

# Human Rights in the Inter-American System

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## INTRODUCTION

Over the past few decades a number of regional systems have developed to for the protection of human rights.<sup>(1)</sup> Situated midway between national human rights institutions and international institutions, regional human rights systems play an important part in defining, promoting, and protecting human rights. Even for those outside of the geographic region in which these systems operate, regional human rights mechanisms provide an important model for how human rights can be better protected elsewhere in the world.

Three principle regional human rights systems have emerged, each based on a separate treaty and providing slightly different protections and notably different enforcement options. By far the most developed regional system is found in Europe, where the European Convention on Human Rights offers some of the strongest protections and the European Court of Human Rights can directly enforce its judgments against violator nations.<sup>(2)</sup> On the other end of the spectrum, the African human rights system remains in its infancy.<sup>(3)</sup> Though the African (Banjul) Charter on Human and People's

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Rights offers many of the protections found in other human rights instruments, the African Court on Human Rights was only established in 2004 and remains very weak.<sup>(4)</sup> Somewhere between these two extremes sits the Inter-American system of human rights, which guarantees relatively strong protections of human rights to citizens of North and South America, but still has only relatively weak mechanisms for enforcing those rights when they are violated.

The Inter-American system of human rights remains a critical component of the global human rights architecture. The basic human rights protections in the Inter-American system are laid out in the American Convention on Human Rights which entered into force in 1978.<sup>(5)</sup> Beyond the Convention itself, two separate institutions are tasked with the “promotion and protection of human rights” in the Americas.<sup>(6)</sup>

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights work together in an effort to ensure that the rights established in the Convention are realized.

This chapter explores the Inter-American system of human rights to give those outside of the system an understanding of the basic rights guaranteed and mechanisms of enforcement. The chapter argues that while the Inter-American system has been a useful mechanism for enhancing human rights protections, it remains too weak to ensure that the human rights of all citizens in the Americas are in fact respected. Nonetheless, the Inter-American system offers a useful model of how regional mechanisms can promote human rights and alter state conduct where political unity such as that seen in the European Union is lacking. In short, the Inter-American system has been a relative success, but more work and stronger institutions are necessary for it to be truly effective.

This chapter proceeds by first providing an historical introduction to the Inter-American system of human rights. Next, the protections provided in the American Convention on Human Rights are considered in some detail. Part III turns to the actual institutions of the system and considers how the design of institutions determines their effectiveness in protecting human rights. Part IV considers some of the key cases before the Inter-American

Commission on Human Rights and the Inter-American Court on Human Rights and suggests some of the successes and failures of the system. Finally, part five looks at the place of the United States in the Inter-American system and the protection of human rights more broadly.

## **I. AN HISTORICAL INTRODUCTION TO THE INTER - AMERICAN SYSTEM**

The Inter-American human rights system first took shape in 1948 with the establishment of the Organization of American States (OAS). Among the purposes of the OAS, which currently has 35 member states in the Americas, is to “strengthen the peace and security of the continent.”<sup>(7)</sup> The promotion of human rights has been repeatedly deemed part of that mission. At the 1948 conference in Bogotá establishing the OAS, the American Declaration on the Rights and Duties of Man was adopted.<sup>(8)</sup> The Declaration was the first international human rights instrument and preceded the Universal Declaration of Human Rights by nearly seven months. The Declaration affirmed that “All men are born free and equal, in dignity and in rights.” As well as traditional political rights to life, liberty, equality, and freedom of religion, the Declaration provided a range of social rights, including education and culture.<sup>(9)</sup> Finally, the Declaration includes a number of individual duties as well as rights, including duties to society, parents, and children.<sup>(10)</sup> While the Declaration is significant - particularly in that it was the first regional human rights document and emphasized the importance of human rights in the Americas, it remained a rather weak instrument with no formal enforcement capabilities. Though states in the OAS made clear an aspiration to protect human rights, under the Declaration, there were no real consequences for the failure of states to do so.

Recognizing the weaknesses of the American Declaration on the Rights and Duties of Man, the OAS undertook a process of drafting a more powerful Inter-American Human Rights Treaty in 1959. The Inter-American Convention on Human Rights was formally adopted in 1969 and entered into force in July 1978. Though the specific provisions of the Convention will be

discussed in the next section, it is worth noting here that the Convention is a legally binding text which formally places obligations on states with respect both to political and social rights. It also provides the legal foundations for both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.<sup>(11)</sup> Today, the American Convention on Human Rights serves as the foundational text of the Inter-American Human Rights System.

