

## REEVALUATING REGIONAL HUMAN RIGHTS LITIGATION IN THE TWENTY-FIRST CENTURY: THE CASE OF THE INTER-AMERICAN COURT

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Over the past few decades, regional human rights tribunals have grown in both number and activity. The European Court of Human Rights (European Court or ECHR) now receives tens of thousands of petitions and issues over fifteen hundred judgments on the merits each year.<sup>1</sup> The Inter-American Court of Human Rights recently tripled the number of cases that it resolves annually. At the time of this writing, in mid-2008, Africa's own regional human rights court, the African Court on Human and Peoples' Rights, prepares to begin hearing its first contentious cases.<sup>2</sup> Currently, sixty-eight states are subject to the decisions of the two established regional courts (forty-seven in Europe<sup>3</sup> and twenty-one in the Americas<sup>4</sup>), up from less than half that number twenty years ago.<sup>5</sup> In the nascent African system, twenty-four African Union

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<sup>1</sup> EUROPEAN COURT OF HUMAN RIGHTS [ECHR], ANNUAL REPORT 2007, at 134, 137 [hereinafter ECHR ANNUAL REPORT]. This and the other documents of the Court cited below are available at its Web site, <<http://www.echr.coe.int>>.

<sup>2</sup> See *Rights Court 'Yet to Start Work'*, BBC NEWS, Sept. 24, 2008, at <<http://news.bbc.co.uk/2/hi/africa/7633383.stm>>. Additionally, supranational bodies charged with establishing individual criminal liability have flourished over the past fifteen years. Beginning with the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda in 1994, these bodies now include the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court.

<sup>3</sup> ECHR, Composition of the Court, at the Court's Web site, *supra* note 1.

<sup>4</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2007, at 5 [hereinafter 2007 IACHR ANNUAL REPORT]. This report and the decisions and other documents of the Court are available at its Web site, <<http://www.corteidh.or.cr>>. The Uniform Resource Locator will be cited in full for documents that are available only in Spanish.

<sup>5</sup> See ECHR ANNUAL REPORT, *supra* note 1, at 11 (reporting that the European system exercised jurisdiction over twenty-two states in 1990; this number refers to the combined jurisdiction of the European Commission, now dissolved, and the Court); Inter-Am. Comm'n H.R., American Convention on Human Rights "Pact of San José, Costa Rica," at <<http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>>.

member states have ratified the Protocol establishing the African Court, with an additional twenty-five signatory states.<sup>6</sup>

Observing from the international level, scholars and practitioners interested in promoting human rights may at first instinctively assume that this growth of tribunals on the global stage necessarily signals an equivalent increase in the power of international human rights law to protect individuals throughout the world. Yet a disproportionate focus on these institutions' existence in isolation may lead us to overlook the actual degree of success that such tribunals have had in the countries subject to their jurisdiction. While ideally the growth of human rights bodies with binding legal authority (and the expansion of these bodies' jurisprudence) should indeed translate into proportionately better human rights practices on the ground, evaluating the domestic impact of recent supranational<sup>7</sup> decisions often reveals a vast gap between what regional courts order and what actually happens in a country. The mounting evidence that greater institutionalization of human rights protection at the supranational level does not necessarily increase respect for human rights on the ground points to the need for a new model of how and when supranational litigation can positively affect domestic human rights practices.

To date, the most comprehensive model for how and when supranational tribunals succeed in influencing human rights situations is that pioneered in 1997 by Laurence Helfer and Anne-Marie Slaughter, based largely on a study of the success of the European Court of Human Rights. Writing at a time when the ECHR enjoyed high rates of implementation of its decisions, Helfer and Slaughter identified a series of factors that they believed contributed to the ECHR's success and that could potentially be imported into other international systems.<sup>8</sup> However, Helfer and Slaughter's model acknowledged that the climate of entrenched rule of law and the frequently minor nature of violations seen in Western Europe had been key factors in the effectiveness of supranational litigation in the region.<sup>9</sup>

Now, the world's regional human rights tribunals (including the ECHR with respect to many newly admitted member states) face the challenge of advancing human rights in states that may resist supranational decisions and that suffer from large-scale, endemic human rights violations. In this environment, many of the factors that made the early European Court successful may lose much of their relevance and explanatory power. The future effectiveness of regional courts may depend instead on their ability to operate in ways relevant to a model of human rights advancement drawn precisely from states characterized by systematic violations and resistance to supranational authority. This article represents an initial effort to set forth

<sup>6</sup> See *Rights Court 'Yet to Start Work'*, *supra* note 2; African Union, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Oct. 15, 2007), at <<http://www.africa-union.org>>. The African Court on Human and Peoples' Rights will eventually merge with the Court of Justice of the African Union to create the African Court of Justice and Human Rights, which will assume jurisdiction over any human rights cases under consideration by the Court on Human and Peoples' Rights. See African Union, Protocol on the Statute of the African Court of Justice and Human Rights, July 1, 2008, available at <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>>.

<sup>7</sup> Note that our use of the term "supranational" throughout this piece does not imply that regional human rights courts have a direct, hierarchical relationship to domestic institutions or even that their judgments are automatically enforceable in domestic courts. Rather, we refer to regional courts as supranational simply in the sense that they exercise jurisdiction over a variety of countries and represent a judicial recourse for victims who have exhausted remedies available at the domestic level.

<sup>8</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273 (1997). Factors identified include, e.g., functional capacity, fact-finding capacity, quality of legal reasoning, and independence from political interests. See *id.* at 300–36.

<sup>9</sup> *Id.* at 329–30, 333–34.

some of the general contours of such a model, including what we believe to be several specific features of the role of supranational courts in this context.

We begin with the assertion that in states where respect for human rights is not entrenched, supranational tribunals are unlikely to enjoy the automatic implementation of their decisions, particularly when these decisions call for a significant political or financial commitment or implicate endemic human rights problems. As a result, supranational courts will often lack the power to trigger lasting improvements in the protection of human rights simply by directing governments to change their practices. Rather, the primary actors who provoke such improvements are generally the social movements, human rights activists, members of the media, members of government with progressive views on human rights, and others carrying on long-term advocacy campaigns or pushing for better policies on a given issue. We therefore maintain that supranational tribunals are most likely to be effective when their procedures and jurisprudence are relevant to such actors' long-term efforts to advance human rights.

A corollary of our argument is that supranational courts should view individual cases that are emblematic of persistent or structural human rights problems as opportunities to stimulate broader change on the relevant issues. Thus, we contend that courts should follow procedures that increase the relevance of court cases to domestic (and in some cases, international) movements working to eliminate the structural causes of the violations in question. Without this broad strategic focus, supranational litigation (which affords access to only a tiny fraction of victims) will function as a lottery in which the handful of petitioners whose cases reach a court will obtain benefits not available to the vast majority of similarly situated victims.

Finally, we emphasize that adjudicating human rights cases in ways likely to stimulate lasting change beyond a given case requires a court, while remaining impartial in its factual evaluations and legal determinations, nonetheless to stay in touch with factors such as the prevailing social and political climate in countries subject to its jurisdiction; the strategies of relevant national, regional, and international human rights campaigns; existing or planned government projects aimed at addressing human rights problems; and the shape of domestic public opinion on human rights issues. In this regard, it is axiomatic that courts, whether domestic or international, must understand the reality within which they work to be relevant and effective. Domestic tribunals, by their nature and location, are more likely to possess this type of awareness. Supranational courts, located far from some of the countries over which they exercise jurisdiction and immersed in an ever-growing network of global legal norms, are in greater danger of losing touch with the day-to-day realities on the ground. This potential remoteness, combined with the possibility of challenges to their authority, underscores the need for such tribunals to monitor the concrete factors working both for and against human rights in respondent states and to evaluate whether and how they can respond to these factors while maintaining their fundamental identity as impartial judicial bodies.

Although we briefly assess recent developments in the European human rights system, we use the Inter-American Court as the principal lens to elaborate on our arguments. Drawing on case studies from the Court's jurisprudence, we argue that this body has been most effective in contributing to respect for human rights when its judgments could be incorporated into domestic actors' broader strategies to promote positive change on the underlying issues. In recent years, however, the Court has undergone procedural reforms that have caused a case-by-case reduction in the days of public hearings held and the number of witnesses heard by the Court. These developments, we suggest, may sometimes reduce the effect of the Court's work

for domestic actors. We also consider possible advocacy and enforcement challenges presented by states' increasingly frequent strategy of acknowledging responsibility for alleged violations before the Court, sometimes leading to a reduction in independent fact-finding and live Court proceedings against them. Finally, we examine both positive and negative aspects of the recent jurisprudence of the Court, underscoring the need for it to render judgments that are relevant and responsive to the domestic reality in a given country. By critically evaluating these aspects of the Inter-American Court, we demonstrate how our theory of supranational litigation against states in which respect for human rights is not entrenched applies in practice, and we explore ways that supranational courts might adapt their working methods to maximize positive impact. We hope that our conclusions about the inter-American system serve as a starting point for related thinking about other systems and contribute to the consolidation of a more generally applicable framework for understanding how regional tribunals can advance human rights.

## I. THE ROLE OF SUPRANATIONAL TRIBUNALS IN ADVANCING HUMAN RIGHTS

### *Moving Beyond the Western European Model of Compliance*

Until 1988 (the year that the Inter-American Court issued its first merits judgment), the only regional human rights tribunal resolving contentious cases was the European Court of Human Rights. Created in 1959,<sup>10</sup> the ECHR hears interstate and individual cases against states parties to the European Convention on Human Rights. Recognition of the ECHR's contentious jurisdiction is now compulsory for all parties to the Convention.<sup>11</sup>

For nearly three decades, the European Court thus provided the only model for observing whether and how a regional human rights court could influence state practices. The model was widely hailed as a triumph by scholars and practitioners alike. Helfer and Slaughter, writing in 1997, called the ECHR a "remarkable and surprising success"<sup>12</sup> and noted that the degree of compliance with its judgments in individual cases had been "extremely high."<sup>13</sup> Indeed, examples abound of cases in which the ECHR's decisions resulted in concrete changes in policy and practice. Legal scholar Dinah Shelton observes:

In Europe, it is relatively easy to demonstrate the effect of the ECHR . . . Austria, for example, has modified its Code of Criminal Procedure; Belgium has amended its Penal Code, its laws on vagrancy, and its Civil Code; Germany has modified its Code of Criminal Procedure regarding pre-trial detention, given legal recognition to transsexuals, and taken action to expedite criminal and civil proceedings; the Netherlands has modified its Code of Military Justice and the law on detention of mental patients; . . . Sweden introduced rules on expropriation and legislation on building permits; Switzerland amended its Military Penal Code and completely reviewed its judicial organization and criminal procedure applicable to the army; and France has strengthened the protection for privacy of telephone communications.<sup>14</sup>

<sup>10</sup> ECHR ANNUAL REPORT, *supra* note 1, at 11.

<sup>11</sup> *Id.*

<sup>12</sup> Helfer & Slaughter, *supra* note 8, at 276.

<sup>13</sup> *Id.* at 296.

<sup>14</sup> Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 147 (2003) (footnotes omitted). Some observers caution that compliance in Europe may be more nuanced than

Given the generally high degree of respect for the rule of law by the governments in question, there is little doubt that the legal reforms and policy efforts cited above often, if not always, translated into better protection of human rights for the intended population. Shelton states that the ECHR has clearly influenced, *inter alia*, “practice in criminal law, the administration of justice and family, immigration, media and property law.”<sup>15</sup>

Broadly speaking, then, if one takes the European experience through the early 1990s as a model for how supranational tribunals should carry out their work, it follows that a tribunal should issue jurisprudence instructing governments to alter their policies to correct human rights problems, knowing that in a large percentage of cases, such instructions will shape actual domestic policy formation and practice. Under this model, advances in procedure or jurisprudence that strengthen a human rights system at the regional level—such as by allowing it to process more cases—would translate into corresponding enhanced human rights protection at the domestic level.

Over the past fifteen years, however, supranational tribunals have sought to influence human rights situations far different from those seen in Western Europe in the first decades of the ECHR. Even the political landscape of the Council of Europe has changed considerably during this time with the entry of a significant number of new members (largely former Soviet bloc states). As we contend in the paragraphs that follow, given the complex and often severe human rights problems that regional tribunals must address today, the model of governmental compliance exemplified by the early ECHR cases is no longer the primary reference point for how regional courts influence state practice. In fact, it may now be the exception rather than the rule.

The reason for this discrepancy becomes clear when one considers the specific set of factors that characterized the European system through the early 1990s. Most salient, at this time the European Court exercised jurisdiction over a relatively homogeneous group of Western European states in which democratic governance and the rule of law were already well established. Many states in the Council of Europe prior to the collapse of the Berlin Wall shared a specific commitment to implement the decisions of the European Court in their domestic systems, a commitment that existed not only in law, but also in practice.

While hierarchical implementation of human rights jurisprudence generally (if not always) worked in the European system, we argue that this had less to do with the inherent nature of supranational tribunals than with the particular domestic conditions in the states involved. Indeed, in their study of the European system in 1997, Helfer and Slaughter acknowledged that for a human rights body to enjoy the levels of state compliance seen in Europe, ideally certain political and structural conditions must be met. They noted that

existing scholarship demonstrates. Professor Mark W. Janis, for example, calls for more comprehensive studies of the past and present effectiveness of the European system. Janis notes that while the system’s compliance record may well be comparable to that of many domestic courts, without truly comprehensive data, “one must be careful not to go too far in asserting a nearly perfect record for compliance with Strasbourg judgments and decisions.” Mark W. Janis, *The Efficacy of Strasbourg Law*, 15 CONN. J. INT’L L. 39, 41–42 (2000). We note, for example, the large number of judicial process violation cases lacking compliance by Italy as a clear counterexample. See Council of Europe, Simplified Global Database with All Pending Cases for Execution Control (July 2007), at <[http://www.coe.int/t/e/human\\_rights/execution/02\\_documents/PPIndex.asp](http://www.coe.int/t/e/human_rights/execution/02_documents/PPIndex.asp)> [hereinafter Global Database]. Whether or not the European system ever enjoyed near-perfect compliance, what is important here is the general trend toward domestic implementation that was historically demonstrated in a large number of European cases.

<sup>15</sup> Shelton, *supra* note 14, at 147.

the existence (in states subject to the jurisdiction of a supranational tribunal) of domestic government institutions committed to the rule of law, responsive to the claims of individual citizens, and able to formulate and pursue their interests independently from other government institutions, is a strongly favorable precondition for effective supranational adjudication. It may even be a necessary (although not sufficient) condition for maximally effective supranational adjudication.<sup>16</sup>

They likewise highlighted the “minor and unintentional nature of most violations” at issue in the European system, adding that the nonviolent, administrative character of the majority of petitions to the ECHR as of 1997 meant that resolving the underlying problems did not require large-scale policy overhauls by the offending states.<sup>17</sup>

By contrast, the entry of roughly twenty new members into the Council of Europe beginning in the early 1990s—many of which are former Soviet bloc states typified by grave violations and more limited experience of the rule of law than Western Europe—has presented the ECHR with a significantly different political climate. Today, the notion of hierarchical implementation of jurisprudence is less and less relevant even in Europe, as the ECHR faces both challenges to its authority<sup>18</sup> and an increased number of cases involving systematic, violent human rights violations.<sup>19</sup> Its 2007 annual report notes that five member states—Russia, Turkey, Romania, Ukraine, and Poland—accounted for 59 percent of the Court’s docket as of the end of that year.<sup>20</sup> In the prior year’s report, virtually all of the example cases involving deprivations of life, excessive use of force by state authorities, torture, and unlawful arrest arose from facts in new member states (notably Russia), and in Turkey.<sup>21</sup> Further, the statistics of the Council of Europe’s Committee of Ministers reveal that the majority of ECHR judgments awaiting compliance supervision by the committee (excluding the large family of similar cases involving delays in civil and criminal proceedings in Italy) now involve Eastern European member states and Turkey.<sup>22</sup> These are precisely the sort of states whose political and human

<sup>16</sup> Helfer & Slaughter, *supra* note 8, at 333–34.

<sup>17</sup> *Id.* at 329 (citing Menno T. Kamminga, *Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?* 12 NETH. Q. HUM. RTS. 153, 153–54 (1994)). Christina M. Cerna, a specialist in the Inter-American Commission Secretariat, also underscores this distinctive feature of the early ECHR, stating: “Until 1989, the European human rights system functioned as a kind of regional Supreme Court, concerned with what I would call lifestyle issues, whereas the Inter-American system dealt with traditional human rights violations involving the right to life and physical integrity.” Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 95 ASIL PROC. 75, 76 (2001). Note that while we highlight this contrast in relation to the ability of human rights courts to stimulate change on the relevant issues, we do not mean to minimize the serious impact that nonviolent or “administrative” violations can have on victims’ lives (examples that come to mind include cases of discrimination or delays and irregularities in judicial proceedings).

<sup>18</sup> Shelton, *supra* note 14, at 143 (noting challenges to the authority of the Court’s judgments in cases of serious or widespread violations).

<sup>19</sup> Significantly, in those cases the ECHR’s power has historically been weakest. *Id.* at 142 (“The ECHR has been fortunate in having few cases of gross and systematic violations. Those cases that have been brought indicate the limitations of the judicial process in resolving systemic failure of the rule of law.”).

<sup>20</sup> ECHR ANNUAL REPORT, *supra* note 1, at 136.

<sup>21</sup> ECHR, ANNUAL REPORT 2006, at 59–61, 63.

<sup>22</sup> Global Database, *supra* note 14. Note that multiple factors (such as the number of cases brought against a state, when they were decided, and how many issues are involved) influence the distribution of cases under supervision. We do not view these data as an exact measure of state willingness to implement ECHR decisions. However, they serve as a broad indicator of the scale on which enforcing compliance in newer member states is a challenge that the European system must address.

rights contexts over the past half-century have differed substantially from those of the traditionally democratic countries on which much of Helfer and Slaughter's analysis of ECHR effectiveness was based.<sup>23</sup> In fact, the large-scale or violent human rights violations seen in some of these countries often bear greater similarity to those that have plagued the inter-American human rights system for two decades.<sup>24</sup> Christina M. Cerna of the Inter-American Commission's secretariat noted in 2003 that "the conflicts occurring in these [some of the newly democratic] states, such as the conflict in Russia with Chechen rebels, . . . might justify characterizing this development as the Latin-Americanization of the European system."<sup>25</sup>

As this analogy suggests, the experience of the inter-American system has been far different from that of the early ECHR. When the Inter-American Court came into being in 1979, it entered a region characterized largely by authoritarian regimes, mass atrocities, and violent human rights violations, such as massacres in indigenous communities and prisons, as well as widespread forced disappearances of political dissidents. By the time the Court received its first contentious cases in 1986, the landscape in the Americas was changing, but still included several conflict-ridden states and recent transitional democracies. Today, the Court continues to adjudicate cases of severe, endemic violations such as paramilitary violence, summary executions, use of torture by police, and brutal violations against detained individuals.

Resolving these problems requires greater and more sustained efforts than were entailed by many of the policy changes triggered by the early ECHR. However, available evidence demonstrates that the Inter-American Court wields *less* rather than *more* political power to cause governments to undertake human rights reforms.<sup>26</sup> As we discuss below, throughout its lifetime the Inter-American Court has had to contend with explicit challenges to its authority, widespread noncompliance with certain elements of its decisions, and a shortage of political support from its parent organization, the Organization of American States.

The experience of the Inter-American Court and the challenges now facing the European system confirm our belief that the early European Court is not a representative model of how regional courts influence states' human rights practices outside the entrenched democracies of

<sup>23</sup> In an article published this year, Helfer discusses the more complex political landscape currently facing the ECHR and the European system's overwhelming docket crisis. In response to these challenges, Helfer argues that the European system should enact reforms to enhance its *embeddedness* in national legal systems, defined roughly as the extent to which the ECHR "can penetrate the surface of the state to interact" directly with government institutions. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 131 (2008). The ultimate goal of embeddedness is to bolster domestic institutions until they can assume the task of resolving violations without the need for intervention by the Court. *Id.* at 156. Under this same model, however, the ECHR is justified in increasing its level of scrutiny and intervention in states whose domestic systems are currently inadequate to remedy human rights violations. *See id.* at 138–46.

<sup>24</sup> Not to oversimplify, we recognize that the early European Court did address some cases that focused on situations of violence, even in established Western European democracies (to name just one well-known example, *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 25 (1978), considered brutal interrogation techniques employed by British forces in Northern Ireland). The data in the paragraphs above are meant to demonstrate a very broad trend; there are, of course, exceptions to each of the tendencies referenced here.

<sup>25</sup> Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT'L L. 195, 202 (2004).

<sup>26</sup> *See, e.g.*, Thomas Buergenthal, *New Upload—Remembering the Early Years of the Inter-American Court of Human Rights*, 37 N.Y.U. J. INT'L L. & POL. 259, 276–77 (2005) ("[D]espite the fact that this year the Court celebrates its twenty-fifth anniversary, it still has a long way to go to gain the acceptance and prestige in the Americas that the European Court enjoys in its region—or at least in the Western European parts thereof.").

Western Europe. This understanding is even more relevant when one considers that the African Court, too, will soon face significant challenges as it begins to operate in a climate of severe violations and lack of deep-rooted respect for the rule of law. In this regard, we note that the African Commission on Human and Peoples' Rights has operated in the context of limited compliance with its determinations.<sup>27</sup> The question presented, as we see it, is, how can tribunals positively influence human rights practices when dealing with states that may not automatically implement supranational judgments?

Primarily on the basis of a survey of case studies in the inter-American system,<sup>28</sup> we contend below that supranational tribunals will generally have the greatest impact when their procedures and judgments are relevant to the actors working to advance specific human rights in these countries, including not only state agents but also human rights organizations, social movements, and the media. This argument finds support in Helfer and Slaughter's analysis of factors that contribute to the effectiveness of a human rights tribunal, one of which is awareness of audience. Helfer and Slaughter note that even at its height, the ECHR recognized the value of addressing its jurisprudence to a broader audience than just governments, reflecting the following understanding:

Individuals and their lawyers, voluntary associations, and nongovernmental organizations are ultimately the users and consumers of judicial rulings to redress a particular wrong or advance a particular cause or set of interests. . . . [A]ppreciation of the relationship between these social actors and the institutions of state government opens the door to deploying them as forces for expanding the power and influence of supranational tribunals.<sup>29</sup>

We suggest, however, that rather than viewing local actors as forces to be deployed to increase the power of a tribunal, human rights tribunals should understand that international rights courts are most effective when their work contributes to efforts deployed *by* domestic activists as part of their broader human rights campaigns. Professor Obiora Chinedu Okafor, in an analysis of the effects of recommendations of the African Commission, comes closer to endorsing this view:

[A]n examination of the operations or mechanics by which [the African system's] influence was exerted reveals that the system was only able to work in the way it did largely because it allowed itself to be mobilised and deployed in creative ways by various activist groups

<sup>27</sup> Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004*, 101 AJIL 1, 5 (2007) (reporting that as of mid-2003, only 14 percent of African Commission cases had resulted in full compliance).

<sup>28</sup> We recognize that significant variation exists among states subject to the jurisdiction of the Inter-American Court, and that some states have stronger legal mechanisms for implementing its decisions than others.

<sup>29</sup> Helfer & Slaughter, *supra* note 8, at 312. Political scientists studying the European Union have argued that supranational litigation can serve as a catalyst for social mobilization by, *inter alia*, defining rights in ways that spur or strengthen the development of social movements around these rights and paving the way for future strategic litigation in domestic courts. Once mobilized, social actors can then exert influence on the broader policy issues at stake and potentially expand space for citizen participation in government processes in the long term. *See generally* RACHEL A. CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE* (2007) (analyzing the interactions between litigation and mobilization in the context of the European Court of Justice, with particular attention to gender equality rights and environmental protection). While the institutional setting of the European Union is distinct from that of the inter-American system, the basic principle that supranational cases can serve as focal points for domestic mobilization is relevant to our arguments regarding the role of the Inter-American Court.



that operated *within* Nigeria. . . . The system's influence enabled them . . . . to persuade many in the discerning public to put pressure on the military regime to act in the ways in which these activists desired, to justify preferred interpretations of existing constitutional provisions, and to embarrass (and de-legitimise) the military on many occasions, thereby helping to transform public ideologies regarding the appropriateness of military rule and many of its characteristic practices.<sup>30</sup>

In an analysis of compliance with recommendations of the African Commission from 1994–2003, Frans Viljoen and Lirette Louw likewise report that compliance is enhanced when a petition to the African Commission forms one part of a broader social movement. They consider several cases illustrating the role of international pressure and domestic mobilization in persuading states to comply with Commission recommendations.<sup>31</sup>

While there is thus some recognition that supranational tribunals maximize their effectiveness by responding to the local political and social contexts in which they work (including the ongoing advocacy efforts of domestic groups), existing scholarship provides little guidance on precisely how this perception should inform the practice of the tribunals. To date, the bulk of the scholarship has focused on the legal aspects of supranational jurisprudence rather than on how these courts can maximize their on-the-ground impact. It is to address this imbalance that we seek to develop a model of how courts can increase the likelihood of advancing respect for human rights in contexts of active or passive resistance to implementation of their judgments.

