Centro por la Justicia y el Derecho Internacional
Center for Justice And International Law
Centro Pela Justiça e Dereito Internacional
Centre pour la Justice et le Droit Internacional
Pemonton Kowantok Wacüpe Yuwanin Pataset

The Urgent Need for a Legal Aid Fund in the Inter-American System for the Promotion and Protection of Human Rights

341.481
C397u Center For Justice and Internacional Law , CEJIL
Position paper: The Urgent Need for a Legal Aid Fund in the Inter- American System for the Promotion and Protection of Human Rights / CEJIL. – San José, Costa Rica : Centro por la Justicia y el Derecho Internacional, 2006
24 p. ; 20 x 28cm.

ISBN **9968–9623-1-7**

1. Human Rights. 2. International Cooperation. 3. Legal Aid. 4. Inter-American System for the promotion and protection of human rights. I. Title

Printed in Costa Rica by
Gossestra Intl., S.A.

Art and design:
Alejandro Pacheco R.

Cover:
Diseñadores, S.A.

ITC Mixage BT

CEJIL is a non-governmental, non-profit organization with consultative status before the Organization of American States (OAS), the United Nations (UN) and observer status before the African Commission of Human Rights.

Viviana Krsticevic
Executive Director
direccion@cejil.org

Ariela Peralta
Deputy Director
direccion@cejil.org

Tatiana Rincón
Program Director for the Andean Region, North America and the Caribbean
washington@cejil.org

Soraya Long
Program Director for Central America and Mexico
mesoamerica@cejil.org

Beatriz Affonso
Program Director for Brazil
brasil@cejil.org

Liliana Tojo
Program Director for the Southern Cone
sur@cejil.org

Kate Lasso
Director of Institutional Development
klasso@cejil.org

Susana García
Institutional Development, Mesoamerica Office
sgarcia@cejil.org

Victoria Amato and Nancy Marín
Press and Communications
difusion@cejil.org

CEJIL/Washington
1630 Connecticut Ave., NW
Suite 401
Washington D.C. 20009 1053, U.S.A.
Tel. (202) 319-3000
Fax (202) 319-3019
washington@cejil.org

CEJIL/Mesoamérica
Apartado Postal 441-2010
San José, Costa Rica
Tel. (506) 280-7473
Fax (506) 280-5280
mesoamerica@cejil.org

CEJIL/Brasil
Av. Mal. Camara, 350/707,
Centro – 20020-080
Río de Janeiro, RJ, Brasil
Tel. (55-21) 2533-1660
Fax (55-21) 2517-3280
brasil@cejil.org

CEJIL/Sur
Esmeralda 517, piso 2, “A”
C1007 ABC. Ciudad Autónoma
de Buenos Aires, Argentina
sur@cejil.org

Position Paper
CEJIL

Presentation

The Center for Justice and International Law (CEJIL) is a regional organization dedicated to ensuring that Member States of the Organization of American States (OAS) effectively implement international human rights norms through the optimal use of the Inter-American System for the Protection of Human Rights. CEJIL strives to reach this goal through three programs: defense, training and dissemination, and the strengthening of the Inter-American System.

In relation to strengthening the Inter-American System, CEJIL promotes and participates in debates, lobbying campaigns, legislative processes and constitutional formulation as a way to incorporate international standards into internal systems. In addition, it monitors the execution of Inter-American System decisions, the reform of human rights protection mechanisms, and the process of selecting members of the Inter-American Commission and Court, among other activities. The purpose of the CEJIL "Position Papers" is to promote and strengthen reflection and debate about themes relevant to realizing the rights and guarantees of the Inter-American System, both at the national and international levels as well as within the System's organs of protection: the Inter-American Commission and Court.

It is with great satisfaction that CEJIL presents the publication: "The Urgent Need for a Legal Aid Fund in the Inter-American System for the Promotion and Protection of Human Rights." With this fourth issue of the CEJIL "Position Paper" series, we hope to contribute to the discussion between state actors, intergovernmental agencies and civil society regarding the problem of access to the Inter-American System that arises from the limited financial resources available to victims of human rights abuses, while advocating for the establishment of a Legal Aid Fund to address that problem.

This paper's publication has been made possible thanks to the generous support of the European Commission, Ford Foundation, Open Society Institute, John Merck Fund and MISEREOR, none of which are responsible for the content of this paper. We hope this paper helps nourish an open and productive debate on human rights themes pertinent to the Inter-American setting.

Viviana Krsticevic
Executive Director

Table of Contents

The Urgent Need for a Legal Aid Fund in the Inter-American System for the Promotion and Protection of Human Rights
CEJIL, Washington Office, December 2005

Introduction

The Inter-American System for the Promotion and Protection of Human Rights ("Inter-American System" or "System") presently offers more possibilities for the protection of human rights than at any time in its history. At the same time, many of those subject to systematic violations of their human rights are either unaware of the possibilities for redress presented by the Inter-American System or are unable to access it. While this lack of awareness is a problem that must be addressed, this paper will focus on the problem of access, specifically that which arises from limited financial resources. Indeed, the cost of bringing a case before the Inter-American Commission on Human Rights ("Inter-American Commission" or "Commission") and the Inter-American Court of Human Rights ("Inter-American Court" or "Court") are prohibitive for the vast majority of those the System is meant to serve. This situation poses a quandary for victims who, unable to scale the barrier imposed by financial requirements of litigating before the System, endure repeated experiences of disempowerment and injustice without recourse. This structural impediment to justice would be even more protracted if non-governmental organizations ("NGOs") did not mitigate circumstances by providing unremunerated representation, training and advice to victims of human rights abuse and their relatives. The clear contradiction produced by the fact that the Inter-American System is not accessible to those who suffer egregious patterns of human rights abuse jeopardizes the integrity of the System and the credibility of the OAS Member States. A Legal Aid Fund for victims and their representatives in the Inter-American System would help to address the problem of access to justice in the continent and cure this glaring contradiction.

