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A Non-Governmental Perspective Regarding the International Protection of Children in the Inter-American System of Human Rights

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A Non-Governmental Perspective Regarding the International Protection of Children in the Inter-American System of Human Rights

Cover Page Footnote

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A NON-GOVERNMENTAL PERSPECTIVE REGARDING THE INTERNATIONAL PROTECTION OF CHILDREN IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

ARIEL E. DULITZKY* & LUGUELY CUNILLERA TAPIA**

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*Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state.*¹

I. INTRODUCTION

While gross and massive violations of human rights have declined in the Americas as a result of transitions to democracy, other insidious abuses have come to the forefront. Police brutality, inhumane prison conditions, constraints on civil liberties, racial and gender discrimination, political, social and economic rights violations, and discrimination against minorities, which can all be characterized as structural human rights violations, are still very common in the Americas. These violations are not merely the result of policies of a particular regime, but also the actions and attitudes that result from the abusive exercise of power by state authorities.²

Human rights abuses performed by state actors against the children of the Americas have not diminished, but actually increased. Such children, part of the most vulnerable group in society, are living in an era of extreme violence and terror. According to the United Nations Children's Fund (UNICEF), one hundred million of the world's children live on the streets.³ Forty million of these children live in Latin America.⁴ These "street children" are frequently victims of human rights violations and they are often the targets of police brutality.⁵ Cases involving the arbitrary killing, detention, inhumane treatment, torture, sexual abuse, child labor, and trafficking of children have, sadly, become increasingly common.

Despite the existence of several international instruments ostensibly designed to protect children, including the Convention on the Rights of the Child⁶ and the American Convention on Human Rights,⁷ violations of children's rights in Latin America are too infrequently brought to the attention of the international community.

1. American Convention on Human Rights, Nov. 22, 1969, art.19, 1144 U.N.T.S. 123, 123 (entered into force July 18, 1978) [hereinafter American Convention].

2. For a description of the term "abuse of powers," see Case No. 11,430, Inter-Am. C.H.R. 511-512, OEA/ser. L./V./II.95, doc. 7 rev. (Mar. 14, 1997) (original in Spanish) [hereinafter 1996 Annual Report].

3. UNICEF & THE UNITED NATIONS CENTER FOR HUMAN RIGHTS, *Street Children in United Nations Children's Convention Briefing Kit* (1993) (on file with author).

4. *Id.*

5. *Hearings on The Situation of Street Children in Latin America*, Oct. 9, 1997, Inter-Am. C.H.R. (statement of Casa Alianza).

6. See Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 28 I.L.M. 1148 (recognizing formal international human rights for children, including the child's civil, political, economic, social, cultural, and humanitarian rights).

7. See American Convention, *supra* note 1.

Children's rights in this region of the world are not respected or promoted, and worst of all, they are habitually ignored.

One method currently utilized to enforce children's rights in Latin America is that of bringing individual cases before the Inter-American system for the protection of human rights created under the aegis of the Organization of American States (OAS). Non-governmental human rights organizations (HROs) are basing claims on, and invoking the appropriate provisions of, treaties ratified by the responsible state to ensure the full implementation of international human rights norms at the domestic level and to further protect the rights of children. When a government fails to comply with its international obligations, for example by engaging in abusive state conduct or failing to comply with international human rights standards, HROs try to hold the government responsible before an appropriate forum and to publicize the abuses. HROs currently play a vital role in monitoring and preventing violations of children's human rights and are demanding that the international declarations of regional government be reflected in domestic practice.

This article discusses the mechanism within the Inter-American system that is used to advocate on behalf of children. The processing of individual complaints by the Inter-American Commission on Human Rights⁸ (Commission) is currently one of the best means directly available to victims and HROs. This process allows both petitioners and victims to monitor their claims and exercise a certain level of control during the proceedings. Claimants can regularly submit additional information to the Commission, request a hearing before the Commission, respond to the government's factual representations, request a Commission-led mediation to reach a friendly settlement, request protective measures for witnesses in danger, and potentially receive damages, while maintaining full access to information.

The creation of the Inter-American Court on Human Rights in 1979⁹ and its development in the last several years, along with the petition process established by the American Convention, have provided new access for HROs dedicated to the defense of children's rights in Latin America. Because the Commission monitors human rights by examining individual petitions, a more technical, rather than political, decision-making process based on merit and the evidence in the case results. Moreover, such a decision-making

8. See discussion *infra* parts III and VII.

9. See discussion *infra* parts III and V.

process within the Commission helps to develop international human rights standards in both substantive and procedural matters.

This article focuses on the Inter-American human rights system, its function, and how HROs can use the system to protect the rights of the child, as illustrated through examples of litigation regarding children's rights conducted by one HRO, the Center for Justice and International Law (CEJIL).

II. OVERVIEW OF THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS PROTECTION

The Inter-American human rights system has slowly evolved over the last fifty years. At the end of World War II, a Special Inter-American Conference on War and Peace was held in Mexico to develop ways to strengthen the existing Inter-American system.¹⁰ Then, in 1948, the Ninth International Conference of American States was held in Bogota and the Charter of the Organization of American States (OAS) was adopted.¹¹

In 1948, the OAS Charter included only a few provisions relating to human rights, and only one addressed children's rights (in the context of elementary education).¹² All of these provisions were phrased in very general and hortatory terms.¹³ The most important reference to human rights in this instrument appears in current Article 3(k), wherein the parties reaffirmed and proclaimed as a principle of the OAS "the fundamental rights of the individual without distinction as to race, nationality, creed or sex."¹⁴ The OAS Charter did not define these rights or establish a mechanism to promote and protect them. However, at the Ninth Conference two important resolutions were passed: Resolution XXIX, entitled "Inter-American Charter of Social Guarantees," and more importantly,

10. See Inter-American Conference on Problems of War and Peace, Feb. 21-Mar. 8, 1945, reprinted in *THE INTERNATIONAL CONFERENCES OF AMERICAN STATES 1942-1954* 51 (Pan American Union ed., 1958) [hereinafter *International Conferences*].

11. See Ninth International Conference of American States, Mar. 30-May 2, 1948, reprinted in *THE INTERNATIONAL CONFERENCES OF AMERICAN STATES*, *supra* note 10, at 161.

12. "The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases: (a) Elementary education, compulsory for children of school age When provided by the State it shall be without charge" See Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3, art. 48(a) [hereinafter *OAS Charter*].

13. See THOMAS BUERGENTHAL & DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS* 39 (4th ed. 1995).

14. See *OAS Charter*, *supra* note 12 art. 3(k).

Resolution XXX, the now well renowned American Declaration on the Rights and Duties of Man (American Declaration).¹⁵

The American Declaration was adopted as a simple conference resolution with the understanding that it had not been incorporated by reference into the Charter, and that it lacked the status of "positive substantive law."¹⁶ However, this instrument established the first legal mandate to protect children in the Americas in the form of Article VII, which states that "[a]ll women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid."¹⁷

Over time, the legal status of the American Declaration has changed. Today it is deemed the authoritative interpretation of an individual's fundamental rights under the OAS Charter and its legal authority has been enhanced by Advisory Opinion No. 10 issued by the Inter-American Court of Human Rights.¹⁸

Historically, sporadic attempts to establish an institutional mechanism for dealing with human rights issues failed. In 1959, at the Fifth Meeting of Consultation of Ministers of Foreign Affairs, a resolution that created the Inter-American Commission on Human Rights was adopted.¹⁹ Twenty more years passed until the entry into force in 1979 of the American Convention on Human Rights, and thereafter, the Inter-American Court of Human Rights (the Court) was established. The Statute of the Commission,²⁰ adopted by the OAS Council in 1960, describes the Commission as an autonomous entity of the OAS, composed of seven members elected in their individual capacity by the OAS General Council, with the duty "to promote respect for human rights."²¹ Article 2 of the Statute declares that "for the purpose of the Statute, Human Rights are understood to be those set forth in the American Declaration of the Rights and

15. See American Declaration of the Rights and Duties of Man. O.A.S. Res. XXX, Mar. 30-May 2, 1948, O.A.S. Off. Rec. OEA/ser. L./V./I.4 rev. (1965).