#### *What Role for International Courts?*

As an initial matter, one might of course question the core thesis that regional human rights courts should develop procedures and judgments that are responsive to the social and political contexts in which they operate. These bodies, critics may assert, are or should be tasked with deciding individual cases, insulated from the local, national, and regional political battles that might be affected by their judgments (precisely the sort of political concerns that shape the decisions of other intergovernmental organs, such as general assemblies, councils of ministers, and multinational parliaments).

At an intuitive level, this argument is appealing. We certainly agree that courts must decide individual cases fairly. For example, for an international court to assess which political actors would benefit from, and which would be prejudiced by, each possible substantive outcome in a given case and then to decide in accordance with the interests of one political group over another would undermine the integrity, and delegitimize the rulings, of the court. However, the questions presented are both broader and more subtle than this extreme example suggests.

As a basic starting point in this discussion, one must consider whether it is appropriate, when defining the goals and operating procedures of a court, to extend the scope of one's review beyond the moment that the judges issue their legal resolution of an individual case: that is,

<sup>30</sup> Obiora Chinedu Okafor, *The African System on Human and Peoples' Rights, Quasi-Constructivism, and the Possibility of Peacebuilding within African States*, 8 INT'L J. HUM. RTS. 413, 431 (2004) (footnotes omitted).

<sup>31</sup> Viljoen & Louw, *supra* note 27, at 28–31. Viljoen and Louw's data also suggest that democratic openness in a country predicts better compliance, *id.* at 26, as do follow-up enforcement efforts, *id.* at 32. These results fit with a model in which domestic activism, international pressure, and supranational enforcement efforts combine with a particular domestic climate to prompt positive change.

whether it is appropriate to consider not only the internal workings of the court, but also its real-world impact and interactions with the societies over which it exercises jurisdiction.

In this regard, we presume that impact matters, and should matter, to regional rights bodies. While this view may sound like a significant departure from the traditional view of a court's role, we argue that this role is entirely consistent with the goals that animate international human rights law and international oversight mechanisms. International rights courts should serve to promote respect for human rights in the regions where they operate; that is, while a court should never align itself a priori with a certain political party, government, nongovernmental organization (NGO), or other actor, once an objective evaluation of the evidence has proven the existence of human rights violations, the court should issue judgments and reparations orders with the highest possible likelihood of contributing to the actual elimination of the abuses in question.<sup>32</sup>

This point brings us back to our core thesis: namely, that it is both appropriate and necessary for courts to be aware of their factual and political surroundings to maximize their relevance and effectiveness in their regions. Once again, this does not mean that a court should yield to political pressures in individual cases. Rather, what we attempt to analyze in this article is what sort of procedures and jurisprudence *in general*—in terms of procedural design of court hearings, preferred forms of evidence, standard elements to be included in judgments, and the degree to which a court pursues strict or liberal interpretations of the scope of rights established in regional treaties—are most likely to advance human rights in a region, given the general model of human rights change applicable in that region.

At a second level of inquiry, within a more limited scope, we do urge the Inter-American Court and other regional rights courts to consider the social and political dynamics at work in particular countries and cases, to the extent appropriate for an impartial judicial body. While purists might contend that courts must be totally removed from social and political contexts to be fair judicial arbiters, we contend that total isolation is never possible and may be counterproductive to the extent that it leads the court to make incorrect factual assumptions. This consideration is especially relevant, for example, when a court issues reparations orders. Without contextual understanding of a country, the court might issue a reparations order to achieve a certain concrete goal, not understanding that the form of the reparations order is likely to provoke societal backlash. Contextual information and an understanding of the local political

<sup>32</sup> This is not to assert that regional courts are the main tool for eliminating human rights abuses by governments. As noted, in our experience supranational courts constitute just one tool in the broader processes that ultimately lead to lasting human rights improvements, often led by public advocacy campaigns, national courts, and/or non-judicial mechanisms. Importantly, however, regional courts should operate in the most effective way possible, whether playing a leading or subsidiary role in the broader process of improving particular human rights practices. In this regard, analysts have identified several possible models for how international adjudicatory bodies can best contribute to the advancement of human rights. One vision holds that such bodies should simply provide justice for individual litigants. See Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?* in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 15, 32–36 (Philip Alston & James Crawford eds., 2000). A second view, often termed the “constitutional” model, posits that a rights body should seek broader impact by using “appropriate cases to elucidate the [human rights] instrument that they are applying, to interpret and explain it.” *Id.* at 39. Variants of the constitutional model focus on the use of emblematic cases to address endemic problems in a given country. See Helfer, *supra* note 23, at 135. While we contend that a tribunal such as the Inter-American Court should seek to create impact beyond its cases, we believe that merely elucidating the American Convention will not suffice to reverse the human rights problems in the Americas but that, as a variant to the models above, the Court can best increase its impact by working in ways that are relevant and useful to domestic actors.

climate, by contrast, could lead the court to choose another form of reparations order better suited to achieve the same goal, if an alternative form is available.

In the end, regional human rights courts operate subject to various structural limitations: among others, they lack police authority to enforce their decisions; they often lack resources; and they may exercise jurisdiction over domestic systems in which the rule of law is relatively weak. Nevertheless, they can be relevant forces for advancing respect for human rights. We contend no more than that they should take the steps necessary to maximize their role as contributors to such advancement—steps that will sometimes require these bodies to consider, to the extent compatible with their role as impartial arbiters, how their methods of operation help or hinder the impact of their jurisprudence in the world beyond the confines of their courtrooms.

In the rest of this article, we use the example of the Inter-American Court to analyze the dynamics of supranational tribunals' influence on human rights practices. To this end, we have reviewed the contentious judgments, advisory opinions, decisions on compliance, and recent annual reports of the Court. We have also interviewed numerous practitioners and NGOs to investigate the effects of Court cases in their countries. Other sources of information include interviews and discussions with current and former staff and members of the Inter-American Commission and Court, legal scholarship pertaining to the inter-American and other systems, and secondary sources including media coverage of various cases and their effects. We draw on these data, as well as our significant personal experience with the system, to identify what we believe to be the general dynamics through which Inter-American Court cases influence various human rights practices and to set forth proposals that we hope will contribute to the Court's impact in the years ahead.

## II. OVERVIEW OF THE INTER-AMERICAN SYSTEM

The inter-American system of human rights protection consists of two bodies created by the Organization of American States (OAS): the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The quasi-judicial Commission acts as the first instance for victims of human rights violations who wish to bring cases before the system. Aside from its role in processing these individual petitions, the Commission undertakes a range of monitoring and promotional activities. The Court, on the other hand, is an exclusively judicial body that issues binding decisions in cases of human rights violations submitted to it by the Commission. In addition, the Court issues advisory opinions and grants provisional measures for the protection of individuals in imminent danger of rights violations.

Litigation before the inter-American system occurs within the legal framework of the main human rights instruments adopted by the OAS: the American Declaration of the Rights and Duties of Man<sup>33</sup> and the American Convention on Human Rights.<sup>34</sup> The Declaration lacks the binding status of a treaty, although the Inter-American Court has held that it applies to all member states of the OAS as the authoritative interpretation of human rights commitments

<sup>33</sup> American Declaration of the Rights and Duties of Man, May 2, 1948, OAS Res. XXX, adopted by the Ninth International Conference of American States (1948), 43 AJIL Supp. 133 (1949), *available at* the Court's Web site, *supra* note 4.

<sup>34</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123, *available at* the Court's Web site, *supra* note 4.

contained in the OAS Charter.<sup>35</sup> The Convention is a legally binding treaty ratified by most Latin American states. Both instruments set forth a range of fundamental rights; they are complemented by numerous specialized instruments focusing on specific issues such as torture and forced disappearance. States parties to the Convention have the option to recognize the jurisdiction of the Inter-American Court to hear contentious cases against them, and the majority of states parties (twenty-one states) has done so.<sup>36</sup>

The result of this arrangement is that supranational human rights litigation before the system consists of two possible phases. Individuals alleging violations of protected rights by any OAS member state may file a petition before the Inter-American Commission. If the Commission finds the state responsible for the alleged violations, it may issue recommendations to that state concerning reparations and measures to be undertaken to prevent future violations. If, however, the state fails to implement these recommendations, and if it has recognized the contentious jurisdiction of the Inter-American Court, generally or for a particular case, the Commission may forward the case to the Court for a legally binding judgment.

### *The Inter-American Commission*

Created in 1959, the Inter-American Commission<sup>37</sup> is composed of seven independent members who meet during sessions held several times annually for approximately two weeks each, most often at the Commission's headquarters in Washington, D.C. The Commission also carries out on-site visits to evaluate the general human rights situation in member countries; publishes country and thematic reports; organizes human rights seminars, conferences, and meetings; and maintains rapporteurships on various human rights issues.

The Commission has multiple roles in relation to the Inter-American Court. Like member states of the OAS, it has standing to request advisory opinions from the Court interpreting provisions of human rights instruments. It can also request provisional measures on behalf of individuals who face an imminent threat of harm. Most important for our purposes, the Commission receives petitions from individuals alleging violations of rights protected in the system's human rights instruments. The number of complaints received by the Commission has increased significantly; over 1,300 have arrived annually since 2004 (increasing to 1,456 complaints in 2007 alone).<sup>38</sup> Yet the Commission resolves only a small fraction of the matters before it each year. In 2007 the Commission published seventy-four reports in individual cases, sixty-five of which dealt with admissibility alone, and submitted fourteen cases to the Court.<sup>39</sup>

During each period of sessions, the Commission devotes some percentage of its time (generally not more than one-third of its schedule) to public hearings on the admissibility or merits

<sup>35</sup> Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion, Inter-Am Ct. H.R. (ser. A) No. 10, at 11, paras. 43–45 (July 14, 1989).

<sup>36</sup> The twenty-one states that have recognized the Court's contentious jurisdiction are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. 2007 IACHR ANNUAL REPORT, *supra* note 4, at 5.

<sup>37</sup> Background information on the Commission is available at the Commission's Web site, <<http://www.cidh.org/>>.

<sup>38</sup> INTER-AM. COMM'N H.R., ANNUAL REPORT 2007, ch. III, graph B.1.b., Total Number of Complaints Received by Year, *available at* the Commission's Web site, *supra* note 37.

<sup>39</sup> *Id.*, para. 4, & graph B.4.a., Cases Submitted to the Inter-American Court of Human Rights.

of individual cases under consideration. It should be emphasized that even when such hearings are granted (which is by no means the rule), they ordinarily last one hour and are not dedicated primarily to taking live evidence from witnesses. When witnesses do appear, they ordinarily give a brief statement and are not subject to examination or cross-examination. Thus, as currently structured, the Commission's fact-finding process in individual cases cannot be termed judicial. While one might imagine enhancing the procedures of the Commission to enable it to become the authoritative judicial fact-finder of the system, doing so would require significant changes that we do not foresee in the near future.<sup>40</sup>

For cases in which it reaches a merits determination in favor of the petitioners, the Commission transmits its recommendations for remedying the violation in question to the state concerned. However, member states may ignore or otherwise fail to implement these recommendations, in which case the Commission may submit the matter to the Court.

Until 2001, the Commission exercised full discretionary control over whether to submit matters to the Court. For more than two decades, the Commission employed that discretion in few instances, forwarding a growing, but comparatively small number of cases to the Court. Since the entry into force of new Rules of Procedure for the Commission in 2001, the Commission's default procedure has now become to submit cases to the Court.<sup>41</sup> These procedural reforms have more than doubled the number of cases sent to the Court each year, so that from 2004 to 2007 the Commission has forwarded an average of more than one dozen cases to the Court annually.<sup>42</sup> This signifies a dramatic increase in workload for the Court and has led that body to undertake procedural reforms of its own (discussed in part IV below).

### *The Inter-American Court*

The Inter-American Court came into being as the system's binding judicial institution in 1979.<sup>43</sup> Composed of seven judges, the Court holds sessions several times annually for approximately one to two weeks at a time, usually at its seat in San José, Costa Rica, but also, more recently, in various member states that offer to host its sessions. In addition to its jurisdiction over contentious cases, the Court exercises authority to prescribe provisional measures. It may also issue advisory opinions at the request of the Commission, OAS member states, and other organs of the OAS.

For roughly the first decade of its existence, the Court issued only advisory opinions, as the Commission failed to submit a single contentious case to it until 1986. Then, in 1988, the

<sup>40</sup> The possibility of converting the Commission into the binding fact-finder of the system may appeal to some observers because the inter-American system currently uses a duplicative procedure in which the Commission conducts fact-finding and decides the merits of a case, after which, if the case proceeds to the Court, that body also conducts fact-finding to reach its own merits determination. As an initial matter, since the results of domestic investigations or judicial proceedings concerning human rights violations in the Americas are frequently suspect (indeed, these domestic proceedings may form part of the alleged violations in a case), it is clear that despite the cost in resources, the inter-American system must continue to conduct independent fact-finding. We argue that, barring radical changes in the fact-finding resources and procedures of the Commission (a possibility to which we are open but do not think likely to occur soon), the Court must continue to be the authoritative judicial fact-finder of the system. This position does not discount the possibility of other reforms to the relationship between the Commission and the Court.

<sup>41</sup> Inter-Am. Comm'n H.R., Rules of Procedure of the Inter-American Commission on Human Rights, Art. 44(1), Dec. 8, 2001, *as amended* July 25, 2008, available at the Commission's Web site, *supra* note 37.

<sup>42</sup> 2007 IACHR ANNUAL REPORT, *supra* note 4, at 60.

<sup>43</sup> Background information on the Court is available at the Court's Web site, *supra* note 4.

Court issued a landmark judgment on the merits of its first contentious case, *Velásquez Rodríguez v. Honduras*, concerning forced disappearances.<sup>44</sup> During the next decade, the Court addressed first one and then three to four cases annually.

Like the Commission, the Court will not exercise jurisdiction over the merits of a case until it has satisfied itself that certain admissibility requirements have been met. Therefore, litigation before the Court has traditionally consisted of several phases, beginning with consideration of any preliminary objections to admissibility. If admitted, cases have continued to the merits phase, followed by a reparations stage (each phase routinely resulted in a separate decision, although this practice has changed in recent years). In any phase, the Court has the power to convene a public hearing and to receive the testimony of live witnesses.

When the Court determines that a state is responsible for human rights violations, it publishes a judgment setting forth the violations found and orders the state to carry out reparations measures (discussed in parts III and IV below). On the basis of its own interpretation of its mandate, the Court retains jurisdiction to monitor compliance with its judgments and issues periodic compliance orders.<sup>45</sup> As will be seen later, the Court faces considerable difficulties with respect to compliance with certain elements of its judgments. While states generally pay monetary damages, there are very few cases of full compliance, which is notably lacking as regards the obligation to bring perpetrators of violations to justice.

The working methods of the Court have evolved in several ways since the time of its first contentious cases. For instance, originally petitioners did not participate directly in the proceedings. Rather, once the Commission forwarded a case to the Court, it changed roles from neutral arbiter to litigant, representing the petitioners as the sole party opposing the state. In successive reforms to its Rules of Procedure, however, the Court gradually authorized greater participation of petitioners in its proceedings. As a result, today petitioners engage in Court proceedings alongside the Commission,<sup>46</sup> adding a layer of complexity to the Court's work.

The second crucial shift in the Court's operations stems from a dramatic increase in its caseload over roughly the past four years, a direct result of the Commission's procedural reforms of 2001 (see figure 1, p. 782). Since these reforms entered into force, the surge of cases that began reaching the Court has forced it roughly to triple its own rate of case resolution.

To keep pace with this remarkable increase in work, the Court has changed its procedures with a view to greatly shortening the amount of time spent on each case. In addition to combining the various phases of each case (preliminary objections, merits, reparations) into a single judgment, the Court has reduced the average number of days of public hearings devoted to each case and the average number of witnesses appearing in each case before it, changes that we examine in detail in part IV.

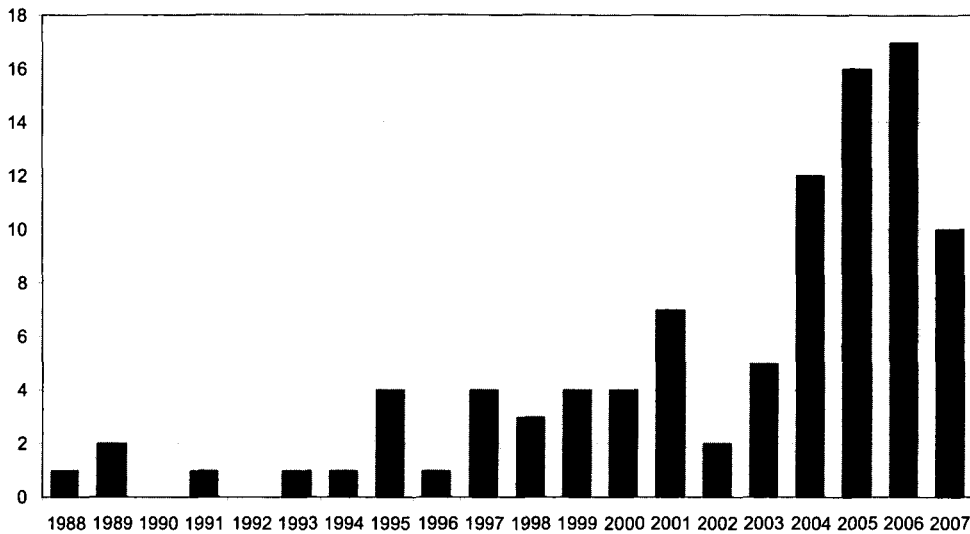
Although the Court now resolves a significantly increased number of cases each year, we emphasize that it remains an organ of extremely limited access for the vast majority of victims of human rights violations. From the Court's inception through the end of 2007, it had issued

<sup>44</sup> *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

<sup>45</sup> See *Baena Ricardo v. Panama*, Competence, Inter-Am. Ct. H.R. (ser. C) No. 104, sec. III (Nov. 28, 2003).

<sup>46</sup> Inter-Am. Ct. H.R., Rules of Procedure, Art. 23, Nov. 24, 2000, as amended Nov. 25, 2003, available at the Court's Web site, *supra* note 4.

FIGURE 1. CASES DECIDED ANNUALLY BY THE INTER-AMERICAN COURT 1988–2007



For the purposes of this graph, a case is counted as decided in the year in which the Court issued a judgment on the merits, or, when the case did not proceed to a merits decision, the year in which it was dismissed or discontinued. The data are from Inter-Am. Ct. H.R., Jurisprudence: Decisions and Judgments, at <<http://www.corteidh.or.cr/casos.cfm>>.

174 determinations in ninety-five contentious cases.<sup>47</sup> From 2004 to 2007 (following the systemic reforms discussed above), the Court resolved approximately fourteen cases annually, including a total of seventeen in 2006. Yet these numbers still represent an average of less than one case per year for each country that has recognized its contentious jurisdiction. Recalling that the Inter-American Commission receives more than thirteen hundred complaints each year—which already represent only a fraction of total victims of rights abuses—it is clear that the fourteen or so cases resolved by the Court each year make up a tiny percentage of the potential cases that would progress through the system if every victim of human rights violations had his or her proverbial day in court.

Despite our emphasis on the limited numbers of victims who are able to reach the Inter-American Court, we do not suggest that this characteristic reflects any deficiency on the part of the Court itself. Considering that thousands of individuals in the Americas continue to suffer human rights violations every year, it is unrealistic to expect a tribunal to hear more than a small percentage of cases. Aside from this inherent limitation, however, the Court contends with external constraints on its power. Namely, as an organ of the OAS, the Court depends on that organization's commitment to carry out its mandate. Yet throughout its existence, the Court has received relatively meager financial and political support from the OAS.<sup>48</sup>

<sup>47</sup> Inter-Am. Ct. H.R., Jurisprudence: Decisions and Judgments, at the Court's Web site, *supra* note 4. Following the practice of the Court, we count as one contentious case *Hilaire v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 94 (2002), which constitutes the joinder of three separate initial applications.

<sup>48</sup> See JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 343–48 (2003).

This lack of support has not gone unnoticed by those engaged in the system. In 2000 the president of the Court implored the OAS for greater funding, noting that the budget of U.S.\$1,114,900 “permits the Court to function only with the minimum of resources, with a consequent deterioration in the services required for the proper operation of the Court. Normally we [are forced to] make cutbacks or eliminate important activities . . . .”<sup>49</sup>

The Commission’s procedural reforms and the subsequent dramatic increase in the Court’s docket exacerbated these budgetary problems. The judges of the Court underscored that the reforms had been made on the understanding that the OAS would provide funding to cover the inevitable increase in the workload.<sup>50</sup> However, this increase in funding did not occur. The judges of the Court delivered letters to the OAS secretary general warning of “the imminent collapse that will occur beginning in the year 2004 in the work of the Inter-American Court due to the budgetary reductions suffered by the Tribunal.”<sup>51</sup> The secretary general dismissed their arguments and stated that the procedural reforms had never included an understanding that the Court’s budget would increase to compensate for its growing workload.<sup>52</sup>

As of 2008, the Court’s annual budget was U.S.\$1,756,300, or 2 percent of the annual budget of the OAS;<sup>53</sup> but this amount would suffice to fund only a portion of the Court’s present activities. To continue operating at its current level, the Court depends for a large percentage of its funding on international institutions. For instance, in 2006 the European Union was the main financier of the majority of the Court’s sessions.<sup>54</sup>

Another notable contribution to the Court’s budget comes from individual Latin American governments. In recent years, such donor governments have included Mexico, Colombia, Brazil, and Paraguay.<sup>55</sup> For a regional human rights tribunal, whose legitimacy depends on maintaining visible independence from member governments, these financial contributions from states facing potential or actual litigation before the Court are, at a minimum, troubling. Moreover, so long as the Court lacks sufficient financial support from its parent organization, it will be dependent on voluntary contributions (whether from individual member states of the OAS or from foreign institutions and governments). As such, its continued viability will turn on the continued willingness of these entities to donate funds, which, of course, is subject to change.

Insufficient budgetary support is not the only indication that the Court lacks strong political backing from the OAS. The OAS has not, for example, responded to repeated calls by the

<sup>49</sup> Inter-Am. Ct. H.R., *Informe a la Comisión de Asuntos Jurídicos y Políticos del Consejo Permanente de la Organización de los Estados Americanos (OEA) en el marco del diálogo sobre el Sistema Interamericano de Protección de los Derechos Humanos* 32 (Mar. 16, 2000), available at <<http://www.corteidh.or.cr/discursos.cfm>>. Note that in this article all translations from documents available only in Spanish or Portuguese are those of the authors.

<sup>50</sup> Letter from the judges of the Inter-American Court of Human Rights to César Gaviria Trujillo, Secretary General of the OAS (Nov. 20, 2003), reprinted in Manuel E. Ventura Robles, *La Corte Interamericana de Derechos Humanos: La necesidad inmediata de convertirse en un tribunal permanente*, 1 REVISTA CEJIL (Center for Justice and International Law) 12, Annex 1, at 24 (2005), available at <[http://www.cejil.org/revista/revista\\_1.pdf](http://www.cejil.org/revista/revista_1.pdf)> [hereinafter IACHR Letter].

<sup>51</sup> *Id.* at 23.

<sup>52</sup> Letter from César Gaviria Trujillo, Secretary General of the OAS, to the judges of the Inter-American Court of Human Rights (Jan. 16, 2004), reprinted in Ventura Robles, *supra* note 50, Annex 2, at 25–26.

<sup>53</sup> 2007 IACHR ANNUAL REPORT, *supra* note 4, at 78.

<sup>54</sup> See INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2006, at 6, 13, 16, 18, 19.

<sup>55</sup> *Id.* at 64. In 2006, for example, Mexico donated \$125,000 and Colombia announced a contribution of \$300,000.



Court to appoint a permanent working group to monitor compliance with Court judgments and provide reports to facilitate discussion of this topic by the OAS General Assembly.<sup>56</sup> Judge Ventura Robles has observed in this regard that the American Convention was largely designed to resemble the European Convention, yet fails to establish one of the components (the Committee of Ministers, which monitors compliance with ECHR judgments) that make the latter viable.<sup>57</sup> The salience of the lack of a permanent monitoring body in the OAS becomes apparent when one considers that eighty-four Court cases (88 percent of resolved contentious matters) were in the phase of supervision of compliance as of the end of 2007, an increase of 162.5 percent since 2003.<sup>58</sup>

### III. THE DYNAMICS OF HUMAN RIGHTS ADVANCEMENT IN THE INTER-AMERICAN SYSTEM

As the foregoing overview of the inter-American system suggests, supranational tribunals seeking to strengthen their effectiveness cannot necessarily look to other international courts (such as the ECHR) as models, since the political and institutional environment of one regional system may differentiate it from another. Instead, we argue that supranational courts can maximize their impact by being responsive to the relevant characteristics of the regions over which they exercise jurisdiction. The type of rights violations prevalent in a region, the political climate on the ground, states' general willingness to comply with the court's orders, and the current efforts of local actors and groups working on underlying human rights issues should all shape the procedures and jurisprudential patterns of a court. By understanding how these forces interact to open spaces for the advancement of human rights, a supranational tribunal can design its working methods to provide appropriate tools to the actors best placed to bring about progress within the countries subject to their jurisdiction.<sup>59</sup>

In the paragraphs that follow, we identify what we believe to be the key features of the human rights landscape and possibilities for the advancement of human rights through supranational litigation in the inter-American system.