This paper advocates for the immediate establishment of a Legal Aid Fund in the Inter-American System. It begins with an exploration of the central role of the victim in the Inter-American System and the growing need to support this role with financial assistance. The paper goes on to discuss the actual costs of litigation in the Inter-American System, summarizing important trends that have become apparent over years of litigation and drawing on experiences with a variety of human rights cases. The paper then articulates a series of legal and policy arguments for the establishment of a Legal Aid Fund. Finally, this paper presents some concrete proposals of how such a Fund might operate and offers some concluding remarks with an eye towards the future.

A changing System – the growing role of the victim

The Inter-American System is constantly evolving. As our experience with the System informs our interactions with it, its mandate becomes clearer and its institutions change to meet new demands. One of the most significant developments in recent years was the implementation of new rules of procedure in the Inter-American human rights bodies. Voted upon by the Commission and the Court of Human Rights in 2000, the new rules for these bodies came into force in May and June 2001 respectively. In this context, the

Presidents of the Hemisphere made a commitment to increase access to justice in the Americas. They pledged to

> continue promoting concrete measures to strengthen and improve the Inter-American Human Rights System, in particular the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, focusing on … facilitating the access of persons to this protection mechanism and substantially increasing resources to maintain ongoing operations, including the encouragement of voluntary contributions.[1]

The new Rules of Procedure of the Commission and the Court changed important features of the negotiation and litigation process before the Inter-American human rights bodies, following the example of the Protocol 9 procedural changes in the European System of Human Rights.[2]

First and foremost, the amended Rules of Procedure of the Court give a greater role to the victim and his or her representatives by according them independent standing in all steps of the proceedings. Before this amendment, the Commission was the only entity that had standing to act on the victim's behalf during the merits and admissibility stages before the Court. While the victims' representatives were given independent standing the reparations stage, they were not were not allowed any more than an advisory role during the formulation and presentation of arguments on the substantive human rights violations. The 2001 Rules of Procedure changed this by establishing that "when the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit requests, arguments and evidence, autonomously, throughout the proceeding."[3] This increased autonomy marks an impressive milestone in the history of the Inter-American System "by unquestionably establishing the individual as the true complainant party at all stages of contentious proceedings under the American Convention on Human Rights."[4]

The Rules of Procedure of the Commission also evolved in important ways so as to promote the role of the victim. One significant advance in this regard was the requirement that the Commission verify that all friendly settlement agreements are authorized by the victim. This sets the tone for any friendly settlement process, making it clear from the outset that the goal is to achieve reparations for the victim and that a contentious case can only conclude through a process of negotiation when a victim is content with the outcome. Also significant is the fact that the Commission Rules established clear, though broad criteria that it must consider when deciding whether to submit a case to the contentious jurisdiction of the Court.[5] This reduces the arbitrariness of the Commission's deliberations and empowers victims as a result. In as much as victims have the final word in the friendly settlement process, their ability to make an informed decision about their chances of liti-

1 Third Summit of the Americas: Declaration of Québec City (Québec City, Canada, April 20-22, 2001); 2. Human Rights and Fundamental Freedoms, Strengthening the Human Rights Systems.

2 Protocol 9 gave the petitioner the right to refer its case, in certain cases, directly to the Court. Protocol 9 to the European Convention on Human Rights and Freedoms, ETS 140, adopted on 6/11/1990, entry into force as integral part of the Convention on 1/10/1994, repealed by entry into force of Protocol 11, which abolished the European Commission, enlarged the Court and allowed petitioners to take their cases directly to it.

3 Rules of Procedure of the Inter-American Court of Human Rights, adopted in November 2000, lastly amended in December 2003, Rule 23.

4 Report: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos para Fortalecer su Mecanismo de Protección, Rapporteur: Antônio Augusto Cançado Trindade, May 2001, vol. II, at 398.

5 See for a discussion of the new Rules of Procedure, CEJIL, Gazette No. 13, 2001, available at www.cejil.org. The new Rules of Procedure are available at the Court's homepage, www.corteidh.or.cr.

gating their case before the Court based on clear criteria guarantees them a place at the center for the process.

That fact that the amended Rules of Procedure of the Commission and Court promote the role of the victims in the proceeding in the Inter-American System is also important for the human rights bodies. With the increased participation of the actual individuals who have fought to vindicate their rights, the human rights bodies avoid the risk of adjudicating in a vacuum, without the visible presence of the victim and his or her family during the proceedings.[6]

The 2001 changes in the Inter-American System were meant to be accompanied by a substantial increase in resources allocated to the human rights bodies, to allow them to adequately fulfill their mandates. Yet, for various reasons, these resources have not been made available, although both the Commission and the Court have, independently and jointly, stressed the dire need for additional support for the System.

In 2002, then president of the Inter-American Court, Judge Antônio Augusto Cançado Trindade, pointed out that "from multiple vantage points – of the Member States themselves, of experts, and of the citizens of the region – the System urgently needs a carefully planned process of change to make it more accessible, effective, efficient, dynamic and capable of meeting the increasingly demanding requirements of a democratic society and its protection of human rights."[7] While the States had abundant time to react to this diagnosis, and indeed called for the "[f]acilitation of access for individuals to the inter-American human rights system"[8], not much happened. In a recent concurring opinion to the provisional measures granted by the Inter-American Court to inmates in a Brazilian juvenile detention center (FEBEM), Judge Cançado Trinidade laments that he has been "talking to walls" in his call for increased resources for the Inter-American System.[9] In his concurring opinion, he points out that four inmates died in the time between the issuance of the precautionary measures by the Commission and the request for provisional measures to the Court, deaths that perhaps could have been prevented if enough resources would have been available. The human cost of prolonged proceedings and the denial of effective access to the protection mechanisms of the Inter-American System are simply not acceptable. In extreme situations, such as FEBEM, the cost is human lives. More commonly the cost manifests in the form of prolonged suffering as a result of the unmet need for truth, justice and reparation. It has been clearly established that the victim and his or her quest for justice must be at the center of any proceeding before the Inter-American bodies. However, victims who are denied justice on the national level and look to the international community for vindication of their rights

6 Before the changes, the victims and their representatives were only admitted to actively take part in the reparations proceedings.

