

THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND THE ROLE AND RIGHTS OF JUDGES

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SUMMARY

Access to justice at the domestic level is a core component of human rights protection, with judges playing a key role in that process. Judges may require particular protection when subject to violations of their own rights in connection with their judicial mandate. This article first provides a basic overview of the Inter-American Commission's and Court's respective mandates. There are some brief references to examples from Brazil, as well as some concerning judicial independence and the protection of judges. The article then reviews a series of individual cases in which the Commission and Court have set standards on the obligation of states to respect the role and independence of judges. The focus is on independence, through respect for their security of tenure against improper interference, as well as effective protection when judges are subjected to threats or violence due to their work. In relation to judicial protection and guarantees, the article also looks briefly at the system's clear position against the use of military jurisdiction to investigate, prosecute and punish serious human rights violations. The article closes with a brief reflection on the system and the commonalities and distinctions within which it necessarily works.

KEYWORDS: International law. Human rights. Judges. Judicial protection and guarantees.

RESUMEN

El acceso a la justicia a nivel interno es un componente central en la protección de los derechos humanos, y los jueces juegan un papel clave en ese proceso. Los jueces pueden requerir protección particular cuando están sujetos a violaciones de sus derechos en relación con su mandato judicial. Este artículo primero proporciona una descripción básica de los respectivos mandatos de la Comisión y la Corte Interamericana. Se incluyen breves referencias a ejemplos de Brasil, así como algunas relativas a la independencia judicial y la protección de los jueces. Luego, el artículo revisa una serie de casos individuales en los que la Comisión y la Corte han establecido estándares sobre la obligación de los Estados de respetar el papel y la independencia de los jueces. La atención se centra en la independencia, a través del respeto de sus garantías de estabilidad frente a interferencias indebidas, así como la protección efectiva cuando los jueces son objeto de amenazas o violencia debido a su trabajo. En relación con la protección y las garantías judiciales, el artículo también analiza brevemente la clara posición del sistema contra el uso de la jurisdicción militar para investigar, procesar y sancionar violaciones de los derechos humanos. El artículo cierra con una breve reflexión sobre el sistema y los puntos en común y las distinciones dentro de los cuales necesariamente funciona.

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PALAVRAS CHAVE : Derecho internacional, derechos humanos, jueces, protección judicial y garantías.

1 INTRODUCTION

The present article focuses on the standards the inter-American human rights system has set to ensure respect for the independence that judges must have to properly fulfill their role. That role is central under both national and international human rights law, and the former must be consistent with the latter. Prior to covering those points, the article provides an introduction to the regional system for those less familiar with it.

First, access to justice at the domestic level is a core component of human rights protection, with judges playing a key role in that process. A basic requirement for access to the inter-American individual case system is having exhausted domestic remedies, or explaining why it was not possible to do so. Both the inter-American Commission and Court look closely at how judges dealt with such remedies at the domestic level in their analysis of individual cases before system.

Second, judges may require particular protection because in discharging their responsibilities they may be subject to violations of their own rights. In connection with their role, when judges act to safeguard basic rights the inter-American system considers that they may be acting as human rights defenders. Individual cases brought by judges before the inter-American system focus on interference with judicial independence, particularly dismissal without due process, as well as different forms of intimidation, including risk of serious harm.

The first part of this article provides a basic overview of the Inter-American Commission's and Court's respective mandates. There are some brief references to examples from Brazil, as well as some concerning judicial independence and the protection of judges within the system. The overview is intended to briefly cover key processes and how they apply. The second part focuses on individual cases in which the Commission and Court have set out standards on the obligation of states to respect the role and independence of judges. The focus is

on independence, through respect for their security of tenure against improper interference, as well as effective protection when judges are subjected to threats or violence due to their work. In relation to judicial protection and guarantees, the article also looks briefly at the system's clear position against the use of military jurisdiction to investigate, prosecute and punish serious human rights violations. The article closes with a brief reflection on the system and the commonalities and distinctions within which it must work.

2 OVERVIEW OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Respect for human rights is a basic underlying principle of the Organization of American States (OAS), and all member states are part of the inter-American human rights system. The system applies in three basic levels according to the obligations the state itself has accepted. For member states that have yet to ratify the American Convention, the basis of their human rights obligations is the OAS Charter, the American Declaration and the Commission's Statute. The member states themselves consider these to be the minimum applicable set of commitments, and the Commission monitors compliance with these obligations.

The majority of member states, including Brazil, have ratified the American Convention, which provides more explicit protections. 24 OAS member states are parties. Of these, 20, including Brazil, have also accepted the contentious jurisdiction of the Inter-American Court. Many member states have ratified multiple regional human rights instruments. Brazil has ratified all of the regional human rights treaties except for the last three adopted. The most widely ratified of all of the regional human rights treaties is the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. All member states are party, except the United States, Canada and Cuba.²

It is important to mention that the regional human rights system relies on the engagement and participation of the member states on the one hand, and civil society, human rights defenders

2 The websites of the Inter-American Commission and Court provide a wide range of information. They include the relevant instruments and all published work derived from the respective competence of each body. The Commission publishes its reports in Spanish and English; reports concerning Brazil are published in Portuguese, as are a range of selected other documents. See [http:// www.oas.org/en/iachr/](http://www.oas.org/en/iachr/) (accessed February 17, 2020). For years the Court published its judgments in Spanish and English. However, since 2015, it has translated few judgments into English. Judgments concerning Brazil are available in Portuguese. See [http:// www.corteidh.or.cr/index.php/en](http://www.corteidh.or.cr/index.php/en) (accessed February 17, 2020). These websites include information relative to all the basic functions and procedures covered in the first part of this paper.

and victims on the other. For the system to work, the direct and engaged participation of these actors is indispensable.

2.1 Commission Mechanisms

Visits

The Commission carries out visits to member states, including its traditional on-site visits, as well as working visits, and visits that focus on particular themes. Visits are carried out subject to the state's invitation or consent. The Commission's rules and practice require that it set and carry out its agenda free of limitations.

On-site visits generally involve the participation of multiple commissioners and staff, an agenda covering a range of rights and obligations, multiple locations, and are usually part of the process of preparing a country report. Working visits are often directed by one commissioner, and may focus on a particular issue or theme. They sometimes focus on friendly settlement meetings. Thematic rapporteurships carry out visits for the purpose of analyzing and reporting on key issues. For example, the Rapporteurship on Women's Rights has carried out a series of visits to analyze the need for stronger state responses to gender-based violence and discrimination. With all visits, the Commission balances the time spent with representatives of the state sector on the one hand, and civil society on the other, in the process of gathering information.³

In 2019 the Commission carried out an on-site visit to El Salvador, as well as a significant number of working and thematic visits throughout the region. For example, the IACHR organized working visits in Bolivia and Ecuador toward the close of the year to respond to the urgent situation of massive social protest met with harsh repression and violence by the respective states. In 2018 the Commission carried out an on-site visit to Brazil, as well as to Honduras and Nicaragua. The visit to Brazil and its results will be referred to in the next section.

