Chapter 4
THE EUROPEAN COURT OF HUMAN RIGHTS AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS

1. Introduction

Previously, consideration has been given to two issues that limit full respect for the rule of law. The voluntary nature of international adjudication allowing States to auto-determine whether they subscribe to any court's jurisdiction is the most fundamental limit to the rule of law. Beyond this encumbrance, the legacy of the Central American Court of Justice demonstrates how non-cooperation with international courts places in peril, not only institutions, but also the very essence of international adjudication. These limitations directly challenge the system of international adjudication. By seeking to remain outside that system, States devalue the legitimacy of international courts and the rule of law. States, however, have also sought to limit the effectiveness of the rule of law while being subject to the jurisdiction of a court, appearing before it, and respecting and implementing its judgments. The best example of this may be found in a comparison of regional human rights courts, where the constitutive instruments were essentially analogous, yet their ability to ensure the respect of the rule of law varied.

To establish the differences in the ability for the European Court of Human Rights and the Inter-American Court of Human Rights to function effectively may well be the best case-study available for students of international adjudication who seek to understand how legal instruments, similar in nature, can vary in implementation. These two Courts, along with the nascent African Court of Human and Peoples' Rights, also provide an instructive continuum illustrating the evolution of human rights courts. While the European system dismantled the European Commission of Human Rights in 1998, thus allowing individuals increased access to the European Court, African countries decided in the late 1990s, to establish a court – having relied exclusively on its Commission to garner respect for human rights. Between these two poles lies the Inter-American system where – this will be emphasized in this study – both an Inter-American Commission and Court are mandated to ensure compliance with human rights norms in the Americas.

2. The Human Rights Systems[1]

The establishment of regional human rights courts is a result of the events in Europe in the late 1930s and early 1940s, and of the subsequent failure of the international community, as a whole, to provide for a universal human rights court within the framework of the newly created United Nations Organization. The atrocities of the National Socialist Government in Germany against its own people were perpetrated:

> with complete legality under [its] legislation: the domestic laws authorized, and paralleled, the pernicious injustices of the acts. Moreover, those laws had been enacted by a legislature lawfully installed under the constitution of a sovereign State. According to the strict doctrine of national sovereignty, any foreign criticism of those laws was therefore formally illegitimate[2].

Out of the ravages of the Second World War came a movement "to introduce into international law new concepts designed to outlaw such events for the future, in order to make their recurrence at least less probable"[3]. Beyond the *ad hoc* international war crimes tribunals performing at Nuremberg and Tokyo, and the establishment of a new legal order with the United Nations Organization; the real novelty in international law, which would have an impact on international adjudication at the regional level, was the emergence of the notion of "human rights". The fact that the Charter of the United Nations mentions the promotion and encouragement of respect for human rights as one of its main purposes, yet failed to establish, within the Charter, a mechanism to ensure its "faith in fundamental human rights"; together with the 1948 Universal Declaration of Human Rights, which was not a legally binding document, meant that those who advocated the international "judicialization" of the respect for human rights would have to look elsewhere for their implementation.

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[1] See generally Héctor Gros Espiell, "La Convention américaine et la Convention européenne des droits de l'homme", *Collected Courses of The Hague Academy of International Law*, Vol. 89, 1989, pp. 175-410, and "La Cour interaméricaine et la Cour européenne des droits de l'homme", *Liber Amicorum Marc-André Eissen*, 1995, pp. 233-246; Jochen A. Frowein, "The European and the American Conventions on Human Rights – A Comparison", *Human Rights Law Journal*, Vol. 1, 1980, pp. 44-65; A. Glenn Mower, *Regional Human Rights: A Comparative Study of the West European and Inter-American Systems*, 1991; and Burns Weston, Robin Lukes, and Kelly Hnatt, "Regional Human Rights Regimes: A Comparison and Appraisal", *Vanderbilt Journal of Transnational Law*, Vol. 20, 1987, pp. 585-638.

[2] Paul Sieghart, *International Law of Human Rights*, 1983, p. 14.

[3] *Ibid.*, p. 14.

2.1. **Evolution of Human Rights Courts**

At the end of the Second World War, it was left to the Council of Europe to establish a human rights regime at the regional level, as Europe had witnessed first-hand the violations that States could perpetrate against their own people. Thus, the European Convention for Protection of Human Rights and Fundamental Freedoms entered into force in 1953 to "take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration"[4]. European States agreed, at that time, that a European Commission of Human Rights and a European Court of Human Rights would be created to "ensure the observance of the engagements undertaken"[5].

The Inter-American community, for its part, adopted the American Declaration on the Rights and Duties of Man some seven months before the 1948 Universal Declaration of Human Rights[6], but would have to wait until 1959 for the creation of the Inter-American Commission on Human Rights and until 1980 for the establishment of the Inter-American Court of Human Rights. Still slower to develop was the African regime that saw the African Charter on Human and Peoples Rights enter into force in 1986, creating an African Commission on Human and Peoples Rights[7], and the agreement to establish the African Court on Human and Peoples Rights having come as late as 1996[8]. Thus, the notion of human rights would evolve during the second half of the twentieth century in an uneven manner, both in time and in effectiveness. Despite this uneven evolution, the notion of "human rights" maintains a unique position within the realm of international law. A regional regime has developed, with the consent of States, to respect and protect the rights of individuals within the territories of those States. Also by consent, States have provided international organs with the responsibility to ensure – albeit with varying degrees of success – the respect of their conventional undertakings. It may be said that in the area of international human rights law,

> the strict doctrine [of State sovereignty was] cut down in two crucial respects. First, how a State treats its own subjects is now the legitimate concern of international law.

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[4] Preamble, Convention for Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS n. 5. The text of the Convention was completed by Protocol No. 2 (ETS n. 44), 6 May 1963, and amended by Protocol No. 3 (ETS n. 45), 6 May 1963, Protocol No. 5 (ETS n. 55), 20 January 1966, Protocol No. 8 (ETS n. 118) of 19 March 1985, and Protocol no. 11 (ETS n. 155), 1 November 1998. See Appendix 4.

[5] *Ibid*., Article 19.

[6] Weston *et al.* (eds.), *op. cit.* n. 1, p. 593.

[7] Article 30, African Charter on Human and Peoples Rights, P. R. Ghandhi (ed.), *Blackstone's International Human Rights Documents*, 1995, pp. 175- 185.

[8] See Resolution on the African Commission on Human and Peoples' Rights, 64th Session of the Council of Ministers of the Organization of African Unity, 1-5 July 1996, Yaoundé, Cameroon. Note that the Court had to be established by 31 December 1999.

> Secondly, there is now a superior international standard, established by common consent, which may be used for judging the domestic laws and the actual conduct of sovereign States within their own territories and in the exercise of their internal jurisdictions[9].

2.1.1. *The European Convention for the Protection of Human Rights and Fundamental Freedoms*

In May 1948, a "Congress of Europe" was held in The Hague that proposed the creation of a European charter of rights and a European court of human rights. The outcome of this Congress was the establishment of the Council of Europe, "a sort of social and ideological counterpart"[10] to NATO and the body that would prepare the European Convention to be signed at Rome in 1950 and brought into force three years later[11]. Since that time, the European system for the protection of human rights has been continuously reinventing itself. Not satisfied with either the substantive rights guaranteed or with the monitoring mechanisms established, the European States have added eleven protocols to the 1950 Convention either amending it or adding to its scope[12].

Protocol 1 guarantees individual property and provides that the right to education shall be part of the Convention; and it calls on States Parties to "undertake to hold free elections"[13]. Protocol 4 adds further substantive rights, which for the Parties having accepted it are to "regard as additional article to the Convention"[14]. Those rights revolve around the concept of nationality and include the right to liberty of movement and the prohibition of collective expulsion of aliens. Protocol 6 seeks to abolish the death penalty[15], while Protocol 7 deals with a variety of matters, including the refining of the rights respecting aliens, the acceptance of the right to appeal in criminal matters, and the equality of spouses[16]. Beyond these additions to the substantive rights

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[9] Sieghart, *op. cit.* n. 2, p. 15.

[10] Ian Brownlie, *Basic Documents on Human Rights*, 1992, p. 325.

[11] Gros Espiell, *op. cit.* n. 1, pp. 216-217.

[12] For Protocols 1 through 10, see Ian Brownlie, *Basic Documents on Human Rights*, 1992, pp. 341-363; for the European Convention as amended by Protocols n. 3, 5, 8 and 11, see Ghandhi, *op. cit.* n. 7, pp. 125-134.

[13] Protocol to the Convention for Protection of Human Rights and Fundamental Freedoms: Enforcement of Certain Rights and Freedoms Not Included in Section I of the Convention, 20 March 1952, ETS n. 9.

[14] Article 6(1), Protocol 4 to the Convention for Protection of Human Rights and Fundamental Freedoms: Securing Certain Rights and Freedoms Other than Those Included in the Convention and in Protocol 1, 16 November 1963, ETS n. 46.

[15] Article 1, Protocol 6 to the Convention for Protection of Human Rights and Fundamental Freedoms: Concerning the Abolition of the Death Penalty, 28 April 1983, ETS n. 114.

[16] Articles 1, 2 and 5, Protocol 7 to the Convention for Protection of Human Rights and Fundamental Freedoms: Concerning Various Matters, 22 November 1984, ETS n. 117.

enshrined in the European Convention, Protocols 2, 3, 5, and 8-10 provide refinements to the system and its organs. Protocol 2 grants the Court the competence to deliver advisory opinions[17], while Protocol 9 gives individuals direct access to the Court[18]. Protocols 3, 5 and 8 seek, *inter alia*, to develop and clarify the mandate of the European Commission on Human Rights[19]. Finally, Protocol 11, which came into force on 1 November 1998, dismantled the Commission in favour of a revamped European Court of Human Rights and incorporated various Protocols into the Convention[20].

