Research Handbook on International Human Rights Law

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14. The Inter-American human rights system: selected examples of its supervisory work

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1 Introduction
The work of the Inter-American human rights system (‘Inter-American system’ ) extends for over 50 years. The Inter-American system emerged with the adoption of the American Declaration on the Rights and Duties of Man¹ in April 1948. However, the Inter-American system started, in practice, with the creation of the Inter-American Commission on Human Rights (‘the Commission’ or ‘IACHR’) in 1959. In 1969 the Inter-American system adopted the American Convention on Human Rights (‘American Convention’),² and in 1979 it established the Inter-American Court on Human Rights (‘the Inter-American Court’).

The goal of this chapter is to describe briefly the functions of the Commission and the Inter-American Court and provide some examples on how these organs have addressed human rights violations in regard to English-speaking States. Section 2 focuses on the Commission’s powers and functions and contains an overview of the work carried out in monitoring the protection of human rights in the so-called war against terrorism. Section 3 describes the scope of the Inter-American Court’s powers and functions within its contentious jurisdiction, and there is a brief review of a group of emblematic human rights issues which the Inter-American Court addresses, in the context of cases arising from English-speaking Caribbean States.

2 The Inter-American Commission on Human Rights

A The functions and powers of the Inter-American Commission on Human Rights

(i) Political dimension The political dimension of the Commission’s

functions and powers refers to its capacity to promote and protect human rights through mechanisms such as negotiation and international pressure on member States to improve human rights conditions. Between the 1960s and the 1980s, the Commission used its political mechanisms primarily to confront massive and systemic violations of human rights, such as forced disappearances of persons, arbitrary executions, and torture. The Commission also periodically used its political authority to publish general reports on human rights situations in various countries, thereby applying pressure on State authorities with poor human rights records. For this reason, individual petitions were not treated in a strict adjudicatory manner. Instead, in many cases, immediate political action served as the most effective method for protecting individuals and instigating changes in the pertinent countries. The Commission did not seek to adjudicate these cases under a strictly judicial analysis, but rather used the individual cases as records to support the demands and urgent petitions of the Commission.

Among the Commission’s political mechanisms, several of the Commission’s enumerated powers within the Inter-American instruments are included, such as the IACHR’s Statute (‘IACHR Statute’) and Rules of Procedure (‘IACHR Procedures’). According to these documents, the Commission has the authority to take a broad range of actions to confront human rights violations, including ‘quiet diplomacy’ and public denunciation through press releases and general reports.

(a) On-site visits and special reports. Among the Commission’s most important powers is its capacity to conduct on-site visits to investigate or observe a member State’s general human rights situation. On-site visits are authorized under Article 18(g) of the IACHR Statute and are regulated according to Articles 51 and 55 of the IACHR Procedures. Typically, the investigations during on-site visits are conducted by obtaining information from non-governmental organizations (‘NGOs’), victims, public officials, and other local actors. Importantly, the on-site visits serve a key role in drawing attention to human rights issues, which otherwise might not receive the level of notoriety that is deserved. The Commission, the victims, and other actors are given the opportunity to publicly present their opinions through the media and press releases. Additionally, during the on-site visits, the Commission receives formal complaints from victims and NGOs, holds hearings, and obtains relevant evidence for the individual cases.

Moreover, the Commission also has the authority to publish special reports, perform studies, and make recommendations to the member States. In each of its Annual Reports, which are published, presented to the General Assembly of the Organization of American States (‘OAS’), the Commission includes ‘General Reports’, which detail the human rights conditions in various States. States are evaluated according to criteria established by the Commission, indicative of human rights situations that merit special attention. The Commission also includes in its Annual Report certain ‘Follow-up Reports’ and various thematic reports that focus on particular relevant topics in human rights.

The Commission also publishes ‘Special Reports’, which expose human rights situations in relevant countries and, in some cases, focus on specific human rights issues. The Special Reports differ from the General Reports in that they are separately published, more complete, and more detailed. Additionally, the Special Reports may be issued following an on-site visit and include information from the investigation undertaken during the visit.

(b) Special Rapporteurships, Adisory Powers, and other functions. The Commission has the authority to designate a Special Rapporteur and performs an advisory function. Typically, the Commission designates one of its seven commissioners as Special Rapporteur on a relevant human rights topic. The mandates of the Commission’s current Special Rapporteurs include the Rights of Women, Freedoms of Expression, and Migrant Workers and their Families, among others.

Article 18(e) of the IACHR Statute provides that member States may present enquiries to the Secretariat of the Commission on human rights issues. In turn, the Commission may provide advisory services, though it is not mandatory. Member States, however, rarely use this prerogative, preferring to seek Advisory Opinions of the Inter-American Court, due to its greater judicial authority.

Additionally, the Commission has certain powers conferred under the American Convention. These include the power to request Advisory Opinions from the Inter-American Court, the power to request that the Inter-American

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5 Topics that the Commission has reported on in the past include economic, cultural, and social rights; rights of women; rights of migrant workers; asylum and its relationship to international crimes; rights of persons with mental disabilities; rights of children in armed conflicts; and the compatibility of laws of contempt with the American Convention.

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Court take provisional measures in serious and urgent situations in individual cases, and the power to refer to the OAS General Assembly certain protocols to the American Convention in order to gradually include other protected rights in the Inter-American system.

(ii) Judicial dimension The judicial dimension of the Commission’s functions is manifested in its ability to receive complaints or claims filed against a State. In the past, the Commission exercised its legal function infrequently. However, the consolidation of democratic regimes in the majority of OAS member States is increasingly requiring the Commission to use the individual petition process. Democratic States recognize and enforce human rights through their judicial systems. Hence, this judicial predilection has incited a ‘judicialized’ approach to international supervision. In effect, its legal functions currently occupy a central place among the Commission’s activities. The Commission processes a considerable and increasing number of individual cases per year, which is demonstrative of the growing demand for international human rights protection. For example, in 2007 the Commission reported that 1,456 petitions were received compared with 681 in 2000 and 718 in 2001.7 Currently, due to the Commission’s limited resources, the average number of decisions issued does not exceed 100 cases per year, and this is of great concern given the importance of this function.

These individual cases are strategically important for activist work conducted by civil society organizations. Each case has an impact that goes beyond the sphere of the case itself, affecting structurally the area of human rights that the petition deals with. Thus, a case processed before the Inter-American system offers victims the possibility of compensation, while simultaneously being the basis of change for domestic norms that are incompatible with human rights standards. These cases have not only an individual and legal effect but also a general political effect.

In accordance with the principles of subsidiarity or complementarity, the States are entrusted with the primary protection of human rights. The national courts, the executive and legislative systems and other domestic bodies are called upon to respect and guarantee the human rights of individuals. International protection (the Commission and the Inter-American Court) is activated only if States fail to protect those rights. Thus, the fundamental objective of the Inter-American system is met when the protection of an individual’s human rights is achieved in the national courts.

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7 See IACHR, Petition System and Individual Cases of the 2000 and 2001 Annual Reports.

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B Brief overview of the individual complaint system before the Commission

(i) The examination of petitions in the Commission. The mechanism of individual petitions, as mentioned, is gaining importance within the Inter-American system. The Commission examines the petitions pursuant to the procedures established in the American Convention, the IACHR Statute and the Regulations of the Commission. Pursuant to this mechanism, the Commission may publish reports on the outcome of individual cases and may submit cases to the Inter-American Court.

Petitions to the Commission must be presented in written form. The Commission may receive complaints from victims, other individuals or groups, or any NGO.8 Petitions can also be filed against member States of the OAS that have not ratified the American Convention,9 claiming violations of rights recognized in the American Declaration.10 Furthermore, according to Article 45 of the American Convention, States may also file petitions against other States as long as both States expressly recognize the Commission’s jurisdiction to hear and determine such cases.

Once a petition is submitted, the Commission will examine the formal admissibility requirements of the communication. If the requirements are met, the Commission will transmit the petition to the State against which the claim is brought, which may present its observations. Ultimately, the Commission will assess an ample variety of evidence in order to make a determination on the merits of the case. The Commission also has certain ancillary functions that it may use under appropriate circumstances. It may adopt preventive measures or protective precautionary measures, and it may facilitate friendly settlement of the claims. The Commission can also hold public hearings, which are broadcast live through the Internet.

(ii) The admissibility of individual petitions The admissibility phase is a crucial step in the Commission’s proceedings. There are a number of admissibility hurdles that must be overcome before a case will be heard. Indeed, most of the petitions are rejected in this phase.