7 Presentación del Presidente de la Corte Interamericana de Derechos Humanos, Juez Antônio Augusto Cançado Trindade, Ante el Consejo Permanente de la Organización de los Estados Americanos (OEA): ' El Derecho de Acceso a la Justicia Internacional las Condiciones para su Realización en el Sistema Interamericano de Protección de los Derechos Humanos", on October 16 2002, at http://www.corteidh.or.cr/publica/cancado_16_10_02.pdf.

8 Resolution of the OAS General Assembly, Strengthening of Human Rights Systems pursuant to the Plan of Action of the Third Summit of the Americas, adopted on June 10, 2003, AG/RES. 1925 (XXXIII-O/03), para. 2c, reaffirmed in AG/RES 2075 (XXXV-O/05), para. 1c.

9 "(…) tenho hoje a impressão de que estava discursando para as paredes.", Caso de los Niños y Adolescentes privados de Libertad en el "Complexo do Tatuapé" de FEBEM, Provisional Measures, resolution of 17/11/2005, concurrent vote of Judge Cançado Trindade, para. 9.

can lose all hope for a remedy when they find that their economic status prevents them from accessing the Inter-American System.

The issue of funding was also taken up by Secretary General Insulza in 2005, who stated during his opening remarks of the 123rd regular session of the Inter-American Commission that "the absence of adequate funding for the mandates given to the Commission and the Inter-American Court endanger the System."[10] Yet, the funding for the Inter-American System, including the Secretariat of the Commission and the complete administration of the Court remains at a mere 5.5% of the total OAS budget.[11]

While the procedural reforms to the System offered an enhanced role for victims, the challenge is now to make these reforms effective. The Court's Rules of Procedure require that "the party requesting the production of an item of evidence shall cover its cost," but makes no provision to aid the party in covering the cost.[12] Similarly, the Court's Rules explicitly state that representatives of the victims, who intend to take part in the Court proceedings by presenting witnesses, evidence or expert testimonies, have to independently present their own written and oral arguments, without indicating how the representatives should pay for these increased litigation costs.[13] While the rules allow the victim and his or her representative greater involvement in the Inter-American process, they do not establish mechanisms to ensure that the increased involvement is meaningful by allocating the necessary resources.

Important to consider in this discussion is the fact that, due to this deficiency in resources, a significant portion of the financial burden of the victims' representation currently rests on NGOs litigating in the Inter-American System. NGOs not only offer legal advice, but also represent the victims before the Commission and Court and provide training for local lawyers in the intricacies of litigating in the System under the new rules of procedure.[14] Given the scarce resources allocated to the System itself, NGOs have become the actors that often give a concrete and real meaning to the enhanced possibilities for victims. In that sense, they provide effective access to the Inter-American System's adjudicatory mechanisms.

As is clear from the title of this paper, CEJIL's position is that to make the 2001 reforms effective, a Legal Aid Fund should be established in the Inter-American System. This position is shared by Judge Antônio Augusto Cançado Trindade, who in 2002 signaled the "necessity of examining the possible future allocation of material resources for the establishment of free legal aid mechanism for petitioners that lack financial resources" and referred to the inauguration of a legal aid system set up in the European Court of Human Rights some years earlier.[15] Unfortunately, Judge Cançado's call has gone unanswered, but the situation remains just as urgent and CEJIL is intent upon advancing this dialogue.

Any serious discussion about the need for such a fund must include a consideration of the actual costs of litigation before the System. For this rea-

10 OAS Press Release dated October 11, 2005, "Human Rights an OAS Priority, Secretary General Says."
11 General Assembly of the OAS, Resolution on the Program-Budget for 2006, AG/RES. 2157 (XXXV-O/05), at http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/xxxvga.
12 *Supra* note 7, Rule 46.
13 *Ibid*., Rule 47(2).
14 The costs associated with victim representation are discussed further below.
15 *Supra* note 2, at point 7.

son, the next section provides an overview of the costs that invariably arise during the litigation of a human rights case before the Inter-American Commission and Court.

Costs for litigating a case in the Inter-American System

The costs arising for the victims and their representatives when litigating a case before the Inter-American Commission and Court vary greatly according to the overall complexity of the case. Factors include the number of violations being addressed, the length of the proceedings, the number of victims in the case, and the location of witnesses, experts and representatives, all of which must be considered in light of varying costs of litigating in the victims' and representatives' country or countries. While it is difficult to predict the average cost of litigating a case in the Inter-American System, this paper presents an analysis of expenses from model cases to demonstrate the range of costs that exist.

Obviously, any case taken before the Inter-American System will require a significant investment of resources from petitioners. The baseline costs include expenses such as salaries and travel, which add up to a substantial sum over the course of the many years it takes to litigate. When looking at salaries, one must consider that cases are generally litigated by a team of attorneys on the national and international level, as different kinds of expertise are needed to handle the complex issues arising at the intersections of domestic and international law. Furthermore, interviews with victims can be logistically complicated and expensive. Victim, witnesses, experts and lawyers subsequently must travel to the Commission and possibly the Court, sometimes incurring costs for safety measures. Further, the case has to be documented; courier and other communication expenses obviously arise. The Rules of Procedure of the Commission and the Court provide for subsequent procedural stages (admissibility, merits, and in the case of the Court, reparations), often with multiple hearings. Additionally, there exists the possibility to engage in time consuming friendly settlement negotiations that require constant consultation and/or participation of both the victims and their representatives. As an estimation of what costs are incurred in the course of Inter-American litigation, Annex B provides an outline of the costs related to a prototypical case involving a single violation, one victim, witnesses that were easily located and relatively undisputable evidence.