16. See Inter-American Juridical Committee, Report of the Inter-American Council of Jurists Concerning Resolution XXXI of the Conference of Bogota (Inter-American Court to Protect the Rights of Man), at 2 (Sept. 26, 1949).

17. American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Off. Rec. OEA/Ser. L./V./II.23/Doc. 21 Rev. 6 (1979) [hereinafter American Declaration].

18. Inter-Am. Ct. H.R., Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 65 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, (ser. A) No. 10.

19. Res. VII, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12-18, 1959, Final Act, at 10-11, OEA/Ser. C/II.5.

20. Statute of the Inter-American Commission on Human Rights (1960-67) [hereinafter Statute of Inter-Am. C.H.R.] reproduced in INTER-AM. C.H.R., HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 105 (1985), OEA/Ser. L./V./II.65, doc. 6 (July 1, 1985) (original in Spanish) [hereinafter HANDBOOK].

21. *Id.* art. 1.

Duties of Man."²² In this fashion, the "non-binding" American Declaration became the basic normative instrument of the Commission.

The statute gave the Commission only limited powers to recommend governments of the member states to adopt progressive measures in favor of human rights within the framework of their domestic legislation. The Commission, however, in a formal interpretation adopted in its first session, considered itself empowered to condemn human rights violations in specific countries, and for that purpose prepare studies and urge the governments of the member states to supply it with information about their adopted measures.²³

Following this interpretation, the Commission started to examine complaints, hear witness testimony, conduct on-site investigations, direct recommendations to governments engaged in large-scale violations of human rights, and issue reports documenting such violations. Although the Commission could not take any legal action on individual petitions, it could use them as additional sources of information when deciding whether to conduct on-site country investigations and prepare country reports.²⁴ Victims and family members who had suffered human rights violations during the heyday of military dictatorship in the Americas brought the majority of the first complaints.²⁵

The Commission powers were further expanded in 1965 to include a petition system that permitted it to review complaints alleging violations of the right to life, liberty, and personal security, equality before the law, freedom of religion, freedom of expression, freedom from arbitrary arrest, and due process of law.²⁶ This change was based on OAS conference resolutions of uncertain legal effect, but the Protocol of Buenos Aires, amending the OAS Charter, changed the status of the Commission from an autonomous entity to one of the principal organs of the OAS.²⁷ The Protocol of Buenos Aires included a provision that allowed the Commission to oversee observance of human rights until the American Convention on Human Rights, adopted one year before, entered into force. This

22. *Id.* art. 2.

23. Informe Sobre la Labor Desarrollada Durante su Primer Periodo de Sesiones [Report on Work Accomplished During The First Session], Oct. 3-28, 1960, Inter-Am. C.H.R., at 10, OEA/ser. L./V./II.1 doc. 32 (Mar. 14, 1961).

24. See Anna P. Schreiber & Philippe S.E. Schreiber, *The Inter-American Commission on Human Rights in the Dominican Crises*, 22 INT'L ORG. 508, 510-511 (1968).

25. CECILIA MEDINA QUIROGA, *THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM* 71-72, 189-91, 222-223 (1988).

26. See Stat. of the Inter-Am. C.H.R., *supra* note 20, art. 9.

27. See OAS Charter, *supra* note 12, as amended by Protocol of Amendment to the Charter of the Organization of American States (Protocol of Buenos Aires), Feb. 27, 1967.

legitimized the powers the Commission already exercised and recognized the normative character of the American Declaration as a standard to judge the human right activities of all OAS member states.

The American Convention on Human Rights, or Pact of San Jose, was adopted in 1969 at an intergovernmental conference convened by the OAS in San Jose, Costa Rica.²⁸ The American Convention is longer and more detailed than most other international human rights agreements and was deeply influenced by the European Convention on Human Rights. It contains eighty-two articles and codifies over twenty different rights, such as the right to: juridical personality, life, humane treatment, personal liberty, a fair trial, privacy, a name, nationality, participate in government, equal protection of the law, judicial protection, and the rights of the child.²⁹

The American Convention marks the first time the legal term "rights of the child" was formally introduced. Article 19 of the American Convention entitles "every minor child" to the right of protection by his or her family, society, and state.³⁰ This provides a tremendous step toward recognizing the importance and vulnerability of children and their need for special protection from society.

The OAS General Assembly has approved five other human rights instruments:³¹ (1) The Inter-American Convention to Prevent and Punish Torture;³² (2) The Protocol of San Salvador, an additional Protocol to the American Convention, recognizing economic, social, and cultural rights,³³ (3) The Second Protocol to the American Convention to Abolish the Death Penalty;³⁴ (4) The Inter-American Convention on the Prevention, Punishment, and Eradication of

28. See American Convention, *supra* note 1.

29. *Id.* arts. 3-5, 7, 8, 11, 18-20, 23-25.

30. *Id.* art. 19.

31. CEJIL, LOS DERECHOS HUMANOS EN EL SISTEMA INTERAMERICANO, COMPILACIÓN DE INSTRUMENTOS [HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, COMPILATION OF INSTRUMENTS] (1996).

32. Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67 entered into force Jan 20, 1987. This convention currently has twenty states parties. For a current list of signatories see the OAS web site (last visited Jan. 29, 1999) <<http://www.oas.org>>.

33. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter Protocol of San Salvador), Nov. 17, 1988, O.A.S.T.S. No. 69. The Protocol of San Salvador has not yet entered into force. Fifteen states have signed this protocol. For a current list of signatories, see the OAS web site (last visited Jan. 29, 1999) <<http://www.oas.org>>.

34. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. No. 73. Seven states have currently signed on to the Protocol. Not yet in force. For a current list of signatories, see the OAS web site (visited Jan. 29, 1999) <<http://www.oas.org>>.

Violence against Women (Convention of Belem do Para),³⁵ and (5) The Inter-American Convention on Forced Disappearance of Persons.³⁶ In addition, since 1989 the Commission also has been preparing an international instrument regarding protection of the rights of indigenous people.³⁷

III. MAIN BODIES RESPONSIBLE FOR HUMAN RIGHTS PROTECTION IN THE INTER-AMERICAN SYSTEM

As discussed above, the two bodies responsible for human rights protection in the Inter-American system are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The American Convention empowers both organs to protect and promote human rights. The Commission is also authorized to monitor human rights according to the American Declaration.³⁸

This last instrument is technically a recommendation³⁹ but has gained enforceability in practice and is applied by the Commission to member states of the OAS that have not ratified the Convention.⁴⁰ In a case involving state parties to the Convention, the Commission may seek a settlement or, in the alternative, refer a case to the Court if it involves a state that has recognized the Court's jurisdiction.⁴¹

35. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para), June 9, 1994. Twenty-five states are parties to this convention. For a current list of signatories, see the OAS web site (last visited Jan. 29, 1999) <<http://www.oas.org>>.

36. Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, OAS Doc. OEA/Ser.P AG/doc.3114/94 rev 1. This convention currently has thirteen states parties. For a current list of signatories, see the OAS web site (last visited Jan. 29, 1999) <<http://www.oas.org>>.

37. The Commission on its 95th Period of Sessions (Mar. 14, 1997) approved the proposal of the American Declaration of the Rights of Indigenous Peoples. This proposal was presented at the 27th meeting of the General Assembly before the 1997 General Assembly of the Organization of American States for its approval. Telephone interview with Osvaldo Kreimer, Senior Attorney, and Executive Secretariat of the Inter-American Commission on Human Rights (Apr. 3, 1998).

38. See O.A.S. Res. XXX, *supra* note 15.

39. See generally LOUIS HENKIN, *INTERNATIONAL LAW: CASES AND MATERIALS* 114 (2d ed. 1987).

40. See Tom J. Farer & James P. Rowles, *The Inter-American Commission on Human Rights*, in *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 47, 47-50 (J. Tuttle ed., 1978); Vargas Carreno Edmundo, *Visit on the Spot: The Experience of the Inter-American Commission on Human Rights*, in *INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS* 137, 137-148 (B.G. Ramcharan ed., 1982); F.V. Garcia-Amador, *Atribuciones de la Comision Interamericana de Derechos Humanos en Relacion con los Estados Miembros de la OEA que no son Partes en la Convencion de 1969* [*Attributions of the Inter-American Commission of Human Rights in Relation to the O.A.S. Member States That are not Part of the 1969 Convention*], in *HUMAN RIGHTS IN THE AMERICAS* 177-187 (1984).

41. See American Convention, *supra* note 1, arts. 48(1)(f), 50(1).

IV. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Commission is an entity of the OAS whose principle function is to promote the observance and defense of human rights and to serve as an advisory body to the OAS.⁴² It is a quasi-judicial body with legal, diplomatic, and political powers, established in 1959. Since its creation, the Commission has been the subject of reforms that have broadened its powers. The most important legal reform affecting the work of the Commission occurred in 1969 with the adoption of the Convention.⁴³ Today, the majority of OAS member states are parties to the Convention,⁴⁴ and, unlike the Declaration, the Convention is an international treaty. It established a sophisticated procedure for individual petitions, similar to its European counterpart⁴⁵ and, more significantly, established the Court.

Seven experts in the human rights field, elected in their individual capacities and not as government representatives, serve on the Commission. The Commission's members⁴⁶ are elected by the OAS General Assembly's member states, while only parties to the Convention may elect members of the Court. In contrast to Commission members, the Court's judges must be jurists and nationals of the member states of the OAS.⁴⁷

The Commission has three primary functions: (1) processing individual complaints of alleged human rights violations; (2) preparing reports on the human rights situations in OAS member states; and (3) proposing measures to be taken by the OAS to increase respect for human rights in the region.⁴⁸

42. See Regulations of the Inter-American Commission of Human Rights [hereinafter Regulations], June 29, 1987, art. 1, reprinted in HANDBOOK, *supra* note 20, at 117.

43. See American Convention, *supra* note 1. The American Convention or Pacto de San Jose was signed in San Jose, Costa Rica on November 22, 1969, and entered into force on July 18, 1978, with the requisite eleven OAS member state ratification.

44. The Convention has twenty-five parties. For a current list of signatories and reservations, see the OAS web site (last visited Jan. 29, 1999) <<http://www.oas.org>>.

45. See European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 25-55 [hereinafter European Convention].

46. They are not required to be attorneys. They must be persons of high moral character, however, with a recognized level of competence in the field of human rights. See American Convention, *supra* note 1, art. 34.

47. See INTERNATIONAL LAW: CASES AND MATERIALS 1034, *supra* note 39 (noting that Thomas Buergenthal, a distinguished United States legal scholar became a member of the Court on May 22, 1979, after nomination by Costa Rica, as the United States is not a party to the Convention).

48. See American Convention, *supra* note 1, art. 41. On the subject of the Commission's current powers, see MEDINA, *supra* note 25, at 113-56.

A. Processing Individual Complaints

Two categories of complaints may be brought under the Convention: (1) complaints by state parties that another state party has violated the rights protected in the Convention,⁴⁹ and (2) complaints by persons denouncing violations of the Convention by states parties under Article 44.⁵⁰ To date, the former type of complaint has never been brought. Thus, individuals may petition the Commission directly or through representatives⁵¹ and HROs may file petitions on behalf of individuals.⁵² This mechanism provides good access for HROs or any institution advocating increased recognition of children's human rights to present cases of children's rights violations.

When the Commission receives a petition, it may solicit information from the state involved, which in turn must cooperate with the proceedings.⁵³ In serious and urgent cases, the Commission, with the consent of the state involved, may carry out an independent, on-site, fact-finding investigation.⁵⁴

In serious cases, the Commission also may request the issuance of a preliminary injunction by the Court to avoid irreparable harm to children as well as to any other human being.⁵⁵ However, the Commission's request for such measures is not intended to prejudice the state in the final disposition of the case.⁵⁶ The Commission also may request the Court to adopt other provisional measures at its discretion. Nevertheless, the Commission has used this power only once in a matter concerning children's rights.⁵⁷

Petitions submitted to the Commission must satisfy certain formal requirements. Article 46 of the Convention states these requirements:

49. States must make a declaration to accept the competence of the Commission to that effect. See American Convention, *supra* note 1, art. 45(1) § 3.

50. In this case the competence of the Commission is automatically recognized. See American Convention, *supra* note 1, art. 44 § 3.

51. From 1965 to the present, the Commission has processed over 10,000 petitions. Telephone interview with Osvaldo Kreimer, *supra* note 37; American Convention, *supra* note 1, art. 44; Regulations, *supra* note 42, art. 26; A detailed examination of the individual petition procedure is made by Robert Norris, *The Individual Petition Procedure of the Inter-American System for Protection of Human Rights*, in GUIDE TO INTERNATIONAL HUMAN LAW PRACTICE 108 (H. Hannum ed., 1984).

52. The European Convention allows petitions only from those individuals who claim to have had their fundamental rights violated. See European Convention, *supra* note 45, art. 25.

53. See American Convention, *supra* note 1, art. 48(1)(d).

54. See *id.* art. 48(2); see also Regulations, *supra* note 42, art. 44(2).

55. See Regulations, *supra* note 42, arts. 29, 34(2); see also 1996 Annual Report, *supra* note 2, at 26-33.

56. See Regulations, *supra* note 42, art. 29(4).

57. See discussion *infra* part X. regarding the case against the State of Guatemala, Bosques de San Nicolás, a.k.a. Aunstraúm Villagrám et al.

