

The Relationship between the African Commission and the African Court: Lessons from the Inter-American System

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In several aspects, both Latin American and African states confront similar human rights problems and abuses. Structural problems facing both regions include police brutality, violations of due process of law, unlawful restrictions upon the exercise of freedom of expression, lack of independence and impartiality of the courts, together with widespread poverty afflicting its people, a phenomenon which commonly contributes to political and institutional instability.

Furthermore, as a result of the abuse of power and its tolerance by many Latin American and African state agents, violations of fundamental rights such as life, liberty and personal integrity continue to occur in both regions. The situation is aggravated by the delay and/or inefficiency in the prosecution of these violations by domestic courts².

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Reasons shall be given for the judgment of the Court;

If the judgment of the Court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.¹

12 Article 27 of the Protocol.

13 The Report of the Commission submitted to the Summit in 1995 indicated, *inter alia*, that gross and massive violation of human and peoples' rights had been committed in Nigeria and Cameroon. The delegations of Nigeria and Cameroon did not take the floor and there was no debate after the statement of the Chairperson of the Commission.

14 Decision Assembly/AU/Dec.11 (II), *inter alia*, mandated the Executive Council to consider the Annual Activity Report of the Commission and to submit a report to it.

15 Paragraph 7 of the Preamble to the Constitutive Act underlines the role of civil society. Article 3 (i) and (p) of the Protocol on Amendments to the Constitutive Act enshrines the effective participation of women in decision-making, particularly in the political, economic and social-cultural areas; and the need to invite and encourage the participation of the African diaspora as an important part of our continent, in the building of the AU.

16 The African Peer Review Mechanism (APRM) is a voluntary self-monitoring instrument, established by the Heads of State and Government of the African Union

Like the African human rights system, the Inter-American system (the IA system) is two tiered. The two bodies of the system are the Inter-American Commission on Human Rights (the Commission), established in 1959 and the Inter-American Court of Human Rights (the Court), established 20 years later, in 1979, with the entry into force of the American Convention on Human Rights (the Convention). In its decades of functioning dealing with problems like those mentioned above, the IA system has established several innovative approaches to promote and protect human rights in this difficult context. Thus, an analysis of the IA system may provide important lessons for other regions.

The Organization of American States (OAS) is comprised of 35 member states. Nevertheless, not all have ratified the Convention or accepted the jurisdiction of the Court. Thus, in the IA system there are at least three categories of OAS member states over which the Commission and the Court have jurisdiction: 1. States that have ratified the Convention and recognised the competence of the Court³; 2. States that have ratified the Convention but have not recognised the jurisdiction of the Court⁴; and finally states that are not parties to the Convention but are nevertheless bound by the obligations contained in the American Declaration, and, therefore, subject only to the Commission's jurisdiction⁵.

Although the Commission's jurisdiction regarding the protection of human rights in all OAS member states renders

the IA system universal, the scope of protection and the applicable mechanisms of supervision available for such protection vary from one category of member states to another. Certain persons in the hemisphere are able to have their rights ensured through an international, judicial, and contentious proceeding before the Court, while others can only seek redress before the Commission. This situation of unequal protection for all persons in the Americas, both substantively and procedurally, is not ideal nor even satisfactory. Consequently, the non-acceptance of the Court's jurisdiction has created a definite obstacle to the defence, promotion and protection of human rights in the region, as it considerably limits the universal value of the regional instruments and mechanisms. It constitutes a problem which should be addressed and resolved to the fullest extent possible.

Furthermore, in two-tiered systems like the IA and African systems, cases must be considered first by a Commission and then by a Court. Whether this is the most effective structure for the protection of human rights is a legitimate question, taking into account that the procedures before both bodies are often time-consuming, and thus may not adequately protect the victim's rights to have a timely response from the regional system⁶.