## II. THE AMERICAN - CONVENTION ON HUMAN RIGHTS

The Inter-American Convention on Human Rights is a comprehensive human rights treaty that seeks to establish “a system of personal liberty and social justice based on respect for the essential rights of man.”<sup>(12)</sup> Like other regional human rights instruments such as the African Charter on Human and People’s Rights and the European Convention on Human Rights, the Inter-American Convention lays out a fundamental set of obligations defining how states are required to treat their own citizens. All of these conventions are thus part of an important development in the international legal system whereby international law has come to regulate not just the behavior of states toward one another but also the conduct of states toward individuals within the state.<sup>(13)</sup> Like most modern human rights treaties, the American Convention begins from the natural rights perspective<sup>(14)</sup> that human rights are just that – human. As the Preamble to the Convention recognizes, “the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality.”<sup>(15)</sup>

While many earlier human rights instruments, such as the Universal Declaration of Human Rights and the American Declaration on the Rights and Duties of Man, were largely aspirational, in the American Convention, states formally commit “to respect the rights and freedoms recognized” in the Convention.<sup>(16)</sup> The Convention is thus a formally binding legal document through which states pledge to one another a minimum standard of treatment for all individuals within their jurisdictions. Not only do states

obligate themselves through the Convention to protect these essential human rights, they further commit to enact any domestic legislation that “may be necessary to give effect to these rights and freedoms.”<sup>(17)</sup> States are therefore required to modify any national laws that may violate the Convention and adopt any additional legislation necessary to ensure that the rights included in the Convention can, in fact, be enjoyed by all their citizens.

One of the most important substantive rights included in the Convention is the right to life, namely that “each person has the right to have his life respected.”<sup>(18)</sup> More specifically, the Convention requires that no person shall be arbitrarily deprived of life; that the death penalty “may only be imposed for the most serious crimes” and may not be used in relation to political offences or common crimes.<sup>(19)</sup> The concept of the right to life is then extended to the protection of bodily integrity and humane treatment as the Convention specifies that no one shall be subjected to torture or slavery.<sup>(20)</sup>

The Convention next turns to a set of rights associated with personal liberty, specifying that “every person has a right to personal liberty and security” and that “no one shall be subject to arbitrary arrest or imprisonment.”<sup>(21)</sup> A series of specific requirements for arrest and detention including notification of charges, an appearance before a judge, and recourse to a competent court are then spelled out more particularly.<sup>(22)</sup> A related article provides an extremely detailed list of rights required for a fair trial. These rights include a fair hearing, the presumption of innocence, the assistance of an interpreter, notification of charges, adequate means to prepare a defense, the right to legal counsel, the right to examine witnesses, the right to refrain from self-incrimination, the right to a public trial and the right to an appeal.<sup>(23)</sup> This is by far the most specific portion of the Convention and, as such may be the most enforceable. This article has generated a significant number of cases based on the Convention before the Inter-American institutions.

The next section of the Convention specifies more private rights of thought and religion. The Convention specifies a general right to privacy by prohibiting “arbitrary or abusive interference with ... private life.”<sup>(24)</sup>

Freedom of conscience and religion are guaranteed, including a prohibition on “restrictions that might impair [the] freedom to maintain or to change religion or beliefs.” Any restrictions on the practice of religion are limited to those that “are necessary to protect safety, order, health, or morals.”<sup>(25)</sup> Beyond religious freedoms, freedoms of thought and expression are guaranteed, including “freedom to seek, receive and impart information of all kinds” without prior censorship.<sup>(26)</sup> The final rights guaranteed in this section of the Convention include rights to peaceful assembly and association for a variety of reasons, subject only to such restrictions established by law as may be necessary in a democratic society.<sup>(27)</sup>

The Convention then moves to familial or group rights beginning with an acknowledgement that “the family is the natural and fundamental group unit of society” and providing for the right to marry and raise a family.<sup>(28)</sup> Rights to property, freedom of movement, and residence are further specified, subject to some limitations for public interest or in the case of legitimate judicial proceedings.

The final section of the Convention relating to political rights guarantees some level of political participation, though this right has rarely been enforced and often violated.<sup>(29)</sup> The Convention specifies that “every citizen” shall have the right “to take part in the conduct of public affairs, directly or through freely chosen representatives” and “to vote and be elected in genuine periodic elections.”<sup>(30)</sup> Though this falls short of guaranteeing democratic governance, in the words of Henry Steiner, at a minimum, it should “never require less of a government than provision of meaningful exercise of choice by citizens in some form of electoral process permitting active debate on a broad, if not unlimited, range of issues.”<sup>(31)</sup> This section of the Convention also provides a guarantee of judicial protection, a right that has been the subject of much of the work of the Inter-American Court. Article 25 specifies that “everyone has the right to simple and prompt recourse ... to a competent court or tribunal for protection against acts that violate his fundamental rights.”<sup>(32)</sup>