- (1) A statement of the facts regarding the alleged violation(s) and the name of the State allegedly responsible;⁵⁸
- (2) Proof of exhaustion of remedies under domestic law in accordance with generally recognized principles of international law;⁵⁹
- (3) The petition must be filed six months from the date on which the party alleging violation of his/her rights was notified of the final judgment;⁶⁰
- (4) The subject of the petition cannot be pending in another international proceeding for settlement,⁶¹ and
- (5) The identification of the person or HRO filing the complaint must be provided, including name, nationality, profession, domicile, and signature of the person or legal representative of the entity lodging the petition.

In the initial phase of the proceeding, the Commission facilitates the flow of information between the parties, acting as a conduit for exchanges of information and clarifying the issues for resolution, as it is often confronted with vague or evasive responses by governments.⁶² The Commission's preference is, and should be, to seek the relevant information from the governments through compliance. In extreme cases, where a state completely fails to cooperate, the Commission may issue a warning that it intends to immediately apply Article 42 of its Regulations, which establishes a presumption of truth regarding pertinent facts in favor of the petitioner.

The Commission has been extraordinarily flexible and informal with regard to rules of evidence. It has permitted the admission of affidavits, videotaped testimonies, personal documents, newspaper clippings, and technical expert testimony. During the initial investigative period, the petitioner plays the fundamental role of providing information and supporting the proceeding. The petitioner may choose to appear in a private hearing during the Commission's sessions, personally or through a representative, to present the alleged facts and relevant evidence.⁶³

58. See American Convention, *supra* note 1, art. 46.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*; see also Stat. of the Inter-Am.C.H.R., *supra* note 20, art. 34.

63. Should the circumstances require, a hearing before the Commission during its Period of Sessions is perhaps the most timely opportunity to request an on-site investigation by the Commission or a special mission by the attorney of the Secretariat in charge of cases in the petitioner's country. See Regulations, *supra* note 42, arts. 15, 28, 67.

The Commission, on its own initiative or at the request of either party, may offer to mediate a friendly settlement of the case.⁶⁴ This procedure may be used only if the Commission considers that the alleged facts are sufficiently precise and the nature of the case is susceptible to the use of the friendly settlement mechanism.⁶⁵ In any case, all settlements must be based on respect for the human rights recognized in the Convention.⁶⁶

If the friendly settlement process is unsuccessful, the Commission may create a report with its conclusions of law and recommendations. This report is transmitted to the state involved, which is not authorized to publish it.⁶⁷ The Commission usually offers a period of three months for the state to comply with its recommendations. After this period has ended, the Commission may send the case to the Court (if the state involved has accepted the jurisdiction of the Court) or publish its final report.⁶⁸ This report is then included in the Annual Report of the Commission and presented before the General Assembly of the OAS.

Unfortunately, the most common practice followed to date is that of issuing of a final report, rather than referring it to the Court. Only fifteen cases have been brought before the Court since its creation in 1979, and only one of these cases has concerned children's rights. Nevertheless, many of these reports have had great impact and had served to effectively protect human rights.

B. Preparing Reports on Human Rights

On the Commission's own initiative⁶⁹ or by invitation from a particular state, the Commission may conduct on-site investigations, from which it has prepared reports on the situation of human rights in that specific state.⁷⁰ The request for an investigation can also be made by a political body of the OAS, such as the Meeting of

64. See *id.* art. 45(1); see also *The Structure of the Inter-American System: The Friendly Settlement before the Inter-American Commission*, 4 CEJIL Gazette 2 (1996).

65. See Regulations, *supra* note 42, art. 45(2).

66. See *id.* art. 45(1); see also *Godínez Cruz Case*, Inter-Am. C.H.R. 81, OEA/ser. L./V/III.17 doc. 13 (1987) (preliminary objections) ¶¶ 45-49.

67. See American Convention, *supra* note 1, art. 50(1),(2); Advisory Opinion of the Inter-Am. Ct.H.R. No. 13/93, July 16, 1993, ¶¶ 48-49, OEA/ser. L./V./III.29 doc. 4 (Jan. 10, 1994) (original in Spanish).

68. See American Convention, *supra* note 1, art. 51; Advisory Opinion of the Inter-Am. Ct.H.R. No. 13/93, July 16, 1993, *supra* note 66, ¶¶ 50-52.

69. See *Godínez Cruz*, *supra* note 66, ¶¶ 50-58.

70. During the last fifteen years, the Commission has prepared several country reports on human rights in the following countries: Argentina, Bolivia, Colombia, Cuba, Chile, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Surinam, and Uruguay. Telephone interview with Osvaldo Kreimer, *supra* note 37.

Consultation of Foreign Ministers.⁷¹ All visits conducted by the Commission for the purpose of reporting human rights conditions require the prior consent of the state concerned.⁷²

Although such reports were of significant importance during the widespread military rule of the region in the 1970s and 1980s, they are only an indirect channel of protection against abuse. Yet such publications do have the salutary effect of provoking strong reactions from democratic governments, the public, the media, HROs, and other political actors.⁷³ However, most reports do not address the issue of children's rights. This is a major failure of the Inter-American system to protect and promote the rights of the child. The Commission must increase its efforts to identify such violations in its reports because through publicity, the Commission can place some pressure on governments to improve their human rights situations.

V. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court of Human Rights is an autonomous judicial institution of the Inter-American system whose purpose is to apply and interpret the Convention.⁷⁴ The Convention confers on the Court two distinct judicial functions: advisory jurisdiction and contentious jurisdiction.

The advisory jurisdiction of the Court is set forth in Article 64 of the Convention.⁷⁵ Cases adjudicated under contentious jurisdiction are binding upon parties to the Convention, but those under advisory jurisdiction are not.⁷⁶ As discussed above, the Court also has special jurisdiction to adopt provisional measures in certain matters, at the request of the Commission.⁷⁷

71. See Edmundo Vargas, *Las Observaciones In Loco Practicadas Por La Comision Interamericana de Derechos Humanos [Observations In Loco Applied by the Inter-American Commission of Human Rights]*, HUMAN RIGHTS IN THE AMERICAS, *supra* note 40, at 294-295.

72. American Convention, *supra* note 1, arts. 48(2), 44; see Regulations, *supra* note 42, art. 44.

73. *Id.* art. 62(3).

74. See Statute of the Inter-Am. C.H.R., *supra* note 20, art. 1.

75. Article 64 of the American Convention reads as follows:

(1) The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. . . . (2) The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

76. See Interpretation of Peace Treaties and Advisory Opinions, 1950 I.C.J. 71-72.

77. See *supra* part IV.

A. Advisory Jurisdiction

The Court's advisory jurisdiction is very broad. It allows the Court to interpret the Convention as well as other human rights treaties and to examine the compatibility of domestic law with such instruments.⁷⁸ Advisory opinions may be requested by all OAS member states, regardless of whether they have ratified the Convention, and by permanent organs of the OAS, such as the Commission, in matters relating to their functions.⁷⁹ A state may request an advisory opinion to test the compatibility of its own law with the American Convention, while avoiding the legally binding result that would follow from a judgment by the Court in a contentious case.⁸⁰

In the last ten years, the Court has issued fourteen advisory opinions, with varying effects.⁸¹ Unfortunately, no advisory opinions have been issued in the area of children's rights, despite the fact that the Court could strongly reaffirm the importance of the promotion and total respect of human rights through an opinion on this issue. Such an opinion could prevent further violations, or at minimum, decrease the currently unacceptable frequency of occurrence.

