The Inter-American System for the Protection of Human Rights

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I. INTRODUCTION

I would like to deal with four issues in my Article. First, what is the inter-American system for the protection of human rights? Second, what have we learned from looking at the history of the system? Third, what can we say about state compliance and state noncompliance with the recommendations of the Inter-American Commission on Human Rights and the judgments of the courts? And lastly, what recommendations can we make to this conference?

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II. WHAT IS THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS?

To understand the inter-American system for the protection of human rights it is useful to place it in its historical context. International concern for human rights dates from the end of World War II. It evolved as a consequence of the international community's expressed vow to never again let such events occur, events characterized by the shock and horror at the photographs of the prisoners who emerged from the Nazi concentration camps. In order to prevent such atrocities from ever occurring again, the international community resolved to define human rights norms and to adopt the measures to protect them.

Although natural law and concepts of rights are not new to this century, the modern human rights movement was born with the adoption of the grandfather instrument of them all, the Universal Declaration of Human Rights, approved by the U.N. General Assembly on December 10, 1948, which is commemorated annually as Human Rights Day throughout the world. Six months prior to the adoption of the Universal Declaration, the American Declaration of the Rights and Duties of Man was approved by the member states of the Organization of American States (OAS) at the renewal of the inter-American system. The inter-American system was established in 1890 as the Union of American Republics, and was renamed the Pan American Union in 1910. Following the creation of the United Nations, in 1948 it was renamed the OAS in Bogotá, Colombia, to fit into the architecture of the postwar new world order. The American Declaration was adopted virtually simultaneously with the OAS Charter, its constitutive instrument, and the relationship of the Declaration to the Charter can be compared to the Bill of Rights to the U.S. Constitution.

The American Declaration is what its name suggests it to be. It is simply a declaration, in spite of the fact that the human rights organs of the inter-American system have interpreted it to be legally binding. The OAS member states that are subject to the jurisdiction of the Inter-American Commission on Human Rights, however, refuse to accept that the American Declaration has any binding force. This group includes, notably, the United States, Canada, and many of the countries of the English-speaking Caribbean.

Following the adoption of the Universal Declaration, the Council of Europe was the first regional organization to adopt a legally binding human rights instrument. In 1950, it adopted the Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights. This Convention
entered into force in 1953 and created both a European Commission and European Court of Human Rights. This was the model for the eventual American Convention on Human Rights.

In the interim, as a reaction to the Cuban Revolution in 1959, the Inter-American Commission on Human Rights was created, not by a treaty, but by a political resolution of the OAS, with the very limited function of observing and studying the human rights situation in the Americas. It was authorized by the OAS political bodies to make general recommendations to the member states, but it was not until 1965 that the Inter-American Commission was granted the authority to receive, examine, and make decisions on individual complaints from inhabitants of the countries of the hemisphere. The worldwide decolonization movement increased the original OAS membership of 21 states to the current number of 35. The English-speaking Caribbean countries now comprise about a third of the OAS membership, and more recent members include Canada, which finally joined the Organization in 1990, and Belize and Guyana, which became members in 1991.

It was only after 1966 and the adoption of the two U.N. human rights covenants, the primary international human rights instruments in the world, that the inter-American system acknowledged the necessity of adopting a legally binding human rights treaty in the Americas. In 1969 the American Convention was adopted, but it did not enter into force until 1978, and the institutions created by the Convention were not in place until 1979. These institutions include a re-creation of the Inter-American Commission on Human Rights and the establishment of an Inter-American Court of Human Rights. The Inter-American Commission is located at the headquarters of the OAS, in Washington, D.C., whereas the Inter-American Court has its seat in San Jose, Costa Rica.

The Inter-American Commission on Human Rights currently holds two regular meetings of three-week duration per year, one in the spring and one in the fall, with an occasional one or two extraordinary meetings that can be as short as one day or as long as a week. The second week of each session is devoted exclusively to hearings between the parties on pending contentious cases. The Inter-American Court of Human Rights, for its part, holds four regular meetings of two weeks each per year, and has been advocating its eventual transformation into a full-time institution to deal with the ever-increasing workload. The Inter-American Commission effectively determines the workload of the Inter-American Court since only the Commission and state parties to the American Convention are authorized to present cases to the Inter-American Court, and a state has yet to present a case. To be presented to the Inter-American Court, a case must have been processed by the Inter-American Commission and a decision
taken. The literature in this field indicates that the Inter-American Commission is not to be understood as a court of first instance, and that the two organs are to be equal in competence. However, in practice, the Commission is becoming just such a court.