2.1.2. *The American Convention on Human Rights*

The Inter-American human rights system originated in the 1948 Bogotá Conference, which saw the setting up of the Organization of American States (OAS). The creation of the OAS was a further evolution in the regional organization of the Americas; the "present Organization of American States has its origins in a resolution of the First International Conference of American States convened in Washington by the United States in 1899"[21]. Out of this Conference emerged the Commercial Bureau of the American Republics which, in 1910, became the Pan American Union and which would later evolve into the Secretariat of the Organization of American States[22]. It has been pointed out that "the Inter-American System would have probably continued its gradual evolutionary growth"[23], had it not been for the move towards establishing the United Nations Organization. Fearful that the Inter-American system would be absorbed by the United Nations, American States reorganized and strengthened their regional structure.

Margaret Ball, one of the few English-language writers to have dealt with the OAS in depth, wrote that at the 1948 Bogotá Conference three fundamental issues were being raised concerning the incorporation of human rights into the new Charter of the Organization of American States:

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[17] Protocol 2 to the Convention for Protection of Human Rights and Fundamental Freedoms: Conferring upon the European Court of Human Rights Competence to Give Advisory Opinions, 6 May 1963, ETS n. 44.

[18] Protocol 9 to the Convention for Protection of Human Rights and Fundamental Freedoms: Concerning Access to the Court by Individuals, 6 September 1990, ETS n. 140.

[19] See Articles 1 and 2, Protocol 3 to the Convention for Protection of Human Rights and Fundamental Freedoms: Amending Articles 29, 30 and 94 of the Convention, 6 May 1963, ETS n. 45; Articles 1 and 2, Protocol 5, Amending Articles 22 and 40 of the Convention, 20 January 1966, ETS n. 55; and Articles 1 to 8, Protocol 8 to the Convention for Protection of Human Rights and Fundamental Freedoms: Concerning Various Matters, 19 March 1985, ETS n. 118.

[20] Protocol No. 11 to the Convention for Protection of Human Rights and Fundamental Freedoms: Restructuring the Control Machinery Established thereby, 1 November 1998, ETS n. 155.

[21] M. Margaret Ball, *The OAS in Transition*, 1969, p. 10.

[22] O. Carlos Stoetzer, *The Organization of American States: An Introduction*, 1966, p. 6.

[23] Ann Van Wynen Thomas and A.J. Thomas, Jr., *The Organization of American States*, 1963, p. 36.

1) whether any statement of human rights should be included in the Charter;
2) if handled outside the Charter, whether the statement should take the form of a declaration or a convention; and,
3) whether the rights should be simply "recognized" internationally, or whether some effort should be made to protect them through the efforts of some sort of international tribunal"[24].

Thomas Buergenthal, former President of the Inter-American Court, answers these questions in part in noting that "the 1948 OAS Charter contained very few provisions relating to human rights, and all of them were phrased in very general terms"[25]. Rather than being included in the Charter, a statement on human rights – The American Declaration of Rights and Duties of Man – "was proclaimed at the same Bogotá Conference that produced the 1948 Charter, but the Declaration was adopted in the form of a simple conference resolution; [hence it] did not form part of the Charter itself"[26]. As to the third of Ball's issues, a request was made to the Inter-American Juridical Committee to "prepare a draft statute providing for the creation and functioning of an Inter-American Court to guarantee the rights of man to be submitted first to the governments then to the Tenth Conference"[27]. It was considered at that Conference that in the "absence of a convention on the subject [i.e. human rights] creating positive substantive law, the time had not arrived for the drafting of a statute of the court"[28].

Instead, the members of the OAS agreed, in 1959, to establish a human rights commission as an "interim measure", until a human rights court could be created[29]. The Inter-American Commission on Human Rights was to be an "autonomous entity" within the Inter-American system, and later in 1970, it became an organ of the Organization of American States by virtue of the Protocol of Buenos Aires amending the Charter of the OAS[30]. The Commission was directed by the main organ of the OAS, the General Assembly, to prepare a draft which would later become the American Convention on Human Rights, adopted in 1969, which entered into force in 1978[31]. Buergenthal notes that the "American Convention is patterned on the European Convention of Human

[24] Ball, *op. cit.* n. 21, p. 503.

[25] Thomas Buergenthal, "The Inter-American System for the Protection of Human Rights", in Buergenthal *et al.* (eds.), *Protecting Human Rights in the Americas: Select Problems*, 1990, p. 4.

[26] *Ibid.*, p. 4.

[27] *Ibid.*, pp. 503-504.

[28] C. G. Fenwick, "The Tenth Inter-American Conference at Caracas", *The American Journal of International Law*, Vol. 48, 1954, p. 139.

[29] Christina M. Cerna, "The Inter-American Commission of Human Rights", *Connecticut Journal of International Law*,Vol. 2, 1987, p. 312.

[30] Charter of the Organization of American States, 1948, amended by the Protocol of Buenos Aires, 1967, and by the Protocol of Cartagena de Indias, 1985, OAS Doc. OEA Ser. A/E/2 Rev.

[31] American Convention on Human Rights, signed November 22, 1969, entered into force 18 July 1978, O.A.S. no. 36, OAS Doc. OEA Ser. L./V/II. 23 Rev. 2. See Appendix 5 for full text.

Rights. This is true in particular of its institutional framework which is quite similar to its European counterpart"[32]. The American Convention on Human Rights gave the Inter-American Commission a different role, however, and made way for the creation of the Inter-American Court of Human Rights[33]. The Statute of the Inter-American Court, drafted by the newly elected judges, was approved by the OAS General Assembly in October 1979, while the original Rules of the Court were adopted in August 1980[34].

2.1.3. *African Charter on Human and Peoples' Rights*

The pressure to establish a regional human rights regime in Africa came in the wake of the dismantling of the colonial system. Having removed the yoke of colonialism, African States established the Organization of African Unity (OAU) to "promote solidarity in Africa; to cooperate in an attempt to better the lives of Africans; to defend State sovereignty and territorial integrity; to eliminate all forms of colonialism from Africa; and to promote international cooperation with regard to the UN and the Universal Declaration of Human Rights"[35]. The OAU emphasized, however, the preoccupation of its members to ensure political stability and territorial integrity, often at the expense of violations of human rights:

> Notwithstanding the genuine concern of African Leaders to maintain their national sovereignty and territorial integrity, the African public, NGOs and the international community were justifiably outraged by the OAU's inaction if not indifference to massive human rights violations in Africa.[36]

As a result of this type of criticism, the OAU Secretary-General requested the drafting of an African human rights treaty. The African Charter of Human and Peoples' Rights was thus produced in 1981 and entered into force on 21 October 1986[37]. This instrument differs in two significant respects from its counterparts in Europe and the Americas. Beyond first-generation (political and civil) and second-generation (economic, social and cultural) rights that are found in all three instruments, the African Charter ensures third-generation (solidarity or "peoples") rights, which include the right of peoples to self-determination, the free disposition of wealth and natural resources, and the right to international

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[32] Buergenthal, *op. cit.* n. 25, pp. 8-9.

[33] See Chapters 6, 7, and 8 of the American Convention on Human Rights, *ibid.*

[34] The Rule of the Court may be found at Inter-American Court of Human Rights: Rule of the Court, adopted July 30 to 9 August 1980, OAS Doc. OEA Ser. L./V/III. 3.

[35] Article 2, Charter of the Organization of African Unity, 23 May 1963, *International Legal Materials*, Vol. 2, 1963, p. 776.

[36] Evelyn Ankumah, *The African Commission on Human and Peoples' Rights*, 1996, p. 5.

[37] The African Charter of Human and Peoples' Rights, *op. cit.* n. 7.

peace and security[38]. A further distinction is to be found in the enforcement mechanisms provided for under the African Charter. As opposed to the European and Inter-American Conventions, the African Charter has provided for only an African Commission on Human and Peoples' Rights. The African Court of Human and Peoples' Rights, which was agreed upon in 1996, was given formal consent by the African States through the signing of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and People's Rights during the 34th Ordinary Session of the Assembly of Heads of States and Governments of the OAU in June 1998[39], had not even seen the light of day by the end of 1999.

3. Comparing the European and Inter-American Courts, 1980–1998

While the African Court of Human and Peoples' Rights had not yet been established by the latter part of the twentieth century, the courts within the European and American systems have been functioning for some time. Until November 1998, the European and Inter-American human rights systems had analogous constitutive instruments[40]. The active presence of nearly identical human rights courts in the Americas and in Europe during an eighteen-year period from 1980 to 1998 allows for comparisons which shed light on why the Inter-American Court, while appearing to be similar to its European counterpart, in reality evolved in a fundamentally different manner. The first difference, which relates to the inability of contentious cases to reach the Inter-American Court is, of course, the voluntary nature of international adjudication. Article 62(1) of the American Convention allows State Parties to recognize as binding the jurisdiction of the Court. Further, Article 63(3) reads:

> The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it, provided that the State Parties to the case recognize or have recognized such declaration pursuant to the preceding paragraphs, or by a special agreement.

While the European system remained voluntary (until November 1998), thirty-nine States subscribed to the Court's contentious jurisdiction under Article 46. By contrast, by that same date only sixteen American States had recognized the

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[38] Articles 19, 21, and 23, *ibid.*

[39] By the end of 1999, 35 States had signed the Protocol and 3 States had ratified it: Burkina Faso, Gambia, and Senegal. Information received from Ben Kioko, Legal Counsel, the Organization of African Unity.

