

The Inter-American System for the Promotion and Protection of Human Rights

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Let me start by reiterating the sentiment of those who have gone before me and thank the sponsors of this event for the privilege of being here. I particularly want to thank the students for their wonderful hospitality and efficient planning of this Roundtable.

I also need to echo the disclaimer made by the other attorneys who work for public institutions. The observations I am about to make are, by and large, my own views and neither those of the Organization of American States nor the Inter-American Commission on Human Rights.

What I propose to do this morning, briefly, and I will try to be succinct, if a lawyer can be succinct, is tell you something about the Organization of American States, the origins of the Inter-American system for the protection and promotion of human rights, the Inter-American Commission, the Inter-American Court and the question of United States ratification of human rights treaties. In my case, we are most interested in the United States' ratification of the American Convention on Human Rights,¹ also known as the Pact of San José.

This year, the Organization of American States ("OAS") celebrates its one-hundredth anniversary. It is the oldest international, regional organization in the world. While the Organization has been called the OAS only since 1948, it is undergoing a paradoxical period. On the one hand, it has rarely been called upon to address greater challenges such as the recent observation of elections in Nicaragua or the work that we do in the Commission. On the other hand, we are practically going out of existence, and I am not exaggerating.

When I joined the OAS in 1975 we had more than 1,500 employees, plus a considerable number of contract people, consultants, and so forth. We now have 650. We laid off thirty-five percent of our staff last year. At this moment we have six lawyers and three vacancies

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¹ 22 Nov. 1969, OEA/Ser. K/XVI/1.1 Doc. 65, Rev. 1, Corr. 1 (7 Jan. 1970); 21 U.S.T. 607, T.I.A.S. No. 6847, *reprinted in* 9 I.L.M. 673 (1970).

in the Inter-American Commission on Human Rights. My boss just resigned to take up new duties as Vice-Minister of Foreign Affairs in Chile. He will be replaced in due course. We also have one position open for selection and that post should be filled soon. Another position will shortly be open for selection and one person is away on leave. That leaves us with six lawyers. Bear this in mind when I describe the panoply of activities that we are involved in here. Obviously, it requires a great deal of juggling to attend to all the various activities I will tell you about.

By the way, the reason we are in financial jeopardy is because the members of the Organization of American States do not pay their dues. More accurately, many of them do not pay their dues, or at least, all of their dues. To be fair, some countries *do* pay their dues. However, we are excessively dependent now on the United States' contribution and those of a few other larger countries. According to the OAS quota formula, the United States is supposed to pay two-thirds of the freight, which is roughly 40 million dollars a year. In recent years, they have paid about 30 million dollars to the regular budget. As a consequence, we have had to lay quite a few people off. In the process, we have lost some excellent people in the Commission as well.

The Organization's interest in human rights goes way back. Following World War II, in 1948 to be precise, the foreign ministers of the American states met to forge a new Organization. Among other things, they adopted a resolution called the American Declaration of the Rights and Duties of Man.² This instrument was approved one month before the Universal Declaration, a similar type document. The framers of the Declaration had in mind a convention, but the tradition in the Organization of American States regarding the development of conventional international law is to start with a declaration, and in due course, to eventually press towards a multilateral treaty.

In 1959, in response to the situation in Cuba, there was a meeting of consultation of foreign ministers in Santiago, Chile, at which the Commission was born. Established initially by a simple resolution of that meeting of foreign ministers, the Commission lacked a conventional basis. It remained this way until 1967 when the Charter of

² Reprinted in *IACHR Handbook of Existing Rules Pertaining to Human Rights* 17, OEA/Ser. L/V/II.50, Doc. 6 (1980).

the OAS was amended by the Protocol of Buenos Aires,³ establishing the Inter-American Commission as a permanent organ of the OAS. In spite of the fact that the Commission did not have a conventional basis until that time, it had been in the business of receiving individual petitions for a very long time. This was done initially through the Commission's Statute,⁴ an instrument adopted by the Member States at the OAS' General Assembly. The Statute is binding on the Member States, so even today, when a third of the Member States of the OAS have yet to ratify the American Convention, they are still bound under the Commission's Statute. They voluntarily accepted the obligation of providing information when so requested on individual petitions presented by the Commission.