³ Information regarding on-site visits may be found at: http://www.oas.org/en/iachr/activities/countries_all.asp accessed February 17, 2020. There have been approximately 100. Information on working visits is compiled in sources including the Commission's Annual Report, available at: <http://www.oas.org/en/iachr/reports/annual.asp> accessed February 17, 2020. Information on visits of thematic rapporteurships may be found in the Annual Report or in the rapporteurship's respective section of the webpage: <http://www.oas.org/en/iachr/mandate/rappoteurships.asp> accessed February 17, 2020.

Country Reports

On-site visits are usually followed by a country report, and these have an important history in the regional human rights system. During the era of dictatorships, with gross and massive human rights violations including forced disappearance, killings and torture, country reports served as the principal means to document and denounce those violations. In more recent years, country reports continue to play an important role, and there is often a relation between country-based approaches, individual cases and thematic initiatives.

Country reporting in the inter-American system is distinct from the United Nations processes that include the periodic review of country reports for all parties. The inter-American process for visits and reports is selective, based on Commission priorities. Country reports are based on visits whenever possible, although they can and have been prepared in the absence of a visit when the country has declined to accept one. In recent years the Commission has produced, on average, two country reports a year.

In addition to country reports, the Commission also reports on a small number of countries of special concern in its annual report. This reporting is done on the basis of criteria outlined by the Commission in its Rules, and does not depend on a visit. For example, the Annual Report for 2018 includes that type of reporting on Cuba, Nicaragua and Venezuela.⁴

Country reports may be more general or more specific, but one common denominator is a focus on the administration of justice. For example, in its reporting on Colombia during the conflict and following the peace accord, the Commission has consistently analyzed the challenges of justice for the human rights violations of the conflict. With respect to Venezuela, the Commission has repeatedly focused on the deep-rooted problems with the separation of powers, and interference with the independence of the judiciary. With respect to Honduras the Commission has repeatedly focused on grave deficiencies in the state's capacity to investigate, prosecute and punish serious human rights violations.

The Commission's visit to Brazil provides another example of the mechanism and its objectives. The visit was carried out during a week in November of 2018, and included 9 different locations in the country. While the Commission has yet to publish its country report, in

⁴ These reports may be found in chapter IV of the Commission's annual report for each year, available at: <http://www.oas.org/en/iachr/reports/annual.asp> accessed February 17, 2020.

accordance with its practice it issued preliminary observations shortly after the visit to set out points of primary focus and concern (IACHR, Preliminary Observations, 2018).

While the preliminary observations recognize past actions that strengthened democratic institutions and human rights, they focus on current central concerns. The Commission calls for priority attention to human rights in the context of poverty and inequality exacerbated by discrimination based on race, ethnicity, income, gender and sexual orientation. This includes the need to respond to strong inequities in the rights to housing, education and health care. The observations refer to unequal land distribution; draw attention to the situation of conflict and human rights violations against Afrodescendants, Quilombolas, indigenous peoples and rural laborers; and call for better state response to land disputes, forced displacement and related violence.

The preliminary observations give close attention to the action of police and military forces, especially when military forces participate in criminal law enforcement. The use of military jurisdiction to address cases of killings of civilians by members of the military forces has been and remains a deep concern in the system. The state's use of excessive force against protesters participating in demonstrations raises serious concerns.

The Commission identifies ongoing deep deficiencies in the justice system. It points to high rates of impunity for crimes committed against most vulnerable in socio-economic terms; rural violence; killings of civilians by police and military forces; high levels of incarceration, prison overcrowding and violence.

The country report is expected soon. Prior to publication, the Commission's process is to request observations from the state itself, and will indicate any it finds relevant within the report itself. Once issued, the Commission will follow up on the implementation of its recommendations by asking the state and non-state sources for information, as well as through meetings, and possibly hearings and other opportunities for follow-up.

Individual Cases

One of the singular components of the European, African and Inter-American systems, as well as certain UN monitoring bodies, is that victims can present individual cases for an authoritative determination as to state responsibility. Individual cases provide a means to better understand what the general, sometimes abstract protection of basic rights requires in practice.

Individual cases offer the possibility of reparation for victims, and often require broader measures such as reforms against repetition of the same violations.

The presentation of a petition does not automatically lead to its processing. The Commission Secretariat carries out an initial review that examines whether basic requirements have been met, for example, whether domestic remedies have been exhausted, or there is a valid reason that has not been possible or effective. If there has been a final judicial decision, the petition must be filed within 6 months. Otherwise it must be filed within a reasonable time. The review will also consider whether a presumed violation of protected rights has been presented.⁵

The number of petitions accepted for processing varies, but could be estimated at roughly 10% of those presented. There are well over 4000 cases being processed before the Commission.⁶ The system of cases is not a rapid response mechanism in any event, but the extent of delay has been and remains highly problematic. In response the Commission has adjusted some procedures and assigned some additional human resources; however, it has assigned additional human resources other functions as well, so the change is incremental and limited.

In 2019 the Commission approved admissibility/inadmissibility reports in just over 150 cases. It sent 31 cases to the Inter-American Court, with some still pending a decision as to submission to the Court. A small number of the cases decided concern states that have not accepted the Court's jurisdiction. The Commission retains competence with respect to cases not submitted to the Inter-American Court, and regularly follows up and reports on the status of compliance with its recommendations.

Friendly settlement is an alternative to completing the contentious process. It can be pursued when and for as long as both parties are willing to do so. The Commission must approve any settlement subject to its determination that the terms respect human rights. Brazil has only engaged in this process to completion in two cases, in 2003 and 2006 respectively.⁷

5 For basic information on how to file an individual petition, see IACHR, *Petition and case system* (2010), available at: <http://www.oas.org/en/iachr/docs/pdf/HowTo.pdf>, accessed February 20, 2020.

6 The Commission publishes a substantial amount of statistical data on petitions filed and being processed in chapter II of its annual report. Chapter II of the 2018 Annual Report can be accessed at: <http://www.oas.org/en/iachr/docs/annual/2018/TOC.asp>

7 For information on friendly settlement, see the relevant section of the webpage at: http://www.oas.org/en/iachr/friendly_settlements/

See also, IACHR, *Impact of the Friendly Settlement Procedure* (Second edition), 1 March 2018, at: <http://www.oas.org/en/iachr/reports/pdfs/ImpactFriendlySettlement-2018.pdf>

In terms of individual cases concerning judicial independence, a section below describes and analyzes a number of them to better illustrate the focus of this mechanism. It is important to note that both the Commission, if it makes the final determination, and the Court, when it issues a sentence, have processes aimed at follow up toward full compliance with measures required to repair human rights violations.