<sup>56</sup> See Antônio A. Cançado Trindade, President of the Inter-Am. Ct. H.R., *Hacia la consolidación de la capacidad jurídica internacional de los peticionarios en el Sistema Interamericano de Protección de los Derechos Humanos* 28–29 (Presentation Before the Committee on Juridical and Political Affairs of the OAS, Apr. 19, 2002), OEA/Ser.G/CP/CAJP–1933/02 (Apr. 25, 2002), *available at* <[http://www.corteidh.or.cr/docs/discursos/01cancado\\_19\\_04\\_02.pdf](http://www.corteidh.or.cr/docs/discursos/01cancado_19_04_02.pdf)>.

<sup>57</sup> *Caesar v. Trinidad & Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 123, at 25, paras. 37–38 (Mar. 25, 2005) (Ventura Robles, J., sep. op.).

<sup>58</sup> See INTER-AM. CT. H.R., SÍNTESIS DEL INFORME ANUAL DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS CORRESPONDIENTE AL EJERCICIO DE 2007, at 5 (Apr. 3, 2008), *available at* <<http://www.corteidh.or.cr/discursos.cfm>> [hereinafter IACHR SÍNTESIS]. Rather than working to strengthen the enforcement of these judgments, however, OAS member states have been reluctant to raise the matter. CEJIL notes, “Within the OAS, Member States refuse to tackle this issue head-on, not wanting to publicly denounce each other for non-compliance. The prevailing opinion is that if States question the compliance of another Member State, they are infringing on that State’s sovereignty.” CEJIL, ACTIVITIES REPORT 2003–2004, at 42, *available at* <<http://www.cejil.org/labores.cfm>>.

<sup>59</sup> Indeed, in several important ways, the Inter-American Court’s procedures have responded to the particular factors present in the Americas. Thus, given the lack of a committee of ministers to supervise compliance, the Court has developed specific mechanisms for monitoring compliance with its own judgments. See *Baena Ricardo v. Panama*, Competence, Inter-Am. Ct. H.R. (ser. C) No. 104, at 33–34, para. 105 (Nov. 28, 2003).

### *Human Rights in Law and in Fact*

Many Latin American countries are characterized by the recognition of a wide range of human rights in legislation, constitutions, and treaty ratifications. However, such legal provisions often do not translate into effective human rights protection on the ground. While the region has emerged from the military dictatorships of the 1970s and 1980s, leading to a reduction in the levels of state-sponsored civil and political rights abuses, widespread violations of fundamental rights continue, ranging from systematic, targeted executions and forced displacement by paramilitary groups in Colombia; to death squad and police killings in Brazil; to military abuses and the use of torture to extract confessions in Mexico; to pervasive extrajudicial violence in Honduras, Guatemala, and El Salvador. In many areas, the rule of law is still solidifying, and in some cases members of the military or of the political party responsible for massive, state-sponsored violations in recent decades continue to hold influential positions in current governments. Moreover, even if the national government of a state attempts to put human rights reforms in place, resistance by local governmental authorities and actors directly involved in abuse often obstructs their implementation.<sup>60</sup> In this climate, the decisions of a supranational tribunal are even less likely to provoke broad change on their own.

### *State Compliance with Orders of the Inter-American Court*

A review of the Inter-American Court's past cases demonstrates that the Court does face frequent nonimplementation of its judgments. Governments may openly reject certain orders, but even more commonly they assert that they will comply or are in the process of complying, yet fail to take the steps necessary to bring their practices into line with the requirements of the Court's judgment.

On finding a rights violation, the Inter-American Court normally orders individual measures of material reparations for the victims (such as the payment of monetary damages), as well as symbolic reparations (usually including an order for the state to hold a public ceremony recognizing its responsibility for the violations). Beyond these measures, which are relatively isolated in scope, the Court also normally orders the state to carry out an effective investigation of the violation or violations in question and to bring to justice all of the perpetrators, a measure designed to end ongoing impunity and deter future abuses. Finally, the Court may order a state to alter its laws, policies, or practices to conform to the American Convention, or to take positive measures (such as providing human rights training to its armed forces) to rectify systematic human rights problems.

Our review of the compliance orders of the Court reveals a clear (though not universal) pattern in states' reactions to its judgments. The pattern that emerges demonstrates that states generally pay some or all of the monetary damages awarded by the Court. In addition, states may comply with symbolic reparations, including those concerning public ceremonies. However, when it comes to more far-reaching measures to reduce impunity and advance human rights (such as prosecuting past violations or changing laws and practices), compliance is considerably less likely. Most salient, virtually no compliance decision records that a state has effectively investigated and punished the perpetrators of a human rights violation forming the basis of a

<sup>60</sup> See James L. Cavallaro, *Toward Fair Play: A Decade of Transformation and Resistance in International Human Rights Advocacy in Brazil*, 3 CHI. J. INT'L L. 481, 489 (2002).

Court decision.<sup>61</sup> Even when states report taking some steps toward a full investigation of the case or having prosecuted some of the alleged perpetrators, they often do not progress to investigating fully or prosecuting all the parties involved, weakening the impact of those legal processes in combating impunity.<sup>62</sup> States also frequently fail even to provide the Court with the data necessary to determine whether the state is complying with a judgment or not. In 2003 Panama challenged the principle that the Court even has the authority to monitor compliance with its orders.<sup>63</sup> As of 2007, the Court reported full compliance in only 11.57 percent of resolved cases.<sup>64</sup>

The picture that emerges from interviews with human rights groups regarding the Court's substantive impact on human rights issues is also troubling. To provide just a few examples, with respect to the cases of *Blanco Romero v. Venezuela* and *Montero Aranguren v. Venezuela*,<sup>65</sup> involving, respectively, forced disappearances and a prison massacre, the state has yet to comply fully with any part of the judgments.<sup>66</sup> Meanwhile, in the first half of 2007, the level of violence occurring in Venezuelan detention facilities—the problem at issue in *Montero Aranguren*—increased.<sup>67</sup> In Paraguay, two cases in the past few years, *Yakye Axa Indigenous Community v. Paraguay* and *Sawhoyamaxa Indigenous Community v. Paraguay*,<sup>68</sup> have brought before the Court the issue of indigenous communities' right to their traditional lands. In these cases, the displacement of indigenous communities from their lands caused their members to live in deplorable conditions and sometimes to die as a result of the state's subsequent failure to provide necessary medical services.<sup>69</sup> Yet the state has not complied with the most important element of the Court's determinations on reparations: giving possession of the lands to the

<sup>61</sup> See Cerna, *supra* note 25, at 203–04 (stating that “only in the rarest case is [the state] 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”).

<sup>62</sup> One could argue that prosecution of all perpetrators is not, a priori, the most relevant indicator of the Court's impact, particularly when significant time and resources would be required to prosecute a particular defendant. However, given the central role that persistent impunity for human rights abuses has played in Latin America; the symbolic, deterrent value of punishing perpetrators in high-profile cases, such as many of those that reach the Inter-American Court; and the high importance placed on accountability by victim populations (as seen in very clear forms in, e.g., continuing efforts to hold accountable participants in the “dirty wars” of countries such as Argentina and Chile), we consider this element of reparations orders important in achieving progress in long-term respect for human rights and thus a highly relevant factor in evaluating compliance with the orders of the Court. Additionally, while in certain cases a failure to prosecute may result from the practical difficulties in locating an individual or other internal constraints, the extremely low level of full compliance in this regard strongly suggests a recurrent lack of political will to enforce this aspect of the Court's decisions.

<sup>63</sup> *Baena Ricardo*, Competence, Inter-Am. Ct. H.R. (ser. C) No. 104, at 10–13, para. 54 (Nov. 28, 2003).

<sup>64</sup> IACHR SÍNTESIS, *supra* note 58, at 9.

<sup>65</sup> *Blanco Romero v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 138 (Nov. 28, 2005); *Montero Aranguren v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 150 (July 5, 2006).

<sup>66</sup> Telephone interview with María Daniela Rivero, Comité de Familiares de las Víctimas de los sucesos ocurridos entre el 27 de febrero y los primeros días de marzo de 1989 (Oct. 17, 2007). This lack of compliance continues at the time of this writing.

<sup>67</sup> Gustavo Rodríguez, *241 Presos han sido asesinados durante el primer semestre*, EL UNIVERSAL.COM. (Venez.), July 4, 2007, <[http://buscador.eluniversal.com/2007/07/04/sucgc\\_art\\_241-presos-han-sido\\_345395.shtml](http://buscador.eluniversal.com/2007/07/04/sucgc_art_241-presos-han-sido_345395.shtml)>; Yolimer Obelmejías Valdez, *Denuncian aumento de 31% de violencia en cárceles venezolanas*, EL UNIVERSAL.COM., Aug. 6, 2007, <[http://buscador.eluniversal.com/2007/08/06/pol\\_ava\\_denuncian-aumento-de\\_06A911051.shtml](http://buscador.eluniversal.com/2007/08/06/pol_ava_denuncian-aumento-de_06A911051.shtml)>.

<sup>68</sup> *Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); *Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006).

<sup>69</sup> *Yakye Axa Indigenous Community*, Inter-Am. Ct. H.R. (ser. C) No. 125, at 2, para. 2; *Sawhoyamaxa Indigenous Community*, Inter-Am. Ct. H.R. (ser. C) No. 146, at 1–2, para. 2.

communities.<sup>70</sup> The Court noted in February 2007 that since the publication of the judgment in *Sawhoyamaxa*, the state's failure to implement its orders on providing basic services to the community had led to the deaths of four additional individuals and the hospitalization of five more.<sup>71</sup>

The examples listed above should not detract from the Court's achievements in other cases, which induced states to change laws and policies in response to Court judgments. A notable case in this regard is *Barrios Altos v. Peru*,<sup>72</sup> in which the Court's declaration that Peru's amnesty laws (covering crimes committed under the regime of Alberto Fujimori) were incompatible with the American Convention led to criminal proceedings against numerous human rights violators previously shielded from prosecution in Peru.<sup>73</sup> The Court's judgment in *Suárez Rosero v. Ecuador*<sup>74</sup> triggered reforms of provisions of Ecuador's penal code dealing with drug offenses, ultimately contributing to the release of many persons who had been detained for prolonged periods without trial or sentencing.<sup>75</sup>

Moreover, sometimes state institutions do comply with the Court's orders even when domestic factors could be expected to create resistance. In *Bulacio v. Argentina*, the Inter-American Court ordered Argentina to prosecute a police captain regardless of domestic extinguishment of the criminal action against him.<sup>76</sup> Argentina's Supreme Court voiced its disagreement with aspects of this judgment, noting that it appeared unduly to restrict the rights of the defendant and that it did so on grounds not of an independent determination of the facts but, rather, of the procedural fact of Argentina's international acknowledgment of responsibility before the Inter-American Court.<sup>77</sup> Nonetheless, the Supreme Court stated that "in spite of the reservations expressed here, it is the duty of this Court, as part of the Argentine State, to comply [with the judgment of the Inter-American Court]."<sup>78</sup>

<sup>70</sup> Telephone interview with Julia Cabello, Tierraviva a los Pueblos Indígenas del Chaco (Sept. 18, 2007); *Yakye Axa Indigenous Community, Compliance with Judgment* (Inter-Am. Ct. H.R. Feb. 8, 2008); *Sawhoyamaxa Indigenous Community, Compliance with Judgment* (Inter-Am. Ct. H.R. Feb. 8, 2008).

<sup>71</sup> *Sawhoyamaxa Indigenous Community, Compliance with Judgment, Considerando*, para. 11 (Inter-Am. Ct. H.R. Feb. 2, 2007).

<sup>72</sup> *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

<sup>73</sup> See *Barrios Altos*, Cumplimiento de Sentencia, para. 15 (Inter-Am. Ct. H.R. Sept. 22, 2005), available at <[http://www.corteidh.or.cr/docs/supervisiones/barrios\\_22\\_09\\_051.pdf](http://www.corteidh.or.cr/docs/supervisiones/barrios_22_09_051.pdf)>; International Federation for Human Rights, *Fujimori: ¿Extradición al Perú o Juicio en Chile!* LA LETRA, NO. 476/3, May 2007, at 6, available at <<http://www.fidh.org/IMG/pdf/peru.pdf>>.

<sup>74</sup> *Suárez Rosero v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 35 (Nov. 12, 1997).

<sup>75</sup> See Tribunal Constitucional, Resolución No. 119-1-97 (Dec. 24, 1997), available at <<http://www.consep.gov.ec/>> (declaring unconstitutional a provision of the penal code relating to pretrial and presentencing detention); UN Human Rights Committee, Información adicional presentada por el Estado Parte: Ecuador, UN Doc. CCPR/C/84/Add.8, para. 102 (Dec. 17, 1998) (describing the effects of this declaration), available in English at <<http://documents.un.org/simple/asp>>.

<sup>76</sup> *Bulacio v. Argentina*, Inter-Am. Ct. H.R. (ser. C) No. 100, at 48–49, paras. 116–17 (Sept. 18, 2003).

<sup>77</sup> Corte Suprema de Justicia [CSJN], 23/12/2004, "Espósito, Miguel Angel s/ incidente de prescripción de la acción penal promovido por su defensa," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2004-327-5668), paras. 12–15, available at <<http://www.csjn.gov.ar/>>. The Supreme Court noted that because of this procedural resolution, the Inter-American Court had declined to consider expert evidence offered on the facts of the case. *Id.*, para. 15. We critically examine acknowledgments of responsibility and their relationship to the exclusion or limitation of evidence in part IV *infra*.

<sup>78</sup> *Id.*, para. 16. The relevant criminal case is ongoing. For further examples of domestic jurisprudence citing inter-American instruments and decisions, see Brian D. Tittmore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law*, 12 SW.

As these examples demonstrate, not all cases are alike. In some countries, on some issues, the Court can directly trigger a change in laws or practices; and even in cases lacking full compliance, a Court judgment can nonetheless prompt the repeal of a violatory law or otherwise have a significant impact on a key human rights issue. In addition, actors within some national governments have undertaken initiatives to promote implementation of Court decisions. For instance, in 2007 Ecuador's attorney general introduced a bill that would establish automatic procedures for such implementation.<sup>79</sup>

In more cases than not, however, the Court continues to confront problems in achieving meaningful and lasting implementation of its reparations orders. Lack of political will and the powerful position of the armed forces and police in various Latin American countries mean that the Court often faces particular difficulties in prompting states to punish the authors of past violations, a crucial challenge given the role of impunity in perpetuating tolerance for human rights violations. Governments may also be reluctant to deploy the resources necessary to carry out the systematic reforms needed to correct endemic human rights problems. This situation is complicated by the fact that states are not monolithic; even if a country's supreme court or national government is receptive to inter-American jurisprudence, resistance by the local authorities actually responsible for day-to-day implementation of ordered reforms may stymie efforts to advance human rights in practice.

### *The Ingredients of a Successful Case: Supranational Litigation as an Advocacy Tool*

Rather than stemming directly from Court orders, advances in the human rights practices of numerous Latin American societies have historically depended, in our view, on the ability of social movements and human rights advocates on the ground to exert pressure on authorities to implement change. The coordinated, long-term advocacy strategies necessary to achieve such pressure may involve grassroots organization and mobilization; use of the media and other strategies to engage public opinion; cooperation with transnational advocacy networks to trigger international shaming; and the litigation of emblematic cases, sometimes including use of the inter-American system. Within this framework, a comparison of the success of several Inter-American Court cases illustrates the power of domestic activists to deploy the inter-American system to advance a campaign.<sup>80</sup> Conversely, we suggest that inter-American jurisprudence that does not fit within a larger campaign is unlikely to trigger concrete benefits on the ground when governmental authorities are resistant to the judgment.

*The influence of media attention and public support.* In 1997 the Court considered the case of *Loayza Tamayo v. Peru*.<sup>81</sup> The case arose from the 1993 detention of Professor María Elena

J. L. & TRADE AM. 429, 449–61 (2006). The existence of such jurisprudence is a positive indication of the inter-American system's influence. At the same time, this cannot serve as the only criterion for studying the Court's impact. Domestic judgments that involve progressive jurisprudence or call for large-scale reforms may themselves suffer from a lack of implementation when political will is lacking in other governmental institutions.

<sup>79</sup> See Comisión Especializada Permanente de lo Civil y Penal, Ley Orgánica para la Ejecución de Sentencias de la Corte Interamericana de Derechos Humanos e implementación de acuerdos amistosos y de cumplimiento ante la Comisión Interamericana, Oficio No. 153–CEPCP–P–07 (Nov. 15, 2007), available at <<http://apps.congreso.gov.ec/sil/documentos/informes/574.doc>>.

<sup>80</sup> More detailed versions of the first two case studies that follow (based on the cases *Loayza Tamayo v. Peru* and *Castillo Petruzzi v. Peru*) appear in James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 245–49 (2004).

<sup>81</sup> *Loayza Tamayo v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997).

Loayza Tamayo, accused of association with Peru's Sendero Luminoso (Shining Path) insurgent group.<sup>82</sup> Loayza Tamayo was subjected to incommunicado detention, physically and psychologically abused, and eventually sentenced by a faceless tribunal to twenty years' imprisonment for terrorism.<sup>83</sup> The Court found that Peru had violated the victim's rights and ordered the state to release her.<sup>84</sup> Even though Peru (then under Fujimori) routinely resisted the Court during this period,<sup>85</sup> the government released Loayza Tamayo within a month.<sup>86</sup>

The Court decision, however, was far from the only element of the campaign to free Loayza Tamayo. From the time of her arrest and continuing for four years, her case generated both widespread popular support and media attention within and beyond Peru.<sup>87</sup> She maintained her innocence, helping to make her a sympathetic victim whose plight resonated with the public when reported through the media.

Two years later, in *Castillo Petruzzi v. Peru*, the Court dealt with a similar case in which the victims (four Chilean nationals) were sentenced to life imprisonment by a faceless tribunal.<sup>88</sup> The Court ordered that they be retried with full due process guarantees,<sup>89</sup> but this time the Court's judgment met with a different reception. As foreign nationals accused of committing violent crimes in Peru, the victims failed to generate the public support and sympathetic media coverage that had characterized the *Loayza Tamayo* case. In this climate, not only did the government refuse to comply with the *Castillo Petruzzi* judgment, asserting that the Court's orders were an intrusion upon state sovereignty,<sup>90</sup> but the Peruvian Congress approved a resolution attempting to retract Peru's recognition of the Court's jurisdiction.<sup>91</sup>

These two case studies illustrate the role that media and public support can play in pressuring a state to comply with supranational orders in favor of victims. This particular pair of cases yielded very different results at the level of the individuals concerned and, more broadly, generated different types of public dialogue and outcomes with regard to state engagement in the inter-American system.<sup>92</sup>

<sup>82</sup> *Id.* at 2–3, 21–24, paras. 3, 46.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*, sec. XVIII, at 31–35.

<sup>85</sup> See, e.g., *Castillo Petruzzi v. Peru*, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 41, at 24, para. 100(a) (Sept. 4, 1998) (quoting Peru's assertion that "the sovereign decision of the legal organs of Peru cannot be modified much less rendered ineffective by any . . . international authority"); *Castillo Petruzzi*, Inter-Am. Ct. H.R. (ser. C) No. 52, at 63, para. 216(f) (May 30, 1999) (quoting Peru's statement that the Inter-American Court "does not have the right to order that criminals be released").

<sup>86</sup> *Loayza Tamayo*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 42, at 2, para. 4 (Nov. 27, 1998). The state challenged and refused to comply with various other reparations orders in the case. *Loayza Tamayo*, Compliance with Judgment, Inter-Am. Ct. H.R. (ser. C) No. 60 (Nov. 17, 1999).

<sup>87</sup> In 1995 Loayza Tamayo was able to send a letter from prison to Amnesty International describing how she had been raped and otherwise tortured during her detention. Amnesty Int'l, *Peru/Japan, Alberto Fujimori Ex-president of Peru Must Be Brought to Justice*, AI Index AMR 46/017/2001 (2001), available at <<http://www.amnesty.org/en/library/info/AMR46/017/2001/en>>.

<sup>88</sup> *Castillo Petruzzi*, Inter-Am. Ct. H.R. (ser. C) No. 52, at 1, 20–31, paras. 1, 86 (May 30, 1999).

<sup>89</sup> *Id.*, sec. XVII.

<sup>90</sup> *Castillo Petruzzi*, Compliance with Judgment, Inter-Am. Ct. H.R. (ser. C) No. 59, at 3, para. 3 (Nov. 17, 1999).

<sup>91</sup> Legislative Res. No. 27152 (July 8, 1999); see Letter from Fernando de Trazegnies Granda, Minister for Foreign Affairs, Republic of Peru, to César Gaviria, Secretary General, OAS (July 8, 1999), available at <<http://www.umn.edu/humanrts/iachr/Annuals/app16-99.html>>.

<sup>92</sup> The situation with regard to *Castillo Petruzzi* would change several years after Fujimori left power. In 2003, a time when rejection of Fujimori's abuses was of growing importance in public opinion, Peru's Constitutional

As another example, in *Yean and Bosico v. Dominican Republic*,<sup>93</sup> the Court considered the state's discriminatory failure to provide two children of Haitian descent with birth certificates. The case occurred against a backdrop of entrenched prejudice and social exclusion of persons of Haitian descent in the country.<sup>94</sup> This climate had made it difficult for domestic activists to mobilize widespread public pressure for the equal treatment of such persons. The Court's finding in favor of the petitioners thus met with backlash from the public.<sup>95</sup> The secretary of foreign relations issued a document stating that the government questioned the procedures and outcome of the inter-American case, leading to speculation in 2007 that despite having paid monetary reparations to the victims, the state did not intend to reform its law and practice to comply with the Court judgment.<sup>96</sup>

By contrast, public support and preexisting advocacy efforts on an issue can help to ensure that governments will be receptive to Inter-American Court judgments that seek to move the issue forward. As we discuss in part IV below, the evolving public attitude toward amnesty laws in the region was a factor that promoted implementation of the Court's decision in the *Barrios Altos* case, mentioned above.

*Government actors and human rights advocacy.* Domestic pressure to comply with Court judgments and to reform underlying human rights problems can also come from individuals or institutions within a state's government. Cases in which a Court judgment complements and fits into ongoing advocacy efforts by such stakeholders have generally led state actors to pay greater attention to changing relevant policies. One such case, *Ximenes Lopes v. Brazil*,<sup>97</sup> concerned a killing in a psychiatric clinic operating pursuant to a contract with Brazilian authorities in Ceará State. Before the Inter-American Commission, the *Ximenes Lopes* case attracted the support of the Ceará legislature's human rights commission, a major Brazilian human rights organization, psychiatric professionals, and the media. By the time the case progressed to the Court, efforts by domestic stakeholders, including local and national health commissions, had already fostered an ongoing shift from an internment model of mental health care to a system focused on outpatient care and increasing respect for patients' rights. This context of reform brought about a greater focus on the underlying issues of mental health policy before the Inter-American Court. Brazil presented testimony regarding steps it had taken to

Court cited *Castillo Petruzzi* in its landmark decision to strike down several pieces of antiterrorist legislation. See Constitutional Court, 01/03/2003, "Marcelino Tineo Silva y más de 5,000 ciudadanos," Exp. No. 010-2002-AI/TCLIMA, available at <<http://www.tc.gob.pe/jurisprudencia/2003/00010-2002-AI.html>>. Later that same month, Peru at last opened a new trial for the victims in *Castillo Petruzzi*. See, e.g., *New Trial Opens for Chileans Imprisoned in Peru on Terrorism Charges*, AP, Jan. 30, 2003, available at <<http://www.highbeam.com/doc/1P1-71400211.html>>.

<sup>93</sup> *Yean and Bosico v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005).

<sup>94</sup> See *id.* at 25, para. 85(b)(1).

<sup>95</sup> See Juan Bolívar Díaz, ¿Haitianos, dominicanos ó dominicohaitianos? EL DIARIO HOY, Oct. 16, 2005, available at <[http://www.clavedigital.com.do/App\\_Pages/Portada/Titulares.aspx?Id\\_Articulo=6231](http://www.clavedigital.com.do/App_Pages/Portada/Titulares.aspx?Id_Articulo=6231)> (reporting that most Dominicans who knew of the judgment had strong negative reactions).

<sup>96</sup> Diógenes Pina, *República Dominicana: Acatamiento parcial a Corte Interamericana*, INTER PRESS SERV., Mar. 23, 2007, available at <<http://ipsnoticias.net/interna.asp?idnews=40469>>. At the same time, the Court's decision appears to have galvanized international concern over the plight of Dominicans of Haitian descent. In 2007 Dominican activist Sonia Pierre received the Robert F. Kennedy Human Rights Award. See Marc Lacey, *A Rights Advocate Whose Work Divides Dominicans*, N.Y. TIMES, Sept. 29, 2007, at A4. A coalition of NGOs in Washington has also taken up the issue. Interview with Michael Camilleri, staff attorney, CEJIL, Washington, D.C. (Oct. 11, 2007). It remains to be seen whether these developments will produce change on the ground.

