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Kimberly D. King-Hopkins

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INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: IS ITS BARK WORSE THAN ITS BITE IN RESOLVING HUMAN RIGHTS DISPUTES?

I. INTRODUCTION

In the Americas, unimaginable atrocities happen to individuals that rock the very foundation of human conscience and human dignity. Individuals everyday are extrajudicially executed, persecuted, threatened, abducted never to be found, beaten, raped, stripped of their ability to reason for themselves, and denied the right to an education and religious freedom.¹ For centuries these atrocities have taken place unpunished or unquestioned.

International concern for human rights violations has finally catapulted into action many measures to address these issues.² The United Nations (U.N.) established the United Nations Charter which addresses its promotion of respect for human rights.³

Slowly, states are beginning to recognize human rights as a serious international concern and have established different charters which address the human rights issues.⁴ The charters, however, are vague because they do not clearly set out the rights to be promoted or respected.⁵

1. See generally Barry Bearak, *Taliban Militia accused of Bloody Mayhem*, SAN DIEGO UNION & TRIB., Nov. 7, 1999, at A28 (militia murdered individuals, destroyed crops, and butchered individuals' livestock); *Appeal to Protect Civilians*, AFR. NEWS SERV., Oct. 21, 1999 (Pg. Unavail. Online) (government armed forces murdered and abducted individuals); *Cameroon's Human Rights Record Under Scrutiny by UN*, AFR. NEWS SERV., Oct. 27, 1999 (Cameroon security forces are extrajudicially executing, torturing, and beating prisoners); Ibon Villeda, *Report reveals Guatemala Brutality*, ORANGE COUNTY REG., Feb. 26, 1999, at A12; (U.S. accused of helping to perpetuate the civil war which caused a lot of deaths in Guatemala by military officials); Russ Christensen, *As Someone Who Has Worked for Human Rights in Central America...*, BANGOR DAILY NEWS, Mar. 10, 1999 (military and police forces killed over two hundred thousand Guatemalan citizens); *Log Details Guatemala Killings by Secret Military Unit in 1980s*, DESERET NEWS, May 21, 1999, at A18 (secret Guatemalan military unit kidnapped, tortured and executed men and women). See also Scott Splittberger, *The Need For Greater Regional Protection For the Human Rights of Women: The Cases of Rape In Bosnia and Guatemala*, 15 WIS. INT'L L.J. 185 (1996) (military officials and political leaders exploit women and consider rape as a means of power and to further military goals).

2. Some treaties that have been enacted include the Inter-American Convention to Prevent and Punish Torture, Inter-American Convention on Forced Disappearance of Persons, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, The American Declaration of the Rights and Duties of Man, and American Convention on Human Rights. Several commissions have also been established. These include, but are not limited to, United Nations Commission on Human Rights, Inter-American Commission on Human Rights, European Commission on Human Rights and the African Commission on Human and Peoples' Rights.

3. "Article 1(3) of the United Nations Charter listed its promotion of respect for human rights among its purposes and principles." U.N. CHARTER art. 1 para. 3. The U.N. Charter further states in Article 55 that "it shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. CHARTER art. 55. In Article 56, "all United Nation members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55." U.N. CHARTER art. 56. These articles of the U.N. Charter are also cited in LAWRENCE J. LEBLANC, *THE OAS AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS 2* (1977).

4. The United Nations Charter, the Charter of the OAS, and the Statute of the Council of Europe are examples. See generally LEBLANC, *supra* note 3, at 2. (discussing how states that have established systems to address human rights issues); see also THOMAS BUERGENTHAL & DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS* (4th ed. 1995) (discussing regional systems for the protection of human rights).

5. See LEBLANC, *supra* note 3, at 2.

It was for this reason that those who advocated international human rights pressed hard in the post-war years for the adoption of declarations, covenants, and conventions which would give greater meaning to obligations already assumed, or would create new, more meaningful obligations. Many obligations have been adopted. Numerous international human rights agencies have also been created, though they differ from each other in terms of their structure, functions, and the degree of independence and objectivity with which they have performed their tasks.⁶

The human rights movement has encountered serious difficulties and obstacles.⁷ Countries do not often address the human rights confronting them.⁸ Individual rights are abused and, in many instances, the countries themselves are responsible for these human rights violations. There are numerous cases in which the military and officials are the main culprits of human rights violations.⁹ Consequently, human rights disputes arise and protocol agencies are created to address these disputes.¹⁰

Finally, in the late twentieth century, the nations of the Americas have moved to take action against these heinous crimes against persons. Out of this concern for human rights violations in the Americas came the Inter-American Commission on Human Rights. The Organization for American States (OAS) has numerous references to human rights included in its charter.¹¹

The purpose of this comment is to explore one particular protocol, the Inter-American Commission on Human Rights (IACHR) and to review its effectiveness in resolving human rights disputes before it. This comment will explore the opinions

6. *Id.* at 2-3. The United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948. In the ensuing years it has adopted, and thus opened for ratification, numerous conventions and covenants, some of which deal with specific subjects such as racism and the rights of women. Two of which, adopted in 1966, are of a more general nature: the International Covenant on Civil and Political Rights (and an Optional Protocol to it), and the International Covenant on Economic, Social, and Cultural Rights. In 1950 the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms, and it has since been ratified by the great majority of member States and has entered into force. The European Social Charter, which has also entered into force, affirms a group of rights commonly referred to as economic, social, and cultural rights. In 1948, the American States adopted the American Declaration of the Rights of Man; in 1969 the American Convention on Human Rights was adopted and thus opened for ratification by member states of the OAS. Examples include the United Nations Commission on Human Rights created by the Economic and Social Council in 1946; the European Commission on Human Rights which function as organs implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms; and the Inter-American Commission on Human Rights (IACHR), created by resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959. *See id.*

7. *See id.* at 4.

8. *See* Victims of the Tugboat "13 de Marzo" v. Cuba, Case No. 11.436, Inter-Am. C.H.R. 45, OEA/ser.L./V/II, doc. 95, rev. 7 (1996) (Cuba would not recognize the petitioners request to retrieve the drowned bodies of the sinking tugboat and did not punish those responsible for the drowning).

9. *See* Patriotic Union v. Colombia, Case No. 11.227, Inter-Am. C.H.R. 45, OEA/ser.L./V/II, doc. 95, rev. 7 (1997) (political party alleged that its membership suffered persecution in the form of extrajudicial executions, disappearances, unfounded criminal prosecutions by the government); Pradesaba Barillas v. Guatemala, Case No. 8074, Inter-Am. C.H.R. 45, OEA/ser.L./V/II, doc. 95 rev. 7 (1996) (military officials abducted the victim from his home); Rosario Congo v. Ecuador, Case No. 11.427, Inter-Am. C.H.R. 45, OEA/ser.L./V/II, doc. 95 rev. 7 (1996); (guards assaulted and killed a prisoner).

10. *See* LEBLANC, *supra* note 5, at 3.

11. *See id.* Article 13 of the original Charter; Article 16 of the revised Charter which provides that "Each State has the right to develop its cultural, political and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality." *See id.*

and enforcement mechanisms of the IACHR. Section II will discuss the background of the IACHR by laying out the framework of the IACHR and explaining how it theoretically functions. In Section III, this comment will show how the IACHR actually works in practice, focusing on four cases in this area: *Victims of the Tugboat "13 de Marzo" v. Cuba*,¹² *Pratdesaba Barillas v. Guatemala*,¹³ *Rosario Congo v. Ecuador*,¹⁴ and *Montoya Gonzalez v. Costa Rica*.¹⁵ In Section IV, this comment concludes with a discussion on how the theory and actual practice of the IACHR interplay realistically with each other and whether the IACHR is ineffective or not in resolving human rights disputes.