Precautionary Measures

Precautionary measures are an exceptional mechanism. The Commission may issue such measures with respect to “serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter” of a pending case before the system.⁸ The precautionary measures are understood to fall within the Commission’s general mandate of protection. The requirements and procedure are set forth in its Rules. While the number of requests has climbed substantially over the years, they are granted on a very exceptional basis.

Precautionary measures may be related to individual cases, existing or new, but that is not a requirement. The objective of such measures is not merits-based, but related solely to the need for protection. Precautionary measures do not lead to a finding of violation of rights. They are most often granted in response to a strong showing of risk to life or personal integrity. An example would be that of a human rights defender threatened or attacked in relation to his or her work, where the risk of harm continues. In the case of a person under threat, the precautionary measures would require the state to provide protection. The Commission requires that such measures be implemented in consultation with the person or group of persons being protected. It also generally requires investigation and accountability to deal with the source of the risk.

The IACHR issued 120 precautionary measures in 2018. Half of those concerned protection in relation to protests and detention in Nicaragua. The other half covered a range of issues and countries (IACHR, Annual Report, 2018). Normally the number of measures adopted during a year range from 40-60. Of the four precautionary measures granted with respect to Brazil during 2018, three concerned human rights defenders presumably at risk due to their

⁸ Article 25 of the Rules of Procedure of the Commission explains the basis for such measures: “In accordance with Articles 106 of the Charter of the Organization of American States, 41.b of the American Convention on Human Rights, 18.b of the Statute of the Commission and XIII of the American Convention on Forced Disappearance of Persons, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures.” Information about the process may be found at: <http://www.oas.org/en/iachr/decisions/about-precautionary.asp> , and information about measures granted, at: <http://www.oas.org/en/iachr/decisions/precautionary.asp>

work. Precautionary measures involve periodic reporting back and forth between the parties to monitor the situation of risk and due application of measures.

With respect to measures of protection for judges, while not numerous, a dozen or so examples from various countries over the last decade provide examples. The examples concern judges and one attorney general, all allegedly threatened in relation to cases under investigation, with information sufficient to demonstrate the absence of a sufficient protective response on the part of the state. The measures granted required the state in question to provide protection and investigate the threats alleged.

Thematic Rapporteurships

The Commission has established thematic rapporteurships over the years to provide a sharper focus on and response to serious human rights challenges. They tend to focus on deeply rooted human rights problems, often based in discrimination. The Rapporteurship on Indigenous Rights was the first, followed by those on the Rights of Women; Rights of Migrants; Freedom of Expression; Rights of the Child; Human Rights Defenders; Persons Deprived of Liberty; Afro-descendants and against Racism; Lesbian, Gay, Trans, Bisexual and Intersex Persons; and Economic, Social, Cultural and Environmental Rights.⁹

Just to take one example, the Rapporteurship on Human Rights Defenders was established to give greater attention to the role of those who defend rights, including justice operators, and the barriers and risks they face. As indicated in the introduction above, the Commission considers that judges often act as human rights defenders when their role involves the protection of basic rights for individuals and groups. The Rapporteurship gives close attention to situations in which judges are at risk in terms of their tenure or personal safety because of that work.

Rapporteurships such as this one carry out diverse initiatives. Reference can be made to the four thematic reports it prepared for the Commission on human rights defenders in the region. The third of those reports, issued in 2013, dedicated special attention to the situation of judges as human rights defenders (IACHR, Guarantees for the independence of justice operators, 2013). Rapporteurships also support Commission activities by providing specific inputs based on

⁹ General information on rapporteurships is available through the links on this page: <http://www.oas.org/en/iachr/mandate/rapporteurships.asp>
Please note this is one of few areas in which some webpage sections are not fully up to date.

their focus and experience, for example with respect to relevant individual cases, precautionary measures, country reports and other activities.

Hearings

The Commission normally holds hearings during its periods of sessions, and these cover a range of member states and human rights challenges. The majority relate to diverse themes, with an average of only a few a year concerning individual cases pending at the merits stage. For many years the hearings have been web cast and archived on the IACHR's web page, so as to remain available over time.¹⁰ Hearings can be useful to denounce serious situations, to report on deep longstanding challenges that require a stronger response by the state/s concerned, and sometimes provide an opportunity for civil society and states to dialogue, with Commission attention and participation, in seeking better responses. For those seeking processes of change, hearings can be helpful when part of a larger initiative.

The hearings related to Brazil during 2018 and 2019 concerned issues including law enforcement and justice, for example, extrajudicial executions by police, the rights of persons deprived of liberty, human rights in the context of the federal intervention in Rio de Janeiro, the criminal justice system and the rights of afro-descendants, and the problem of torture.

2.2 Court Mechanisms

The Inter-American Court was established with the entry into force of the American Convention, and focusses on three specific roles: contentious cases, provisional measures, and advisory opinions. The Court is also active with initiatives to promote its work and human rights protection, including through training, seminars and publications.

Contentious Cases

In the inter-American system, all individual cases must be filed with and decided by the Inter-American Commission. There is no access to the Court without a decision by the Commission. As indicated above, in order for the Court to exercise contentious jurisdiction in

¹⁰ Information on and access to past hearings may be found by topic/theme at: <http://www.oas.org/es/cidh/audiencias/topics.aspx?lang=en>
And by session at: <http://www.oas.org/es/cidh/audiencias/default.aspx?lang=en>

individual cases, the state concerned must have ratified the American Convention and expressly accepted that jurisdiction.

The Commission submits individual cases to the Court. States are able to do so but generally do not (there have been a couple of simultaneous Commission/state submissions). The Commission's Rules set out a presumption in favor of submitting cases susceptible to its jurisdiction to the Court. The Commission consults the victims in making that decision. It takes into account if they do not want to pursue Court litigation or if the temporal jurisdiction would be excessively limited in light of facts prior to acceptance of that jurisdiction.

Over its history, the Court has dealt with hundreds of individual cases.¹¹ The limited number of cases sent to the Court in a given year --18 were submitted in 2018, and 31 in 2019 -- is related to the number of cases the Commission decides on the merits over that period. Brazil accepted the Court's contentious jurisdiction in 1998, and as of January, 2020 is the subject of nine cases with sentences, and two cases currently pending a decision.

For those not familiar with the Court's work on contentious cases, brief reference will be made here to three cases from Brazil that illustrate key themes. First, the Herzog case decided against Brazil in 2018 was brought to challenge the denial of justice for grave human rights violations against the journalist, who was arrested, detained, tortured and killed in 1975 (Ser. C No. 353, 2018). While his family pursued multiple judicial actions, and it was judicially established that he had been tortured and killed (as opposed to having committed suicide as the detaining authorities falsely claimed), the amnesty law prevented clarification and accountability. The amnesty law passed to insulate the crimes of the dictatorship from accountability was upheld by the Supreme Court in 2010 as valid.