[40] See Protocols n. 9 and n. 11 to the Convention for Protection of Human Rights and Fundamental Freedoms.

jurisdiction of the Inter-American Court[41]. Thomas Buergenthal, as President of the Inter-American Court of Human Rights, noted in a 1986 address before the OAS Permanent Council that there are "many hurdles"[42] surrounding the Court's contentious jurisdiction. At the time, he stated that the biggest obstacle to having more cases heard before the Court was the lack of Parties which had accepted the Court's contentious jurisdiction. However, in the years following his address, the number of States accepting the jurisdiction of the Court doubled from eight to sixteen and therefore, by the end of the century, included almost half of the thirty-five OAS member States.

Having consented to the jurisdiction of the Court, American and European States, during the period 1980-1998, saw their obligations under the applicable human rights conventions enforced by way of proceedings initiated by the Commissions. As Héctor Fix-Zamundio, a judge of the Inter-American Court, stated, the latter does "not have a direct jurisdictional function; there is no direct access to the Court. Access is through the Commission, and we have jurisdiction only when the Commission send us cases"[43]. Before a case could reach either of the Courts, it must first have been dealt with by the Commission which, like a gatekeeper, would make the determination of allowing a case to proceed to the Court. Although "any person or group of persons, or any non-governmental entity"[44] may come forward complaining that their Convention rights have been violated, they cannot bring such complaints directly before the Court[45]. Thus, in the period under review, a case started its road towards either the European or Inter-American Court as a petition before the relevant Commission.

Before either the European or the Inter-American Commission could consider a petition, the petitioner would have to ensure that all domestic remedies available had been exhausted in accordance with the rules of international law and that the petition had been lodged within a six-month period from the time of

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[41] The sixteen countries which had accepted the jurisdiction of the Court are*:* Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, Uruguay, and Venezuela. See "State of Ratification of Major Human Rights Conventions", *Netherlands Quarterly of Human Rights*, Vol. 14, 1996, pp. 360-373.

[42] Thomas Buergenthal, "The Inter-American Court, Human Rights and the OAS", *Human Rights Law Journal*, Vol. 7, 1986, p. 158.

[43] Lynda E. Frost, "The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges", *Human Rights Quarterly*, Vol. 14, 1992, p. 178.

[44] Article 44, American Convention on Human Rights; Article 25, Convention for Protection of Human Rights and Fundamental Freedoms.

[45] In the first contentious case to be brought before the Inter-American Court, Costa Rica – in a case against itself – asked the Court to deliberate, without having gone through the Commission's procedures, on the death of one of its nationals, Viviana Gallardo, killed while in detention by National Guardsmen. By submitting this case directly to the Court and bypassing the Commission, Costa Rica rendered the case inadmissible. The Court decided that the Commission "is the channel through which" cases must proceed if they are to reach the Court. *In the Matter of Viviana Gallardo*, I/A Court H.R., 13 November 1981, p. 85.

the exhaustion of those local remedies[46]. Having thus gone through a domestic judicial system, the case would then become something of a political issue before the Commissions, thereby losing its judicial nature, until it would again appear before a human rights court. If the Commissions considered a petition admissible, it would inform the State accused and ask it to provide information. Regardless of whether the Commissions received information back from the State, after a set period of time, they could decide whether grounds existed to proceed with the petition. The Commissions could at this time end the procedure if they considered the petition totally unfounded[47].

Further in the petition process, the Commissions were called upon to undertake fact-finding missions and to seek friendly settlement[48]. To this point in the process, by which a petition could be heard before either the Inter-American or European Courts, the systems were analogous. If a friendly settlement could not be reached, within the Inter-American system then the Commission was to draw up a confidential report outlining facts and drawing conclusions, which was to be made available to the parties[49]. Under certain conditions, including a waiting period, the Commission could then publish the report making recommendations where appropriate and establishing a period in which a State was to remedy the situation. Within the former European system, reports were forwarded not only to the parties but also to the Committee of Ministers for consideration and possible action[50]. Finally, it was at this point, when no settlement was possible, that a petition could, upon the decision of either of the Commissions, proceed to a Court.

3.1. **The New European Human Rights System**

One of the main reasons the Inter-American Court of Human Rights had not functioned to its potential has been the lack of coordination with the Inter-American Commission; both mechanisms of European system, by contrast, worked in a complementary manner. In fact, the European system functioned to such a degree that it became overburdened and major reforms became necessary,

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[46] Article 46(1)(a) and (b), American Convention on Human Rights; Article 26, Convention for Protection of Human Rights and Fundamental Freedoms.

[47] Article 48(1)(b), American Convention on Human Rights. Article 27, Convention for Protection of Human Rights and Fundamental Freedoms.

[48] Article 48, American Convention on Human Rights; Article 28, Convention for Protection of Human Rights and Fundamental Freedoms.

[49] Article 50, American Convention on Human Rights; Article 31, Convention for Protection of Human Rights and Fundamental Freedoms.

[50] Articles 31 and 32(3) and (4), Convention for Protection of Human Rights and Fundamental Freedoms.

> so as not to collapse under its own weight, be this as a result of the enormous increase in individual applications now coupled with a 48 per cent increase of State Parties [to the Convention] since 1989 or the interrelated problem of the clogging–up with unacceptable delays in the processing of applications in Strasbourg[51].

A major determination in the reforming of the European human rights system was that the Commission was expendable. This is in direct contrast to the Inter-American mechanism, where Inter-American Judge Gros Espiell has noted that:

> In America, we do not foresee the modification of the bi-organizational system (the Commission and the Court). It is true that there has been some thought as to the improving and to better coordination between the two organs. But there are no attempts to assimilate the two organs or to eliminate the Commission[52].

In contrast to this stance, the phasing-out of the European Commission commenced in 1990 with the signing of Protocol No. 9 to the European Human Rights Convention. For those States which became Parties to that Protocol, the Convention allowed "the person, non-governmental organization or group of individuals having lodged the complaint with the Commission" to refer a case directly to the Court[53]. In such cases, the judges formed a panel effectively to carry out the duties that had been attributed to the Commission; they considered whether the cases raised "serious questions affecting the interpretation or application of the Convention" and thus became the "gatekeepers", determining the admissibility of the case before going to the full Court[54].

By 1993, the members of the Council of Europe had decided that further reforms were necessary "to enhance the efficiency of the means of protection, to shorten procedures and to maintain the present high quality of human rights protection"[55]. Protocol No. 11 was signed at the meeting of Heads of State and Governments of the Council of Europe on 11 May 1994. The Protocol, which came into force on 1 November 1998, one year after the last of the State Parties to the Convention had consented to be bound by it, dismantled both the European Commission and the part-time Court. In their stead, a new full-time European Court of Human Rights was created which receives applications directly from

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[51] Andrew Drzemczewski, "The Major Overhaul of the European Human Rights Convention Control Mechanism: Protocol No. 11", *Collected Courses of the Academy of European Law*, Vol. 6, 1995, pp. 121-245, p. 127.

[52] Gros Espiell, *op. cit.* n. 1, p. 236.

[53] Article 5(1), Protocol 9 to the Convention for Protection of Human Rights and Fundamental Freedoms. Concerning Access to the Court by Individuals, 6 September 1990, ETS n. 140. Protocol 9 came into force on 1 October 1994 and, before it was repealed by Article 2(8) of Protocol 11, had been ratified by 23 States.

[54] Article 5(2), Protocol 9 to the Convention for Protection of Human Rights and Fundamental Freedoms.

[55] Vienna Declaration, 9 October 1993, as cited in Drzemczewski, *op. cit.* n. 51, p. 203.

"persons, non-governmental organizations or group of individuals claiming to be victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or protocols thereto"[56]. This new body was meant to streamline and render more efficient a system which was burdened with over 5000 cases in 1996[57].

While the European system was on the verge of collapse due to its success, the Inter-American system, though the means of bringing a case before its Court were similar, seemed to have been still-born. It appears that whereas the European Commission evolved in parallel to the European Court, in developing an effective coordinated system for the protection of human rights, the mechanisms in the Americas took a distinctly opposite course. The difference in the evolution of the Inter-American system led to a curbing of the effectiveness of the rule of law in the Western Hemisphere. With final judgment being given in only sixteen cases over an eighteen-year period, it appears that factors other than the constitutive documents of the Inter-American system influence respect for the rule of law. These other factors, the development of the Inter-American Commission and the financing of the Inter-American Court, demonstrate that while international adjudication may appear strong on paper, it can be very ineffective in practice.

4. The Inter-American Court of Human Rights

The previous section demonstrated that between 1980 and November 1998 the European Court of Human Rights and its Inter-American counterpart functioned with an analogous procedural regime under which cases started as petitions to the Commission before the could be considered by a judicial organ. Despite the similarities in the constitutive instruments of these judicial bodies, the Inter-American Court has only been able to render final judgment on the merits in seventeen cases in an eighteen-year period while the European Court dealt with 737 cases during the same period[58]. What will now be considered are the impediments which have been faced by the Inter-American Court of Human Rights and which are responsible for the fact that during its existence of nearly twenty years, it came nowhere close to matching the effectiveness of the European Court of Human Rights. To contrast the two Courts is to find that while

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[56] Article 1, Protocol No. 11 to the Convention for Protection of Human Rights and Fundamental Freedoms: Restructuring the Control Machinery established thereby, 1 November 1998, ETS n.155. New Article 34 (Individual applications) of the Convention for Protection of Human Rights and Fundamental Freedoms.

