

FRAGMENTATION OR UNIFICATION AMONG
INTERNATIONAL INSTITUTIONS: HUMAN
RIGHTS TRIBUNALS

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International human rights law is a body of substantive and procedural rules that deals with the protection of internationally guaranteed rights of individuals against violations by governments. Two branches may be identified therein: first, the so-called normative system, and second, the international protection system.¹ The normative system is a set of international rules recognizing human rights, providing for their scope and contents, and giving criteria for their permissible restriction and derogation in times of emergency. The international protection system is a set of rules establishing legal mechanisms for the supervision and control of states parties' obligations.

Human rights law is embodied in legal rules that derive, in part, from declarations and treaties. A small group of human rights treaties (both general and specific in scope, and both universal and regional in reach) establishes international enforcement systems designed to ensure that states parties comply with their obligations. These systems usually consist of a monitoring body, which is composed of a given number of experts acting in their personal capacities. The body is endowed with a range of functions, including the power to receive and consider individual petitions.² Thus, treaty-based mechanisms provide a sought-after protection system, answering the call for more binding instruments that recognize human rights and define them with greater precision.

This paper will explore the connections and conflicts in the jurisdiction, functioning, and jurisprudence of two inter-

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1. *See generally* MÓNICA PINTO, TEMAS DE DERECHOS HUMANOS (1997).

2. *See id.* at 119-53. *See generally* MÓNICA PINTO, LA DENUNCIA ANTE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS (1993).

national human rights bodies: the Inter-American Commission on Human Rights (IACHR) and the Human Rights Committee (HRC). The IACHR is an organ of a regional system established by the Organization of American States (OAS), while the HRC is an organ of a universal system established under the auspices of the United Nations (U.N.).

I. JURISDICTION

The IACHR and the HRC take different approaches to their complaint systems. This difference is illustrated by the manner in which each body answers the question of its jurisdiction over particular petitions.

Initially, the inter-state complaint machinery was considered to be an important monitoring system, a general reflection of traditional international law. The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) became the first international legal instrument to grant the right to file petitions for human rights violations.³ It provided for an inter-state complaint system that became effective upon its entry into force for the state party.

The European Commission, however, could only receive individual petitions against states that had made separate declarations recognizing its jurisdiction over such complaints.⁴ Notwithstanding that precedent, the later American Convention on Human Rights (the American Convention) permits, upon its entry into force, individual petitions against *any* state party.⁵ The inter-state system established by the American Convention further requires a declaration recognizing the IACHR's competence to deal with these complaints.⁶ Treaty bodies adopted under U.N. auspices, such as the HRC, require a separate declaration recognizing their jurisdiction, and thus

3. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. The original system was superseded by the protection system established by Protocol 11, March 20, 1952, 213 U.N.T.S. 262.

4. European Convention, arts. 24-25, *supra* note 3, at 236-38.

5. American Convention on Human Rights, in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 25, OEA/Ser.L.V/II.82, doc.6, rev.1 (OAS General Secretariat 1992) [original Spanish] [hereinafter BASIC DOCUMENTS].

6. *See id.* arts. 44-45, at 40-41.

lie somewhere in between the European and Inter-American systems.⁷

Local trust and homogeneity explain some of the differences in approach between the regional and global human rights mechanisms. With respect to the Inter-American system, it should be noted that its 1966 Statute⁸ granted the IACHR jurisdiction to consider complaints against any Member State of the Organization of American States, in light of the American Declaration of the Rights and Duties of Man.⁹ That being so, any reduction in the scope of petitions was not possible.

The individual petition is the heart of the complaint system. The inter-state procedure has never taken off in either the U.N. treaty system or in the Inter-American system. Only the European system has seen a significant number—around a dozen—of inter-state complaints. Some of these complaints have generated truly leading opinions, such as *Ireland v. United Kingdom*.¹⁰

As a matter of fact, the inter-state complaint system is weak and does not go far beyond being a conciliation machinery. As such, it is closer to the peaceful settlement of disputes of general international law than to the petition system of international human rights law. It should be noted that human rights litigation is not a means for the peaceful settlement of disputes because, rather than taking a case-by-base approach,

7. See International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, arts. 11-14, 660 U.N.T.S. 212, 226-32 [hereinafter CERD]; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 41, 999 U.N.T.S. 171, 182-83; Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302 [hereinafter ICCPR Optional Protocol]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, arts. 21-22, 1465 U.N.T.S. 113, 118-19 [hereinafter CAT]. See also Dinah Shelton, *Individual Complaint Machinery under the United Nations 1503 Procedure and the Optional Protocol to the International Covenant on Civil and Political Rights*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 59 (Hurst Hannum ed., 1984).