Although the different types of costs associated with a case like the one described above are extensive, they are generally modest in comparison to cases involving multiple violations, numerous victims, witnesses who have scattered in search of safety, elusive evidence and disputable facts, as is common in massacres such as *Aloeboetoe,*[16] *El Caracazo,*[17] *Barrios Altos,*[18] *Plan de Sánchez*[19] or *Mapiripán.*[20]

In addition to lawyers' salaries and travel costs which arise in every case, different types of very cost intensive activities are required when litigating highly complex cases, especially related to the production of evidence. Possible witnesses and the victims' next of kin have to be identified and contacted throughout the country, or abroad if they have been forced into exile. Lawyers, witnesses, and psychologists have to meet in the country to

16 I.A.Ct.H.R., *Case Aloeboetoe et al.*, Judgment of December 4, 1991, Series C No. 11.
17 I.A.Ct.H.R., *Case Del Caracazo,* Judgment of November 11, 1999, Series C No. 58.
18 I.A.Ct.H.R., *Case Barrios Alto,* Judgment of March 14, 2001, Series C No. 75.
19 I.A.Ct.H.R., *Case of Plan de Sánchez Massacre,* Judgment of April 29, 2004, Series C No. 105.
20 I.A.Ct.H.R., *Case of the Mapiripán Massacre,* Judgment of September 15, 2005, Series C No. 134.

prepare written documents and oral statements for the Commission or Court. The displacement of surviving victims is common after massacres have occurred, and significant costs related to transportation and accommodation are incurred as witness meetings often cannot take place near the site of the massacre for security reasons. These costs can be very high in situations when witnesses and victims cannot safely use public transportation, but are required to travel in chartered private vehicles. Moreover, forensic anthropologists or doctors need to access the site of the massacre each time victims are exhumed and identified. Sometimes this might include a difficult search for the gravesite, cost intensive DNA tests or ballistics analyses, and requests for affidavits. Professional personnel such as lawyers, psychologists, doctors and forensic anthropologists, drivers and secretaries have to be paid for the time they invest in preparing the case documentation and writing the petition. All of these activities must be carried out before there is any hearing before the Commission in Washington, DC or the Court in San José, Costa Rica. Obviously, hearings require additional expenditures, as victims, witnesses, experts, lawyers and possibly next of kin travel to either the Commission or Court. As it is not common in all countries throughout the Americas to have identification documents or passports, especially not among people with lower incomes, these documents must be obtained, requiring additional fees and expenses.

Legal aid provisions in the European System

As was mentioned above, Judge Antônio Augusto Cançado Trindade referred to the European Human Rights System when suggesting the establishment of a free legal aid mechanism in the Inter-American System. While the two systems are different in important aspects, it is useful to note the similarity in the types of litigation costs identified above and those addressed in the European Court of Human Rights Rules of Procedure that provide for legal aid awards.

Rule 94(2) of the European Court's Rules provide that "[l]egal aid may be granted to cover not only representatives' fees but also traveling and subsistence expenses and other necessary expenses incurred by the applicant or appointed representative."[21] This may include the preparation of the case, the filing of written pleadings, the appearance of a lawyer at a hearing, assisting in friendly settlement negotiations, and expenses like secretarial expenses, translations, traveling costs to the Court, and subsistence expenses for the days at the Court. Costs and expenses for witnesses and experts appearing before the European Court of Human Rights are also covered by this legal aid program; pursuant to Rules 42 and 65, the Court may make exceptions to the general provision that costs for experts and witnesses are to be borne by the party presenting the evidence. The argument presented by this paper is surely bolstered by the fact that an authoritative regional human rights body has already identified the costs described above as recurring and worthy of reimbursement.

But why does this situation call for the establishment of a Legal Aid Fund? More specifically, why is the current approach of mixing private funding from third party donors with contributions from victims acting in their own interest and, ideally, the partial[22] reimbursement of costs and expenses pursuant to a favorable Inter-American Court sentence inadequate?

Legal arguments in favor of a Legal Aid Fund

It is well established that access to justice may not

21 Rules of Court of the European Court of Human Rights, adopted in 1998.

22 See Annex, listing the awards for costs and expenses the Court granted through 2004 and 2005.

be subject to discrimination of any kind. The American Convention on Human Rights establishes in Article 1(1):

> "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, *economic status*, birth, or any other social condition. "[23] [CEJIL's emphasis]

The American Convention on Human Rights thus prohibits discrimination of any kind, and there is a clear implication that the same standards promoted by the Inter-American System, should be applicable to the System itself. Therefore, in the same way that access to justice on the national level should not be denied to individuals on the basis of economic resources, recourse to international legal remedies for human rights violations should be available independent of the availability of private resources. Given the vast income inequalities throughout the Americas,[24] many individuals experience *de facto* discrimination in their efforts to access justice. Currently, the Inter-American System is not making substantial efforts to remedy the fact that individuals that are especially vulnerable to discrimination on economic grounds and being denied access to the system, and it certainly corresponds to the System to confront this problem. A Legal Aid Fund would be a significant step towards the eradication of this *de facto* discrimination that exists in the Inter-American System. What follows is a presentation of Inter-American jurisprudence on standards of non-discrimination pertinent to this analysis.

Non-discrimination requirement for access to justice in domestic courts

The rule of equality and non-discrimination is considered by the Court to be a norm of *jus cogens* that allows no exceptions to its application in any circumstances. The Court held in its *Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants* and affirmed in the contentious case of the *Mapiripán Massacre*:

> "The principle of equality and non-discrimination that enjoys the status of *jus cogens*, is fundamental for the safeguard of human rights both in international and domestic law and marks all State activities in all their manifestations. (…)"[25]

In its advisory opinion on the situation of undocumented migrant workers, the Court makes explicit reference to economic discrimination, stating that it runs counter to the *jus cogens* norm of non-discrimination.[26] Consequently, States have the

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23 *Emphasis added*.

