; VIII, 12-17.03.1989; IX, 17-21.07.1989; extraordinary session, 09.01.1990; X, 13-17.08.1990; XI, 29.07 to 01.08.1991; XII, 29.06 to 07.07.1992; XIII, 15-18.03.1993; XIV, 06-10.09.1993; XV, 19-22.06.1994; XVI, 19-27.01.1995; XVII, 17-18.05.1995; XVIII, 27.11 to 08.12.1995; XIX, 26.06 to 03.07.1996; XX, 05-07.09.1996; XXI, 22-25 and 29.01.1997; XXII, 22-30.01.1998; and XXIII, 01-08.03.1998.

94. During its period of sessions, the Court delivers judgments and advisory opinions and explains them in public hearings, adopts and lifts interim or provisional measures of protection, and submits interlocutory resolutions. Furthermore, it hears the party's arguments, and testimonies of witnesses and experts, in public hearings. It also studies all writings and actions presented to it (since the previous session). Moreover, it considers the procedural advance of pending cases, the state of the provisional measures of protection adopted, and the state of compliance with its Judgments. It further considers the reports of its President and the

a year, and, since then, four times a year. As the Court and the Commission have their seats in the capital of two different countries, (San José of Costa Rica and Washington, D.C., respectively) there have been rather few joint meetings of their members: only nine to date.⁹⁵ The dynamics of a regional *system* of human rights protection requires greater coordination between its two international supervisory organs; as such, more joint meetings should be scheduled.

As to the procedures under the American Convention, they can be improved in virtually all stages. To begin with, the opening of cases should be prompt and uniform vis-à-vis all States Parties to the Convention (nonselectivity). To the extent “universal ratification” of human rights treaties is achieved, the much-needed and desirable *jurisdictionalization* of the mechanisms of human rights protection, as well as their necessary and desirable depolitization, are bound to accelerate.

With the integral ratification of all human rights treaties by all States of the region,⁹⁶ without reservations or interpretative declarations and comprising optional instruments and clauses, the universality of human rights will find expression not only in theory but also in practice. The result would be the application of uniform norms and criteria to all countries (bearing in mind that the supervisory organs are endowed with clear mandates). The jurisdictionalization of the procedures of protection constitutes a guarantee for all against the temptations of selectivity, discretion, and causism. It secures the primacy of the rule of law in the pursuit of justice.

The decisions of the Inter-American Commission as to the admissibility of communications or petitions ought to be pronounced *in limine litis*, without delay. The decision of admissibility is within the exclusive competence of the members of the Commission; the secretariat can only assist them. Such decisions should be well founded, and they should not be susceptible to reopening or revision. To allow decisions of admissibility of the Commission to be reopened and questioned before the Court by the respondent governments would generate an imbalance between the parties in favor of

Secretariat, as well as administrative matters, and it issues its own *Annual Report* and approves its budget.

95. Those joint meetings have taken place in San José, Costa Rica, in 1990, in Nassau in 1992, in Belém do Pará, Brazil, in 1994, in Miami, Florida, in 1994, in Washington, D.C., in 1995 and again in 1996, in San José, Costa Rica, in 1997, in Washington D.C. in 1998, and finally in San José, Costa Rica, in 1999.

96. See generally *supra* notes 45-46.

respondent governments (even more so as individuals currently do not have direct access to the Inter-American Court). This said, the decisions of inadmissibility of the Commission should also be reopened by the alleged victims and submitted to the Court; either all the decisions of the Commission are reopened before the Court, or they are kept within the exclusive domain of the Commission.

The examination of a case by the Commission, if it is not referred to the Court, could be subject to a follow-up procedure for verification and monitoring of the degree of compliance by the State. If, however, the Commission decides to submit the case to the Court, the *dossier* must then be well prepared and founded, so as to avoid the time consuming task of reopening the fact-finding. This would enable the Court to concentrate on the task of building solid case law. This is especially important now that contentious cases are regularly submitted to the Court.

Clear criteria must be devised for the *renvoi* of cases by the Commission to the Court, so that the present situation of indefiniteness on the matter no longer persists. The following elements could be taken into consideration for the formation of such criteria: (1) whether fundamental rights (e.g., nonderogable rights) are at stake; (2) whether there exist questions which could generate a jurisprudential contribution to the interpretation and application of the American Convention; (3) whether the questions are susceptible to adequate judicial settlement (e.g., "individualized" cases in justiciability); (4) whether the questions at issue disclose new aspects requiring, or deserving of, judicial determination; and (5) the nonselectivity in relation to all the States Parties to the American Convention which have accepted the compulsory jurisdiction of the Court (under Article 62 of the American Convention).