II. HISTORY OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

A. Formation of IACHR

In 1959, the IACHR was formed by a resolution of the Fifth Meeting of the Consultation of Ministers of Foreign Affairs.¹⁶ The IACHR was created as a self-governing entity of the Organization of American States. During the 1959 meeting, the political climate of the OAS advocated progress in the human rights area.¹⁷ The Member States' representatives adopted a two-part resolution,¹⁸ with the second part of the resolution not as well received as the first.¹⁹ In 1960, the statute was adopted, establishing the IACHR.²⁰ However, the IACHR did not have much power, prompting the OAS to adopt the Protocol of Amendment to the OAS Charter which

12. Case No. 11.436, Inter-Am. C.H.R. 45, OEA/ser.L./V/II, doc. 95, rev. 7 (1996).

13. Case No. 8074, Inter-Am. C.H.R. 45, OEA/ser.L./V/II, doc. 95 rev. 7 (1996).

14. Case No. 11.427, Inter-Am. C.H.R. 45, OEA/ser.L./V/II, doc. 95 rev. 7 (1996).

15. Case No. 11.553, Inter-Am. C.H.R. 45, OEA/ser.L./V/II, doc. 95, rev. 7 (1996).

16. See generally RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 782-83 (3d ed. 1995). See also ANNA P. SCHREIBER, THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (1970); KAREL VASAK, LA COMMISSION INTERAMERICAINE DES DROITS DE L'HOMME (1968); THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS (4th ed. 1995); SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (1997); LEBLANC, *supra* note 5.

17. See DAVIDSON, *supra* note 16, at 15.

18. See *id.* at 15-16. "The first part of the Resolution VIII called upon the Inter-American Juridical Committee to draft a convention on human rights and a convention for the creation of an Inter-American Court of Human Rights or other organizations 'appropriate for the protection and observance of those rights.' This part of the resolution was adopted unanimously. The second part of the resolution called upon the Permanent Council of the OAS to create an Inter-American Commission on Human Rights composed of seven members elected, as individuals, by the Council of the Organization of American States from panels of three presented by the governments. The Commission, which shall be organized by the Council of the Organization and have the specific functions that the Council assigns to it, shall be charged with furthering respect for such rights." See *id.*

19. See *id.* at 16. "Although fifteen Member States voted in favor of Resolution VIII., Brazil, the Dominican Republic, Mexico and Uruguay voted against it, while Bolivia and the US abstained. Once again, the main reason for opposing the creation of an Inter-American Commission was the fear on the part of some states that it would have the power to intervene in internal affairs. Nonetheless, in accordance with the mandate of the Consultation of Ministers of Foreign Affairs, the Council established a committee to draft a statute for the proposed Affairs, the Council established a committee to draft a statute for the proposed Inter-American Commission on Human Rights. After the submission of a number of drafts to the Member States, the Council finally adopted the Statute of the Commission after excising a right of individual petition to the Commission which had been included in the Committee's final draft." See *id.*

20. See *id.*

added important provisions to the human rights area and expanded the power of the IACHR.²¹

The IACHR was originally conceived as a study group whose purpose was to perform "abstract investigations in the human rights area."²² Creators of the IACHR did not realize the effect that the establishment of this organization would have on "human rights violations for individual victims."²³ Complaints were sent to the IACHR concerning human rights violations immediately after it was known that the IACHR had been created.²⁴

A major part of the IACHR's work included addressing the problems of countries "with gross, systematic violations of human rights."²⁵ This was in large part due to the nonexistence or lack of effectiveness in the protection of human rights and minimal cooperation on the part of governments concerned.²⁶ In a world inundated with heinous human rights atrocities, the IACHR was thought to be the "sole protector" of human rights violations.²⁷ However, the IACHR was part of an organization where human rights violations were not a primary concern which affected how the IACHR dealt with these issues.²⁸

Under Article 1 § 1 of the IACHR statute, the IACHR "was created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter."²⁹ Defending human rights is the basic model for the IACHR's activities.³⁰ Article 1 §2(a)-(b) of the statute goes further to enumerate

21. From those member states of the OAS present for the Third Special Inter-American Conference, 18 member states ratified the Protocol of Amendment to the Charter by February 27, 1970, which is the date of entry into force. *See Protocol of Buenos Aires*, (visited October 31, 1999) <<http://www.oas.org/EN/PROG/Juridico/english/sigs/b-31.html>>. "The member states ratifying at that time were: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, United States, and Venezuela. Member states not ratifying at that time were: Antigua and Bermuda, Bahamas, Barbados, Chile, Dominica, Ecuador, Grenada, Haiti, Saint Lucia, Saint Vincent, Saint Kitts and Nevis, Suriname, and Uruguay. To date, all 35 member states have ratified the Protocol of Amendment." *Id.*

22. Lillich, *supra* note 16 at 782. The IACHR was to perform country studies and discuss human rights broadly. It was not originally planned that the IACHR would handle individual complaints.

23. *Id.* The creators envisioned a group that would discuss human rights issues in an academic sense but it never contemplated that individuals would find out about the IACHR and its function that quickly.

24. *Id.* The IACHR was the only organization in place to handle human rights issues in the Americas at its creation.

25. *Id.* at 783. The main objective of the Commission was not to investigate isolated violations but to document the existence of these gross, systematic violations and to exercise pressure to improve the general condition of human rights in the country concerned. For this purpose, and by means of its regulatory powers, the Commission created a procedure to "take cognizance" of individual complaints and use them as a source of information about gross, systematic violations of human rights in the territories of the OAS member states. *See id.*

26. *See Pradesaba Barillas v. Guatemala*, Case No. 8074, Inter-Am. C.H.R. 45, OEA/ser.L./V/II., doc. 95 rev. 7 (1996).

27. LILLICH, *supra* note 20, at 784.

28. *Id.* "The IACHR viewed itself more as an international organ with a highly political task to perform than as a technical body whose main task was to participate in the first phase of a quasi-judicial supervision of the observance of human rights. The IACHR's past made it ill-prepared to efficiently utilize the additional powers the Convention subsequently granted it." *Id.*

29. Statute of the Inter-American Commission on Human Rights, Art. 1 [hereinafter referred to as Statute].

30. Inter-Am. C. H.R. Ann. Rep. (1996), OEA/ser.L./V/II., doc. 95, June 4, 1996.

human rights.³¹ These rights are the same as those set forth in the American Convention on Human Rights and the Declaration of the Rights and Duties of Man.³²

Furthermore, while the American Convention of Human Rights provides the specific source of obligations with respect to the protection of human rights for States Parties to that instrument, it must nevertheless 'be remembered that, given the provisions of Article 29(d), these states cannot escape the obligations they have as members of the OAS under the Declaration'.

The right to life, integrity, and personal liberty, and to the protection of judicial guarantees are, among many others, issues of constant concern to the IACHR. Consequently, when one person is deprived of his liberty in violation of the law, the IACHR focuses its attention, in principle, on the observance of the state of the due process protections in its own law and in the mechanisms used for detention.³³

IACHR functions include: "(1) promoting human rights in all OAS member states; (2) assisting in the drafting of human rights documents; (3) advising member states of the OAS; (4) preparing country reports, which usually include visits to the territories of these states; (5) mediating disputes over serious human rights problems; (6) handling individual complaints and initiating individual cases on its own motion, both with regard to states parties and states not parties to the Convention; and (7) participating in the handling of cases and advisory opinions before the Court."³⁴

For those states which are parties to the American Convention on Human Rights, Article 19 of the statute discusses the IACHR's duties.³⁵ These duties are

31. Statute, art 1.

32. See DAVIDSON, *supra* note 16, at 29. The American Declaration of the Rights and Duties of Man was adopted by the Ninth International Conference of American States in Bogota, Colombia, 1948. OAS, Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.92, doc. 31, rev. 3, May 3, 1996 at 17.

33. *Id.* The First Committee of the General Assembly goes further to state that the situation could be far more serious, when the legislation is the cause of the detentions occurring when it manifestly undercuts basic guarantees and principles that should govern in a state under the rule of law: Trial of Civilians by military courts, the punishment of crimes committed by minors, the restrictions on judicial control of investigations, and the prolonged solitary confinement of persons detained, often illegally, are still, unfortunately, procedures commonly applied in a few member states of the Organization. The IACHR goes further to state they will continue to remind the states of the need to adapt their domestic law to the international obligations to which they have freely consented. The IACHR adopts decisions and makes general recommendations to protect the rights of individuals in order to minimize the effect of the violations that derive from these other situations, based on the competence and procedures assigned to it by the Inter-American legal instruments, whose nonperformance is quite often reflected in grave injustices to the persons affected. *See id.*

34. LILLICH, *supra* note 16, at 785; *See also* Statute, art. 18.

35. Statute, Art. 19. The duties include the following:

1. To act on petitions and other communications, pursuant to the provisions of Articles 44 to 51 of the Convention;
2. To appear before the Inter-American Court of Human Rights in cases provided for in the Convention.
3. To request the Inter-American Court of Human Rights to take such provisional measures as it considers appropriate in serious and urgent cases which have not yet been submitted to it for consideration, whenever this becomes necessary to prevent irreparable injury to persons;
4. To consult the Court on the Interpretation of the American Convention on Human Rights or of other treaties concerning the protection of human rights in the American states;
5. To submit additional draft protocols to the American Convention on Human Rights to the General Assembly, in order to progressively include other rights and freedoms under the system of protection of the Convention, and
6. To submit to the General Assembly, through the Secretary General, proposed amendments to the American Convention on Human Rights, for such action as the General Assembly deems appropriate.

unique to those Member states which have ratified the Convention. These duties allow the IACHR more latitude in addressing the human rights disputes that come before the commission.