[57] Drzemczewski, *op. cit.* n. 51, pp. 134-135.

[58] See the Judgments and Decision section of the European Court of Human Rights website at: http:// www.dhcour.coe.fr.

they were similar on paper, the amount of decisions delivered demonstrates a wide disparity in practice. The lack of effective judicial remedies before the Inter-American Court of Human Rights was best summarized by a Judge of that Court, who wrote:

> I have come to the conclusion that unfortunately the system of the Convention appears to make [human rights protection] impossible because the American States in drafting it did not wish to accept the establishment of a swift and effective jurisdictional system but rather they hobbled it by interposing the impediment of the Commission, by establishing a veritable obstacle course that is almost insurmountable, on the long and arduous road that the basic rights of the individual are forced to travel[59].

The obstacle course to which Judge Piza alludes includes the procedural regime discussed, which attributes a key role to the Inter-American Commission. Further, the Organization of American States (OAS) must be criticized for having established the Inter-American Court of Human Rights without funding it in a manner which would allow it to function effectively. Despite the fact that non-governmental human rights organizations, such as Amnesty International and Human Rights Watch, have drawn attention to, and documented, systematic State-sponsored abuses during the 1980s and 1990s, which have lead to literally millions of human rights violations in Latin America while the Inter-American Court was forced to live in near-splendid isolation, giving judgment in less than two dozen contentious cases[60].

The limitations on the rule of law imposed by States becomes evident when examining the establishment and functioning of the Inter-American Court. Beyond the procedural road a case must travel before reaching the Court, the administrative and political impediments meeting cases upon their arrival explains why the Inter-American Court – as opposed to its European counterpart – has had little tangible impact as a judicial organ meant to uphold the rule of law. How is it that in an area of the world fraught with human rights violations only a handful of contentious cases had been decided? To answer the question, different factors should be highlighted. First, the evolution of the Court as related to its gatekeeper – the Commission – inhibited a number of cases from being forwarded to the Court. Second, the OAS member States had further reduced the ability of the Court to deal with adjudicative matters by administrative limitations. Through these impediments, the American States sought to ensure that major obstacles would have to be overcome before a case could reach the Inter-American Court of Human Rights.

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[59] Concurring Opinion, Judge Rodolfo Piza Escalante, *In the Matter of Viviana Gallardo*, 13 November 1981, I/A Court H.R., p. 99.

[60] See for instance Amnesty International, *Crime without Punishment: Impunity in Latin America*, AMR 01/08/96, 1996; Latin American country reports in Human Rights Watch, *World Report 1999*, 1999, and, more specifically, the situation reports from Human Rights Watch/Americas.

4.1. **Organizational Impediments**

The evolution of both the European Court and the Inter-American Court were conditioned by the relationships with their respective Commissions. While both the European and the Inter-American Commission appeared *prima facie* to have the same responsibilities, the evolution of their mandates demonstrated that they were fundamentally different. The fact that the European Commission has been recently dismantled does not affect the following evaluation, which seeks to identify the factors which have caused the Inter-American Court to take a fundamental different course from that of its European counterpart.

The European Commission of Human Rights, during the 45 years of existence, consisted of the same number of commissioners as there were Parties to the European Convention. Originally composed of eleven members, the Commission would grow to have thirty-nine by the end of its mandate[61]. By way of contrast, Articles 34 to 36 of the American Convention provide for a set number of members – seven – who are to act as Human Rights Commissioners in their personal capacity but, at the same time, as representatives of all the member States of the OAS, regardless of whether a State has ratified the American Convention. Both bodies were empowered to receive petitions from any person, group of persons, or non-governmental organizations claiming to be victim of violations of the Conventions[62]. Having received a petition, the Commissions were to determine the admissibility of the claim; if the latter was judged admissible, the Commissions were to ascertain the facts and to seek a friendly settlement[63]. If such friendly settlement was not forthcoming, they were empowered either to bring the petition to their Courts as contentious cases or to submit a report to their respective executive organs for action[64].

Despite these similarities, the fundamental difference in the establishment and evolution of the European and Inter-American Commissions meant that these institutions, which acted as "filters", would play significant roles in any success which a Court might have in fulfilling its mandate. While the European Com-

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[61] Chart of Signatures and Ratifications, Convention for the Protection of Human Rights and Fundamental Freedoms, http://www.dhcour.coe.fr.

[62] Article 25, European Convention; Article 44, American Convention.

[63] For admissibility, see Articles 26-28 of the European Convention and Articles 46 and 47 of the American Convention; for friendly settlement, Article 30 of the European Convention and Article 49 of the American Convention.

[64] Provisions for friendly settlement are found at Article 30 of the European Convention and Article 48 of the American Convention; the provision related to the referral to the European Courts or the filing of a Report with the Committee of Ministers (Article 32 of the European Convention), while Article 51 of the American Convention allows the Commission to refer a petition to the Inter-American Court as a case or, by virtue of Articles 49-51, to make a report and forward it to the State accused of violations of the Convention and to the Secretary-General of the OAS, and to make it public if, after a set period of time, no action has been taken.

mission of Human Rights was a creation of the European Convention, as was the European Court, the Inter-American Commission was established twenty years earlier than the Inter-American Court. This resulted in a situation where the European mechanisms matured as complementary organs, while the Inter-American system evolved in a less than harmonious manner. Despite its having been established in 1959, the Inter-American Commission always functioned in the shadow of an Inter-American Court. This is due, in large part, to the fact that originally the American States wished to create a human rights court but settled for a commission instead.

4.1.1. *The Evolution of the Inter-American Commission on Human Rights*

Although attempts were made at the Tenth Inter-American Conference held at Caracas, Venezuela, in 1954, "to have the question of an Inter-American Court to Protect the Rights of Man included on the agenda", these came to naught[65]. This was, in large part, a result of a meeting of the Inter-American Council of Jurists in the previous year, where it was decided that without a human rights convention it made no sense to establish a judicial mechanism[66]. Anna Schreiber notes that:

> The fate of the proposal to prepare a draft statute for an inter-American court to protect human rights indicates that in 1953 most governments were still unwilling to move rapidly to establish international guarantees for human rights. Although the proposal came within one vote of being placed on the agenda of the Tenth Inter-American Conference, the mood of the majority was mirrored in the title of the human rights item which was placed on that agenda: "Human Rights – Measures Tending to Promote Human Rights Without Detriment to National Sovereignty and the Principle of Non-Intervention". Few States were willing to modify their traditional adherence to the doctrine of non-intervention by approving measures that would give international bodies the power to pass judgment on their domestic activities[67].

Schreiber points out that during the next five years, up until 1959, "no major steps towards the construction of an inter-American system for the protection of human rights were taken"[68]. At the Fifth Meeting of Consultation of the Ministers of Foreign Affairs held at Santiago, Chile, in 1959, the delegates called on the Inter-American Council of Jurists to forge a link between a court and a convention by drafting first a "convention on human rights and another convention for the establishment of an Inter-American Court for the Protection of

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[65] Fenwick, *op. cit.* n. 28, p. 139.
[66] See n. 28.
[67] Anna P. Schreiber, *The Inter-American Commission of Human Right*, 1970, p. 24.
[68] *Ibid.*, p. 26.

Human Rights and of any other organs suitable for that same task"[69]. The second paragraph of the draft resolution provided for the creation of:

> an Inter-American Commission on Human Rights, composed of seven members elected as individuals by the Council of the Organization of American States from panels of three names presented by the governments. The Commission, which shall be organized by the Council of the Organization and have the specific functions that the Council assigns it, shall be charged with furthering respect for such rights"[70].

The draft resolution calling for the establishment of the Inter-American Commission on Human Rights appears to have been a setback to the movement towards creating a human rights court. Although the founding of the Commission was secondary to the task of developing a convention on human rights and the establishment of a court, the Commission would come to play a prominent role in the protection of human rights in the Americas. However, the creation of the Inter-American Commission on Human Rights would also become an obstacle in the path of creating a properly functioning human rights court. The Commission would, with its solid work in promoting human rights, sidetrack the wishes of proponents of international adjudication for a twenty-year period; it would become the gatekeeper which would determine which cases could reach the Court; and it would become the *locus* of a labyrinth of procedures both slowing down and limiting the number of cases reaching the Inter-American Court. Finally, the Commission, feeling threatened by the establishment of the Inter-American Court of Human Rights, would involve itself in a "turf war" with the Court. This struggle affected both the amount of international adjudication taking place in the Americas and the impact which the Court would have on human rights in the Western Hemisphere.

"The Inter-American Commission on Human Rights was born almost by accident and without special design. There was no definite plan for its creation, no prior studies"[71]. The happenstance manner in which the Commission originated and would later evolve belies the fact that it did so as a response to a functional and pragmatic approach taken by the States of the Western Hemisphere. A staff attorney for the Commission noted in a 1987 article that, at the 1959 Santiago Meeting of Consultation, "the drafters considered a court the primary instrument for the promotion and protection of human rights in the

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[69] *Ibid.*

[70] Cecilia Medina, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System*, 1988, p. 67.

[71] César Sepúlveda, "The Inter-American Commission on Human Rights (1969-1981)", *Israel Yearbook on Human Rights*, Vol. 12, 1982, p. 47. Note that M. Margaret Ball wrote, however, that the establishment of the Commission was not without precedent, a like plan having been put forward by the Uruguayan delegation at the Tenth International Conference of American States at Caracas in 1954. *Op. cit.* n. 21, p. 373.