There is a pressing need to search for greater balance between the parties at distinct procedural stages. Such balance, for example, should encompass notification to *both* parties of any and all information on the handling of the case. It is incumbent upon the parties to comply with conventional requirements. In order to attain that balance, one needs to critically reconsider the reopening of preliminary objections of admissibility before the Court which have already been decided by the Commission.⁹⁷ Likewise, the joinder of those objections to the merits should be avoided, except in very

97. See *Castillo Páez Case*, Preliminary Objections, Judgment Jan. 30, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 24 (1996) (separate opinion of A.A. Cançado Trindade); *Loayza Tomayo Case*, Preliminary Objections, Judgment Jan. 31, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 25 (1996) (separate opinion of A.A. Cançado Trindade).

exceptional situations and on solid juridical grounds.⁹⁸ Once seized of a case, the Court is master of its own jurisdiction. When the Court is faced with procedural “incidents” (such as the “withdrawal” of the case by the Commission)⁹⁹ which may render the alleged victims defenseless, the Court can, and should, retain jurisdiction over the case.¹⁰⁰ Superior interests of international *ordre public* are at stake.

In handling contentious cases, one issue is particularly deserving of attention; namely, the degree of overlap between the Inter-American Commission and the Court with regard to fact-finding. Early examples are provided by the *Honduran* and *Surinamese* cases. As the number of contentious cases increases, the duplication of work is cause for concern.¹⁰¹ By the end of 1996, the Court expected to hear no less than 157 witnesses and experts on the merits of nine contentious cases,¹⁰² a task which consumed much of its work in the two years following. This has been aggravated by the fact that the Court is not in permanent session and has recently been meeting only four times a year (besides not working in chambers).

To avoid long and undesirable delays in receiving testimonial and documentary evidence, less time-consuming methods of fact-finding should be devised.¹⁰³ In addition to its use of presumptions and the shifting of the burden of proof, the Court should be able to rely more heavily on the fact-finding previously undertaken by the Commission. There are indications in the American Convention that the task of fact-finding comes under the purview of the Commission (Articles 48, 50, and 61). This will enable the Court to devote most of its time to its primary function of adjudicatory claims. Such a division of labor, which allows the Court to concentrate on the legal issues, is implicit in the relevant provisions of the Convention. The Court is not an appellate tribunal of the Commission’s decisions, and the functions of the two international supervisory organs under the

98. See *Genie Lacayo Case*, Order May 18, 1995, Inter-Am. Ct. H.R. (Ser. C) (1995) (dissenting opinion of Judge A.A. Cançado Trindade).

99. See *Cayara Case*, Preliminary Objections, Judgment Feb. 3, 1993 Inter-Am. Ct. H.R. (Ser. C) No. 14 (1993).

100. See generally Rules of Procedure of the Inter-American Court of Human Rights, art. 43(3) (1991) [hereinafter Rules of Procedure-1991].

101. See OAS, *Toward a New Vision of the Inter-American Human Rights System* (permanent Council) OAS Doc. OEA/Ser.G-CP/doc.2828/96, at 9-10 (1996).

102. See OAS Doc., *supra* note 52, at 9.

103. See, e.g., M. Reisman & J.K. Levit, *Fact-Finding Initiatives for the Inter-American Court of Human Rights*, in *LA CORTE Y EL SISTEMA INTERAMERICANOS DE DERECHOS HUMANOS* 443-57 (R.N. Navia ed., 1994); see also Thomas Buergenthal, *Judicial Fact-Finding: Inter-American Human Rights Court*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 261-74 (R.B. Lillich ed., 1990).

American Convention are essentially complementary. Thus, overlap should be avoided. Essentially, there is room for much-needed improvement.

Insofar as the inter-American system of protection is concerned, a central and recurrent question pertains to the condition of the *parties* in human rights cases under the American Convention on Human Rights. In particular, to the legal representation or the *locus standi in judicio* of the alleged victims (or their legal representatives) *directly* before the Inter-American Court in cases already submitted to it by the Commission.¹⁰⁴ It is certain that the American Convention determines that only the States Parties and the Commission have the right "to submit a case" to the Court (Article 61(1)). However, the Convention, in providing for reparations, also refers to "the injured party" (Article 63(1)), meaning, of course, the alleged victims and not the Commission.