First, domestic remedies must be ‘exhausted and not be pursued in accordance with generally recognized principles of international law’.11 That is, attempts must be made to resolve the case under the domestic laws of the State in question before a case will be admissible. However, petitioners are not required to
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8 ACHR Article 44.
9 IACHR Statute Article 20.
10 ACHR, the US and Canada, among other countries, are subject to this individual complaint procedure.
11 ACHR Article 46(1)(a).
comply with this rule in cases where: (1) the domestic legislation of the State concerned does not afford due process of law for the protection of alleged human rights violations; (2) the party alleging violation of rights is denied access to the remedies under domestic law or is prevented from exhausting them; or (3) there is an unwarranted delay in rendering a final judgment under the aforementioned remedies.12

Petitions must be presented within six months following the date of notification of the decision through which domestic remedies were exhausted. If domestic remedies are not exhausted due to the existence of one of the specified exceptions, then the complaint must be presented within a reasonable period of time following the occurrence of the events denounced.

Petitions that are pending before other similar international systems or petitions that substantially reproduce other cases decided or pending before the Commission are not admissible, nor are petitions that are already decided under, or that present a similar claim to cases pending before, another international mechanism.13

In addition, petitions may be rejected if manifestly groundless or out of order, due, for example, to an absolute lack of evidence, other evident defects, or inadmissibility generated when new evidence arises.

Petitions must demonstrate violations of the victims' rights; abstract complaints are not permissible.14 While a case without a victim is inadmissible, the victim does not have to be the one to submit the complaint.15 The Commission similarly considers inadmissible petitions that allege a violation of the rights of legal entities, such as corporations and NGOs: the American Convention does not protect legal entities. However, under certain circumstances, it is possible to allege that human rights are violated when certain government measures are directed against a legal entity.16

Finally, the Commission has developed the 'fourth instance formula' for the purpose of considering cases decided by independent and impartial national courts. The Commission will hold cases inadmissible when there is no evidence of a violation of due process standards or non-discrimination, or other human rights violations.17 Therefore, the Commission may not serve as an appellate court or a 'fourth instance' to review the judgments of national courts simply because the petitioner considers the domestic judgment to be erroneous or unfair.

(iii) Decision on the Merits: Article 50 and 51 Reports Petitions that are declared admissible are opened and reviewed by the Commission, which requests observations from the parties for further analysis. The Commission makes a final decision on the case pursuant to Article 50 of the American Convention, which may include recommendations for the respective State. States then have a period (generally from 45 to 90 days) from the date that the Article 50 Report is received to comply with the Commission's recommendations. This report is confidential. If the State concerned does not comply with the Article 50 Report, the Commission has the power to publish its decision (an Article 51 Report) or refer the case to the Inter-American Court (if the State has accepted that body's jurisdiction). Therefore, if the State does not abide by the decision, it risks public condemnation or a judicial decision of the Inter-American Court.

(iv) Follow-up A new function that the Commission included in 2001 is the follow-up of compliance with the recommendations incorporated in the Article 51 Reports for each country,18 justified on the basis of the political mandate of the OAS to improve the systems for the protection of human rights.19 The Commission conducts follow-up of cases in relation to the individual reports adopted since 2000. The follow-ups are carried out by methods that include the possibility of holding case hearings and publishing a list of all cases by country in the Commission's Annual Report, showing the status of implementation. To this end, the Commission categorizes the level of compliance as 'total compliance', 'partial compliance' or 'pending compliance'. Moreover, the State's response regarding the level of compliance is also included in the individual report when the State concerned explicitly requests its publication.

12 ACHR Article 46(2).
13 ACHR Arts. 46(c) and 47(d) and IACHR Statute Article 33.
14 ACHR Article 47(b).
18 IACHR Statute revised Regulations Article 46.
19 See also AO/Res. 1899 (XXII-G/02), Evaluation of the Workings of the Inter-American System for the Protection and Promotion of Human Rights with a View to its Improvement and Strengthening, "resolutions 31(3)-31(8)". Available at <http://www.oas.org/juridico/english/ga92/gen_a92.htm>.
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\textsuperscript{15} Inter-American Court of Human Rights ('IACHR'), International Responsibility for the Promotion and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-1/94 of December 9, 1994, Series A No. 14, [45].
\textsuperscript{18} IACHR Statute revised Regulations Article 46.
C Terrorism and human rights: a recurrent issue on the Commission’s agenda

The Commission has dealt with a wide variety of issues throughout its history. In the case of English-speaking States such as the United States, Canada and several Caribbean countries, the Commission has dealt with abortion issues, racial discrimination, political asylum, use of force, and death penalty of minors and foreign nationals, among other issues. This subsection focuses on the most relevant aspects of the Commission’s reaction to the notorious events of “9/11” related to counter-terrorism measures and the need to secure human rights.

(i) The 2002 Special Report on Terrorism and Human Rights

As mentioned above, one mode of action for the Commission is the preparation of special and general reports. The Commission’s special report produced in 2002, entitled Report on Terrorism and Human Rights (“the terrorism report”), is of particular importance. This report was one of the first comprehensive actions taken by an intergovernmental organisation following the events of 11 September 2001. The Commission engaged in an exhaustive analysis of the subject matter and recommended anti-terrorism policies to OAS member States that ensured compliance with international human rights obligations. Currently, the terrorism report is also an essential point of reference for clarifying and restating the Inter-American system’s jurisprudence and human rights standards on critical issues regarding the “War on Terror.”

The terrorism report establishes principles that advise States to apply human rights and international humanitarian law when engaged in armed conflict. Thus, the terrorism report is particularly useful for those States that are immersed in internal armed conflict. Also notable is that the application of these two fields of law has set proliferative standards in the fight against terrorism that are gaining prominence in the Inter-American system.

In addition, the terrorism report includes an analysis of the rights to life, personal liberty, and due process; the prohibition against torture and cruel, inhuman, and degrading treatment; the principle of non-discrimination; and, inter alia, the rights to freedom of expression, freedom of assembly, property, and privacy. The terrorism report further examines issues related to migrant workers, asylum and refugee law, and the rights of non-citizens, all of which the Commission identified as critical in the context of the post-September 11 fight against terrorism.

Following the adoption of the terrorism report, the Commission continued monitoring the fight against terrorism and the new and developing human rights challenges in the post-September 11 world. In 2006, the Commission released a follow-up series of recommendations intended to clarify and reinforce the 2002 terrorism report. These recommendations provide, in up-to-date and concise language, a clear and schematic summary of the recommendations that the Commission presented to the States in 2002.

(ii) Country reports

The special country reports conducted by the Commission analyse the ways that the States guarantee and uphold the standards of human rights and international humanitarian law. An important pre-9/11 example is the Third Report on the Situation of Human Rights in Colombia. In this report, the Commission analyses the Colombian armed conflict in light of the norms regarding human rights and international humanitarian law. The report refers to the Additional Protocol I and Common Article 3 of the four Geneva Conventions, and found violations not only on the part of State agents but also on the part of illegal non-governmental armed groups. It is in the context of these special reports that the Commission has developed a more comprehensive application of international norms of armed conflict. This development allows the Commission to evaluate the conduct of State and non-State actors, as both are likely to be involved in possible terrorist actions, or human rights abuses in armed conflict.

(iii) The Commission’s reports and the situation in Guantanamo

In the context of individual petitions, the Commission has the authority to issue precautionary measures against any OAS member State regarding situations

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21 According to the Commission, during armed conflict international humanitarian law must be applied with the human rights provisions of the ICHR and the American Declaration. States must comply with these international law norms even during periods of terrorist activities. The Commission holds that protecting non-derogable internationally-protected human rights is consistent with international humanitarian law and, thus, States must not violate such guarantees when dealing with counter-terrorism measures.


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of serious and urgent character. These precautionary measures constitute vital and flexible tools used to confront, *inter alia*, certain reckless and arbitrary State reaction to terrorist activity. The Commission’s authority to confront abusive reactions in the so-called ‘War on Terror’ is exemplified in the series of precautionary measures issued against the United States regarding the detainees held at the US naval base in Guantanamo Bay, Cuba. It is worth noting that the only international human rights body with a mandate to receive international human rights complaints against the United States is the Commission.

On 12 March 2002, the Commission granted the first precautionary measures in favour of the detainees in Guantanamo Bay.29 The Commission specifically declared that, although the Guantanamo naval base is not located in US territory, the United States was responsible for ensuring the rights of the detainees because these individuals were clearly under its authority and control.30 The Commission informed the Bush administration that under international human rights law the US was obliged to provide information about each detainee, clarify the detainees’ legal status through a competent and independent tribunal, grant the detainees the guarantees associated with their detention and respect the minimum guarantee and non-cerebrable rights recognized in the Inter-American System.31

On 12 April 2002, the United States presented its observations on the Commission’s precautionary measures and argued that the Commission lacked jurisdiction to apply norms of international humanitarian law or to issue precautionary measures against OAS members that had not ratified the American Convention.28 The Commission rejected the objections to its jurisdiction and reiterated the precautionary measures of 12 March 2002.29 The Commission continued to issue precautionary measures from 2003 to 2006, as well as in 2008. The released communications expressed concern over the repeated reports of the detainees’ illegal status and the allegations of cruel, inhuman and degrading treatment.

