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# **АКТУАЛЬНЫЕ ВОПРОСЫ МЕЖДУНАРОДНОГО ПРАВА**

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## **THE FUNCTIONS OF INTER-AMERICAN COURT AND COMMISSION OF HUMAN RIGHTS**

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Departing from the proposition that the universality of human rights is compatible with the existence of regional systems to protection and promotion of human rights, the author explores the Inter-American mechanisms in this field. The legal basis and activities of the Inter-American Commission of Human Rights and Inter-American Court of Human Rights are analyzed alongside with certain particular issues, such as provisional measures and the supervision of the execution of judgements.

**Key words:** human rights, regional systems of protection and promotion of human rights, Inter-American system of protection and promotion of human rights, Inter-American Commission of Human Rights, Inter-American Court of Human rights

*If it is certain that the 20th century has been the scenario for cruelties against the human person on a hitherto unprecedented scale, it is certain that a reaction against those atrocities and abuses — equally unprecedented — has been generated as a manifestation about the discovering of juridical awareness under an universal proportion for the most urgent needs of human being protection. The most important and precious result in this evolution can be identified, and with no hesitation, on historical, definitive and irreversible conquest of the direct access from the individual to justice at the international level, as a true emancipation of the human being against all the domination ways or arbitrary power.*

*The recognizing of centrality of human rights definitively corresponds to a new ethos of our time.*  
(Antonio Augusto Canzado Trindade)

### *I. The inter-american system of protection and promotion of human rights*

The universality of human rights is compatible with the existence of Systems to Protection and Promotion of Human Rights under a regional ambit which faces the search for more specific solutions related to characteristic problems of the regions.

In our hemisphere, the Inter-American System was created to constitute the mark for the promotion and protection of human rights. It is structured, according to the Inter-American Court of Human Rights (IHR Court), under the principle of legality, and with the democratic institutions and of the State Law, which are inseparable (OC 6/86), integration that complement itself with the guarantees and give stability to the system [1. P. 165].

The legality regime which must assure the organizations of Inter-American System finds its basis on proclamation of fundamental rights of human person, on the Letter of Organization and on the American Declaration of the Rights and Duties of Man, which was made by the American States with the conviction that «the juridical organization is a necessary condition for safety and peace, which is founded on moral and justice order».

From this proclamation and as the result of a progressive work during the rest of 20<sup>th</sup> century and the beginning of the 21<sup>st</sup>, a *sui generis* regime was created, whose substantive dimension is completed with: the American Convention; the Additional Protocol to the American Convention on Economic, Social, Cultural and Rights; the Protocol to the American Convention on Human Rights to Abolish Death Penalty; the Inter-American Convention to Prevent and Sanction Torture; the Inter-American Convention to Prevent, Sanction and Eradicate Violence against Women; and the Inter-American Convention on Elimination of all Forms of Discrimination against Persons with Disabilities.

Nevertheless, only the Letter and Convention establish the adjective legality regime to the actions of system organizations. The other instruments refer to the Convention regarding the procedures [2].

The pillars are: the Inter-American Commission on Human Rights ([www.cidh.org](http://www.cidh.org)), with seat at Washington D.C., and the Inter-American Court on Human Rights ([www.corteidh.or.cr](http://www.corteidh.or.cr)), located at San Jose, Costa Rica.

The Inter-American System of human rights protection is built on the basis of full autonomy and independency of their organizations to exercise the functions attributed to them [3].

## *II. A comissão interamericana de direitos humanos*

The adoption (1969) and the validity (1978) of the American Convention (ACHR) is the most important step of the Nations from the Hemisphere, in order to establish juridical obligations on human rights scope. For the States which ratified the Convention, the duties it establishes have a conventional character. Besides, Argentina incorporated the block of constitutionality, therefore, to the Argentinean juridical ordainment, it has constitutional status.

The Inter-American Commission on Human Rights (IHR Commission) is one of two entities from the Inter-American System of Protection and Promotion of Human Rights in Americas. It is an independent and main organization from Organization of American States — OAS, whose mandate arose from the Letter of OAS and the American Convention on Human Rights; it functions on representation of all coun-

tries members of OAS and it is consisted of seven independent components which work in a personal way, they do not represent any country in particular and they are elected by the General Assembly [4].

The Commission aims mainly to promote the observance and the defense of human rights and during the exercise of its mandate, it also aims to:

Receive, analyze and investigate individual petitions which allege violations of human rights according to what is determined on the articles 44 to 51 of the Convention.

Observe the general validity of human rights on Member States, and when it is convenient, special reports about the situation (in a State, particularly) are published.