In fact, to recognize the *locus standi in judicio* of the victims (or their representatives) before the Court (in cases already submitted to this latter by the Commission) aids the "jurisdictionalization" of the mechanism of protection, putting an end to the ambiguity of the function of the Commission. The Commission is not rigorously a "party" in the process, but rather a guardian of the correct application of the Convention.¹⁰⁵ Like the accumulated experience of the European Court of Human Rights, since its first case (the *Lawless*¹⁰⁶ case), the Inter-American Court of Human Rights, also in its first contentious cases faced the artificiality of the initial scheme, and reacted against it.

In the sphere of the inter-American system of human rights protection, developments that are taking place today appear similar to those which occurred in the European system in the last decade.¹⁰⁷

104. Parallel to those contentious proceedings, the participation of nongovernmental organizations and other *amici curiae* in the proceedings for Advisory Opinions before the Inter-American Court is already well known.

105. The American Convention (Articles 61(1) and 57) followed in this regard the corresponding original provision of the European Convention on Human Rights (Article 44); despite this, in the system under the European Convention individual applicants, were gradually granted direct legal representation before the European Court, initially by its revised Rules of Court of 1982, followed years later by the adoption of Protocol nine (of 1990) to the European Convention.

106. See *Lawless v. Ireland*, 1 Eur. Ct. H.R. (Ser. A) (1960).

107. From the considerations in the first case the court was seized of (*Lawless v. Ireland*, 1 Eur. Ct. H.R. (Ser. A) (1960)), and subsequently expanded (*Vagrancy* cases against Belgium, 1970), through the Reform of its Rules of Procedure (of 1982), culminating in the adoption in 1990 of Protocol No. 9 to the European Convention. See Council of Europe, Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms: Explanatory Report 8-9 (1992); cf. *id.* at 3-18; Jean-Francois Flauss, *Le droit recours individuel devant la*

For example, the legal representatives of the victims have been integrated into the delegation of the Commission with the euphemistic designation of "assistants" to the Commission. This "pragmatic" solution counted on the endorsement, with all good intentions, of the decision made in a joint meeting of the Inter-American Commission and Court held in Miami in January 1994. Instead of solving the problem, it created ambiguities which have persisted to date.¹⁰⁸ Time has come to overcome such ambiguities in the inter-American system, given that the respective roles of the Commission (as guardian of the Convention assisting the Court) and of the individuals (as the true complainant party) are clearly distinct.

The evolution of the final recognition of these distinct roles should take place, *pari passu*, with the gradual jurisdictionalization of the mechanism of protection. In this way, the politicization temptations are definitively discarded, which can then be treated exclusively in the light of legal rules. One can hardly deny that jurisdictional protection is the most developed form of human rights protection and the one which best fulfils the imperatives of law and justice.

The previous Rules of Court of the Inter-American Court (of 1991) predicted, in rather oblique terms, a timid participation of the victims or their representatives in the procedure before the Court, especially in reparations proceedings.¹⁰⁹ In the *Godínez Cruz* and *Velásquez Rodríguez* cases (reparations, 1989), concerning Honduras, the Court received briefs from the relatives and lawyers of the victims, and took note of them.¹¹⁰ However, a more significant step

Cour européenne des droits de l'homme: Le Protocole no. 9 à la Convention Européenne des Droits de l'Homme, 36 ANNUAIRE FRANÇAIS DE DROIT INTERNACIONAL 507-19 (1990); Genevieve Janssen-Pevtschin, *Le Protocole Additionnel No. 9 à la Convention Européenne des Droits de l'Homme*, 2 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 199 (1991); Michele de Salvia, *Il nono Protocollo alla Convenzione europea dei diritti dell'uomo: Punto di arrivo o punto di partenza?*, 3 RIVISTA INTERNAZIONALE DEI DIRITTI DELL'UOMO 474 (1990); M.A. EISSEN, EL TRIBUNAL EUROPEO DE DERECHOS HUMANOS 26-43 (1985). By force of this Protocol, relations between the European Court and the individual complainants became direct, without counting necessarily on the intermediation of the delegates of the European Commission.

108. The same occurred in the European system of protection until 1982, when the fiction of the "assistants" to the European Commission was at last overcome by the reform in that year of the Rules of Court of the European Court. See generally Paul Mahoney & Soren Prebensen, *The European Court of Human Rights*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 630 (Ronald St. J. Macdonald et al. eds., 1993).