A former Chairman of our Commission, César Sepúlveda, a Mexican national and distinguished Professor of Law, once wrote that the Commission was a *monstruo pequeño* during its first fifteen years of existence. That is, a "small monster" or a "monster in the making." Very few people realized that in time the Commission would have a significant impact on the human rights situation in this hemisphere. I think he was right. I think the early years of the Commission's existence were a period of patient, persistent and quiet development. It conducted its first on-site visit in the early 1960's to Miami, Florida, to take testimony from Cuban refugees. The Commission was also present in the Dominican Republic on a number of occasions in the 1960's for extended periods of time in the wake of the invasion by the United States Marines.

The Commission's two terms of reference for defining human rights are the American Convention⁵ and the American Declaration.⁶ The Inter-American Commission on Human Rights is composed of seven members, each from a different country. They are nominated by their home countries, elected at the Organization's annual General Assembly, and serve four-year terms. At present, the Chairman, Oliver H. Jackman, is from Barbados. The other current members are from Jamaica, the United States, Venezuela, Honduras, Brazil, and Argentina. They are elected in their individual capacity.

³ 27 Feb. 1967, OEA/Ser. G/CP/Doc. 499/76, Rev. 29, Corr. 1 (11 Jan. 1977), 119 U.N.T.S. 3, *reprinted in* 6 I.L.M. 310 (1967).

⁴ Statute of the Inter-American Commission on Human Rights, OAS G.A. Res. 447, AG/Com.I/Doc. 22/79, Rev. 2, OEA/Ser. L/V/II 50, Doc. 6 (1 July 1980).

⁵ *See supra* note 1.

⁶ *See supra* note 2.

In my ten years with the Commission, my honest opinion is that, overwhelmingly, our members have taken their responsibilities seriously and indeed have acted on the whole with a great deal of independence. When a matter arises involving the country of which a member is a national, he or she religiously excludes himself or herself from voting on that issue.

Probably the most impactful protection activity that the Commission has been engaged in over time is the issuance of special country reports. These are reports, varying in length and in detail, about human rights situations in particular countries. The Commission has issued a considerable number of these over the years. One of the most dramatic was the 1978 report on the situation in Nicaragua while General Somoza was still in power. That report was taken up by an emergency meeting of the foreign ministers and was cited as the moral and legal basis for the delegitimization of Anastasio Somoza. The country on which the Commission has done the most reports is Cuba. Over the years, it has published a total of seven special country reports on that country.

Last year the Commission issued what I believe to have been a truly historical report on Panama. Its publication occurred prior to the United States invasion. The Commission had just concluded an official on-site visit. I was present in Panama with the Commission in February and March of last year. The report, among other findings, concluded that there had been a massive violation of the political rights of the people of Panama under the Convention to which Panama is a state party. The Commission then declared that, as a consequence of this violation, the then Government was, and I quote, "devoid of constitutional legitimacy."⁷ Those are significant words in diplomatic and political circles and they have not gone unnoticed in OAS circles. The report was lauded by governments throughout the hemisphere, including the Secretary of State of the United States, James Baker.

The Commission's special country reports frequently, but not always, follow on-site visits. This is another area in which I believe the Inter-American Commission is truly a pioneer. At the time President Carter left office in 1980, I thought that the number of on-site visits that the Commission would be conducting in the future

⁷ Statute of the Inter-American Court of Human Rights, OAS G.A. Res. 448, AG/Res. 448/IX-0/79 (Oct. 1979), OEA/Ser. L/V/II.50, Doc. 6 (1 July 1980), reprinted in 19 I.L.M. 1458 (1980).

would decrease significantly. I say this because Patricia Darien and Mark Schneider and others in the Carter Administration had been openly pressing governments in the hemisphere—a number of which were experiencing chronic human rights problems—to invite the Commission to conduct on-site visits. I felt that once that pressure lessened, the Commission would be conducting fewer missions of that type. Fortunately, I was wrong. Both under the Reagan Administration and recently under the Bush Administration, governments have been encouraged to consider inviting the Commission to conduct on-site visits. Moreover, the OAS is now in the practice, when there is a problem, of requesting that the Commission conduct on-site human rights investigations for purposes of verification and reporting.