For those State members of the Organization who are not a part of the American Convention on Human Rights, Article 20 of the Statute outlines those powers of the IACHR.³⁶ These duties are unique to those Member states that have not ratified the Convention. These duties limit the IACHR's abilities in handling human rights disputes that arise against Member states that have not ratified the Convention.

B. Ratification of the American Convention on Human Rights States Treaty

The OAS proposed the American Convention on Human Rights Treaty (Convention) at San Jose, Costa Rica, which was adopted on November 22, 1969.³⁷ The Convention addressed the human rights violations perpetrated against individuals in the Americas.³⁸ The Convention outlined exactly what rights are afforded individuals.³⁹ In the event of a violation of any of these rights, appropriate measures are available to address these violations.⁴⁰ Twenty-five signatories to the OAS have ratified the Convention to date.⁴¹ Ten other signatories ratifying the Convention have

See id.

36. *Id.* at art. 20. Those powers are as follows:

1. To pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man;
2. To examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and,
3. To verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

Id.

37. The American Convention of Human Rights [hereinafter cited as Convention] was opened for signature in San Jose, Costa Rica, on November 22, 1969, and entered into force on July 18, 1978.

38. *See id.* at Preamble.

39. *See id.* at arts. 1-25.

40. *See id.* at arts. 34-51.

41. These signatories include Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica (Commonwealth), Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad, Tobago, Uruguay, and Venezuela. *B-32: American Convention on Human Rights*, "Pact of San Jose, Costa Rica," OAS Inter-American System of Legal Information (visited May 21, 1999) <<http://www.oas.org/ENprogr/juridico/english/Sigs/b-32.html>>. *See generally* Cecilia Medina, *Toward Effectiveness in the Protection of Human Rights in the Americas*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 337, 348-49 (1998); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 *AM. J. INT'L L.* 341 (1995); Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 *COLUM. J. TRANSNAT'L L.* 211 (1997).

done so under certain reservations.⁴² Ironically, the staunch supporter of human rights, the United States, has yet to ratify the Convention.⁴³

C. Composition/Duties of the IACHR

Under Article 2 of the IACHR Statute, the IACHR consists of seven members, "who shall be persons of high moral character and recognized competence in the field of human rights."⁴⁴ There are three elected positions to the IACHR.⁴⁵ The IACHR

42. These signatories include, Uruguay, Argentina, Barbados, Chile, El Salvador, Mexico, Venezuela, Trinidad and Tobago, Dominica.

Uruguay Reservation: "Article 80.2 of the Constitution of Uruguay provides that a person's citizenship is suspended if the person is "under indictment on a criminal charge which may result in a penitentiary sentence." Such a restriction on the exercise of the rights recognized in Article 23 of the Convention is not envisaged among the circumstances provided for in Article 23, paragraph 2, for which reason the Delegation of Uruguay expresses a reservation of this matter." *Id.* at 2.

Argentina Reservation: "Article 21 is subject to the following reservation: The Argentine Government establishes that questions relating to the Government's economic policy shall not be subject to review by an international tribunal. Neither shall it consider reviewable anything the national courts may determine to be matters of 'public utility' and 'social interest', nor anything they may understand to be fair compensation." *Id.* at 2.

Barbados Reservations: "In respect of 4(4) the criminal code of Barbados provides for death by hanging as a penalty for murder and treason. The Government is at present reviewing the whole matter of the death penalty which is only rarely inflicted but wishes to enter a reservation on this point inasmuch as treason in certain circumstances might be regarded as a political offence and falling within the terms of section 4(4)." "In respect of 4(5) while the youth or old age of an offender may be matters which the Privy Council, the highest Court of Appeal, might take into account in considering whether the sentence of death should be carried out, persons of 16 years and over or over 70 years of age may be executed under Barbadian law." "In respect of 8(2)(e) Barbadian law does not provide as a minimum guarantee in criminal proceeding any inalienable right to be assisted by counsel provided by the state. Legal aid is not provided for certain scheduled offences such as homicide, and rape." *Id.* at 4.

Chile Reservation: "The Government of Chile declares that, when the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights apply the provisions of Article 21.2 of the Convention, they may not make statements concerning the reasons of public utility or social interest taken into account in depriving a person of his property." *Id.* at 5.

El Salvador Reservation: "Ratification is understood without prejudice to those provisions of the Convention that might be in conflict with express precepts of the Political Constitution of the Republic." *Id.* at 7.

Mexico Reservation: "The Government of Mexico makes express reservation to Article 23, paragraph 2, since the Mexican Constitution provides, in Article 130, that ministers of denominations shall not have an active or passive vote, nor the right to associate for political purposes." *Id.* at 7.

Venezuela Reservation: "Article 60, paragraph 5 of the Constitution of the Republic of Venezuela establishes that: No one may be convicted in a criminal trial without first having been personally notified of the charges and heard in a manner prescribed by law. Persons accused of an offense against the res publica may be tried in absentia, with the guarantees and in the manner prescribed by law. Such a possibility is not provided for in Article 8, paragraph 1 of the Convention." *Id.*

Trinidad and Tobago Reservation: "As regards Article 4(5) of the Convention, the Government of the Republic of Trinidad and Tobago makes a reservation in that under the laws of Trinidad and Tobago there is no prohibition against the carrying out a sentence of death on a person over seventy (70) years of age." *Id.*

Dominica Reservations: "Article 5 should not be read as prohibiting corporal punishment administered in accordance with the Corporal Punishment Act of Dominica or the Juvenile Offenders Punishment Act" "Article 4.4 reservation is made in respect of the words "or related common crimes." "Article 8.2(e), this article shall not apply in respect of Dominica. "Article 21.2 must be interpreted in the light of the provisions of the Constitution of Dominica and is not to be deemed to extend or limit the rights declared in the Constitution." "Article 27.1 must also be read in the light of our Constitution and is not to be deemed to extend or limit the rights declared by the Constitution. "Article 62, the Commonwealth of Dominica does not recognize the jurisdiction of the Court." *Id.*

43. *Id.* at 2-10.

44. Statute, *supra* note 29, at art. 2.

45. *Id.* at art. 14. The officers include a Chairman, a First Vice-Chairman and a Second Vice-Chairman. These officers are elected for one-year terms by absolute majority of the IACHR. Reelections are only allowed once over a four-year period. The Secretariat and Executive Secretary are appointed positions.

represents all member states of the OAS.⁴⁶ Issues occasionally arise as to whether members of the IACHR will act impartially and independently of their own countries in reality when faced with cases involving their own countries.⁴⁷ Members of the IACHR have the burden of balancing between the rights of individuals being infringed and their duty and loyalty to their home country. Political ties, economic wealth, and position and status in the community also play roles in how members decide human rights issues brought before the commission. When the financial stability and status of members are threatened based on the outcome of cases, it will very well be determinative of the outcome, or even consideration, of a case. This results in difficulty in ascertaining whether the IACHR's decisions in cases are unbiased.

Article 9 of the Statute outlines the duties of the members of the IACHR.⁴⁸ Violations of these duties can result in removal from office.⁴⁹ However, a member is allowed the opportunity to refute the charges before any such action is taken by the IACHR.⁵⁰

D. Standing and Jurisdiction

"[A]ny person or group of persons, or nongovernmental entity legally recognized in one or more of the OAS member states, regardless of whether the complainant is the victim of a human rights violation" can bring a complaint against an OAS member state.⁵¹ Procedurally, individual and state complaints begin before the IACHR.⁵² Under Article 62(3) of the Convention, however, "the jurisdiction of the Inter-American Court of Human Rights⁵³ shall comprise all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it, *provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.*"⁵⁴ Read together with Article 62(3), Article 61(1) of the

46. Statute, art. 3. *See also* DAVIDSON, *supra* note 16 at 101.

47. *See* LEBLANC, *supra* note 3, at 4.