8. (Former) Statute of the Inter-American Commission on Human Rights, 1960, as amended in 1966, art. 9 (bis), available in OAS GENERAL SECRETARIAT, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: TEN YEARS OF ACTIVITIES, 1971-1981 42, 44-45 (1982).

9. American Declaration of the Rights and Duties of Man, in BASIC DOCUMENTS, *supra* note 5, at 17.

10. 25 Eur. Ct. H.R. (ser. A) (1978), reprinted in 17 I.L.M. 680 (1978).

it focuses on creating larger structural changes aimed at preventing similar abuses in the future. A look at the U.N.'s record leads to the conclusion that requiring a separate and distinctive acceptance to activate a treaty body's jurisdiction reduces the number of states recognizing such jurisdiction. That is why only twenty-five out of 150 states parties to the Convention for the Elimination of Racial Discrimination (CERD) have formulated the declaration under Article 14 granting jurisdiction.¹¹ Only thirty-nine out of 103 states parties to the Convention Against Torture (CAT) have done the same under Article 22 of that treaty, while ninety-two out of 140 states parties to the International Covenant on Civil and Political Rights (ICCPR) have become parties to that instrument's Optional Protocol.¹²

In contrast, the IACHR deals with petitions lodged against nearly all states parties to the American Convention—even against those OAS Member States that have not yet ratified the Convention. To date, only Canada and a few Caribbean states have avoided having petitions lodged against them under the American Convention system.

II. ACCESS

Article I of the Optional Protocol to the ICCPR states that any individual claiming to be a victim of a violation by a state party may submit a communication to the HRC. The same wording can be found in Article 22 of the CAT and, with slight differences, in Article 14 of the CERD.

The Optional Protocol prevents Non-Governmental Organizations (NGOs) and other interested parties from filing communications. Nonetheless, the notion of "victim" has been interpreted broadly, such that the HRC *may* accept communications submitted by any person or NGO on a victim's behalf. Such petitioner may submit these communications if the victim is unable to do so personally and the petitioner can

11. *See Status of the International Convention on the Elimination of All Forms of Racial Discrimination: Report of the Secretary General*, U.N. Doc. A/53/256, para. 5 (1998).

12. *See Report of the Committee Against Torture*, U.N. GAOR, 53rd Sess., Supp. No. 44, Annex III, U.N. Doc. A/53/44 (1998); *Report of the Human Rights Committee*, U.N. GAOR, 53rd Sess., Supp. No. 40, Annex I-B, U.N. Doc. A/53/40 (1998).

establish a sufficient link to the victim. As for the European Convention, which has become the source for U.N. and other human rights treaties, it has been pointed out that the “requirement that only victims may lodge petitions before the European Commission is . . . most unfortunate. It ignores the fact that, in the struggle for human dignity against the abuses of state power especially, ours is truly a Kafkaesque world.”¹³

With a completely different aim, the American Convention states that any person, group of persons, or non-governmental entity legally recognized in one or more OAS Member States, may lodge petitions with the IACHR containing denunciations or complaints of violation of that Convention by a state party.¹⁴ This formula happens to be the broadest included in any convention. The victim and the petitioner may be different subjects in this system. Although there must be a victim for a case to be maintained, the victim need not personally bring suit. In fact, an NGO may even file a petition without the victim’s consent. Because of this expanded scope, the great majority of petitioners in the Inter-American System are NGOs. One possible explanation for this phenomenon is that, with domestic courts open only to victims, civil society is seeking redress internationally. Alternatively, this may suggest that democratic institutions are not uniformly developed throughout the hemisphere.

III. ADMISSIBILITY

Unlike U.N. treaty bodies, the IACHR is not required to issue a formal declaration of admissibility. The Inter-American Court of Human Rights has stated: “Although the admission of a petition does not require an express and formal act, such an act is necessary if it is found to be inadmissible.”¹⁵ This practice, inherited from the statutory rules that governed the IACHR’s action before the American Convention’s entry into force, has been useful to keep the eye on cases not meeting all the requirements for admissibility—namely the exhaus-

13. Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT’L L. 585, 630 (1987).