Visit the countries to examine carefully the general observation of the situation or to investigate a determined one. Generally, these visits result in elaboration of a respective report, which is published and sent to the General Assembly.

Stimulate the awareness of human rights in American countries. Because of this, the Commission also aims to study and publish about specific themes. For instance: measures to guarantee more independence of the judicial power; activities of the irregular armed groups; the situation of human rights of the minors, the women, and the Indigenous.

Take part of conferences and reunions of different kinds with the representatives of governments, academics, non-governmental organizations to spread and analyze issues related to Inter-American System Human Rights.

Recommend the Member States of OAS about the adoption of measures to contribute on the promotion and guarantee of human rights.

Require the States to take specific «prevent measures» to avoid serious and irreparable damages to human rights in urgent cases. It may also request the Inter-American Court to adopt «prevent measures» from the governments in urgent and dangerous cases to peoples, even if the case still has not been submitted to the Court.

Present cases to jurisdiction of the Inter-American Court and acts in the presence of the Court on these litigations.

Request «consultive bodies» to the Inter-American Court on aspects of interpretation of the American Convention [4].

The Commission exercise functions within three categories, with the basic aim to promote the observance and the defense of human rights: i) the administrative ones; ii) the consultive and promotional ones; and, iii) the semi judicial ones, according the established articles 44<sup>th</sup> to 51<sup>st</sup> on Convention [5].

The Commission is competent to receive individual complaints coming from the Member States of the Convention, as well as the Member States of the OAS that have not ratified the Convention. It is assisted by an Executive Secretary Continued to carry out its functions. The on-site visits usually provide material for the preparation of reports.

It is also empowered, in serious and urgent situations, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the object of the process in connection with a peti-

tion or pending case. As well as the people who are under its jurisdiction, regardless of any request or pending case.

It is also entitled, in situations of gravity and urgency, on its own initiative or at the request of the party, to request that a State adopts precautionary measures to prevent irreparable damage to the persons or the object of the process in connection with a petition or in a pending case. As well as people who are under its jurisdiction, regardless of any request or pending case.

The mechanism of precautionary measures is provided on the article 25<sup>th</sup> from the Regulation of the Commission HDI. It may be of collective nature in order to avoid irreparable damage to people because of its link with an organization, group or community of determined people or determinables.

The regulation provides the granting of such measures and their adoption by the State will not constitute prejudgment on the violation of the rights protected by the American Convention of Human Rights and other applicable instruments.

The Commission publishes Annual Reports and Special Rapporteurs. Among these are national reports — even the writing of this essay, approximately 63 — thematic (1) and others of interest.

The procedure for the individual petitions is a resource provided on the Convention, and in which any person may propose an international mechanism when it may be considered as the main factor to break their fundamental rights and of national law — the subsidiarity principle — and which is not able to prevent or correct this breach. Here, the competence by reason of the person is very large, because the complaint may be submitted by any individual, including third parties, that is not the victim —, also by non-governmental organizations — NGOs —, the States and even of his own will.

Regarding the individual petitions, the Commission must comply with the guidelines established by the OAS Charter, the American Convention, the Statutes and Regulations of the organ itself, which determines the framework for the legality of their procedures.

The processing of individual petitions shall be governed by the guarantees which have guaranteed the parts the exercise of the rights of the defense in the procedure.

For the processing of individual communications, it requires that there is no complaint about the probable violation of the American Convention by a State. From this circumstance, the Commission shall decide on the existence of the violation. The final resolution of the dispute, for sentencing, corresponds to the Inter-American Court [6].

The Article 41 of the American Convention establishes the Commission other tasks for the promotion and protection of human rights. Among these, it is included the formulation of recommendations to Member States to adopt measures favoring the human rights, the preparation of studies and reports appropriate to the performance of the functions conferred on the Commission, the completion of site visits and the attention to the consultations of the Organization.

The recommendations of the Commission are binding and must be complied with in good faith by the Member Parts of the American Convention. This is the case, the application of the Vienna Convention on the Law of Treaties, which requires that these must be completed and implemented in good faith. Therefore, if a State must fulfill in good faith with its international obligations, the Commission's decisions are binding.

In its turn, the article 33 of the ACHR, provides that the Commission and the Court are the competent bodies to assess the issues relating to the implementation of the commitments undertaken by States Parts. By ratifying the Convention, the contracting parties undertake to take account of the recommendations of the Commission adopted in its reports [7].

The Commission HDI has the Special Rapporteurs, which are responsible for the support in the performance of its mandate to promote and protect the freedoms and rights in the Americas, referring to the specific topics that they are entrusted.