An example illustrating the positive effect of advisory opinions on increasing protection of human rights is found in the advisory opinion reaffirming restrictions on the death penalty as established in Article 4 of the Convention.⁸² An advisory opinion on this subject was particularly effective in stopping a party that had placed a reservation upon ratification of the Convention regarding this Article. Guatemala ceased its practice of executing individuals allegedly involved in common crimes related to political offenses shortly before the Court issued its opinion.⁸³

78. See American Convention, *supra* note 1, art. 64(1); Advisory Opinion on "Other Treaties" Subject to the Advisory Jurisdiction of the Court, Inter-Am. Ct.H.R., OC-1/82 of Sept. 24, 1982, Inter-Am. C.H.R. (ser. A), No.1 (Sept. 24, 1982); Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1 (1985).

79. See American Convention, *supra* note 1, art. 64(2).

80. R. LILICH & H. HANNUM, INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW AND PRACTICE 805 (3d ed. 1995).

81. Of those opinions, the Commission has requested three. State Parties that requested advisory opinions by the Court include: Argentina, Chile, Peru, Costa Rica, Uruguay and Colombia. Telephone interview with Osvaldo Kreimer, *supra* note 37.

82. "In no case shall capital punishment be inflicted for political offenses or related common crimes." American Convention, *supra* note 1, art. 4(4); *see also id.*, art. 4(2).

83. See Bert B. Lockwood, Jr., *Advisory Opinions of the Inter-American Court of Human Rights*, in 13 DENV. J. INT'L L. & POL'Y 245, 245-67 (1984); Charles Moyer & David Padilla, *Executions in Guatemala as Decreed by Court of Special Jurisdiction in 1982-82: A Case Study*, in 6 HUM. RTS. Q. 507, 520 (1984); Thomas Buergenthal, *The Inter-American Court: Human Rights and the OAS*, 7 HUM. RTS. L.J. 157, 158 (1986).

Equally significant was the Court's opinion establishing the principle that even under states of emergency, the writ of habeas corpus could not be suspended as an essential judicial guarantee for the protection of individual rights.⁸⁴ The government of Nicaragua, which had previously suspended the right of habeas corpus during states of emergency, halted this policy following the Court's opinion. On the other hand, the Panamanian government continued to suspend the right of habeas corpus during states of emergency, even after several pleas by the Commission to stop, without any acknowledgment of the Commission's requests.⁸⁵

These examples show the utility of the advisory opinion mechanism. Thus, it is important that the Commission or the member states request an advisory opinion from the Court regarding the scope of obligations under the Convention relative to children.

B. Contentious Jurisdiction

The Court's contentious jurisdiction is set forth in Article 62 of the Convention. Under its contentious jurisdiction, the Court has binding authority to consider and decide cases concerning the interpretation and application of the Convention. Upon a finding of violation of the Convention by a party, the Court may decide that an injured party be guaranteed the exercise of the violated right and, if appropriate, order the payment of fair compensation.⁸⁶

Only the Commission and parties with prior recognition of the Court's jurisdiction, or that recognize jurisdiction for a particular case, may submit cases to the Court.⁸⁷ Twenty-five OAS member states have ratified the Convention; but only seventeen of these have recognized the contentious jurisdiction of the Court.⁸⁸ The

84. The suspension of habeas corpus is prohibited by the American Convention, *supra* note 1, arts. 7(6), 25(1), 27(2).

85. See PAN. CONST. art. 51 (stating that habeas corpus may be suspended under states of emergency. Panamanian authorities declared states of emergency on several different occasions during 1987-89 suspending habeas corpus. See Report on the Situation of Human Rights in Panama, Inter-Am. C.H.R. 9-13, OEA/ser. P AG/doc. 2509/89 rev. 1 (Nov. 18, 1989) (original in Spanish).

86. See American Convention, *supra* note 1, art. 63(1).

87. See *id.* art. 61(1).

88. To date, parties that have recognized the Court's jurisdiction in conformity with Article 62 of the Convention include: Argentina, Bolivia, Colombia, Costa Rica, Chile, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, Uruguay, and Venezuela. See 1996 Annual Report, *supra* note 2, at 771. Some countries (e.g., Argentina in 1984, Colombia in 1985, and Guatemala in 1987) have limited the Court's jurisdiction to violations that occurred after the date of acceptance. See *id.*; see also Linda Drucker, *Governmental Liability for "Disappearances": A Landmark Ruling by the Inter-American Court of Human Rights*, 25 STAN. J. INT'L L. 289, 295-297 (1989).

Commission has unsuccessfully requested parties that have not recognized the Court's jurisdiction to accept it in particular cases.

Judgments of the Court are final and not subject to appeal. A judgment for compensatory damages may be executed in the country concerned in accordance with domestic procedures. However, in cases of disagreement over the meaning or scope of a judgment, parties must request a clarification from the Court within ninety days after notification of the judgment.⁸⁹

In the exercise of its contentious jurisdiction, the Court has established important precedents relating various subjects: forced disappearance,⁹⁰ the extension of the duty to guarantee rights,⁹¹ the concept of fair compensation,⁹² and the extension of reparations.⁹³ The impact of the Court's judgments in the region is evidenced in a variety of ways. For example, relatives of the victims have obtained compensation and persons arbitrarily detained have been released. But as discussed above, the Court has not had the opportunity to make a pronouncement regarding the human rights of children until January 1999. When states fail to comply with Court judgments or recommendations, the Court may submit their cases to a regular session of the General Assembly or to the Permanent Council when the Assembly is not in session for its review.⁹⁴

VI. ROLE OF NON-GOVERNMENTAL ORGANIZATIONS BEFORE THE INTER-AMERICAN SYSTEM

By the early 1970s, the use of the Commission as a forum for filing human rights petitions had become widespread due to the well-documented repression and atrocities committed during the military dictatorships in Argentina, Chile, and Uruguay.⁹⁵ The same

89. See American Convention, *supra* note 1, arts. 67-68; see also *Godínez Cruz Case*; see also Interpretation of the Compensatory Damages Judgment of Aug. 17, 1990 (art. 67 American Convention) Inter-Am. C.H.R.; see also Series C: Decisions and Judgments No. 10; Secretariat of the Court, San Jose, Costa Rica. 1992.

90. See Inter-Am. C.H.R.: Judgment in *Velasquez Rodríguez case*, July 29, 1988, 28 I.L.M. 291, 321-323 (1989).

91. See *id.* at 329.

92. See *Velasquez Rodríguez case*, Compensatory Damages, Judgment of July 21, 1989, Inter-Am. C.H.R., ser. C, No. 7 (1990).

93. See *El Amparo case*, Judgment of Jan. 18, 1995; see also *Neira Alegria case*, Reparations Judgment of Sept. 19, 1996, 1996 Annual Report, *supra* note 2, at 39.