Each of the Inter-American human rights bodies has seven members, unlike the European system, which had a commissioner and judge for each state party to the European Convention. All thirty-four active member states of the OAS participate in the nomination of candidates to the Inter-American Commission on Human Rights and in their election. Only the twenty-four state parties to the American Convention, however, are authorized to participate in the nomination of candidates to the Inter-American Court of Human Rights and in their election. Currently, the Inter-American Commission has five male commissioners and two female commissioners, and the Inter-American Court has seven male judges. The seven commissioners serve four-year terms and may be re-elected only once. The seven judges serve six-year terms and also may be re-elected only once. In early June 2003, elections were held for four members of the Inter-American Commission and four judges of the Inter-American Court at the recent OAS General Assembly in Santiago, Chile. At the General Assembly, four new judges were elected to the Inter-American Commission, whereas one judge of the Inter-American Court was re-elected and three new judges elected for the first time. The new composition of the Inter-American Commission as of January 1, 2004, will be six male commissioners and one female commissioner, and the Inter-American Court, similarly, will have six male judges and one female judge. As a result of the elections, these bodies tend to reinvent themselves with each new configuration.

Currently, the Inter-American Commission on Human Rights has a professional staff of seventeen lawyers, of which I am one, and carries out basically two functions. The first is the examination and preparation of draft decisions of individual petitions, and the second is the performance of on-site visits and the preparation of draft country reports on the situation of human rights in the member states of the hemisphere. During approximately the first thirty years of the Inter-American Commission's history, from 1959 to 1989, that second function was really its primary function. The Inter-American Commission's reputation was built on the

1. The 35th member state of the OAS, Cuba, is still considered to be a member state of the Organization since the OAS Charter does not provide for the expulsion of any member state. The government of Fidel Castro, however, is considered to have voluntarily separated itself from the principles and purposes set forth in the OAS Charter, by adopting Marxism/Leninism, and since 1962 it has been excluded from participation in OAS activities.
importance of its on-site visits and the seriousness of the approximately two or three hundred page country studies that analyzed the human rights situations in these member states.

Since the entry into force of the American Convention and the creation of the Inter-American Court of Human Rights, the Inter-American Commission’s functions regarding individual petitions have increased in importance as its on-site visits and country reports have faded. Since 1965, the Inter-American Commission has opened approximately 12,500 cases, whereas the Inter-American Court has taken decisions in approximately 45 cases since its first judgments were issued in 1987. The Inter-American Court has two principal functions: first, issuing legally binding decisions on contentious cases, and second, issuing advisory opinions. It has issued 17 advisory opinions to date.

The Inter-American Commission on Human Rights was not given explicit authority to carry out on-site visits; it created that competence by dint of its own initiative. The Inter-American Commission’s Statute, which is prepared by the member states of the OAS, authorized it to hold meetings in any state in the hemisphere, and the Commission converted that authorization into a mandate to conduct monitoring and the preparation of a report on the human rights situation in the country visited. These reports dominated the agenda of the OAS General Assemblies for many years, especially during the long period of military dictatorships in the region, when the Inter-American Commission critically reviewed the behavior of these states as regards their failure to respect human rights norms.

After the initial period of on-site visits and country reports (1959-1989), the period from 1989 to the present, which can be called the second period, has been characterized by the creation of the Inter-American Court of Human Rights. The Inter-American Court was created in 1979, but did not issue its first decisions on the merits in contentious cases until 1988-1989. This second period has been dominated by the processing of individual petitions. As a result of the re-democratization of the Americas, the barrier to the presentation of petitions, which is the exhaustion of domestic remedies, has been easier to overcome since there are now domestic remedies to exhaust. States tend to answer complaints that the Inter-American Commission sends them, which for years they did not do, or did so erratically. The Inter-American Court took approximately ten years to begin to function properly. From 1979–1986, it received no contentious cases. But since 1986, the Inter-American Commission has been presenting cases regularly to the Inter-American Court.

