

HUMAN RIGHTS
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Improving the Inter-American Human Rights System: A Continental Challenge, a Collective Undertaking

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More than 200 human rights organizations from across the Americas recently signed a document entitled "Human Rights Plan of Action for the Americas: A continental challenge, a collective undertaking". This document is the result of extensive discussions over several years between hundreds of organizations in the region. The results of this process are several recommendations for the development of a more agile, transparent and effective Inter-American human rights protection system.

The Inter-American human rights system has given the Organization of American States (OAS) great prestige, inside and outside the hemisphere. This was achieved through the serious, professional, and committed work of the Inter-American Commission on Human Rights for over 40 years, and of the Inter-American Court, for the last 20 years. This work has saved lives, brought justice to victims, and advanced the cause of human rights in the region.

Ironically, during the age of dictatorships, when the massive and systematic violation of human rights was state policy, the OAS General Assembly paid great attention to the annual and country reports of the Commission. Now, in the hemisphere's current democratic era, many States, as well as the political bodies of the OAS — its Permanent Council (PC) and General Assembly (GA) — at the very least, manifest indifference.

For many, 1999 will be remembered as a year of OAS silence. The GA, meeting in Guatemala, said and did nothing when the government of Trinidad and Tobago executed a prisoner who was under the protection of provisional measures of the Inter-American Court. Neither the GA nor the PC made a move to oppose the Peruvian Government's decision to remove itself from the contentious jurisdiction of the Court. As well, in recent years, many States have failed to comply with decisions of the Inter-American Commission or Court, striking at the very legitimacy of the Inter-American human rights system.

There have also been pernicious attempts to weaken the OAS's human rights institutions by proposals disguised as efforts to strengthen the system.

In addition, there has been a concerted attack by some governments on the non-governmental organizations (NGOs) that operate within the Inter-American human rights system. Such NGOs frequently represent victims of human rights abuses, bringing their information and claims to the Commission or Court. Yet, they have been portrayed as covert agents of terrorism, guerilla movements, drug traffickers or political opposition groups, or as fronts for spurious economic interests. In recent years, states have also been reluctant to acknowledge the important role NGOs play as a channel for the demands of civil society.

At the present time, the Commission on Juridical and Political Affairs of the PC of the OAS is spearheading a dialogue on strengthening and reforming the system. Meanwhile, the Foreign Ministers and Heads of Delegations, while meeting in San José, Costa Rica, resolved to form an *Ad-Hoc Task Force*, with the goal of elaborating a "plan of action for the strengthening and development" of the inter-American system.

Both States and NGOs recognize that serious problems continue in the Inter-American system, weakening the protection of human rights and endangering the credibility of the Commission and the Court. These problems include, among others:

- the endemic shortage of resources;
- the lack of compliance with the Court's verdicts and the Commission's recommendations;
- the failure of some States in the region to ratify the basic human rights treaties;
- the delays and the insufficient capacity of the supervisory bodies to process the enormous volume of registered complaints; and
- the lack of clarity in some procedures.

These issues have been addressed in the NGO "Human Rights Plan of Action for the Americas", with the hopes that the plan will be adopted by the next Summit of the Americas, to take place in Canada in the year 2001. The Summit has been chosen as the preferred venue because it brings together the Presidents and Heads of State from the entire hemisphere. The following is a summary of the proposals.



The Inter American Court of Human Rights, San José, Costa Rica.

The NGO Proposals

(1) Maintaining the dual structure of the system and moving toward a permanent Commission and Court

Various proposals have suggested that it would be better to merge the Commission and the Court into a single judicial body following the European model. Human rights organizations do not agree. They point out that the different functions performed by the two bodies — the quasi-judicial, political and diplomatic functions performed by the Commission and judicial functions of the Court — have allowed the system to respond to the multiple and complex realities of the hemisphere.