<sup>97</sup> *Ximenes Lopes v. Brazil*, Inter-Am. Ct. H.R. (ser. C) No. 149 (July 4, 2006).

reduce the frequency of confinement of patients and to restructure its national mental health program.<sup>98</sup> The Court case, in turn, stimulated fresh debate within Brazil about public health policy.

Supranational litigation can also support human rights advocacy by individual governmental actors. Former judge of the Inter-American Court Thomas Buergenthal provides two vivid examples. In one case, the Court issued an advisory opinion holding that a Costa Rican law requiring all journalists to belong to an association was incompatible with the American Convention.<sup>99</sup> The law, however, remained in force until former president of the Court Rodolfo Piza was named to the new Constitutional Chamber of Costa Rica's Supreme Court; soon thereafter, that body annulled the law.<sup>100</sup> Likewise, Honduras delayed in complying with the monetary damages due in the Court's first contentious cases, *Velásquez Rodríguez* and *Godínez Cruz v. Honduras*, until former Court judge Carlos Roberto Reina became president of Honduras.<sup>101</sup> While extreme cases such as these are rare, the point to be made is that governments and their agencies are not unitary actors; it is not uncommon for certain individuals within a government to have a far greater commitment to advancing human rights agendas than that reflected in the state's current policy and practice. For such individuals, an Inter-American Court judgment may help them push colleagues to implement changes. Key to this process, as we argue later, is for Court judgments to be well-grounded and sensitive to domestic factors that could provoke a backlash.

*The role of international pressure in reducing systematic violations.* Finally, while we have emphasized the role of domestic actors, broader advocacy campaigns may also involve pressure from international institutions. Scholars Margaret Keck and Kathryn Sikkink point to the evolution of the former Argentinean military dictatorship's human rights practices, for example, in articulating their *boomerang theory* of international influence on domestic human rights situations.<sup>102</sup> Under this theory, domestic advocates employ international allies to shame and pressure a government on the global stage, amplifying domestic groups' own demands and ultimately serving to "echo back these demands into the domestic arena."<sup>103</sup> Keck and Sikkink highlight the role of international human rights NGOs, foreign governments, the Inter-American Commission, and the international press<sup>104</sup> in forcing a greater degree of openness and eventually improvements in the human rights practices of Argentina's military government.<sup>105</sup>

Professor Sonia Cardenas takes a more skeptical and nuanced view of the international community's influence on the military dictatorships in Argentina and Chile.<sup>106</sup> While

<sup>98</sup> One of the witnesses presented by Brazil was Pedro Gabriel Godinho Delgado, National Coordinator of the Mental Health Program of the Ministry of Health. Godinho Delgado's testimony focused on measures taken by the state to increase outpatient care, as opposed to confinement, as well as measures designed to promote and respect human rights within the mental health system. *See id.*, para. 47.3.b.

<sup>99</sup> Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 5 (1985).

<sup>100</sup> Buergenthal, *supra* note 26, at 268–69.

<sup>101</sup> *Id.* at 272.

<sup>102</sup> MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); *see, e.g., id.* at 107.

<sup>103</sup> *Id.* at 13.

<sup>104</sup> *Id.* at 105–07.

<sup>105</sup> *Id.* at 109.

<sup>106</sup> SONIA CARDENAS, *CONFLICT AND COMPLIANCE: STATE RESPONSES TO INTERNATIONAL HUMAN RIGHTS PRESSURE* (2007); *see, e.g., id.* at 38–39.



acknowledging that pressure led to improved human rights practices in these countries in the 1970s,<sup>107</sup> Cardenas emphasizes that international human rights influence is limited by the presence of internal national security threats and pro-violation constituencies.<sup>108</sup> Even after international pressure rose against Chile, for instance, the use of torture increased in 1979 and 1980.<sup>109</sup> Similarly, as Argentina was publicly committing itself to international norms in 1977, over three thousand disappearances took place and the government opened four new clandestine detention centers.<sup>110</sup> Cardenas thus argues that international pressure is effective only when it fills the void previously occupied by real or manufactured national security threats.<sup>111</sup> In Chile, violations declined in 1976 only after armed confrontations with leftist groups subsided. Similarly, the largest decline in violations in Argentina followed the dismantling of internal armed groups in 1977 and 1978.<sup>112</sup> Drawing on these observations, Cardenas concludes that international pressure campaigns, to the extent that they have the power to bring about change on the ground, will be most effective when they take advantage of strategic openings for advocacy and are tailored to the unique domestic conditions of the violating state.<sup>113</sup>

The data cited by Cardenas underscore that international pressure in isolation is unlikely to advance the human rights situation in states resistant to the authority of international obligations. However, according to both Keck and Sikkink's boomerang theory and Cardenas's understanding, an integrated advocacy campaign involving the deployment of targeted international pressure at strategic moments can enhance the power of domestic advocates and other political actors to bring about change.

### *The Role of the Court: Relevance to Domestic Activists*

We wish to make clear that we do not suggest that a supranational tribunal should limit itself to hearing popular cases or matters in which the victims already enjoy support from the public, international human rights bodies, or other sources. Quite the contrary: it is often the role of human rights litigators to represent individuals marginalized by society or overlooked by the international community. Our point is simply that tribunals will be most effective when they understand the specific dynamics of change in a country or region. Experience indicates that advancement of human rights in many Latin American countries is most likely when positive media coverage, public support, and/or international pressure can be brought to bear on a given issue.

With the caveat that each country and case comes with a specific set of factors, we now conclude this section by introducing (and in some cases reiterating) several of the specific advocacy tools that we argue the Court should bear in mind when considering a case.

*Public Court proceedings: a focal point for media advocacy.* As already mentioned above, one of the highly valuable outcomes of an Inter-American Court case for petitioning NGOs is the accompanying media coverage that the case may generate. One of the authors has previously

<sup>107</sup> *Id.* at 65.

<sup>108</sup> *Id.* at 27–28.

<sup>109</sup> *Id.* at 67–68.

<sup>110</sup> *Id.* at 69.

<sup>111</sup> *Id.* at 83.

<sup>112</sup> *Id.* at 82.

<sup>113</sup> *Id.* at 134.

observed, on the basis of years of litigating before the inter-American system as the director of various human rights organizations in Brazil, that the impact of inter-American decisions in that country has varied not according to their content but, rather, in accordance with the degree of pressure brought to bear by the public and especially by the media.<sup>114</sup>

In this regard, public hearings held by the Inter-American Court provide a focal point for media attention immediately before, during, and after their occurrence, and can strengthen the perceived legitimacy of a cause by serving as a forum for victims and civil society groups to tell their stories and debate respondent states. Compelling victim testimony, in particular, may give rights violations a human face and counteract the otherwise negative public or media perception of certain unpopular groups (such as prisoners) who are victims of human rights violations.<sup>115</sup> We thus suggest that the media attention inherent in public hearings may help to generate popular support and compliance pressure around a case.

*Full and accurate factual record.* As observed above, the European system prior to the early 1990s dealt primarily (if not exclusively) with nonviolent human rights violations. Moreover, in many cases the facts were largely undisputed.<sup>116</sup> Historically, therefore, the ECHR has not had to devote a significant percentage of its time to fact-finding and, particularly when considering cases against well-established democratic states, has often been able to take the results of domestic judicial processes as dispositive of the facts of a case.<sup>117</sup>

In the inter-American system, by contrast, the types of human rights violations alleged have, on the whole, been more violent and are likely to involve complex patterns of facts, requiring proof not only of the physical occurrences alleged, but also of the level of state knowledge of or participation in these events, as well as the role of authorities in their investigation. Respondent states have often denied at least some of the petitioners' factual allegations, arguing, for example, that a massacre was in fact a confrontation between two armed parties or that their investigation of the facts was done in good faith. Finally, the offending state may well acknowledge the specific violations alleged in the case but deny that they form part of a larger pattern of violations (a trend that we discuss in detail below).

We argue that what is required in all of these cases is for the Court to set forth a complete narrative of the facts, providing advocates with an authoritative record to use in their campaigns and preventing governments or their supporters from putting forth alternative factual

<sup>114</sup> Cavallaro, *supra* note 60, at 487.

<sup>115</sup> Victim testimony may also greatly benefit victims themselves, providing them with the chance to tell their stories in a neutral, authoritative forum. Because this article focuses on the wider advocacy impact of Court decisions, we do not discuss in depth the potential loss to victim witnesses that accompanies the Court's procedural reforms. We note, however, that this is another cost to be considered in evaluating the reduction in the use of public hearings by the Court, as discussed in text below.

<sup>116</sup> Speaking in the early 1990s, Professor Jochen A. Frowein noted that in the vast majority of cases to come before the European system, "the documents produced by both parties lead to a non-controversial establishment of the facts." Jochen A. Frowein, *Fact-Finding by the European Commission of Human Rights*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS: ELEVENTH SOKOL COLLOQUIUM 237, 238* (Richard B. Lillich ed., 1991).

<sup>117</sup> One ECHR judge reported in 1997 that when dealing with established democracies, the ECHR has generally been able to accept the findings of domestic courts as true; however, this rule did not necessarily hold for Turkey or for newly entered Eastern European states. See *Visita de la Corte Europea de Derechos Humanos (noviembre de 1997, extractos de los debates)*, in 2 INTER-AM. CT. H.R., INFORME: BASES PARA UN PROYECTO DE PROTOCOLO A LA CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS, PARA FORTALECER SU MECANISMO DE PROTECCIÓN 501, 509 (Antônio Augusto Cançado Trindade ed., 2d ed. 2003), available at <<http://www.corteidh.or.cr/docs/libros/Semin2.pdf>>.

accounts later.<sup>118</sup> Importantly, the scope of facts proven before the Inter-American Court determines the scope of facts that the state is obligated to investigate under the ensuing reparations orders.<sup>119</sup> Even when the state acknowledges responsibility for the violations, the advocacy value in setting forth a narrative of the facts may be considerable.<sup>120</sup>

Most significant, because advocacy power, and not necessarily technical legal points, often influences the effectiveness of a Court judgment, it is not enough for the Court to declare that it has sufficient legal justification to find a violation. Instead, it is crucial for the Court to deploy rigorous fact-finding processes to determine as far as possible the precise facts underlying the violation, as the difference in advocacy and media impact between competing versions of the facts (for instance, one version in which the state fails to protect a victim from third-party violence as against another version in which state agents carry out an extrajudicial execution) may be enormous.<sup>121</sup> Likewise, by identifying illegitimate actions by specific actors or deficiencies in specific institutions, the Court may provide helpful guidance in efforts to strengthen domestic human rights practices.<sup>122</sup> For these reasons, we emphasize the importance of an authoritative factual record in maximizing the impact of Court judgments.

*Grounded jurisprudence.* An appreciation of the role of supranational tribunals in advancing respect for human rights also has implications for the style of jurisprudence that will maximize a court's impact on the ground. In an ideal system in which governments followed all supranational orders, the style, length, and innovative character of a court's jurisprudence would perhaps not matter. In the inter-American system, this is not the case. Instead, the degree to which domestic human rights advocates, government insiders, and others can make use of a Court judgment will generally depend on its relevance, reasoning, and awareness of the political situation in a country. In particular, it is essential for the Court to avoid (to the extent possible) jurisprudential elements likely to provoke public or governmental backlash.

We certainly do not suggest that supranational human rights courts should sacrifice impartiality for political reasons; indeed, for such institutions to be effective, they must demonstrate their integrity as politically neutral arbiters. Within this framework of political independence, however, supranational courts nevertheless exercise some degree of discretion over the exact form that their judgments take. Such discretion may include, for instance, whether to discuss

<sup>118</sup> Importantly, a Court's perceived fact-finding abilities make a crucial contribution to its legitimacy. Helfer and Slaughter state, "An important dimension of [a human rights court's] powers is the ability to elicit credible factual information on which to base the tribunal's decisions. A guaranteed capacity to generate facts that have been independently evaluated, [e.g.] through the public contestation inherent in the adversary system, helps counter the perception of self-serving or 'political' judgments." Helfer & Slaughter, *supra* note 8, at 303.

<sup>119</sup> See Tatiana Rincón Covelli, *La verdad histórica: una verdad que se establece y legitima desde el punto de vista de las víctimas*, 7 ESTUDIOS SOCIO-JURÍDICOS 331, 340–41 (spec. ed. 2005) (Colom.).

<sup>120</sup> Indeed, the Court has placed increasing importance on setting forth a narrative of facts even in cases of acknowledgment of responsibility, as discussed in part IV *infra*.

<sup>121</sup> In some cases, certain facts may remain unclear even after rigorous fact-finding. In such situations, the Court may have sufficient proof to declare, e.g., a violation based on failure to protect but not to declare direct responsibility for the original violation (such as a killing). We do not suggest that every example of this type indicates deficient fact-finding; rather, in some cases it will be the best outcome that the petitioners can achieve if there are true obstacles to clarifying the underlying facts. Note also that we intend the phrase "rigorous fact-finding" to denote a process that determines as precisely as possible the facts of a case, regardless of whether these facts turn out to support the petitioners or the state.

<sup>122</sup> For example, the international NGO and inter-American litigant CEJIL notes the value of the Court's establishment of the specific military unit responsible for the victim's death in *Mack Chang v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003). CEJIL, *supra* note 58, at 27.

issues not necessary to the holding of a case; the precise form that reparations should take; and (to some extent) whether to expand upon the previous understanding of a right. In this regard, we believe that courts enhance their effectiveness to the extent that they recognize political realities on the ground and are able to tailor their decisions to maximize the potential for positive impact.

*The need for impact beyond the facts of the case.* Finally, each supranational human rights case must be viewed as an opportunity to leverage strategic pressure in favor of broad social impact. While hardly a radical or novel idea in itself, this view of supranational litigation bears emphasizing in light of the extremely small fraction of total cases reaching the Inter-American Court each year. Viewed in this context, a case resolved in a manner that gives reparations to the individual victim but fails to provide support for campaigns on behalf of much larger populations is a missed opportunity. This notion is not meant to minimize the significant value in giving justice to the individual victim; but considering the equally urgent situation of the hundreds or thousands of victims whose cases will never be heard by it, the Court, as both a moral and a practical matter, must use each case that comes before it as an opportunity to advance the broader issue underlying the litigation.

Bearing these general principles in mind, we turn to a survey of the current procedures and jurisprudence of the Inter-American Court.

#### IV. STREAMLINING ITS WORK OR STRAYING FROM ITS STRENGTHS? CURRENT PRACTICES OF THE INTER-AMERICAN COURT

A survey of recent trends in the practice of the Inter-American Court raises concerns that a growing docket and continuing financial limitations may be hampering the tribunal's ability to achieve the goals discussed immediately above most effectively. In particular, in its efforts to cope with its steeply increased caseload and to respond to states' changing litigation tactics, the Court has adopted new procedures that reduce the use of public hearings, witness testimony, and (in some cases of state acknowledgments of responsibility) adversarial argument concerning the merits of a case. These changes potentially weaken several of the Court's most useful functions, such as producing detailed factual records and generating media and public pressure on human rights issues. At times in recent years, the Court has also issued visionary or philosophical jurisprudence that suggests an insufficient appreciation of local political conditions.

The Court has already recognized some aspects of these broad trends as problematic and has taken positive measures to counteract some of their potentially negative consequences (discussed below). At the same time, the Court remains largely focused on processing increased numbers of cases, leaving it with little time for a critical evaluation of any negative effects of its overarching shift in operations.<sup>123</sup>

Until increased funding is made available, the Court will face real trade-offs in deciding how to allocate its resources. Moreover, it faces pressure to avoid backlogs of cases, and we hesitate to suggest a course of action that might delay justice for victims. However, as discussed in detail

<sup>123</sup> We recognize, of course, that the Court's remarkable increase in the number of cases heard and the speed with which decisions are issued may have beneficial effects for individual victims. As we discuss below, however, we worry that actors within the system may be overlooking any price paid for these gains. We believe that, at a minimum, critical evaluation of the Court's new procedures is warranted.

below, the negative advocacy impact of even a single case processed with insufficient time dedicated to rigorous fact-finding or other elements may have severe consequences for the activities of domestic advocates. Thus, while we do not argue that the Court should apply more resource-intensive procedures to every case or even most cases, we do urge it to retain the flexibility to consider each case with an eye to identifying those for which greater resources are required.

Finally, striking an appropriate balance between giving attention to each individual case and coping with an expanding docket is not a challenge unique to the inter-American system. The European Court, for instance, faces an overwhelming docket of its own. The number of applications allocated annually to the decision bodies of the ECHR has increased from 10,500 in 2000 to 41,700<sup>124</sup> in 2007, with 79,400 applications pending at the end of 2007, an increase of 19 percent from the year before.<sup>125</sup>

In its continuing efforts to handle this enormous caseload, the Council of Europe in 2004 adopted Protocol 14 to the European Convention, streamlining its procedures by, *inter alia*, reducing the number of judges dealing with various matters. Under this protocol, a single judge may declare an application inadmissible (instead of a committee of three) and committees of three judges (instead of chambers of seven) may render judgments on the merits of cases when these can be resolved under established case law.<sup>126</sup> Currently, all but one member state (Russia) has ratified this protocol, which requires universal ratification to enter into force. The urgency with which the European Court views its expanding docket is clear in the statements of its president, Jean-Paul Costa, who stated at the ECHR's 2007 annual press conference:

[I]f Protocol 14 does not enter into force soon, the future of the Court and Convention system will be in jeopardy.

. . . [T]he application of Protocol 14 will enable the Court to increase its productivity by at least 25%. Although it cannot suffice by itself, the Protocol is therefore indispensable. Everything starts with Protocol 14. . . .

. . . [Without it,] our great European institution will be asphyxiated.<sup>127</sup>

Given the analogous challenges (though vastly different in scale) facing regional human rights courts and these courts' recent focus on processing cases more efficiently, we hope that our evaluation of several aspects of the inter-American system will complement thinking about other systems as well, while recognizing, of course, that the numerical and other differences between the systems highlight the need for region-specific analyses and solutions.<sup>128</sup>

<sup>124</sup> ECHR ANNUAL REPORT, *supra* note 1, at 146.

<sup>125</sup> *Id.* at 134.

<sup>126</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, Europ. T.S. No. 194, *available at* <<http://conventions.coe.int/>>.

<sup>127</sup> Jean-Paul Costa: Urgent Need to Implement Reforms to Secure Future of European Court, Eur. Ct. H.R. Press Release 063 (2007) (Jan. 25, 2007), *available at* <<http://www.coe.int/>>.

<sup>128</sup> For instance, in the absence of a European Commission to act as a filter, the ECHR admits only a small minority of its applications, in sharp contrast to the Inter-American Court. Other differences worth analyzing include the phenomenon of so-called clone cases in the European system (groups of cases raising the same questions of law in the same countries), as well as the subject matter of these cases (including the large percentage of European cases that continue to involve procedural violations related to the length of judicial proceedings). *See, e.g.*, ECHR ANNUAL REPORT, *supra* note 1, at 142–45.

*Increasing Case Resolution by Decreasing Hearings and Witnesses*

A clear trend in the Inter-American Court's work over the past decade—although it has not yet provoked empirical analysis of its effects—has been a reduction in the number of days dedicated to public hearings for each case decided. Accompanying this decline has been a reduction in the use of live witness testimony<sup>129</sup> and an increasing reliance on written affidavits instead, a trend most apparent in the past three to five years. To place these changes into context, it is helpful to contrast the Court's current practice with its initial approach to hearings and testimony, as exemplified by its first contentious case, *Velásquez Rodríguez v. Honduras*.<sup>130</sup>

*Historical use of public hearings and witness testimony by the Court.* Twenty years ago in *Velásquez Rodríguez* and its companion cases (*Godínez Cruz* and *Fairén Garbi v. Honduras*, all concerning forced disappearances), the Inter-American Court placed visible emphasis on gathering facts in live Court sessions. In the merits phase alone of this line of cases, the Court spent more than a week hearing testimony,<sup>131</sup> and it convened separate hearings to examine admissibility and reparations. When the Court determined that the testimony of members of the Honduran security forces would be useful during the merits stage, it took the initiative of requesting such witnesses.<sup>132</sup> It heard twenty-two witnesses in all.<sup>133</sup>

The significant role that witness testimony played in these cases is evident in the judgments. Witness names appear more than 120 times in the concise *Velásquez Rodríguez* merits opinion, and the Court explicitly stated that certain testimony was instrumental in demonstrating the pattern of disappearances in Honduras at the relevant time. On the basis of its finding that the victim's kidnapping fit the pattern, the Court held Honduras responsible for violations of the victim's rights to liberty, physical integrity, and life.<sup>134</sup>

The numerous witness accounts probably also increased the nascent Court's perceived legitimacy in declaring a violation of the right to life based on a pattern of similar violations, reasoning that might have drawn skepticism if it had not been perceived as well-grounded in the evidence. Finally, the multiple hearings and compelling testimony that characterized the case offered repeated focal points for media attention.<sup>135</sup> The witnesses had the opportunity to publicize the state's forced disappearances in a neutral, highly visible supranational forum, reinforcing domestic actors' own calls for accountability.

<sup>129</sup> We recognize that the testimony of witnesses and that of expert witnesses can play different roles in Court proceedings. For the purposes of this piece, however, which represents an initial exploration of this material, we group together witnesses and experts as one category in our statistical analyses, using the term "witnesses" to refer to this combined group.

<sup>130</sup> *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

<sup>131</sup> *Id.* at 5–6, para. 28.

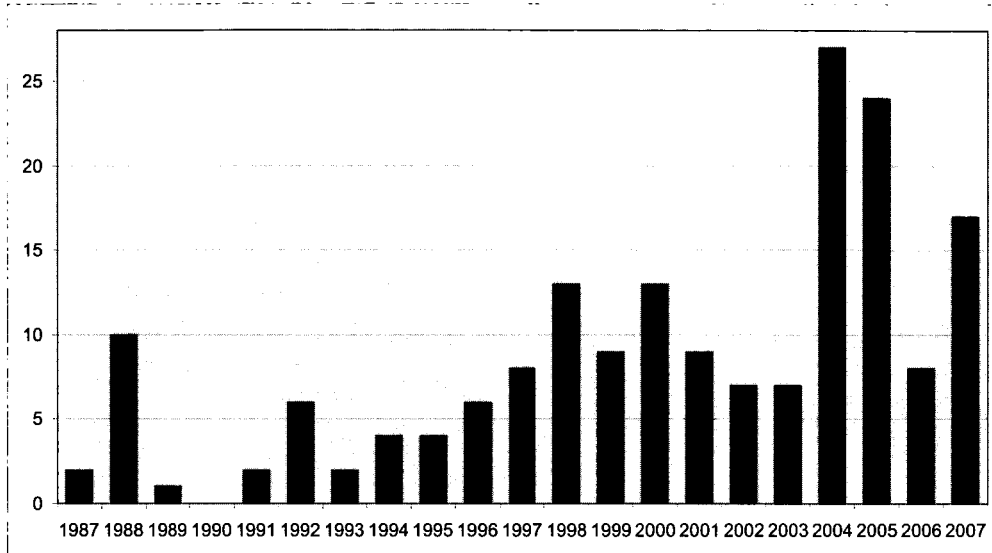
<sup>132</sup> *Id.* at 7, para. 34.

<sup>133</sup> Rather than speaking of twenty-two witnesses, one can view this figure as an average of just over seven witnesses per case in *Velásquez Rodríguez*, *Godínez Cruz*, and *Fairén Garbi*, respectively. However, since the testimony in these matters occurred largely simultaneously, we find it logical to discuss the cases as one proceeding for the purposes of illustrating the role of live testimony.

<sup>134</sup> *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, sec. XIV, at 34–35 (July 29, 1988). Empirically it is not possible to test whether the Court could have found the necessary facts to reach these conclusions through affidavits rather than testimony. However, the fact that after hearing the offered witnesses, the Court went to great lengths to receive more live testimony suggests that it may have recognized some fact-finding value in testimony (which, among other things, allows for in-person assessments of credibility) as compared to written evidence.

<sup>135</sup> See Juan E. Méndez & José Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 *HAMLIN L. REV.* 507, 557–58 (1990) (noting the wide press coverage of the hearings).

FIGURE 2. TOTAL DAYS OF PUBLIC HEARINGS ANNUALLY 1987–2007



This chart shows the total number of days in each year that were devoted to public hearings in contentious cases, regardless of the year in which the corresponding cases were decided. For the data, see Inter-Am. Ct. H.R., *Annual Report 2007*, p. 65.