Currently, it has the following: Special Rapporteur for Freedom of Expression, the Rapporteur on the Rights of Women, the Rapporteur on Migrant Workers and Members of their Families, Rapporteur on Human Rights Defenders, Rapporteur on the Rights of Indigenous Peoples, the Rapporteur on the Rights of Persons Deprived of their Freedom, the Rapporteur on the Rights of Afro-descendants and against Racial Discrimination, Rapporteur on the Rights of the Child [8].

The Special Rapporteurs develop, in general, the following functions:

Prepare reports on the matters with which they have been ordered, for the consideration by the IACHR and for its publication, including thematic reports and an annual report on the situation in the Americas.

Process individual cases on the specific issue of their specialty, to the decision to Commission HDI and advise the Commission HDI in proceedings before the Inter-American Court of Human Rights in cases related to their field.

Assist the IACHR in promotion of international instruments related to the specialty of the Rapporteur, including the organization of and participation in promotional activities for the authorities, professionals, journalists and students, on the work of the Commission HDI in that field.

Make recommendations to the Commission HDI on urgent situations which may require the adoption of precautionary measures or at the request of the adoption of interim measures before the Inter-American Court.

Advise and assist the other organs of the OAS in matters related to the specialty of their Office, in the Americas.

Comply the other mandates for the promotion and protection of freedoms and rights involved in the specialty pertinent, in which are delegated by the Commission HDI [9].

The Annual Reports contain — briefly — a review of the situation of Human Rights in the Americas, a summary of the activities of the Commission HDI, the processes in regular and special sessions, visits to the countries, details of the actions of the Special Rapporteurs, the activities of the Commission HDI in relation to the

Court HDI, the follow-up mechanism for the effective implementation of the various international instruments on human rights, the state of the system of petitions and individual cases: both before the Commission HDI and as before the Inter-American Court. The precautionary measures are also granted by the Commission and requested the Member States of the Organization and the activities carried out by the Commission before the Inter-American Court for provisional measures and contentious cases. Finally, the current state of the Conventions and Protocols on Human Rights adopted within the Inter-American System, the press releases and annual speeches [10].

### *III. The Inter-American Court of human rights*

The Inter-American Court of Human Rights is an autonomous judicial institution of the OAS whose purpose is the application and interpretation of the American Convention on Human Rights and other treaties concerning the same subject. It was established in 1979. It is composed by jurists of the highest moral authority and recognized competence in the field of human rights, elected on a personal level.

It has a consultative competence and other litigation. The first, for the subject matter is very wide, and it is also from a permissive nature. The litigation involves the power to determine whether or not the circumstances underlying the request are such that they can take it to not have any response [11].

As to the extent already mentioned, the legitimacy of the whole of the organs of the OAS, which lists the article X of the Letter –, the whole Member State, whether or not a party to the Convention; thus, as an object of the consultation, together with the Convention, reaches the other treaties on the protection of human rights in the American States. It also gives to all Member States of the OAS to the possibility of requesting opinions on the compatibility of any one of its domestic laws and international instruments mentioned [12].

The limits of the consultative function were defined by the same Court: since that is the only interpretation of the treaties to which it is directly implicated in human rights protection in a Member State of the Inter-American System and defines the inadmissibility of any request for consultation, which can distort the function litigation or to weaken or changing the system established by the Convention.

Until now — October 2011 — the Supreme Court issued 20 advisory opinions.

### *IV. The human person as a subject of international law*

As far as the litigation function, the international legal ownership of the human being, it is now a reality. Within the framework of International Human Rights Law, us and European systems Inter-American protection, today it is recognized, together with its legal personality, also the capacity international procedural (*locus standi* in review) of individuals [13].

On the basis of all this development it is the principle of respect for the dignity of the human person, regardless of its existential condition. By virtue of this principle, all human beings, regardless of the situation and the circumstances in which they find, they have the right to dignity. In fact, it is not possible to separate the recogni-

tion of international legal personality of the individual, of the dignity of the human person.

The legal personality, in its turn, is manifested as a legal category in the world of the Law as the expression of unitary capacity of the human being to be holder of rights and duties in terms of behavior and human relations regulated [14].

It is in the field of International Human Rights Law, through its steady progress, which produces the historical recovery of the position of the human being as the subject of International Human Rights Law, with full capacity international procedural. This ransom is manipulated through the consecration of the right of individual petition international, granted in broader terms, on any person, by article 44 of the American Convention on Human Rights [15].

However, procedurally this legitimacy is not full. In contentious issues, only the Member States and the Commission has the right to submit a case, the decision — article 61 of the ACHR. Prior exhaustion of the procedures provided for in articles 48 and 50 of the ACHR.