In the drafting of the American Convention, it was decided not to have a separate treaty relating to economic and social rights, but rather to include an

aspirational provision regarding such rights in the text of the Convention itself. Article 26 of the Convention obligates states to work toward the “progressive development” of the realization of the “economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States.”<sup>(33)</sup> This passage does not provide any enforceable rights nor has the OAS itself done much to specify the nature of such standards. However, an Additional Protocol to the Convention adopted in 1998 further obligates states to “adopt such measures ‘to the extent allowed by their available resources, taking into account their degree of development’ for the progressive achievement of the rights listed.”<sup>(34)</sup> Even this protocol, however, provides no explicit standards nor offers potentially enforceable rights. On the whole, then, the protection of economic and social rights in the Inter-American system remains very weak and there are normally no consequences for the failure of states to provide economic and social rights.

The Convention allows for derogation from the rights guaranteed in certain narrowly defined circumstances. In “time of war, public danger or other emergency that threatens the independence or security” of the State, derogations are allowed provided that they do not involve “discrimination on the ground of race, color, sex, language, religion or social origin.”<sup>(35)</sup> Certain core rights, such as the right to life, humane treatment, freedom of religion, and political participation, are non-derogable even in extreme circumstances.<sup>(36)</sup> States which seek to derogate from the rights specified in the Convention are required to notify the Secretary General of the OAS prior to derogation.<sup>(37)</sup> Thus, derogation is possible from many of the rights of the Convention, but only in limited circumstances.

The final two sections of the Convention provide the legal and statutory foundation for the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. These two institutions are discussed in greater detail in the next part of this chapter.

### III. THE INSTITUTIONS OF THE INTER - AMERICAN HUMAN RIGHTS SYSTEM

In an effort to further protect and promote human rights, in 1959 the OAS established the Inter-American Commission on Human Rights and in 1961 the Commission began to observe the human rights practices in various countries in the region.<sup>(38)</sup> Yet, in its early years, the Commission remained weak, deriving its “existence only from OAS General Assembly resolutions of uncertain legal force.”<sup>(39)</sup> In 1970, however, revisions to the OAS charter and the adoption of the American Convention on Human Rights greatly enhanced the effectiveness of the Commission. In 1979, a formal Statute for the Commission was enacted, charging it with the power to promote “the observance and defense of human rights.”<sup>(40)</sup> With this stronger foundation, the Commission was authorized to “make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights” and to “conduct on-site observations in a state, with the consent or at the invitation of the government in question.”<sup>(41)</sup> The seven-member Commission is effectively a fact finding body. It can initiate investigations of a country’s human rights practices when it receives reports of human rights abuses. The first such reports - covering Cuba, Haiti and the Dominican Republic were published in 1960. The Commission’s subsequent investigations have included Argentina, Bolivia, Chile, Columbia, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Suriname, and Uruguay.<sup>(42)</sup> Though these reports are useful and can play an important role in drawing attention to human rights violations or publicly shaming states that routinely violate human rights, the Commission has little direct power to force states to change their human rights practices.

One significant aspect of the Commission is its ability to receive individual complaints. O.A.S. Resolution XXII of 1965 allows the commission to investigate isolated cases of human rights violations brought to the commission’s attention by individuals.<sup>(43)</sup> However, a number of procedural bars limit the ability of the Commission to pursue such individual complaints, particularly a requirement of exhaustion of local remedies.<sup>(44)</sup> This requirement means that an individual must first use all available judicial

mechanisms in the home state before proceeding to file an a petition with the Commission. Even where this requirement has been met, the Commission may collect evidence at the site of the abuses only if the government cooperates.<sup>(45)</sup> The efficacy of the commission in such cases of individual petitions was further limited by the fact that “once the Commission had given its opinion on the case, nothing else could be done.”<sup>(46)</sup> In other words, the Commission was able to investigate and report on individual violations but was unable to actively sanction states or change their behavior.

A second key institution in the Inter-American human rights system is the Inter-American Court of Human Rights. The Inter-American Court was created through the American Convention on Human Rights and is explicitly a body of that treaty. It consists of seven judges who are nationals of OAS member states and elected by the OAS General Assembly.<sup>(47)</sup> OAS member states must specifically accept the jurisdiction of the Court and, if they have not done so, can not be subject to the Court’s jurisdiction.<sup>(48)</sup> While this requirement that states independently accept the Court’s jurisdiction can be a substantial limitation on its powers, to date twenty states in the Americas have made such a formal acceptance of jurisdiction.