Americas, while the Commission was considered only an interim measure until the creation of such a court"[72]. With such an auspicious beginning, it is interesting to note the critique leveled by the delegate from Uruguay, at the 1959 Santiago Meeting of Consultation of the Ministers of Foreign Affairs, to the paragraph of the draft resolution, noted above, creating the Commission. The Uruguayan delegate took up the argument mentioned earlier by the Inter-American Council of Jurists[73], stating that "to create an organ to promote the rights before respect of the rights become a precise and clear legal obligation [i.e. a convention on human rights] would be illogical"[74]. Yet, the argument, which had been strong enough to derail the movement toward an Inter-American Court, was not sufficient to stop the creation of the Inter-American Commission on Human Rights.

The battle for legitimacy that the Commission waged after the Council of the OAS approved its Statute in 1960 is important to an understanding of the response which the Commission would later have towards the establishment of the Inter-American Court. The Commission, through an arduous process, moved from being a temporary entity, "which, sooner or later, would disappear at the expense of a system which would establish a convention on human rights"[75], to becoming an OAS Charter organ[76]. How did the Commission leave such unstable ground to become a foundation for the promotion of human rights within the Inter-American system?

Karel Vasak argues that the Commission's "actions, prudent and daring at times, had the effect of proving, if not the compatibility, at least the possibility of conciliation, between the principles of non-intervention and the international protection of human rights in the Western Hemisphere"[77]. It was within this atmosphere of finding a balance between human rights and State sovereignty that the Commission would come to prosper within the Inter-American system. As José Cabranes notes, the establishment of the Commission

> gave little hint of the role which the new body would fashion for itself within the inter-American system, and indicates that some of the Members of the O.A.S. may have supposed that in voting to create the Commission they had merely voted for the establishment of one more "study group":
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> > In carrying out its assignment of promoting respect for human rights, the Commission shall have the following functions and powers:

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[72] Cerna, *op. cit.* n. 29, p. 312.

[73] See *supra*, n. 26.

[74] Medina, *op. cit.* n. 70, p. 67.

[75] Karel Vasak, *La Commission interaméricanne des droits de l'homme*, 1968, p. 175. My translation.

[76] Articles 52 and 111, Charter of the Organization of American States.

[77] Vasak, *op. cit.* n. 75, p. 87. My translation.

a. To develop an awareness of human rights among the peoples of America;

b. To make recommendations to the Governments of the members states in general, if it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic legislation and in accordance with their constitutional precepts, appropriate measures to further the faithful observance of those rights;

c. To prepare such studies or reports as it considers advisable in the performance of its duties;

d. To urge the Governments of the member states to supply it with information on the measures adopted by them in matters of human rights;

e. To serve the Organization of American States as an advisory body in respect of human rights.

By its own interpretation and application of its Statute, however, the Commission has received and reviews communications from individuals and groups within member States, studied conditions and held sessions and public hearings in particular states, and made findings and recommendations thereon to the State or States involved. This interpretation of its own Statute, as one of the Commission's members noted, "laid a foundation for visitations, examinations, and recommendations with respect to conditions involving flagrant and persistent violations of human rights in individual countries"[78] .

The evolution of the Commission from its early form of an "entity" to become an important part of the Inter-American system clearly demonstrates the mistrust which American States fostered towards the notion of international adjudication. The Commission would come to play a significant role within the OAS as a quasi-political go-between, linking States and the Inter-American Court. The establishment and evolution of the Inter-American Commission was a pragmatic means used by American States for dealing with human rights without having to submit to the jurisdiction of a court. Yet the growth in stature of the Commission would become a double-edged sword.

During its early years, American States saw the Commission's actions as being "political" in nature. This eased the pressure which had been building in favour of setting up a tribunal by dealing with human rights within the political realm. However, by the late 1960s, the Commission was, "if not in the process of solidifying, at least acquiring, the powers of a juridical organ"[79] . In so doing, the Commission forced the American States to follow through on the establishment of the Inter-American Court or face the consequences of placing formal judicial powers in the hands of a very powerful organ of the OAS. The final thrust toward

[78] José A. Cabranes, "The Protection of Human Rights by the Organization of American States", *The American Journal of International Law*, Vol. 62, 1982, pp. 894-895.

[79] Vasak, *op. cit.* n. 75, p. 140. My translation.

creating the Inter-American Court of Human Rights was, therefore, not born out of any affinity for a judicial mechanism to protect human rights. Instead, a proper evaluation would lead to the conclusion that the States of the Americas sought to curb the judicial powers that the Commission was acquiring and, in so doing, developed an awkward system for the protection of human rights which further shielded States from having to defend themselves in front of an international court.

The hasty creation of the Inter-American Commission can be attributed to the fall of the Batista dictatorial regime in Cuba on 1 January 1959. The theme of the Meeting of Consultations of the American Ministers of Foreign Affairs, which took place that year, was "the rupture of democracy in various parts of the Hemisphere, and the delegates, or at least the majority, were convinced that if human rights were reinforced, the democratic system would function better"[80]. The Commission rode this wave of anti-communism and Cold War rhetoric, enabling it to secure strong institutional foundation:

> The development during [the first sessions of the Commission, 1961-65] show that the Commission had assumed several powers which were not explicit in its Statutes, but which it felt were implied powers needed for the better fulfillment of its functions. The OAS political organs, by not questioning these powers, had tacitly agreed on their validity. A powerful reason for this attitude was the fact that most cases handled by the Commission at that time concerned [Fidel Castro's] Cuba, and there the issue was [...] fighting communism. […]For the cause of human rights it was fortunate that Cuba's cases were the first to be examined by the Commission; the activities undertaken in this respect formed a precedent that was very difficult to challenge when the Commission started handling other cases in the same fashion[81].

By 1965, the actions that the Commission had taken were incorporated into its Statute. A Guatemalan representative, when asking for a discussion of the Commission's status to be placed on the agenda of an upcoming conference, explained that: "the Commission was in no position to give efficient protection to human rights due to its lack of powers [and] that this body could only be considered a temporary Commission"[82]. At the Second Special Inter-American Conference held at Rio de Janeiro in 1965, the Statute of the Commission was amended to legitimize the expanded role it had already assumed. The increased mandate included: ensuring the observance of specific rights as set out in the American Declaration of Rights and Duties of Man; examining communications which were sent to it; seeking information from governments; making recommendations for bringing about a more effective observance of human rights;

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[80] Sepúlveda, *op. cit.* n. 71, p. 47. Note that dictatorial regimes in a state of imminent collapse in the late 1950s, included, besides Cuba, the Dominican Republic and Haiti.

[81] Medina, *op. cit.* n. 70, pp. 74-75.

[82] *Ibid.*, p. 77.

submitting an annual report noting any progress or setbacks with respect to States' obligations under the American Declaration; and making "explicit decisions about the merits of a complaint"[83].

American States justified this increased mandate by pointing out that the ratification of a convention on human rights was still many years away and that there had been "agreement among American governments about the positive role that the Commission had already played in the [human rights] field"[84]. Karel Vasak argued that "due to the authorization – resembling a blank check – which it received at Rio de Janeiro"[85], the Commission was quickly moving from a quasi-political entity to a quasi-judicial one. Vasak notes that "[i]f some doubt still remains, it is that the jurisprudence – not the actions of the Commission – had not, as of yet, confirmed the evolution which would allow for a comparison between the writings which have emanated from the Inter-American Commission with those of the European Commission"[86].

Cecilia Medina, in her work *The Battle Of Human Rights: Gross, Systematic Violations and the Inter-American System*, notes that the Commission had acquired quasi-judicial functions and points out that:

> [It] had special competence to examine individual communications concerning the violations of human rights. […] This competence comprised more elements of a judicial nature. On the one hand, there were preliminary legal requirements. [...] On the other hand, its purposes were to lead to an opinion as to whether a violation [...] had been committed. Finally the competence had another judicial element; as a sanction against a government failing to carry out the recommendations, the Commission was empowered to publish a report on the violation.[87]

Vasak likewise shared the opinion of Medina with respect to the evolution towards a judicial mandate which the Commission was undergoing. He notes that the latter already had at its disposal all the elements of a judicial procedure:

> a written phase in the form of an exchange of "information" which is supplied to the Commission by each of the antagonists; an oral phase in the form of an audience accorded often by the Commission to individual petitioners [as] well as the on-site investigation. [...] Even the presumption of truth which, according to Article 51 of the Regulations of the Commission, is attached to the facts not in dispute by the State accused[88].

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[83] Schreiber, *op. cit.* n. 67, pp. 54-55.
[84] Medina, *op. cit.* n. 70, p. 77.
[85] Vasak, *op. cit.* n. 75, p. 140. My translation.
[86] *Ibid.*, p. 140.
[87] Medina, *op. cit.* n. 70, at p. 84.
[88] Vasak, *op. cit.* n. 75, at p. 147. My translation.

Further, he points out that "violations which were not addressed voluntarily by the specific States, [were to be published in the] yearly report, a "judicial document" which, as is, constitutes a decision"[89].

Vasak argues that the Commission had not, as of yet, taken an overtly judicial character because, although judicial elements existed in its mandate, they were of "variable judicial worth" and were "quite dispersed"[90]: some were to be found in the Commission's Statute, others in its Regulations, and still others were customary in nature, having emerged through the Commission's practice. Vasak contends that the Commission was evolving into a strong entity within the Inter-American system and was solidifying its judicial base. "Already the 1967 revisions of its Regulations, compared to the previous year, traces a clear division between the Commission's function of investigation and its function of protection [...] of human rights"[91]. Vasak ventures the observation that the Commission's status would have to be reformed eventually, lest the Commission attempt to "judicialize its actions"[92]. Thus, in June 1968, the main political body of the OAS, the Council, "approved a resolution by which the Commission was requested to prepare a draft convention on human rights that was to serve as a working document for the Inter-American Specialized Conference on Human Rights"[93].