109. Compare the previous Rules of Court of the Inter-American Court of 1991, Articles 44(2) and 22(2), and also Articles 34(1) and 43(1) and (2).

110. See *Godínez Cruz v. Honduras*, Compensatory Damages, Judgment July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8 (1989); see also *Velásquez Rodríguez v. Honduras*, Compensatory Damages, Judgment July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989).

was taken more recently in the *El Amparo* case (reparations, 1996),¹¹¹ concerning Venezuela, a landmark case in this respect. In the public hearing held by the Inter-American Court on January 27, 1996, one of the Judges expressed his understanding that, at least in that stage of the proceedings, there could be no doubt that the representatives of the victims composed "the true complainant party before the Court."¹¹² In the hearing, the Court began to address questions to those representatives of the victims rather than to the delegates of the Commission or to the agents of the Government.¹¹³

Shortly after that memorable public hearing in the *El Amparo* case, the representatives of the victims presented two briefs to the Court (of May 13, 1996, and May 29, 1996). Parallel to that, with regard to compliance with the judgment of interpretation of the previous sentence on compensatory damages in the earlier cases of *Godínez Cruz* and *Velásquez Rodríguez*, the representatives of the victims presented two briefs to the Court (dated March 29, 1996, and May 2, 1996). The Court (with its composition of September 1996) decided to close the process of those two cases after having verified the compliance, on the part of Honduras, with the sentences on compensatory damages and on interpretation of this latter, and after having taken note of the points of view not only of the Commission and the respondent State, but also of the petitioners and the legal representatives of the families of the victims.¹¹⁴

The way was paved for the modification of the pertinent provisions of the Rules of Court, above all from the developments in the proceedings in the *El Amparo* case. The next step, a decisive one, was taken by the new Rules of Court, adopted on September 16, 1996, and in force as from January 1, 1997.¹¹⁵ Article 23 provides that "at the stage of reparations, the representatives of the victims or of their next of kin may independently submit their own arguments and evidence."

111. See *El Amparo*, Reparations, Judgment Sept. 14, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28 (1996) (Venezuela).

112. See *id.*

113. Compare the intervention of Judge A.A. Cançado Trindade, and the answers of Mr. Walter Márquez and of Ms. Ligia Bolívar, as representatives of the victims, see Inter-American Court of Human Rights, Verbatim Records of the Public Hearing Held before the Court on 27 January 1996 on Reparations (*El Amparo* Case (Venezuela)), at 72-76 (hearing on compensatory damages) (mimeographed, internal circulation; original in Spanish).

114. See The two resolutions of the Court, on the *Velásquez Rodríguez* and *Godínez Cruz* cases, respectively, in CORTE I.D.H., INFORME ANUAL DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS 207-13 (Oct. 9, 1996).

115. We had the honor to be *rapporteur* by designation of the Inter-American Court.

This significant step paves the way for subsequent developments in the same direction. That is to say, to the effect of securing that, in the foreseeable future, individuals are to have *locus standi* in the proceedings before the Court not only in the stage of reparations, but also in that concerning the merits of the cases submitted to it by the Commission, ultimately, in *all* phases of the proceedings before the Inter-American Court (an old goal of ours).¹¹⁶

The arguments in favour of the recognition of the *locus standi* of the alleged victims in the proceedings before the Inter-American Court in cases referred to it by the Commission are solid.¹¹⁷ First, the acknowledgment of rights at national, as well as international, levels corresponds to the procedural capacity to vindicate or exercise them. The protection of rights should be endowed with *the locus standi in judicio* of the alleged victims (or their legal representatives), which allows a better instruction concerning the cases, and without which the latter is partly devoid of an essential element (in the search for truth and justice), besides being ineluctably mitigated and in flagrant procedural imbalance. The jurisdictionalization of the procedure greatly contributes to a remedy and puts an end to those insufficiencies and deficiencies, which can no longer find any justification today.

The contraposition between the victims of violations and the respondent States is the very essence of the international *contentieux* of human rights. Such *locus standi* of the individuals concerned is the logical consequence, at the procedural level, of a system of protection which purports to guarantee individual rights at the international level, as it is not reasonable to conceive of rights without the procedural capacity to vindicate them. Moreover, the right of freedom of expression of the alleged victims is an element which integrates the due process of law, at both the national and international levels. The equity and transparency of the procedure, which are equally applicable to the international supervisory organs

116. At the joint meeting of the Inter-American Court and the Commission held in Washington, D.C. on April 12, 1995, and at all subsequent joint meetings of the two supervisory organs of the American Convention to date, we have consistently advocated the need to grant individual complainants *locus standi* before the Court (in all stages of the proceedings before it), in cases already referred to it by the Commission.