The Inter-American Court analyzed how the application of the amnesty law to shield what was a crime against humanity from investigation was incompatible with Brazil's obligations as a matter of jus cogens. It was contrary to the state's obligation to investigate, prosecute and punish grave human rights violations, as well as a violation of the family's right to know the truth about what happened.

The Court emphasized that the failure of the authorities to investigate, and in particular the Supreme Court's decision to uphold the amnesty law were carried out in contravention to the

11 Contentious cases can be found on the Court's webpage at: http://corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en

principle of “control of conventionality.” For the Inter-American Court, control of conventionality requires that the domestic authorities, especially the courts, consider not only applicable domestic legal obligations but also those the state is obliged to comply with under international law. In this case the Brazilian authorities failed to properly consider fundamental principles of international law (Ser. C No. 353, 2018, para. 311).

The Court’s findings followed those in the earlier case against Brazil concerning the *Guerrillado Araguaia* (Gomes Lund et al., Ser. C No. 219, 2010). The Inter-American Court has been working with these fundamental principles about the obligation of the state to establish criminal responsibility and accountability for grave violations since the *Barrios Altos* case against Peru in 2001. The Inter-American Commission first began applying these principles in contentious cases in 1992, in cases from the Argentine and Uruguayan dictatorships, respectively.

While Argentina, Chile, Peru and other countries have made tremendous strides in their efforts to provide judicial accountability for the grave violations of their respective anti-democratic regimes, Brazil remains out of compliance with its obligation to provide justice. Reports indicate that Brazil’s amnesty law --which remains in effect in sharp contrast to other countries-- continues to be challenged,¹² and the inter-American system will continue to follow up in favor of accountability.

The case of *Favela Nova Brasilia v. Brazil* decided by the Inter-American Court in 2017 deals with human rights violations perpetrated during two armed police operations in Rio de Janeiro (Ser. C No. 333, 2017). The first operation by police in 1994 produced the deaths of 13 males, four of whom were children, and sexual violence against three females, two of whom were children. The second operation, in 1995, produced the deaths of 13 males, two of whom were children. The deaths were registered as having occurred due to resistance to arrest, and investigated by the Civil Police of Rio de Janeiro and a special commission appointed by the governor. No serious findings were made during the investigations, which were archived in 2009 due to the expiration of the statute of limitations.

¹²See “At Long Last, Brazil’s Amnesty Law is Declared Anti-Conventional,” *OpinioJuris*, Aug. 16, 2019, at: <http://opiniojuris.org/2019/08/16/at-long-last-brazils-amnesty-law-is-declared-anti-conventional/> briefly describing the opinion of the 2nd Regional Federal Tribunal, which remained under appeal; on the claims in the case, see generally “Brasil: el caso de la mujer cuya violación y torturas en el régimen militar lleva por primer vez a un soldado a juicio”, Redacción, *BBC News Mundo*, 16 de agosto 2019 at: <https://www.bbc.com/mundo/noticias-america-latina-49374836>

The sentence focuses on the state's failure to effectively investigate what happened as from 1998 when Brazil accepted the Court's jurisdiction. The Court looks first at the lack of independence and impartiality of the investigation because those who carried it out were members of the same police body that carried out the operations. The principle of independence required the investigation to have been dealt with by another competent body, fully independent from the one involved in the facts being investigated. The Court found the investigations carried out were characterized by irrelevant measures, omissions and negligence. While other bodies could have taken corrective measures, none were taken. As to the sexual violence denounced by the three young women, there was simply no effort to investigate. The young women were considered witnesses, not victims, and there was no effort to investigate and clarify the treatment police subjected them to during the first operation.

The third case, concerning the workers in a fireworks factory in San Antonio de Jesus, was subject to a hearing before the Inter-American Court at the end of January 2020, with the decision pending (Audiencia, Caso de los empleados de la fábrica de fuegos de Santo Antônio de Jesus, 2020). The case as presented by the Commission to the Court in 2018 concerns the deaths of 64 workers, and injury of six, from the explosion of the factory. Many victims were children. The Commission found the state was aware of the risk, took no measures to prevent or protect against it, and failed to provide judicial protection and guarantees.

The case is notable because it presents grave human rights violations from both a traditional perspective and one in development. The Commission focused first and foremost on the traditional rights to life, personal integrity and to justice. However, at the same time it addressed the case in light of economic, social and cultural rights, identifying the employment of the affected children as one of the worst forms of child labor. Such factories represented the only real labor option for people living in poverty in the municipality. The job with high risk and low pay lacked basic measures of protection, and the state was aware of the risk. These findings by the Commission rely on the application of Article 26 of the American Convention on economic, social and cultural rights (IACHR, Report No. 25/18, Case 12.428, 2018, analysis, section B).

The other seven cases decided by the Inter-American Court are: Xucuru Indigenous People and its members; Hacienda Brasil Verde Workers; Gomes Lund et al. ("Guerrilha do

Araguaia”); Garibaldi; Escher et al.; Nogueira de Carvalho et al.; and Ximenes Lopes.¹³ The case currently pending a decision, in addition to that concerning the employees of the fireworks factory mentioned, is Barbosa de Souza et al.

Provisional Measures

Provisional measures may be adopted when necessary to avoid irreparable harm to persons. This competence of the Court is set out in the American Convention, with some further provisions in its Rules. The Convention provides the Court this competence in situations of “extreme gravity and urgency.” In contrast to precautionary measures, provisional measures apply only with respect to countries that have accepted the Court’s contentious jurisdiction.

The situation giving rise to the provisional measures may relate to a case pending before the Court or to a potential case that could be submitted in the future. The issuance of provisional measures does not constitute a finding of international responsibility for a rights violation. It is based on the state’s duty to protect. In matters that may be linked to a future individual case before the Court, only the Commission may present a request for provisional measures. When provisional measures relate to a case before the Court, either the Commission or the victims/representatives have standing to request such measures.

While precautionary measures are exceptional, provisional measures are extremely exceptional. They are not requested in great numbers. The Court’s web page records six requests in 2018 and six in 2019, with the majority (but not all) granted.

With respect to Brazil, the Inter-American Court has granted provisional measures in eight matters since 2002, all of which deal with the rights of persons deprived of liberty at extremely grave risk of harm. While the measures are issued to protect against urgent risk, the monitoring makes it clear that the underlying problems have deep structural roots, and in fact the measures in question have lasted for years. Overcrowding and lack of hygiene and medical services are substantial problems, and related violence and deaths are the focus of the measures. Such measures may also include the guards and others who work in the prisons.