14. See American Convention on Human Rights, art. 44, *supra* note 5, at 40.

15. Velásquez Rodríguez Case, Preliminary Objections, 1987 I/A Ct. H.R. (ser. C) No. 1 (judgment of June 26, 1987).

tion of local remedies—in countries charged with systematic and asserted violations of human rights. The moment has come for revision of this practice. In 1996, the IACHR issued fourteen reports on admissibility; and in 1997, the figure rose to eighteen. Given the IACHR's extensive practice in settling disputes arising from the American Convention, it is worth having an admissibility phase.¹⁶

On the other hand, under universal mechanisms, the first procedural concern is admissibility, which is subjected to a stricter analysis than in the regional system. To date, the HRC has dealt with 829 registered communications with respect to fifty-seven countries. It has declared 245 communications inadmissible and discontinued another 124. The reasons behind such rulings include the non-exhaustion of local remedies and the preemption of the same matter by another legal body.

IV. FACT-FINDING

It has been stressed that “the [Inter-American] Commission has, *inter alia*, the function of investigating allegations of violations of human rights guaranteed by the Convention that must be carried out in all cases that do not concern disputes relating to mere questions of law.”¹⁷

Hearings provide one of the means for fact-finding in the Inter-American system. The IACHR may conduct hearings in disputed cases either on its own initiative or at the request of a party.¹⁸ The purpose of these hearings should be “the receipt of testimony oral or written of the parties, relative to the additional information regarding the admissibility of the case, the possibility of applying the friendly settlement procedure,” or “the verification of the facts or the merits of the matter submitted to the Commission for consideration.”¹⁹ Hearings are held in closed chambers, away from the public and the press.

16. See American Convention on Human Rights, art. 48, para. 1(f), *supra* note 5, at 43.

17. In the Matter of Viviana Gallardo et al., No. 101/81, 1984 I/A Ct. H.R. (ser. A&B) at 85, para. 22 (decision of Nov. 13, 1981).

18. See American Convention on Human Rights, *supra* note 5, art. 48, para. 1(e), at 43.

19. Regulations of the Inter-American Commission on Human Rights, art. 67, in BASIC DOCUMENTS, *supra* note 5, at 128.

Both parties are invited to attend unless, due to the confidential nature of material covered in the hearing, the IACHR decides otherwise.²⁰

The IACHR may also engage in on-site observations. Article 48 of the American Convention furnishes the grounds for fact-finding, stipulating that, “[i]f necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities.”²¹ Furthermore, as stated in the same provision, “in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed.”²² The IACHR has strengthened its practice of on-site observations or, more generally, its visits to countries against which a number of petitions have been lodged, in order to verify complaints, contact authorities, and get an overall sense of the situation.

Notwithstanding this capacity, the IACHR has no authority to consider allegations of improper evaluation of facts or evidence, unless a violation of the American Convention is involved. This “fourth instance formula” is shaped in different decisions and is analogous to the doctrine of the European Commission.²³

In contrast, the Optional Protocol makes no provision for oral hearings or independent fact-finding. The HRC lacks the power to undertake its own investigations to verify assertions contained in the periodical reports that states parties are required to submit, in accordance with Article 40.

V. JURISPRUDENCE

Both the HRC and the IACHR have developed an important body of jurisprudence interpreting and applying treaties.

20. *See id.* art. 70, at 129.

21. *See* American Convention on Human Rights, *supra* note 5, art. 48, para. 1(d), at 42-43.

22. *Id.* para. 2, at 43.

23. *See* Resolution No. 29/88, Inter-Am. C.H.R., OEA/Ser.L/II.74, doc.10, rev.1 (1988); Report No. 39/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc.7 (1997) [hereinafter Annual Report of 1996].

While the reporting guidelines developed by the HRC are useful in inferring the limits and contents of many of the provisions of the ICCPR, the statements of the IACHR embodied in its country studies are no less important. The General Comments of the HRC—initially conceived to help states in drafting their reports—are relevant to individual complaints because they put a gloss on the ICCPR's substantive provisions.²⁴ For instance, for the definition of non-discrimination—dealt with in General Comment Number 18—the HRC relies on other human rights treaties (e.g., CERD, CEDAW).²⁵ In the same context, much of the interpretation of the American Convention that the IACHR has done in its country studies is useful in the individual petition system.

