

# CEJIL GAZETTE

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EDITORIAL

## CURRENT CHALLENGES FACED BY THE INTER-AMERICAN SYSTEM

In January 2004, the composition of the Inter-American Court and Commission changed substantially. For the first time in the history of the inter-American system, eight of the fourteen judges and commissioners were replaced at the same time. This comes three years after the enactment of one of the most significant regulatory reforms in the history of the regional human rights system, one which further articulated the organs' procedures and gave victims a more active role in the litigation process.

These changes take place on a continent in which inequality, abuse of power and impunity have been perpetuated—problems that must be added to the new challenges we face today: those embodied by the post-September 11<sup>th</sup> world, the imminent entry into force of a free trade agreement for the Americas, the start of the International Criminal Court's operations, and the shift of some States toward greater social sensibility, among others.

This conjuncture permits and demands that we newly reflect on the specific challenges faced by the inter-American system for the protection of human rights, in order to maintain a constructive dialogue about the common agenda shared by the Commission and Court, the human rights movement, users of the system, and diverse state actors.

The Commission and Court, through both opportunities granted to them and their own will, have converted themselves into increasingly relevant

political actors in the protection of human rights at both the local and regional levels. This is illustrated, for example, by the role both bodies have assumed in Peru in recent years, questioning the intervention of the Fujimori Government in judicial processes, the state counter-terrorism policy, and the grant of immunity to those who committed human rights abuses in the name of the State. It is likewise demonstrated by the protection of thousands of lives through the grant of precautionary and provisional measures and by the development of human rights standards for critical themes in the continent, such as freedom of expression and due process guarantees.

The inter-American system, nonetheless, still faces important challenges. Thus, despite substantial headway made by the Commission's Executive Secretariat in the processing of individual cases, the majority of petitions pending before the Commission lack any definitive resolution. In cases in which decisions have issued from the Commission or Court, the system has provided delayed solutions to victims of human rights violations and their families. There is, moreover, an imbalance in the system's intervention in certain relevant hemispheric situations and multilateral debates.

It is necessary to recognize that the inter-American system has real limitations in confronting the immense mandate it has been given to structurally affect the human rights situation in the hemisphere and to protect the rights of every victim of

human rights violations who duly solicits its intervention. Some of these limitations are related to political or legal issues, others —no less important— to the availability of economic and human resources.

To maintain and increase their authority, the organs of the system must maintain their independence. Such independence is evidenced by the organs' impartial, consistent, and balanced actions. Likewise, there are procedural and organizational ways to strengthen not only the reality of an impartial system, but also the appearance of impartiality. In this sense, the "golden rule" of avoiding that commissioners give opinions on, participate in, or make public statements about the Commission's treatment of human rights issues in their countries of origin is crucial. In the same sense, it is important that the Honorable Court ends its practice of authorizing the participation of *ad hoc* judges in cases that do not involve a conflict between two States.

Since the moral standing and expertise of the system's members are another source of its authority, Member States should advance greater transparency in the nomination and selection of the system's judges and commissioners, guaranteeing that all members have the qualities demanded by the American Convention.

To guarantee the system's timely and effective action it is also necessary that its procedures and mechanisms maintain certain flexibility, allowing the system to respond to challenges. Such "impact tools"



are illustrated by the creation of special rapporteurs, the preparation of thematic reports, and public declarations. The guarantee also requires, for example, agile response mechanisms for preventing conflicts and for providing protection in grave and urgent situations. This is the case with respect to the violation of the rights of persons living with Acquired Immune Deficiency Syndrome (AIDS).

Equality of access to and the effectiveness of the system further require that every person receive a resolution in his or her case, without undue delay. To ensure this goal, a substantial increase in the resources of both the Commission and Court is indispensable. The States of the region have a pending and unavoidable obligation in this regard, fulfillment of which is essential to ensuring the functioning and independence of the system.

In the same sense, equality of access to regional human rights protection demands the creation of an assistance fund for victims to help cover their costs: participating in hearings, paying for the presence of witnesses or experts in accordance with the organ's respective rules, etc. In this way, the system can avoid duplication at the international level of the inequalities in access to justice at the local level.

The system's effectiveness likewise depends on strategically choosing how to utilize its resources to impact the

region's human rights situation. In this sense, it is fundamental that a substantial part of its human and economic resources are dedicated to the resolution of cases and, through these and other means, to impacting the establishment of public policies promoting strong human rights guarantees at the local level. In this sense, we consider the emission of timely reports about crucial themes for the region, such as terrorism and human rights and freedom of expression, to be of extreme relevance. High-level diplomatic action, which the Organization is capable of developing, is also of utmost importance. Along the same line, we consider crucial the development of links between the Commission and processes in the political sphere of the OAS that have an impact on the human rights agenda. This is what is happening, for example, with the verification mission for the demobilization in Colombia (called the Mission to Support the Peace Process in Colombia.)