117. Such arguments, summarized in the following paragraphs of this Article, are more extensively developed in our course at the External Session (for Central America) of the Hague Academy of International Law, held in Costa Rica in April-May 1995. See also A.A. Cançado Trindade, *El Sistema Interamericano de Protección de los Derechos Humanos (1948-1995): Evolución, Estado Actual y Perspectivas*, in DERECHO INTERNACIONAL Y DERECHOS HUMANOS/DROIT INTERNATIONAL ET DROITS DE L'HOMME 47 (1996).

benefits all parties, including the individual complainants and the respondent States.

The right of access to justice at the international level should be accompanied by the guarantee of the procedural equality of arms (*égalité des armes*) in the proceedings before the Court, a fact essential to any jurisdictional system of protection of human rights. In cases of proven human rights violations, it is the victims themselves, the true complainant party before the Court (or their relatives or heirs), who receive the reparations and indemnizations. As the victims mark their presence at the *beginning* and at the *end* of the process, there is no sense in denying them presence *during* the process.

To these considerations of principle, others may be added, in favour of the direct representation of the alleged victims before the Court, in cases already submitted to it by the Commission. The advances in this sense are convenient not only to the alleged victims, but to all concerned. This is convenient to the respondent States, to the extent that they contribute to the jurisdictionalization of the mechanism of protection;¹¹⁸ to the Court, to count on more precise and complete information on the facts; and to the Commission, to put an end to the ambiguous role it plays.¹¹⁹ This would enable the Commission to concentrate on its proper function of guardian of the correct and just application of the Convention (and no longer with the additional function of "intermediary" between the individuals and the Court). The advances in this direction, at the present stage of evolution of the inter-American system of protection, are a *joint* responsibility of the Court and the Commission.¹²⁰

To this, one is to add that the advances in this sense (of the direct representation of the individuals before the Court), already

118. It may be recalled that, under the European Convention on Human Rights, for some time already *all* States Parties, without exception, recognize the compulsory jurisdiction of the European Court of Human Rights in contentious matters (under Article 46).

119. In contentious cases, while in the prior stage before the Commission the parties are the individual complainants and respondent States. Subsequently, it becomes the Commission and the respondent States that appear before the Court. The Commission often finds itself in the ambiguous role of defending the interests of the alleged victims on one hand and defending the "public interests" as a *Ministère Public* of the inter-American system of protection on the other. This ambiguity is to be avoided.

120. The Commission ought to be prepared to always express its point of view before the Court, even if they are not entirely similar to those of the representatives of the victims; and the Court ought to be prepared to receive, examine, and evaluate the arguments of the delegates of the Commission and of the representatives of the victims, even if their views are divergent. As the roles of the delegates and representatives are distinct, differences in their arguments before the Court are normally bound to happen, and are to some extent inevitable.

consolidated in the European system of protection, are to be achieved in the American continent by means of criteria and rules previously and clearly defined, with the necessary adaptations to the realities of the operation of the inter-American system of protection. This would require the foreseeing of *ex officio* legal assistance to individual complainants on the part of the Commission, whenever they are not in condition of counting on the professional services of a legal representative.

Finally, turning back to the considerations of principle, it is through the *locus standi in judicio* of the alleged victims before the international courts of human rights (in the regional systems of protection) that human beings assert their international legal personality and full procedural capacity to vindicate their rights whenever national organs are incapable of securing the realization of justice. In an effort to improve the mechanism of protection under the American Convention, the emphasis should fall upon the jurisdictionalization of that mechanism, insofar as the operation of the method of petitions or complaints is concerned (without prejudice to the continued use by the Inter-American Commission of the methods of reporting and fact-finding).