48. Statute, art. 9. "The duties of the members of the Commission are:

1. Except when justifiably prevented, to attend the regular and special meetings the Commission holds at its permanent headquarters or in any other place to which it may have decided to move temporarily.
2. To serve, except when justifiably prevented, on the special committees which the Commission may form to conduct on-site observations, or to perform any other duties within their ambit.
3. To maintain absolute secrecy about all matters which the Commission deems confidential.
4. To conduct themselves in their public and private life as befits the high moral authority of the office and the importance of the mission entrusted to the Commission." *Id.*

49. *Id.* art. 10.

50. *See id.* After extensive research, no information was available to determine if there have in fact been violations causing removal of any member of the IACHR. Therefore, even if a member has been in violation of any duties in Article 9, there has been no action resulting in discipline or removal. It defeats the purpose to have provisions in place to combat these problems if there is not an enforcement mechanism to see that the statutes are carried out.

51. *Id.*

52. *See* LILLICH, *supra* note 16, at 784.

53. *See id.* at 785, and note 46, *supra*.

54. Convention, Art. 62 (3); *See also* Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231, 236 (1982).

Convention “declares that only the States Parties and the IACHR shall have the right to submit a case to the Court.”⁵⁵ Individuals cannot bring actions to the Court because they do not have standing.⁵⁶ Furthermore, the Court cannot hear a case if the parties have not consented to the Court’s jurisdiction.⁵⁷ The IACHR, however, has authority to allow a state the opportunity to accept jurisdiction for a limited purpose, but the State can decline if it so chooses.⁵⁸

Given the objectives of the Convention, the Court having jurisdiction of all cases concerning the interpretation and application of the Convention’s provisions is a positive function of the Court. This allows the Court to interpret and apply the law which can be helpful in future cases brought before that forum. A state’s recognition of the Court’s jurisdiction should not be an issue. There should mandatory provisions in the OAS Charter as well as the Convention, which give the Court power to hear cases under any circumstances. Mandatory jurisdiction provisions will ensure that states are held accountable for their actions, and reinforce the Court’s power to redress human rights violations.

The Inter-American Court of Human Rights exercises two kinds of jurisdiction. First, the Court has advisory jurisdiction, which allows the Court to interpret the Convention as well as other treaties concerning human rights issues in the Americas.⁵⁹ It also has contentious jurisdiction, in which the Court adjudicates human rights disputes to determine whether the state is in violation.⁶⁰

1. Advisory Opinion Jurisdiction

The Court has the power to give advisory opinions by three different methods.⁶¹ First, it can interpret the Convention when requested by any Member state or any organ of the OAS.⁶² Second, member states can request opinions concerning other treaties that affect human rights in the Americas.⁶³ Third, the Court will entertain requests brought by any Member state of the OAS in ascertaining potential conflicts between the Member states’ domestic laws and the laws of the Convention, or other treaties, involving human rights protection in the Americas.⁶⁴

As a result, when a Member state requests an advisory opinion, it must establish its competency in the application and set forth why it chose to seek an opinion from the Court.⁶⁵ The Court requires full information to render an informed opinion.⁶⁶ If

55. Convention, *supra* note 37, at art. 61(1).

56. *See id.*; *see also* Buergenthal, *supra* note 54, at 236.

57. *See id.* at 236.

58. Convention, Art. 61(1); *See also* Buergenthal, *supra* note 54, at 236.

59. *See* DAVIDSON, *supra* note 16, at 232.

60. Convention, *supra* note 37, at art. 64.

61. *See* DAVIDSON, *supra* note 16, at 146.

62. *See id.* at 146-47.

63. *See* Buergenthal, *supra* note 54, at 243.

64. *See id.* at 245.

65. *See* DAVIDSON, *supra* note 16, at 147.

66. *See id.*

full information is not provided, however, the Court has discretion to decline jurisdiction.⁶⁷

The Court's advisory jurisdiction to interpret treaties is limited to requests involving member states of the OAS.⁶⁸ If the ultimate purpose for the request involves a non-American state's obligation under the treaty, the Court will decline jurisdiction.⁶⁹ Invariably, there is nothing in the Convention, Statute, or Regulations of the Court that gives it power to reject cases that it considers "an abuse of the process."⁷⁰ The Court must have a strong, compelling reason for not complying with an advisory opinion request.⁷¹ The Court decides whether an advisory opinion request is admissible on a "case-by-case basis."⁷²

This advisory form of jurisdiction is effective because it allows Member states to seek interpretation of the Convention and other treaties from the Court which informs the states whether it is in compliance with those treaties or the Convention. This jurisdiction also allows the a Member state the opportunity to learn whether its laws are in conflict with the laws of the Convention or other treaties, which may help in resolving conflicts before human violations occur. The fact that the Court must have a strong and compelling reason for not complying with an advisory opinion request is also another positive characteristic of advisory jurisdiction. This allows the Court to render opinions more often than not since declining will put the Court in the position of having to explain its decision to decline.

The advisory form of jurisdiction, however, has weaknesses. First, the Court will not recognize requests which involve a non-American state. Arguably, if the purpose of the Court is to interpret the Convention, it should not matter whether it is a Member state or non-American state if the reason for the request involves human rights issues in the Americas. Second, the procedural formalities involved in requesting an opinion may deter States from seeking advice from the Court.

2. Contentious Jurisdiction

The primary function of the Court is to rule on whether a particular Member state has violated the human rights of an individual under the Convention and to

67. *See id.*

68. *See id.* at 244.

69. *See id.* at 244-45. "Although advisory opinions under Article 64(1) of the Convention are essentially declaratory in nature, the Court has nevertheless recognized that its authoritative interpretations may have wider implications for states which are not party to proceedings. This being so, the procedure in requests for advisory opinions contains two important elements. First, the Secretary of the Court transmits copies of the request to any Member State of the OAS 'which might be concerned in this matter.' In practice, all Member States of the OAS are sent copies of the request. The request is sent to the Secretary-General of the OAS for transmission to the appropriate organs of the OAS listed in Chapter VIII of the Charter who might have an interest in the proceedings. Second, all the states and organs so notified are entitled to provide written observations or other documents on the matter which is the subject of the request." *Id.* at 147. *See also* Dinah Shelton, *The Jurisprudence Of the Inter-American Court of Human Rights*, 10 AM. U.J. INT'L L. & POL'Y 333, 334.

70. *See* DAVIDSON, *supra* note 16, at 235.

71. *See id.* at 237.

72. *Id.*

“secure redress for those violations.”⁷³ This function of the Court has been characterized as being “penal in nature.”⁷⁴ Contentious proceedings are fact-oriented, and the decisions are usually binding on the violating state.⁷⁵ State parties and the IACHR are the only two entities allowed to bring “a contentious case.”⁷⁶

The Court cannot hear a contentious case unless, under Article 62(3) of the Convention, a State Party or Parties submit to the Court’s jurisdiction.⁷⁷ The IACHR has the same obligation as the Court, in requesting that a state that has not accepted the jurisdiction of the Court to accept jurisdiction in a particular matter.⁷⁸ A state’s acceptance of the Court’s jurisdiction alone is not enough for the Court to exercise its jurisdiction.⁷⁹ Before the Court may hear a case, the procedures under Articles 48 to 50 of the Convention must also be satisfied.⁸⁰ Once those procedures are satisfied, the Court can entertain the case brought before it.

The fact that contentious proceedings are based on facts and produce a binding decision is a strong attribute of this particular form of jurisdiction. It holds the violating States accountable for its actions. Contentious jurisdiction finds a violation, and awards redress to the victims of those violations. This gives the victims the assurance that the Court acknowledges their claims and wants them to be compensated for their suffering.

Conversely, the jurisdictional requirement that a State Party must submit to the court’s jurisdiction in order for the Court to hear the case, is a weakness. If a State Party is in violation of an individual’s human rights, the Court should be allowed to hear the case regardless of whether the State submits to the Court’s jurisdiction. If a State knows that action will not be taken by the Court because of this jurisdictional requirement, then a State will not care if it violates an individual’s rights. To make Member States accountable for redressing those violations they commit, the Convention should make it mandatory that States are automatically under the Court’s jurisdiction.

E. Petitions Brought Before the IACHR

The procedures for the IACHR to deal with a complaint brought before it are set forth in Articles 48 to 50 of the Convention.⁸¹ There are a number of stages that must occur in the litigation process. The IACHR must first determine whether the

73. *See id.* at 205; *See also* Shelton, *supra* note 69, at 343.