For example, the Commission's on-site visits and country reports continue to be indispensable, addressing needs that individual case reports and decisions alone do not satisfy. The visits and reports also have educational, preventive and promotional effects. An Inter-American Court, by itself, would be unable to resolve the myriad of structural human rights problems that exist in the region including police brutality, inhuman prison conditions, the marginalization of the indigenous population, or discrimination and violence against women, especially in the absence of independent, efficient, and strong judicial systems at the national level.

Moreover, if the Commission and the Court merged into one permanent body, the inhabitants of a number of countries in the hemisphere — including Cuba, the United States, Canada and Trinidad and Tobago — would be left without a supervisory mechanism since the governments of these countries have not ratified the Convention. The inhabitants of four other countries — Barbados, Dominica, Grenada and Jamaica — would also be without protection, since their governments have ratified the Convention but have not accepted the jurisdiction of the Court.

What human rights NGOs would prefer is for the current two-body structure be maintained, but that both the Inter-American Commission and the Inter-American Court sit all year round as permanent institutions.

(2) Providing sufficient financial and human resources to the Inter-American system

The human rights organs of the Inter-American system of human rights protection lack the necessary infrastructure and resources to confront the magnitude of their tasks. The work of the Commission and the Court has expanded significantly over the last several years, but their resources have not grown commensurately. It should be a cause for worry and shame for OAS member States that the Commission and the Court depend on generous voluntary contributions of a few member States and on the philanthropy of various European countries. Thus, the OAS should double the budget for the Commission and Court over the next three years. To improve financial transparency, the annual reports and the web pages of the Commission and the Court should include the budget accorded them by the OAS, the voluntary contributions received from member States, the donations of third countries, and information regarding expenditures.

(3) Improving the fact-finding process before the Commission and the Court to ensure independence, publicity and efficiency

There is a consensus in the inter-American system that the Commission should improve its procedures for gathering evidence and determining the facts of a case. If the Commission is to properly investigate cases — which might include holding hearings, bringing witnesses to testify, and doing on-site visits — it will need greater resources. Second, the Commission must enjoy complete independence and impartiality to engage in proper fact-finding. To achieve this, the victims must have independent representation before the Court. Only in this way will the Commission be relieved of its current dual role as judge in the first instance and party in the second. Third, the Commission should reform its rules to ensure transparency, clarity and equality between the parties in the proceedings.

As these changes are implemented, the Court should change its own procedures to grant validity to the proceedings and findings of the Commission. This change would eliminate the duplication which currently takes place where, after

the Commission conducts a lengthy fact-finding process, and reaches its conclusions, the whole process is repeated in its entirety for those cases that reach the Court.

(4) Ensuring the election of independent and competent members of the Commission and the Court through an open and public process.

The reputation of the protection bodies depends on the confidence that they inspire in users — both victims and states. In proposing candidates, the States have not always evidenced a serious commitment to the qualities of independence, competence and moral authority. In some cases, judges and commissioners elected by the States have acted simultaneously as ambassadors or high government officials. The current procedure for proposing and electing candidates is not open to public discussion, and there is no procedure for objectively evaluating the credentials of the candidates. A new and more open procedure, and one which takes into account gender balance, should be put in place.

(5) The need to strengthen the implementation of decisions by the Commission and the Court.

States have failed to design better mechanisms to supervise the compliance of member States with decisions of the Commission and with the judgements of the Court, and States have repeatedly failed to comply with the decisions and judgements themselves. It is, therefore, important that we strengthen existing ties between the Inter-American system and domestic systems to facilitate the implementation of binding decisions or judgements of supervisory bodies. The NGO proposal recommends that all countries in the Americas adopt the legislative measures necessary to grant domestic legal force to the decisions of the Commission and the Court and to ensure their execution.