Advisory Opinions

¹³ Cases decided by the Inter-American Court concerning Brazil are available in Portuguese, and may be accessed through its web site (starting from either the English or Spanish page). The link in English is: http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en

The Court is competent to issue advisory opinions at the request of the Commission, a member state, or certain organs of the OAS. In contrast to contentious cases, all member states may participate in the advisory opinion process. Interested parties from civil society may also present arguments.

The Court has indicated that advisory opinions provide an important opportunity to clarify the content of standards and required protections. While they do not involve decisions on individual rights claims, the Court considers that these opinions have broad applicability within the system as setting out what states are required to do to comply with obligations. In this sense the Court considers that state organs must carry out the central exercise of control of conventionality based not only on its pronouncements in individual cases, but those of advisory opinions as well.¹⁴ The Court considers that its advisory opinions have juridical relevance and provide important guidance for both states parties and non-states parties to the Convention.¹⁵

Brazil has had limited participation in such requests, but did participate with other states in the request for the advisory opinion on children in the context of migration (Advisory Opinion OC-21/14, Ser. A No. 21, 2014). This gives an example of how such opinions work. The questions posed concerned the rights of the child in migration, and the duties of the receiving state. Duties emphasized by the Court include that the state of reception must identify which children may require protection – refugee or otherwise – through an initial evaluation. Turning children away absent such an evaluation violates essential duties. The opinion gives central attention to the obligation of non-discrimination; requirement to respect the child's best interests, particularly the right to life and development; and the need to take the child's views into account to the extent possible. Specific attention is given to a series of due process and related requirements, considering first and foremost that migrant children should never be held in prison or prison-like detention conditions.

3 THE CONTRIBUTION OF INDIVIDUAL CASES CONCERNING JUDICIAL INDEPENDENCE

Human rights systems set out clearly that the independence of judges is essential to the function. This independence is essential to ensure a free and fair justice process at the national

¹⁴ See e.g. OC/24, para. 26, the latest among other decisions.

¹⁵ See *id.*, paras. 27-28, which track development of approach.

level, and for states to comply with their human rights obligations under international law.

The present section looks at some of the principal cases from the system concerning the dismissal or removal of judges absent basic required guarantees. The Commission has examined appointment processes and a broad range of issues concerning the judicial mandate in country-based work and reports, but dismissal has been the significant point in individual cases. While judicial independence has been a key underlying theme of the inter-American human rights system, and as such has been dealt with often across the different mechanisms, the number of individual cases directly on point is fairly limited.

The Judges of Chiriquis is an early case before the Commission looking directly at the standards applicable to judges, their impartiality, and dismissal (IACHR, Report No. 28/94, 1994). In summary, the case concerned a phone call by a superior judge to a municipal judge pressuring the latter to find in favor of a particular party in a case before her. When the municipal judge did not decide in accordance with that pressure, the superior judge instructed circuit court judges to proceed with disciplinary measures. When four of those circuit court judges insisted on the need for a hearing, they were fired. The superior court appointed new circuit judges, who dismissed and replaced the municipal judge. While the Constitution guaranteed judicial independence, the laws to make that guarantee operational had long been suspended, leaving it unclear how the judges could appeal. They nonetheless tried, but with no access to a hearing or due process.

In establishing that the firings and lack of due process were a violation of the judges' rights, the Commission set out two main points that have continued to inform its work. First, that judicial tenure and independence must be supported by clear (not vague or general) rules, and, second, that dismissal of a judge must include access to judicial protection and guarantees (Report No. 28/94, paras. 26-30, 41-42). In terms of follow-up on the case, two of the judges were later reinstated, the applicable legal regime was reformed, and the State finally recognized that their rights had been violated.

The Carranza case from Argentina, decided by the Commission, is the next example (IACHR, Report No. 30/97, 1997). By way of context, if readers are familiar with the inter-American system, they will be aware of the Commission's work concerning the human rights

abuses of the dictatorships of the 1970's and 80's, with Argentina as a key example. Part of what the Commission looked at closely in its 1980 country report on Argentina was how the military junta appointed a new supreme court, superior courts, and replaced many judges. To be appointed, a proposed judge had to swear allegiance to the junta and its aims (IACHR, Report on the Situation of Human Rights in Argentina, 1980, section VI.B).

The case of Gustavo Carranza formed part of the legacy of the dictatorship and was decided by the Commission years later in 1997. Carranza was one of the many judges dismissed by the junta's directive. With the restoration of democracy, he began filing judicial claims against his firing. The provincial court found that it was a political question and dismissed the complaint with no review of the merits. It took this decision notwithstanding that the province itself did not contest the judge's claim. The Supreme Court declined to review the case in 1987, and this case was not the only example.

The Commission's decision indicates, first, that the right to judicial protection is not satisfied simply by being able to file a claim. The Commission indicated that because the dismissal of a judge by an illegitimate *de facto* authority, in disregard for the procedure prescribed by the Constitution, would be unlawful, the courts would be required to review it and provide a reasoned response. The State maintained that the rejection on the basis of the political question doctrine was a decision. The Commission found that because this was not a decision on the substance, it did not meet the required standard. The Commission found that "[e]ffective recourse means recourse suitable for protecting the rights violated," which means a substantive answer on the claim (Carranza, Report No. 30/97, para. 75).

The Commission's recommended reparation was compensation, and this opened a further chapter. When no payment was forthcoming, Carranza went back to the provincial courts, which agreed that he should be compensated. He disagreed with the amount awarded, and appealed to Argentina's Supreme Court which in a close decision confirmed that he should be compensated (without changing the amount) because compliance with the Commission's decision was a state obligation (Corte Suprema de Justicia, "Carranza Latrubesse, Gustavo c/ Estado Nacional", 2013).

An important next chapter in the system's approaches to judicial independence was developed in response to measures of the Fujimori regime in Peru. Just months before the end of that regime in 2000, the Commission published a country report on the situation of human rights

in Peru, which provided a detailed analysis of the deliberate deconstruction of the independence of the judiciary (IACHR, Second Report on the Situation of Human Rights in Peru, 2000). The Commission reported that more than 80% of judges were provisional, appointed without public competition, by Congress, with no guarantees of stability and subject to removal without cause. It should be noted that the Commission's report had a significant impact on the position of member states of the OAS against the regime that fell soon thereafter.

One of these situations, the impeachment and removal of three judges of the Constitutional Tribunal in 1997, led to an individual case and the Inter-American Court's first major decision focused directly on judicial independence and guarantees for judges. The case was presented to the Inter-American Court in 2000, and decided in 2001. (*IACourtHR, Constitutional Tribunal v. Peru*, 2001). In summary, the Constitutional Court had been asked to rule on the effects of a law that would have allowed then-President Fujimori to run for a third term, even though the Constitution provided for a limit of two. The majority of the Constitutional Court considered the law was inapplicable so there was no basis for him to run. Following a series of negative reactions from the administration, three judges with a clear position on the inapplicability of the law were impeached and removed by the legislature.