Only States Parties to the American Convention and the Inter-American Commission on Human Rights have the power to appear before the Court.<sup>(49)</sup> This means that cases can only be initiated by States or by the Commission itself - not by individuals. If in the course of an investigation by the Commission it deems that a violation of the Convention has occurred, it is empowered to refer the case to the Inter-American Court and then appear before the Court to present the case.<sup>(50)</sup> In such cases, the Commission effectively acts as the prosecutor before the Court. Hence, individual petitions must begin at the Commission and can only reach the Court if the Commission finds that a violation has occurred. States are thus given a double layer of protection whereby two separate bodies must investigate individual petitions before a judicial judgment can be made against a state.

The Court has the specific powers both to interpret the American Convention on human rights and to make rulings regarding violations of the Convention. Under the Court’s advisory jurisdiction, member states of the

OAS may consult the court regarding the interpretation of the American Convention or other human rights treaties in the Americas.<sup>(51)</sup> Under its contentions jurisdiction, when the court finds that a right or freedom guaranteed by the Convention has been violated, it is empowered to rule that “the injured party be ensured the enjoyment of the right or freedom that was violated” and that the “situation that constituted the breach...be remedied.”<sup>(52)</sup> Finally, the Court can order that “fair compensation be paid to the injured party.”<sup>(53)</sup>

The Court can only hear cases when all domestic remedies have been exhausted.<sup>(54)</sup> This is a significant limitation as it deprives the Court of jurisdiction if all national judicial options - such as appeals or the writ of *habeas corpus* - have not been exhausted. However, in many cases this domestic remedies requirement will not apply. Specifically, the domestic remedies requirement is inapplicable if “the domestic legislation of the state concerned does not afford due process of law for the protection of the right,” the individual has been deprived of the ability to exercise domestic remedies, or there has been an undue delay in the state’s response to a domestic remedy.<sup>(55)</sup> Often where a state is itself responsible for the violations in question, these exceptions will apply and the domestic remedies requirement will effectively be waived.

Despite these relatively far-reaching powers, the Court still has only limited abilities to enforce its decisions. States-Parties to the Court formally undertake “to comply with the judgment of the Court in any case to which they are parties.”<sup>(56)</sup> Yet, when states fail to follow the Court’s rulings, the only option available to the Court is to refer that matter to the O.A.S. General Assembly, which may or may not take further action.<sup>(57)</sup>

Overall, while the institutions of the Inter-American human rights system are robust in their investigatory capability, they remain relatively weak in their enforcement capacity. This weakness is largely a product of institutional design and was the intent of the states which created the system. Like the European Court of Human Rights, the decisions of the Inter-American Court are legally binding, but, unlike the European system, the added requirements of review and referral by the Commission and a separate

acceptance of the Court's jurisdiction, drastically limit the number of cases that ever reach the Court. Moreover, the high jurisdictional hurdle of exhaustion of local remedies (which often are not available in the first place), further limits the Court's effectiveness. The net result is that "the conclusions and recommendations of the Commission, which are the end result in the great majority of cases that are completed on the merits, are not legally binding."<sup>(58)</sup>

#### **IV. EXEMPLARY CASES BEFORE THE INTER - AMERICAN COMMISSION ON HUMAN RIGHTS AND THE INTER - AMERICAN COURT OF HUMAN RIGHTS**

This section of the chapter provides a detailed history of one important case before the Inter-American Commission and Court in order to demonstrate the operation of the system in action. Brief references to other cases then suggest the scope and nature of the jurisprudence of the Inter-American institutions. One of the first cases in which the Inter-American Commission launched an investigation and subsequently referred the case to the Inter-American Court is the Velasquez-Rodriguez Case.<sup>(59)</sup> Velasquez-Rodriguez thus illustrates the relationships between the Commission and Court as well as the workings of the systemic institutions as a whole.

Velasquez-Rodriguez was one of three cases from the early 1980s relating to forced disappearances in Honduras.<sup>(60)</sup> In 1981, the Inter-American Commission received a petition alleging that the National Office of Investigations (DNI) and the Honduran Armed Forces had seized Velasquez and subjected him to torture and interrogation.<sup>(61)</sup> Thereafter Velasquez disappeared. The Inter-American Commission launched an investigation of the matter, which the Government of Honduras protested on grounds that domestic remedies had not been exhausted. The Commission found the case admissible and, due to the Government's lack of response to substantive inquiries from the Commission, presumed the allegations true, pursuant to Article 42 of the Commission's statute. The Commission found that Honduras "had not offered convincing proof that would allow the

Commission to determine that the allegations are not true.”<sup>(62)</sup>

As Honduras had previously accepted the compulsory jurisdiction of the Inter-American Court pursuant to Article 62 of the American Convention, the Commission then referred the matter to the Court.<sup>(63)</sup> The Commission “requested that the Court determine whether the State in question had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the Convention ... and asked the Court to rule that “the consequences of the situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”<sup>(64)</sup> The Court first considered the preliminary objections filed by Honduras to its exercise of jurisdiction and dismissed these objections with the exception of the issue of local remedies which was joined to the merits of the case.<sup>(65)</sup> The case was thus able to proceed.