24 The Gini-coefficient, a statistical measure indicating income distribution in a country, may provide further insight: On a scale from 0 to 100, 100 representing a perfectly equal income distribution, the regions' countries range from 37.9 to 59.3, Brazil, Guatemala, Paraguay and Colombia showing the highest inequalities, *see* http://hdr.undp.org/statistics/data/indicators.cfm?x=148&y=2&z=2. The average for Latin America and the Caribbean lies at 57.1, pursuant to the latest UN World Development Report, *see* http://hdr.undp.org/reports/global/2005/pdf/HDR05_chapter_2.pdf. The average GNI per capita throughout the Latin America and the Caribbean is at 3600 US-$ a year, *see* World Development Indicators database, Worldbank Data and Research, 2005, at http://devdata.worldbank.org/data-query/. The stark reality of many living in the region thus becomes apparent. The attainment of justice on the international level remains beyond their reach. Data collected by the United Nations Development Programme's shows that up to 30 to 40 % of the Latin American Population make their living with less than US-$ 2 a day, *see* http://hdr.undp.org/statistics/data/excel/hdr05_table_3.xls.

25 *Mapiripán* para. 178, and I.A.Ct.HR, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion of September 17, 2003, Series A No. 18, para. 101.

26 *Migrants*, para. 101.

obligation to "abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination"[27] and to change discriminatory situations in society.[28]

Besides making clear the *jus cogens* status of the principle of non-discrimination, jurisprudence consistently establishes that any substantive right guaranteed by the Convention is to be read together with Article 1(1). In its Advisory Opinion on the Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, the Inter-American Court stated that:

> "Article 1(1) of the Convention, a rule general in scope which applies to all the provisions of the treaty, imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein "without any discrimination." In other words, regardless of its origin or the form it may assume, any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is per se incompatible with that instrument.[29]

In the *Castillo Paez* and *Yakye Axa* cases, the Court confirmed this rule specifically for Article 25, which establishes the human right to judicial protection.[30] With respect to the judicial protection of indigenous peoples, the Court highlighted the State's responsibility to take the particularities of indigenous groups into consideration, specifically their economic and social characteristics, special vulnerabilities, and customary law, values and customs.[31]

Another central and prominent provision in this context is the American Convention's Article 24 guarantee to equal protection before the law without discrimination of any kind. Thus, the Court determined in an advisory opinion in 1999:

> "To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts[32] and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages."[33]

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27 *Migrants*, para. 103.

28 *Mapiripán*, para. 178, *Migrants*, para. 100.

29 I.A.Ct.H.R, *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion of January 19, 1984, Series A No. 4, para. 53. *Case of Velásquez-Rodríguez*, Judgment of July 29, 1988, Series C No. 4, para. 162.

30 I.A.Ct.H.R., *Yakye Axa v Paraguay*, Judgment of 17th June 2005, Series C No. 125, para. 99, *Case of Castillo Páez*, Judgment of November 3, 1997, Series C No. 34, para. 83.

31 Yakye Axa, para. 63. The Spanish original states: "En lo que respecta a pueblos indígenas, es indispensable que los Estados otorguen una protección efectiva que tome en cuenta sus particularidades propias, sus características económicas y sociales, así como su situación de especial vulnerabilidad, su derecho consuetudinario, valores, usos y costumbres (…)."

32 *Cf. the American Declaration*, Arts. II and XVIII; *the Universal Declaration*, Arts. 7 and 10; *the International Covenant on Civil and Political Rights (supra* footnote 77), Arts. 2(1), 3 and 26; *the Convention on the Elimination of All Forms of Discrimination against Women*, Arts. 2 and 15; the *International Convention on the Elimination of All Forms of Racial Discrimination*, Arts 2(5) and 7; the *African Charter on Human and Peoples' Rights*, Arts. 2 and 3; the *American Convention*, Arts. 1, 8(2) and 24; the *European Convention on Human Rights and Fundamental Freedoms*, Art. 14.

33 IACtHR, *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law***,** Advisory Opinion OC-16/99 of October 1, 1999, Series A No. 16, para. 119.

The Inter-American Court further applied this interpretation of the American Convention in its analysis of discrimination for reasons of economic status with respect to the requirement of exhaustion of domestic remedies:

> "If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status (in this case, his indigency), prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law."[34]

The Inter-American Court thus establishes the crucial importance of the principle of equality and non-discrimination for the protection of every other human right. What the Court has acknowledged for national justice systems –when victims of human rights abuse are denied access to justice due to financial limitations they are being discriminated against– must be true for the Inter-American System as well.

Non-discrimination requirements within the Inter-American System

It is as obvious as it is deplorable that potential petitioners from low-income groups might not access the Inter-American System as easily as victims of human rights violations with more abundant resources. As the situation stands now, they would at least need to have the resources and knowledge to acquire funds, or to be able to advance the litigation fees for years with the hope that those costs are ordered reimbursed in the Court's reparations decision. The length of proceedings in the Inter-American System being at least four to five years, the burden on the petitioners is excessive and cannot be born by low-income families.

Even when considering that a portion of the costs and expenses incurred during the proceedings might be recovered through the Court's decision on reparations pursuant to Article 63(1),[35] the problem remains: equal access to justice refers to the initiation of the case. As costs and expenses are reimbursed long after they are incurred, the decision to present a case may depend on the victims' ability to pay rather than his or her will or necessity. This seriously jeopardizes the quality and depth of the supervision of State Parties' compliance with human rights obligations under the American Convention.