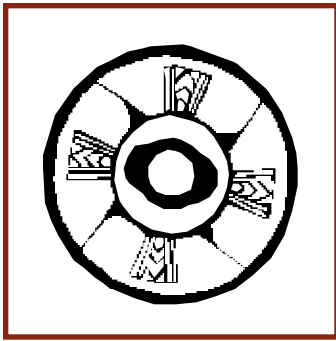
To multiply their impact on human rights protection efforts, the Commission and Court should identify their different capacities for action and for serving as catalysts of change. From this perspective, only rarely should the Commission assume as its own work that which can be undertaken by civil society actors or in academic or state institutions.

The inter-American system's impact is also tied to its ability to establish guidelines for addressing human rights problems confronting the region that are part of, but surpass, the so-called historical issues, i.e., those linked to

political violence and the rule of law. Issues associated with defining the scope of the right to health, non-discriminatory access to education, the rights of refugees and migrant workers, women's rights, and the right of indigenous peoples to land and to consultation and consent procedures, among others, should form part of the American agenda.

Without claiming to exhaust the enormous richness of this issue, we conclude by emphasizing the importance for the system's effectiveness of executing the Commission's and Court's judgments. This debate resounds not only in the OAS in relation to the role of Member States as collective guarantors (which has generally gone unfulfilled), but also within States vis-à-vis the participation of diverse executive, legislative and judicial entities in the implementation of those judgments. In this second arena, the path to travel remains enormous.

These succinct reflections on the challenges currently faced by the inter-American system summarize some of the central concerns that CEJIL and other non-governmental and academic organizations have about the regional system. We hope that they serve as a point of departure for a dialogue between diverse actors in the inter-American system as we act with the common purpose of improving the protection of human rights for all persons and peoples of America.



## Principle Reforms of the Rules of Procedure of the Inter-American Court of Human Rights<sup>1</sup>

In November 2003, the Inter-American Court of Human Rights enacted a partial reform of its rules of procedure, aimed at adjusting its procedures in light of the Court's practice and its experience with the rules it adopted in December 2000.<sup>2</sup> The amended norms reflect the logic inaugurated in those rules: on one hand, to strengthen victims' participation in the international judicial process and, on the other, to ensure greater swiftness and certainty in the procedures and administrative organization of the Court's work.<sup>3</sup>

The reform to the rules of procedure affects ten of their articles and adds an additional one. The reformed provisions include articles 8, 25, 26, 33, 35, 38 (previous 37), 43 (previous 42), 45 (previous 44), 47 (previous 46) and 53 (previous 52). Modifying what had previously been article 35.4, a new article 36 was added. This provision independently introduces "a period of two months, which may not be extended" for the alleged victim, or his or her relatives or representatives, to autonomously present their pleadings, motions and evidence. The other reforms pertain essentially to the following points: 1. Recognition of the power of victims, alleged victims, their next of kin or their representatives, in contentious proceedings before the Court, to present "requests" for provisional measures "directly" to the Court as well as independent

"observations" on State reports regarding fulfillment of those measures (arts. 25.3 and 25.6); 2. Reduction in the time period—defined now as "seven days"—to send the "originals" of all documents and accompanying "evidence" to the Court—including the original application, the State's reply brief, any reply to preliminary objections and, expressly, "the written brief containing pleadings, motions, and evidence" (arts. 26.1 and 26.2); 3. Establishment of a non-extendable four-month deadline (running from notification of the suit) for the accused State to respond, in writing, to the action and to "present its comments on the written brief containing pleadings, motions and evidence" (art. 38.1); 4. Granting the Inter-American Commission on Human Rights ("IACHR"), in its capacity as "guarantor of the public interest under the American Convention, the position of procedural representative" of the victims and their families whose identity has not been established in the lawsuit, "to ensure that they have the benefit of legal representation" (art. 33.3); 5. Introduction of the practice of "recording the hearings" of the Court, establishing that such recordings "will be attached to the case file" and that the Agents of the State, the Delegates of the IACHR, the victims, and their next of kin or their representatives will receive a copy of the "recording of the public hearing (at its conclusion or within a period of 15 days)" (arts. 43.2 and 43.3); 6. Specification of the means by which one or various members of the Court can