Appearing before the Court, the Commission presented evidence and witnesses that there were numerous cases of kidnapping and disappearances attributable to the Armed Forces, the Security Service, and the Government of Honduras.<sup>(66)</sup> Witnesses spoke to the nature of the torture including “beatings, electric shocks, hanging, burning, drugs, and sexual abuse” as well as to the government’s role in these activities.<sup>(67)</sup> Evidence presented by the Commission suggested that between 112 and 130 individuals disappeared between 1981 and 1984.<sup>(68)</sup> The Commission further alleged that a particular unit of the Honduran Armed Forces was particularly established to conduct such operations.

In addition to presenting proof of disappearances, the Commission’s case before the Court further sought to establish that Honduras lacked adequate domestic remedies to protect human rights as Courts were often corrupt and judicial decisions ignored by the government. This portion of the case was critical for it addressed the requirements for the exhaustion of local remedies and further established Honduras’ liability for the failure to provide adequate judicial protection required by Article 25 of the Convention.

In its decision on the merits, the Court began by first considering the issue of domestic remedies. As noted above, before a case can proceed to the Commission or the Court, all domestic remedies must first be exhausted. In

considering this domestic remedies issue, the Court first observed that “the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.”<sup>(69)</sup> The Court reached an important conclusion that expanded the range of cases in which domestic remedies would be deemed ineffective. The Court found:

although there may have been legal remedies in Honduras that theoretically allowed a person detained by the authorities to be found, those remedies were ineffective in cases of disappearances because the imprisonment was clandestine; formal requirements made them inapplicable in practice; the authorities against whom they were brought simply ignored them, or because attorneys and judges were threatened and intimidated by those authorities.<sup>(70)</sup>

Turning to the substantive merits of the Case, the Court evaluated the phenomenon of forced disappearances under Article 7 of the Convention relating to the right to personal liberty and found that “The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee.”<sup>(71)</sup> The Court further found a violation of Article 5 of the Convention - the right to physical and mental integrity - finding that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment.”<sup>(72)</sup> Finally, the Court deemed such disappearances to be “a flagrant violation of the right to life, recognized in Article 4 of the Convention.”<sup>(73)</sup>

Next, the Court turned to the specific obligations of Honduras under the Convention. It found that Honduras had a duty to take steps to prevent such actions, even if the actions were not directly caused by the State: “The State has a legal duty to take reasonable steps to prevent human rights violations.”<sup>(74)</sup> Moreover, the State has a specific duty to investigate alleged violation, “to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”<sup>(75)</sup> The opinion concludes by finding that “the facts found in

this proceeding show that the State of Honduras is responsible for the involuntary disappearance of Angel Manfredo Velásquez Rodríguez” and that “Honduras is hereby required to pay fair compensation to the next-of-kin of the victim”<sup>(76)</sup>

In a separate set of proceedings before the Court, issues of appropriate compensation were considered. The Court deemed that both compensatory damages (actual loss) and moral damages (those resulting from emotional harm) were appropriate based on general standards of international law and ordered payments by the Government of Honduras to the family of Velasquez-Rodriguez.<sup>(77)</sup>

The Velasquez-Rodriguez case thus illustrates the basic workings of the Inter-American human rights system. First, an individual petition was filed with the Inter-American Commission on behalf of the victim of a human rights violation. Note, however, that the Commission could have launched an investigation on its own or at the request of another state. After finding that the case was admissible and that a violation had, in fact, occurred, the Commission referred the matter to the Inter-American Court. The Court heard the case presented by the Commission and defended by the government in question. The Court then issued a final judgment against the government. One important issue to note is the length of time these proceedings took. The initial petition was filed with the Commission, but a final judgment was not rendered until 1988. Hence, justice within the Inter-American system can often be exceedingly slow.

While this case would seem to reflect an effective and relatively efficient system, all too often in case of human rights violations, cases never make it to the Commission or the Court. While the situation has improved since the 1980s with the Commission seemingly more willing to refer cases, procedural hurdles or politics often prevent cases from being heard and final judgments rendered. Even when such judgments are rendered, it remains the rare case when the result is a significant shift in state policy and its respect for human rights.