4.1.2. *The Conflict between the Commission and the Court*

Through its achievements in the protection and promotion of human rights, the Commission not only had gained legitimacy as an OAS Organ, but had been directed to prepare the draft of a human rights convention; thus assuring its own survival. On 22 November 1969, at the Inter-American Specialized Conference on Human Rights in San José, Costa Rica, twelve OAS members signed the "American Convention on Human Rights" based on a draft convention prepared by the Inter-American Commission. It is worth recalling, at this point, that the American Convention closely resembles the European Convention of Human Rights. As Héctor Gros Espiell points out, there "is no doubt that all of Chapter VIII of the American Convention, which deals with the Inter-American Court (Arts. 52-69), is inspired by the European model, which had already been adopted and running, when the Pact of San José was opened for signatures in 1969"[94].

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[89] *Ibid.*, p. 150.
[90] *Ibid.*, p. 148.
[91] *Ibid.*
[92] *Ibid.*
[93] Medina, *op. cit.* n. 70, p. 96.
[94] Gros Espiell, *op. cit.* n. 1, p. 235.

With the coming into existence of the Inter-American Court of Human Rights in 1980, the means by which human rights abuses were to be dealt within the Inter-American system fundamentally changed. The Inter-American Commission, which had been vested solely with the responsibility of insuring the promotion, and later the protection, of human rights since 1959, was forced to cede to the Court what had been its growing judicial character. Since the establishment of the Court, the Commission witnessed its actions becoming less and less "judicalized", to the point where it questioned the force of its own recommendations.

The Commission's recommendations, adopted pursuant to in Article 51(2) of the Convention, are to be incorporated in a report which is to be issued confidentially to the parties towards the end of the petition procedure. By the late 1960s, this had taken on the flavour of what Cecilia Medina termed "a sanction" and what Vasak called "a "judicial document" that is, a decision"[95]. Yet, by 1994, the Commission had become unsure of the status of such Reports[96]. The movement towards the judicialization of the Commission, which Vasak foresaw in his 1968 text, did not materialize, as the Court stepped in to create a clear distinction between the judicial and political roles which the Convention organs were to fulfill.

Cecilia Medina points out that, from the earliest period of the Court's existence, tension had existed between it and the Commission. That tension reduced the likelihood of a case being heard before the Inter-American Court. In its first contentious case before the Court, *In the Matter of Viviana Gallardo,* the Commission, having had its jurisdiction upheld by the Court and hence established itself as the channel by which cases were to proceed to the Court, decided after a two-year deliberation that the *Gallardo* petition was inadmissible. Medina notes that the "Commission's decision could be perceived as aimed at preventing the Court from exercising its powers"[97]. This hypothesis would seem to be confirmed by the fact that the Commission – the main channel through which contentious cases are to proceed to the Court – did not refer a contentious case to the Court until 1986, six years after it had been constituted. Although the Commission did submit, for its consideration, a number of advisory questions, the Court was obviously being under-utilized at the time. As Scott Davidson noted in 1992, it "is perhaps an abuse of speech to refer to the 'lack of the use' of

[95] Medina, *op. cit.* n. 70 and Vasak, *op. cit.* n. 75.

[96] See *El Amparo* case, I/A Court H.R., 18 January 1995. The *El Amparo* case, submitted by the Commission to the Court on 15 January 1994, dealt with the attack and subsequent attempted cover up, in 1988, of a Venezuelan commando unit on fishermen of their own country whom they mistook for Colombia drug-runners.

[97] Cecilia Medina, "The Inter-American Commission on Human Rights and the Inter-American Court on Human Rights: Reflections on a Joint Venture", *Human Rights Quarterly*, Vol. 12, 1990, p. 450.

the Court's contentious jurisdiction. It is possibly more accurate to describe the prevailing situation as one of 'non use'"[98].

The Court, in its advisory opinion on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, criticized the Commission for not taking advantage of its ability to refer cases to the Court:

> Although the Convention does not specify under what circumstances a case should be referred to the Court by the Commission, it is implicit in the functions that the Convention assigns to the Commission and the Court that certain cases should be referred by the former to the Court[99].

In a separate opinion, Judge Máximo Cisneros went further, stating that he was disappointed, having sat on the Court for six years and now retiring: "I feel [a sense of frustration] in leaving the Court before it has had the opportunity to hear a single case of a violation of human rights, in spite of the sad realities of our America in this field"[100]. He then concurred with the Court's judgment by restating that "the Commission has a special duty to consider the advisability of coming to the Court"[101].

4.1.3. *The Commission accepts the Court*

Since the early 1990s, the political impediments to adjudication, which the Court suffered during its early years, have been slowly disappearing, allowing it to become more active in attempting to protect human rights. If this trend is to continue, the Court will face a situation where there are no longer any overt political impediments preventing cases from reaching it. This, however, appears to be a blessing in disguise, as the Court will be called upon to perform more and more work while remaining within the limited budget provided by the Organizations of American States. As shall be seen in the next section on "administrative impediments", while the Inter-American Commission was willing, in the 1990s, to recognize the contentious jurisdiction of the Court, the OAS was slow to supply the Court with the resources required for fulfilling its task of dealing with a burgeoning caseload.

In a 1990 article, entitled "The Inter-American Commission on Human Rights and the Inter-American Court on Human Rights: Reflections on a Joint Venture", Cecilia Medina wrote that 1986 was the year when "the Commission seized the Court"[102]. However, in hindsight, the disappearance of friction between the

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[98] Scott Davidson, *The Inter-American Court of Human Rights*, 1992, p. 195.
[99] I/A Court H.R., 1 November 1985, p. 96.
[100] *Ibid.*, p. 145.
[101] *Ibid.*, p. 145.
[102] Medina, *op. cit.* n. 97, p. 453.

Commission and the Court did not become tangible until the 1990s. Medina's only basis for stating that the Court had been "seized" by the Commission was that it had, for the first time, presented to the Court a series of contentious cases related to the same incident[103]. However, after having submitted these cases, it would take the Commission another four years to forward another.

In 1990, the "turf war" between the Commission and the Court appeared to have ceased for all intents and purposes. Since that time, the Inter-American Commission has been active before the Court as it had never been during the 1980s. The increased activities of the Court can be attributed to its acceptance, by the Inter-American Commission, as a vital tool in the protection of human rights. After an extended period of hesitation, the Commission recognized, in a series of cases dealing with "disappearances" in Honduras, the important role that the Court could play in the Americas. Medina confirms this when she states:

> the Court is a welcome and necessary addition. The importance of legally binding decisions against states needs not be emphasized. Not only do binding decisions provide authoritative interpretations of the rights in the Convention, but the Court's decisions may have an enormous political importance as well, making it more difficult for governments to persistently disregard human rights. The *Velásquez* case shows how important it is for the system to receive and rule on individual cases[104].

The Commission, during the 1990s, consistently utilized the Court's contentious jurisdiction and called on the Court to adopt provisional measures in urgent matters to prevent harm to individuals. During in the 1990s, it has forwarded to the Court twenty-two contentious cases in which various American States were accused of having violated the American Convention on Human Rights[105]. In addition to submitting such cases, the Commission requested the Court to use its powers of issuing provisional measures. Article 63 (2) of the American Convention reads:

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[103] The cases submitted dealt with the issue of 'disappearances' in Honduras. *Velasquez Rodriguez Case*, I/A Court H.R., 17 August 1990; *Cadinez Cruz Case*, I/A Court H.R., 17 August, 1990; and *Fairan Garbi and Solis Corrales Case*, I/A Court H.R., 21 July 1989.

[104] Medina, *op. cit.* n. 97, p. 461.

[105] The following are the thirteen contentious cases for which the Court has rendered judgment on the merits in the 1990s: *Gangaram Panday* case, I/A Court H.R., 4 December 1991; *Aloeboetoe et al.* case, I/A Court H.R., 10 September 1993; *Cayara* case, I/A Court H.R., 3 February 1993; *El Amparo* case, I/A Court H.R., 18 January 1995; *Neira Alegría et al.* case, I/A Court H.R., 19 January 1995; *Caballero Delgado and Santana* case, I/A Court H.R., 8 December 1995; and *Garrido and Baigorria* case, I/A Court H.R., 2 February 1996; *Genie Lacayo* case, I/A Court H.R., 29 January 1997; *Loayza Tamayo* case, I/A Court H.R., 17 September 1997; *Castillo Paez* case, I/A Court H.R., 3 November 1997; *Suárez Rosero* case, I/A Court H.R., 12 November 1997; *Blake* case, I/A Court H.R., 24 January 1998; *Paniagua Morales y Otros* case, I/A Court H.R., 8 March 1998, *Castillo Petruzzi et al.* Case, I/A Court H.R., 30 May 1999. For information regarding the Inter-American Court of Human Rights consider its website at: http://corteidh-oea.nu.or.cr/ci/HOME_ING.HTM .

> In cases of extreme gravity and urgency, and when necessary to avoid irreparable damages to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission[106].

Since the Inter-American Commission first used the provision in Article 63(2) in 1991, it had, by 1999, asked the Court to take such measures on more than two dozen occasions[107]. This willingness, since the early 1990s, to request the Court to adopt provisional measures, coupled with the use by the Inter-American Commission of the Court's contentious jurisdiction, demonstrates that the organizational impediments which hampered its ability to adjudicate internationally in the Americas during the 1980s had vanished.