On the other hand, the two-tiered nature of the IA system has allowed for a number of other important features such as friendly settlement proceedings, as well as flexible diplomatic and quasi-judicial approaches, which have been crucial in addressing the problem of countries with gross, systemic violations of human rights, characterised by an absence or a lack of effective, national, judicial remedies for the protection of human rights. For example, the Commission, in acting as a quasi-judicial body, has allowed the system to effectively tackle very difficult situations in the region

where a strictly judicial and legalistic approach would not have been successful. This has been particular true in contexts where there has been a lack of cooperation on the part of the governments concerned, states have been reluctant to collaborate with the system, where domestic courts have routinely ignored international decisions, and where public authorities have either tolerated or engaged in grave human rights violations.

As indicated by the experiences of the IA system, the establishment of a Court within a human rights system inevitably results in making the proceedings of the complementary body more judicial because of the requirements involved in sending these cases to the Court. The Commission needs to prepare those cases to be sent to the Court. However, it is imperative that this movement to a more judicialised process does not result in the abandonment of the Commission's flexible, more diplomatic-political, quasi-judicial approach which in many circumstances is more suitable for dealing with countries that lack basic principles of the rule of law.

The Commission was never conceived to act merely as a filter for cases before they arrive at the Court. To the contrary – the Commission has brought much more to the IA system. The Commission's multiple functions (on-site visits, country reports, thematic initiatives) reinforce and complement its works on cases. Monitoring the fulfilment of international human rights commitments made by states parties to certain treaties is at the interface of law and politics. This is so because the implementation of international human rights standards frequently entails negotiations, dialogues, and engagements with national authorities; situations in which the use of diplomacy is as essential as the construction of a strong legal argument. Therefore, the experience of the OAS regional human rights system shows the importance of keeping both legal and diplomatic competence within the system⁷ The IA system, particularly the Commission, has wisely taken the opportunity to use diplomatic, in addition to judicial, approaches when required. On account of this, the IA system has been able to work closely with governments in fashioning public policies consistent with international human rights obligations, while at the same time being critical and censorial when that is the appropriate course to take. The necessity and advantage of diplomacy is further corroborated by the many circumstances in which the mere 'threat' of sending the case to the Court, has allowed the Commission to engage,

encourage and persuade states to implement their international human rights commitments rather than be exposed in an international judicial proceeding. What the Commission learns about countries from performing its other functions greatly affects how it deals with individual petitions – from understanding whether domestic remedies work, to identifying patterns and practices of violations, to facilitating the dialogue or work on individual cases with the authorities involved.

The experience of the IA system illustrates that the Commission and the Court are an integral part of a single regional human rights system. The co-existence of two bodies, performing complementary functions, in stages of increasing intensity, encourages states to fulfil their obligations to cooperate in the resolution of a case. For example, the Commission's quasi-judicial proceedings offer states an opportunity to settle the matter before it is brought to the Court, while at the same time offering the petitioner the opportunity to obtain an appropriate remedy more quickly and simply than with a long litigation before a judicial tribunal. However, it is worth mentioning that the effectiveness of the proceedings before the Commission particularly depends upon the circumstances of each case, the nature of the rights affected, the characteristics of the violations, and the willingness of the government to cooperate and take all the necessary steps to bring about the reparation⁸. In the event the quasi-judicial approach does not work, the next step in this incremental mechanism is to refer the case to the Court.

Thus, in accordance with the assertion of one of the judges seated on the Court, both the Commission and the Court need to regard each other as being partners in the same system, embarked in a joint venture⁹. The history of the IA system demonstrates just how crucial it is for both bodies to properly understand the necessity for their cooperation.

For several years after the establishment of the Court, the Commission avoided sending cases on by broadly interpreting its discretion as to which cases to submit.¹⁰ As a result, the Court was precluded from exercising its contentious jurisdiction for almost a decade¹¹. During this period of time, the Commission effectively deprived victims of human rights violations of one of the foremost remedies provided for by the Convention, that is to have a judicial determination of the victim's rights guaranteed by the Convention with the possibility of reparation. At other

instances, it was the Court which diminished the importance of the role of the Commission within the structure of the system¹².

However, the IA system's history indicates that its greatest successes have been achieved when both bodies collaborated with each other. Some examples include situations where the Commission submitted cases that allowed the Court to develop its jurisprudence, where the Court built its case law based on previous decisions reached by the Commission, where the Court strengthened the role of the Commission by giving weight or deference to the Commission's procedures or findings, and situations where both bodies acted coordinately to achieve compliance with its resolutions. Furthermore, an important aspect in the evolution of the system was how the Court commenced exercising its contentious work with single issues such as forced disappearances and extrajudicial executions, and has gradually built up to more complex ones, thereby giving the Court time to develop the necessary practical and jurisprudential foundations.