Beyond forced disappearances, another series of cases have concerned amnesty laws adopted by states in Latin America that seek to immunize

government officials from prosecution for serious crimes and human rights violations.<sup>(78)</sup> In its October 1992 report in *Consuelo v. Argentina*,<sup>(79)</sup> the Commission confronted an amnesty law, which allowed for the prosecutions of top military commanders and created an investigatory mechanism to record past atrocities. Nonetheless, the Commission found the amnesty law incompatible with the state's obligations under the Inter-American Convention, interpreting the right to a fair trial under Article 8.1 to apply to victims and perpetrators alike. The Inter-American Commission took a further step in this direction in a more recent report of 1996 in the case of *Hermosilla v. Chile*, in which it found that “the application of amnesties renders ineffective and worthless the obligations that States-Parties have assumed under . . . the Convention.”<sup>(80)</sup> The more recent case of *Barrios-Altos v. Peru* confirmed the same result. Unlike the earlier amnesty cases, however, in *Barrios-Altos*, the Commission referred the case to the Inter-American Court which issued a formal decision in 2001.<sup>(81)</sup> In its decision, the Court found that all amnesty provisions . . . are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations . . . because they violate non-derogable rights recognized by international human rights law.”<sup>(82)</sup> The Court then ordered that reparations be paid to the victim’s next of kin.

While other issues and rights have been considered by the Commission and Court, forced disappearances and amnesty laws have been an important part of the jurisprudence of these institutions and illustrate both the successes and failures of these institutions. While the Court and Commission have gone far in expounding the rights guaranteed in the Convention and pronouncing certain significant violations, both remain relatively weak enforcement instruments. Many cases never get heard and even when they are it is only in rare circumstances that judgments are rendered and policy changes result.

## V. THE UNITED STATES IN THE INTER - AMERICAN SYSTEM

Given the power and influence of the United States in the international arena, it is worth considering briefly the role of the U.S. in the Inter-

American system of human rights. The U.S. often considers itself unique, exceptional and separate from the international legal system.<sup>(83)</sup> The frequent refusal of the U.S. to participate in international legal or human rights mechanisms often stems from the strong protections of human rights accorded in the United States Constitution. The Bill of Rights, included in the Constitution as Amendments 1-10, guarantees freedom of religion, assembly, speech, and fair trial among others. These rights have been the subject of extensive jurisprudence of U.S. courts and are frequently enforced against both the U.S. federal government and the various US states. In the vast majority of cases, these basic human rights are thus protected and enforced domestically.

Oftentimes, the United States refuses to take part in international organizations. The U.S. Senate which must advise and consent on treaties before ratification, is generally hesitant to commit to obligations beyond those found in the Constitution, often claiming such protections are unnecessary given the strength of domestic law. Two obvious examples of this US refusal to join international organizations is the “unsigning” of the Rome Statute of the International Criminal Court by President George Bush and the Bush Administration’s withdrawal from the Kyoto Process on climate change.

Even when the U.S. is part of an international institution, the requirements of exhaustion of local remedies, a necessary component of jurisdiction or admissibility in most international fora, prevents cases from ever reaching regional or supra-national institutions. In the United States there is always a right to appeal and U.S. courts, for the most part, are effective in protecting rights. For example, before local remedies in the US are deemed exhausted, the right to appeal (including an appeal to the Supreme Court) must be exercised.<sup>(84)</sup> Thus cases against the U.S. rarely reach international adjudication.

While the United States is a member of the Organization of American States, the U.S. has not ratified the Inter-American Convention on Human Rights and has not joined the Inter-American Court of Human Rights.<sup>(85)</sup> Though the U.S. did sign the American Convention in 1977, as a signatory it

is only bound not to defeat the object and purpose thereof.<sup>(86)</sup> The specific provisions of the American Convention do not apply to the United States and cases against the U.S. can not be brought before the Inter-American Court.

As a member of the Organization of American States, however, the United States is subject to the powers of the Inter-American Commission on Human Rights.<sup>(87)</sup> The Statute of the Commission, adopted with US approval by the OAS defines the human rights within the Commission's scope to include not only the American Convention on Human Rights, but also The American Declaration of the Rights and Duties of Man. In three significant cases, the Commission has found that the U.S. is bound by the rights provided for in the Declaration. In the *Baby Boy* case, two individuals petitioned the commission to prevent the abortion of a fetus on ground that abortion violated the rights guaranteed in the Declaration.<sup>(88)</sup> The Commission found that, though the Declaration applied to the U.S., U.S. law on abortion was not in violation of the Declaration. In the Roach case, a petition was brought on behalf of two juveniles sentenced to death, claiming a violation of the right to life. The Commission found that the Declaration was applicable and that the U.S. had violated the right to equality before the law.<sup>(89)</sup> A third case involved refugees seeking to enter the US from Haiti who were returned without the ability to seek asylum. Though the U.S. again asserted that the Declaration did not apply to the U.S., the Commission found that "for member states of the Organization (OAS), the Declaration is the text that defines the human rights referred to in the Charter" and found the US in violation thereof.<sup>(90)</sup> Given the Commission's limited enforcement capabilities, however, even when it has found against the U.S., it has not been able to force the U.S. to follow its rulings.