74. DAVIDSON, *supra* note 16, at 205. Judge Piza Escalante has taken the view “that contentious jurisdiction has ‘an obvious condemnatory nature, as in penal jurisdiction, whose specific object is not that of defining the right in question but rather that of re-establishing the violated right, specifically deciding whether there has been a violation of the rights guaranteed by the Convention that can be imputed to a State Party ...’, the Court itself has refused to characterize its contentious procedure as penal in nature.” *Id.*

75. *See id.* at 241.

76. *Id.*

77. Convention, *supra* note 39, at art. 62(3).

78. *Id.* at art. 50; *See also* DAVIDSON, *supra* note 16, at 205.

79. Convention, *supra* note 39, at art. 50.

80. *Id.* at art. 48-50.

81. *See* DAVIDSON, *supra* note 16, at 155.

petition is admissible.⁸² This stage requires the IACHR to decide whether the case satisfies the requirements necessary to be heard.⁸³ If deemed admissible, the case proceeds to the second stage. During this stage, the IACHR investigates the facts alleged, by means such as holding hearings and examining documents.⁸⁴ At this point, the IACHR attempts to get the parties to resolve their dispute through friendly settlement, in lieu of litigation.⁸⁵ If the parties reach an impasse in the settlement negotiations, the case moves on to the third stage.⁸⁶ The IACHR then writes a report outlining the facts and its findings.⁸⁷ The report is sent to “the states concerned”⁸⁸ and can be supplemented by the IACHR with “such proposals or recommendations” that the IACHR deems necessary.⁸⁹ The case may be brought before the Court during the three month period following the transmittal of the report, by the IACHR or by the violating state.⁹⁰ According to Article 61(2), before the Court can adjudicate a case, these procedures must be completed.⁹¹

These litigation steps are time consuming and will likely delay the process of redressing the victim’s rights. Bureaucratic red tape only makes matters worse. It will take an enormous amount of time to investigate the matter. The procedural time should be shortened so that the victims are afforded justice quickly.

III. THE IACHR IN PRACTICE

Four particular cases illustrate the practical application of the lofty goals of the IACHR: (1) *Victims of the Tugboat “13 de Marzo” vs. Cuba*,⁹² (2) *Pratdesaba Barillas vs. Guatemala*,⁹³ (3) *Rosario Congo vs. Ecuador*,⁹⁴ and (4) *Montoya Gonzalez v. Costa Rica*.⁹⁵

Victims of the Tugboat “13 de Marzo” vs. Cuba illustrates how the IACHR handles a case involving human rights atrocities committed against individuals in a country. *Pratdesaba Barillas vs. Guatemala* displays just how serious some States are about the Convention and the IACHR. Guatemala, for example, never cooperates with the IACHR and is not pressed to mend its ways. *Rosario Congo vs. Ecuador* discusses why informal settlement should not be used in cases of severe human rights

82. Convention, art. 48.

83. *See id.*

84. *Id.* at art. 50.

85. *Id.* at art. 49.

86. *Id.* at art. 50.

87. Convention, *supra* note 39, at art. 50(1).

88. *See id.* at art. 50(2).

89. *See id.* at art. 50(3).

90. *See id.* art. 51.

91. *Id.* at art. 61(2). “In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed.” *Id.*

92. *Victims of the Tugboat “13 de Marzo” v. Cuba*, Case 11.436, Inter-Am. C.H.R. 45, OEA/ser.L./V./II, doc. 95, rev. 7 (1996).

93. *Pratdesaba Barillas v. Guatemala*, Case 8074, Inter-Am. C.H.R. 45, OEA/ser.L./V./II., doc. 95 rev. 7 (1996).

94. *Rosario Congo v. Ecuador*, Case 11.427, Inter-Am. C.H.R. 45, OEA/ser.L./V./II., doc. 95 rev. 7 (1996).

95. *Montoya Gonzalez v. Costa Rica*, Case 11.553, Inter-Am. C.H.R. 45, OEA/ser.L./V./II, doc. 95, rev. 7 (1996).

violations and why punishment is the better approach to send a message that certain behavior will not be tolerated.⁹⁶ *Montoya Gonzalez v. Costa Rica* examines what the IACHR deems as adequate standing for a party to bring a case before it.⁹⁷

The major lesson these cases teach is that the IACHR has more of a ministerial role than an enforcement. Although in principle the IACHR was created to deal with human rights disputes, in reality it has no power. As a ministerial organization, the IACHR has no authoritative decision making capacity. Member states are not obligated to abide by the suggestions of the IACHR. The best mechanism in place to handle human rights disputes has limitations.⁹⁸

A. Victims of the Tugboat "13 de Marzo" v. Cuba

On July 13, 1994, in Cuba, forty-one people were drowned trying to leave Cuba when Cuban State boats used pressurized water hoses and prows to sink the tugboat.⁹⁹ The surviving victims and family members of the deceased victims brought the complaint before the IACHR.¹⁰⁰ The IACHR's basis of jurisdiction for hearing this petition was grounded in Article 51 of its regulations.¹⁰¹ IACHR felt competent to hear the case because it involved violations of rights embedded in the American Declaration of the Rights and Duties of Man.¹⁰² This case arose in the midst of strife and turmoil that has engulfed the people of Cuba since Fidel Castro took control over thirty years ago.¹⁰³

The main issue before the IACHR was whether Cuba was internationally liable for the deaths of the forty-one people by acting in such a way that the violation occurred without prevention or care of human life.¹⁰⁴ Cuba argued that it had nothing to do with the alleged events and that it was a terrible accident.¹⁰⁵ Cuba contended that the owners of the tugboat were simply trying to recover their stolen tugboat. Cuba also argued that the Cuban coastguard arrived after the other boats and tried to assist the victims, but the tugboat was already sinking.¹⁰⁶ Cuba blamed the United

96. See Rosario Congo, *supra* note 94.

97. See *Montoya Gonzalez*, *supra* note 95.

98. Convention, *supra* note 39, at art. 62(3).

99. Victims of the Tugboat "13 de Marzo" v. Cuba, Case 11.436, Inter-Am. C.H.R. 45, OEA/ser.L./V/II, doc. 95, rev. 7 (1996).

"[I]n the early morning hours of July 13, 1994, four boats belonging to the Cuban State and equipped with water hoses attacked an old tug boat that was fleeing Cuba with 72 people on board. The incident occurred seven miles off the Cuban coast, opposite the port of Havana. The Complaint also indicates the Cuban State boats attacked the runaway tug with their prows with the intention of sinking it, while at the same time spraying everyone on the deck of the boat, including women and children, with pressurized water. The pleas of the women and the children to stop the attack were in vain, and the old boat—named "13 Marzo"—sank, with a toll of 41 deaths, including ten minors. Thirty-one people survived the events of July 13, 1994." *Id.*

100. See *id.* at para. 6.

101. See *id.* at para. 68.

102. See *id.*

103. See generally RHODA P. RABKIN, CUBAN POLITICS: THE REVOLUTIONARY EXPERIMENT 179-222 (1991); HUGH S. THOMAS ET AL., THE CUBAN REVOLUTION: 25 YEARS LATER 61-67 (1984).

104. See Victims of the Tugboat "13 de Marzo", *supra* note 92, at para. 67.

105. See *id.* at para. 29.

106. See *id.* at para. 28.

States for the drownings since the victims were trying to seek refuge in the United States.¹⁰⁷ The petitioners contend that Cuban officials deliberately tried to drown them with pressurized water from hoses.¹⁰⁸ Petitioners also contended that Cuba would not allow them to recover the bodies of the drowned victims and that Cuba state officials murdered innocent victims.¹⁰⁹

The IACHR recommended that Cuba find, prosecute, and punish those persons responsible for the deaths and human rights violations committed.¹¹⁰ It was also recommended that compensation be paid to the surviving victims and to the bereaved families for all damage, as well as for intentional emotional distress.¹¹¹ The IACHR further recommended that the sunken boat be recovered by the Cuban Government and any remains of bodies of the victims be handed over to their surviving relatives.¹¹² The IACHR reasoned that the eyewitness accounts as well as other evidence showed that the sinking of the tugboat was not an accident but an intentional, calculated act.¹¹³ The IACHR found that Cuba did not investigate this matter and quickly exonerated the parties responsible which was a compelling reason to find against Cuba.¹¹⁴

This case illustrates how the IACHR typically responds to complaints when they are presented. Here, Cuba attempted to cooperate with the IACHR but had the opportunity to do more than it did. Cuba could have allowed the victims' families to retrieve their bodies and bring to justice those who were responsible for their deaths. Cuba, however, chose not to do so. The IACHR only made recommendations to the Cuban Government. It did not lay out the actual deadline to complete the recommendations. Based on this case, it would seem that a country has leeway to follow the recommendations whenever it feels moved to do so, or to ignore the recommendations, with no consequences, if so inclined. If there is nothing absolute as to when recommendations must be carried out, resolution of human rights disputes cannot be quickly and effectively resolved. There must be specific deadlines in place to ensure prompt resolutions of disputes that arise. The IACHR needs to appoint individuals to ensure that the cooperation with the recommendations, and to ensure that the uncooperative, violating countries are reprimanded.