Any individual may present a petition to the Inter-American Commission on Human Rights, alleging the violation of a right set forth
either in the American Convention, for state parties thereto, or in the American Declaration, for those OAS member states that are not parties to the Convention. The violation must be attributable to agents of the state, or the failure of the state to act, for example, as in the investigation of a crime, or in the execution of a judicial sentence. Before the Inter-American Commission will consider a petition, the alleged victims must have exhausted domestic remedies at the national level. This requirement is crucial and underlines the general principle of international law that the international system plays a subsidiary role and is triggered by the failure of national law to function properly. If every member state had a functioning and effective Bill of Rights as part of its Constitution that included all the rights adopted at the international level, then the inter-American machinery would be redundant. It is the failure to observe human rights at the national level that has created the necessity for the adoption of international standards and mechanisms. If there has been a manifest denial of justice, then the exhaustion requirement is waived. A manifest denial of justice occurs: 1) if the state fails to act or provide a remedy for the alleged violations; 2) if the judicial system does not function, and there has been an unwarranted delay in reaching a decision in the national courts; or 3) if the alleged victims have been denied access to the remedy.

As with the newly created International Criminal Court, if a state demonstrates good will and seeks to resolve the issue at the national level, then there is no reason for the Inter-American Commission on Human Rights to initiate processing of the complaint. Obviously, reality is more complicated, and many issues cannot be solved easily or quickly. National judicial systems may get bogged down by overuse, creating due process violations, which in many cases are also violations of domestic law. These problems, in turn, are not solved at the national level because of the inability of the national system to cope with the large number of pending cases.

On balance, today there are twenty-four state parties to the American Convention on Human Rights, which includes all of Spanish-speaking Latin America and Brazil. Of those twenty-four state parties, twenty-one have accepted the contentious jurisdiction of the Inter-American Court of Human Rights, including all the Spanish-speaking countries, as well as Brazil, Suriname, and Haiti. Grenada and Jamaica have ratified the American Convention but have not accepted the Inter-American Court’s jurisdiction. Barbados and Trinidad and Tobago have ratified the Convention and accepted the Inter-American Court’s contentious jurisdiction, but Trinidad and Tobago denounced the Convention on May 26, 1998, over the issue of the death penalty — the first country to do so.
That denunciation went into effect one year later, and, consequently, there are now twenty-four (rather than twenty-five) state parties to the American Convention and twenty-one (rather than twenty-two) states that currently accept the Inter-American Court’s contentious jurisdiction. As mentioned earlier, neither the United States nor Canada has ratified the American Convention.

III. WHAT HAVE WE LEARNED FROM LOOKING AT THE HISTORY OF THE SYSTEM?

The Inter-American Commission’s greatest contribution to the inter-American system has been in de-legitimizing nondemocratic governments by means of the monitoring conducted during its on-site visits, and as a result of the presentation of its country reports to the OAS political organs and to hemispheric public opinion in general. These country reports are presented to the political organs and have dominated the agendas of the OAS General Assemblies for many years. The documentation presented by an intergovernmental organization of human rights violations committed by states against their own populations has a credibility not achieved by reports issued by nongovernmental organizations, and every state will fight not to be censored by its peers. In 1980, Argentina, for example, threatened to pull out of the OAS fearing censure because of the Inter-American Commission’s report on human rights violations in that country, which focused, inter alia, on the military regime’s policy of “forced disappearances.”

Also, it has been one of the first acts of governments that have made the transition from dictatorship to democracy to ratify the American Convention on Human Rights, as was the case with Nicaragua, Argentina, and Chile. In the past two decades, we have also seen a dramatic increase in the number of states accepting the contentious jurisdiction of the Inter-American Court of Human Rights, with ten states accepting its jurisdiction in the 1980s, and another eleven in the 1990s. Barbados is the first to accept the Inter-American Court’s jurisdiction in this decade (June 4, 2000) which we hope is an auspicious sign suggesting increased participation by the English-speaking states in the system.

The democratization of the hemisphere is the central political advance in the region during the twentieth century, and the Inter-American Commission’s role in this political development has been crucial. In 1991, the OAS General Assembly adopted Resolution 1080, which has now evolved into a treaty, the Inter-American Democratic Charter, which attempts to guarantee democracy in the Americas. The obligations
incumbent upon member states under this Charter require the convocation of a meeting to discuss collective action in the case of any interruption of the democratic process in any member state in the region.