94. See American Convention, *supra* note 1, art. 65.

95. Report on the Situation of Human Rights in Argentina, Inter-Am. C.H.R. OEA/ser. L./V./II.49, doc. 19 corr.1 (Apr. 11, 1980) (original in Spanish); Report on the Status of Human Rights in Chile: Findings of On-Site Observations in the Republic of Chile, July 22-Aug. 2, 1974, Inter-Am. C.H.R. OEA/ser. L./V./II.34 doc. 21 corr. 1 (Oct. 25, 1974) (original in Spanish); Second Report on the Situation of Human Rights in Chile, Inter-Am. C.H.R. OEA/ser. L./V./II.37, doc. 19 corr.1 (June 28, 1976) (original in Spanish); Third Report on the Situation of

era gave birth to a group of HROs and saw the professionalization of a growing number of advocates who learned how to represent victims and their families,⁹⁶ primarily due to the propitious wording of Article 44 of the American Convention. The Convention states "[a]ny person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."⁹⁷

Ample access is available through the Inter-American System for HROs willing to advocate for the human rights of children and other vulnerable groups. HROs may present individual complaints, investigate, present evidence, advocate in the course of hearings before the Commission, assist during on-site visits, assist in negotiations aimed at friendly settlement, and serve as legal advisors to the Commission in litigation before the Court. HROs may also present amicus curiae briefs and oral arguments in advisory and contentious cases brought before the Court, make requests for provisional measures to avoid irreparable harm in serious and urgent cases, and conduct follow up investigations regarding Commission recommendations and Court decisions. Today, the usual procedure is for a victim to present a complaint to a local HRO in the victim's home country, and after investigation and verification, it is presented to the Commission by an international team of lawyers. The ever-increasing influence and success of HROs in the operation of the system is due in part to the creation of transnational coalitions and networks.⁹⁸

VII. PROTECTING CHILDREN'S RIGHTS BEFORE THE INTER-AMERICAN SYSTEM: CEJIL'S EXPERIENCE

The Center for Justice and International Law (CEJIL) was founded in 1991. CEJIL is an HRO based in Washington, D.C., which seeks full compliance of domestic practices with international human rights standards through litigation in the Inter-American system. Due to an ever-increasing caseload, CEJIL must select cases based on the following criteria:

Human Rights in Chile, Inter-Am. C.H.R. OEA/ser. L./V./II.40, doc. 10, (Feb. 11, 1977) (original in Spanish); Report on the Situation of Human Rights in Uruguay, Inter-Am. C.H.R. OEA/ser L./V./II.43 doc.19 corr.1, (Jan. 31, 1978) (original in Spanish).

96. David Padilla, *The Inter-American Commission on Human Rights of the OAS: A Case Study*, 9 AM. U. J. INT'L L. & POL'Y 95, 97 (1993).

97. See American Convention, *supra* note 1, art. 44

98. See generally David Weissbrodt & James McCarthy, *Fact-Finding by Non-Governmental Organizations*, in INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS 186 (B.G. Ramcharan ed., 1982) (discussing HRO fact-finding role in the implementation of human rights).

- (a) *Merits and evidence*: cases that represent the most pressing current human rights issues and cases with strong, accessible and available evidence;
- (b) *Ripeness*: cases that offer a timely opportunity to expand domestic and international human rights law in substantive and procedural matters;⁹⁹
- (c) *Potential for the development of jurisprudence*: cases that involve new legal challenges for domestic and international human rights law;¹⁰⁰
- (d) *Domestic significance*: cases that will define a country's domestic policies regarding international human rights norms; cases that are politically significant in the country; and cases which allow for follow-up in cooperation with local human rights organizations;
- (e) *Needs of the victims and their relatives*: cases that provide a vehicle for fair monetary and ethical compensation to individuals and, if applicable, the restoration of the victim's rights.¹⁰¹

In a relatively short time, CEJIL has obtained significant decisions from the Commission regarding children's human rights, and successfully brought the first and only case before the Court regarding children.

As a strategic litigation body, CEJIL is mainly concerned with conducting research and presenting complaints and evidence before the Court, making requests for provisional measures, providing advocacy in the course of hearings, and following up on the decisions of this body. CEJIL has accompanied the Commission and supported local HROs during on-site visits to Brazil, Mexico, and the Dominican Republic in recent years (1995-1997). It also participates in negotiations aimed at friendly settlement whenever this solution offers potential relief for a victim of a human rights violation.

99. For instance, some domestic courts define torture as the use of force to extract information while the victim is in detention. In fact, any excessively forceful, degrading, cruel and inhuman physical or psychological treatment of persons could constitute torture. Through the litigation of relevant and illustrative cases, CEJIL can help to educate and change public opinion about the incidence of torture. By bringing particular cases of torture before the Commission and the Court, CEJIL will help set precedents to develop an expansive and progressive concept of human rights that strengthens the broad principles of the American Convention.

100. CEJIL uses international humanitarian law, in conjunction with human rights treaties, to hold state agents accountable for violations.

101. Victims of human rights violations deserve to be fairly compensated for their suffering. Victims or their relatives should receive monetary compensation (in an amount equivalent to the material and psychological damage or loss), ethical compensation such as a public apology by the authorities (to re-establish the dignity and honor of the victim), and punitive damages.

As legal advisors of the Commission before the Inter-American Court, CEJIL's attorneys have played an active role in formulating petitions, making requests that certain matters be taken to the Court, drafting demands and memoranda to the tribunal, proposing and examining witnesses and experts, and rendering oral arguments. CEJIL also participates in every phase of the cases it brings, ranging from arguing the merits to setting forth damages schedules and dealing with procedural issues.

VIII. LITIGATING FOR CHILDREN THROUGH THE INTER-AMERICAN SYSTEM

Being a minor generates a particular circumstance in which the individual's human rights are even more vulnerable than that of an adult. The purpose of Article 19 of the American Convention is to create juridical responsibility on the part of the member states to protect and create all necessary mechanisms to prevent and compensate violations of children's human rights.

As discussed above,¹⁰² the Inter-American system for the protection of human rights is a tool available to any individual or HRO willing to defend children's rights. The potential to achieve the protection and respect of children's rights are even greater under the Inter-American system and the United Nations Conventions on the Rights of the Child because, unlike the latter, the former permits the presentation of individual cases. Nevertheless, Article 19 has proved a paper tiger, as children's rights remain undeveloped within the Inter-American system.

CEJIL has witnessed many abuses against children. It has received and investigated cases of torture, arbitrary execution, arbitrary detentions, detention of minors in adult penal facilities, inhumane prison conditions, and sexual abuse. Yet, that the Commission has brought only one case before the Court (in January 1997) proves there is insufficient interest in promoting children's rights in the Americas.¹⁰³

CEJIL has been vigorous in locating children's rights cases and presenting as many as possible to the Commission. It has repeatedly requested the Commission to take precautionary measures and has presented cases that raise awareness of children's plight, with the goal of compelling regional governments to address and take responsibility for the basic rights of children.

102. See discussion *supra* part VIII.

103. See discussion of this case *infra* part X.

IX. ILLUSTRATIVE CASES

CEJIL has brought cases before the Commission involving torture, sexual abuse, arbitrary detention, executions, and inhumane treatment. Fifteen cases have been filed with the Commission; but so far only one has reached the Court: *Aunstraúm Villagrám, et al.*, Case No. 11,383.¹⁰⁴ A description of some of the cases brought before the Commission follows, organized alphabetically by nation.

A. *Argentina*1. *Degrading Treatment, Protection of Dignity, X, Y, et al. (Case Number 10,506)*

In 1989, CEJIL, in conjunction with local lawyers and Americas Watch, submitted this case to challenge to the regulations of the Argentinean Federal Penitentiary Service, which permits vaginal inspection of wives and daughters visiting inmates. The Supreme Court of Argentina upheld the statute. Argentina asserts that the statute is consistent with the Convention as applied, given that vaginal inspections are not the norm. Rather, it contends that only those female visitors of inmates who are reasonably suspected of being a danger to themselves or others are subject to vaginal inspection. In 1997, the Commission recommended the government of Argentina adopt legislative measures prohibiting such inspections, and adequately compensate the victims. Due to such recommendations Argentina changed its regulations.