The level of witness testimony seen in *Velásquez Rodríguez* will not be necessary in all or even most cases. However, while the Honduran disappearance cases represent some of the most resource-intensive matters undertaken by the Court (as well as constituting the entire docket at the time), they are by no means unique among cases heard in its first dozen years. For example, in the 1995 case of *Neira Alegria v. Peru*, concerning a prison massacre, the Court heard thirteen witnesses during the merits phase, dividing a week's worth of hearings among preliminary objections, merits, and reparations.<sup>136</sup> In the subsequent cases of *Villagrán Morales v. Guatemala* (concerning the murder of street children by police) and *Baena Ricardo v. Panama* (concerning the dismissal of protesting workers),<sup>137</sup> the Court heard seventeen and fifteen witnesses, respectively. As late as 2003, the Court heard thirteen witnesses in the case of murdered anthropologist Myrna Mack Chang.<sup>138</sup>

In the cases mentioned above, the Court found it necessary to receive more live argument and testimony than the norm. The average numbers during the 1990s are closer to three days of public hearings and seven witnesses per case (see figures 3 and 4, pp. 799, 800).<sup>139</sup> Indeed, a few cases were resolved with only one day of hearings, and in several cases in which the respondent states acknowledged the truth of the facts alleged against them, the Court did not receive

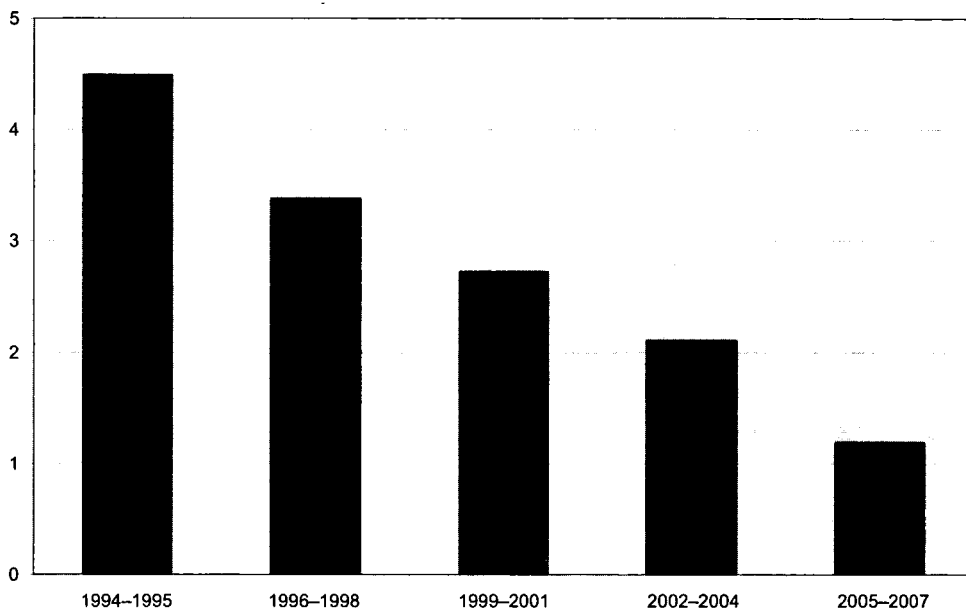
<sup>136</sup> *Neira Alegria v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 20 (Jan. 19, 1995).

<sup>137</sup> *Villagrán Morales v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999); *Baena Ricardo v. Panama*, Inter-Am. Ct. H.R. (ser. C) No. 72 (Feb. 2, 2001).

<sup>138</sup> *Mack Chang v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003).

<sup>139</sup> The numbers of hearing days and witnesses reported in this article come from our manual count of these data in each judgment issued by the Court. For purposes of our analysis, we count a case as decided in the year in which the merits judgment was issued, although the relevant hearings may be spread out over a period of several years before and after this year. In addition, we have excluded cases that, owing to dismissal or discontinuance, did not reach either the merits or the reparations stage of the case.

FIGURE 3. AVERAGE DAYS OF PUBLIC HEARINGS PER CASE RESOLVED 1994–2007



These data were calculated by counting the number of days of public hearings as reported in the Court's judgments, excluding days spent on provisional-measures hearings. The days used for hearings were counted in the year in which the corresponding merits judgments were issued. The chart therefore shows the trend in days spent on each case. Two cases that did not reach either the merits or reparations stages, *Maqueda v. Argentina* (1995) and *Martín del Campo Dodd v. Mexico* (2004), were excluded because they were dismissed or discontinued.

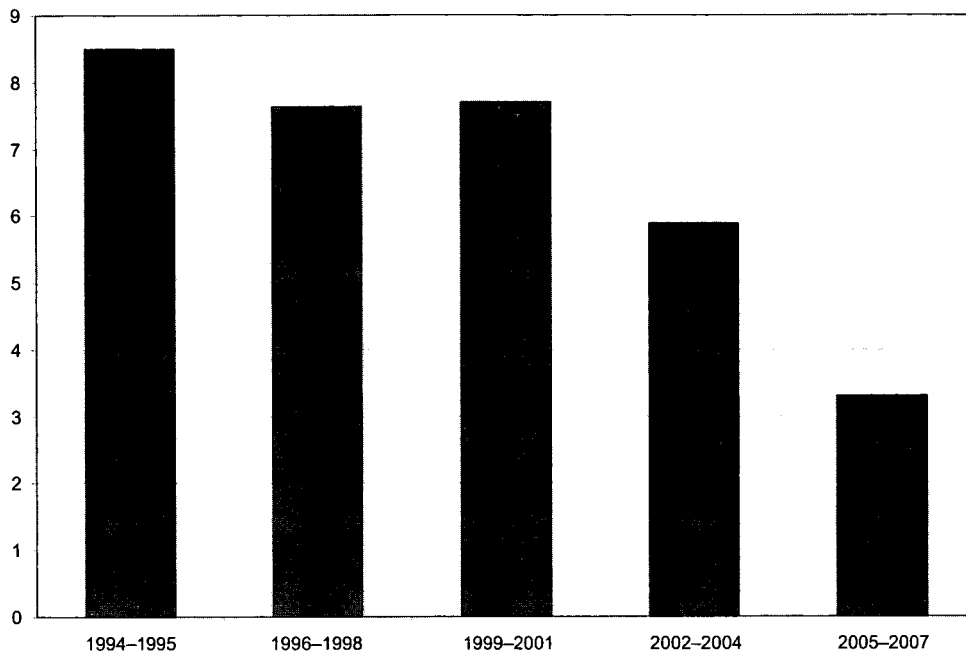
witness testimony.<sup>140</sup> Nevertheless, the important points to underscore here are that until the year 2005, every case considered on the merits received at least one and usually more than one public hearing, and those hearings often spanned multiple separate procedural stages (particularly through 2002). Likewise, it was the strong norm, if not the universal rule, for each case to feature witnesses, who might testify at the preliminary objections, merits, or reparations stage. In fact, prior to 2005, every contested case considered on the merits (that is, every case in which the state did not acknowledge responsibility for the alleged violations) included witness testimony. As shown above, the Court did not hesitate to exercise the option to convene large numbers of hearings and witnesses in a single case.

*Reduction in hearings and witnesses following the procedural reforms.* In contrast to the practice described above, the last several years have seen a clear trend toward reducing the number of witnesses and hearings dedicated to each Court case. The explanation for this reduction lies primarily in the Commission's 2001 procedural reforms, which more than doubled the cases progressing to the Court. Faced with a growing caseload, the Court responded by seeking to minimize the amount of time spent on individual cases, consistently limiting to one or two the total number of public hearing days devoted to each.

<sup>140</sup> As the above data illustrate, the number of hearing days and especially of witnesses has traditionally varied from case to case, sometimes greatly. We do not assert that the Court ever heard a certain uniform number of witnesses in each case, nor do we maintain that it should establish any such number. Rather, we favor a model in which it retains the flexibility to receive as many witnesses as needed for each case, meaning that variance from case to case is to be expected.



FIGURE 4. AVERAGE NUMBER OF WITNESSES PER CASE RESOLVED 1994–2007



These data were calculated by counting the number of witnesses as reported in the Court's judgments. The witnesses were counted in the year in which the corresponding merits judgments were issued. The chart therefore shows the trend in witnesses heard in each case. *Las Palmeras v. Colombia* (2001) was excluded because the merits opinion does not list the witnesses who appeared, and *Maqueda v. Argentina* (1995) and *Martín del Campo Dodd v. Mexico* (2004) were excluded because, not having reached either the merits or reparations stages, they were dismissed or discontinued.

By the time the full effects of the Commission's reforms reached the Court (roughly in 2003), the judges viewed their resource constraints in dire terms, prompting their previously quoted warning of "the imminent collapse that will occur beginning in the year 2004 in the work of the Inter-American Court."<sup>141</sup> In this climate, the Court passed its own reforms in 2003, including an overhaul of its provisions for hearing witness testimony. The Rules of Procedure now provide in Article 47(3): "The Court may require, for reasons of procedural economy, that particular witnesses and expert witnesses offered by the parties give their testimony through sworn declarations or affidavits."<sup>142</sup> Since the introduction of this provision, the Court's judgments have routinely contained a paragraph setting forth the sometimes-lengthy list of proposed witnesses who submit affidavits under Article 47(3).

As demonstrated in the graphs above (figures 2–4), the Court's changes in procedure have allowed it to triple its case output in recent years, meeting the challenge of the 2001 procedural reforms. In addition, in 2004 and 2005 the Court devoted a much greater total number of days to public hearings than in previous years. Viewed on a case-by-case basis, however, the reductions in the use of live hearings and witnesses are striking. Among cases resolved from 2005 to the present, the average number of hearings and witnesses has fallen to just above one day of

<sup>141</sup> See note 51 *supra* and corresponding text.

<sup>142</sup> Inter-Am. Ct. H.R., Rules of Procedure, *supra* note 46, Art. 47(3).

hearings<sup>143</sup> and three live witnesses per case. Recalling that there are now three parties litigating (petitioners, Commission, state), the latter total yields an average of just over one witness per party per case. These trends are also apparent when the data are broken down by cases rather than by years.<sup>144</sup>

Contributing to the pattern seen above, the Court's routine practice is now to combine all phases of a matter (preliminary objections, merits, and reparations) into one hearing or consecutive set of hearings, reducing not only the amount of time spent on each phase, but also the ability of witnesses to testify to the sometimes distinct factual matters involved. Nowadays, when the Court holds a hearing, the petitioners and the Commission have approximately twenty-five minutes each to present their final arguments, addressing in this time all phases of the case.<sup>145</sup> Similarly, each party in practice has a mere fifteen minutes to examine each witness, although witnesses may be asked to testify about matters relating to multiple phases.<sup>146</sup>

### *Evaluation of the Court's Streamlined Procedures*

We cannot state conclusively that the Court's reduction in hearings and witnesses has been, in general, a change for the worse. The on-the-ground effects of the dramatic increase in cases processed since 2004 have rarely yielded proof that the streamlined procedures have either amplified or reduced the Court's impact. It may be that more time must pass before any effects become apparent, or it may be that because some states are already so reluctant to implement certain types of reparations orders, the lack of implementation in any given case is difficult to attribute to changes in Court procedures.

Nonetheless, at least two reasons at this stage warrant critically examining the Court's procedural changes. First, as a matter of principle, when a supranational human rights tribunal undergoes any dramatic alteration, scholars and practitioners should consider the possible negative (and positive) effects that may result.<sup>147</sup> Particularly as the African Court prepares to begin operating, the Inter-American Court may serve as a model of the consequences of following certain procedures.

Second and more specifically, we find several troubling signs that the pressure on the Inter-American Court to increase its rate of case processing may be weakening the relevance, in some cases, of its work for domestic forces. We raise these issues below, drawing on concrete examples to illustrate why we consider the Court's new procedures cause for concern.

<sup>143</sup> Note that we count all public hearings in these calculations, regardless of whether these hearings involved witness testimony.

<sup>144</sup> In addition, although the growing percentage of cases resolved through a state's recognition of responsibility for alleged violations (discussed *infra*) contributes to this trend, the same general pattern is apparent even when only contested cases are considered.

<sup>145</sup> Interview with Juan Pablo Albán, litigation officer, Inter-American Commission, Washington, D.C. (Feb. 21, 2007); Interview with Lilly Ching, litigation officer, Inter-American Commission, Washington, D.C. (Feb. 21, 2007).

<sup>146</sup> Interviews with Albán and Ching, *supra* note 145.

<sup>147</sup> Indeed, the judges of the Inter-American Court indicate that the Court's process of reform is an ongoing effort requiring constant evaluation. In this sense, they invite commentary to aid them to "incorporate well-founded reforms, anchored in experience, necessity, and possibility." INTER-AM. CT. H.R., SÍNTESIS DEL INFORME ANUAL DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS CORRESPONDIENTE AL EJERCICIO DE 2006, at 17 (Mar. 29, 2007), available at <<http://www.corteidh.or.cr/discursos.cfm>>. We hope that the ideas set forth in this article contribute to the Court's ongoing evaluations as envisioned in this quotation.

*An increased number of judgments brings decreased space for advocacy.* As mentioned above, a victory in the Inter-American Court will normally have a broader social impact to the extent that it contributes to advocacy on an issue. In this regard, the Court's current restrictions on public hearings, and especially its failure to hold hearings at all in some cases, threaten to deprive civil society of opportunities to concentrate media and public attention on underlying human rights campaigns,<sup>148</sup> in both contested cases and cases in which states acknowledge some or all of the alleged violations. Past cases demonstrate the specific value of public hearings (as opposed to written proceedings) in bringing attention and pressure to bear on human rights issues. For example, in the provisional measures case of *Urso Branco v. Brazil*, concerning a massacre and subsequent acts of violence in a penal facility, the Court granted provisional measures in favor of the inmates in June 2002.<sup>149</sup> Yet it was not until the Court convened a public hearing in 2004<sup>150</sup> that the inter-American case gave rise to significant media attention in Brazil, following which the media used the hearing to generate pressure regarding the government's failure to respond to violence in Urso Branco prison.<sup>151</sup> Also illustrative is the hearing in *Montero Aranguren v. Venezuela* (the *Retén de Catia* case),<sup>152</sup> which was attended by Venezuelan journalists. The hearing gave rise to news stories not only about the Court case and its underlying facts, but also about the entire history of the matter before the inter-American system, including the state's prolonged failure to comply with the terms of its prior friendly settlement before the Commission.<sup>153</sup>

Public hearings attract attention not only domestically but also internationally. Professor Jo M. Pasqualucci, who has undertaken extensive studies of the Inter-American Court, affirms that its hearings have helped to stimulate international publicity on cases and hence to increase pressure on respondent governments.<sup>154</sup> Notably, states may take positive human rights measures, such as modifying their practices or releasing an imprisoned victim, precisely at or around the time of a public hearing.<sup>155</sup>

<sup>148</sup> Former Inter-American Court judge Thomas Buergenthal comments on the challenge of generating media attention for a case and the negative consequences of failing to do so, stating:

Judges and court employees are prevented from making any but the blandest pronouncements about the cases being heard . . . . Those statements they feel free to make certainly do not attract the public attention that human rights courts need in order to have an impact . . . . Judgments of international human rights courts that are not adequately publicized are much easier for governments to disregard.

Buergenthal, *supra* note 26, at 279. These observations reinforce the value of public hearings, in which the media have firsthand access to the parties, witness testimony, and the arguments at issue in a far more compelling form than would otherwise occur.

<sup>149</sup> *Urso Branco v. Brazil*, Provisional Measures Order (Inter-Am. Ct. H.R. June 18, 2002).

<sup>150</sup> See *Urso Branco v. Brazil*, Provisional Measures Order, para. 22 (Inter-Am. Ct. H.R. Apr. 22, 2004).

<sup>151</sup> See, e.g., *Crise na prisão Urso Branco leva Brasil a se explicar na OEA*, O ESTADO DE S. PAULO, May 20, 2004, available at <<http://www.estadao.com.br/arquivo/cidades/2004/not20040520p13325.htm>>.

<sup>152</sup> *Montero Aranguren v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 150 (July 5, 2006).

<sup>153</sup> See, e.g., Solbella Pérez Rodríguez, *Juzgarán masacre del Retén de Catia*, EL UNIVERSAL.COM, Apr. 3, 2006, <[http://buscador.eluniversal.com/2006/04/03/pol\\_art\\_03156A2.shtml](http://buscador.eluniversal.com/2006/04/03/pol_art_03156A2.shtml)>.

<sup>154</sup> PASQUALUCCI, *supra* note 48, at 195.

<sup>155</sup> One example of such timing is *De la Cruz Flores v. Peru*, in which the detained victim was released within days of the public hearing. See *De la Cruz Flores v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 115, at 5–6, 40, paras. 28, 73(48) (Nov. 18, 2004); see also *Ximenes Lopes v. Brazil*, Inter-Am. Ct. H.R. (ser. C) No. 149 (July 4, 2006) (in which Brazil took concrete steps to improve conditions in several mental health centers shortly before the public hearing in the case).

Thus, to human rights activists, hearings may constitute a tool for generating both domestic and international human rights pressure on governments.<sup>156</sup> That the Court has reduced its use of hearings as its caseload has grown does not reflect the salutary trimming away of superfluous procedures but, rather, should be recognized as a trade-off in which potential domestic advocacy value in some cases is reduced. This situation serves as a clear call, if not for the Court to retreat in its efforts to streamline its procedures, then for the OAS to provide the increased funding that the Court needs to process its current docket while still guaranteeing that sufficient time is available for public hearings in individual cases.

*Effects of the procedural reforms on the Court's fact-finding.* The Court's decreased use of hearings and witnesses raises serious questions about the extent to which live testimony is necessary to establish a full and accurate record of events. While we do not argue that witness testimony is indispensable in every case, our survey of inter-American litigation indicates that the role of live witnesses in fact-finding cannot always be fulfilled by written submissions. Before scrutinizing this issue in the inter-American context, it may be useful to set forth several observations on the experience with live testimony in the only other regional human rights tribunal currently in operation, the European Court.

Even in the European system, which in recent years has issued over fifteen hundred merits judgments annually,<sup>157</sup> and in which oral hearings are necessarily the exception rather than the rule, there are signs that the ECHR is conscious of the importance of witness testimony in certain cases of large-scale and systematic violations. Since the entry into the Council of Europe of various new member states in which the rule of law is still solidifying or in which the government faces ongoing armed conflict, the fact patterns before the ECHR have included a larger number of forced disappearances and other violations resembling those traditionally seen in Latin America.<sup>158</sup> The ECHR's recognition that these complex and violent fact patterns sometimes require a more intensive fact-finding process is reflected in the presence in the very small percentage of cases in which it takes live evidence from witnesses (usually by sending delegations of judges to hear witnesses in-country<sup>159</sup>) of allegations that generally involve a context of systematic violations or difficult-to-ascertain facts in states facing challenges in entrenching respect for human rights.<sup>160</sup> From 2002 to 2006, the ECHR deployed fact-finding missions to countries including Croatia, Cyprus, Finland (to interview a refugee claimant contesting deportation to the Democratic Republic of the Congo), Georgia, Greece, Moldova, and Ukraine.<sup>161</sup> It also sent several delegations to Turkey: in the forced disappearance case of

<sup>156</sup> Notably, in recent months the Court has initiated the practice of holding private hearings to receive information regarding compliance. All compliance reports are available at the Court's Web site, *supra* note 4.

<sup>157</sup> ECHR ANNUAL REPORT, *supra* note 1, at 137.

<sup>158</sup> See Cerna, *supra* note 25. Many cases of severe violations also arise out of facts occurring in Turkey.

<sup>159</sup> Interviewing witnesses in-country, of course, is not identical to having those witnesses testify in court. However, fact-finding missions are more akin to live testimony than to affidavits, as during fact-finding missions the judges may formulate questions (rather than simply the party offering the witness). Live interviews also allow judges to pursue new lines of inquiry that emerge and to evaluate witnesses' demeanor. (These advantages of live testimony will be discussed further *infra*.)

<sup>160</sup> Common contexts for fact-finding missions include cases regarding prison conditions and cases arising from political conflicts such as the dispute over Cyprus, the conflict between the PKK political party and the Turkish government, and the Russian-Chechen conflict. See note 161 *infra* for citations.

<sup>161</sup> Benzan v. Croatia, App. No. 62912/00 (Eur. Ct. H.R. 2002); Adali v. Turkey, App. No. 38187/97 (Eur. Ct. H.R. 2005); N. v. Finland, App. No. 38885/02 (Eur. Ct. H.R. 2005); Shamayev v. Georgia and Russia, 2005—III Eur. Ct. H.R.; Kaja v. Greece, App. No. 32927/03 (Eur. Ct. H.R. 2006); Ilaşcu v. Moldova and Russia, App. No.

*İpek v. Turkey*, three judges heard eight witnesses over several days in November 2002;<sup>162</sup> in *Taniş v. Turkey*, involving the disappearance of two other individuals, three judges took evidence from thirty-two witnesses in April 2003;<sup>163</sup> and in *Balyemez v. Turkey*, concerning detainees suffering the effects of a prolonged hunger strike (the subject of some fifty similar applications to the ECHR), a delegation from the Court and a committee of medical experts visited various detention facilities, interviewed staff, and examined alleged victims in September 2004.<sup>164</sup>

During the fact-finding missions listed above, the ECHR delegations took evidence from more than 130 witnesses, sometimes hearing dozens in a single case. Thus, in *Ilaşcu v. Moldova and Russia*, four judges took evidence from a total of forty-three witnesses over six days.<sup>165</sup> The case concerned the conviction, alleged torture, and conditions of detention of four persons.<sup>166</sup> After interviewing witnesses in locations including a Moldovan prison and the headquarters of a Russian military detachment, the ECHR ultimately held both Moldova and Russia liable for arbitrary detention and torture.<sup>167</sup>

The use of fact-finding missions remains confined to a minority of cases,<sup>168</sup> as the ECHR often adopts other methods to address factually disputed, complex violations. In some cases, for instance, it applies presumptions to shift the burden of proof when core facts in dispute have not been established by the state, finding that the petitioners' version of the facts is true because the state failed to convince the Court of an alternative version.<sup>169</sup> However, the fact-finding pattern discussed above does demonstrate recognition by the ECHR that despite its enormous caseload, it must approach its docket with flexibility and deploy vastly greater fact-finding resources than normal in certain circumstances. With the ECHR's experience in mind, we turn once more to fact-finding in the Inter-American Court.

At a conference on the inter-American system held in March 2007, the Court's deputy secretary, Emilia Segares Rodríguez, argued forcefully that the Court's reduction in oral testimony

48787/99 (Eur. Ct. H.R. 2004); Naumenko v. Ukraine, App. No. 42023/98 (Eur. Ct. H.R. 2004). Note that the respondent state does not always correspond to the location of the on-site fact-finding.

<sup>162</sup> *İpek v. Turkey*, 2004–II Eur. Ct. H.R., para. 8 (extracts), available in full at the Court's Web site, *supra* note 1. It is noteworthy that when one witness failed to appear and instead sent a sworn affidavit, the Court pointed out that his statement could not be weighed as heavily as live testimony since it was not subject to cross-examination. *Id.*, paras. 119–20.

<sup>163</sup> *Taniş v. Turkey*, 2005–VIII Eur. Ct. H.R., paras. 23–137.

<sup>164</sup> *Balyemez v. Turkey*, App. No. 32495/03, paras. 59–64 (Eur. Ct. H.R. 2005). The fact-finding missions listed here appear in the ECHR's Annual Section Activity Reports, Annual Grand Chamber Activity Reports, and/or archived press releases that mention the term "fact-finding" for the years 2002–2006.

<sup>165</sup> *Ilaşcu*, App. No. 48787/99, paras. 12–13.

<sup>166</sup> *Id.*, para. 3.

<sup>167</sup> *Id.*, op. paras. 9, 10, 14, 15.

<sup>168</sup> We do not assert that the ECHR's current, limited use of witness testimony is ideal or that there is no room for improvement in its fact-finding procedures despite its large caseload. We note, for instance, that Françoise Hampson, a leading practitioner before the European Court, has proposed that the ECHR create another chamber that would focus exclusively on fact-finding hearings. See Philip Leach, *Human Rights Hotspots and the European Court*, N.L.J., Feb. 6, 2004, available at <<http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/>> (follow "media and journals" hyperlink; then follow "European Court of Human Rights" hyperlink).

<sup>169</sup> See, e.g., *Bitiyeva v. Russia*, App. Nos. 57953/00, 37392/03, paras. 132–35 (Eur. Ct. H.R. 2007) (finding the state liable for extrajudicial executions in Chechnya under a shifted burden of proof since it did not sufficiently rebut the applicants' prima facie case or produce necessary documents); *Bazorkina v. Russia*, App. No. 69481/01, paras. 104–05 (Eur. Ct. H.R. 2006) (reiterating the ECHR's jurisprudence concerning the shifted burden of proof applicable in cases of individuals injured while in police custody).

in favor of written submissions need not compromise the quality of its work, stating that although the Court had changed its operational procedures, “this does not signify . . . that there will be a change in the quality of its judgments.”<sup>170</sup> On the basis of our analysis of the current evidentiary procedures of the Court and interviews with practitioners before it, there is at least reason to question whether the picture is so promising. Indeed, there is reason to believe that an exchange of affidavits may not be comparable to the presentation of live witness testimony.