The fact that the region now attempts to guarantee democracy has also brought about a change in the nature of the violations presented to the Inter-American Commission on Human Rights. Whereas the earlier period (1959-1989) of the Inter-American Commission’s history was replete with petitions concerning forced disappearances, extrajudicial executions and torture, petitions presented in recent years concern problems common to most democratic states, such as violations of due process, delays in judicial proceedings, disputes over property rights, and status questions (e.g. loss of employment, decrease in pension, and the like). One might even characterize this change as the Europeanization of the inter-American system. At the same time, the European system, (which, since Protocol 11 now comprises only a single organ, the European Court of Human Rights, with the European Commission having been fused into the new European Court), also is dealing with different violations due to the composition of the newly democratic governments of the new member states of the Council of Europe. The membership of the Council of Europe now, in July 2003, comprises forty-five member states, and the conflicts occurring in these states, such as the conflict in Russia with Chechen rebels, and the incidents of torture in Turkey, might justify characterizing this development as the Latin-Americanization of the European system.

But there are many things that the inter-American system can still learn from the European model. The inter-American system is on the road set by the Europeans and if it continues to function as it is at present, it can be assumed that there will also be an eventual fusion of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The President of the Inter-American Court, the distinguished Brazilian jurist, Antonio Cancado Trindade, in his public appearances during the past few years, has called for a Protocol 11 for the inter-American system and direct access for alleged victims to the Inter-American Court. I do not see this happening tomorrow, but I see it clearly on the horizon.

What have we learned? We have learned that, in general, the member states of the Organization, the state parties to the American Convention, have accepted this system of monitoring and supervision. They have accepted the judgments of the Inter-American Court of Human Rights and, this is surprising, because the decisions of the Commission still generally remain unobserved in comparison.

I was glad to hear Jorge Santistevan expand on Dennis Jett’s comments regarding the lack of confidence in the judicial system in the Americas.
But there is a greater problem, which is the total degradation of democratic institutions in the hemisphere. That is what I understood him to say and that is also what our Inter-American Commission on Human Rights has said in its most recent Annual Report.

The most remarkable development in the evolution of the inter-American human rights system, and I cannot emphasize this enough, is that it has become accepted. All of the Latin countries in the hemisphere have ratified the American Convention. I can recall approximately twenty-two years ago, Cesar Sepulveda, a distinguished Mexican jurist and member of the Commission, telling me, “Christina, this system was not made for supervising the human rights performance of our countries,” meaning Mexico and the United States. In his view, the inter-American system was designed to monitor small countries that are considered insignificant on the world stage, but not big countries such as Mexico, Brazil, and the United States; that view has now been totally superseded. Brazil and Mexico are state parties to the American Convention and have accepted the contentious jurisdiction of the Inter-American Court, whereas the United States, although it signed the Convention during the Carter Administration, still has not ratified it. The struggle for legitimacy of the inter-American human rights system has been largely won in Latin America but has yet to be won in the English-speaking states in the region.

IV. WHAT CAN WE SAY ABOUT STATE COMPLIANCE AND STATE NONCOMPLIANCE WITH THE RECOMMENDATIONS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AND THE JUDGMENTS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS?

The American Convention provides that the judgments of the Inter-American Court of Human Rights are legally binding. A court judgment generally consists of two parts: 1) the reparations, which includes both material and moral damages, and costs and expenses, and 2) the obligation to investigate, try, and punish those responsible for the violation. Given that Latin America has now demonstrated ownership of the system, and approximately forty-five cases have been decided by the Inter-American Court, some preliminary critical observations are in order. In most cases, the state is prepared to pay the pecuniary reparations ordered by the Inter-American Court, but only in the rarest case is it willing to investigate, try and punish the perpetrators, and in those rare cases where it does punish
them, they tend to be released from prison after short periods, or never serve prison terms at all.

This climate of impunity characterizes the Americas, and amnesty laws have proliferated throughout the region. The Inter-American Commission on Human Rights, in 1992, was the first international human rights body to declare in two cases, dealing with victims in Argentina and in Uruguay, that amnesty laws were incompatible with the obligations of a state in the inter-American system. These were, perhaps, the Inter-American Commission’s most important decisions, and their effects are still being felt. The Inter-American Commission also took the issue to the Inter-American Court of Human Rights in the context of the Peruvian amnesty laws in Barrios Altos, and in a judgment issued on March 14, 2001, accepted the Commission’s arguments that the amnesty laws were incompatible with the state’s obligations under the American Convention.