B. *Brazil*1. *Attempted Homicide of a Minor, Edson Damiao Calixto (Case No. 11,285)*

On December 28, 1991, Edson Damiao Calixto, a fourteen-year-old living in the slums on the outskirts of Recife, was allegedly beaten, shot several times, and abandoned by police who accused him of robbery. Miraculously, Edson survived, although he remains paralyzed from his injuries. In October of 1993, three military police officers were accused of the crime. On February 22, 1994, CEJIL denounced the events before the Commission, requesting that Brazil be condemned for violating Edson's rights to physical integrity, protection from arbitrary detention, and due process. The Commission

104. For continuously updated information regarding this case, see <<http://www.casa-alianza.org/EN/human-rights/violations/bosques.shtml>>.

opened the case on May 20, 1994. Although Brazil informed the Commission in November 1994 that it had initiated legal proceedings in the military and civil tribunals, the prosecution did not progress. A final decision on this case has not yet been issued.

2. *Violation of the Right to Life, Roselandio Borges (Case Number 11,290)*

On January 17, 1991, sixteen-year-old Roselandio Borges Serrano was paralyzed from a gunshot wound to the back. The police fired the shot as he was riding a horse in Peixinhos, a slum near Olinda in the state of Pernambuco. In the military courts, the only police officer accused was found innocent for acting in self-defense, despite evidence that the officer had shot Roselandio in the back purportedly without provocation, and that he may have convinced other officers to testify falsely before the military court. This case is still pending.

3. *Violation of the Right to Life, Aluisio Calvacanti Junior and Claudio Aparecido de Moraes (Case Number 11,286)*

On March 4, 1987, in Sao Paulo, the military police allegedly brought Aluisio and Claudio, eighteen and sixteen years of age respectively, to a vacant lot and shot them both in the back of the head. Aluisio died instantly, but Claudio survived. He escaped and sought help after the police dumped them into a wooded area. No one has been arrested for this crime. In February 1994, CEJIL petitioned the Commission to condemn Brazil for violation of the human rights of these minors. A year later, CEJIL transferred control of the case to the Santo Dias Center of Sao Paulo, another human rights organization involved in the denunciation of the events described.

C. Guatemala

1. *Physical Integrity, Juan Jose Menez et al. (Case Number 12,020)*

CEJIL presented a complaint to the Commission on February 19, 1998, alleging a violation against Juan Jose's right to physical integrity under Article 5 by four private security guards of a commercial building in Guatemala City. According to the testimony of Juan Jose, he and another street child were near the building when the guards, who were making rounds with attack dogs, took the muzzles off the dogs and ordered them to attack the children. As a result, Juan was severely bitten on his chest and right leg. The guards then locked up Juan and his friend and threw cold water on them. The boys escaped from the basement when the guards were

distracted and ran to Casa Alianza's shelter to tend to their wounds. CEJIL believes the victims' rights to judicial protection under Articles 8 and 25 have been violated as well as the rights of the child found in Article 19. It is CEJIL's view that the State of Guatemala is unwilling to conduct an efficient investigation and sanction those responsible. This case is particularly important because, as in other Guatemalan cases, it involves private security agents who are not supervised by the national police nor have legislative restraints. To the contrary, private security forces remain in all cases thus far immune. CEJIL is now expecting the first response from the Guatemalan government on the allegations presented before the Inter-American Commission.

2. Violation of the Right to Life, Sergio Manuel Fuentes Chavez (Case Number 11,554)

A private security agent in South Market No. 2 of Guatemala City allegedly shot Sergio Miguel Fuentes Chávez, a street child, because he was suspected of a theft. This case again implicates private security agents, one of the main sources of cruel and violent acts against street children in Guatemala. On November 27, 1995, CEJIL filed this complaint jointly with Casa Alianza before the Commission. In March 1997, a hearing was held regarding the admissibility of the case. The admissibility has not yet been granted.

3. Violation of the Right to Life, Juan Humberto Ramos Cifuentes and Cecilio Jax (Case Number 11,544)

In this case, the victims were street children of nineteen and sixteen years, respectively. They disappeared in the early morning hours on July 20, 1994, after being forced into a car by several strangers whose license plates were clearly identified by witnesses. Their bodies were found the same day in a trash bin with nearly twenty gunshot wounds each. They were immediately buried without being identified. The mother of the children heard of the events from a friend who had witnessed the acts and identified the bodies using the National Police's files of photographs of deceased persons. CEJIL and Casa Alianza filed this complaint before the Commission on October 18, 1995. CEJIL participated in a hearing regarding admissibility of the case in October 1998 sessions of the Commission.

D. Honduras

1. Martha María Saire (Case Number 11,545)

Martha María Saire is an eleven-year-old girl who suffers from mental disorders. She was brought to Hogar de Orientación Tamara,

the state mental institution for adults. In April 1994, two guards employed by the institution raped María Saire. Her case was presented to the Commission in September 1995, and in October 1995, the Commission formally initiated the case. After presentation of the evidence, the government of Honduras prosecuted and convicted the two guards. The case remains open as to damages and reparations in favor of this child.

2. *Carlos Enrique Jaco (Case Number. 11,805)*

Carlos Enrique Jaco was detained by the authorities in November 1994 and accused of robbery. He informed police authorities that he was sixteen-years-old, but despite his age, he was sent to an adult prison facility. After eight months, a judge ordered a forensic exam to determine his age, confirming his statement. One year later, a second forensic examination was ordered, but the judge waited eighteen months to send his file to the proper jurisdiction. In the interim, as a result of this judicial negligence, an adult inmate murdered Carlos Enrique Jaco. His case was presented to the Commission on September 1997.

3. *Ramon Hernández Berrios, et al. (Case Number 11,802)*

These victims are eight minors that were illegally held in an adult prison, where the prison director and an adult inmate allegedly tortured them. In November 1995, the director ordered the inmate to hang the minors upside down, and to tie their hands behind them. The youths remained in this position for twelve hours while the director beat them. This case was filed before the Commission in August 1997.

E. Paraguay

1. *Mistreatment of Incarcerated Minors, Instituto Panchito López (Case Number 11,666)*

This case was brought before the Commission as a result of the extreme physical and psychological violence that young people are subjected to in the Panchito López Penitentiary for minors. The Tekojoja Foundation¹⁰⁵ brought a habeas corpus proceeding before the Paraguayan Courts to halt the confinement there. The legal proceedings demonstrated the uninhabitable conditions and inhumane,

105. An Paraguayan human rights foundation specializing in the legal protection of poor children.

degrading treatment the minors are subjected to. Among other things, there was evidence of overcrowded conditions, continuous violence, malnourishment, a lack of beds or mattresses, and a lack of basic medical attention. The Paraguayan Supreme Court has effectively frozen any further proceedings in this case, despite repeated requests for a resolution. The Tekojoja Foundation and CEJIL presented this case to the Commission on August 14, 1996. There was a hearing in October 1997 before the Inter-American Commission requesting a friendly settlement to improve the situation of these minors.