While witness testimony has historically played a different role in civil versus common law traditions, legal systems the world over recognize the basic value of live witness evidence—whether before a judge or a jury—in discerning the truth.<sup>171</sup> Live witnesses may be questioned and may more easily be found unreliable than documentary evidence, which can affect the facts proven and legal conclusions reached by a court.<sup>172</sup>

Our interviews of practitioners in the inter-American system and our studies of and participation in Court proceedings lead us to conclude that the experience of the Inter-American Court supports the value of live witness testimony. For instance, if a live witness gives testimony that provokes a new line of inquiry, the other parties can respond by pursuing this line of questioning or challenging the new argument, leading to a better clarification of the facts. Attorneys at the Inter-American Commission have commented on the importance of public hearings in affording them the chance to cross-examine the state’s witnesses.<sup>173</sup> They relate multiple instances in which such cross-examination has brought out lines of questioning that have ultimately had a positive impact on the case.<sup>174</sup>

The use of written affidavits precludes these opportunities. As attorneys at the Commission point out, when a state offers witness testimony through an affidavit, the state’s authorities usually decide which subjects the witness will address. In these circumstances, the state will probably not ask the questions that the other parties would like to pose (a deficiency that is not cured by the fact that each party can submit comments on the other parties’ affidavits). In addition, one of the purposes of testimony is to enable judges to ask questions about matters that are

<sup>170</sup> Webcast: Emilia Segares Rodríguez, Remarks, in Washington College of Law, American University, Second Annual Meeting on Human Rights, Overview of the Current Status of the Inter-American Human Rights System’s Case Law (Mar. 9, 2007) [hereinafter Overview], available at <[http://www.wcl.american.edu/humright/hracademy/2008/meeting\\_webcast.cfm#](http://www.wcl.american.edu/humright/hracademy/2008/meeting_webcast.cfm#)>.

<sup>171</sup> While providing less opportunity than common law systems to question a witness directly or via cross-examination, civil law procedure still places value on the statements of live witnesses. See, e.g., Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 266 n.63 (1977).

<sup>172</sup> In her detailed discussion of the value of live versus written testimony in the context of international criminal tribunals, former ICTY Judge Patricia M. Wald makes this observation, based on the experience of the ICTY: “Cross-examination, considered alongside lifeless affidavits, counsels a prudent skepticism of written testimony.” Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 229 (2002).

<sup>173</sup> Interview with Albán, *supra* note 145; Interview with Ariel Dulitzky, then human rights senior specialist, Inter-American Commission, Washington, D.C. (Feb. 21, 2007).

<sup>174</sup> E.g., Interview with Dulitzky, *supra* note 173 (noting that examining a state witness in *Yean and Bosico v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005), gave rise to a line of questioning by judges concerning the criteria used to issue birth certificates and noting that in *Serrano Cruz Sisters v. El Salvador*, Inter-Am. Ct. H.R. (ser. C) No. 120 (Mar. 1, 2005), cross-examination elicited information concerning the military’s failure to keep records of what happened to children taken by the armed forces).

unclear to them. This process becomes much more difficult if the witnesses are not present and the parties do not realize beforehand which subjects will need clarification.

The party offering witnesses may prefer live testimony because it is more compelling and more easily understood. In cases with complex fact patterns, it may be crucial to present witnesses who can explain detailed sequences of events or experts who can clarify opaque domestic procedures. Further, certain features of witness testimony, such as credible demeanor, may be accessible only through live hearings. In *Velásquez Rodríguez*, for example, counsel for the petitioners emphasized the demeanor of three witnesses associated with the Honduran security forces. The attorneys noted, "Although there were no important revelations, their wooden explanations and demeanor raised serious doubts about their credibility. Consequently, their appearance strengthened the Commission's case."<sup>175</sup> The Court also based part of its reasoning on demeanor in *Aloeboetoe v. Suriname*, discounting a certain witness's testimony because of "the manner in which that witness testified, his attitude during the hearing and the personality he revealed."<sup>176</sup>

That litigants believe that live argument and testimony are superior to written submissions alone is evidenced by the fact that parties often ask the Court to convene public hearings and may protest if it declares that no hearing is necessary. For example, in *Fermín Ramírez v. Guatemala*, a 2005 death penalty case, the petitioners argued that a hearing was necessary to resolve the case fairly, "taking into consideration the importance of presenting their arguments *in voce* and being able to directly refute the State's positions."<sup>177</sup> In denying the petitioners' request, the Court cited the need for procedural economy in light of its large caseload.<sup>178</sup>

The curtailment of oral proceedings may also lead to the negative consequence of undetected violations. We acknowledge that the number of hearings and witnesses appropriate to any given case will vary based on the complexity of the facts; thus, there is no baseline requirement for every case. Nevertheless, the Court's current standard procedure of restricting every case to one or two days of sessions and roughly one or two witnesses per party strongly suggests that it seeks to observe these limits as a blanket time-saving measure, a policy that may leave inadequate room for consideration of the factual complexity of each individual case. In 2006 one member of the Court made clear his opinion that its efforts to increase the rate of case resolution had led to "decisions that are inevitably rushed."<sup>179</sup> It bears emphasizing that the negative impact of even one case in which insufficient factual evaluation by the Court leads to a failure to find violations is potentially devastating.

The potential for the curtailment of oral proceedings to have a negative impact on the Court's fact-finding, moreover, may increase in the coming years, as the Latin American region increasingly shifts to democratic governance. The now-democratic governments of Latin

<sup>175</sup> Méndez & Vivanco, *supra* note 135, at 540.

<sup>176</sup> *Aloeboetoe v. Suriname*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, at 14–15, para. 58 (Sept. 10, 1993).

<sup>177</sup> *Fermín Ramírez v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 126, at 5, para. 23 (June 20, 2005).

<sup>178</sup> *Fermín Ramírez v. Guatemala*, Resolution of the Court, *Considerando*, para. 19 (Inter-Am. Ct. H.R. Apr. 28, 2005) (on file with authors).

<sup>179</sup> *Servellón García v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 152, para. 3 (Sept. 21, 2006) (Cañado Trindade, J., sep. op.).

America are less likely than their predecessors to engage in blatant, targeted human rights violations (such as mass forced disappearances) and then fail to take *any* steps in response to denunciations of these violations. In a far more likely scenario, domestic authorities, recognizing that it is in their interest to maintain the appearance of the rule of law, will engage in the outward motions or initial stages of investigating violations before either closing the investigation or allowing it to languish with little hope of resolution. When such a case reaches the Inter-American Court, it may require thorough contextual knowledge of the normal procedures followed by domestic authorities to determine whether the state's investigation was performed in good faith. Indeed, the Court already processes a large number of this type of case, in which witness and expert testimony may be essential to an accurate appreciation of the facts.<sup>180</sup>

These arguments find strong support in *Nogueira de Carvalho v. Brazil* of 2006,<sup>181</sup> a factually complex case concerning impunity for a killing within the broader context of death squad murders. The case arose from the murder of human rights defender Gilson Nogueira in the Brazilian state of Rio Grande do Norte. Because Nogueira's murder took place prior to Brazil's recognition of the competence of the Inter-American Court, the Court could base its ruling only on the failure (if demonstrated) of Brazilian authorities to investigate this death in accordance with the judicial guarantees of the inter-American system.<sup>182</sup> Over several years, Brazilian authorities had cloaked their bad-faith actions in this regard in the guise of legality, going through the outward motions of investigation and compiling thousands of pages of court documents in the process. Only by analyzing sufficient evidence to gain a solid understanding of Brazilian police and judicial procedures would it have been possible for the Court to appreciate the full extent of the violations in the case.

Following its recent standard practice, the Court devoted a single day to hearings, combining its evaluation of admissibility and the merits of the case into one process. The Court heard testimony from a total of only three witnesses, two on behalf of Brazil and one on behalf of the Commission (the Court rejected all of the petitioners' witnesses). The parties, by contrast, had proposed more than a dozen witnesses,<sup>183</sup> including individuals who could testify to specific acts by Brazilian authorities that demonstrated deviations from normal police procedure and other failures to comply with the requirements of the American Convention.

After its single day of hearings, the Court issued a judgment in which it failed to find any violations, stating only that the petitioners and the Commission had not produced sufficient evidence to establish that Brazil had failed to investigate Gilson Nogueira's murder in good

<sup>180</sup> A positive example is the 1999 case of *Villagrán Morales v. Guatemala*, involving the extrajudicial execution of street children, in which one of the expert witnesses testified entirely on the defects of domestic investigations and judicial proceedings. After highlighting various failures of the investigating authorities, this expert cited precedents within Guatemalan law to show how a domestic judge's procedure had been irregular and demonstrated partiality. *Villagrán Morales v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 63, at 20–22, para. 66(b) (Nov. 19, 1999). This expert's presentation of the narrative of the case probably facilitated the judges' understanding of the degree to which the domestic procedures had been deficient; the Court subsequently set forth a detailed condemnation of the flawed investigation and domestic judicial proceedings. *Id.* at 53–55, paras. 228–38.

<sup>181</sup> *Nogueira de Carvalho v. Brazil*, Inter-Am. Ct. H.R. (ser. C) No. 161 (Nov. 28, 2006).

<sup>182</sup> The Commission maintained that the deficiencies in the state investigation violated Articles 8 and 25 of the Convention, *Nogueira de Carvalho v. Brasil*, No. 12.058, Demanda at 23 (Inter-Am. Comm'n H.R. Jan. 13, 2005), while the petitioners additionally argued that these actions violated Article 4 by failing to protect and guarantee the right to life. Justiça Global, *Alegações Finais*, *Gilson Nogueira de Carvalho v. Brasil*, paras. 67–109, Mar. 10, 2006; see also 2006 IACHR ANNUAL REPORT, ch. III, para. 524.

<sup>183</sup> See Justiça Global, *supra* note 182, para. 2 n.2; *Nogueira de Carvalho v. Brazil*, Inter-Am. Ct. H.R. (ser. C) No. 161, at 6, para. 23 (Nov. 28, 2006).



faith. This ruling runs counter to the analysis of multiple Brazilian public bodies and civil society groups,<sup>184</sup> as well as international human rights organizations,<sup>185</sup> which concurred in signaling that state agents were responsible for Nogueira's death and that the subsequent investigation was not seriously pursued with the intention to clarify the facts or punish those responsible.

It would be difficult to overstate the devastating effects of this pronouncement on the human rights advocates in Rio Grande do Norte, who awaited a positive ruling by the Court to provide support for their struggle against ongoing violence and impunity in the region. Instead of serving as a tool to advance local human rights campaigns, the Court judgment played into the hands of the very state government implicated in Nogueira's murder; one of Brazil's representatives before the Court was subsequently able to portray the judgment in the state media as "an important decision . . . recognizing [the state's] non-violation of human rights."<sup>186</sup> The same representative added, "The judgment serves as an example to the Commission. Before getting carried away and bringing any old case to the Court, they ought to think first."<sup>187</sup>

Recognizing once again that the Inter-American Court faces compelling trade-offs when deciding how to allocate its resources, we hesitate to suggest that it further restrict the already limited access of victims by taking measures that might lead to reductions in the number of cases it hears. In light of the above, however, the apparently substantial gains involved in hearing larger numbers of cases may prove illusory if in some complex cases crucial facts will be missed, leading to suspect conclusions of fact and negative consequences for the protection of human rights on the ground.

### *Playing the System: State Acknowledgments of Responsibility*

Another striking trend in inter-American litigation over the past few years has been the growing number of acknowledgments of responsibility by states for the human rights violations alleged against them. An acknowledgment of responsibility (or *allanamiento* in Spanish) can be made before or during the merits stage of the case (with some occurring during public hearings convened for adversarial consideration of the merits). To effect an *allanamiento*, the

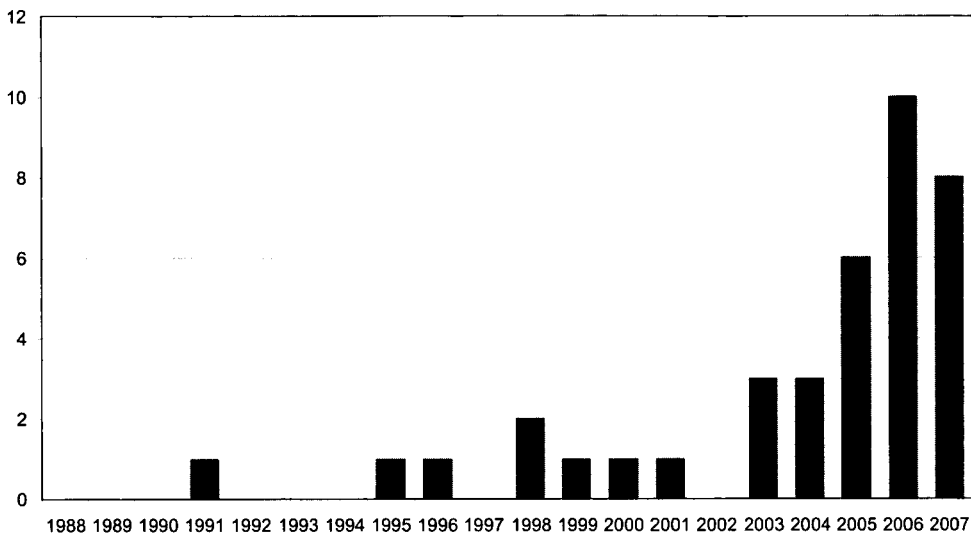
<sup>184</sup> Brazilian bodies condemning the role of the state agents in Nogueira's murder and/or the deficiency of the investigation include a special commission of the state office of the public prosecutor, the human rights commission of the National Bar Association, the human rights commission of the national legislature, and the Federal Commission of Rights of the Human Person, a body with a mixed civil society/government composition. Scores of Brazilian civil society groups joined in condemning the state at the time of Nogueira's murder and in criticizing the subsequent investigation performed by Brazilian police and prosecutors. On this latter point, see the October 2006 statement of the Brazilian Forum of Human Rights Organizations (a network of fifty leading Brazilian rights groups) on the tenth anniversary of Nogueira's death. Fórum de Entidades Nacionais de Direitos Humanos, *Dez anos do assassinato de Gilson Nogueira* (Oct. 19, 2006), available at <[http://www.direitos.org.br/index.php?option=com\\_content&task=view&id=2010&Itemid=2](http://www.direitos.org.br/index.php?option=com_content&task=view&id=2010&Itemid=2)>.

<sup>185</sup> See, e.g., Hum. Rts. Watch, *World Report 1998: Brazil*, available at <<http://www.hrw.org/worldreport/Americas-01.htm>> (noting the general lack of investigation into violations against human rights defenders in Rio Grande do Norte and stating that the investigation of Nogueira's death was closed "despite significant evidence of police involvement in his killing"); Amnesty Int'l, Brazil: The Killing of Francisco Gilson Nogueira and Threats Against Witnesses, in *Special Appeals on Behalf of Human Rights Defenders in Latin America* 7, AI Index AMR 01/03/99, June 1, 1999, available at <[http://archive.amnesty.org/library/pdf/AMR010031999ENGLISH/\\$File/AMR0100399.pdf](http://archive.amnesty.org/library/pdf/AMR010031999ENGLISH/$File/AMR0100399.pdf)>.

<sup>186</sup> See Sérgio Vilar, *Estado é absolvido pela Corte Interamericana*, DIÁRIO DE NATAL (Braz.), Dec. 21, 2006, at 6.

<sup>187</sup> *Id.*

FIGURE 5. CASES DECIDED ANNUALLY WITH FULL OR PARTIAL ACKNOWLEDGMENTS OF RESPONSIBILITY 1988–2007



For the purposes of this graph, cases are counted as decided in the year in which the Court issued the corresponding merits judgments. The cases included here are those classified as *allanamientos* by the Court. See Inter-Am. Ct. H.R., *Annual Report 2007*, p. 72; Inter-Am. Ct. H.R., *Síntesis del Informe anual de la Corte Interamericana de Derechos Humanos correspondiente al ejercicio de 2007*, p. 8.

state declares that it accepts international responsibility for part or all of the allegations of the Commission or petitioners. The case may then proceed to an adversarial consideration of any allegations still in dispute or it may turn directly to a determination of reparations due.

While *allanamientos* occurred occasionally during the 1990s (prior to the year 2000, six cases included a partial or full *allanamiento*), they remained the exception to the rule; but in the past five years, the number of states adopting this approach has increased steeply (see figure 5). In 2006 alone, ten cases ended with partial or full *allanamientos*, representing almost 60 percent of the cases resolved by the Court. Of the judgments published in 2007, the Court classifies 80 percent as involving some form of *allanamiento*.<sup>188</sup>

The Inter-American Commission and Court, as well as observers and participants in the system, have welcomed *allanamientos* as a sign of positive engagement by states and a visible step forward in solidifying regional respect for international human rights.<sup>189</sup> In certain cases, however, this characterization may reflect a misunderstanding of the process by which Inter-American Court litigation is most likely to advance human rights on the ground. Viewed at the

<sup>188</sup> See IACHR SÍNTESIS, *supra* note 58, at 8.

<sup>189</sup> See, e.g., Manuel Ventura Robles, *The Discontinuance and Acceptance of Claims in the Jurisprudence of the Inter-American Court of Human Rights*, 5 ILSA J. INT'L & COMP. L. 603, 619 (1999) ("The acceptance of a claim . . . has an enormous importance because it represents a serious and responsible attitude by the States demanded before the Court . . ."); Zambrano Vélez v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 166, at 4, para. 10 (July 4, 2007) (in which the Commission describes the state's acknowledgment as a "positive step toward the vindication of the victims' memory and dignity," as well as toward "efforts aimed at avoiding the repetition of similar situations"); Escué Zapata v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 165, at 6, para. 20 (July 4, 2007) (noting that the state's acknowledgment was a positive contribution to "the proper fulfillment of the Inter-American human rights jurisdictional function and, in general, the enforcement of the principles enshrined by the American Convention").

supranational level, *allanamientos* may certainly allow the Court to process cases more quickly (by declaring violations without the need to evaluate competing factual and legal arguments in an adversarial setting), and of course they facilitate recovery by the victims involved in the case. Yet declaring violations against these individual victims will have little significance for the broader class of similarly situated victims on the ground unless the Court's procedures and judgments are relevant to the needs of domestic human rights movements—needs, we suggest, that may sometimes be frustrated by *allanamientos*.

By recognizing responsibility before the Court, states gain more power in framing the litigation. In particular, states can sometimes avoid a full fact-finding process (including live testimony) that would cast their respect for human rights in a highly damaging light, and they may use public hearings as a forum for proclaiming their commitment to human rights. In our view, this understanding of *allanamientos*—as a state strategy for saving face and gaining greater control over the case, perhaps with a view to defusing domestic pressure concerning an issue—is the relevant understanding with respect to at least some cases in which states acknowledge responsibility.

On the basis of this understanding, we maintain that the Court must not automatically view *allanamientos* as an opportunity to resolve a case with streamlined procedures but, rather, as a warning sign that it should make special efforts to ensure that the procedures and outcome of the case avoid, to the greatest extent possible, manipulation by the state. Indeed, the Court has already made notable progress in this direction.

*Cause for concern: allanamientos following denials.* One clear indication that *allanamientos* do not always represent an increased commitment to human rights is the strategic use of such acknowledgments only after a state's efforts to have a case dismissed (or to win it on the merits) have failed. In *Ximenes Lopes v. Brazil*,<sup>190</sup> for example, the Court had scheduled two days for public hearings and the witnesses had flown to the Court to testify on the merits, only to have Brazil demand a suspension in the live proceedings (ultimately lasting several hours) while the Court made a determination on the state's preliminary objections. Only after losing this stage of the case did Brazil acknowledge partial responsibility for the alleged violations, having meanwhile cost the Court and the parties precious time to advance its own interests.<sup>191</sup> The Court welcomed Brazil's acknowledgment of responsibility as "a positive contribution to the outcome of the instant case and to the effectiveness of the principles which have inspired the American Convention in Brazil."<sup>192</sup> Likewise, the Commission lauded Brazil for its "positive, ethical, responsible, and constructive attitude . . . in acknowledging its liability for the violation of Articles 4 and 5 [of the Convention]."<sup>193</sup> However, the procedure followed by the state—namely, expending the resources of the Commission and Court in contesting the case,<sup>194</sup> only to withdraw part of its arguments when it became apparent that the case would be considered on the merits—indicates neither a strong commitment to human rights accountability nor a desire to conserve the system's resources. Moreover, even after deciding to acknowledge partial

<sup>190</sup> *Ximenes Lopes v. Brazil*, Inter-Am. Ct. H.R. (ser. C) No. 149 (July 4, 2006).

<sup>191</sup> *Id.* at 7, paras. 35–36.

<sup>192</sup> *Id.* at 26, para. 80 (footnote omitted).

<sup>193</sup> *Id.* at 23, para. 64.

<sup>194</sup> In its initial submission, the state questioned the cause of the victim's death and also alleged that it had taken all the proper steps to investigate the case. República Federativa do Brasil, *Ximenes Lopes v. Brasil*, Contestação do Estado Brasileiro, paras. 4, 84, 175 (Mar. 9, 2005).

responsibility for the alleged violations, the state did so in such an indirect and legalistic manner that the victim's sister, who was present in the courtroom, did not understand what had been said and had to ask for an explanation.<sup>195</sup>

States may also attempt to retract *allanamientos* if they perceive a change in strategy to be in their interests. One notable example is *Montero Aranguren v. Venezuela*,<sup>196</sup> which concerned the massacre of thirty-seven detainees at the Retén de Catia (Catia Detention Center). In this case, following its signing of a friendly settlement and an *allanamiento* at a Commission hearing, Venezuela failed to fulfill its part of the settlement.<sup>197</sup> It subsequently rejected the proposition that friendly settlements were legally binding, maintaining that such an understanding would be contrary to state sovereignty.<sup>198</sup> Against this background,<sup>199</sup> the state's subsequent *allanamiento* before the Court (following an initial stage during which it denied the alleged violations) hardly seems to indicate a serious commitment to conform its practices in detention centers to the obligations of the American Convention.<sup>200</sup> As noted above, Venezuela has yet to comply with the Court's judgment as of this writing.

Because more than half of all *allanamientos* have occurred since 2005, many of the relevant compliance data are not yet available, making it difficult to generalize about their impact. Available compliance reports reveal that numerous *allanamientos* suffer from the same types of compliance problems as adversarial cases, especially regarding states' failure to investigate and prosecute human rights violators. This result supports the view that, at a minimum, *allanamientos* do not necessarily involve a greater commitment by the state to repair and prevent human rights violations than contestation by the state at all phases.

*Turning the tables on international shaming.* By offering *allanamientos*, states have been able to shorten the proceedings against them, reduce witness testimony, and in some cases avoid public Court hearings entirely (aspects that we discuss further below). These outcomes can allow states to bypass to a significant extent the negative publicity that might otherwise come from being denounced in public hearings or from having the Court find that, as between the petitioners (and/or the Commission) and the state, the former had proven their version of contested facts.

<sup>195</sup> Brazil recognized responsibility by acknowledging "the insufficiency, during the time of the events that led to the passing away of Sr. Damião Ximenes Lopes, of positive results in the implementation of public policies in mental health that would have made possible at that time a more effective process of accreditation and inspection" of the mental health facility in which the victim was beaten to death. *Justiça Global, Alegações Finais, Damião Ximenes Lopes v. Brasil* 3, Jan. 9, 2006.

<sup>196</sup> *Montero Aranguren v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 150 (July 5, 2006).

<sup>197</sup> See *Montero Aranguren v. Venezuela*, No. 11.699, Demanda, paras. 17, 23 (Inter-Am. Comm'n H.R. Feb. 24, 2005), available at <[http://www.corteidh.or.cr/expediente\\_caso.cfm?id\\_caso=233](http://www.corteidh.or.cr/expediente_caso.cfm?id_caso=233)>.

<sup>198</sup> *Id.*, para. 28.

<sup>199</sup> This case comes within a broader context of resistance by Venezuela to the inter-American system. CEJIL notes:

[T]he [Venezuelan] government has consistently taken an antagonistic position with regard to the Inter-American System, has openly questioned the need to comply with the decisions of the Commission and Court, and has failed to guarantee the protection of human rights defenders, some of whom are protected by precautionary and provisional measures, among others.

CEJIL, ACTIVITIES REPORT 2003–2004, at 67, available at <<http://www.cejil.org/labores.cfm>>.

<sup>200</sup> The Court recognized that Venezuela's engagement in the case had been contradictory for the reasons described above. *Montero Aranguren*, Inter-Am. Ct. H.R. (ser. C) No. 150, at 10–11, paras. 47–49.

Beyond avoiding negative publicity, moreover, *allanamientos* may enable states to reframe and gain more control over the Court setting, using it as a forum from which to project their image as human-rights-respecting democracies. This dynamic can be seen clearly when states issue *allanamientos* during public hearings. In the *Retén de Catia* case, for instance, despite its earlier attempt to retract its *allanamiento* and its initial contestation of the Court case, Venezuela declared at the public merits hearing that it had come to the Court to “honor the memory of those that have died, to acknowledge the truth and to seek justice.”<sup>201</sup> The government also addressed the victims present in the courtroom, asserting that it had come to “acknowledge and repair all the pain that you have suffered.”<sup>202</sup> In the same case, one of the victims’ family members who was present wished to address the Court but was not given the opportunity to speak.<sup>203</sup>

We hesitate to cast state apologies and progressive statements on human rights in a negative light, considering that some governments (or at least some actors within those governments) may well be sincere. Nevertheless, we cannot help but note that when a government appears before a supranational tribunal and can focus attention prominently on its commitment to human rights and its solidarity with the victims, the state has to some extent changed its role from accused violator to magnanimous ally helping the Court to function and benefiting victims of past human rights abuses—a strategy that may work against the efforts of domestic advocates to denounce ongoing abuses.