The Commission amended its Rules of Procedure in 2001 in order to give greater normative value to their decisions which, according to the American Convention, are not explicitly defined as legally binding. The most important amendment has been in Rule 44, which provides that if the state has not complied with the Inter-American Commission’s recommendations as set forth in the merits report on the case, the case shall be sent to the Inter-American Court of Human Rights, unless four members of the Commission take a reasoned decision that it should not be sent. This change in the Rules will undoubtedly lead to a greater number of cases being sent to the Inter-American Court. In this year alone, ten cases had already been sent as of July, whereas in all of last year only seven cases were sent to the Inter-American Court.

The Inter-American Court of Human Rights also amended its Rules of Procedure, and the most significant amendment was to Rule 23, which grants autonomy to the representatives of the victims. Whereas previously the alleged victims could only speak before the Inter-American Court through the Inter-American Commission on Human Rights, except for the reparations stage of the proceedings, now they are autonomous throughout the entire proceedings. Unlinking the alleged victims from the Inter-American Commission will doubtless also result in a change in the role of the Commission before the Inter-American Court. Until now, the Inter-American Commission’s role was that of a quasi-judicial organ when the

case was pending before it; when it decided the case, it was transformed into the advocate of alleged victims before the Inter-American Court. The representatives of alleged victims, in many ways the true party to the case, were euphemistically known as the assistants of the Inter-American Commission's delegates. Now, the courtroom will be reconfigured and alleged victims and the state will have their respective seats before the Inter-American Court as the parties to an individual case, whereas the Inter-American Commission is a party only in the procedural sense, and will modify its role, foreseeably, to that of defender of the best interests of the system.

As regards the larger issue of state compliance with decisions of the system, having been very much involved with the cases presented by the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against the government of Peru during the 1990s, I will take my examples from that period.

In April 1992, President Fujimori abolished the Peruvian Congress and Supreme Court, and was accused of having perpetrated a coup against his own government, a so-called autogolpe. In an act of political brinkmanship, President Fujimori appeared a month later at the OAS General Assembly, held in the Bahamas, normally a political gathering of foreign ministers of the region, which is generally only attended by one head of state, that of the host country. President Fujimori came to the OAS General Assembly in order to make a plea to the foreign ministers of the region to accompany him in a democratization process which would culminate in the election of a more representative Congress. The OAS, which was actively involved in monitoring democratic transitions in the hemisphere and observing electoral processes, could not refuse to provide the assistance requested by the Peruvian head of state. With OAS assistance, elections were held and a new Congress was elected. Soon thereafter, a new constitution, the Peruvian Constitution of 1993, was adopted. The 1979 Peruvian Constitution did not permit the re-election of the President, but the 1993 Constitution allowed one re-election. As a consequence, President Fujimori was re-elected in 1995. He sought re-election again five years later, although the 1993 Constitution only allowed one consecutive re-election.

In order to deal with the problem of one consecutive re-election, President Fujimori's lawyers argued that since the 1993 Constitution came into force in 1993, that period should be considered as his first term under the new Constitution, although in reality it was his second term. The new Congress, which was controlled by President Fujimori's political party, adopted a law to allow the President to run for re-election. Three judges of Peru's Constitutional Tribunal, however, decided that this law,
facilitating the President’s unprecedented re-election, was unconstitutional. In reprisal, the government-party-dominated Congress impeached the three judges of the Constitutional Tribunal. These three judges, in turn, presented a petition to the Inter-American Commission on Human Rights, alleging violation of their rights, stating that their impeachment had been driven by political motives and without the requisite guarantees of due process. The case was a quintessential political case, presented to the Inter-American Commission by Lourdes Flores, a lawyer and politician, who, before the Inter-American Court of Human Rights, was considered the assistant to the Delegates of the Commission.

The processing of Constitutional Tribunal was complicated by the fact that on July 9, 1999, the government of Peru withdrew its acceptance of the Inter-American Court’s contentious jurisdiction under Article 62(2) of the American Convention.