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25 Ibid 534.
26 Ibid 533.
29 Ibid.
30 Ibid.
The Commission obtained information specifying that several detainees were captured in Bosnia and Pakistan. It is unclear as to whether these detainees were part of enemy armed forces, thus generating reasonable doubts about the detainees' legal status and whether the guarantees entitled to them were given. Likewise, there were reports indicating that some of the detainees were minors (under 18) and were held in facilities not in accord with international standards. In response to the reports of human rights violations, the Commission reiterated previously issued requests and issued new ones in the subsequent precautionary measures. The Commission requested, *inter alia*, that the US adopt all necessary measures to conduct independent, impartial, and effective investigations of the allegations of torture, taking into account the actions of perpetrators as well as any mandated superior orders. The Commission also requested that the detainees be ensured the right not to be transferred to countries that may subject them to torture or other mistreatment. Additionally, the Commission requested detailed information on the status and treatment of detainees in all detention centers under US control.

The Commission’s capacity to respond quickly and the effectiveness of the precautionary measures are restricted when compliance is an issue. For instance, the decisions and orders of the Commission have had limited impact on US conduct. However, this organ is not alone in challenging US compliance with international norms and regulations. The International Court of Justice (‘ICJ’), as illustrated by the recent Avena et al. Case, also has difficulty attaining US compliance with its measures.

Despite this reality, the Commission’s provisional measures are critical in exposing and publicly condemning States, such as the US, that are defiant in complying with their international human rights obligations. The importance of the Commission’s work is best analysed through its historic role in confronting compliance issues among several OAS member State authoritarian regimes. These regimes neither complied with the Commission’s decisions nor did they appear before hearings. Nevertheless, the Commission was not deterred and

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25 Ibid 534.
26 Ibid 533.
29 Ibid.
continued to develop its supervisory functions, including adjudicating cases even when States neglected to cooperate with proceedings.

The Commission’s persistence set the path for change within the Inter-American system. First, official international recognition of human rights violations proved effective in publicly shaming States, which often led to negative political ramifications in the international sphere. Second, publicly shaming States, in many cases, provided sufficient redress in itself for victims who had suffered years of stigmatisation from national authorities and societies. Third, many cases that were dismissed by authoritarian regimes were later adequately addressed by new democratic governments that wanted to differentiate themselves from the previous regime. Fourth, all processed cases established critical international case law that is indispensable for the development of human rights and humanitarian law.

In regard to the US, there were some noteworthy compliance developments. Two years after the Commission’s 2002 precautionary measures, the US Supreme Court similarly conferred US jurisdiction over habeas corpus suits concerning foreign nationals detained in Guantanamo and decided that the detainees’ legal status must be determined by an impartial and independent adjudicator and the detainees must be ensured their judicial guarantees.36 The US administration responded to the Rasul v Bush (“Rasul”37) decision by setting up a military tribunal to determine the detainees’ legal status. In the 2005 precautionary measures, the Commission declared that these tribunals were neither sufficiently independent nor effective.38 In 2006, the US Supreme Court similarly reached the conclusion that military commissions ‘lack the power to proceed’ since they violated both the Uniform Code of Military Justice and the Geneva Conventions.39 In 2008, the US Supreme Court went a step further in re-establishing habeas corpus as a constitutional right for non-US citizens,40 thereby making it difficult for the Bush administration to bypass its obligation to ensure the legal status of all Guantanamo detainees.

However, the continued issue of non-compliance by US administrative authorities obligated the Commission to urge the US to close Guantanamo; to remove the detainees in a manner that complied with international human rights and humanitarian law; to comply with the obligation of non-refoulement; and to investigate, prosecute, and punish any acts of torture or other cruel, inhuman, or degrading treatment.41

Overall, the Commission has demonstrated the flexibility and adaptability of its mandates as well as their extensive responsive capacity when challenged with the most difficult encroachments of human rights. Moreover, the coordinated uses of its political and adjudicatory powers are ascertainable mechanisms that have effectively denounced and documented human rights violations. The Commission continues to play a vital role in the Inter-American system, complemented by the judicial role of the Inter-American Court.

3 The Inter-American Court of Human Rights

A Introduction to the jurisdiction of the Court

The Inter-American Court has two specific types of jurisdiction: advisory and contentious.

The advisory jurisdiction of the Inter-American Court is governed by Article 64 of the American Convention and is the broadest of all existing international tribunals. Member States of the OAS – even those that have not yet ratified the American Convention – and selected OAS organs, including the Commission, may submit requests for advisory opinions. States may request advisory opinions on the interpretation of the American Convention and ‘other treaties concerning the protection of human rights in the American States’,42 as well as on the compatibility of any domestic laws with the aforementioned international instruments. The OAS bodies, in contrast, may only request interpretations of the American Convention and other international treaties. Furthermore, the scope of their requests must be limited to their respective areas of competence.

The Inter-American Court has interpreted ‘other treaties concerning the protection of human rights in the American states’ to encompass all human rights treaties ratified by one or more of the OAS’s members, even if non-OAS members are parties as well.43 The Inter-American Court further concluded that it has the authority to interpret a human rights provision in a treaty whose

37 Ibid.
42 IACHR Article 64(1).
43 IACHR, 'Other treaties' subject to the advisory jurisdiction of the Court (Article 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982, Series A No. 1 [48].
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The Inter-American human rights system

The main purpose is not to protect such rights. For example, in Advisory Opinion 16 the Inter-American Court asserted jurisdiction to interpret Article 36 of the Vienna Convention on Consular Relations, insofar as this provision provides a right to individuals detained in foreign States to communicate with a consular officer from their country of nationality.

Additionally, the Inter-American Court has the power to adopt provisional measures in extremely serious and urgent cases where there is a risk of irreparable harm to a victim. The Inter-American Court’s authority is governed by Article 63(2) of the American Convention and by provisions of the Statute and Rules of the tribunal. Though the American Convention is silent on the matter, the Inter-American Court, in practice, has asserted jurisdiction to adopt provisional measures only in regard to States that have ratified the American Convention and accepted its contentious jurisdiction.

The purpose of the Inter-American Court’s provisional measures is to protect the victim against potential human rights violations, particularly when there is a risk of irreparable harm. Provisional measures can be requested in relation to a case pending before the Inter-American Court or a petition that is not yet submitted to its cognizance. The Inter-American Court adopts provisional measures mainly to protect individual victims. Regarding groups, the Inter-American Court requires that the members of the group be identifiable and in a situation of danger that directly resulted from affiliation with that specific group.

For the Inter-American Court to adopt an interim measure, the party petitioning the measure must demonstrate *prima facie* the existence of a reasonable presumption that the alleged facts involve a situation of extreme gravity and urgency which presents a risk of irreparable harm for the victim.

**B. Contentious jurisdiction**

The Inter-American Court’s contentious jurisdiction refers to its power to decide cases. The cases are principally based on alleged violations of the American Convention provisions. However, the Inter-American Court may also find violations of other Inter-American human rights treaties, granting the tribunal jurisdiction to supervise compliance with the obligations contained therein. Furthermore, the cases may stem from individual petitions or interstate petitions. The only inter-state petition on record was filed by Nicaragua against Costa Rica before the Commission in 2006. The case never made it to the Inter-American Court, because it was ultimately declared inadmissible for failure to exhaust domestic remedies.

The Inter-American Court may hear a case only after all proceedings before the Commission are exhausted. Moreover, for the Inter-American Court to assert jurisdiction over a claim, certain requirements with respect to person, subject matter, time, and place must be satisfied. To date, the Inter-American Court has not analysed the scope of its territorial jurisdiction.

(i) Jurisdiction ratione personae. The Inter-American Court’s personal jurisdiction or jurisdiction *ratione personae* involves the determination of two issues, namely: who is authorised to submit a case, and against whom the case may be submitted. In contrast to the Commission, which may receive petitions submitted by individuals, groups of persons and NGOs, Article 61(1) of the American Convention only authorises the Inter-American Court to hear cases referred by the Commission or by State Parties to the American Convention.

Most of the cases decided by or pending before the Inter-American Court have been filed by the Commission. There are only two instances where a State has submitted a case to the Inter-American Court. In *Viviana Gallardo*, victims belong to an identifiable group but also the alleged violations were directly linked to the detention itself.