The so-called cross-fertilization is valid only for the regional body that sometimes refers to the interpretation that the HRC has given to analogous substantive provisions, even though its main source is to be found in the European system. In any case, it should be kept in mind that while the HRC is the final interpreter of the ICCPR, that role is played by the Court in the Inter-American system.

VI. CONCLUSION

Important questions have been raised regarding whether unification is realistic, politically appropriate, and normatively desirable. Keeping these thoughts in mind, a few concluding remarks are in order.

First, the mere existence of a supervisory system is of great importance in that it empowers individuals in the struggle against impunity. Second, even when these mechanisms against human rights abuses are overburdened and display slow and somewhat bureaucratic procedures, they still have an impact on public opinion. Third, improvements should be made in the procedures of the monitoring bodies, but these

24. See *General Comments Adopted by the Human Rights Committee Under art. 40, para. 4, of the International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/21/Rev.1 (1989). See also *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Human Rights Committee, U.N. Doc. HRI/GEN/1/Rev.1 (1996) [hereinafter *Compilation of General Comments*].

25. See *General Comment 18, Non-Discrimination*, U.N. Human Rights Committee, 37th Sess., reprinted in *Compilation of General Comments*, *supra* note 24, at 26.

changes must not compromise the effectiveness of the mechanisms nor reduce their reach.

The reasonable goal of unification of the international legal system necessarily involves the international protection of human rights. Advantages of unification include improved economy of time and resources—both human and material—as well as the promotion of higher standards of effective protection. Nevertheless, some things must be preserved, such as the consent already given to the monitoring body's jurisdiction and the *pro homine* criteria for the interpretation of legal rules. The disadvantages of unification include the usual reluctance of states to consent to new jurisdictions and the inherent danger of tinkering with jurisdictions that have already been accepted.

There are some points of convergence with respect to the HRC and the IACHR. The two bodies deal with more or less the same subject matter, but important differences remain. The two bodies have developed independently of one another, with little consideration for their common enterprise. This is perhaps not surprising if one notes that, at least until the World Conference in 1993, the same happened to U.N. treaty bodies and even among Special Procedures.²⁶ As far as their respective impacts are concerned, the HRC has never enjoyed the publicity of the IACHR in the countries of the western hemisphere.²⁷

In any case, both bodies are suffering the same pains. For example, Trinidad and Tobago (in the Inter-American context) and Jamaica (in the ICCPR framework) have denounced the treaties because of so-called “death row issues.” Moreover, good faith and the *pro homine* principle led the Privy Council to commute a death sentence in *Pratt and Morgan v. Attorney General of Jamaica*.²⁸ Trinidad and Tobago and Jamaica allege, however, that international procedures are too time-consuming. These Caribbean countries assert that, in order to avoid

26. See Param Cumaraswamy, Special Rapporteur, *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*, U.N. Commission on Human Rights, Economic and Social Council, U.N. Docs. A/CONF.157/9 and E/CN.4/1995/39 (1995).

27. For example, consider the press releases and press communiques published in the Annual Reports. See, e.g., Annual Report of 1996, *supra* note 23.

28. 43 W.I.R. 340 (1993), [1993] 4 All E.R. 769.

the cruel and inhuman treatment of being on death row for more than five years, the states should be released from their treaty commitments and allowed to proceed with the executions, which they contend do not constitute human rights violations.

While I am not suggesting that the attitude or practice of monitoring bodies provides a sound basis for that Caribbean policy, their reluctance to conceive certain priorities does not help to maintain everyone in the human rights camp. It is very difficult to approach the unification of international human rights bodies in the context of this article, because regional and universal monitoring bodies have such fundamentally different ways and means of acting and vary in their reliability and trustworthiness.

What may well be asserted is that an in-depth study of the unification of universal treaty bodies must be initiated to assess the feasibility of establishing a unique body to handle complaints in adversarial proceedings and to develop some fact-finding mechanisms.²⁹ Decisions reached by this proposed body should engage the governments' will, as these governments will have freely consented to the body's jurisdiction and, in so consenting, will have decided to deploy as many efforts as necessary to ensure compliance. Therefore, and in conclusion, a reasonable follow-up mechanism must also be established.

29. To date, almost 18 states have accepted the jurisdiction of the HRC, CAT, and CERD. Another 14 have accepted the jurisdiction of two of them, the CAT and HRC. Lists of states parties may be found in the HRC's Treaty Bodies database at <<http://www.unhchr.ch/tbs/doc.nsf>>.