be commissioned to hold hearings, including expressly "preliminary hearings, either at the seat of the Court or elsewhere, for the purpose of gathering evidence" (art. 45.4); 7. Explanation of the Court's power, in relation to witnesses and expert witnesses, "to indicate the purpose of the testimony" (art. 47.1). With respect to such witnesses, it is also expressly established that "[t]he party proposing testimonial or expert evidence shall bear the costs of the appearance of its witnesses before the Tribunal" (art. 47.2) and, moreover, that the Court "may require that particular witnesses and expert witnesses give their testimony through sworn declarations (affidavits)" (art. 47.3); and 8. Instructions in relation to a respondent State's acceptance of responsibility with respect to the claims of parties, including those of "representatives of the alleged victims, their next of kin or representatives" (art. 53.2).

<sup>1</sup> The Court reformed its rules of procedure by resolution approved on November 25, 2003. The new rules entered into force on January 1, 2004.

<sup>2</sup> The rules of procedure referred to entered into force on May 1, 2001.

<sup>3</sup> For more information, refer to Pompei et al., *The procedure for individual accusations in accordance with the new rules of procedure of the Inter-American Commission and Court of Human Rights* (February 2001).



## COMPOSITION OF THE ORGANS OF THE INTERAMERICAN SYSTEM OF HUMAN RIGHTS

COMMISSION	STATE	TERM OF OFFICE	COURT	STATE	TERM OF OFFICE
José Zalaquett (President)	Chile	1/1/2002-12/31/2005	Sergio García Ramírez (President)	México	1/1/2004-12/31/2009
Clare Kamau Roberts	Antigua y Barbuda	1/1/2002-12/31/2005	Alirio Abreu Burelli (Vice-President)	Venezuela	1/1/2001-12/31/2006
Susana Villarán	Perú	3/27/2002-12/31/2005	Oliver Jackman	Barbados	1/1/2001-12/31/2006
Paulo Sérgio Pinheiro	Brasil	1/1/2004-12/31/2007	Manuel Ventura Robles	Costa Rica	1/1/2004-12/31/2009
Florentín Meléndez	El Salvador	1/1/2004-12/31/2007	Cecilia Medina Quiroga	Chile	1/1/2004-12/31/2009
Evelio Fernández Arévalos	Paraguay	1/1/2004-12/31/2007	Diego García Sayán	Perú	1/1/2004-12/31/2009
Freddy Gutiérrez Trejo	Venezuela	1/1/2004-12/31/2007	Antônio A. Cançado Trindade	Brasil	1/1/2001-12/31/2006

### THE PERMANENT COUNCIL CONDITIONS THE AGREEMENT CONCERNING THE PARAMILITARY DEMOBILIZATION PROCESS IN COLOMBIA.

On February 6, 2004, the Permanent Council of the Organization of American States (“OAS”) emitted a resolution conditioning the OAS Verification Mission for the Demobilization of Paramilitaries in Colombia on the guarantee of full respect for human rights and international humanitarian law. After two days of intense debate, OAS Member States amended the agreement signed by the OAS General Secretary, Cesar Gaviria, and the President of Colombia, Álvaro Uribe, on January 23, concerning which they had not been consulted. Given the deficiencies in the agreement signed by Gaviria and Uribe, OAS Member States incorporated respect for human rights as a fundamental condition for the Organization’s intervention in the demobilization process. Thus, the new resolution affirms the necessity of “[e]nsur[ing] that the role of the OAS is completely in accordance with the member states’ obligations with respect to the full applicability of human rights and international humanitarian law.” To ensure fulfillment of this guarantee, the approved resolution grants the Inter-American Commission on Human Rights (IACHR) a protagonistic role. The reports that the IACHR submits to the Permanent Council will constitute an essential element at the moment of evaluating the continuity and terms of the Mission.

### LATEST JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

**The Inter-American Court condemns the State of Guatemala for the extrajudicial execution of anthropologist Myrna Mack Chang**

By means of its November 25, 2003 judgment in the *Myrna Mack Chang vs. Guatemala Case*, the Inter-American Court of Human Rights established the responsibility of the Guatemalan State for the extrajudicial execution of the Guatemalan anthropologist and for the denial of justice to her relatives in the respective internal process.

The Court found the Guatemalan State responsible for violating Myrna Mack Chang’s right to life (articles 4.1 of the American Convention on Human Rights) as well as her relatives’ rights to personal integrity (article 5.1), due process and judicial protection (articles 8 and 25).