*Allanamientos as a misleading model for advancing human rights.* Despite the sometimes-clear contrast between state recognitions of responsibility and real political commitment to accountability for human rights violations, both the international community and the public within a country may believe (to some extent) that an *allanamiento* resolves a human rights case or demonstrates a government’s intent to address a broader problem in good faith. Indeed, reading an *allanamiento*—in which the state recites its apology and commitment to repair violations, the Court welcomes this response, and the petitioners themselves may feel obligated to thank the very state against which they lodged their complaint—may create the impression that the Americas have progressed to a point at which human rights issues are resolved through discussion and good-faith promises to improve. All of these factors may make the domestic populace reluctant to mobilize behind human rights campaigns that, in contrast to the *allanamiento*, insist that the state is continuing to violate the very human rights involved in a case. Yet, depending on the situation, this may be the more accurate narrative, and confrontation may be the more effective strategy in effecting real-world change.

*Allanamientos* may also undermine attempts to mobilize international pressure. In this regard, research on the correlation between countries’ ratifications of human rights treaties and their actual human rights practices is instructive. Scholars studying the human rights behavior of states assert that they often ratify such treaties not out of an intent to improve their human rights practices, but precisely to deflect attention from their human rights failures, projecting a positive image and decreasing external scrutiny and pressure.<sup>204</sup> Applying the model to

<sup>201</sup> *Id.* at 9, para. 40.

<sup>202</sup> *Id.*, para. 42.

<sup>203</sup> Interview with Albán, *supra* note 145.

<sup>204</sup> See, e.g., Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005). The results of Hafner-Burton and Tsutsui’s global study demonstrate that on average, “[i]n no instance does state ratification of any of the six core UN human rights treaties

*allanamientos*, the image that states project when acknowledging violations in a particular case may serve to deflect pressure from the subsequent need to implement the actual Court judgment or improve the broader human rights situation.

That states sometimes seek to acknowledge responsibility for isolated cases while not allowing a case to generate pressure on a broader issue is demonstrated by the specific terms of the *allanamiento* in several Court cases. In *Servellón García v. Honduras*, for instance, the government recognized responsibility for the extrajudicial killings of four youths resulting from a mass arrest, but denied that these killings fit within a pattern of state-tolerated systematic human rights violations against youths.<sup>205</sup> Likewise, in *Rochela Massacre v. Colombia*, the government acknowledged the specified massacre but denied that this event took place within a context of paramilitary violence promoted by state policies.<sup>206</sup> In *Escué Zapata v. Colombia*, the case of an indigenous leader who had been shot to death by military agents, Colombia offered a detailed *allanamiento* but rejected the Commission's allegation that the victim's death fit within a pattern of retaliatory violence against indigenous leaders.<sup>207</sup>

In light of governments' sometimes-undisguised attempts to decontextualize alleged human rights violations, we worry that some states may now conceptualize resolving cases before the Inter-American Court as essentially a matter of trying to acknowledge responsibility for a limited violation and to pay a manner of fine to the petitioners. Considering how few violations reach the Court, it doubtless costs states less to agree to acknowledge specific facts and pay compensation to specific victims than to risk a full-fledged adversarial proceeding that results in greater pressure to enact systematic, resource-intensive reforms of its security forces, prison system, courts, mental health services, or other public agency.

*State acceptance of legal violations to avoid rigorous fact-finding.* As emphasized above, domestic advocates seek more from a Court case than simply a list of which articles of the American Convention have been violated. Equally or more important is the official narrative of facts that emerges from the litigation, which can serve as a tool for generating public support for a cause. We suggest that an overarching motivation for some states to offer *allanamientos* is precisely to terminate cases as quickly as possible and avoid drawn-out fact-finding against them.<sup>208</sup> Indeed, in the past this strategy has met with success.

predict the likelihood of government respect for human rights." *Id.* at 1398. Rather, state ratification often correlated negatively with signatories' behavior: "treaty members are more likely to repress their citizens than nonrati- fiers." *Id.* Hafner-Burton and Tsutsui maintain that the true value of treaty ratifications often lies in providing global civil society with tools for human rights campaigns, explaining, "Even though treaties often do not directly contribute to improvement in practice, the norms codified in these treaties are spread through INGOs that strategically leverage the human rights legal regime to pressure governments to change their human rights behavior." *Id.* at 1399.

<sup>205</sup> *Servellón García v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 152, at 4, 17, paras. 16, 54 (Sept. 21, 2006).

<sup>206</sup> *Rochela Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 163, at 21, para. 70 (May 11, 2007).

<sup>207</sup> *Escué Zapata v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 165, at 4–5, paras. 11–12 (July 4, 2007). The Court ultimately declared that it did not have sufficient evidence to find that the victim's death fit within the alleged pattern. *Id.* at 21, paras. 63–64. Regardless of whether the Commission and petitioners' version of the factual context is accurate, this case draws attention to the potentially vast difference in advocacy impact between two judgments finding identical legal violations but having different factual narratives (e.g., one in which a murder is an isolated incident and another in which it is emblematic of a decades-long pattern of targeted repression). In light of this dynamic, states' attempts to decontextualize alleged violations in their *allanamientos* serve as a call for rigorous fact-finding regarding the context in each case.

<sup>208</sup> For an example of states' attempts to reduce witness testimony against them, see *La Cantuta v. Peru*, Resolution of the Court, *Considerando*, para. 16 (Inter-Am. Ct. H.R. Aug. 17, 2006) (on file with authors) (reporting Peru's unsuccessful attempts to block the testimony of numerous witnesses offered by the other parties on the grounds that, since the state had acknowledged many of the relevant facts and violations, their testimony would lack purpose).

The tendency for the Court to devote less time to evaluations of evidence and factual narratives in *allanamientos* was particularly salient in early examples of such cases. For instance, in the 1995 massacre case of *El Amparo v. Venezuela*,<sup>209</sup> Venezuela's acknowledgment of responsibility effectively brought the merits phase to an end. In a five-page judgment that set forth the facts in a few cursory paragraphs, the Court simply noted that the factual dispute no longer subsisted and ordered the government and the Commission to agree upon an amount for damages.<sup>210</sup>

In time, members of the Court recognized the potentially negative effects of reducing their factual analyses in the face of *allanamientos*. In the Guatemalan cases of *Myrna Mack Chang* (2003) and *Plan de Sánchez Massacre* (2004), Judge Sergio García Ramírez discussed *allanamientos* in detail, pointing out the advantages of supplementing state acknowledgments of responsibility with evidentiary analysis.<sup>211</sup> He underscored that an *allanamiento* should not automatically trigger the cancellation of live hearings; he also expressed the view that when judges lack a solid understanding of the facts of a case, the reparations are decided in a vacuum.<sup>212</sup> (Attorneys at the Commission echo this observation.<sup>213</sup>)

In addition to providing necessary context for reparations orders, rigorous fact-finding can be crucial to informing the Court's merits judgments, in which we place particular importance on the sections setting forth proven facts. Among other considerations, we note that by including a full narrative of proven facts at the merits stage, the Court guards against the risk that a state's acknowledgment of certain facts might later be characterized differently by the government or local state agents.<sup>214</sup> The scope of the facts set forth in any given case is also crucial from a media perspective, not only because the media are generally interested in this aspect,<sup>215</sup> but also because the Court frequently orders violating states to publish the sections of its judgments containing proven facts in national newspapers as a reparations measure.

The Court's growing experience with *allanamientos* has led to improvements in the procedures and judgment format in more recent cases. Most important, the Court now routinely includes narratives of acknowledged facts in *allanamiento* judgments, considering the inclusion of those facts a form of reparation in itself. Furthermore, the Court evaluates the legal scope of *allanamientos*. If it is not satisfied that a state has acknowledged a certain fact or violation, it will declare that a controversy continues to exist as to certain parts of the case and will proceed to evaluate those parts.

<sup>209</sup> *El Amparo v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 19 (Jan. 18, 1995).

<sup>210</sup> *See id.* at 3, 5, paras. 10–12, 20.

<sup>211</sup> *See Mack Chang v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 101, at 6–7, paras. 21–25 (Nov. 25, 2003) (García Ramírez, J., sep. op.); *Plan de Sánchez Massacre v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 105, at 3–4, paras. 14–15 (Apr. 29, 2004) (García Ramírez, J., sep. op.).

<sup>212</sup> *Plan de Sánchez Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 105, para. 14 (García Ramírez, J., sep. op.).

<sup>213</sup> Interview with Albán, *supra* note 145.

<sup>214</sup> *Allanamientos* generally reference the facts listed in the Commission's *demanda* (application) as acknowledged. However, these factual narratives could potentially be deepened by witness testimony before the Court (although the parties cannot allege facts different from those in the *demanda*). In addition, the added advocacy value of facts set forth in a Court judgment, as compared to a Commission *demanda*, should not be underestimated.

<sup>215</sup> For instance, in *Montero Aranguren* (the *Retén de Catia* case), the Venezuelan media specifically reported the facts declared proven by the Court (including the available details about how the detainees were killed, such as that the guards used firearms and tear gas against them and that some detainees were shot from behind). *See, e.g.*, Edgar López, *Corte IDH condenó a Venezuela por masacre del retén de Catia*, EL NACIONAL (Venez.), Aug. 2, 2006, at B21 (on file with authors).

For instance, in the *Mack Chang* case, Guatemala acknowledged responsibility for the death of anthropologist Myrna Mack, but did so in ambiguous terms.<sup>216</sup> The Court subsequently conducted three days of hearings and heard thirteen witnesses in the case, after which it issued a judgment containing a detailed factual record.<sup>217</sup> In *Rochela Massacre v. Colombia*, the Court set forth the context within which the massacre had occurred, which clearly indicated that Colombia's internal laws and policies had helped to fuel paramilitary violence.<sup>218</sup> By addressing this context, the Court did not allow the state to avoid attention to the broader human rights issues exemplified by the case.

Despite marked improvements in the Court's factual analyses, in many *allanamiento* cases the Court's initial fact-finding is itself curtailed in the name of procedural efficiency. For instance, the Court may instruct witnesses scheduled to testify in *allanamientos* to focus on moral and material damages or on a specific question still in dispute, omitting testimony on the underlying facts of the case.<sup>219</sup> In other cases, the Court has shortened or omitted public hearings following an *allanamiento*.<sup>220</sup> Former judge Antônio Augusto Cançado Trindade has discussed this dynamic with great concern, arguing that the Court's decision not to hold a hearing in the 2006 case of *Servellón García v. Honduras* in light of the state's partial (but decontextualized) *allanamiento* reflected "the current senseless urge to decide on the greatest number of cases in record time" and had "deprived [the Court] of elements that could have enriched this Judgment."<sup>221</sup>

In light of the concerns expressed in this section, we suggest that the previously discussed risks of reducing the use of live evidence before the Court, particularly regarding potential loss of impact on domestic advocacy, apply as well to *allanamientos*. These risks may in fact take on greater importance in certain cases involving *allanamientos* due to attempts by states to decontextualize violations or minimize public proceedings against them. This understanding counsels strongly against reducing the scope of testimony or Court proceedings in cases of acknowledgment of responsibility without a careful evaluation of the potential disadvantages of this approach in each case.

*Allanamientos: final thoughts.* The Court cannot forbid states to acknowledge responsibility for their human rights violations. Were a state to commit itself in good faith to repairing past violations and avoiding future ones, it would doubtless respond exactly this way. At present, however, states' use of *allanamientos* sometimes falls short of this ideal. We suggest that states may offer *allanamientos* because years of experience have taught them that this strategy allows

<sup>216</sup> See *Mack Chang*, Inter-Am. Ct. H.R. (ser. C) No. 101, at 24, para. 100 (Nov. 25, 2003).

<sup>217</sup> *Id.* at 55–87, para. 134.

<sup>218</sup> *Rochela Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 163, at 23–27, paras. 77–91 (May 11, 2007).

<sup>219</sup> See, e.g., *Mapiripán Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134, at 9, para. 37 (Sept. 15, 2005) (quoting *Mapiripán Massacre*, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 122, at 12, para. 32(5) (Mar. 7, 2005)) ("The object of the testimony and expert opinions will be restricted as appropriate, regarding those parts of the merits, reparations, and costs with regard to which there is still a dispute among the parties.").

<sup>220</sup> See, e.g., *Montero Aranguren v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 150, at 4–6, paras. 21, 26 (July 5, 2006) (reduction in length of scheduled hearing); *Servellón García v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 152, at 5, para. 18 (Sept. 21, 2006) (declaring hearing unnecessary). The Commission or representatives may also indicate that they no longer view live testimony as needed in light of an *allanamiento*; the final decision rests with the Court. See, e.g., *Vargas Areco v. Paraguay*, Resolution of the Court, *Considerando*, para. 19 (Inter-Am. Ct. H.R. Feb. 7, 2006) (noting that the Commission did not consider live testimony necessary in light of the state's acknowledgment).

<sup>221</sup> *Servellón García*, Inter-Am. Ct. H.R. (ser. C) No. 152, at 1, para. 3 (Cançado Trindade, J., sep. op.).



them to bypass some of the most damaging aspects of inter-American litigation, turning a risk of costly international shaming into an opportunity to pay public lip service to human rights and possibly even to deflect attention from their substantive lack of structural reform. This is not to say that the existence of an *allanamiento* prevents a Court case from having a positive domestic impact; as just one example, *Barrios Altos v. Peru*, whose beneficial impact was already mentioned and will be discussed in detail in the following section, involved an *allanamiento* and has led to concrete advances in human rights on the ground.<sup>222</sup> We do not maintain that all *allanamientos* are given in bad faith. However, their increasing use, particularly when there is reason to suspect that at least some of them are *not* in good faith, does signify the emergence of potentially new obstacles to the capacity of supranational litigation to mobilize pressure on an issue.

In light of this reality, the Court would do well to continue refining its approach to *allanamiento* cases. As in all cases, the Court's effectiveness may often depend on the extent to which it elicits and sets forth a full narrative of proven facts. Moreover, the Court should take the initiative in limiting states' ability to use *allanamientos* to their own advantage at the expense of the system's resources. Options that the Court could consider include setting a time limit for *allanamientos* (such as that the state must acknowledge any violations in its initial submission for the *allanamiento* to be deemed voluntary); this measure might reduce the state practice of drawing out the system's resources through initially contesting cases, only, for example, to acknowledge responsibility at a public hearing. At a minimum, the Court might refuse to curtail witness testimony once public hearings are scheduled, regardless of the emergence of an *allanamiento*. Whether through these or other options, we contend that the Court will maximize its impact by responding to acknowledgments of responsibility in ways designed not only to conserve its resources, but to contribute strategically to pressure on the broader issues underlying a case.

### *Influences from Above and Below: Trends in Jurisprudence of the Inter-American Court*

Since the creation of the Inter-American Court, its jurisprudence has evolved and expanded in several ways. First, the Court has recognized an increasing array of situations in which governments incur responsibility for rights violations. For instance, the Court will hold states accountable for a violation of the right to life not only if state agents kill a victim, but also if the state fails to take positive measures to protect victims from imminent harm<sup>223</sup> or to provide known groups of vulnerable victims with basic services needed for life.<sup>224</sup> Overall, the Court

<sup>222</sup> We have also noted that despite the state's highly questionable engagement in the initial stages of litigation in *Ximenes Lopes v. Brazil*, owing to the strength of the ongoing campaign on mental health policy generated by the death of Sr. Ximenes Lopes (including support from other sectors of government), the Court case helped to advance broader domestic advocacy efforts.

<sup>223</sup> See, e.g., *Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 140, at 95–96, paras. 123–26 (Jan. 31, 2006) (discussing Colombia's liability for violations of the right to life due to, inter alia, the government's failure to adopt positive protective measures in light of the real and immediate risk to the victims of a massacre by paramilitary forces).

<sup>224</sup> See, e.g., *Sawhoyamaya Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 146, at 87, para. 178 (Mar. 29, 2006) (stating that Paraguay violated the right to life of nineteen individuals who died of treatable health conditions "since [the state] has not adopted the necessary positive measures within its powers, which could reasonably be expected to prevent or avoid risking the right to life of the members of the Sawhoyamaya Community").

has developed increasingly detailed and sometimes quite progressive understandings of the requirements of the system's human rights instruments, often drawing on developments from other systems such as the jurisprudence of the European Court, as well as on a growing universe of international declarations and norms. Finally, the range of the Court's reparations orders has expanded.

The Court's sometimes-progressive explications of protected human rights, frequently framed by reference to an overarching global system of human rights norms, enrich the content of inter-American jurisprudence, following (and on occasion leading) international legal understandings. However, while pushing the legal boundaries of human rights at the global level would necessarily translate into better human rights practices if states obeyed Court orders to the letter, here and elsewhere we have argued that this focus is potentially misplaced given the actual relationship between Court jurisprudence and its reception by many Latin American states.<sup>225</sup> Indeed, the Court continues to face passive noncompliance with even basic, established lines of jurisprudence (for instance, that states are obligated to investigate violations of the right to life committed by their own agents), as well as occasional explicit challenges to its authority. In this climate, the Court should be less concerned with expanding understandings of human rights than with maximizing the relevance and implementability of its jurisprudence.

In a positive development, the Court has demonstrated an awareness in recent years of the need for its jurisprudence to be more accessible to human rights activists and the public. In response to feedback from NGOs, governments, and others, it has reduced the length of its judgments. It has also moved away from highly philosophical dissenting opinions (formerly a common feature of its judgments). We recognize and welcome the Court's efforts in this regard. At the same time, making jurisprudence more accessible is only one necessary element in maximizing its potential to contribute to lasting change in a country.

In particular, the Court must familiarize itself with the political situation in a country and frame its jurisprudence (to the extent appropriate, in the event that violations are proven) to be relevant to this context. The Court will often maximize its impact when it sets forth a full narrative of the facts of a case and then declares that these facts violate recognized (or incrementally expanded) human rights norms. By contrast, visionary or philosophical jurisprudence may cause the Court to appear out of touch with realities on the ground and may hinder rather than advance respect for human rights. Further, Court orders that demonstrate insensitivity to the domestic situation may provoke backlash on the ground.

*Advancing versus overlegalizing human rights.* Laurence Helfer provides a detailed framework for understanding governmental backlash in response to supranational jurisprudence. Specifically, Helfer analyzes a case study from the Caribbean in which a supranational body (the Judicial Committee of the Privy Council, the highest appellate body originally exercising jurisdiction over British colonies) ordered that the Caribbean states subject to its jurisdiction reform their capital punishment procedures by ensuring that all domestic and international appeals of

<sup>225</sup> James L. Cavallaro & Stephanie Erin Brewer, *The Virtue of Following: The Role of Inter-American Litigation in Campaigns for Social Justice*, 8 SUR INT'L J. HUM. RTS. 85 (2008), available at <<http://www.surjournal.org>>; Cavallaro & Schaffer, *supra* note 80.

death sentences be completed within five years.<sup>226</sup> This situation led to a “near de facto abolition of the death penalty” since the available appeal mechanisms, including use of the inter-American system, often took more than five years to complete.<sup>227</sup> The resulting commutation of numerous death sentences provoked such strong domestic resistance that Trinidad and Tobago withdrew its ratification of the American Convention to prevent further petitions to the inter-American system<sup>228</sup> and proceeded to execute several defendants in defiance of orders from the Inter-American Court.<sup>229</sup> On the basis of this case study, Helfer argues that if a supranational decision imposes new or more costly obligations on a state than those foreseen when the state ratified the treaty setting forth the relevant rights and duties (a situation that he terms *overlegalization*), resistance to the supranational decision is more likely.<sup>230</sup> Discussing the precise reasons that overlegalization by human rights bodies produces backlash, Helfer highlights the role of domestic pressure in accounting for resistance to supranational jurisprudence:

Where a treaty’s obligation . . . levels increase over time, *government discretion to achieve countervailing societal objectives in tension with human rights diminishes*. . . . “Overlegalization” exists where a treaty’s augmented legalization levels require more extensive changes to national laws and practices than was the case when the state first ratified the treaty, *generating domestic opposition to compliance* or pressure to revise or exit from the treaty.<sup>231</sup>

We argue that further unpacking the part of Helfer’s hypothesis concerning the role of domestic forces is the key to understanding the likely effects of supranational jurisprudence in a country. Under our view, overlegalization in a technical sense (i.e., the fact that a court decision expands the scope or enforceability of a human rights obligation) is just one of many factors to be considered. In states that are not receptive to supranational authority, even a court judgment that stays within clearly defined parameters and imposes no new duties may provoke resistance by the government, particularly if the judgment does not resonate with public understanding of an issue (e.g., in Trinidad and Tobago, the public strongly supported the death penalty; hence internal pressure ran *against* rather than *in favor of* implementing supranational orders on this subject<sup>232</sup>). On the other hand, sufficient media or external pressure, or strategic advocacy campaigns and public or governmental support for an issue, can bring about implementation of even an innovative judgment.<sup>233</sup> In other words, it is the confluence of a range of domestic factors, rather than the legal character of a supranational judgment itself, that most influences whether the judgment will have a practical effect in a country. Thus, staying in tune with local factors both within and outside a country’s government is crucial to maximizing the impact of supranational jurisprudence.

<sup>226</sup> Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1871 (2002).

<sup>227</sup> *Id.* at 1879.

<sup>228</sup> *Id.* at 1881.

<sup>229</sup> *Id.* at 1882–83.

<sup>230</sup> *Id.* at 1910.

<sup>231</sup> *Id.* at 1854 (emphasis added).

<sup>232</sup> *See id.* at 1910.

<sup>233</sup> Indeed, Helfer acknowledges that the pace and degree of human rights innovation that will be successful in a country depend on a variety of pressure sources, including other states, transnational advocacy networks, and domestic opinion. *Id.* at 1855.

Further, to underscore that engagement within the inter-American system can be informed by the human rights situation in the country under consideration, we note that over the course of nearly five decades, the Inter-American Commission has carefully considered the domestic political conditions in the countries in which it has acted. Apart from its detailed consideration of such conditions during its on-site visits and in country reports (in which it enjoys a far greater margin of discretion than the Court in deciding how to frame and respond to domestic factors), the Commission's historic practice vis-à-vis the Court reflects a high degree of responsiveness to the human rights conditions in the region. For instance, when the Commission had discretion over which cases to submit to the Court (prior to the 2001 procedural reforms discussed above), it opted not to forward a variety of cases involving points of law on which sufficient consensus had not yet developed in the region (or in particular countries), and that would have risked states' rejection of Court determinations, leading to a net setback for the human rights issue in question.<sup>234</sup> The Commission's determinations of the invalidity of amnesty laws in Argentina and Uruguay (considered in greater detail below) typify this approach. Basing itself on its assessment of human rights conditions in those countries, as well as the state of development of international human rights law, the Commission chose to publish its reports on those matters rather than to forward them to the Court, thus avoiding possible undesired consequences for human rights (had the Court ruled against the petitioners) or for the perceived legitimacy of the Court (had the Court declared the laws invalid only to have this interpretation rejected by member states). The Commission took this approach, based on similar concerns, in other volatile cases.<sup>235</sup> While the analogy is not exact given the differing competence and roles of the Commission and the Court, this practice shows the general value of considering domestic factors instead of mechanically assuming that generating the largest amount of binding jurisprudence on an issue will most benefit human rights in the region.<sup>236</sup>

Taking this framework as the lens of analysis, we consider some illustrative cases from the Inter-American Court in which its jurisprudence has had a positive impact due largely to its relevance to the domestic political climate.

*The influence of domestic climate on the acceptance of supranational jurisprudence.* One context in which the positive impact of the Court's jurisprudence can be seen concerns the invalidity of amnesty laws in the region. The subject of amnesty laws first came before the inter-American system through a series of petitions in the 1980s. In 1992 the Commission declared that the Argentine and Uruguayan amnesty laws contradicted those states' human rights obligations.<sup>237</sup>

<sup>234</sup> Prof. Robert Goldman, former Commission member, Comments, *in* Overview, *supra* note 170.

<sup>235</sup> *Id.* Cases cited by Professor Goldman in which the Commission chose not to submit the matter to the Court include *Abella v. Argentina (Tablada case)*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. (1997); *Gallardo Rodríguez v. Mexico*, Case 11.430, Inter-Am. C.H.R., Report No. 43/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1996); and *Río Frio Massacre v. Colombia*, Case 11.654, Inter-Am. C.H.R., Report No. 62/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2000).

<sup>236</sup> In addition, the Court might consider ways of working more closely with the Commission to ensure implementation of the former's decisions. Given its experience in the countries that form the OAS and its understanding of the political dynamics in each of them, the Commission is well suited to design strategies to foster implementation of Court judgments. While the Commission, as a general matter, encourages states to comply with the determinations of the system, if it were to do this in greater coordination with the Court, the Court's results might well improve.

<sup>237</sup> Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. C.H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14, corr.1 (1992–93) (Argentina); Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Inter-Am. C.H.R., Report No. 29/92, *id.* (Uruguay).

However, in the aftermath of these states' transitions from military to civilian rule, the Argentine and Uruguayan governments viewed the amnesty laws as vital policy tools to ensure stability.

In response to the Commission's decisions, Argentina and Uruguay requested an advisory opinion from the Inter-American Court (Advisory Opinion OC-13),<sup>238</sup> challenging the Commission's competence to render decisions on the validity of domestic legislation. The Court upheld the Commission's competence in this regard,<sup>239</sup> but the political climate in the relevant countries remained hostile to the system's views on amnesty laws.