One important factor that has allowed the two bodies to strengthen their ties, limit their frictions, and create joint strategies where possible, is the annual meetings between the Court and the Commission. They try to meet once a year, alternating from one headquarters to another. Good, fluid communications between the Commission and Court Secretariats cannot be underestimated in helping the IA system to work smoothly.

In response to the limited number of cases that the Commission submitted to the Court early on, advocates for increased collaboration proposed to have every case routinely submitted to the Court once the Commission had reached a decision on the merits of a complaint. Accordingly, in 2001, the Commission amended its Rules of Procedure to that end¹³. The impact of this new approach was felt immediately. For example, in 2003 alone, the Commission submitted more cases to the Court than it had in the previous three years combined. This new practice has created logistical and practical problems, some of which were discussed and addressed by the Commission and the Court in its recent joint meeting held in July 2004.

Referring a case to the Court requires the Commission to prepare for judicial proceedings. Thus, the Commission needed to reorganise its daily work in order to create the substantial records detailing all the relevant facts and legal arguments. As a result, the Commission was forced to make many institutional

changes in its daily work. In addition, the experience of the IA system shows that the Commission and the Court must use their staff and material resources effectively in the production of evidence and in factfinding. The Court's credibility in particular is built in part by a solid record that leaves no useful fact out, and the cooperation of the Commission, the complainants and the state is crucial. To that end, the Court has placed a strong burden on the state to produce evidence⁴. Justices are empowered to request and look for documents and records, and to interview witnesses. This dynamic and aggressive search for the truth has benefited the credibility of the Court and made it more effective.

Related to the production of evidence are the public hearings which have been crucial for the effectiveness of the system. Hearings provide a form of healing to victims, and also play a symbolic and educational role, because the public is able to witness that governments can be held legally accountable for their actions or omissions, and that victims of human rights violations deserve to be treated with respect. Finally, hearings have also been useful for collecting evidence and for helping judges better understand the facts and issues disputed.

However, the time required to resolve a case must be minimised. Particularly troublesome are the procedural redundancies, especially the duplication of fact-finding and admissibility proceedings that the contentious jurisdiction mechanism of the IA system suffers from. Currently the Court continues to perform its own fact-finding and investigative research, despite the fact that much of it mirrors the Commission's from earlier deliberations. Moreover, in matters of admissibility, particularly those related to the exhaustion of domestic remedies, the Court reviews the determinations of the Commission⁵. These duplications result in lengthier, more expensive proceedings. Furthermore, taking into consideration the fact that the Court does not sit permanently, the duplications are, in many ways, a waste of precious time and resources. During a Court's inception, the need to review the factual findings and admissibility determinations of a Commission may have been more necessary, however, once a system has matured, it should establish a more productive and rational distribution of functions between both the organs.

Another lesson can be learned from the inter-American experience by looking at the potentially conflicting roles the Commission has assumed before the Court. For instance, during the initial proceedings, the Commission acts as an

impartial adjudicator. However, once before the Court, the Commission acts both as a plaintiff and sometimes as advocate for victims as well as the principal organ body of the system representing the general interest of the system. The duality of the Commission's role potentially hinders its impartiality and makes its functioning more difficult.

The IA system has faced many challenges, some of which have been especially daunting, and so the solutions it has sought may be especially useful for regions such as Africa facing similar challenges. The main lesson to be learned from the Inter-American experience is that developing an effective human rights system requires time, practice, and a commitment by its bodies to regard each other as mutually responsible for promoting and protecting human rights in the region. ■