During the days previous to her extrajudicial execution, Myrna Mack Chang had been watched and followed by men in the service of the Presidential General Staff (EMP). She was extrajudicially executed on September 11, 1990, in a military intelligence operation designed by the high command of the EMP upon leaving the offices of the Association for the Advancement of Social Sciences in Guatemala (AVANCSO), where she worked. The Court concluded that her execution was politically motivated inasmuch as her research into the Guatemalan Army’s policies toward the internally displaced and the Communities of Population in Resistance (CPR) were perceived as a threat to national security and to the Guatemalan government.

The most notable jurisprudential developments of the case concern articles 8 and 25 of the American Convention, which Guatemala violated “to the detriment of the victim’s relatives by the deficient conduction of a fair trial, its slowness and the obstructions carried out to impede the sanction of those materially and intellectually responsible, both the



participants and their accomplices, which has engendered feelings of insecurity, defenselessness and anguish in the relatives of the victim.”

In effect, after more than thirteen years since the penal process was initiated, only one of the material authors has been judged and sanctioned. As such, “a situation of grave impunity” has been created, constituting an infraction of the State’s duty to provide an efficient penal process to prosecute and sanction those responsible. Giving rise to a chronic repetition of the human rights violations at issue, this breach injured the victim’s relatives.

The Court likewise reiterated the right of both the victim’s relatives and society as a whole to

the truth with respect to what happened and to the identity of the state agents responsible.

The Court ordered the Guatemalan State “to effectively investigate the facts of the present case with the goal of identifying, judging and sanctioning all the material and intellectual authors, and others responsible for the extrajudicial execution of Myrna Mack Chang, and the concealment of the extrajudicial execution, independently of the person that has already been sanctioned for these facts.” Along these lines, the State was also ordered to publicly disclose the results of the process, to guarantee that the internal process does not permit impunity for those criminally responsible, and to remove all obstacles and laws that maintain impunity.

With respect to measures of satisfaction and guarantees of non-repetition, the State was ordered to undertake a public act recognizing its responsibility; to publically honor the memory of the assassinated police investigator; to publish the Court’s judgment; to include human rights and international humanitarian law training in required education courses for security forces; to establish a scholarship in the name of Myrna Mack Chang; to name a recognized street or plaza in Guatemala City after her; and to hang a plaque in her memory in the place where she died. Finally, in respect to material and moral damages, expenses and costs, and future expenses, the Court granted the highest level of compensation in the history of its jurisprudence.

## NEWS FROM THE INTER-AMERICAN SYSTEM

### CONFERENCE ON HEMISPHERIC SECURITY

Mexico City, Mexico  
October 27-28, 2003

CEJIL and other members of the International Coalition of Organizations for Human Rights in the Americas took part in the Special Conference on Hemispheric Security. At this event, OAS Member States reaffirmed the concept of multidimensional security and committed to fortifying their defense and security institutions to achieve greater cooperation in the fight against terrorism and a variety of other problems, such as extreme poverty and narco-traffic, problems that fall within the category of “new” security threats. The Coalition, through a declaration signed by 116 organizations and presented in Mexico during a dialogue with government representatives, manifested its concern that the multidimensional concept of security was not being accompanied by

responses of a multidimensional character. The Coalition also manifested its strong opposition to the militarization of the security agenda and demanded recognition of the principle that all actions taken against security threats be undertaken with complete respect for international human rights, humanitarian, and refugee law.

### EXTRAORDINARY SUMMIT OF THE AMERICAS

Monterrey, Mexico  
January 12-13, 2004

During the Extraordinary Summit of the Americas, which addressed themes of economic growth with equity, social development and democratic governance, the International Coalition of Organizations for Human Rights in the Americas presented a declaration indicating, *inter alia*, the primacy of human rights with respect to free trade agreements, the necessity that the Summit and all inter-American fora be conducted with transparency and with true civil-society

participation, and that States fulfill their commitments to strengthen the inter-American system for human rights. Seventy-eight organizations from around the hemisphere signed the final declaration, which was distributed to representatives of participating States and to the press.

### COMMUNICATIONS FROM THE INTERNATIONAL COALITION OF ORGANIZATIONS FOR HUMAN RIGHTS IN THE AMERICAS

The Coalition has a discussion list at Yahoogroups where members can receive and send electronic mail to all of Coalition members by writing to [coalición\\_ong@yahoogroups.com](mailto:coalición_ong@yahoogroups.com). To subscribe to this valuable communication medium and source of information about human rights in the Americas, please send a message to [coalición\\_ong-subscribe@yahoogroups.com](mailto:coalición_ong-subscribe@yahoogroups.com)



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