33. ACHR, Article 62.

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For example, in Advisory Opinion 16 the Inter-American Court asserted jurisdiction to interpret Article 56 of the Vienna Convention on Consular Relations, insofar as this provision provides a right to individuals detained in foreign States to communicate with a consular officer from their country of nationality.

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B. Controversial jurisdiction

The Inter-American Court’s controversial jurisdiction refers to its power to decide cases. The cases are principally based on alleged violations of the American Convention provisions. However, the Inter-American Court may also find violations of other Inter-American human rights treaties, granting the tribunal jurisdiction to supervise compliance with the obligations contained therein. Furthermore, the cases may stem from individual petitions or inter-state petitions. The only inter-state petition on record was filed by Nicaragua against Costa Rica before the Commission in 2006. The case never made it to the Inter-American Court, because it was ultimately declared inadmissible for failure to exhaust domestic remedies.

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Mendoza Prisons, above n 48 at ‘considering’ [14].


IACHR, Article 62.

hearing facts which occurred or started to occur before those States’ recognition of the Inter-American Court’s jurisdiction, were valid.63
The American Convention does not explicitly establish a role for individuals in the Inter-American Court proceedings. The American Convention has no provisions that give individuals the authority either to submit cases or to participate independently in litigation before the Inter-American Court. However, in the first cases litigated before the Inter-American Court,64 the Commission appointed the attorneys of the victim’s relatives as its advisors. As Commission representatives, these advisors examined and cross-examined witnesses and presented their final arguments jointly with the Commission’s attorneys. Subsequent changes in the IACHR Procedures allowed the victim’s relatives and their attorneys to participate independently at the reparations phase. Currently, following the 2001 modification of the IACHR Procedures and the Inter-American Court, victims and their representatives can participate in the decision on whether the Commission should submit a case to the Inter-American Court.65 In addition, once the case is submitted to the Inter-American Court, the claimants are granted standing to autonomously present their requests, arguments, and evidence throughout the Inter-American Court’s proceedings.66
The Court’s Rules of Procedure, however, do not define the scope of the petition that victims and their representatives can submit before the Inter-American Court. These rules are silent on whether petitioners may claim additional facts and rights violations to those stipulated in the Commission’s (or State’s) petitions. In Five Pensioners v. Peru,67 and recently, in Saramaka People v. Suriname,68 the Inter-American Court held that petitioners could not allege facts that were different from those claimed by the Commission, unless there were supervening facts.69 However, petitioners may invoke the violation
the case was rejected because Costa Rica submitted the case directly to the Inter-American Court without exhausting proceedings before the Commission. In *Lori Berenson*, 55 Peru submitted a brief to the Inter-American Court56 while the Commission simultaneously referred the case to the Inter-American Court. The Inter-American Court decided that examination of the State brief was not necessary in light of the Commission’s submission of the case.57

The Inter-American Court’s ability to hear a case requires that the defendant State ratify the American Convention and recognise, by unilateral declaration, the Inter-American Court’s contentious jurisdiction. Recognition is optional and may be effected at the time of ratification or of accession to the American Convention, or at any other subsequent time. Article 62(2) of the American Convention authorises States to recognise jurisdiction unconditionally or ‘under the condition of reciprocity.’ Furthermore, in the *Icher Bronstein*58 and Constitutional Court59 cases, the Inter-American Court held that, in light of that provision, States may only restrict their recognition of the Inter-American Court’s contentious jurisdiction for a specific period of time and/or for specific cases.60 Moreover, once a State unconditionally recognises the Inter-American Court’s contentious jurisdiction it may not withdraw its declaration of acceptance.61 States must therefore denounce the American Convention in order to be released from the legal obligations generated by such recognition.62 Arguably, those cases also suggest that other non-stipulated limitations are not authorised by the American Convention and are therefore invalid. Recently, however, the Inter-American Court held that the temporal limitations inserted by El Salvador and Chile, preventing it from hearing facts which occurred or started to occur before those States’ recognition of the Inter-American Court’s jurisdiction, were valid.63

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59 Ibid *Icher Bronstein v Peru*, [40]; ibid IACHR, *Constitutional Court v Peru*, [39]. 
62 Ibid *Icher Bronstein v Peru*, [40]; ibid IACHR, *Constitutional Court v Peru*, [39]. 
of additional rights to those asserted by the Commission, because 'they are entitled to all of the rights enshrined in the American Convention, and to not admit it would be an undue restriction of their status as subjects of international human rights law.'

In addition, the IACtHR procedures authorise petitioners to file requests for provisional measures in cases that are being heard by the Inter-American Court, while giving that power only to the Commission in cases not yet referred to the Inter-American Court. For example, urgent measures have been requested from the Inter-American Court in several cases to protect the life and security of particular persons. Also, the beneficiaries of provisional measures may submit observations to the status reports, submitted by the State to the Inter-American Court, as part of the monitoring process implemented to supervise compliance with those measures.

(ii) Jurisdiction ratione materiae. The American Convention establishes that the subject matter jurisdiction of the Inter-American Court 'shall comprise all cases concerning the interpretation and application of the provisions of [the American Convention].'

In Las Palmas v Colombia, the Inter-American Court interpreted that phrase restrictively, holding that its contentious jurisdiction was limited to finding violations of the American Convention and not to other rules of international law, such as international humanitarian law. However, the Inter-American Court makes use of other norms of international law to interpret the provisions of the American Convention's provisions. In The 'Street Children' v

No. 98 (153–155); IACtHR, Saramaka People v Suriname, Judgment of November 18, 2007, Series C No. 172 (27).
70 Ibid Five Pensioners v Peru (155), IACtHR, Saramaka People v Suriname (27).
72 Ibid Article 25(2).
75 ACHR Article 6(5).
76 IACtHR, Las Palmeras v Colombia, Judgment of February 4, 2000, Series C No. 67 (12–3).
77 Ibid.
78 See IACtHR, The 'Street Children' (Villagran-Morales et al.) v Guatemala, Guatemala and Mapiripán Massacre cases, for example, the Inter-American Court used several provisions of the United Nations Convention on the Rights of the Child, as part of a 'comprehensive international corpus juris' to interpret Article 19 of the American Convention, which concerns the rights of children. The Inter-American Court has also used 'soft law' to aid in the interpretation of the provisions of the American Convention. For example, in Juan Humberto Sánchez v Honduras, the Inter-American Court used the United Nations Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions, or the Minnesota Protocol
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72 IACHR Article 25(2).
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76 IACHR, Las Palmeras v Colombia, Judgment of February 4, 2000, Series C No. 67 [22-3].
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the Inter-American Court found that the principle of retroactivity applies even in the absence of a State’s express temporal limitation.99 Several States have restricted recognition of the Inter-American Court’s contentious jurisdiction exclusively to events or legal actions subsequent to the date of deposit of their unilateral declaration.100

In line with other international case law, the Inter-American Court recognizes that the only exceptions to the principle of non-retroactivity of treaties are the so-called ‘permanent or continuing violations’. These situations originate prior to the recognition of the Inter-American Court’s jurisdiction by the relevant State, but continue to exist subsequently to those dates.101 The Inter-American Court has deemed the following to be continuous violations: the denial of justice resulting from the lack of an effective investigation of a massacre; the forced and continuous displacement of victims from their traditional lands; and the arbitrary deprivation of nationality.102 Though the Inter-American Court has stated on several occasions, in dicta, that forced disappearances constitute continuous violations, it has never decided a case where it applied this exception to assert jurisdiction.103

C The scope of reparations granted by the Inter-American Court

Pursuant to Article 57(1) of the American Convention, the Inter-American Court may award reparations to the victims of human rights violations protected by the American Convention, which may include monetary

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99 IACHR, Negreteria de Carvalho v Brazil, Judgment of November 28, 2006, Series C No. 161 [53].
100 See, inter alia, declarations from Argentina, Mexico and Guatemala. Moreover El Salvador, Chile and Nicaragua have included additional restrictions on the recognition of the Court’s jurisdiction, excluding not only on facts that occurred before recognition but also on those that began before that critical date – some of which even continued afterwards. See IACHR, Basic Documents: http://www.cidh.org/Basicos/English/BasicTOC.htm.
102 Ibid Moiwana Village v Suriname [43]; IACHR, Avelino and Bosico v Dominican Republic, Judgment of September 8, 2005, Series C No. 130 [132].
Violence Against Women ('Convention of Belém do Pará'). Although the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights confers upon the Inter-American Court jurisdiction to supervise compliance with two rights protected therein, the Inter-American Court has yet to find a violation of those provisions in a contentious case.