B. *Pratdesaba Barillas v. Guatemala*

On September 24, 1982, a Guatemalan citizen was abducted by Guatemalan state agents and transported to several military bases. This individual still is

107. *See id.* at para. 26.

108. *See id.* at para. 13.

109. *See id.* at para. 18-19.

110. *See* Victims of the Tugboat "13 de Marzo", *supra* note 92, at para. 108.

111. *See id.* at para. 110.

112. *See id.* at para. 109.

113. *See id.* at para. 82.

114. *See id.* at para. 96.

missing.¹¹⁵ Guatemala has neither investigated nor clarified the facts.¹¹⁶ The victim's next-of-kin submitted the complaint to the IACHR.¹¹⁷ The IACHR was able to entertain the complaint since it alleged violations of the victim's rights under the American Convention on Human Rights.¹¹⁸

The IACHR forwarded the complaint to the Guatemalan government for a response and granted several extensions.¹¹⁹ The Guatemalan government has yet to respond.¹²⁰ The petitioners argue that eyewitnesses saw military personnel in the victim's vehicle.¹²¹ Guatemala never answered the petition.¹²² The IACHR determined from the evidence that the victim was abducted by agents of the state.¹²³ IACHR recommended that the Guatemalan government conduct a thorough and impartial investigation as to the abduction and disappearance of the citizen and ascertain the identity of the people responsible.¹²⁴ IACHR also recommended that Guatemala make full reparations to the victim's family as well as make necessary arrangements for the victim's family to find an appropriate final resting place for the victim.¹²⁵ The IACHR also planned to publish Guatemala's lack of cooperation regarding this case.¹²⁶ The IACHR thoroughly analyzed the rights violations in rendering its recommendations.¹²⁷

Barillas is a problematic case because it highlights the ineffectiveness of the IACHR. Here, the IACHR unilaterally extended Guatemala's response time sixty days, yet Guatemala failed to respond. If the IACHR had more power to enforce its recommendations and orders, instead of a mere ministerial type role, countries like

115. See *Pratdesaba Barillas v. Guatemala*, Case No. 8074, Inter-Am. C.H.R. 45, OEA/ser.L/V/II., doc. 95 rev. 7 (1996) at para. 2-3.

"[O]n October 1, 1981, at 1:00 p.m., Dr. Francisco Jose Antonio Pratdesaba Barillas was abducted by members of the Guatemalan National Army at the facilities of the private sanitarium he headed. He was taken away in his own vehicle, a light yellow 1982 Ford Fairmont. The complaint states that Dr. Pratdesaba Barillas was confined at the military base at Quetzaltenango; he was later taken to a military outpost in San Rafael Pie de la Cuesta, Department of San Marcos; he was then held at the headquarters at the Military Police on the Berlin de Coatepeque Ranch, Department of Quetzaltenango. The last place the petitioners learned he was being held was the Rafael Carrera Military Base in Zacapa, Department of Zacapa. He was later seen by witnesses in December of 1981, in Guatemala City, in a private vehicle, in the custody of armed men. The petitioners state that eyewitnesses saw Dr. Pratdesaba Barillas' car in possession of persons from the Fifth Military Zone. The complaint contends that Dr. Francisco Jose Antonio Pratdesaba Barillas is still missing, and the Guatemalan State has neither investigated nor clarified the facts. A criminal complaint of kidnaping was filed by Dr. Pratdesaba Barillas' next-of-kin on October 29, 1981, to ascertain his whereabouts, but the action taken on the complaint was flawed and ineffective." *Id.*

116. See *id.* at para. 8.

117. See *id.* at para. 3.

118. See *id.* at para. 9. Those rights include Articles 1, 3, 4, 5, 7, 8, and 25 of the Convention.

119. See *id.* at para. 8.

120. See *id.* at para. 6-7.

121. See *Pratdesaba Barilla*, *supra* note 39, at para. 19.

122. See *id.* at para. 8.

123. See *id.* at para. 20.

124. See *id.* at para. 46 (a).

125. See *id.* at para. 46 (b).

126. See *id.* at para. 47.

127. See *Pratdesaba Barilla*, *supra* note 39, at para. 21-40. The IACHR found that Guatemala violated the victims right to juridical personality; right to life; right to humane treatment; right to personal liberty; right to due process of law and to judicial protection; and obligation to respect and ensure rights. *Id.*

Guatemala would be more apt to take the allegations brought against it more seriously, especially if stiffer penalties were in place for lack of cooperation. The prestige of the IACHR weakens when it cannot admonish a country to follow directives or at the very least to respond to the Commission in a timely fashion. Repeated requests to a country for response leaves an inference that if it does not even respond to allegations, it can flaunt the recommendations that the IACHR imposes upon it. The IACHR cannot be effective in resolving human rights disputes when it cannot get a country to cooperate with the process.

In order for the IACHR to effectively resolve human rights disputes, it should implement serious penalties against uncooperative violating countries. If stiffer penalties are in place and enforced, then those violating countries will be more apt to cooperate in the process and take the IACHR more seriously. Serious penalties should include, but not be limited to: (1) substantial monetary fines against the violating countries; (2) automatic monetary damages from the violating countries to the victims or families of the victims; and (3) suspension or even termination from the OAS if repeated uncooperative behavior is noted.

C. Rosario Congo v. Ecuador

On September 14, 1990, a mentally ill prisoner at the Machala Social Rehabilitation Center was beaten and denied medical care which by agents of the Center in Machala, Ecuador, injuries which lead to his death.¹²⁸ The victim's attorney brought a petition before the IACHR.

The petitioners argued that the state was liable for the victim's death since the guards were state agents.¹²⁹ Petitioners further alleged that police investigations were not done properly and in manner to cover up the conduct of the state.¹³⁰ The Ecuadorian state responded to the complaint by affirmatively acknowledging that the prisoner was indeed beaten and denied medical care which led to his death.¹³¹ The prisoner's death was the result of negligence on the part of the responsible authorities.¹³² The IACHR recommended that the parties initiate proceedings for a friendly settlement within 30 days following the notification of the present report.¹³³

128. See Rosario Congo v. Ecuador, Case No. 11.427, Inter-Am. C.H.R. 45, OEA/ser.L./V./II., doc. 95 rev. 7 (1996).

On September 14, 1990, Victor Rosario Congo, a prisoner at the Machala Social Rehabilitation Center who was mentally ill, was assaulted with a garrote by guards at the center, causing him serious injury. Despite his condition, the prisoner was stripped naked, placed in solitary confinement, and denied medical care. Medical examiners from the District Attorney confirmed Victor Congo's condition, stating that he had welts on his body caused by the flaying and a contusion that was dirty and caked with mud. Victor Congo was transferred to the Men's Social Rehabilitation Center in Guayaquil, then to Luis Vernaza Hospital, where he died a few hours later. Prior to the death of Victor Rosario Congo, nongovernmental organizations had requested, through various avenues, that he be moved to a hospital so that he could receive proper medical care. *Id.*

129. See *id.* at para. 1.

130. See *id.* at para. 27.

131. See *id.* at para. 21.

132. See *id.* at para. 21.

133. See *id.* at para. 54.

The IACHR considered the facts of this case to be suitable for friendly settlement, a decision it never explained.¹³⁴

This case illustrates one government's effort to cooperate with the IACHR. Ecuador did not deny involvement in the beating of the prisoner. Perhaps even more interesting, the IACHR actually gave a deadline for the parties to initiate proceedings for a friendly settlement. What was not addressed by the IACHR was the possibility of the parties not reaching a friendly settlement. Also disturbing is the type of cases referred for friendly settlement. In egregious cases of human rights violations, such as executions, severe beatings, or body dismemberments, friendly settlement is not an effective tool. There is nothing "friendly" about the reason the parties are coming together and it will be highly unlikely that such a dispute can be resolved in this manner. In *Rosario Congo*, a man was severely beaten and denied medical care which subsequently led to his death at the hands of government agents.¹³⁵ A friendly settlement should not be the answer in situations such as these. The better alternative is to send a message that this conduct will not be tolerated. This message should come in the form of a hearing before the IACHR, and, if not resolved at that level, the Inter-American court should ensure compliance with the recommendations imposed on that violating country.