The improvement of the mechanism of the inter-American system of protection should be the object of considerations of an essentially juridico-humanitarian character, even as an additional guarantee to the parties in contentious cases of human rights. There is pressing need to overcome the *capitis diminutio* which individual petitioners suffer in the inter-American system of protection. One should overcome the paternalistic and anachronistic conception of the total intermediation of the Inter-American Commission on Human Rights between the individual petitioners (the true complainant party) and the Court, so as to grant them direct access (*jus standi*) to the Court.¹²¹

The necessary recognition of the *locus standi in judicio* of the alleged victims (or their legal representatives) before the Inter-American Court constitutes a most important advance, but not necessarily the final stage of improvement of the inter-American system of protection. From such *locus standi* one is to evolve towards

121. Compare arguments to this effect in *Castillo Páez v. Peru*, Preliminary Objections, Judgment Jan. 30, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 24 (1996) (Caçado Trindade, J., separate opinion); *Loayza Tomayo v. Peru*, Preliminary Objections, Judgment Jan. 31, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 25 (1996) (Caçado Trindade, J., separate opinion); *Castillo Petrucci v. Peru*, Preliminary Objections, Judgment Sept. 4, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 41, (1998) (Caçado Trindade, J., concurring).

the future recognition of the right of *direct access* of individuals to the Court (*jus standi*), as the sole jurisdictional organ of the system of protection, so as to lodge a concrete case directly with it and doing so entirely without the Commission.¹²² For this step to be taken, in line with Protocol Eleven, of 1994, to the European Convention on Human Rights,¹²³ certain prerequisites ought to be fulfilled, namely: all OAS member States should become Parties to the American Convention on Human Rights; jurisdiction of the Inter-American Court on contentious matters should be mandatory to all States Parties to the Convention (and no longer accepted only on the basis of an optional clause); and adequate human and material resources should be provided to the Inter-American Court, so as to enable it to operate on a permanent basis.

The day this level of evolution is achieved and individuals are at last granted *jus standi* before the Inter-American Court, one will have attained the culmination of a great movement of universal dimension to strengthen the position of the human being in the defense of his rights. Every international lawyer, faithful to the historical origins of his discipline, will surely contribute to rescue the position of the human being in the law of nations (*droit des gens*), and to sustain the recognition and crystallization of his international personality and full legal capacity.

Finally, the perspectives of a regional system of protection such as the inter-American system should be considered necessarily within the framework of the universality of human rights.¹²⁴ Human rights

122. See A.A. Cançado Trindade, *The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments*, in LES DROITS DE L'HOMME À L'AUBE DU XXIÈ SIÈCLE—MÉLANGES EN L'HONNEUR DE K. VASAK (1999).

123. For the most complete study of Protocol No. 11 to date, see Andrew Drzemczewski, *A Major Overhaul of the European Human Rights Convention Control Mechanism: Protocol n.11*, 6 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 121 (No. 2 1997), in force since November 1, 1998; see also Silvio Marcus Helmons, *Le Onzième Protocole Additionnel à la Convention Européenne des Droits de l'Homme*, 113 JOURNAL DES TRIBUNAUX 545 (Bruxelles 1994); Rudolf Bernhardt, *Reform of the Control Machinery Under the European Convention on Human Rights: Protocol n.11*, 89 AM. J. INT'L L. 145-54 (1995); Juan Antonio Carrillo Salcedo, *Vers la réforme dy système européen de protection des droits de l'homme*, in 2 PRÉSENCE DU DROIT PUBLIC ET DES DROITS DE L'HOMME—MÉLANGES OFFERTS À JACQUES VELU 1319 (Emile Bruylant ed., 1992); Heribert Golson, *On the Reform of the Supervisory System of the European Convention on Human Rights*, 13 HUM. RTS. L.J. 265 (1992); Karel de Vey Mestdagh, *Reform of the European Convention on Human Rights in a Changing Europe*, in THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE: ESSAYS IN HONOUR OF HENRY G. SCHERMERS 337 (Rick Lawson & Matthijs de Blois eds., 1994).

124. The lessons and results of the Second World Conference on Human Rights (Vienna 1993) are valid for the inter-American system as well as for other regional systems of protection of human rights. They are marked, above all, by the integrated and global outlook of all human rights; by the special attention to those in greater need of protection (the weaker and more

violations continue to occur virtually everywhere, but the prompt responses to them are indeed much stronger today than they were in the past. We have reached a stage of development characterized by the recognition of the legitimacy of the concern of the whole international community with the promotion and protection of human rights by everyone. This corresponds to a new *ethos* of our times, universally acknowledged, bringing about obligations *erga omnes*. We are, ultimately, in the course of a process of construction of a universal culture of observance of human rights. In the pursuit of this goal, a significant role is reserved, on the American continent, to the inter-American system of protection of human rights in general, and to its international supervisory organs in particular.

vulnerable); by the temporal dimension (with measures of prevention and follow-up) of protection; by the omnipresence of human rights. This latter finds expression in the recognition that human rights entail obligations *erga omnes* (binding on States, as well as international organizations, private groups and individuals), everywhere and at all times.