Just last week, for instance, there was an emergency meeting of the Permanent Council of the OAS, an organ composed of the thirty-two ambassadors of the Member States. This meeting was held at the request of the CARICOM countries (the English-speaking Caribbean countries) plus Venezuela and Canada. Two requests were made in the adopted resolution. One, that the Secretary General send an election observer team to Haiti for the elections to be held this fall. The other was for the Commission to conduct another on-site visit in Haiti, with the prior consent of the Haitian Government, which we are in the process of obtaining right now, and report the situation to the next General Assembly. The Assembly will now be held in *June* of each year, and not in November, for those of you who follow these matters.

One of the traits which I believe characterized the evolution, growth, and practice of the Commission over the years has been that while it is formally modeled on the European system, it faces different realities in *this* hemisphere. You have extremes, from the stability of a place like Barbados, to countries where they pour gasoline on children and light them ablaze, murder people by death squads, throw them out of helicopters while still alive, cut off their tongues, and so forth.

The Commission, in trying to address these situations, has acted with a great deal of pragmatism and informality. It does not hesitate to call ambassadors and foreign ministers or to send off telexes. Often these efforts bear fruit. I know of instances where the Commission's intervention has saved lives and spared people from possible torture.

I will tell you an anecdote to illustrate this. A few years ago, a gentleman named Oscar Padilla walked into my office and said: "Mr. Padilla, I'm Mr. Padilla and I want to tell you about a case of

another Padilla. His name is Dr. René Padilla and he is being held incommunicado in country X." He said, "I know you are going there in a few days and I wish you would look into it." Dr. René Padilla was a physician in a small town. It appeared that the Army thought he had been providing medical assistance to the guerrillas. In any event, when the Commission arrived in the country, the case was brought to the attention of the Ministers of Defense and the Interior. Initially, they indicated no knowledge of the case. But two days later, while the Commission was still in the country, they said that "Dr. René Padilla is indeed at the prison." So I went in to see the man. He was being kept in isolation in a clinic. I said, "Dr. Padilla, I'm Mr. Padilla and I am about to ask you a question that is going to sound silly to you. Are you here of your own free will?" The reason I asked him that question is because the explanation that had been given to the Commission by the Government was that because he was afraid of the guerrillas he voluntarily delivered himself into the hands of the Army for protection. The man looked at me and with an expression that said, "I have waited all this time to be rescued and they send me a madman." Happily, the doctor was released a couple of days later.

There are other examples of this pragmatism and informality. In 1980, a group called M-19 had taken over the Dominican Embassy in Bogotá, Colombia, and held a number of diplomats as hostages. I think at final count there were approximately seventeen diplomats, including Ambassador Diego Ascencio of the United States. In all, they were held for a total of sixty-one days. There had been negotiations between the M-19 and the Government of President Turbay Ayala, who was then President of Colombia. The upshot was that the Commission was invited to come in, and part of the deal was that the Commission assist in affording safe conduct for the guerrillas out of the Embassy. They would release their hostages, and at the same time the Commission would conduct a human rights investigation and report. There is nothing in the Convention, the Statute, or the Commission's Rules of Procedure that contemplates this kind of situation, but the Commission considered that since it is essentially a humanitarian institution, it could play a useful role. And it did. Within several days, the hostages were released and the guerrillas were taken to Cuba in an Air Havana plane.