The case before the Inter-American Court focused on denial of due process during the impeachment process and subsequent judicial appeals. The Inter-American Court did not consider impeachment in and of itself invalid for judges serving at the highest instance, but found that when applicable it must be carried out with full respect for due process. Among the failures to provide due process, the Inter-American Court found the judges were given limited information; limited access to evidence; not allowed to question witnesses; and were not heard. The Inter-American Court found the process had not been independent and impartial.

With respect to remedies, the dismissed judges filed an amparo that was rejected. The Inter-American Court determined that they had a right to file the remedy and be heard— and that the objective of that remedy would be to review due process. Not to review the political evaluation of the legislature, but to review the due process of the procedure. It may be noted that the Inter-American Commission has dealt with a series of complaints about the firing of judges in violation of judicial independence and due process during the Fujimori years that have led to negotiated friendly settlements for dozens and dozens of judges.

The situation of human rights in Venezuela has been a deep concern for the Commission over many years, particularly the separation of powers and independence of the judiciary. This is addressed in multiple country reports. In particular, the practice of appointing many judges on a provisional basis absent any guarantees is a longstanding problem that persists. For example, in its 2017 report on Venezuela, the IACHR reported that 73% of judges were serving on a provisional basis (IACHR, Democratic Institutions, the Rule of Law and Human Rights in Venezuela, 2017).

This problem of provisional judges and the absence of the basic guarantees required to protect judicial independence is illustrated in a sequence of three cases decided by the Inter-American Court, *Apitz, Reveron and Chocrón*, between 2008 and 2011. All concern the provisional appointment of judges and their firing absent any guarantees of due process. Through these cases the Inter-American Court emphasized that in the case of judges, contrary to other public officials, it is the necessity for independence that requires they have special guarantees with respect to tenure.

The *Chocrón* case is an example (IACourtHR, Ser. C No. 227, 2011). Mrs. Chocrón was appointed as a provisional judge, served for a few months, and was then notified that her appointment had been terminated. The notification indicated that the Supreme Court had received some comments about her, but there was no explanation as to what those comments were or who presented them. She filed a complaint, and the decisions indicated simply that her removal had not been a disciplinary measure but the termination of a temporary arrangement that had no guarantees of stability and no right of review.

Referring to inter-American, UN and European standards, the Inter-American Court indicated that judicial independence gives rise to certain guarantees: an adequate appointment process, tenure in the post, and guarantees against external pressure. The Inter-American Court noted that provisional judges in Venezuela exercise exactly the same functions as permanent judges. Litigants have the right for the judges deciding their disputes to be and appear to be independent.

The Inter-American Court concluded that “the State must offer the guarantees derived from the principle of judicial independence to both permanent and provisional judges” (IACourtHR, *Chocrón*, para. 103). It found that the concept of provisional judge applied in the case, subject to removal at will, is incompatible with judicial independence, because some form

of tenure is a necessary safeguard. The judgments in all three cases have not been subject to measures of compliance.

The next two cases concern the dismissal of the judges of the Constitutional Tribunal and Supreme Court of Ecuador. The dismissals were followed by the activation of mechanisms that prevented the judges dismissed from having access to judicial guarantees or review.

On November 23, 2004 the then-President of Ecuador announced the reorganization of the top three courts. On November 25, 2004, in the case that became *Camba Campos et al.*, Congress declared the termination of the judges of the Constitutional Court of Ecuador, indicating that the manner in which they had been appointed had been unlawful (IACourtHR, Ser. C No. 268, 2013). The termination was an ad hoc mechanism not provided for in the Constitution or law. Congress appointed new judges the same day. Congress then held impeachment proceedings with respect to certain judges concerning two decisions issued prior to their dismissal, but the vote to censure them did not pass. After a call to special sessions by the President, Congress voted for a second time and approved impeachment and a motion of censure. The Inter-American Court also noted the connection between the timing of their removal and the judicial decisions the majority had taken about questions related to executive policy.

Regarding the case of *Quintana Coello et al.*, the judges of the Supreme Court were then fired on December 8, 2004 (IACourtHR, Ser. C No. 266, 2013). With respect to the dismissal of those 27 judges, it was later proven that with the threat of impeachment hanging over his head, the then-President of Ecuador negotiated an agreement with the majority political party that included the removal of the sitting judges and appointment of new ones. Congress then justified the dismissal of the sitting judges by saying the process to name them had been improper. In this and the prior case, in response to the state's defense that their termination had been necessary because the manner in which they had been appointed had been invalid, the Inter-American Court found that the State never identified a basis in domestic law that required invalidation, and this was done long after they were appointed.

The Inter-American Court applied certain basic principles in both cases. It underlined that, given their role and responsibilities, as public officials judges must be covered by special guarantees. Because of the need to safeguard their independence, there must be an adequate process of appointment, stability in the position, and guarantees against external pressure.

Removal would be exceptional, valid only for serious misconduct or incompetence. Other measures would apply for less serious problems in carrying out the role.

The Inter-American Court's decision relates stability to independence directly and concretely. It emphasizes that the process for removal must be independent and impartial, through established procedures, with the right to defense, and the right to appeal for review of due process. While the victims filed amparo actions seeking to defend their rights, these were dismissed without any hearing or substantive consideration, leaving them with no access to an effective remedy.

The Inter-American Court found the massive firing of judges from these courts signified a rupture of the democratic order and rule of law, and meant there was no effective separation of powers (see Quintana Coello, Ser. C No. 266, p. 178). There was a direct effect on the rights of the judges, and also a direct impact on society in terms of the breakdown in the guarantees of independence and impartiality necessary for judicial protection.

The state complied by publishing the Inter-American Court's decision and paying the compensation ordered. These two cases from Ecuador provided an important opportunity for the system to consider the right to due process when a domestic system provides for dismissal through impeachment. Both the Commission and Court have looked at systems in which impeachment of high-ranking judges by congress is not subject to judicial review and both have indicated that access to judicial review of due process during such a proceeding is required.

The Commission, however, has gone significantly further in expressing that impeachment as a process poses a threat to the guarantees of independence and impartiality. In its 2013 Report on the Guarantees for the Independence of Justice Operators, the Commission directly addressed this point, indicating that: "vesting the legislative branch with the authority to remove justice operators from their posts is at variance with the guarantee of independence that justice operators must have, without having to fear disciplinary action by other branches of government" (IACHR, Guarantees for the independence of justice operators, para. 204). The Commission was unambiguous in its approach, indicating its view that "the use of impeachment in the case of justice operators should be gradually eliminated in the region" (Guarantees, para.205).