Even if the ACHR has modified its regulation, recognizing the individual as plaintiff, for the first time in the history of the Inter-American System, as a subject of International Law of Human Rights with legal capacity procedural. Their legitimacy is not complete.

It allows for full participation *locus standi* of the human person, in almost all of the stages of the proceedings before the Inter-American Court in an autonomous way, with the exception of the presentation of the petition. The individual had thus strengthened its capacity procedural and its quality of party before the Inter-American Court of Human Rights, while it ceases to be a mere observer of its own process, as it is part procedural and material of it.

*Locus standi in judicio* is based on the fact that, if we have any rights protected, then they must have the capacity for procedural to exercise them. It is known that without *locus standi in judicio* of both parties, any system for the protection of human rights is substantially reduced, because it is inconceivable have rights without having the ability to exercise them directly.

The alleged victims, their relatives or representatives may submit requests, arguments and evidence autonomous throughout the process. During the public hearings the petitioners may make use of the word for the presentation of their arguments and evidence, which is in line with his character of real share in the process, with its obligations and duties on procedural matters.

The direct participation of individuals is not limited to advisory opinions and the contentious cases, but also covers the interim measures of protection [16].

It remains to obtain direct action or *jus standi* before the HDI Court, in other words, the autonomous capacity and without intermediates to promote the demand directly.

Thus, the next step to be taken, in the context of the Inter-American System of human rights protection, and ensure the development of the *locus standi* in review for

the *jus standi* of individuals before the Inter-American Court, thus consolidating its capacity procedural full international [17].

Some procedural matters, very important decisions on issues of merit and the interpretation of the judgment by the Inter-American Court, are dealt with in another test and the issues that go beyond the subject of this essay.

#### *V. Provisional measures*

In special situations, the ordinary procedure, provided for the examination of individual petitions, you can request that the organs of the system engaged in an action timely, fast and effective, for it does not become illusory the effective protection of human rights. The delay, which means that the normal paperwork and reaches the issue of a final decision, could cause adverse effects and an irreparable character.

Para esse efeito, a Corte IDH tem feito uso de medidas provisórias, que envolvem a introdução de elementos revolucionários no campo do Direito Internacional clássico.

Thus it is that, at the request of the Commission — article 63, paragraph 2, of the Convention —, in matters that have not yet been submitted for its consideration, in cases of extreme gravity and urgency, and when it is necessary to prevent irreparable harm to persons, may adopt interim measures as it deems appropriate. In addition, in cases which are already in progress, when there is extreme gravity and urgency and is necessary to avoid irreparable damage to persons, may adopt to letter or at the request of the parties, the provisional measures as it deems appropriate.

The Member States have committed themselves to fulfill in good faith the obligations assumed under the Convention, without prejudice, in dealing with such a delicate issue, and must have mechanisms for supervision and control. In the Inter-American System, the body responsible for monitoring compliance with the measures enacted, and the same court that ordered. This does not preclude the possibility that the Court may order the Commission to verification of compliance with the measures taken, as was the case *Bustíos-Rojas*.

Generally, the arranged provisional measures have effective results; the protected persons were not subjected to new attacks against their life or physical integrity. It also proposes to develop this procedure, which is planned as an international resource increasingly appropriate to avoid irreparable damage to people.

#### *VI. The supervision of the execution of judgements*

Both the recommendations of the Commission, and the advisory opinions and judgments of the Inter-American Court are binding, given the good-faith with which they must be celebrating, execute and conclude treaties.

In addition, it is an inherent power in the judicial functions of Court the supervision of the implementation of its decisions.

According to the provisions of article 67 of the American Convention, the judgments of the Court shall be promptly met by the State in full. And the article 68.1 stipulates that «the States parts to the Convention agree to comply with the decision

of the Court in any case to which they are parts». For this, the States should ensure the implementation at the national level the provisions by the Court into their decisions.

The obligation to comply with the provisions of the judgments of the Court is a basic principle of International Law, supported by international jurisprudence, according to which the Member States must comply with their obligations under international treaties in good faith (*pacta sunt servanda*) and has the article 27 of the Vienna Convention on the Law of Treaties of 1969, which the States cannot because of internal reasons, fail to take the international responsibility already established.

The obligation to comply with the rulings of the Court corresponds to a basic principle of International Law, supported by international jurisprudence, according to which the Member States must comply with their obligations under international treaties in good faith (*pacta sunt servanda*) and the provisions of article 27 of the Vienna Convention on the Law of Treaties of 1969, that the States cannot because of internal reasons, fail to take the international responsibility already established. The obligations agreed by the States Parts shall be binding upon all the powers and organs of the State.