In May 1999, the Inter-American Court of Human Rights had issued its judgment in Castillo Petruzzi, which involved four Chilean civilian nationals who were convicted of terrorism by a military court in a judicial proceeding that was held to be devoid of due process. The Inter-American Court, in its judgment, called for the Chileans to be retried in a civilian court and to be provided with due process guarantees. In an earlier case, however, Maria Elena Loayza, the Inter-American Court, in a judgment dated September 19, 1997, ordered the release of a Peruvian wrongfully imprisoned on charges of terrorism. Loayza, a civilian, had been tried twice, first by a military court and then by a civilian court, on the same facts and for the same crime, in violation of the principle non bis in idem (double jeopardy) set forth in the American Convention. The government of Peru, to everyone’s surprise, within a month of the decision, released Loayza in compliance with this judgment, but two years later, in 1999, in the context of the Castillo Petruzzi judgment, it announced that it would not release the four Chileans. President Fujimori accused the Inter-American Court of calling for the release of all three thousand terrorist prisoners in Peruvian prisons.

Ostensibly, in order to prevent being ordered to release all the convicted terrorists, President Fujimori announced that Peru would withdraw from the Inter-American Court of Human Rights, and on July 9, 1999, it presented its declaration of withdrawal from the Inter-American Court’s contentious jurisdiction to the OAS Secretary General. A week earlier, on July 2, 1999, the Inter-American Commission on Human Rights had filed its Application on behalf of the three impeached judges in Constitutional Tribunal with the Inter-American Court. The Inter-American Court had to determine whether it still had the competence to examine the case.
Article 78 of the American Convention allows a state to denounce the American Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Peru, however, did not attempt to denounce the American Convention, but rather expressed its intent to remain a state party, while withdrawing its unilateral acceptance of the Inter-American Court’s contentious jurisdiction, effective immediately. It argued that since several states had ratified the American Convention without accepting the jurisdiction of the Inter-American Court of Human Rights (e.g., Grenada and Jamaica), that a state that had accepted the contentious jurisdiction could subsequently withdraw that acceptance, if it chose to do so. It would simply be placed in that earlier position which Grenada and Jamaica found themselves in at the time.

The Commission, for its part, argued that the Convention did not provide for the withdrawal of acceptance of the Inter-American Court’s jurisdiction once it was accepted and, therefore, it was not possible for Peru to do so. The only possibility for the state to remove itself from the Inter-American Court’s jurisdiction was by means of a complete denunciation of the American Convention, under Article 78, and that denunciation would not take effect immediately, but only following the expiration of a one year period.

The Inter-American Court of Human Rights, in its decision on the issue of competence raised in this case, accepted the Commission’s argument, and held that it was competent to decide this case and also a second pending case that was filed on behalf of Baruch Ivcher Bronstein, the majority owner of a television station that broadcast investigative reports critical of the government. Ivcher, a Peruvian-Israeli dual national, was stripped of his Peruvian nationality in a procedure devoid of due process guarantees in order to remove the television station from his control, since under Peruvian law telecommunications could only be in the hands of Peruvian nationals.

Consequently, in both of these cases, Constitutional Tribunal and Baruch Ivcher Bronstein, the government of Peru, despite having participated in the litigation of the case before the Commission and initially before the Inter-American Court on the issue of competence, refused to participate in the actual litigation of the merits. Given the high profile of these cases and the scandal surrounding Peru’s withdrawal from the Inter-American Court of Human Rights, the existence of these cases before the human rights organs of the inter-American system without the participation of the Peruvian state contributed to the undermining of the integrity of the Fujimori government. Since the Inter-American Court held Peru’s purported withdrawal to be “inadmissible” since it did not conform
to Article 78 of the Convention, it proceeded to hear the case on the merits, but without the presence of the governmental representatives. In fact, the first day of the public hearing on the merits of Baruch Ivcher Bronstein before the Inter-American Court took place on Monday, November 20, 2000, the same day on which President Fujimori, from Japan, presented his letter of renunciation of the Presidency to the Peruvian Congress.