That the discrimination that the Court rules incompatible with basic human rights on the national level persists in the System itself is more than a passing concern; it perpetuates the violation of the same *jus cogens* principle that has been widely applied to Member States. Currently, access to justice depends on the resources that petitioners, victim and/or representative, can invest in proceedings before the regional human rights bodies. Without the existence of a non-discriminatory program of legal aid, people who make their living on subsistence wages cannot conceivably pay for a lawyer and case documentation to denounce action by public officials, represented by lawyers paid through public funds.

The Court has ruled numerous times that an element of the damage that arises from a human rights violation is the frustration and anxiety produced by the inability to attain a just resolution. The *de facto* discrimination in access to justice at the Inter-American level potentially adds to this frus-

34 IACtHR, *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion of August 10, 1990, Series A No. 11, para. 22.

35 It is important to compare the reparations awarded by the Court to victim' representatives to the costs claimed by those representatives: the amount awarded can only be considered as *symbolic*, falling far below the costs actually incurred (see Annex D).

tration and exacerbates the harm from the original violation. This situation contravenes the obligation under treaty and customary law (*jus cogens*), and consistency, credibility and the aim of effectively protecting human rights require that a regional system complies with the standards it is promoting. A Legal Aid Fund in the Inter-American System would help to remedy the inequality and discrimination that impedes the vast majority of the continent's population from accessing justice. Member States of the OAS should swiftly consider this means of confronting discrimination in the access to justice, lending credibility to their own efforts to promote and protect human rights and discharging their responsibility under the American Convention to take positive steps in fighting discrimination.

Policy arguments in favor of establishing a Legal Aid Fund

In addition to the strong legal arguments in favor of a Legal Aid Fund, policy considerations related to democracy and participation also advocate for a Legal Aid Fund in the Inter-American System. Whereas the Inter-American Democratic Charter, among the rule of law and constitutionality, heralds the principle of participation of the citizenry,[36] OAS Secretary General Insulza remains skeptical about the achievements towards full democracy. In the June 2005 General Assembly of the OAS, he said "it is difficult to speak of a full democracy in a region where high rates of poverty and inequality persist."[37] He thus considers inequality as a challenge to political participation and democracy.[38] This same assertion can be made regarding the judicial system, where high income inequality and poverty lead to *de facto* discrimination in the access to justice, and even the outcome of proceedings. This is once again true not only for the national justice systems, but also for the regional system where both lack of knowledge about the System and a lack of resources affect access to justice.

This paper has argued that this lack of resources can be addressed in part through a Legal Aid Fund accessible to those who would otherwise not be able to bring their case before the Commission or the Court or would have to rely on legal support from NGOs. The creation of a Legal Aid Fund would empower[39] victims of human rights violations that are disadvantaged and vulnerable because of their lack of resources. They are individuals who have already been vigorously impeded in the exercise of their rights and the development of their life plan and the Inter-American System should present a hope of undiscriminating justice.[40]

The establishment of a Legal Aid Fund administered centrally within the Inter-American System would also reduce the pressures currently upon petitioners and representatives of victims to solicit resources for their work from third parties. This is significant because a principal critique of the NGOs that routinely advocate on behalf of victims is that they are actually promoting a third party agenda. These attempts to delegitimize the valuable work of NGOs throughout the continent, however baseless, interfere with the work to promote and protect human rights. Making funding for litigation work available through the System itself will help restore a focus on the fundamental is-

36 Inter-American Democratic Charter, Article 2, and Preamble, para. 5.

37 "Democracia, requisito para ingresar a OEA: Rice e Insulza" El Universal, online edition, June 5, 2005.

38 The Inter-American Democratic Charter heralds the same principle stating that "Poverty, illiteracy and low levels of human development are factors that adversely affect the consolidation of democracy". See Art. 12.

39 Sen, Amartya, Development as Freedom, Oxford 2001.

40 I.A.Ct.H.R., *Case of Loayza-Tamayo, Reparations* (Art. 63(1) American Convention on Human Rights), Judgment of November 27, 1998, Series C No. 42, para. 153.

sues and principles at hand by removing the distraction created over funding sources and third party interests they purportedly represent. A Legal Aid Fund itself might rely on third party donations and profit from the good will of current donors in advancing the cause of human rights as is done with other programs administered by the OAS. Any perceived appearance of interference in the litigation of the cases would be reduced, and cause for polemics diminished, refocusing attention to the real issues at hand –that of alleged violations of human rights. In this way, a Legal Aid Fund with established criteria for reimbursing expenses will ensure greater independence from perceived interference. Such independence would help ensure that the Inter-American System can be a permanent means of attaining justice.

Finally, we must recognize that the problem of legal aid is not isolated, rather it is interrelated with many challenges the Inter-American System is facing at the moment. There is a general lack of funding, and thus there is a significant backlog of cases that increases the length of the proceedings before the System and inflates litigation costs for representatives. The Member States of the OAS must reconsider the importance they give to human rights and their commitments to address the need. Without the existence of sufficient financial means, the Inter-American System cannot work and the credibility of the Member States' pledge to the principle of human rights will be questioned continuously. This critique will be increasingly justified the longer Member States establish budgetary priorities focusing on issues other than human rights concerns, and may have significant repercussions in the relations of OAS Member States with States outside the hemisphere and with international governmental organizations as the European Union or the World Bank. Thus, a Legal Aid Fund is *one*, albeit a central measure to make the Inter-American System more effective, just, and equal.

With the legal and political reasons for a Legal Aid Fund clearly established, a next step is to look at some suggestions for how such a Fund would operate, so as to demonstrate that it is not only theoretically necessary, but factually possible.

Possible mechanisms for a Legal Aid Fund in the Inter-American System

The most prominent criterion for a Legal Aid Fund is that it be victim-centered. It must be tailored to respond to the needs of victims of human rights violations, enabling them to obtain a response from the Inter-American bodies to their grievances. At the same time, it is necessary to balance that interest with the interest in maintaining the integrity and legitimacy of the Fund by deterring its abuse. Therefore, the proposed Legal Aid Fund could cover basic costs for cases once they are admitted before the System, while responding fully to the principles of accountability and transparency. In the following, we suggest some points that should be taken into consideration when designing the mechanisms of the Fund.