The Member States in the Convention should ensure compliance with the provisions of the Treaty and its own effects (*effet utile*) to plan for their respective domestic laws. This principle applies not only regarding the substantive rules of the treaties on human rights (those containing provisions on the rights protected), but also regarding the procedural rules, such as those related to compliance with decisions of the Court. Such obligations shall be interpreted and applied in such a way that the guarantee protected is really practical and effective way, given the special nature of human rights treaties [18].

### *VII. Conclusions*

The American System for the Protection and Promotion of Human Rights is in continuous and permanent expansion, in spite of high and low, both in its legal aspect as well as political, continues to make progress toward the future.

The responsibility of the Member States — in accordance with International Law — is the direct protection, immediate and primary Human Rights. However, it has been reinforced the idea of co-existence of an international authority subsidiary, however necessary and essential.

Another example of the evolution of legal thinking universal is the centrality that went to occupy the human person.

According to the words of Cançado Trindade, the human person, far from being reduced to a mere object, occupies a central position in all types of concern and reflection. The human person is the subject of rights. The legal personalism is directly related to the exercise of subjective rights and the search for the realization of the common good. The human person starts to claim their rights [19].

The international legal personality of a human being, then it has crystallized as a limit to the discretion of State power. If, on the one hand, the legal status of the inter-

national legal personality of the human being has contributed to instrumentalize the defense of the rights of the human person, emanating from the International Law, on the other hand, the *corpus juris* of universal human rights, provided the legal personality of the individual much more extensive, this is no longer subject to the law issued by the public power state [20].

In conclusion, the emancipation of the human being vis-à-vis the State itself is moving slowly, but it is advancing. No one could suppose or predict, some time ago that, in the last two years, the causes of displaced persons, of migrants in search of food, housing, work, education and children abandoned on the streets of the cities of Latin America, for instance, achieved an international court as the Inter-American Court of Human Rights. This is the result, in particular, the awakening of human consciousness to the needs for the protection of the weakest and most forgotten [21].

The Inter-American System of Protection and Promotion of Human Rights and built in a constant manner on the basis of full autonomy of its two main institutions: the Commission HDI and the HDI Court, independence is essential to the performance of the functions assigned to them and that was emphasized very briefly in this essay.

Argentina, Corrientes, October 2011.

#### NOTES

- (1) Due to their enormous value, we can quote at least the Thematic Reports:
  - The path to a substantive democracy: the political participation of women in the Americas.
  - Juvenile Justice and Human Rights in the Americas (2011).
  - Report on Immigration in the United States: Arrest and Due Process of Law (2010).
  - Rights of Indigenous and Tribal Peoples to their Ancestral Lands and Natural Resources (2010).
  - Access to services for Maternal Health from the Perspective of Human Rights (2010).
  - Report on the Security of Citizens and Human Rights (2009).
  - Captive Communities: the Situation of the Indigenous Guarani and contemporary forms of slavery in Chaco of Bolivia (2009).
  - Report on the Corporal Punishment and the Human Rights of Children and Adolescents (2009).
  - Preliminary Observations of the IACHR after the visit of the Rapporteur on the Rights of Afro-descendants and against Racial Discrimination in the Republic of Colombia (2009).
  - Report on the rights of women in Chile: equality in the family, at work and in politics (2009).
  - Access to Justice for Women Victims of Violence in the Americas (2007).
  - Women against Violence and Discrimination Arising out of Armed Conflict in Colombia (2006).
  - Special Report on the Human Rights situation in the prison of Challapalca, Department of Tacna, Peru (2003).
  - Situation of the rights of Women in Ciudad Juarez, Mexico: the right to not object of violence and discrimination (2003).
  - Sources of International Law and National the Draft American Declaration on the Rights of Indigenous Peoples (2001).

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## ФУНКЦИИ МЕЖАМЕРИКАНСКОГО СУДА И МЕЖАМЕРИКАНСКОЙ КОМИССИИ ПО ПРАВАМ ЧЕЛОВЕКА

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Отталкиваясь от утверждения о том, что универсальность прав человека совместима с существованием региональных систем защиты и поощрения прав человека, автор исследует межамериканские механизмы в данной сфере. Правовые основы и деятельность Межамериканской комиссии по правам человека и Межамериканского суда по правам человека проанализированы наряду с такими вопросами, как временные меры и надзор за исполнением решений.

**Ключевые слова:** права человека, региональные системы защиты и поощрения прав человека, межамериканская система защиты и поощрения прав человека, Межамериканская комиссия по правам человека, Межамериканский суд по правам человека.