The United States is unquestionably part of the Inter-American system of human rights. However, the U.S. failure to ratify the American Convention or accept the jurisdiction of the Inter-American Court greatly weakens any substantive litigation of U.S. rights and policies before these institutions. Hence, it will only be in very limited circumstances that the Commission will be able to review U.S. actions and then only with respect to the American Declaration on Human Rights.

## VI. CONCLUSION

The preceding chapter has sought to explain the workings of the Inter-American system of human rights. The system presently provides a robust set of rights for all citizens in the region on par with those found in the European Convention on Human Rights and the International Covenant on Civil and Political Rights. While the American Convention provides an extensive list of civil and political rights, it remains only aspirational with respect to social and economic rights. On the whole, the American Convention and the American Declaration which preceded it, are a significant contribution to the protection and promotion of human rights.

Despite the existence of two important institutions - the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights - to adjudicate and enforce the rights enshrined in the Convention, these institutions remain weak in comparison to the European counterparts. Separate acceptance of jurisdiction, high hurdles on the admissibility of cases, and lack of coercive enforcement possibilities continue to limit the effectiveness of these bodies. Though a significant case law has now been developed and more recently the Commission has been willing to refer more cases to the Court, the role of these bodies will remain limited and many cases of abuse will never be formally adjudicated or enforced.

The absence of the United States from the American Convention on Human Rights and the Inter-American Court remains a significant problem. Violations by the US such as those alleged in Guantanamo Bay, Cuba might well be addressed by the institutions of the Inter-American system. Moreover, the United States would be well served to ratify the American Convention on Human Rights and accept the jurisdiction of the Court. Given the significant jurisdictional rules limiting the Court, only in the most extreme cases would decisions be rendered against the U.S., but the U.S. would be able to bring cases before the Court to help ensure protection of rights in other states and would likely receive significant political benefit from its greater involvement in the overall system. So too would the Inter-American system benefit from the political weight of the U.S. in its efforts to protect human rights in the region. ❖

## NOTES:

1. Key regional human rights systems include the Inter-American system, the European system and the African system.
2. For key cases and discussion of the European Human Rights System see, MARK W. JANIS, *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* (2000).
3. For a discussion of the African human rights system, see VINCENT O. ORLU NMEHIELLE, *THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICES, AND INSTITUTIONS* (2001).
4. For a discussion of the African Court of Human and Peoples' Rights, see Project on International Courts and Tribunals: African Court of Human and Peoples' Rights, <http://www.pict-pcti.org/courts/ACHPR.html>
5. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).
6. Inter-American Commission on Human Rights: What is the IAHCRC?, *available at* <http://www.cidh.oas.org/what.htm>
7. Annual Report of the Inter-American Commission on Human Rights 1994 (1995) at 347.
8. American Declaration of the Rights and Duties of Man (approved by the ninth International Conference of American States, Bogotá, Colombia, 1948).
9. *Id.*
10. *Id.* at Chapter II.
11. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 UNTS 123, entered into force July 18, 1978.
12. American Convention on Human Rights, at Preamble.
13. *See generally*, Anne-Marie Slaughter & William W. Burke-White, *An International Constitutional Moment*, 42 HARV. INT'L L. J. 1 (2002).
14. *See* R. TUCK, *NATURAL RIGHTS THEORIES* (1982)

15. American Convention on Human Rights, at Preamble.
16. *Id.*, at Art 1.
17. *Id.*, at Art. 2.
18. *Id.*, at Art. 4(1).
19. *Id.*, at Art. 4(2) and 4(3).
20. *Id.*, at Art. 5(2) and 6(1).
21. *Id.*, at Art. 7(1) and 7(3).
22. *Id.*, at Art. 7(3)-7(6).
23. *Id.*, at Art. 8.
24. *Id.*, at Art. 11(2).
25. *Id.*, at Art. 11(3).
26. *Id.*, at Art. 13. Note that this article does provide for certain limitations on speech including ex-post liability for slander and the protection of national security.
27. *Id.*, at Art. 16.
28. *Id.*, at Art. 17.
29. For further discussion of the right to political participation enshrined in the Convention, see Henry Steiner, *Political Participation as a Human Right*, 1 HARV. YEARBOOK OF INT'L L. 77 (1988).
30. American Convention on Human Rights, at Art. 23.
31. Steiner, *supra* note 29.
32. American Convention on human Rights, at Art. 25.
33. *Id.*, at Art. 26.
34. HENRY STEINER AND PHILLIP ALSTON, Eds. HUMAN RIGHTS IN CONTEXT (2<sup>nd</sup> ed) 200 at 870.
35. American Convention on Human Rights, at Art. 27.
36. Article 27(2) prohibits derogation from the rights specified in Articles 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 4 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex PostFacto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government).
37. American Convention on Human Rights, at Art. 27(3).
38. DAVID WEISSBRODT, et. al., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY & PROCESS 24 (3<sup>rd</sup> ed) (2001); see also Inter-American Commission on Human Rights, What is the IACHR? Available at <http://www.cidh.oas.org/what.htm>

39. WEISSBRODT, *supra* note38, at 24.

40. Statute of the Inter-American Commission on Human Rights, Approved by Resolution N° 447 taken by the General Assembly of the OAS at its ninth regular session, held in La Paz, Bolivia, October 1979.