A Legal Aid Fund in the Inter-American System could cover the costs and expenses associated with litigation before both the Commission and the Court. These costs and expenses might include:

Preparatory phase

- Transportation, hotel, and per diem for victims/relatives, witnesses, team of legal representatives, for gathering evidence, and conducting necessary orientations to the requirements of case litigation.
- Legal fees for victims' representatives
- Experts (costs for hiring anthropologists, doctors, or forensic or ballistic experts)
- Secretarial/administrative expenses (passports, visas, affidavits, telephone, postage, photocopies).

Litigation phase

- Transportation, hotel and per diem to attend Commission and Court hearings or friendly settlement negotiations for:
    - legal representative
    - victim
    - witnesses
    - experts
- Legal fees for victims' representatives, arising from investigating/documenting case, time spent developing the case with local counterparts, preparation of written briefs, appearances at hearings
- Administrative expenses (passports, visas, affidavits, telephone, postage, photocopies).

Such a Legal Aid Fund could operate similar to a small grants program. Upon a demonstration of financial need, and admissibility before the System, the Fund would grant money either to the victims or to the representing NGO or lawyer in cases where representatives do not charge their client directly. The Fund could have both cost reimbursement and "advance" components. The petitioners would then formulate a request for legal aid, covering the costs already incurred, and asking for an advance of costs they will incur in the litigation stage. They would be required to present evidence of those costs later on.

Representatives who recover their costs from the State (through a reparations decision by the Court or at the domestic level) could be required to turn over to the Legal Aid Fund the recovered amount that exceeds the costs they have incurred by litigating the case. As long as the State does not comply with the decision on costs and expenses or a local reparations decision, the representatives would not be required to reimburse the Legal Aid Fund. Alternatively, reimbursements for litigation expenses provided for in the reparations sentence could be ordered paid directly to the Legal Aid Fund. Ideally, the Fund would be endowed, or continually replenished through reparation awards, reducing the need to secure additional working capital of the Fund itself, and thus ensuring its sustainability.

Crucial questions arise concerning the accountability, transparency and independence of the Fund. The Inter-American System must ensure that neither party to the proceedings, nor the contributors to the Fund can wield, or appear to wield influence on the decision of whether a victim or petitioner is awarded legal aid or not. For example, an administrative unit within the OAS, accountable to the General Assembly, might be created, whose decisions on the granting of legal aid are made according to pre-established guidelines. Ideally, this unit would follow the cases in all stages of the proceedings, regardless if they are before the Commission or Court.

Of course, the most important question is how to initially finance such a system of legal aid. There are at least four possibilities. First, the Member States of the OAS could create and maintain the Fund, as is done in the European system. The Legal Aid Fund is a regular item in the annual budget of the Council of Europe. Each Member State of the Council of Europe makes annual payments towards the budget (and the Fund) in accordance with a formula based upon the financial abilities of each Member State.[41] The OAS could follow this system, and create a Legal Aid Fund that is part of its regular annual budget. This would mean that States would pay into the Fund according to the same formula that is already in place for determining the yearly payments of OAS Member States. Adding a new expenditure such as a Legal Aid Fund, however, might be a politically difficult option.

41 See footnotes 23 and 24 above.

Second, the Legal Aid Fund could be financed by Member States, but in accordance with a formula other than the one used to determine annual budget contributions. For instance, this alternative formula could be based on the number of cases that each Member State has before the Commission and the Court in a given year: the more cases before the System, the higher the required contribution. A further alternative formula could be based on the responsiveness of States to the decisions of the Inter-American System: the better a State complies with recommendations and judgments, the lower the required contribution.

Third, the Fund could be financed through private contributions. Foundations and charitable organizations that have a history of funding projects relating to human rights or the Inter-American System could be approached to finance a Legal Aid Fund. This method of financing would have the benefit of not burdening the Member States with increases in the OAS budget, but ultimately, it has to be recognized that access to justice is an obligation of Member States themselves, and it may be unwise to ask foundations and charitable organizations to act in their place.

Fourth, and perhaps the best method of financing a Legal Aid Fund in the Inter-American System would be through a mix of both Member State and private contributions. The money that Member States would contribute to the Fund (through any of the formulas discussed above) could be supplemented by resources provided by private foundations and charitable organizations. The benefit of this approach is that it builds public-private partnerships to provide victims with access to justice in the Inter-American System by drawing upon the interest of a myriad of organizations that understand the importance of the work of the Inter-American System and wish to contribute to its perpetuation.

Conclusion

The establishment of a Legal Aid Fund in the Inter-American System is an urgent necessity. Access to justice in the regional System is being jeopardized by the continental community's failure to countervail economic barriers to justice that manifest as economic discrimination in direct contravention to the human rights norms of customary international law and *jus cogens* as well as norms of the American Convention. Furthermore, the aims of democratic participation and access to justice regardless of economic resources suggest the need for the establishment of a Legal Aid Fund. The Fund would be made available to those who are most disadvantaged economically and who have little recourse to justice as a result. It is critical that resources be made available directly to those seeking justice before the Inter-American System. Otherwise, the guarantees of the System remain elusive for many of those who dream of justice in the face of impunity, and redress and restored honor in the place of humiliation and negation of their own sense of humanity.

Annex A
Rules of Court of the European Court of Human Rights[42]
Chapter X
Legal Aid

Rule 91

1. The President of the Chamber may, either at the request of an applicant having lodged an application under Article 34 of the Convention or of his or her own motion, grant free legal aid to the applicant in connection with the presentation of the case from the moment when observations in writing on the admissibility of that application are received from the respondent Contracting Party in accordance with Rule 54 § 2 (b), or where the time-limit for their submission has expired.
2. Subject to Rule 96, where the applicant has been granted legal aid in connection with the presentation of his or her case before the Chamber, that grant shall continue in force for the purposes of his or her representation before the Grand Chamber.