Furthermore, the Inter-American Court in Moiwana Community v Suriname and Bueno-Alves v Argentina held that, while it generally takes into account the American Declaration when interpreting the provisions of the American Convention, its contentious jurisdiction was limited to finding violations of the American Convention only.

(iii) Jurisdiction ratione temporis The Inter-American Court has discussed the scope of its jurisdiction ratione temporis mainly in the context of cases that presented facts which occurred prior to a State’s recognition of its contentious jurisdiction. The Inter-American Court has consistently declared that, in light of the long-standing international law principle of non-retroactivity of treaties, it cannot hear facts that transpired before such recognition. The Inter-American Court maintains this position even in regard to cases where facts occurred after a State’s ratification of the American Convention but before its recognition of the Inter-American Court’s jurisdiction.

Accordingly, the Inter-American Court found that the principle of retroactivity applies even in the absence of a State’s express temporal limitation. Several States have restricted recognition of the Inter-American Court’s contentious jurisdiction exclusively to events or legal actions subsequent to the date of deposit of their unilateral declaration.

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compensation to victims or their relatives for pecuniary and non-pecuniary damages. Reparations also require States to adopt other measures, such as measures of satisfaction, which vindicate the memory of the victims, and non-repetition, which ensures the cessation of possible repetitive violations. The Inter-American Court has consistently held that the purpose of reparations is to eliminate the consequences of the violations committed.\textsuperscript{105} The type of reparation (that is, its nature and amount) is based on the gravity of the human rights violation perpetrated as well as the damage inflicted upon the victims.\textsuperscript{105} Thus, reparations must be proportional only to the violation and cannot result in the enrichment or impoverishment of the victims or their next of kin.\textsuperscript{106}

The Inter-American Court may order both pecuniary damages, such as the compensation of lost wages or loss of income and consequential damages, and non-pecuniary damages, such as compensation for pain and suffering. Additionally, the Inter-American Court may order the restitution of all litigation costs, international and domestic, including the fees of legal representatives, if appropriate.\textsuperscript{107} In principle, as in domestic legal proceedings, the alleged damages must be proven. Nonetheless, the Inter-American Court may presume the mental pain and suffering undergone by victims of torture,\textsuperscript{108} illegal and arbitrary detention,\textsuperscript{109} and extrajudicial execution preceded by ill-treatment.\textsuperscript{110} Likewise, the Inter-American Court presupposes the suffering of relatives whose loved disappears or is murdered on the account of State agents.\textsuperscript{111} Finally, the Inter-American Court presumes the anguish suffered by victims or their next of kin as a result of the State’s failure to investigate and punish those responsible for gross human rights violations.\textsuperscript{112}

\textsuperscript{105} Ibid.
\textsuperscript{106} Ibid.
\textsuperscript{108} Ibid [202].

The amount of compensation has varied over the years, but most recently the Inter-American Court has ordered States responsible for human rights violations to indemnify the damages with amounts that are appropriate to the seriousness of the violations set forth in the case.\textsuperscript{113} In this vein, the Inter-American Court has declared that ‘jurisprudence can serve as guidance to establish principles in this matter, although it cannot be invoked as a precise norm to follow because each case must be examined in the light of its particularities.’\textsuperscript{114}

With respect to calculation of pecuniary damages, particularly loss of income, the amount is based on the victim’s activity, so the amount awarded oscillates. There are some cases, involving grave human rights violation, where calculating pecuniary damages is problematic. For instance, the victim may not have a specific profession due to his or her deprivation of liberty during the atrocities in question, such as in the \textit{Neiva Alegria}\textsuperscript{115} case, or the victim may be a street child, such as in \textit{The Street Children} case.\textsuperscript{116} In those cases, the Inter-American Court established, on the basis of equity, an amount of estimated income – in some cases using the minimum monthly salary applicable in the particular country – to calculate the total amount of the indemnification.\textsuperscript{117} The Inter-American Court also uses equity as the criterion to calculate the amount of non-pecuniary damages.\textsuperscript{118} In reimbursement issues, the Inter-American Court takes into account the circumstances of the specific case and the nature of the international human rights jurisdiction in order to assess reimbursement of litigation costs incurred by the victims or their legal representatives.\textsuperscript{119} Likewise, such costs and expenses are assessed

\textsuperscript{114} IACHR, \textit{Trujillo-Dorros v Bolivia}, Judgment of February 27, 2002, Series C No. 92 [82].
\textsuperscript{118} See, for example, IACHR, \textit{Chaparro Álvarez y Lago Itíquez v Ecuador}, Judgment of November 21, 2007, Series C No. 170 [250–52]; IACHR, \textit{Ximenes-Lopes v Brazil}, Compliance, Order of May 2, 2008 [235].
compensation to victims or their relatives for pecuniary and non-pecuniary damages. Reparations also require States to adopt other measures, such as measures of satisfaction, which vindicate the memory of the victims, and non-repetition, which ensures the cessation of possible repetitive violations. The Inter-American Court has consistently held that the purpose of reparation is to eliminate the consequences of the violations committed. The type of reparation (that is, its nature and amount) is based on the gravity of the human rights violation perpetrated as well as the damage inflicted upon the victims. Thus, reparations must be proportional only to the violation and cannot result in the enrichment or impoverishment of the victims or their next of kin.

The Inter-American Court may order both pecuniary damages, such as the compensation of lost wages or loss of income and consequential damages, and non-pecuniary damages, such as compensation for pain and suffering. Additionally, the Inter-American Court may order the restitution of all litigation costs, international and domestic, including the fees of legal representatives, if appropriate. In principle, as in domestic legal proceedings, the alleged damages must be proven. Nonetheless, the Inter-American Court may presume the mental pain and suffering undergone by victims of torture and extrajudicial execution, or other less serious violations, such as the killing of a relative. Likewise, the Inter-American Court presumes the impairment of relatives whose beloved disappears or is murdered on the account of State agents. Finally, the Inter-American Court presumes the anguish suffered by victims or their next of kin as a result of the State's failure to investigate and punish those responsible for gross human rights violations.

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105 Ibid.

106 Ibid.


108 Ibid [202].

109 See, inter alia, IACHR, Acosta-Calderón v Ecuador, Judgment of June 24, 2005, Series C No. 129 [159].


114 IACHR, Trujillo-Orozco v Bolivia, Judgment of February 27, 2002, Series C No. 92 [82].

115 IACHR, Neira-Alegria et al. v Peru, Judgment of September 15, 1996, Series C No. 29.


118 See, for example, IACHR, Chaparro Álvarez v Lapo Itúquez v Ecuador, Judgment of November 21, 2007, Series C No. 170 [250–52]; IACHR, Ximenes-Lopes v Brazil, Compliance, Order of May 2, 2008 [235].

on the principle of equity, whereby the Inter-American Court considers the parties’ proclaimed expenses, as long as the amounts are reasonable.\textsuperscript{128}

The other awarded measures of reparation have different purposes, namely vindicating the memory of the victims, restoring their dignity, transmitting a message of official condemnation for the human rights violations, and securing commitment from authorities that the violations will not occur again. The scope of these reparation measures has consistently expanded throughout the years and constitutes a contribution to the development of new standards in international human rights law. For instance, a measure of reparation that the Inter-American Court has consistently adopted is to compel States to investigate acts that gave rise to the human rights violations and to punish those responsible for their perpetration.\textsuperscript{121} Moreover, the Inter-American Court has ordered States to release the results of the investigations to the public so that society, in general, can learn the truth about the violative events and the victims involved.\textsuperscript{122}

On the other hand, in cases of forced disappearance or extrajudicial executions, the Inter-American Court has required States to find and transport the victims’ remains to an appropriate resting ground chosen in agreement with the relatives’ wishes.\textsuperscript{123} Furthermore, pursuant to Article 2 of the American Convention, States must amend their domestic laws in order to comply with the obligations set forth in the treaty. For example, in \textit{Blanco Romero} and \textit{Goiburu}, the Inter-American Court ordered the defendant States to amend domestic legislation on forced disappearances in light of existing international standards.\textsuperscript{124}

In addition, as a measure of satisfaction, defendant States are required to publish the Inter-American Court’s judgments – or parts of them – in their country’s Official Gazette and, in some cases, in a newspaper with national circulation.\textsuperscript{125} Furthermore, as part of those measures, the Inter-American Court has required States to name a school or square after a victim,\textsuperscript{126} hold a public act of resolution to acknowledge international responsibility,\textsuperscript{127} award a scholarship with the name of the victim,\textsuperscript{128} provide human rights training to public officials and members of the judiciary,\textsuperscript{129} offer psychological and medical treatment to the victims or their next of kin,\textsuperscript{129} implement a housing plan to provide adequate housing to victims or their next of kin,\textsuperscript{130} and create a system of genetic information to help in the identification of disappeared children.\textsuperscript{130}

\textbf{D. Compliance with the judgments of the Inter-American Court}

Compliance with the Inter-American Court’s judgments is mandated under Articles 67 and 68 of the American Convention. Article 67 provides that judgments of the Inter-American Court are final and not subject to appeal. Article 68 obligates States Parties to comply with the Inter-American Court’s judgments when the American Convention is breached. Additionally, the Inter-American Court holds that judgment compliance is based on the \textit{pacta sunt servanda} principle, whereby States must undertake their international obligations in good faith.\textsuperscript{133} States that accept the Inter-American Court’s contentious jurisdiction are obligated to respect its orders, including those requesting information on the status of compliance with the Inter-American Court’s judgments.\textsuperscript{134}
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131 IACHR, Inuango Massacres v Colombia, Judgment of July 1, 2006 Series C No. 148 [407].