I will not belabor the issue of individual cases. The Commission's procedures are not unlike those of the European system. I think the Commission is less formalistic about the admissibility stage than its European counterpart. In effect, the Commission does not pronounce

on admissibility at the outset but proceeds to try and get to the merits of the matter while there is time. It looks at the admissibility issue later. This may change, however, when you take into consideration that there are now twenty-one countries that have ratified the American Convention, with Paraguay being the latest, Chile just around the corner, and Brazil not too far down the line. Ten countries have accepted the obligatory jurisdiction of the Inter-American Court of Human Rights. Chile and Panama have declared their intention to accept the Court's jurisdiction.

The Commission's settlement procedure deserves special mention. My own view is that, while it is a good idea, it is not working. We are not arriving at friendly settlements and I am not sure why. This may change in the future. When I discuss the Honduran cases in a moment, I will tell you what the Court had to say about the settlement procedure with respect to cases of forced disappearances.

We have never had an interstate complaint, nor am I holding my breath for one soon. Although, for the creative lawyers out there who someday will be working in your foreign ministries, it is something to keep in mind. Someday, it is conceivable that if states discover one of their neighbors misbehaving, they may employ the interstate complaint procedure to bring public attention to bear on the situation. It must be accepted specifically by governments, a number of which have so done. However, it has never been utilized to date.

The Commission does not have any formal consultative status it may grant to non-governmental organizations (NGOs). All NGOs are welcome to present petitions or information to the Commission. This is an important characteristic of the Inter-American system. There is maximum flexibility in this regard. In addition to its protection activities, some of which I have briefly described for you this morning, the Commission has also been active over the years in promoting the progressive development of the international law of human rights.

An Inter-American ECOSOC protocol came into existence last year and is now open to signature and ratification. An additional protocol on the abolition of the death penalty, proposed by the Government of Uruguay, is currently under study. Likewise, a treaty on forced disappearances is in progress. The OAS also has adopted a torture convention which has been ratified by only a handful of countries. All of these instruments are relatively new. If you are interested in these and write to the Secretariat, we will be happy to send you copies.

The General Assembly last year approved a Commission proposal that a group of experts should be convened to draft an instrument,

possibly a declaration, on the rights of indigenous people. It is to be presented to the OAS General Assembly in 1992, which will mark the quincentennial celebration of the discovery of America by the Europeans, the Encounter of Two Worlds. So, the Commission is on that frontier as well.

I underscore that all of these instruments are still in their infancy. But, those of us who are in international law take the long view. I think we must take such a view. Professor Sohn, who has seen it all, tells us that it is, for the first time, moving at an accelerated rate. These initiatives, therefore, bear watching. I think that they are hopeful signs that the humane and democratic forces in our hemisphere are alive and well and energetically seeking ways to improve the conditions of the peoples of the Americas.

Let us now turn to the Inter-American Court of Human Rights. The Court was created in 1980 and has its headquarters in San José, Costa Rica. Its seven judges are nominated by state parties to the American Convention. All the judges, like their conferees on the Commission, sit in their individual capacity. I mentioned that only state parties to the Convention can nominate candidates for the Court. However, not all judges need be nationals of those state parties. The singular exception is Professor Thomas Buergenthal, who is one of the leading figures on human rights in the world. Judge Buergenthal, a United States national, is now in his second term on the Court. He was nominated in the first instance by Costa Rica and the second time jointly by Costa Rica and Colombia. The United States is not a state party to the American Convention.

The Court has at this moment only one professional staff member. The Secretary's name is Manuel Ventura. Charles Moyer, the first Secretary of the Court, retired last year. They will be hiring a second attorney soon. I should mention that both the Court and the Commission are part-time bodies, meeting two or three times a year to conduct their respective business. In contrast, the European Commission and the European Court meet much more frequently.

A few weeks ago, the President of the Court, Héctor Gros Espiell resigned to accept an appointment as Foreign Minister of Uruguay. Therefore, a vacancy exists on the Court. There are only six judges at this moment, but an election will occur at the forthcoming OAS General Assembly to fill Dr. Gros' vacancy. In the meantime, there has been an election of a new President of the Court. His name is Héctor Fix-Zamudio and he is a Mexican citizen who previously served as First Vice-President. The judges of the Court are from Mexico, Costa Rica, the United States, Honduras, Venezuela, and

Colombia. Judges serve six-year terms and may be re-elected once.