The case of López Lone vs. Honduras was decided by the Inter-American Court in 2015, and provides a strong jurisprudential approach to the role of judges in a democracy and the relationship between that role and the rights of judges (IACourtHR, Ser. C No. 302, 2015). The

handling of the case provides an inter-American perspective on freedom of expression, freedom of association, and the right of judges to take part in government. It should be noted that the Commission has continued to follow up on the question of judicial independence in Honduras in a series of country reports from 2009 to the drafting of the present article.

The case concerns the context of the 2009 coup in Honduras against then-President Zelaya. Each of the four judges named as victims had expressed the importance of the return to democracy. In summary, two had participated in protests against the coup. One had filed a criminal complaint against those carrying out the coup and an amparo in favor of President Zelaya. And one offered a legal and academic opinion about the illegality of the coup, a summary of which was published in a newspaper. The four were subject to disciplinary proceedings and their judicial tenure terminated.

The Inter-American Court framed its sentence taking into account the illegality of the coup under international law, and the fundamental role of representative democracy as a pillar of the regional system. The firing of the judges punished them for their defense of the rule of law and democracy, and the Court directly recognizes that not only did they have the right, but also the duty to defend those values.

The Court recalled that judges may be subject to certain restrictions of their rights in order to protect the independence and impartiality of their role; that may be consistent with the American Convention as necessary to protect the rights of others. However, in moments of grave democratic crisis, as in the context of the coup, those limitations do not apply:

in situations where there is a breakdown of institutional order following a coup d'état, [the relationship between freedom of expression and association and the right to take part in government] is even clearer, especially when they are all exercised at the same time in order to protest against actions by the public authorities that are contrary to the constitutional order, and to reclaim the return to democracy. Protests and related opinions in favor of democracy should be ensured the highest protection (Ser. C No. 302, para. 160).

The Court explained that: “at times of grave democratic crises, as in this case, the norms that ordinarily restrict the right of judges to participate in politics are not applicable to their actions in defense of the democratic order” (Ser. C No. 302, para. 174). It would be “contrary to the independence inherent in the branches of State, as well as the international obligations of the State derived from its membership of the OAS, that judges could not speak out against a coup

d'état" (para. 174). In terms of due process, the procedure carried out to dismiss them was not that set forth in the law, nor was there an impartial, independent process of review.

The reparations issued in the case center on compensation, publication of the sentence in media outlets, and importantly, the reincorporation of the judges to the bench. In addition to being reparation for them, the Court expressed that, given the importance of the judicial mandate, the latter measure was also necessary to avoid a legacy of fear for other judges in the exercise of their rights. Reports indicate that compensation was paid, and the sentence published. It is the central order requiring reappointment to the bench that remains problematic. It applies to three of the four judges (one was reincorporated years before). The state has claimed there are no judicial vacancies in the city in question. One of the three judges finally accepted further compensation instead of reinstatement. The remaining two judges await reinstatement, and the Court continues its compliance process.

4 THE INCOMPATIBILITY OF MILITARY JURISDICTION TO RESPOND TO HUMAN RIGHTS VIOLATIONS

Both the Commission and Court have been clear in rejecting the use of military jurisdiction to investigate and prosecute human rights violations. Both have focused on several related main points. First, they have distinguished between interests that are properly military, pertaining to the needs of service, and the investigation of serious human rights violations such as torture, killing or disappearance which must be dealt with by independent civilian authorities. Second, they have found that civilians should not be tried by military tribunals. Third, in the military justice systems the Commission and Court have looked at, military judges cannot be independent because they are subject to the military chain of command and executive control. That executive control separates them from the independence of the civilian justice system. The inter-American system is clear in emphasizing that military courts should have a restrictive and exceptional jurisdiction. In addressing these basic principles, the system has seen both significant advances and setbacks.

The need for judicial protection and guarantees to be independent is set out in the American Convention and American Declaration, and the jurisprudence amply illustrates and

applies the principles. It should be noted that the question of military jurisdiction is expressly addressed in the Inter-American Convention on Forced Disappearance of Persons, to which Brazil is a party. In Article IX, the treaty specifies that cases of forced disappearance shall be dealt with in the ordinary criminal justice system; may not be dealt with in any special jurisdiction, particularly military jurisdiction; and that acts constituting a forced disappearance may not be understood as part of military duties.

The development of these approaches is closely related to the history of the region. Important aspects were developed in the context of repression and dictatorship. The Commission's 1988 report on the case of Rojas de Negri and Quintana Arancibia is a representative early example. During the dictatorship, soldiers doused two protesters with fuel and set them on fire. The young man died and the young woman suffered permanent damage. The case was dealt with in the military justice system. In its report, the Commission indicated that the "military courts have served to provide a veneer of legality to cover up [...] impunity [...] [for] flagrant violations of human rights" (Case 9755, Res. No. 1a/88, 1988, considerations para. 7(c)). The case was reopened in 2013 and in 2019 a Chilean court held former soldiers responsible for what happened in the protesters' case; the three judged most responsible were sentenced to 10 years in prison (Bonney, 2019).

The Commission has closely monitored the use of military jurisdiction in Colombia, and issued a series of decisions invalidating its use in cases of grave human rights violations, sometimes involving violations of international humanitarian law. An early example is the "milk truck case" decided in 1997 (Ribón Avilán et al., Case 11.142, Rep No. 26/97, 1997). It dealt with the deaths of 11 persons shot by police, most within a distance of a meter or less. Some were members of a guerilla group who were hors de combat, others were civilians. The person who served as military judge and acquitted the officers at trial was their commander. The Commission called on the state to enact the required changes in law and practice to bring torture, extrajudicial execution and forced disappearance under civilian court jurisdiction. These are early examples within a long line of cases that focus on the requirement that civilian courts have competence over serious human rights violations, and which have helped bring about crucial reforms in multiple countries.

The Inter-American Court, as from Durand and Ugarte in 2000, began developing standards on the incompatibility of military jurisdiction to deal with serious human rights

violations. In cases from Colombia, for example Las Palmeras, 19 Merchants, and Pueblo Bello, the Court ordered that investigation and prosecution of state agents implicated in massacres and other grave violations be handled by civilian courts. Many subsequent Court cases further develop this fundamental principle. Over the years, Colombia has in fact implemented a series of changes in the use of military jurisdiction based on findings of both the Commission and Court.