4.2. **Administrative Impediments**

In the wake of the dissipation of the organizational impediments, administrative hurdles had emerged that restrict access to the Court. Thus as the Court, by the late end of the 1990s, was functioning at or near capacity, that capacity was set at a very low threshold. The Court's part-time basis and the lack of budgetary support required to fulfill its mandate places more strain on the Court as its caseload increases. The removal of political impediments, far from aiding the Court, simply reveals fundamental flaws regarding the manner in which the OAS sought to establish and maintain the Inter-American Court of Human Rights. The then Vice-President of the Inter-American Court, Judge Sonia Picado Sotela, alluded to these fundamental problems during a 1991 interview:

> [t]he budget situation of the Court is very bad [...]. The Court will keep getting more cases, but they come in and it is not until one year later that there is an audience on those cases. That is very frustrating [...] the staff of the Court is very small; there is a secretary and an undersecretary and three or four other persons. It really makes it very inefficient[108].

Beyond the political impediments associated with the Inter-American Commission, which have prevented the Court from attempting to fulfill its mandate, the manner in which it is constituted is another hazard on the road to proper respect for the rule of law in the Inter-American system. Despite the numerous violations of human rights, the Court did not sit full-time, although it does have a permanent seat and secretariat. In presenting its draft statute to the OAS General

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[106] Article 63(2), American Convention on Human Rights.

[107] For an early study of provisional measures, see Jo. M. Pasqualucci, "Provisional Measures in the Inter-American Human Rights System: An Innovative Development in International Law", *Vanderbilt Journal of Transnational Law*, Vol. 26, 1993, pp. 846-874.

[108] Frost, *op. cit.* n. 43, p. 189.

Assembly, the Court attempted to obtain full-time status; however, the General Assembly found this proposal unacceptable, "ostensibly on the grounds that a full-time court would be too expensive and was unjustified until the Court had a substantial caseload"[109]. The Court had sought full-time status in an attempt to exude "prestige and legitimacy"[110], yet "since its inception [it] has functioned on a part-time basis, holding two, and sometimes three regular two-week sessions per year"[111].

Beyond establishing the Court as a part-time tribunal, the OAS member States, through their lack of budgetary support, had erected other administrative impediments to full respect of the rule of law. For the Inter-American Court to function properly as the Convention organ mandated with delivering authoritative judgments on human rights cases in the Americas, it must first and foremost have a budget allowing it to carry out that mandate. By the end of the century, the OAS had not provided the Court with the amount of money essential to its functioning. Thus, the Inter-American Court was forced to seek other budgetary sources to ensure the fulfillment of its function and, in so doing, placed itself in a position whereby its status as an independent court could be brought into question.

4.2.1. *The Organization of American States*

Article 72 of the American Convention on Human Rights reads in part: "the Court shall draw up its own budget and submit it for approval to the General Assembly through the General Secretariat. The latter may not introduce any changes in it"[112]. Throughout the period under review, the Court was the recipient of an erratically fluctuating budget provided from the Organization of American States. During the first five years of the Court's existence, stretching from 1983 to 1987, the Court's OAS budget allocations were reduced by 4.4%. During a ten-year period, from 1983 to 1993, the budget provided by the OAS to the Inter-American Court increased on average 3% annually, but this does not take into account the inflation rate which, if taken into account, demonstrates a clear decline in the funding of the Court over that period. While it was not uncommon for public institutions to have their budgets cut during the 1980s, the Inter-American Court was hit particularly hard as it already functioned on very limited funds.

In 1993, the budget provided by the OAS to the Inter-American Court was US$ 429,000. More than half of this – US$ 235,000 – was earmarked for the

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[109] Buergenthal, *op. cit.* n. 25, p. 18.
[110] *Ibid.*, p. 18.
[111] Pasqualucci, *op. cit.* n. 107, p. 860.
[112] Article 72, American Convention on Human Rights.

payment of salaries[113]. Consequently, the Organization of American States, which established the Court as an "autonomous judicial institution"[114], has determined that, apart from the judges, the Court is to function with only four employees[115]. The employment positions which the OAS has established at the Court are: Secretary of the Inter-American Court, its Deputy-Secretary, a Principal Secretary (administrative officer) and a Secretary (support) to the Secretary of the Court. Accordingly, the OAS has not seen fit to provide funds for clerks to assist the judges, for librarians, or for any other support staff. The frustration caused by the lack of OAS funding is apparent when one considers what the members of the Court have had to say on this matter.

Judges have often found themselves lobbying for sufficient funds to allow the Court to fulfill its mandate. In 1981, the budget of US$ 356,700 proposed by the Court was reduced by the OAS Advisory Commission on Administration and Budgetary Matters to US$ 290,500, then further lowered by the OAS Commission on Program-Budget to US$ 284,100. Only through representations made before the latter Commission by the President of the Court, Judge Thomas Buergenthal, was the budget for 1982 increased, albeit marginally, to US$ 300,000[116]. Five years later, Judge Buergenthal, as President of the Court, was still fighting the good fight. This time, in his 1986 address before the OAS Permanent Council, Buergenthal pointed out that:

> the Court currently confronts a very serious crisis. I realize, of course, that the Organization as a whole faces serious financial problems, but the 20% across-the-board budget cuts mandated by the OAS (10% this year and 10% next year) hit the Court particularity hard. This is due to the fact that the Court's 1980-81 start-up budget and those that followed were very small, and rightly so, because the Court did not have much work. Now that our work load has significantly increased, our already small budget is being automatically reduced to a level that has a paralyzing effect on the Court and its ability to properly discharge its obligations[117].

The frustration, felt by the judges over the years is reflected in the reality of the budgetary means supplied to the Inter-American Court of Human Rights by the

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[113] See the section on the Inter-American Court of Human Rights in Secretaria General de los Organizacion de los Estados Americanos, *Programa-Presupuest de la Organizacion, 1992-93*, 1992, p. 64. An explanations of the methodology used on p. 64 is explained in General Secretariat Organization of American States, *Proposed Program-Budget of the Organization, 1980-81*, 1981, OAS/D.Ser./II.1-1980-81, p. 17.

[114] Article 1, American Convention on Human Rights.

[115] Secretary-General of the Organization of American States, "Approved Posts – Regular Fund by Area and Object (1997)" *Annual Report 1996-1997*, p. 224.

[116] Organization of American States, *Annual Report of the Inter-American Court of Human Rights 1981*, OAS Doc. OEA/Ser.L/III.5 doc 13, pp. 6-7.

[117] Thomas Buergenthal, "The Inter-American Court, Human Rights and the OAS", *Human Rights Law Journal*, Vol. 7, 1986, p. 163.

OAS. The Organization has never provided the Court with the required funds or personnel, despite the overwhelming number of violations of the American Convention. Since its inception, the Court has been unable to function with its limited administrative staff. Consequently, it has been forced to rely on other sources of income, including grants from its host State, Costa Rica.

4.2.2. *The Republic of Costa Rica*

The fact that Costa Rica – which to date is the only State to have both brought a contentious case before the Court and to have utilized its advisory jurisdiction[118] – provides an essential source of income to the Court must be examined in the light of the Court's independence. Through its lack of funding, the OAS has placed the Court in a situation whereby it must rely on money provided to it by Costa Rica to ensure that it can function on a daily basis. In so doing, the Court has been forced to accept, annually, an average of 20% of its budget from a State Party to the American Convention on Human Rights, which is also one of the sixteen States which had accepted the contentious jurisdiction of the Court. In reality, the Inter-American Court has never been able to function with an administrative staff of only four OAS employees. To carry out its mandate, it has had to utilize other sources of income and personnel which, although intended for non-essential matters, have become vital in ensuring that the Court fulfill its most basic function: garnering respect for the American Convention. Following the coming into force of the American Convention, the Government of Costa Rica entered into a headquarters agreement with the Inter-American Court. Article 28 of that Agreement reads:

> As a contribution of the host country to the functioning of the Court, the Government of the Republic of Costa Rica shall:
>
> a) Continue to make an annual grant of an amount not less than that allotted to the Court during its first year in operation, and which was included in Law of the General Budget of the Republic of Costa Rica for the year 1980.
>
> b) Make available to the Court an appropriate locale for its operation[119].

The Headquarters Agreement demonstrates to what extent Costa Rica was willing to back the establishment of the Inter-American Court of Human Rights. The Republic of Costa Rica has, on occasion, given more in grant money to the Inter-

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[118] *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, I/A Court H.R., 19 January 1984 and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* I/A Court H.R., 1 November 1985.

[119] Agreement Between the Government of the Republic of Costa Rica and the Inter-American Court of Human Rights, Organization of American States, *Annual Report of the Inter-American Court of Human Rights*, 1981, OAS Doc. OEA/Ser.L/III.5 doc 13, p. 16.

American Court than it has paid to maintain its membership within the Organization of American States. For example, during the year 1992, Costa Rica paid US$ 81 200 in regular funds to the OAS while donating US$ 94 753 to the Court. However, the Court's host country has been hard pressed by economic problems to transfer its support for international adjudication into real money terms. Costa Rica has been generous, arguably beyond its means. In 1980, during the Court's first year of operation, it pledged the amount of US$ 100,000. Yet Costa Rica had only been able to meet its treaty obligation to provide an annual amount of no less than US$ 100,000 three times and did not do so at all during the 1980s. Far from being critical of Costa Rica, the fact that this State had found it hard to provide the promised funding to the Court demonstrates that the latter should not have to use any given State as a source of vital income. That the Court must rely on a specific State to increase its OAS budget allotment to a tolerable level effectively jeopardizes the Court's independence.