It has become more common for the IACHR to deal with situations involving military officials who commit human rights abuses. Government continue to argue that they are not responsible for the actions of those military personnel. This is a difficult problem for IACHR. For the most part, the IACHR has found that governments are responsible for the actions of individuals that are acting under the title of the state.

Political groups also seem to be a ready target for human rights violations. Especially when those political groups may oppose the present government infrastructure or if the government feels that the group is a threat to its existence.¹³⁶ The IACHR still has much work ahead to establish a system that will enable political groups to be free from oppression.

D. Montoya Gonzalez v. Costa Rica

On August 28, 1993, in Costa Rica, a female athlete wanted to compete in a marathon that had established categories for men but none for females.¹³⁷ The Center

134. See *Rosario Congo v. Ecuador*, *supra* note 94, at para. 52.

135. See *id.*

136. See *Patriotic Union v. Colombia*, Case No. 11.227, Inter-Am. C.H.R. 45, OEA/ser.L./V.II, doc. 95, rev. 7 (1997) (political party alleged that its membership suffered persecution in the form of extrajudicial executions, disappearances, unfounded criminal prosecutions by government).

137. See *Montoya Gonzalez v. Costa Rica*, Case No. 11.553, Inter-Am. C.H.R. 45, OEA/ser.L./V.II, doc. 95, rev. 7 (1996).

On August 28, 1993, the municipality of Heredia and the Costa Rican Federation of Athletics organized the Second Municipal Race. The rules for the 12 kilometer, in Article 11, excluded the categories of "juveniles" and "veterans" for female runners although these categories were established for male runners. Article 19 of these rules established a first place prize for male runners in the amount of 20,000 Costa Rican colones whereas the first place prize for female runners was set at 10,000 colones. The second place prize was for male runners was set at

for Justice and International Law and the Asociacion Ventana and Disabled People International brought the petition before the IACHR on behalf of Mrs. Montoya.¹³⁸ The main issue before the IACHR was whether Mrs. Emerita Montoya suffered a violation of any right guaranteed by the Convention as a consequence of Costa Rica's actions.¹³⁹ The petitioners argued that the government discriminated against female athletes by not affording the same privileges granted to male athletes.¹⁴⁰ The government of Costa Rica argued that the case was inadmissible for the IACHR to hear because the facts did not support a violation under the Convention.¹⁴¹

The IACHR concluded that Mrs. Montoya did not have standing to bring this action because she did not fall under "veterans" category; therefore she would not be eligible to win a prize.¹⁴² The IACHR held that the standing requirement, although liberal, should not be "interpreted to mean" that the Commission could decide such an abstract controversy. An individual cannot institute an *actio popularis* and present a complaint against a law without establishing some active legitimation justifying his standing before the Commission. It is not sufficient for an applicant to claim that the mere existence of a law violates her rights under the Convention.¹⁴³

All countries need to address the issues of equal protection of women and minorities. The IACHR needs to focus considerable attention on OAS states that treat women as second-class citizens.¹⁴⁴

This case illustrates how the IACHR handles violations of equal protection issues. The IACHR failed to grasp the real issue in the case. Mrs. Montoya brought this petition before the IACHR because of the disparate treatment between male and female athletes in a marathon race.¹⁴⁵ Her ineligibility in the different categories was

15,000 colones, whereas the second place prize for female runners was only 5,000 colones. In addition, the rules contemplated a third place only for male runners, and the prize was 10,000 colones, equivalent to the first place prize for female runners. The applicant stated that Mrs. Emerita Montoya registered to run the race but without any possibility of obtaining a prize in case she would have been first in her category since the rules had eliminated her category ("veterans") for female runners. The domestic law of the Costa Rica, in particular, Decree Law number 191189-c, provides that all competitive sports must provide equal prizes for men and women. Applicant alleges that Costa Rican law promotes equality between men and women and does not allow for arbitrary discrimination based on sex. Applicant further alleges that the law is not observed in practice as is shown by the activities of state authorities, such as the municipality of Heredia, which organize discriminatory footraces. *Id.*

138. *See id.* at para. 3.

139. *See id.* at para. 1.

140. *See id.* at para. 8.

141. *See id.* at para. 12.

142. *See id.* at para. 30. Mrs. Montoya was 36 years old at the time of the marathon race she wanted to enter. The "veterans" category was female runners 40 years and above. In fact, there was evidence presented that the winners of the "adult" category of which Mrs. Montoya was a part, were the ages of 36, 33 and 26. Therefore, there was a chance that Mrs. Montoya could have won or placed in the race and been eligible for a prize. *See id.*

143. *See Montoya, supra* note 95, at para. 28.

144. *See Medina, supra* note 41, at 348-49.

145. *See Montoya, supra* note 95, at para. 1.

incidental to the main issue of women being treated unequally to men.¹⁴⁶ The IACHR was looking for a way out of addressing the issue.

Pursuant to Article 44 of the Convention, a complaint can be brought against an OAS member state in violation of human rights, by “any person or group of persons, or nongovernmental entity legally recognized in one or more of the OAS member states, regardless of whether the complainant is the victim of a human rights violation.”¹⁴⁷ The IACHR concluded that Mrs. Montoya’s human rights were not violated.¹⁴⁸ Therefore, it is disputable that Mrs. Montoya did not have standing to bring this action against Costa Rica. The Convention clearly addresses the issue that the one bringing a suit does not have to be a victim of a human rights violation.¹⁴⁹ Mrs. Montoya would have that right to bring an action.

According to the Convention, all women would have standing to bring an action before the IACHR regarding the unequal treatment of women and men athletes in this case.¹⁵⁰ Had the IACHR considered this case in a broader context, it would have been clear that the main issue in this case was addressing the inequalities of the men and women athletes and not whether Mrs. Montoya had suffered a human rights violation directly. In fact, in this case the IACHR itself infringes on the rights of an individual to bring an action against discriminate treatment.

IV. MAJOR PROBLEMS WITH IACHR’S HANDLING OF PETITIONS

These cases illustrate the small problems inherent in IACHR’s handling of petitions. IACHR, however, has larger problems. First, complaints can only be handled if all domestic remedies have been exhausted.¹⁵¹ This requirement prevents swift reactions to violations, and if an individual’s rights are seriously threatened, help is not available in a timely fashion. As a result, grievous human rights atrocities sometimes go unanswered.¹⁵²

Second, the lack of cooperation and forthrightness from the member states in violation of human rights is a serious obstacle for the IACHR. The governments will either not respond to the IACHR’s request for information or they may answer with a blanket denial that doesn’t contribute to a satisfactory solution to the problem.¹⁵³ As a consequence, there is no accountability by the States.

146. *See id.*

147. Convention, *supra* note 39, at art. 44.

148. *See Montoya, supra* note 95, at para. 28.

149. *See id.*

150. *See id.*

151. Regulations of the Inter-Am. C. H. R., art. 37 [hereinafter cited as REGULATIONS].

152. *See, e.g., Pradesaba Barillas, supra* note 93, at para. 1; Victims of the Tugboat “13 de Marzo v. Cuba, *supra* note 92, at para. 1.

153. *See e.g., Pradesaba Barillas, supra* note 93, at para. 1; Victims of the Tugboat “13 de Marzo v. Cuba, *supra* note 92, at para. 1.

Third, the IACHR avoids major, controversial issues.¹⁵⁴ The IACHR either will address an incidental issue or deny standing. When this happens, there is no other mechanism in place for an individual to bring an action.

Finally, the enforcement mechanism of the IACHR leaves much to be desired. The IACHR makes recommendations to states being found in violation but provides no time frames for the implementation of recommendations. Violating parties must be subjected to strict deadlines to ensure that recommendations are timely satisfied.

V. CONCLUSION

The Convention attempts to establish guidelines for acceptable treatment of individuals in a context that resembles a constitution for the OAS Member States to follow. It seems contrary, however, to establish a treaty for Member States to follow while States have the option of whether to ratify it or not. This calls into question the commitment of the OAS to stop atrocities committed against individuals in the Americas.