The Radilla Pacheco case decided in 2009 against Mexico is significant for its reparations and the changes they brought about (IACourtHR, Ser. C No. 209, 2009). Rosendo Radilla Pacheco was forcibly disappeared by soldiers in 1975 in a context of severe repression. Years passed with no investigation. When an officer was eventually implicated, the matter was transferred to military jurisdiction, with no results. Because the forced disappearance of a civilian could never be considered a legitimate act of military service, the Inter-American Court ordered the state to ensure the case would be handled by the ordinary criminal courts. The reparations required reforms to modify the domestic definition of forced disappearance, which applied exclusively to state agents, and not to individuals acting at their behest (which is covered by the state's international commitments). Further, the Court required the state to restrict the broad application of military jurisdiction to apply only to crimes legitimately linked to military service, and provide an effective remedy to challenge its use.

The Radilla Pacheco case has been cited as the impetus for significant positive changes in Mexican law and practice. First, expansion of the remedy of amparo enables it to be used to challenge the application of military jurisdiction (IACourtHR, Resolution on Compliance, 2015, paras. 28-31). Further, subsequent changes to the law on military jurisdiction significantly restricted its scope (paras. 9-23).

The friendly settlement of the Correa Belisle case before the Commission supported the repeal of the Argentine Code of Military Justice in 2007 (IACHR, Report 15/10, 2010). Captain Correa Belisle reported the finding of the body of soldier Carrasco. A criminal process was initiated with respect to the death, and in that process the Captain denounced activities carried out by military personnel that he considered illegal. In response to those declarations, and because a high-ranking military figure considered himself offended, a process was initiated against Correa Belisle within the military criminal jurisdiction and he was sentenced to three months of arrest for the crime of disrespect.

Following the Commission's decision to admit the case, the parties reached a friendly settlement. On that basis, in 2007 the state derogated the Code of Military Justice, and adopted a number of broad and positive changes. Most specifically with respect to the case, under the new system members of the military charged with crimes are judged in the ordinary criminal justice system with applicable guarantees.

However, military participation in law enforcement continues to produce serious human rights violations in multiple countries, and the misuse of military jurisdiction further compounds the problem. With respect to Brazil, for example, in late 2017, it amended its Military Criminal Code so that intentional homicide of civilians by members of the armed forces is tried by military courts. Both the Commission and the UN expressed serious concern then (press release 160/17, 2017), and again in 2018 with the state's decision to mobilize armed forces to have a strong role in citizen security in Rio de Janeiro (press release 047/18, 2018). In April of 2019, the Commission issued a press release recounting a series of killings in Rio de Janeiro by civilian and military police officers, and again emphasized the importance of investigation and follow-up by the civilian authorities (press release 103/19, 2019).

CONCLUSION: A SYSTEM OF COMMONALITIES, DISTINCTIONS AND CHALLENGES

The inter-American system has placed strenuous emphasis on the role of judges and the judiciary as part of the democratic process. Due guarantees of tenure and independence are an indispensable part of this evolving process. Many of the cases focus on the effectiveness or lack thereof of guarantees of tenure and independence in processes for dismissal and the right to appeal and be heard with due process. Military jurisdiction may apply to make certain decisions relative to the military mission, but does not provide the independence and guarantees necessary to investigate, prosecute and punish HR violations. In addition to work on specific cases, country-based and thematic work enables broader engagement with the main challenges the judiciary faces and requires and supports positive change.

There are also cases and urgent measures of protection that reflect most grimly and urgently the risk of threats and harm to judges in relation to their roles, and the obligations of the state to respond to that risk. That kind of risk threatens the affected judges – and also threatens the free exercise of judicial authority and the rights of persons who seek judicial protection.

As briefly indicated above, one of the notable characteristics of the inter-American regional system is the emphasis on democracy as a common core value. The system identifies a clear relationship between that commitment and respect for basic human rights.

At the same time, looking at levels of state involvement in the inter-American human rights system, there are significant differences. As opposed to the European human rights system, where membership in the regional body requires ratification of the European Convention on Human Rights and all states are subject to the jurisdiction of the European Court, the inter-American system is based on the three different levels of participation indicated above. These different levels of participation reflect distinct levels of engagement in practice. Non-parties to the Convention are furthest away, and there are no signs of the existing gaps closing.

Against this backdrop, it is interesting to consider the focus the Commission and Court apply to their respective work. As indicated, the Commission pursues a broad range of functions, and works with states parties and non-states parties to the Convention. While the core human rights obligations are common, there are marked differences in the Commission's work with parties and non-parties to the Convention. During the past three years the Commission has taken to expressly designating certain serious human rights challenges for prompt special attention; all have concerned countries in Latin America. The on-site visits set for 2020 are to Chile, Venezuela and Bolivia; the vast majority of all visits have been to countries in Latin America. Initiatives that focus on non-parties to the American Convention are less frequent and often more limited in scope; there are Caribbean member states so distant from the system that they have yet to be involved in cases, country reports or precautionary measures. In practice, the Commission works with member states through diverse approaches.

The Court's primary focus is on contentious cases, and the broad jurisprudential philosophy that it applies across its work is that of "control of conventionality."¹⁶ The Court first began to develop this approach in relation to its work on the incompatibility of amnesty laws with the American Convention. A central point was that, in the face of amnesty laws contrary to the American Convention, judges at the national level were obligated to exercise control of

16 For information on the application of the concept of control of conventionality in the jurisprudence, see IACourHR, Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 7, versión actualizada, 2019, available in Spanish at: <http://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo7.pdf>; for an explanation of the approach in English see Eduardo Ferrer Mac-Gregor Poisot, Conventuality control: The new doctrine of the Inter-American Court of Human Rights, 109 AJIL Unbound 2015, pp. 93-99, available at: <https://www.asil.org/sites/default/files/Ferrer%20Mac-Gregor%2C%20Conventionality%20Controlv3.pdf>

conventionality to ensure compliance of national law with state human rights obligations under international law.

In subsequent cases the Court expanded this understanding to refer to domestic judges' roles in ensuring state compliance with inter-American treaty obligations more broadly, and to explain that officials from each branch of government are required to ensure compliance with the state's international human rights obligations within their realms of responsibility. It is when the state is unable or unwilling to meet this obligation that the Inter-American Court has the role of determining the nature of the noncompliance and reparations required to repair the harm and ensure non-repetition.

“Control of conventionality” has generated a set of unifying principles for the Inter-American Court, and while very much in development and not uniformly accepted by all states, has in some matters generated positive responses in certain countries more deeply engaged with the Court and the American Convention. However, this remains “in process,” and particularly for OAS member states not party to the Convention, this approach is extremely distant.

Regardless of differences and debates in terms of approaches, a key challenge remains that compliance with human rights requires that state officials, particularly judges at all levels, have access to training and full and updated information to interpret and apply the state's human rights obligations in conformity with the standards of the regional system. While this is essential, and certain countries have taken important steps, it remains a very long-term goal.

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Recebido em: 29/04/2020

Aprovado em: 20/05/2020