Costa Rica has emerged, not only as an important source of income for the Court, but beyond a doubt as a vital one. Since 1982, Costa Rica has provided the Court with an average of 20% of its yearly budget. Without this yearly contribution/donation, the Court could not carry out its mandate. Thanks to these annual grants, the Court had been able to complete its staff, more than doubling it. It hired, albeit on a contractual basis, a librarian, a civil law lawyer, an additional secretary, along with the Court's receptionist and driver. Through these yearly supplements, the Court shored up the lack of personnel required to fulfill its mandate. The fact that Costa Rica – which, during the period under review, had been the most active State before the Court – provided an essential source of income must be examined in the light of the Court's independence. Through lack of funding, the OAS has placed the Court in a situation whereby it must rely on money provided to it by its best client.

According to the legal adage, "justice must not only be done, but must also be seen to be done"[120]. To function effectively the Inter-American Court must not only act independently but also dissociate itself from situations that might make it appear dependent. It must ensure that it garners the respect of American States so that they will abide by its judgments. Although there is no indication that the Court's independence had been affected by the money supplied by Costa Rica, this is not the issue. The issue is the appearance of a lack of independence with respect to the Inter-American Court of Human Rights when one of the sixteen countries having accepted the Court's contentious jurisdiction provided a vital part of its budget.

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[120] For an outline of the norms governing judicial independence consider Jean Allain, "Judicial Independence in Practice: The Case of Judge Odio Benito, Vice-President of Costa Rica", *Revue de droit international de science diplomatiques et politiques*, Vol. 77, 1999, pp. 1-22.

4.2.3. *The European Union*

From 1994 onwards, the European Union financed a project known as "Support the Inter-American Court of Human Rights" which, in 1997, entered its third and final phase. The project had "as its fundamental purpose the development of activities which would strengthen and modernize the Inter-American System for the Protection of Human Rights through supporting the work of the Inter-American Court"[121]. During the earlier stages, the European Union financed the publication of the basic documents and case-law of the Court, and further assisted in updating and expanding the library. The purpose of the third stage of the project was "to consolidate the system of circulation of the publications of the Court and to develop and consolidate new resources and sources of information" at the Court[122]. Without the assistance of the European Union, which amounts to 630 000 ECUs[123], the Court would have had no means of disseminating its work and making itself known to the citizens of the Americas.

4.2.4. *The Inter-American Institute of Human Rights*

A further budgetary source, albeit an indirect one, was the Inter-American Institute of Human Rights (IIDH). On 17 November 1980, the Inter-American Institute was established through an agreement between Costa Rica and the Inter-American Court. "The Institute is an autonomous international academic institution with a global, multidisciplinary approach to the teaching, research and promotion of human rights"[124]. The Institute maintains a close relationship with the Court, as one of the judges acts as the Institute's Executive Director; and, until 1991, individuals who were elected judges to the Court became *ex officio* members of the Institute's Board of Directors[125]. The Institute utilizes the premises of the Court to store its documentation centre while using the Court's library as its resource center. In this manner the library, on the site of the Court, has an additional two employees, an assistant librarian and a staff librarian, to ensure its effective functioning. There is no denying that the Court and its librarian (paid for through the yearly Costa Rican grants) have greatly benefited from the IIDH employees. Although the IIDH does not contribute directly to the

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[121] Inter-American Court of Human Rights, *Press Release: Activities of the Inter-American Court of Human Rights*, June 1997, CDH-CP5/97 English.

[122] *Ibid.*

[123] Manuel Ventura-Robles, "Evolución Institucional de la Corte Interamerican de Derechos Humanos durante los Anõs 1987-1997", *Contribución del Juez Héctor Fix-Zamudio a la Evolución Institucional de la Corte Interamericana de Derechos Humanos*, 1998, p. 30.

[124] Organization of American States, *Annual Report of the Inter-American Court of Human Rights* 1991, OAS Doc. OEA/Ser.L/V/III.25 doc 7, 1991, p. 8.

[125] See Douglass W. Cassel, Jr., "Somoza's Revenge: A New Judge for the Inter-American Court of Human Rights", *Human Rights Law Journal*, Vol. 13, 1992, p. 139.

financing of the Inter-American Court, it provides, through this joint venture, personnel who, together with the employees provided by the Costa Rican grants, ensure that the Court can function on a daily basis.

Although the Inter-American Court was envisioned in its Statute as an autonomous judicial institution, an examination of its budgeting sources leads to another conclusion. While the Organization of American States provides the Court with its primary budget, the amount provided has never allowed it to meet all its obligations under the American Convention on Human Rights. The Court has had to rely on Costa Rica as a secondary budget source, thus raising the issue of its independence. Beyond these primary and secondary sources, the Court has received indirect budgetary support through the initiative of the European Union and the staffing of its library by the Inter-American Institute of Human Rights. Without these further sources of income the Court would be expected to function with the resources provided solely by the OAS: an unrealistic proposition.

The staffing and budgetary limits faced by the Inter-American Court has been accentuated in the last decade of the century by the increased amount of cases on the docket. The Court had evolved to the point where it stretched the resources provided to it from various sources. The Secretary of the Court, Manuel Ventura-Robles, noted, in a letter to the President of the Commission on Administration and Budgetary Matters of the OAS, that "it is very hard to believe that the Court continues to provide quality professional work, today internationally recognized, with the human resources that the Court has at its disposal"[126]. Further, the then President of the Court, Rafael Nieto Navia, acknowledged the lack of resources, for which the OAS was responsible, and that this lack of funding might effect the Court's ability to adjudicate properly. In correspondence with the Secretary-General of the OAS, João Clemente Baena Soares, the President pointed out:

> The reality is that the personnel of the Court regularly work 10 hour days which is increased to 14 to 16 hours including Saturdays and Sundays while the Court is in session. This situation can not be allowed to continue much longer without affecting the level of the judgments and consequently the prestige of the Court[127].

Despite the added contributions of Costa Rica, the overall budget was not sufficient to ensure that the Court perform in the manner which is expected of an international tribunal. The moneys first budgeted by the OAS were meant for a Court without cases. In the 18 years that passed, however, the docket increased to a point where it was necessary for the OAS to step in and provide more funds. To

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[126] Correspondence between the Secretary of the Inter-American Court of Human Rights, Manuel Ventura-Robles, and the President of the Commission on Administration and Budgetary Matters, Ambassador Ricardo Toledo, 27 April 1993, CDH-S/352.

[127] Correspondence between the President of the Inter-American Court of Human Rights, Rafeal Nieto Navia, and the Secretary-General of the OAS, João Clemente Baena Soares, 6 November 1993, CDH-S/401.

that end, in a meeting on 4 December 1996 the Secretary-General of the OAS agreed with a delegation of judges from the Inter-American Court that the latter "be given complete administrative independence and budgetary autonomy"[128]. As a result, the Court submitted a larger budget meant to cover "the basics it must have to accomplish its lofty purposes"[129]. In the OAS General Assembly Resolution approving the Court's Annual Report for 1996, the Organization decided to "support appropriate financing to the Inter-American Court of Human Rights within the available resources of the Organization, so it can continue to fulfill the high functions entrusted to it by the American Convention on Human Rights"[130]. Despite this rhetoric, and despite its receiving more funding from the OAS since 1995, the Court still functioned by the end of the decade with only four persons paid by the OAS and receives a large portion of its total budget from other sources[131]. The OAS did not see fit to fund the Court to a proper level and thus continued to place administrative impediments in the way of full respect for the rule of law and of human rights in Western Hemisphere.

5. Conclusion

The preceding study has considered the evolution of the Inter-American Court of Human Rights and sought to identify the factors which have inhibited its ability, within the domain of human rights, to ensure even limited respect for the rule of law in the Americas. A comparison between the Inter-American and the European human rights systems, during the 1980-1998 period, shows that international courts, despite their similar constitutive instruments, can vary much in their effectiveness. Thus, when attempting to understand the limitations to full respect for the rule of law on the international level one must go beyond the legal texts and consider how obligations are implemented. The functioning of the Inter-American Court demonstrates that States can establish adjudicative organs yet hobble them by the introduction of various impediments.

The Inter-American Commission on Human Rights, its establishment and evolution have limited the number of cases that reached the Court. Through this "organizational" obstacle, the Court remained under-employed for more than a decade. When the obstacle was finally removed, in the early 1990s, other impediments emerged in the form of a lack of staffing and budgetary support from the Organization of American States. The consequence of these "admin-

[128] Secretary General of the Organization of American States, *Annual Report 1996-1997*, p. 36.

[129] *Ibid*., p. 36.

[130] Inter-American Court of Human Rights, *Press Release: Activities of the Inter-American Court of Human Rights*, June 1997, CDH-CP5/97 English.

[131] Between 1995 and 1997 the Courts overall budget has increased from US$ 585.700 to US$1.120.000. I/A Press Release, *op. cit.* n. 120, pp. 19-32.

istrative" obstructions is that, as the docket increases its case-load, the Court may not be able to handle the cases in a manner that does not affect the "level of the judgments" or its "prestige"[132]. Such impediments and the manner in which they have affected the evolution of the Inter-American Court demonstrate that the effectiveness of the rule of law can be limited even when States do agree to international adjudication. The comparison of the evolution of the Inter-American Court during the period 1980-1998 with that of the European Court shows that factors other than the voluntary nature of the international adjudication, or non-cooperation with such organs, can prevent full respect for the rule of law.

[132] *Supra*. n. 125.