Following the renunciation of President Fujimori, the Inter-American Commission on Human Rights encountered completely changed circumstances in dealing with the transitional government of President Paniagua, a highly regarded constitutional lawyer. The Peruvian government did not participate in the litigation of Constitutional Tribunal and Baruch Ivcher Bronstein before the Inter-American Court of Human Rights, and the Inter-American Court found for the Inter-American Commission/petitioners. On February 9, 2001, the Minister of Justice of Peru, Diego Garcia Sayan traveled to Costa Rica and presented the Inter-American Court with a note reaffirming Peru’s acceptance of the contentious jurisdiction, without interruption, since its original declaration was deposited with the OAS on January 21, 1981, thereby disavowing former President Fujimori’s attempt to withdraw in 1999. Under the transitional government, the three magistrates were reinstated in their former positions as magistrates of the Constitutional Tribunal and Baruch Ivcher regained control over his television station.

Another politically important case by the Inter-American Commission on Human Rights presented to the Inter-American Court against the government of Peru was Barrios Altos, which involved the Peruvian amnesty laws. This case involved the mistaken killing, in 1991, of some fifteen individuals and the injury of four others at a private block party in an apartment as a result of a raid carried out by a paramilitary commando team. The Peruvian security forces had targeted suspected members of the terrorist organization, Sendero Luminoso, but their information was incorrect and instead innocent civilians were killed and injured. This case was being investigated when, in order to halt the investigation, the Peruvian Congress passed an amnesty law to prevent the investigation from continuing and the prosecution of those responsible. Judge Saquicuray, who presided over the judicial proceedings in this case, took the position that the amnesty law did not affect the case that she was trying. In response, the Peruvian Congress passed a second amnesty law, which specifically prohibited any judicial review of the first amnesty law. On February 19, 2001, the transitional government of President Paniagua acknowledged Peru’s international responsibility in the case. Subsequently, on March 14, 2001, the Inter-American Court delivered its
judgment on the merits and as a result the Peruvian amnesty laws were rendered ineffectual.

It is also worth mentioning some cases in which the member states of the OAS have not complied with the decisions of the human rights organs of the inter-American system. One prominent case of noncompliance involves the United States and the detention of over three hundred persons at the U.S. Naval Base at Guantanamo Bay, Cuba. These persons were detained in early 2002 in Afghanistan, Pakistan, Bosnia, Algeria, and other locations and brought to Cuba; they represent approximately forty nationalities, including those of U.S. allies, such as Great Britain and Australia. They are being indefinitely held without charges, without access to lawyers, in conditions described as humiliating, and are being deprived of any information regarding their status or their future.

On November 13, 2001, President Bush issued a Military Order that stated that no U.S., foreign, or international court has jurisdiction over suspected terrorists. As early as January 2002, U.S. lawyers filed for habeas relief on behalf of the Guantanamo detainees in the U.S. District Court in the Central District of California. The district court dismissed the suit for lack of standing since none of the lawyers had contact with any of the detainees, and did not even know any of their names. Shortly thereafter, in February 2002, a second habeas suit was filed on behalf of several British, Australian, and Kuwaiti detainees who had been identified, since delegations from the International Committee of the Red Cross and from these friendly governments had been allowed to visit their nationals at Guantanamo and to facilitate correspondence with family members, who were thereby notified of their whereabouts. Yet, once again, the district court, this time in the D.C. Circuit, threw out the request for habeas relief on the grounds of lack of jurisdiction, basing its decision on the precedent set forth in an old Supreme Court case, Johnson v. Eisentrager.

The petitioners in both cases appealed to the respective courts of appeal. Both the Ninth Circuit and the D.C. Circuit Courts of Appeal threw out the appeals, for lack of standing and for lack of jurisdiction, respectively.

In March 2002, having exhausted their domestic remedies, the petitioners came to the Inter-American Commission on Human Rights and requested precautionary measures, arguing the seriousness of the violations and the urgency of their situation, since these individuals had been arbitrarily detained for over a year, and were in danger of irreparable
harm. The Inter-American Commission granted the request for precautionary measures and requested that the United States clarify the status of these persons who were under its jurisdiction and control.

The United States rejected the Inter-American Commission's precautionary measures and responded that there was no doubt as to the status of the detainees, that they were enemy combatants and that only international humanitarian law was applicable to their situation, not international human rights law. Further, the United States had never consented to the Inter-American Commission applying norms of international humanitarian law to OAS member states.