41. Id.

42. WEISSBRODT, *supra* note38, at 25.

43. See 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. QUARTERLY 439, 440 (1990).

44. Id.

45. Id.

46. Id.

47. American Convention on Human Rights, at Art. 52.

48. Id. at Art. 62.

49. Id., at Art. 61.

50. Medina, *supra* note43, at 442.

51. American Convention on Human Rights, at Art. 64. For further analysis of the Court's advisory jurisdiction see Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 3-12 (1985).

52. American Convention on Human Rights, at Art. 63.

53. Id.

54. Id., at Art. 46(1) (a).

55. American Convention on Human Rights, at Art. 46(2)

56. Id., at Art. 68.

57. Medina, *supra* note43, at 444.

58. David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in DAVID HARRIS AND S. LIVINGSTONE, eds, THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS (1998) at 1.

59. Velasquez-Rodriguez Case, Inter-American Court of Human Rights, 1988, Ser. C No. 4.

60. Within the Inter-American framework "forced disappearances" refer to kidnappings or murders where and individual simply disappears and is not seen again, making proof of actual murder nearly impossible as there is often no body or other physical evidence available.

61. Petition No. 7920 received on October 7, 1981

62. Inter-American Commission of Human Rights, Resolution 22/86 of April 18, 1986

63. Id.

64. Velasquez-Rodriguez, *supra* note 59, at ¶ 2.

65. Velasquez Rodriguez Case, Preliminary Objections, Judgment of June 26, 1989, Inter Am.Ct.H.R. (Ser. C) No. 1 (1994).

66. See STEINER & ALSTON, *supra* note 34, at 882.

67. Id.

68. Id.

69. Velásquez Rodríguez Case, Preliminary Objections, *supra* note 65, at ¶ 88

70. Veasquez-Rodriguez Case (Merits), *supra* note 59, at ¶80.

71. Id at ¶ 155

72. Id at ¶ 156.

73. Id. at ¶ 157.

74. Id. at ¶ 174.

75. Id. at ¶ 174.

76. Id. at ¶ 185, 194.

77. Velasquez Rodriguez Case, Compensatory Damages (Art. 63(1) American Convention on Human Rights), Judgment of July 21, 1989 Inter-Am.Ct.H.R. (Ser. C) No. 7 (1990).

78. For a more detailed discussion of these cases related to amnesty laws, see William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. J. INT'L L. 467.

79. See *Consuelo v. Argentina*, Case 10.147 Inter-Am. C.H.R. 41, P33 (noting "the effects of the disputed measures was to weaken the victim's right to bring a criminal action in a court of law").

80. Case 10.843, Inter-Am. C.H.R. 156, OEA/ser./L/V/II.95 doc. 7 rev. (1996). This case considered the problem of impunity in Chile for those responsible for the arrest and disappearance of seventy individuals. The petitioners had sought domestic recourse in Chile but had their case dismissed pursuant to the Amnesty Decree Law 2.191.

81. *Barrios Altos Case (Chumbipuma Aguirre Et Al. Versus Peru)* Judgment Of March 14, 2001, Reprinted At 41 INT'L L. MAT. 93 (2002).

82. Id. at para 41.

83. See, e.g., *American Exceptionalism*, Michael Ignatieff, Ed., (forthcoming 2004); Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (1997).

84. See, e.g., *Interhadel Case, (Switzerland v. United States of America)* International Court of Justice March 21, 1959.

85. The US is one of only 9 OAS member states that has not ratified the American Convention on Human Rights.

86. *See* Vienna Convention on the Law of Treaties, at Art. 18.

87. *See* Statute of the Inter-American Commission on Human Rights, at Art. 18 (noting that “The Commission shall have the following powers with respect to the member states of the Organization of American States...”).

88. Case 2141, Inter-Am. C.H.R. 25, OEA. Ser/L/V/II.54 doc.9 rev.1 (1981).

89. Case 9647, Inter-Am. C.H.R. 147, OEA/Ser.L/V/II.71, doc.9 rev.1 (1987).

90. The Haitian Centre for Human Rights, et al. v. United States, Case 10.675, Report No. 51/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. (1997).