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- 2 For the Americas, see IACHR, *Annual Report of the Inter-American Commission on Human Rights* 2003, Chapter I Introduction, OEA/Ser.L/V/II.118, Doc. 5 rev. 2, 29 December 2003, Original: Spanish. For Africa, see *inter alia Amnesty International Report 2004* (stating that the human rights situation across the Africa region in 2003 was characterised by widespread armed conflict, repression of political opponents, persecution of human rights defenders, violence against women, and limited access to justice for the most marginalised in society. Illicit trade in resources and arms, near total impunity for past and continuing human rights abuses, and the failure of many governments to live up to professed standards of governance contributed to the denial of civil, political, economic, social and cultural rights particularly of the most vulnerable – women and children, refugees and the internally displaced, people living with HIV/AIDS, the poor and those who lack formal education).
- 3 Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.
- 4 Dominica, Grenada and Jamaica.
- 5 Antigua & Barbuda, Bahamas, Belize, Canada, Cuba, Guyana, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Trinidad & Tobago and the USA. For the jurisdiction of the Commission over these states see Inter-American Court of Human Rights, Advisory Opinion OC-10/89, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, July 14, 1989, Ser. A. No. 10, paras. 35–45; IACHR, *James Terry Roach and Jay Pinkerton v US*, Case 9647, Res. 3/87, September 22, 1987, Annual Report 1986–7, para.s 46–9, *Rafael Ferrer-Mazorra et al v United States*, Case 9903, Report No. 51/01, April 4, 2001. See also Article 20 of the Statute of the Inter-American

Commission on Human Rights. In addition, it should be noted that the Commission and the Court have an overlapping jurisdiction to receive petitions dealing with other Inter-American human rights treaties: the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 'Convention of Belém Do Pará'; the Inter-American Convention to Prevent and Punish Torture; and the Additional Protocol to the American Convention on Human Rights In the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador'.

- 6 Pasqualucci, J. M., 'The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law', *U. Miami Inter-Am. L. Rev.* 297, 1995, pp.307 and 311.
- 7 Riesman, M., 'Practical Matters for Consideration in the Establishment of a Regional Human Rights Mechanism: Lessons from the InterAmerican Experience', *St. Louis Warsaw Transatlantic L.J.* 89, 1995, p94.
- 8 Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, Preliminary Objections, Judgment of June 26, 1989, para. 60.
- 9 Medina, C., 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture', *Human Rights Quarterly* 4, 1990, pp.439–64.
- 10 See Méndez, J., (1998) *Una Aproximación crítica a la Interpretación Vigente de los Artículos 50 y 51 de la Convención in El Futuro del Sistema Interamericano de Protección de los Derechos Humanos*.
- 11 As was said, the Court was established in 1979 and the Commission only filed the first case in 1986, and the Court handed down its first decision on the merits of a case in 1988. See *Velasquez Rodriguez Case*: One of the first sitting judges expressed his 'sense of frustration' because in his term he had not the 'opportunity to hear a single case of a violation of human rights, in spite of the sad reality of our America in this field', Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, November 13, 1985, Inter-American Court of Human Rights. (Ser. A) No. 5 Declaration of Judge Maximo Cisneros.
- 12 For instance, in one occasion the Court refused to say that the states were under any obligation to follow the recommendations made by the Commission in its final decisions. See Inter-American Court of Human Rights, *Caballero Delgado and Santana Case*, Judgment of December 8, 1995, para. 67. The Court reversed its position in *Loayza Tamayo*, Judgment of September 17, 1997, para. 80–1.
- 13 See Dulitzky, A. and Zarifis, I., 'Facing The Challenge: The Inter-American Commission on Human Rights' Adoption of New Rules of Procedure', *Nordisk Tidsskrift for Menneskerettigheter/Nordic Journal of Human Rights* 21(3), 2002, pp.257–77.
- 14 For example, Inter-American Court of Human Rights, *Gangaram Panday Case*, Judgment of January 21, 1994, para. 49 (stating that 'in proceedings to determine human rights violations the state can not rely on the defence that the complainant has failed to present evidence when it cannot be obtained without the state's cooperation').
- 15 There could be a change in this trend. In its last decision, the Court said, responding to a preliminary objection filed by the government, that it did not consider it necessary to reexamine the Commission's reasoning contained in its admissibility report. See Inter-American Court of Human Rights, *Herrera Ulloa v Costa Rica*, Judgment of July 2, 2004, para. 87.