Another important example of noncompliance involves the mandatory application of the death penalty in certain states in the Caribbean. The Inter-American Commission on Human Rights has held in a number of cases that the mandatory application of the death penalty for murder violates the American Convention for failure to give individual consideration in the sentencing phase. In a case involving the United States, it held that the execution of juvenile offenders who commit capital crimes also violates the American Declaration, even though the Declaration does not specifically address the issue of juvenile offenders who commit capital crimes, in contrast to the American Convention. The Inter-American Commission, however, uses the American Convention to interpret the Declaration, since the two instruments must be seen as complementary, and as interpreting the same rights in the same way. This has led to criticism, however, that the Inter-American Commission is holding states that have not yet ratified the Convention to the same standard of compliance as those that have, despite the difference in the instruments.

Article 4 of the American Convention specifically prohibits the imposition of the death penalty on persons who committed capital crimes under the age of 18. In addition, the member states of the OAS have adopted an Additional Protocol to the American Convention, calling for the abolition of the death penalty. The tendency of international human rights law is toward the abolition of the death penalty, although the death penalty, per se, is not yet illegal. In this recent decision of the Inter-American Commission on Human Rights, involving the imposition of the death penalty in the United States, the Commission held that the international human rights law prohibition on the execution of minors had

V. What Recommendations Can We Make to This Conference?

Since this conference deals with the issue of the rule of law I would recommend that the University of Florida’s law school teach the OAS system. Currently, only one law school in the United States seriously teaches the inter-American system for the protection of human rights. The Washington College of Law at American University has sponsored for a number of years an annual Moot Court competition on the inter-American system, and approximately two hundred law schools throughout the hemisphere now participate in this annual event. It is an excellent way for students to learn the jurisprudence of the inter-American system for the protection of human rights. Furthermore, American University’s law school, with the assistance of donors in the Netherlands, has established a case law digest of inter-American jurisprudence, which is available on the University’s web site. It also has a clinic where students learn how to present cases to the Inter-American Commission on Human Rights, and since they are located in Washington, students attend hearings while the Commission is in session. Lastly, American University’s law school sponsors a Summer Human Rights Academy, where students study the inter-American and European systems, as well as the United Nations system for the protection of human rights and international humanitarian law and other subjects.

There is no reason why the Washington College of Law at American University should be the only U.S. law school engaged in teaching the inter-American system as a separate course and not simply as part of international humanitarian law or international law generally. The University of Florida could create a legal aid clinic, for example, to assist petitioners in bringing cases to the Inter-American Commission on Human Rights. It could send students to work as fellows and interns at the Inter-American Commission and the Inter-American Court of Human Rights in an arrangement such as the one we have with Notre Dame’s law school, where the University pays half of the student’s maintenance expenses and the Commission pays the other half. The Inter-American Commission and Inter-American Court are seriously understaffed and would be pleased to take on more students as junior lawyers.

Further, the law school could hold training seminars for judges and lawyers on the obligations of state parties to the American Convention. There are model laws, such as Law 288 in Colombia, which could be used as examples for other countries to follow in reforming their own legislation to achieve compliance with the judgments of the Inter-American Court of Human Rights.

Also, the University of Florida’s law school, in conjunction with other law schools, could advocate and propose to the government suitable candidates for membership on the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Each body has seven members, who pursuant to their respective statutes, are persons of recognized competence in the field of human rights. As states seek candidates for these posts, law schools and bar associations could play a significant role in promoting distinguished individuals in order to prevent the process deteriorating into a political patronage system.

Lastly, the Inter-American Commission on Human Rights has established Rapporteurships in a number of areas, such as freedom of expression, women’s rights, children’s rights, indigenous people’s rights, etc. The University of Florida’s law school could advocate the creation of new Rapporteurships and could assist the Inter-American Commission’s Rapporteurs by presenting their own studies in these areas and identifying new directions of study. Further, members of the University of Florida’s law school faculty could write articles about the work of the Inter-American Commission and the Inter-American Court, studying and analyzing its growing jurisprudence, and educating the public at large about U.S. obligations in the field of international law. Recently, in Lawrence v. Texas, the U.S. Supreme Court for the first time recognized the existence of the jurisprudence of the European Court. While the United States is not in Europe, it is in the Americas, and common sense would suggest that U.S courts will soon look to the jurisprudence of the Inter-American Court as well. The academic community could play a greater role in assisting and analyzing the work of the inter-American system, and thereby improving it. More importantly, scholars can help the system achieve legitimacy as an important vehicle for upholding the rule of law in this country, as well as in this hemisphere.