132 IACHR, Serrano-Cruz Sisters v El Salvador, Judgment of March 1, 2005, Series C No. 120 [193].

133 IACHR, Bulacio v Argentina, Compliance, Order of November 17, 2004, ‘considering’ [5]; IACHR, Barrios Altos v Peru, Compliance, Order of September 22, 2005, ‘considering’ [5]; IACHR, Caesar v Trinidad and Tobago, Compliance, Order of November 21, 2007, ‘considering’ [6].

134 IACHR, Barrios Altos v Peru, Compliance, Order of September 22, 2005, ‘considering’ [7]; IACHR, Baldomar-Garcia v Peru, Compliance, Order of February 7, 2008, ‘considering’ [5].
The Inter-American Court has no specific authority under the American Convention or the Inter-American Court’s Statute and Rules to supervise compliance or set a monitoring procedure. Nevertheless, since the first judgments on reparations in 1989, the Inter-American Court has established a practice of requesting information from States and adopting resolutions assessing the State’s compliance.\textsuperscript{135} In \textit{Baena Ricardo et al v Panama},\textsuperscript{136} the Inter-American Court articulated the legal bases in support of its practice of monitoring compliance. The Panamanian government challenged the Inter-American Court’s authority to require information from States and adopt resolutions on the status of compliance with its judgments. Panama argued that the Inter-American Court exceeded the scope of its jurisdiction, because the OAS General Assembly, pursuant to Article 65 of the American Convention, was the only organ authorised to monitor States. The Inter-American Court responded by reasserting its authority to determine the scope of its own jurisdiction.\textsuperscript{137} Second, the Inter-American Court reasoned that the surveillance of judicial compliance was an inherent part of its jurisdiction.\textsuperscript{138} Moreover, the Inter-American Court’s decisions not only are intended as declaratory acts but also denote a mechanism used to effectively protect victims and provide redress for human rights violations.\textsuperscript{139} This goal can only be achieved if decisions are fully executed.\textsuperscript{140} Lastly, the Inter-American Court concluded that the power to supervise compliance with its judgments was based on an interpretation of several provisions of the American Convention and its Statute, and supported by a consistent monitoring practice never challenged by States before.\textsuperscript{141}

In practice, the Inter-American Court sends written communications to States requesting information on the measures adopted to implement the judgment. States submit reports that are referred to petitioners and the Commission for their observations. As a result of this process, the Inter-American Court issues resolutions on compliance, which are published and available at the Inter-American Court’s website. The supervision process is essentially in writ-


\textsuperscript{136} Ibid.

\textsuperscript{137} Ibid [68].

\textsuperscript{138} Ibid [72].

\textsuperscript{139} Ibid.

\textsuperscript{140} Ibid.

\textsuperscript{141} Ibid (84–104). The provisions relied upon were Articles 33, 62(1) and 20 and 65 of the ACHR and Article 30 of the IACHR Statute.

\textsuperscript{142} IACHR, \textit{Razzacci-Reyes v Guatemala}, Compliance, Order of May 9, 2008, “having seen” [7].

\textsuperscript{143} See, for example, IACHR, Annual Report of 2003, OEA/Ser.L/V/III.61, doc. 1 (9 February 2004) 45–6, available at <http://www1.umn.edu/humanrts/iachr/Annuals/annual-03.pdf>. (Reporting on the partial compliance of Ecuador in the \textit{Benavides Cevallos Case} and the failure of Trinidad and Tobago to inform the Court on the status of compliance in the \textit{Hilaire, Constatine, Benjamin, et al. Case}. In both cases, the Court requests the General Assembly of the Organization of American States to urge those States to fulfill their obligations under the American Convention.)


\textsuperscript{145} Síntesis del Informe Anual de la Corte Interamericana de Derechos Humanos correspondiente al ejercicio de 2007, que se presenta a la Comisión de Asuntos Jurídicos y Políticos de la Organización de los Estados Americanos (Washington, DC, 3 de abril de 2008) (only in Spanish), p. 9.
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even though the Inter-American Court has never produced a comprehensive report as to compliance with its judgments, the tribunal’s President recently stated that only 11.57 per cent of the total cases decided by the Inter-American Court have been fully complied with by the States concerned. It is worth noting that many cases remain under the Inter-American Court’s supervision as a result of the States’ lack of compliance with the measures ordering the investigation and punishment of perpetrators of gross human rights violations.

E Three issues affecting English-speaking States in the Inter-American system

This section highlights some of the recent developments in the Inter-American Court’s jurisprudence regarding English-speaking Caribbean States. Until recently, the Inter-American Court’s influence was clearly visible and analysed mostly in the context of the Spanish-speaking countries in the Inter-American system. Indeed, analysis of the Inter-American Court’s impact on English-speaking Caribbean countries is sometimes neglected. For this reason, the following discussion centres on three key issues that arose in response to

136 Ibid.
137 Ibid [68].
138 Ibid [72].
139 Ibid.
140 Ibid.
141 Ibid [84–104]. The provisions relied upon were Articles 33, 62(1) and 20 and 65 of the ACHR and Article 30 of the IACHR Statute.
142 IACHR, Razzaci-Reyes v Guatemala, Compliance, Order of May 9, 2008, “having heard” [7].
143 See, for example, IACHR, Annual Report of 2003, OEA/Ser.L/V/III.61, doc. 1 (9 February 2004) 45–6, available at <http://www1.umn.edu/humanrts/iachr/Annuals/annual-03.pdf>, (Reporting on the partial compliance of Ecuador in the Benavides Ceallier Case and the failure of Trinidad and Tobago to inform the Court on the status of compliance in the Hilaire, Constanine, Benjamin, et al. Case. In both cases, the Court requests the General Assembly of the Organization of American States to urge those States to fulfil their obligations under the American Convention.)
the Inter-American Court’s judgments regarding the relevant English-speaking Caribbean States, namely the mandatory application of the death penalty, the use of corporal punishment, and the rights of tribal communities.

(i) Death penalty. The death penalty is particularly critical in the context of the English-speaking countries, because the majority of the Spanish-speaking countries in the Americas either have completely abolished the death penalty or authorize its use only in exceptional cases or cases involving military justice. In the cases of *Hilaire*, *Constantine and Benjamin et al v Trinidad and Tobago* ("Hilaire"),*146* and *Boyce et al v Barbados* ("Boyce"),*147* the Inter-American Court found that the mandatory application of the death penalty violated the States’ obligations under the American Convention. The Inter-American Court held that the nature of mandating the death penalty was inconsistent with the American Convention, although the death penalty per se is not a violation.

In *Hilaire*, 32 complainants had been convicted of murder and sentenced to death under section 4 of the Offences Against the Person Act of Trinidad and Tobago, which prescribes the death penalty as the only applicable sentence for the crime of murder. The Inter-American Court concluded that the Offences Against the Person Act prevented judicial authorities from evaluating basic circumstances for determining the degree of culpability and establishing an individualized sentence, which violated Article 4(1), which ensures the right not to be arbitrarily deprived of life. In addition, by mechanically applying the death penalty to all persons found guilty of murder without judicial review of such application, the Offences Against the Person Act violated Article 4(2) of the American Convention, which limits the imposition of this punishment to those convicted of the most serious crimes. Lastly, the Inter-American Court held that, despite the State’s arguments, the death penalty in Trinidad and Tobago’s procedure for granting mercy lacked transparency, available information, and the victims’ participation. Therefore, it held that the State had violated Articles 4(6) and 8 – protecting due process rights – in connection with Article 1(1) of the American Convention.