Rule 92

Legal aid shall be granted only where the President of the Chamber is satisfied
(a) that it is necessary for the proper conduct of the case before the Chamber;
(b) that the applicant has insufficient means to meet all or part of the costs entailed.

Rule 93

1. In order to determine whether or not applicants have sufficient means to meet all or part of the costs entailed, they shall be required to complete a form of declaration stating their income, capital assets and any financial commitments in respect of dependants, or any other financial obligations. The declaration shall be certified by the appropriate domestic authority or authorities.
2. The Contracting Party concerned shall be requested to submit its comments in writing.
3. After receiving the information mentioned in paragraphs 1 and 2 of this Rule, the President of the Chamber shall decide whether or not to grant legal aid. The Registrar shall inform the parties accordingly.

Rule 94

1. Fees shall be payable to the advocates or other persons appointed in accordance with Rule 36 § 4. Fees may, where appropriate, be paid to more than one such representative.
2. Legal aid may be granted to cover not only representatives' fees but also travelling and subsistence expenses and other necessary expenses incurred by the applicant or appointed representative.

Rule 95

On a decision to grant legal aid, the Registrar shall fix
(a) the rate of fees to be paid in accordance with the legal-aid scales in force;
(b) the level of expenses to be paid.

Rule 96

The President of the Chamber may, if satisfied that the conditions stated in Rule 92 are no longer fulfilled, revoke or vary a grant of legal aid at any time.

42 As available at www.coe.int.

Annex B
Costs for the international litigation of a case before the Inter-American Commission and Court[43]

Types of Expenses	Costs
Salaries	
International and local counsel (pro-rated over 5 years)	60,000
Administrative Assistance (pro-rated over 5 years)	30,000
Total Salaries	**90,000**
Travel Costs (airfare, hotel, per diem)	
Airfare for victim to Commission hearing	700
Airfare for 2 international lawyers to attend Commission hearing	1400
Airfare for 2 local lawyers to attend Commission hearing	1400
Per Diem for victim	250
Per Diem for 2 international lawyers	500
Per Diem for 2 local lawyers	500
Hotel for victim	450
Hotel for 2 international lawyers	900
Hotel for 2 local lawyers	900
Total to Commission Hearing	**7,000**
Airfare for 3 victim/family members	2,100
Airfare for 2 witness for court hearing	1,400
Airfare for 2 international lawyers to attend court hearings	1,400
Airfare for 2 experts to attend court hearing	1,400
Airfare for 2 local lawyers to attend court hearing	1,400
Per Diem for 3 victim/family members	750
Per Diem for 2 witness for court hearing	500
Per Diem for 2 international lawyers to attend court hearings	500
Per Diem for 2 experts to attend court hearing	500
Per Diem for 2 local lawyers to attend court hearing	500
Hotel for 3 victim/family members	750
Hotel for 2 witness for court hearing	500
Hotel for 2 international lawyers to attend court hearings	500
Hotel for 2 experts to attend court hearing	500
Hotel for 2 local lawyers to attend court hearing	500
Total to Court Hearing	**13,200**
Total Travel Costs	**20,200**
Other Direct Costs	
Legally attested documents	500
Evidential documents	1,000
Telephone calls	1,200
Faxes, Photocopies	500
Courier Expenses	500
Total Other Direct Costs	**3,700**
Total Estimated Costs	**113,900**

43 This table reflects the average costs of a prototypical case involving a single violation, one victim, witnesses that were easily located and relatively undisputable evidence before the Inter-American Commission and Court.

Annex C
Costs and expenses in the Inter-American Court, decisions 2004 and 2005

Case	Requested by applicants (in US-$)			Granted by Court (in US-$)	
	Representatives I (primarily national NGOs)	Representatives II (primarily INGOs)	Representatives III	Representatives I	Representatives II and III
Blanco Romero y otros	74,274	26,996.76	75,692[44]	40,000	
García Asto y Ramírez Rojas	Not specified (requested equitable amount)			40,000	
Palamara Iribarne	Not documented			4,000	
Massacre of Mapiripán	129,691.28	51,905.78.		20,000	5,000
Raxcacó Reyes	2,090.87	2,918.92		5,000	
Gutiérrez Soler	89.732,94	17.172,27		20,000	5,000
Girls Yean and Bosico	4.513,13	37.995,94	50.000,00	6,000	
Acosta Calderón	2,000	7,200	5,110	2,000	5,000 2,000
Yatama	61.222,04	13.137,99	34.178,91	15,000	
Fermín Ramírez	11.520,30			5,000	
Yakye Axá	25.668,86	5,500		15,000	
Moiwana Village	15,000	68,213.75	32,681.61	45,000[45]	
Caesar	Not requested	—-	—-	Not granted	
Huilca Tecse	Renounced	Renounced		Renunciation accepted	
Serrano Cruz Sisters	39.323,96	7.252,77		38,000	5,000
Lori Berenson Mejía	Requested within global amount for reparations			30,000	
Carpio Nicolle	150,000	4,000	14,887	50,000	12,000
Massacre of Plan de Sánchez	55.680,00			55,000	
De La Cruz Flores	10,000	10,000	10,000	30,000	
Tibi	54,000	9.950,00	20,000	37.282,00	
Children's Rehabilitation Center	10,000	30.237,42		5,000	12,500
Ricardo Canese	16.520	10.163,02		1,500	4,000
Gómez Paquiyauri Brothers	367,658.70			30,000	
19 Merchants	20,301.76	3.929,08		10,000	3,000
Molina Theissen	600,00	10.738,32		600	7,000
Herrera Ulloa	17.849,90			10,000	

44 For practical reasons, two representatives are summarized in this cell, the fourth representative requesting 14,519 US$ out of the sum indicated.

45 27,000 to representative II, and 10,000 to representative III.