In 2001, however, the Court faced a far different political climate when considering *Barrios Altos v. Peru*,<sup>240</sup> a massacre case in which the Court declared Peru's amnesty law invalid. This decision dovetailed with recent events in Peru (notably the fall of the regime of Alberto Fujimori) and produced an immediate impact in the country. Human Rights Watch reported that "[w]ithin days of the decision, Peruvian police detained several alleged former members of the Colina death squad on murder charges, including two former generals. . . . In October, the Supreme Council of Military Justice annulled its 1995 decision applying the amnesty laws to the Barrios Altos and La Cantuta cases."<sup>241</sup>

Moreover, the decision contributed to human rights advances in the wider region. For example, Argentina's Supreme Court cited the *Barrios Altos* decision when declaring that country's amnesty laws unconstitutional in 2005.<sup>242</sup> Likewise, in the 2006 *Almonacid Arellano* case,<sup>243</sup> the petitioners successfully challenged the validity of Chile's amnesty law, benefiting from the *Barrios Altos* precedent. While the *Almonacid Arellano* decision was met with resistance by some institutions,<sup>244</sup> the president of Chile immediately declared that the judgment must be implemented,<sup>245</sup> and its Supreme Court soon cited the decision, as well as *Barrios Altos*, in holding that domestic legal norms cannot be used as obstacles to the prosecution of perpetrators of gross human rights violations.<sup>246</sup> Thus, the Inter-American Court's judgments lent support to the ongoing efforts by members of Chilean society, including important state actors, to limit the amnesty's effects.

As these examples demonstrate, the positive impact of the Court's amnesty law jurisprudence stems largely from the fact that the political landscape of the Southern Cone had shifted

<sup>238</sup> Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93, Inter-Am. Ct. H.R. (ser. A) No. 13 (July 16, 1993).

<sup>239</sup> *Id.*, paras. 30, 37, 57(1).

<sup>240</sup> *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

<sup>241</sup> Hum. Rts. Watch, *World Report 2002*, at 168, available at <<http://www.hrw.org/wr2k2/pdf/peru.pdf>>.

<sup>242</sup> See CSJN, 14/06/2005, "Simón, Julio Héctor s/ privación ilegítima de la libertad, etc.," Fallos (2005-328-2056), para. 24, available at <<http://www.csjn.gov.ar>>.

<sup>243</sup> *Almonacid Arellano v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

<sup>244</sup> See, e.g., Andrea Chaparro, *Suprema no reabrirá caso amnistiado pese a fallo de la Corte Interamericana*, LA NACIÓN (Chile), Oct. 17, 2006, available at <[http://www.lanacion.cl/prontus\\_noticias/site/artic/20061016/pags/20061016212857.html](http://www.lanacion.cl/prontus_noticias/site/artic/20061016/pags/20061016212857.html)> (reporting the view of the president of Chile's Supreme Court that the inter-American judgment was not binding).

<sup>245</sup> See *id.*; Macarena López, *Bachelet da fuerte respaldo a DD.HH y anuncia derogación de ley de amnistía*, EL MOS-TRADOR (Chile), Oct. 14, 2006, available at <<http://www.memoriando.com/noticias/101-200/164.html>>.

<sup>246</sup> See Supreme Court of Chile, crim. ch., Molco Case, No. 559-2004, *Considerando*, paras. 19-20 (Dec. 13, 2006), available at <[http://www.cecocoh.cl/hm/hm/revista/docs/estudiosconst/revistaano\\_5\\_1\\_hm/sentenci\\_molco5\\_1-2007.pdf](http://www.cecocoh.cl/hm/hm/revista/docs/estudiosconst/revistaano_5_1_hm/sentenci_molco5_1-2007.pdf)>.

dramatically since the time of the Commission's first amnesty law cases. The international proceedings against Augusto Pinochet in Europe initiated in late 1998; efforts by domestic judges, legislatures, and civil society groups to invalidate amnesty laws; and the growing distance between the current and former governments all contributed to a climate in which the invalidation of an amnesty could meet with both public and institutional support.<sup>247</sup>

As a second example, returning to the classic case of *Velásquez Rodríguez*,<sup>248</sup> one can observe the beneficial effects of the interaction of creative, yet pragmatic, jurisprudence with a supportive regional public. Before the Court issued its judgment in the case, it was not self-evident that the existence of a pattern of forced disappearance in Honduras would suffice to lead to a finding that the state had violated the victim's right to life. However, when the Court employed this line of reasoning to come to this conclusion, its opinion resonated with the knowledge in civil society, segments of the media and the Honduran public, and the region regarding state responsibility for forced disappearances. For instance, civil society reports and media in other countries had increasingly shed light on the nature of the practice of forced disappearance in the region, and in Honduras in particular.<sup>249</sup> As a result, despite the jurisprudentially innovative nature of the judgment, for large majorities of Latin Americans, the Court had merely filled in the missing links of legal reasoning needed to hold Honduras accountable for crimes of which it was widely believed to be guilty.

The main conclusion to be drawn from these case studies is that the Court's rulings will rest on firm ground—even those that innovate, require policy changes, or meet with resistance from interested actors—when they mesh with parallel civil society developments and broad societal understanding of a given issue. Once again, we do not highlight these examples to argue that the Court should limit itself to issuing opinions that will be accepted without argument in the reigning political climate. Rather, the determining factor in finding any alleged violation should always be that the evidence and arguments put forth by the parties led the Court to come to a given conclusion. Nevertheless, some amount of maneuvering room will generally be left to the Court in determining the content of its jurisprudence, the exact form of its reparations orders, and whether or not to expand upon prior understandings of a legal instrument.<sup>250</sup> What

<sup>247</sup> For a thorough analysis of the impact of the proceedings against Pinochet on domestic efforts to achieve accountability for abuses by military regimes in Latin America, see NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (2005).

<sup>248</sup> *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

<sup>249</sup> See, e.g., *3 Human-Rights Groups Say Abuses Increase in Honduras*, N.Y. TIMES, Feb. 10, 1984, at A8; Americas Watch (Hum. Rts. Watch), *Honduras: Inter-American Court of Human Rights Wraps up First Adversarial Case 2–3*, Sept. 5, 1990, available at <<http://hrw.org/reports/pdfs/h/honduras/honduras909.pdf>> (describing HRW's fact-finding trips to Honduras in the 1980s and listing several reports that it published following these trips, publicizing the methodology of forced disappearances).

<sup>250</sup> Commenting on the success of the ECHR and the European Court of Justice in the mid-1990s, Helfer and Slaughter discuss the interplay between judicial independence and strategic decision making in terms helpful to the present discussion:

[T]ribunals must be willing to brave political displeasure, searching always for generalizable principles, even as they search for formulations or procedural mechanisms to render the principles more palatable to the states concerned.

...

Bold demonstrations of judicial autonomy by judgments against state interests and appeals to constituencies of individuals must be tempered by incrementalism and awareness of political boundaries.

we suggest, then, is that the Court bear in mind the close connection between political climate and the types of judgments that are likely to be implemented, working within the parameters of the facts and legal conclusions in a given case to maximize the extent to which a decision will resonate at the domestic level.

In some recent judgments, by contrast, the Court has delivered opinions that arguably demonstrate a disproportionate focus on expanding jurisprudence at the international level while failing to take full account of the social and political realities that obstruct the advancement of the human rights in question. In line with our arguments above, these types of decisions have sometimes led to resistance by states.

*Ahead of its time or out of touch? Advisory Opinion OC-18.* One notable example of the Court's attempts to promote visionary jurisprudence occurred in the 2003 Advisory Opinion OC-18, entitled *Juridical Condition and Rights of the Undocumented Migrants*.<sup>251</sup> This opinion arose out of a request by Mexico for clarification of states' obligations toward undocumented workers following a 2002 ruling by the U.S. Supreme Court that an undocumented employee from Mexico, fired in retaliation for union organizing, was not eligible for an award of back pay from the National Labor Relations Board.<sup>252</sup> The main question presented by the Mexican government was whether it is permissible to deny certain labor protections to workers on account of their irregular migratory status.<sup>253</sup>

The Court could have decided the issue before it on the grounds that certain labor rights are fundamental (as sustained by the Commission<sup>254</sup>) and that among these is workers' entitlement to full remedies for unjust termination due to union activities regardless of immigration status. However, the Court instead framed its reasoning within a broad and philosophical framework of nondiscrimination. The advisory opinion begins with a discussion of the nature of the right to equality—a right, the Court pointed out, that “springs directly from the oneness of the human family.”<sup>255</sup> Following this sweeping tone, the Court held in an unprecedented step that nondiscrimination on all grounds had attained the status of *jus cogens* in international law.<sup>256</sup>

The Court then declared that all workers, regardless of migratory status, are entitled to all labor protections provided in international, national, and local law.<sup>257</sup> Advisory Opinion OC-18 thus represents the most progressive jurisprudence to date on the labor rights of undocumented migrants.<sup>258</sup> Its novel character has been recognized by various scholars in the field, who state that it goes “significantly further than existing pronouncements.”<sup>259</sup> In concurring

<sup>251</sup> *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

<sup>252</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002).

<sup>253</sup> Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 4.

<sup>254</sup> *Id.*, para. 47.

<sup>255</sup> *Id.*, para. 87 (quoting *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, para. 45 (Aug. 28, 2002)).

<sup>256</sup> *Id.*, para. 101.

<sup>257</sup> *Id.*, paras. 153, 155.

<sup>258</sup> See Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 N.Y.U. REV. L. & SOC. CHANGE 547, 586–87 (2004).

<sup>259</sup> See, e.g., Sarah H. Cleveland, *Case Report: Legal Status and Rights of Undocumented Workers*, Advisory Opinion OC-18/03, in 99 AJIL 460, 463 (2005).

with the opinion, Judge Cançado Trindade notes that it is “of great transcendence” and “pioneering.”<sup>260</sup> To be sure, the Court’s holding grants a larger array of rights to undocumented migrant workers than the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>261</sup> In this Convention, certain rights (including the right to found trade unions) apply only to workers who are documented or in a regular situation.<sup>262</sup>

In light of the high bar for recognition as a *jus cogens* norm,<sup>263</sup> it appears improbable that a norm prohibiting the denial of any labor protections to undocumented workers could be such a universally agreed-upon precept.<sup>264</sup> This holding therefore risks weakening the perceived relevance and implementability of the Court’s decision in countries that are still far from recognizing this norm.<sup>265</sup>

Further, a sweeping norm of nondiscrimination is unlikely to summon up the same vivid imagery or rallying cry for national workers’ movements as would, for example, an opinion focused on a core set of fundamental labor rights or a strong condemnation of union busting. If anything, since the latter approach does not spotlight the undocumented status of the workers, it might avoid polarizing opinion and provoking prejudiced or nationalistic counterreactions. This observation does not mean, of course, that activists have not incorporated the actual OC–18 opinion into their existing labor rights campaigns. In fact, labor rights activists use the opinion in local organizing campaigns and in educating workers about their rights.<sup>266</sup> Our point, however, is that rather than issuing the most readily implementable decision possible, the Court has produced one that may appear too far removed from daily life to attract widespread public support or institutional cooperation.

Nor has Advisory Opinion OC–18 yet brought about clear improvements in the treatment of migrant workers in the region. Indeed, the labor laws of Mexico, the country that requested the advisory opinion, continue to forbid non-Mexicans from holding leadership positions in

<sup>260</sup> Separate Opinion of Judge A. A. Cançado Trindade, Advisory Opinion OC–18/03, para. 1.

<sup>261</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res. 45/158 (Dec. 18, 1990), available at <<http://www2.ohchr.org/english/law/cmw.htm>>.

<sup>262</sup> *Id.*, Arts. 26, 40. The older ILO Convention No. 143 (the Migrant Workers Convention of 1975) also enshrines different levels of protection based on migratory status. International Labour Organization, Migrant Workers (Supplementary Provisions) Convention (No. 143), Arts. 8–10, June 24, 1975, available at <<http://www.ilo.org/ilolex/index.htm>>.

<sup>263</sup> As mentioned by the Inter-American Commission in its brief in Advisory Opinion OC–18, previously the body of *jus cogens* norms was restricted to a very small number of rights, such as freedom from slavery, genocide, apartheid, and arguably racial discrimination. Dictamen de la Comisión Interamericana de Derechos Humanos en aplicación de los Artículos 57 y 64 de la Convención Americana sobre Derechos Humanos at 6 (Jan. 2003) (submitted to the Inter-American Court of Human Rights) (on file with authors).

<sup>264</sup> For a discussion of the various human rights norms that the Inter-American Court has held to be *jus cogens*, see Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101 (2008). Professor Neuman also presents a detailed critique of the Court’s reasoning in Advisory Opinion OC–18.

<sup>265</sup> Professor Douglas Donoho notes that while “[e]nforcement mechanisms regarding well-defined, universally accepted rights for which international consensus over meaning exists will be . . . more readily accepted by governments,” attempts to “enforce specific applications of human rights that are subject to genuine cultural and political dispute inevitably raise concerns about overreaching.” Douglas Donoho, *Human Rights Enforcement in the Twenty-first Century*, 35 GA. J. INT’L & COMP. L. 1, 49–50 (2006).

<sup>266</sup> Telephone interview with Sarah Paoletti, Transnational Legal Clinic, University of Pennsylvania Law School (May 24, 2007).



trade unions.<sup>267</sup> Overall, then, the opinion may reflect a Court focused on an idealized view of human rights law rather than on the development of jurisprudence most relevant to the challenging and often domestically unpopular field of migrant workers' rights.<sup>268</sup>

*More harm than good: backlash to politically unpopular reparations orders.* Over the years, the Court has greatly expanded its jurisprudence in another area, the content of its reparations orders to states. In particular, the Court's inclusion of symbolic reparations measures as a regular element of its judgments is a progressive feature that goes well beyond the precedents of, for example, the European Court. Moreover, these symbolic reparations have become more detailed and varied in recent years. It is now standard practice for the Court to order states to hold public apology ceremonies. Other symbolic measures include establishing monuments to victims, naming schools after them, and establishing memorial scholarships in their honor.

The Court's issuance of symbolic reparations is a positive step insofar as it signals an awareness that its judgments will have greater impact when they receive public attention within a country. For instance, a public apology will likely receive domestic media coverage. Any such advocacy benefits, of course, supplement those conferred on the victims by such reparations. Yet in some recent decisions the Court has issued reparations orders of a precisely detailed nature, instructing states not only to undertake general tasks, but also to carry them out in a specific way. When such reparations orders are perceived by the domestic community as out of touch with their day-to-day reality, or as overreaching on the part of the Court, they can provoke hostile reactions by both states and the general public.

One case that highlights the potentially negative consequences of jurisprudence that clashes with domestic conditions is *Miguel Castro Castro Prison v. Peru*. In this case, the Court considered the deaths of dozens of inmates and abuses against hundreds more in the Castro Castro penal facility,<sup>269</sup> resulting from politically motivated attacks against a particular segment of the prison population. The attacks targeted those detained in the pavilion associated with the Sendero Luminoso, a domestic movement identified by the Peruvian public as a terrorist group.<sup>270</sup> Among other reparations orders, the Court directed the Peruvian state to inscribe the names of the victims on a monument known as The Eye That Cries,<sup>271</sup> which currently bears the names of individuals who died in the internal conflict in Peru from 1980 to 2000, including police, military agents, and civilian victims of political violence.

<sup>267</sup> Ley Federal del Trabajo, Art. 372(II), *as amended*, Diario Oficial de la Federación, 17 de enero de 2006, available at <<http://info4.juridicas.unam.mx/ijure/fed/>>. This law remains in force despite recommendations from the UN Migrant Workers' Committee that it be amended. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding Observations: Mexico, para. 36, UN Doc. CMW/C/MEX/CO/1 (Dec. 20, 2006).

<sup>268</sup> One could argue that, particularly if the Court expects low compliance with regard to certain unpopular issues such as migrants' rights regardless of the form that its jurisprudence takes, it might just as well set forth a progressive vision to influence scholars and judges in other regions and to set the stage for later progress once the social and political climate improves. This argument would take a longer-term view of the effectiveness of a human rights court. However, we question this approach given the uncertainty that visionary jurisprudence will achieve the desired goals in the future, coupled with the more certain outcome of resistance that such jurisprudence can generate in the present.

<sup>269</sup> *Miguel Castro Castro Prison v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 160, at 2, para. 3 (Nov. 25, 2006).

<sup>270</sup> *See id.* at 61–63, paras. 197(13), (16).

<sup>271</sup> *Id.* at 167, para. 470(16). The Commission and the victims' representatives had suggested the creation of a monument to the victims as a measure of symbolic reparations; in an apparent attempt to avoid the construction of such a monument, the state referenced the existence of The Eye That Cries, a monument officially dedicated to all victims of political violence. *Id.* at 163, para. 453.

An enormous political and societal backlash resulted from the order to include suspected and convicted terrorists on the very monument dedicated largely to remembering victims of terrorism.<sup>272</sup> The families of persons whose names already appeared on the monument expressed shock, while Peruvian president Alan García added to the climate of indignation by forcefully rejecting the judgment in general as “outrageous” and using it as a platform to condemn terrorism and portray the Court as a distant institution without the knowledge or moral authority to issue such a decision.<sup>273</sup> During the following year, the debate over having the monument possibly honor terrorists (inflamed by subsequent reports that at least some of their names already appeared there<sup>274</sup>) reached such proportions that a popular campaign was launched to have it demolished and it was vandalized, prompting fears of violence and forcing domestic human rights organizations to mount a public defense campaign.<sup>275</sup> More far-reaching than the debate over the monument itself, of course, was the nationalistic, intolerant discourse provoked by the judgment.

These negative effects, while significant in scale, were not entirely unforeseeable. While reparations orders often include some form of symbolic reparation, this particular reparations order falls into a more intrusive category, in that it mandates alteration of an existing monument to include the names of a politically unpopular group whose presence (in the minds of many Peruvians) would contradict the monument’s meaning. A more careful evaluation of the likely effects of issuing this order might have led the Court to refrain from ordering this form of symbolic reparations. Indeed, as this article went to press, and after receiving further written arguments from the Peruvian government, the Court modified its reparations order to allow Peru to construct a new park or monument rather than inscribe the victims’ names on *The Eye That Cries*.<sup>276</sup>

*Simplified judgments: an opportunity to focus on facts.* In a positive development, over the past year the Court has signaled that it recognizes the need to make its jurisprudence more accessible. Most notably, beginning in 2007 the Court pioneered a new, simpler format for its judgments. On its Web site, the Court explains that its decision to modify its judgment format “stems from requests the Court has received from Member States . . . , universities and scholars in the region, and civil society organizations, among others, as well as from its own thinking on the matter.”<sup>277</sup> The announcement further states, “The new format reduces the length of judgments . . . without compromising the analysis of the evidence and allegations of the parties or limiting the relevant considerations of fact and of law.”<sup>278</sup>

<sup>272</sup> See Mario Vargas Llosa, *El ojo que llora*, EL PAÍS (Spain), Jan. 14, 2007, available at <[http://www.elpais.com/articulo/opinion/ojo/llora/elpepiopi/20070114elpepiopi\\_5/Tes](http://www.elpais.com/articulo/opinion/ojo/llora/elpepiopi/20070114elpepiopi_5/Tes)>.

<sup>273</sup> Dan Collins, *Peru Slams Ruling on Rebel Rights*, BBC NEWS, Jan. 10, 2007, available at <<http://news.bbc.co.uk/1/hi/world/americas/6246917.stm>>.

<sup>274</sup> In an article attacking the Court judgment, the domestic newspaper *Correo* reported finding two of the relevant names already inscribed in the monument, a discovery that prompted the mayor to vow to remove all names of “subversives” from the monument. *Terroristas en “El ojo que llora,”* CORREO, Jan. 11, 2007, available at <[http://www.correoperu.com.pe/lima\\_notia.php?id=40746](http://www.correoperu.com.pe/lima_notia.php?id=40746)>.

<sup>275</sup> See *Este jueves protestan por ataque a ‘El Ojo que Lloro,’* AGENCIA ANDINA, Sept. 25, 2007, available at <<http://www.adehrperu.org/noticias-ddhh/este-jueves-protestan-por-ataque-a-el-ojo-que-llora.html>>.

<sup>276</sup> Penal Miguel Castro Castro v. Perú, Interpretación de la Sentencia de Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 181, at 17, para. 57 (Aug. 2, 2008), available at <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_181\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_181_esp.pdf)>.

<sup>277</sup> Inter-Am. Ct. H.R., *New Format for Judgments*, available at the Court’s Web site (Oct. 2008).

<sup>278</sup> *Id.*

The Court's recognition of the need to simplify its jurisprudence and to listen to the critiques of observers is welcome. A survey of the cases issued in the Court's new format thus far leads us to suggest that the move toward shorter, simpler judgments has the potential to be beneficial. For instance, the Court's previous judgments routinely included long introductory sections recording the dates that briefs were filed, observations received, and affidavits submitted, along with other procedural data that can be greatly condensed without reducing the utility of the judgment.

The move toward shortening judgments highlights the need for the Court to conserve those aspects of its decisions with the greatest potential impact. In its new judgments, the Court has cut back the amount of space dedicated to reporting the testimony of witnesses in the initial section of its decisions. Whereas the Court formerly set forth at least a paragraph summarizing each witness's testimony, the new format simply mentions the names of the witnesses and the topics on which they testified.<sup>279</sup> The Court now generally moves from introductory matters directly into an analysis of each right or group of rights allegedly violated. In these sections it incorporates those facts deemed necessary to its legal analysis.

This format does not prevent the Court from including detailed factual accounts. For example, in *Rochela Massacre v. Colombia* the Court sets forth a valuable narrative of the context of state involvement in paramilitary violence<sup>280</sup> before describing the actual massacre.<sup>281</sup> At the same time, the judgment clearly contrasts with earlier decisions such as *Mapiripán Massacre v. Colombia*, in which highly detailed discussions of paramilitary operations and the state's responsibility for a massacre were complemented by more than fifteen pages narrating witness testimony and affidavits, as opposed to roughly three pages in *Rochela*.<sup>282</sup> Time will tell whether this difference will affect the media impact or other effects of the Court's new judgments.<sup>283</sup>

The Court's streamlined format for judgments, then, once again underscores the potential tension between procedural efficiency and impact at the domestic level. We hope that as the Court solidifies its new judgment format, it does so in a way that gives priority to factual narratives, understanding that these may be among the elements of its judgments most likely to influence human rights practices on the ground.

## V. CONCLUSION: LOOKING BEYOND THE AMERICAS—AND BEYOND THE COURTROOM

Throughout this piece, we have identified trends in the cases of the Inter-American Court that give us cause for concern. Despite the critiques we have raised, however, we believe that

<sup>279</sup> See, e.g., *Escué Zapata v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 165, at 8, para. 24 (July 4, 2007).

<sup>280</sup> *Rochela Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 163, at 22–31, paras. 73–100 (May 11, 2007).

<sup>281</sup> *Id.* at 34–37, paras. 105–20.

<sup>282</sup> *Mapiripán Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134, at 17–32, paras. 75–76 (Sept. 15, 2005); *Rochela Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 163, at 15–18, paras. 57–58.

<sup>283</sup> Further, not all of the Court's new judgments have set forth detailed factual contexts for each violation found; this lack is especially of concern with respect to violations of the duty to investigate, which may be complex and consist of many stages. In *Bueno Alves v. Argentina*, for example, the Court found that the state's investigations and judicial proceedings violated the American Convention. To support this conclusion, the Court referenced several facts, such as the delay in performing a medical examination on the victim following his denunciation of torture. *Bueno Alves v. Argentina*, Inter-Am. Ct. H.R. (ser. C) No. 164, at 23–25, paras. 110–16 (May 11, 2007). However, a fuller, chronological summary of the state's investigative and judicial processes, drawing on concrete events by specific actors in these processes, could have aided in both the clarity and completeness of this discussion.

the Court can maintain and potentially increase its often-significant real-world impact on human rights issues. To do so, we argue, it should critically evaluate the domestic impact of some of its recent procedural modifications and jurisprudential holdings, keeping in mind that its effectiveness often depends on the relevance of its operating procedures and decisions to the human rights context within a country. Appreciating this role will enable the Court to strengthen its working methods as it seeks the proper balance between procedural efficiency and detailed fact-finding, between diplomatic and adversarial engagement with governments, and between progressive philosophy and realist responses to decidedly unprogressive human rights situations. When it strikes this balance well in a given case, past experience demonstrates that, for the moment, its job is finished. It then falls to domestic actors to carry the Court's judgment forward by incorporating it into their broader efforts to enhance respect for human rights.

Moreover, as the human rights landscape in the European system moves closer to the context in the Americas and as the African Court prepares to begin its work, we believe that the model of supranational litigation and advancement of human rights applicable to the Inter-American Court will be increasingly relevant in other parts of the world. We encourage scholars and practitioners working in all systems to consider the processes of human rights change most suited to different countries and regions, as well as how regional or international human rights mechanisms can contribute most effectively to those processes. By understanding and responding to these unique processes of change, we argue, supranational tribunals can maximize the chances that the ideal of human rights adjudication will translate into substantive improvements in the lives not only of petitioners to their systems, but of the far larger universe of individuals who will never see the inside of a supranational court.