In awarding reparations, the Inter-American Court held that the State had to refrain from the future application of the mandatory death penalty. Also, in accordance with Article 2 of the American Convention, the State had to bring its laws into compliance with this treaty and international human rights norms.

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within a reasonable time, and undertake legislative reform to establish different categories of murder that accounted for the particular circumstances of the crime and the offender. In anticipation of the new legislation, the Inter-American Court also ordered sentencing retrials for the victims after reforms were implemented. In addition, the State had to resubmit the victims’ cases to the authority competent to render a decision on mercy, and the cases were to be conducted in accordance with the due process guaranteed in the American Convention. Furthermore, as part of the reparations, the Inter-American Court held that, regardless of the outcome of the new trials, the State should refrain from executing the complainants.

Though the Inter-American Court in *Hilaire* conclusively determined that Trinidad and Tobago’s mandatory application of the death penalty was inconsistent with the American Convention, the issue surfaced again in 2007 in a case against Barbados. In *Boyce*, the Inter-American Court found that Barbados’ Offences Against the Person Act of 1994, which called for mandatory application of the death penalty in all murder cases, similarly violated the State’s obligations under the American Convention.

In *Boyce*, the State argued that the mandatory application of the death penalty was not incompatible with the American Convention, because defendants in capital cases could appeal a wide range of common law defences and due process procedures, including review by the Barbados Privy Council, which could commute the death sentence. Despite the State’s arguments, the Inter-American Court found that the mandatory application of the death penalty violated an individual’s right to life. Similarly, the possibility of review by the Privy Council was insufficient, because that executive procedure was only available post-sentencing. The Inter-American Court emphasized that during the crucial judicial sentencing phase, Barbadian courts and judges had no option but to sentence all defendants convicted of murder to the death penalty. Based on those considerations, the Inter-American Court found that the mandatory application of the death penalty provided for in Barbados’ Offences Against the Person Act constituted an arbitrary deprivation of life and failed to limit the death penalty to only the most serious crimes, thus violating Articles 4(1) and 4(2) of the American Convention. Although petitioners argued that the method of execution of the death sentence by hanging constituted cruel and inhuman treatment or punishment in violation of Article 5, the Inter-American Court found that it was unnecessary to address that claim. Regarding reparations, the Inter-American Court ordered the State to

*148* The Privy Council in Barbados was established under section 76 of the Constitution of Barbados to advise the Governor-General on the exercise of the prerogative of mercy.
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146 IACHR, Hilaire, Constantine and Benjamin et al v Trinidad and Tobago, Judgment of June 21, 2002, Series C No. 94.
148 The Privy Council in Barbados was established under section 76 of the Constitution of Barbados to advise the Governor-General on the exercise of the prerogative of mercy.
American Convention because it amounted to institutionalised violence. As such, the Inter-American Court held that corporal punishment by flogging constituted a form of torture and therefore a per se violation of the rights protected by Articles 5(1) and 5(2) of the American Convention.

Furthermore, in Caesar, the Inter-American Court remarked that it was reasonable to assume that the beatings, which caused severe pain and physical damage, were exacerbated by the anxiety, stress and fear the victim experienced while incarcerated and awaiting punishment. Consequently, the Inter-American Court held that Caesar’s sentence was executed in a seriously humiliating manner, since, aside from the aforementioned conditions, it was done in front of at least six people. As such, the Inter-American Court concluded that the corporal punishment applied to the victim constituted a form of torture and, as a result, a violation of his right to physical, mental and moral integrity as protected under Article 5 of the American Convention.

Additionally in light of the incompatibility between Trinidad and Tobago’s Corporal Punishment Act and the American Convention, the Inter-American Court concluded that when a State ratifies the American Convention it must adopt its legislation to conform to the obligations within the agreement. Therefore, its failure to do so violated Article 2 of the American Convention in relation to Articles 5(1) and 5(2).

(iii) Rights of tribal communities in Suriname

In recent times the Inter-American Court has issued several important decisions regarding the rights of tribal communities in Suriname, in particular Moiwana Village v Suriname (‘Moiwana Village’) and Saramaka People v Suriname (‘Saramaka People’). In these two cases the Inter-American Court reaffirmed its understanding that, to ensure an effective protection of the rights of tribal communities, the particular characteristics that distinguish these communities from the general population must be taken into account when interpreting the scope of the American Convention.

In Moiwana Village, the Inter-American Court addressed the rights of the N’djakia tribe of Suriname. On 29 November 1986, the Surinamese military attacked Moiwana Village, a community of N’djakia in the eastern part of the

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149 In regard to the other three victims, one passed away and the other two had their sentences commuted before the decision of the Court was adopted. See Boyce et al v Barbados, above n 147 [1.29].

150 IACHR, Caesar v Trinidad and Tobago, Judgment of March 11, 2005, Series C No. 123.

151 For the purposes of this Article, Suriname is part of the ‘English-speaking Caribbean’. The reason is that (1) English is spoken extensively in Suriname, although Dutch is its official language and (2) Dutch is not one of the four official languages of the OAS.


153 IACHR, Saramaka People v Suriname, Judgment of November 28, 2007, Series C No. 172. See also Chapter 19 at p. 504.
commute the death sentence of one of the complainants and adopt legislative or other measures necessary to ensure that the death penalty was no longer imposed in a mandatory fashion.

(ii) Corporal punishment

In *Caesar v Trinidad and Tobago* ("Caesar"), the Inter-American Court examined for the first time the compatibility of corporal punishment with the American Convention. In this case, Winston Caesar was convicted by the High Court of attempted rape. He was sentenced to 20 years in prison with hard labour, in addition to 15 lashes with the cat-o-nine tails. The State's Corporal Punishment Act allowed a male delinquent over the age of 16 to be beaten with a 'cat-o-nine tails', or with any other object approved by the President, in addition to the prison sentence. The cat-o-nine tails consists of nine cords of interwoven cotton, each cord approximately 30 inches long and at least a quarter of an inch in diameter, and is discharged on the prisoner in between his shoulders and lower back. Petitioners argued, *inter alia*, that Trinidad and Tobago's Corporal Punishment Act, in itself and as applied to the victim in this case, violated the right not to be subjected to torture or other cruel, inhuman and degrading treatment as protected by Article 5 of the American Convention.

Articles 5(1) and 5(2) of the American Convention provide for a prohibition of torture or other cruel, inhuman and degrading treatment or punishment. Moreover, Article 5 provides that all persons deprived of their liberty should be treated with the proper respect inherent to human dignity. In deciding whether corporal punishment violated the preceding guarantees, the Inter-American Court took into account the international community's widespread condemnation of torture and other cruel forms of punishment as inhuman and degrading. The Inter-American Court considered the international tendency to eradicate corporal punishment, as well as the increasing recognition of a prohibition on such punishment in domestic tribunals, before declaring it to constitute cruel, inhuman, and degrading treatment. The impermissible character of corporal punishment, in times of both war and peace, implied that member States, in compliance with Articles 5(1), 5(2) and 1(1), have an *erga omnes* duty to abstain from and prevent the imposition of corporal punishment, regardless of the circumstances.

The Inter-American Court concluded that, though the domestic laws authorised judicial corporal punishment, its practice nonetheless violated the American Convention because it amounted to institutionalised violence. As such, the Inter-American Court held that corporal punishment by flogging constituted a form of torture and therefore a *per se* violation of the rights protected by Articles 5(1) and 5(2) of the American Convention.

Furthermore, in *Caesar*, the Inter-American Court remarked that it was reasonable to assume that the beatings, which caused severe pain and physical damage, were exacerbated by the anxiety, stress and fear the victim experienced while incarcerated and awaiting punishment. Consequently, the Inter-American Court held that Caesar's sentence was executed in a seriously humiliating manner, since, aside from the aforementioned conditions, it was done in front of at least six people. As such, the Inter-American Court concluded that the corporal punishment applied to the victim constituted a form of torture and, as a result, a violation of his right to physical, mental and moral integrity as protected under Article 5 of the American Convention.

Additionally in light of the incompatibility between Trinidad and Tobago's Corporal Punishment Act and the American Convention, the Inter-American Court concluded that when a State ratifies the American Convention it must adapt its legislation to conform to the obligations within the agreement. Therefore, its failure to do so violated Article 2 of the American Convention in relation to Articles 5(1) and 5(2).

(iii) Rights of tribal communities in Suriname

In recent times the Inter-American Court has issued several important decisions regarding the rights of tribal communities in Suriname, in particular *Moiwana Village v Suriname* ("Moiwana Village") and *Saramaka People v Suriname* ("Saramaka People"). In these two cases the Inter-American Court reaffirmed its understanding that, to ensure an effective protection of the rights of tribal communities, the particular characteristics that distinguish these communities from the general population must be taken into account when interpreting the scope of the American Convention.