X. BOSQUES DE SAN NICOLÁS, CASE NUMBER 11,383

As discussed above, only one children's human rights case has reach the stage of the Court since the American Convention on Human Rights entered into force twenty years ago in 1979. This tends to demonstrate that development in children's protection has been weak, slow, and ineffective in the Americas. The *Bosques de San Nicolás* case, also known as *Aunstraúm Villagrám et al.*, is significant because it is the first case regarding street children to come before a major international tribunal. CEJIL litigated this case against the State of Guatemala before the Commission and the Court. CEJIL and Casa Alianza filed this case before the Commission on September 15, 1994, for violations of Article 4 (life), Article 5 (personal integrity), Article 7 (personal liberty), Article 8 (judicial guarantees), Article 25 (judicial protection), and Article 19 (rights of the child). A judgement is expected by the end of this year. The facts of this noteworthy case follow.

On June 15, 1990, eighteen-year-old Henrio Contreras, twenty-year-old Federico Figueroa, fifteen-year-old Julio Caal Sandoval, and seventeen-year-old Jovito Suárez were kidnapped and executed. Four men put the victims in a vehicle in the center of Guatemala City, in front of numerous witnesses. Their bodies were found the following day in a zone called Bosques de San Nicolás. The corpses showed signs of extreme torture and mutilation, including their eyes gouged out, tongues and ears cut off, as well as multiple bullet wounds.

On June 24, three policemen allegedly killed a young friend of the victims, seventeen-year-old Aunstraúm Villagrám Morales. His life, the lives of relatives of the victims, and the lives of witnesses of the incidents had been threatened day before. The accused are members of the national police. Although evidence against them existed, the trial court acquitted them and subsequent appeals were rejected.

The Commission appointed CEJIL's lawyers as legal advisors on the case and it was presented before the Court on January 30, 1997. In the petition, the Commission requested the Court find the State of Guatemala guilty of violating the Convention and require the government to compensate the victims' families.

In October 1997, the Court issued the sentence on the preliminary exceptions requested by the Government, dismissing the government's arguments regarding admissibility of the case. On January 28 and 29, 1999, the hearing on the merits of the case was held. The Commission and CEJIL called eleven witnesses. A judgment is expected in November of 1999. After the judgment is issued, if the State of Guatemala is condemned, the case will move to the reparation stage.

XI. CONCLUSION AND PROPOSALS

The possibility conferred within the Inter-American system of presenting individual cases is a major tool that could strengthen the rights of the child. Use of Article 19 of the Convention and the mechanisms of the Inter-American Commission and Inter-American Court on Human Rights remain generally underdeveloped areas of the law. Nevertheless, the mechanisms available have demonstrated some efficiency.

Within the Inter-American regional system other improvements are needed to promote and provide the special attention that children require. The Commission should apply, as it has in other matters regarding Article 29 of American Convention,¹⁰⁶ the United Nations Convention on the Rights of the Child to interpret the use of Article 19 of the American Convention. The U.N. Convention is a complete international juridical instrument that embraces all the institutional aspects concerning the well being of children around the world (*inter alia*, right to life, a name, education, and freedom of expression). The Commission should also use other international instruments such as the United Nations Minimum Rules for the

106. "No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." American Convention, *supra* note 1, art. 29.

Administration of Justice of Minors (Beijing Rules)¹⁰⁷ and the U.N. Convention against Torture.¹⁰⁸ Additionally, the Commission should consider exploring the scope of Article 19 of the Convention by requesting the Court to issue an Advisory Opinion to help clarify this elusive Article.

A "Rapporteur" could be appointed by the Commission to monitor human rights violations concerning the rights of children, as it is within the practice of this body to appoint Rapporteurs for particular human rights issues.¹⁰⁹ Such an expert could observe and evaluate the human rights situation of children in the Americas. An appointment in this area would also emphasize and recognize the importance of respecting and promoting the rights of the child.

Another possible way to increase the promotion and respect of the rights of children would be for the Commission, as it has done in the past in its country reports,¹¹⁰ to include the theme of the Rights of the Child. The Commission should step up its inclusion of this topic in country reports.

The Commission could also enhance the depth of its current practice of issuing reports rather than bringing more cases before the Court. In this regard, the Commission should also apply a more severe level of scrutiny to cases regarding children, so these cases can more readily be brought before the Court. The fact that only one case concerning the rights of children has been litigated is a major concern.

CEJIL has seen a huge increase in the number of cases of human rights violation where children are the victims. Its experience before the Commission has had both positive and negative results. On the positive side is the fact that some cases have brought about changes in domestic law, such as the Honduras and Argentina cases, where minors were illegally detained and sent to adult penal facilities. The law permitting such activities was repealed after the cases were

107. United Nations, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, U.N. Doc. A/RES/40/33 (1985) [hereinafter "Beijing Rules"]. These standards require a government's juvenile justice system to emphasize the well being of the juvenile, *id.* at §5.1, and provide basic procedural safeguards including presumption of innocence, right to counsel, and the right to the presence of a parent or guardian. *Id.* §§ 7.1, 15.1, 15.2. The Beijing Rules also call for diversion from the criminal system wherever possible, *id.* §§11.1-11.4, a speedy trial on charges, *id.* § 20.1, and use of detention pending trial and incarceration as punishment only as a last resort. *Id.* §§ 13.1, 17.1, 19.1.

108. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984), *modified by* 24 I.L.M. 535 (1985).

109. In the past, the Commission has appointed Rapporteurs on various issues such as displaced people, women's rights, indigenous people and prison conditions. Telephone interview with Osvaldo Kreimer, *supra* note 37.

110. See Fourth Report of the Human Rights Situation in Guatemala, Inter-Am. C.H.R. at 97, OEA/ser. L./V./II.83, doc. 16 rev. (June 1, 1993) (original in Spanish).

brought before the Commission. In Honduras, the two guards that sexually abused an eleven-year-old child were convicted after the case was presented to the Commission. An outstanding achievement is the Bosques de San Nicolás case currently before the Inter-American Court, which marks a major triumph for children in the Americas. For the first time, an individual case involving serious human rights violations of children has reached the jurisdiction of the Court.¹¹¹

111 The following list sets forth the items that must be included in a complaint filed before the Inter-American Commission on Human Rights.

1. A brief and clear description of the facts of the case, indicating the names of the victims and the identification (if possible) of the author of the violation.

2. An explanation regarding exhaustion of local remedies were exhausted, describing all actions taken, stating court names and judgment dates. If applicable, it is advisable to argue any of the exceptions foreseen in article 46.2 of the Convention at this point.

3. A description of domestic legislation that is relevant and accessible to an individual who is not a lawyer from the State being denounced.

4. A section stating which articles of the American Convention were violated.

5. A conclusion regarding the obligation of the State involved to observe the American Convention, including date of ratification.

The conclusions should also include a clear petition in regard of the opening of the case and considering it admissible. Should also mentioned that the state must be condemned of violating the rights already mentioned and that such violations must be adequately repaired.

6. If a victim or a witness of the case is in danger, preventive measures can be requested as well.

7. The complaint should be address to:

Ambassador Jorge E. Taiana

Executive Secretary

Inter-American Commission on Human Rights

1889 F Street

Washington, D.C. 20006

Telephone No. (202) 458.6002

Telefax No. (202) 458.3992

8. Do not forget to include in the complaint contacting telephone numbers.