The Court has two types of jurisdiction. One is to render advisory opinions. To date, it has issued ten advisory opinions. The Court's second competency is to adjudicate contentious cases. So far, it has heard three contentious cases, all of which involved alleged forced disappearances of persons. The defendant government in each instance was Honduras and the cases were brought by the Inter-American Commission on Human Rights. The Court found that there were violations in two of the three cases. In the third case, it held there was insufficient evidence to find a violation.

In the two cases in which violations were found, the Court fixed an indemnity. The governments of former President Ascona and current President Callejas have publicly stated their intention to pay these indemnities. Pertinent legislation is presently being adopted in the Honduran Congress. I anticipate that the awards will be paid in the not too distant future.

I mentioned the advisory jurisdiction of the Court. The Court has handed down some interesting advisory opinions. One of them has to do with the legal effect of the American Declaration, which is the second principal instrument used in the Inter-American system. I am not sure I have it in English yet. At the hearing on that matter, the United States Government submitted a brief and made arguments to the effect that the Declaration is not international law. Nevertheless, the Court's opinion held that for the Member States of the OAS, the Declaration is the text determining what the Charter refers to as human rights. Moreover, the Court stated that the Declaration, in relation to the Charter of the Organization, is a source of international obligations.

An important issue I see facing the Commission in the immediate future is the position it will take on the so-called "amnesty" laws being adopted throughout the hemisphere. They are variously called "pardons," "amnesties," and "*indultos*." Characteristically, these laws are enacted just before or just after transitions from military governments back to democratic governments. What rights do victims of human rights violations have in these situations? Can they bring a civil action? May they complain criminally against those individuals who were agents of the state and violated their human rights? Can they sue at all? Another significant issue has to do with the further interpretation of the Conviction provision dealing with political rights. In addition, I see in the near future a marked increase in contentious cases being brought before the Inter-American Court of Human Rights.

With respect to possible accession or adherence by the United States of America to the American Convention and other human rights treaties, I can add very little to what has been said by others during this conference. I wish to comment, however, on the non-ratification by most English-speaking Caribbean Member States of the OAS. Some of the arguments, reluctance, and reticence towards United States ratification of these conventions are also found in the English-speaking Caribbean. There seems to exist an attitude of "why do we need them? We already have a tradition of respect for law and order. We can appeal to the Privy Council in England. Our courts work. These treaties are fine for countries where people disappear, but that does not happen in our countries." To date only four English-speaking Caribbean countries, if you include Suriname, have ratified the American Convention on Human Rights. Only Suriname has accepted the obligatory jurisdiction of the Court.

Several years ago, Ambassador Oliver H. Jackman, Judge Buerghenthal, and I made a trip to several of the Caribbean countries. We visited foreign ministers, heads of state, ministers of justice, and justices of the various supreme courts to discuss the prospects for ratification. About a year-and-a-half ago, President Carter hosted a conference at the Carter Center in which some heads of state and other ranking officials from a number of English-speaking Caribbean countries attended. The primary topic was ratification of the American Convention. Although there was general sympathy towards the idea, no new ratification by an English-speaking Caribbean country has taken place.

I have noted a paradox in United States practice within the OAS. This applies regardless of who is President of the United States and regardless of who serves as ambassador and permanent representative of the United States to the OAS. On one hand, the United States has played an active role in supporting the Commission's work. Assistant Secretary Bernard Aaronson and Ambassador Luigi Einaudi, the current United States Ambassador to the OAS, have been outspoken supporters of the Commission's work. There has always been a United States member of the Inter-American Commission on Human Rights. On the whole, United States support has always been strong and unswerving. On that level, the United States is sincerely committed to human rights in the OAS. Moreover, the Commission has conducted on-site visits in the United States in connection with the Haitian boat people at the beginning of the last decade. In addition, there has been support for the Commission's

budget within the overall OAS budget by the United States delegation.