In *Moiwana Village*, the Inter-American Court addressed the rights of the N'djuka tribe of Suriname. On 29 November 1986, the Surinamese military attacked Moiwana Village, a community of N'djuka in the eastern part of the

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149 In regard to the other three victims, one passed away and the other two had their sentences commuted before the decision of the Court was adopted. See *Boyce et al v Barbados*, above n 147 [1.29].
150 IACHHR, *Caesar v Trinidad and Tobago*, Judgment of March 11, 2005, Series C No. 123.
151 For the purposes of this Article, Suriname is part of the "English-speaking Caribbean". The reason is that (1) English is spoken extensively in Suriname, although Dutch is its official language and (2) Dutch is not one of the four official languages of the OAS.
country, burning its property and killing at least 39 members of the community. Among the victims were men, women and children, whose remains were never recovered and their perpetrators never brought to justice by the Surinamese government. Those whose lives were spared escaped to surrounding territories, including French Guiana. As a consequence of the cultural particularities of the tribal community, the injustice that resulted from the government’s inaction prevented the citizens from carrying on with their lives. The N’djuka tribe’s beliefs prohibited them from returning to the abandoned village of Moiwa. The survivors and the family members of those who died claimed that, to continue living their lives unburdened, they could not return until justice put at ease the spirits of the dead and proper burial rituals were allowed.

During the period of the alleged violations, Suriname had not ratified the American Convention or accepted the Inter-American Court’s contentious jurisdiction. Therefore, the Inter-American Court limited its jurisdiction to those violations that continued to exist after Suriname’s 1987 ratification and recognition. The Inter-American Court found that the lack of investigation, the denial of justice, and the forcible displacement of the community from its ancestral lands, from which the members continued to suffer, were continuous violations over which the Inter-American Court could assert jurisdiction.

The Inter-American Court held that Suriname’s lack of investigation and the denial of justice violated the Moiwa community’s right to physical, mental, and moral integrity on several grounds. First, the Inter-American Court determined that, given the notions of justice and collective responsibility shared by the N’djuka people, and given the State’s failure to return the remains of the villagers killed to allow for a burial according to N’djuka tradition, Suriname caused the Moiwa community members to endure significant emotional, psychological, spiritual, and economic hardship, which amounted to a violation of Article 5(1) of the American Convention. Secondly, the Inter-American Court found that Suriname violated the victims’ right to freedom of movement, as protected by Article 22 of the American Convention, given that the lack of investigation had forcibly displaced the Moiwa community members from their ancestral lands and prevented them from moving freely within the State or choosing their place of residence. Thirdly, the Inter-American Court held that the State’s failure to ensure an effective investigation also entailed a violation of the right of the community to use and enjoy their traditional lands, and, as such, deprived them of their right to property provided under Article 21 of the American Convention.154

As part of the reparations, the Inter-American Court compensated the victims monetarily. Moreover, the Inter-American Court ordered Suriname, inter alia, to investigate the events complained of, prosecute and punish those responsible, and locate and identify the deceased’s remains. The State also had to adopt all necessary measures to ensure the delimitation, demarcation and collective titling of the ancestral lands of the community and refrain from actions that would affect the existence, value, use or enjoyment of that property until the rights of the community are secured. Finally, the Inter-American Court ordered the State to establish a developmental fund of US$1,200,000 to invest in health, housing and educational programs for the Moiwa community members.

In Suriname, People, the Inter-American Court further developed and solidified the ancestral property rights of tribal communities. In this case, Suriname issued various logging and mining concessions between the years of 1997 and 2004 within the territory of the Saramaka tribal community. The Inter-American Court found that while the American Convention, specifically the right to property in Article 21, did not entirely debar the State from granting these concessions, the State did not consult the Saramaka people prior to these operations.

The specific allegations against the State in this case included non-compliance with Article 2 (duty of State to adopt necessary measures to protect American Convention rights) and violations of Articles 3 (right to juridical personality), 21 (right to property) and 25 (right to judicial protection) of the American Convention. The first issue was whether the Saramaka people constituted a ‘tribal community’, entitled to special measures that ensure the full exercise of its rights based on Article 1(1) of the American Convention. The Inter-American Court held that, although the Saramaka people were no: indigenous to Suriname,155 they nevertheless constituted a tribal community entitled to protection under the American Convention, because of their dependence on the land and their ‘profound’ spiritual connection to their ancestral territory.

The next pressing issue was whether Article 21 of the American Convention recognised the rights of the Saramaka people to use and enjoy communal property. In this regard, the Inter-American Court found that Article 21, as interpreted in the light of Suriname’s other international human rights obligations, including common Article 1 (the right to self-determination) of the

154 The Court applied its previous holding in Maranga (Samu) Awos Tingri Community v Nicaragua, Judgment of August 31, 2001, Series C No. 79 (recognising.

155 The Saramaka’ ancestors were African slaves forcibly taken to Suriname during the European colonisation in the 17th century, who later escaped to the interior regions of the country and established autonomous communities.
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International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, ensured the right of the Saramaka people to use and enjoy communal property. The Inter-American Court also found that, because Suriname allowed only individuals to claim a right to property under the law, it violated Article 3 of the American Convention, which protects the right to juridical personality defined "as the right to be legally recognised as a subject of rights and obligations".

Perhaps the most compelling aspect of this decision, however, was the Inter-American Court’s determination of ownership of the natural resources found within the Saramaka territory. The Inter-American Court held that members of tribal and indigenous communities had ownership of the natural resources traditionally used within their territory, because those resources were central to the survival of these groups. Notwithstanding, the Inter-American Court noted that property rights granted under Article 21 were not absolute and that the State, under certain circumstances, could restrict those rights, including issuing concessions for the exploration and extraction of natural resources within Saramaka territory.

To assess the scope of permissible restrictions of the right to property, the Inter-American Court articulated three safety measures that the State had to utilise when granting a concession for the exploration and extraction of a natural resource in Saramaka’s territory. First, the State had to consult the Saramaka people and ensure effective participation in regard to any development, exploration, or extraction plan. However, in cases of major developments or investment plans that could profoundly impact the Saramaka people’s property rights and affect their traditional territory, the State also had to obtain the free, prior and informed consent of the Saramakas in accordance with their traditions and customs. Secondly, the State had to guarantee that the Saramaka people would receive a benefit from any activity that took place within their property. Thirdly, the State could not issue any concession unless it had consulted with an independent entity to assess the social and environmental impact of the requested project.

In applying these safety measures to the concessions already granted by Suriname in the Saramaka territory, especially the logging and mining concessions, the Inter-American Court found that the State failed to comply with these safeguards, which violated Articles 21 and 1(1) of the American Convention.

As part of the reparations, the Inter-American Court ordered the State to demarcate the Saramaka territory and grant a collective property title to the Saramaka people. Additionally, the State had to amend any legislation discouraging the Saramaka people’s right to juridical recognition, access to legal remedies, and the use and enjoyment of their property. The State also had to ensure the right of the Saramaka people to consultation, and, if necessary, set up a process through which they could grant or withhold consent in regard to large-scale projects that might affect their territory. Moreover, the State had to ensure that the environmental and social assessments were conducted by independent and competent agencies.

4 Conclusion

The States of the Americas currently have a more constructive relationship with the Commission and the Inter-American Court, which includes a better understanding of the complementary role that such organs play within their national institutions. This atmosphere allows for better dialogue and coordinated action between civil society, States, the Commission and the Inter-American Court in the common goal of safeguarding human rights. Several States have recently adopted rational legislation and practices that broadened effective implementation of standards and decisions.

However, the increasing growth and impact of the Inter-American system has simultaneously adversely affected it. For example, OAS Members are hesitant to allocate essential additional funds for the Commission and the Inter-American Court. Moreover, some States remain suspicious of these organs and have, on occasion, attempted to undermine the system’s effectiveness through covered proposals. Noteworthy is the vital role that civil society exercises in defending the autonomy and integrity of both organs – which, to a certain extent, are the main guarantors of the effectiveness of the system.

Lastly, a pending issue that remains to be addressed is the lack of universal ratification by all of the OAS State members of the core treaties of the Inter-American system, in particular the American Convention on Human Rights. Although, as previously discussed, the Commission monitors human rights compliance in the US, Canada, and a number of Caribbean States under the American Declaration on the Rights and Duties of Man, the effectiveness of that supervision would strengthen if those States became parties to the IACHR. Furthermore, the case law developed by the Inter-American Court demonstrates that access to this tribunal would also benefit the protection of human rights in many of the English-speaking States that have not yet accepted its contentious jurisdiction.

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