Consequently, the Convention is ineffective when Member States that have ratified it maintain broad reservations. There is little purpose to establishing rules and procedures when States arbitrarily decide which rules they will and will not abide by. Human rights disputes are difficult to resolve and enforce when States are not required to adhere to the entire Convention. More disturbing is the refusal of the United States to ratify the Convention. It is ironic that the country that proclaims itself the champion for human rights causes has yet to ratify the Convention to address human rights issues.¹⁵⁵

Conversely, despite the problems of the Convention, it addresses many controversial human rights areas.¹⁵⁶ The Convention acknowledges the IACHR as

154. See generally Montoya, *supra* note 95.

155. According to the Acting Secretary of State Strobe Talbott in a Remarks and Press Q & A on 1997 Country Report on Human Rights, "The challenge that the United States and the international community face in Iraq is a powerful illustration of why the United States must continue to make support for human rights a cornerstone of our diplomacy. It's a basic premise of our foreign policy that governments that respect the dignity and freedom of their own citizens are much more likely to be responsible members of the international community." *Acting Secretary of State Strobe Talbott and Assistant Secretary for Democracy, Human Rights, and Labor John Shattuck, Remarks and Press Q & A on 1997 Country Report on Human Rights* (visited October 28, 1999) <http://www.state.gov/www/policy_remarks/1998>; See also NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE 204-05 (1990). The author points out the arguments against U.S. ratification of human rights treaties. The reasons, state in pertinent part: "(1) human rights treaties reflect a lower standard than is currently guaranteed; they will take away U.S. rights and protections; (2) human rights treaties violate constitutional protection of states' rights. They will give the federal government powers meant to be retained by the states; (3) human rights treaties are being used to move toward world government; (4) human rights treaties foster communism, soviet policies, and socialist rights; (5) subjects citizens to trial abroad; (6) human rights treaties will erode fundamental governmental powers; (7) human rights treaties contain subjects that infringe on domestic matters; (8) human rights treaties are a creation of the United Nations, which is a suspect organization, and will draw us into matters that should not concern us; (9) create self-executing obligations; (10) human rights treaties contain only the rights we already have and provide no additional protections for U.S. citizens; (11) experts say that human rights treaties should not be ratified; and (12) diminish the rights of U.S. women." *Id.*

156. Convention, *supra* note 39, at art. 20. For example, it addresses the execution of persons under the age of eighteen years old and those persons over the age of seventy; right to a fair trial; freedom of conscience and religion; right to participate in government; right to equal protection; and right to judicial protection. *Id.*

well as the Inter-American Court on Human Rights.¹⁵⁷ Recognition of these two entities were milestones for the Convention, as these two organizations were created to resolve human rights disputes and enforce decisions rendered.¹⁵⁸

Since the formation of the IACHR, there have been notable changes in the approach to human rights violations and the manner in which the IACHR deals with those violations. In the Annual Report of the IACHR for 1996, the IACHR denotes “the continued spread of human rights and democracy, which are deeply rooted in the peoples of the Hemisphere.”¹⁵⁹

Dean Claudio Grossman, Chairman of the IACHR, referred to “a new hemispheric situation due to the existence of democratically elected governments throughout the Americas.”¹⁶⁰ Dean Grossman stated:

The IACHR must gear its working procedures to this positive development, which made for a qualitatively different and improved climate in comparison with previous eras in which the IACHR had to direct its attention primarily to massive and systematic violations of essential human rights.¹⁶¹

Dinah Shelton, a professor of law at Notre Dame opines that:

Both the Inter-American Commission and the Inter-American Court are able to take immediate measures and sometimes do so with speed unparalleled in other human rights institutions...Of the necessary requirements for an effective international human rights system, the Commission performs fact-finding best.¹⁶²

The IACHR has an overwhelming interest in methods of ascertaining the truth regarding human rights violations, and “understands the importance of combating impunity through cases that reveal in detail the violations of human rights that some countries have endured.”¹⁶³ As a result, the IACHR has taken necessary and effective steps, following the due process of the law, in identifying and punishing government agents responsible for human violations and in making appropriate and effective reparations to the victims of those violations.¹⁶⁴ Further, there have been “major reforms on the judiciary, regarding judicial administration, professional training for

157. See LILLICH, *supra* note 16 at 785.

158. *See id.*

159. Inter-Am. C.H.R., Annual Report of the Commission 1996, OEA/ser.L/V/II.95, doc. 7, Press Release, (March 1996).

160. Inter-Am. C.H.R., Annual Report of the Commission, 1996, OEA/ser.L/V/II. 95, doc. 7 Press Release (July 1996).

161. *Id.*

162. See BUERGENTHAL, *supra* note 4, at 146-47 (quoting Dinah Shelton, *Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights*, 3 AM. U.J. INT'L L. & POL'Y 323, 329 (1988)).

163. Convention, art. 50 (2).

164. Inter-Am. C.H.R., Annual Report of the Commission 1996, OEA/ser.L/V/II.95, doc. 7, Press Release, (July 24, 1996).

judges, and the establishment of a legal procedure for challenging the constitutionality of laws."¹⁶⁵

The IACHR has also made recommendations to member states in which full observance of the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights need to be met.¹⁶⁶

The IACHR is the only organ that deals with petitions if a state has not ratified the American Convention or declared its acceptance of the Inter-American Court's Compulsory jurisdiction.

Despite its progress, the IACHR faces major problems. IACHR must deal with the stigma that members are biased towards their own countries.¹⁶⁷ The Charter states that the members are suppose to be persons of high moral character and recognized competence in the field of human rights.¹⁶⁸ The IACHR needs to enforce its recommendations more quickly, disperse with the unilateral extensions to countries in answering charges brought against it, and it needs to address the issues presented before it without ruling a case inadmissible when it is a case that the IACHR is able to hear.¹⁶⁹ Another area of concern for the IACHR is the lack of funding and staffing of the Commission.¹⁷⁰ The IACHR's only has twelve permanent staff lawyers who cover a hemisphere of 900 million individuals.¹⁷¹ With limited funding, the IACHR and the Court only meet two to three times a year.¹⁷² This makes it hard to give adequate attention to each case for a speedy and satisfactory resolution.¹⁷³ Only with

165. *See id.*; *see also* Dinah Shelton, *Remedies in the Inter-American System*, 92 AM. SOC'Y INT'L L. PROC. 202, 204-05 (1998).

166. Inter-Am. C.H.R., Annual Report of the Commission 1996, OEA/ser.L/V/II. 95, doc. 7 (1996). These recommendations include:

1. That the member states take the steps to advance and consolidate the administration of justice in their domestic legal systems.
2. That the member states take measures to strengthen the ability of law enforcement agencies and personnel to fulfill their mission to maintain the peace and provide security while fully respecting the protected rights and freedoms of the individuals within their charge.
3. That the member states develop new initiatives in favor of protecting the rights of children, who, by reason of their status and vulnerability, are entitled to special protection to safeguard their development.
4. That the member states of the OAS develop and amplify measures to counter and eradicate gender-based discrimination.
5. That the member states take the necessary steps both internally and through the OAS juridical and political bodies to review the Commission's proposal for an "American Declaration on the Rights of Indigenous Peoples" in order to achieve consensus and the adoption of such an instrument at the 1998 General Assembly meeting commemorating the 50th anniversary of the OAS and the American Declaration of the Rights and Duties of Man.
6. That the member states devote renewed effort to evaluating the effects of racial discrimination, which continues to prevent individuals in various countries of our hemisphere from fully enjoying their human rights, and to the design of mechanisms to more responsively address the problem.
7. That the member states take the steps required to remedy inhuman conditions in prisons and to minimize the number of pre-trial detainees.

Id.

167. *See* LEBLANC, *supra* note 5, at 3.

168. Convention, *supra* note 39, at art. 34; *See also* DAVIDSON, *supra* note 16, at 101.

169. *See e.g.*, Pradesaba Barillas, *supra* note 93, at para. 1; Montoya, *supra* note 95, at para. 1.

170. *See* Claudio Grossman, *Strengthening the Inter-American Human Rights System: The Current Debate*, 92 AM. SOC'Y INT'L L. PROC. 186, 191 (1998).

171. *See id.*

172. *See id.*

173. *See id.*

changes can the IACHR continue to play a major role in making progress against human rights violations. The IACHR must step forward and make its voice one to be reckoned with.

Kimberly D. King-Hopkins