In addition, the role of the Court and the Commission in supervising compliance with their own decisions should be expanded, and the role of the States as collective guarantors of compliance with Commission and Court decisions should be strengthened. Currently, there exists a gap between the roles that the GA and the PC play, in ensuring compli-

ance with the decisions of the Commission and the Court. This normative *lacuna* should be filled in a way which allows the political bodies of the OAS to complement the work of the Commission and the Court in supervising compliance. One proposal suggests that a mechanism be developed which would allow the political bodies of the OAS to become incrementally more involved in cases to ensure compliance with the decisions of the Commission and Court. This mechanism could include giving the GA the power to suspend the OAS membership of a State which systematically and repeatedly fails to comply with the decisions of the human rights bodies (which would involve amending the OAS Charter). Various other measures are also recommended.

(6) Enlarge the access to the Court

The Convention states that only the Commission or the States may submit cases to the Court. In other words, the Convention does not grant the petitioners or the representatives of the victims direct access to the Court. To address this problem, States should adopt a protocol to the Convention, similar to Protocol 9 adopted in the European human rights system, which allows petitioners to present cases directly to the Court. Until that time, the Commission should establish in its Rules a mechanism for granting special or even determinant weight to the petitioners' wishes regarding the need to send a case to the Court.

It would also be helpful if the criteria for sending cases to the Court were clarified. Currently, the Commission or the States may decide, at their own discretion, whether a case should be submitted to the Court — a procedure characterized by great uncertainty. Until such time as petitioners can submit cases directly to the Court, the Commission should modify its Rules to make submission of cases to the Court mandatory in all cases where the procedure set forth in the Convention has been exhausted without achieving State compliance with the Commission's recommendations. In addition, the Commission should always issue a reasoned explanation in relation to any decision it makes not to send a case to the Court.

As well, States should consider making greater use of their right to send cases to the Court. To date, only Costa Rica has attempted, in one case, to submit a



The Honourable Judges of the Inter-American Court of Human Rights

matter to the Court's contentious jurisdiction.

(7) Ensure the independent representation of the victims before the Court

The inter-American system does not presently allow victims direct representation throughout the proceedings before the Court except that, since 1997, the Court's Rules of Procedure grant the victims the right to independent representation in the reparations stage of a case. As a result, the Commission is frequently obliged to act as the representative of the victim's interests before the Court.

To address this problematic situation, for some 15 years, the Commission's practice has been to allow the victim's representative to participate actively in all stages of litigation before the Court as part of the Commission's delegation. However, this *ad hoc* solution is now compromising the legitimacy of the system, for it puts the Commission in the position of acting in a dual and contradictory capacity. That is, the Commission changes from judge, ruling on the positions of the victims and the States during its own proceedings, to lawyer for the victims and adverse party to the State in the proceedings before the Court. This leads to valid questions about the ability of the Commission to protect its impartiality. For example, the Commission can face a situation in which it is acting before the Court as lawyer to a victim against a specific State, while at the same time dealing in its own Commission proceedings with another case involving that same State, where it must be seen to be impartial as between the State and the alleged victim. In addition, the current system lends credibility to the arguments of

some States that the Commission is too close to the NGOs.

A call for a public and open debate

The Inter-American system, as with any international human rights system, operates through the people it protects, the governments it monitors and the organs of the system itself. Any attempt to strengthen, reform, support or improve the system should take into account these three actors.

It is important to maintain an open, permanent, public and democratic dialogue on the inter-American system. Any discussion and debate that seeks to form a consensus to strengthen the system, in the intermediate and long term, must involve each and every actor related to the system. With this goal in mind, it is essential that effective consultation take place which permits civil society to participate in all debates.

The inter-American system is confronting a crucial period of reform that will define its role in the future. How it responds will determine whether our hemisphere adopts a system that is transparent and able to apply clear precise and progressive rules which best guarantee the protection of human rights, or is a confidential, ritualistic, inaccessible and mechanical system dominated by politics. Thus, the OAS General Assembly, to be held next June in Canada, should mandate the PC, through its Commission on Juridical and Political Affairs, to create task forces — including representatives from all States, commissioners and judges, independent experts and representatives of civil society — to prepare a proposed plan of action.

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