I. INTRODUCTION

Regional human rights systems have become a principal means by which the international community attempts to promote human rights. The conventions on which they are based enunciate aspirational norms to encourage the evolution of human rights protection and to supply human rights tribunals with a set of minimum standards. These systems’ effectiveness,
however, depends upon member states’ consent to the jurisdiction of the systems’ tribunals. While negative publicity may influence a state to comply with an adverse judgment, a human rights court or commission can exert pressure on a state only at the risk of jeopardizing that state’s voluntary support for the system and hence the cohesion of the system itself. Regional systems thus are caught in a tension between maintaining political unity and protecting individual rights.

Human rights tribunals can seek to maintain political unity by employing procedural mechanisms such as admissibility and standing to abstain from deciding politically contentious cases. Both the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights are sufficiently flexible to allow this approach.

2. Loss of agreement is a very real threat. For example, one member state of the European Convention, Greece, disavowed its agreement to jurisdiction under the Convention following an adverse decision by the Commission. See Denunciation (Greece), 1969 Y.B. Eur. Conv. on H.R. 78. It is significant that Greece protested the Commission’s decision on an inter-state, not an individual, petition. See Denmark, Norway, Sweden & the Netherlands v. Greece, 1968 Y.B. Eur. Conv. on H.R. 690 (Eur. Comm’n of H.R.) (Greece I).


In addition, both conventions articulate alternative mechanisms, such as settlement, fact finding, and advisory opinions, with which tribunals attempt to resolve the tension between protecting political unity and human rights. The existence of these other mechanisms that protect political unity has enabled the tribunals to liberalize admissibility and standing rules so as to allow more aggrieved parties to present their claims. As such, the alternative mechanisms have indirectly contributed to the advancement of due process rights in the European and Inter-American systems.

Unfortunately, the impact of these alternative mechanisms has not been expressly recognized in decisions that determine the "reviewability" of claims under admissibility and standing rules. As a result adjudicators have failed to articulate a unified procedural jurisprudence that takes into account all available methods of preserving unity. In articulating such a jurisprudence, adjudicators must consider the effect of all of these methods. Moreover, adjudicators must also incorporate due process concerns into a procedural jurisprudence. This article seeks to provide a framework for the development of a unified, principled theory of procedural jurisprudence for human rights tribunals by analyzing the informal procedural mechanisms employed in the European and Inter-American systems.

Part II of this article therefore begins with a discussion of the theoretical sources of a procedural jurisprudence, and argues that the long-term political unity concerns of regional human rights systems are best met by a procedural theory that incorporates the protection of individual due process rights. Part III.A then briefly outlines the structure and history of the European and Inter-American systems and the significant contributions of each. Part III.B considers several of the innovative mechanisms currently employed to advance human rights while maintaining political unity, including settlement, fact-finding, and advisory opinions, to assess how the European and Inter-American systems attempt to resolve the tension between these two competing

---

6. See infra notes 124-139 and accompanying text.

7. A theory of procedural jurisprudence of particular relevance here is that advocated by Alexander Bickel in his study of the United States Supreme Court. Professor Bickel argued that the Supreme Court's procedural decisions should be guided by what he termed "passive virtues," in order to avoid reaching the merits of politically divisive constitutional cases. In using these prudential doctrines that have come to be known as "justiciability," the Court attempts to refrain in a principled fashion from exercising the full force of its jurisdiction and thereby to preserve judicial legitimacy in a democracy. See Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 111-98 (1962); Alexander Bickel, The Supreme Court, 1960 Term — Foreword: The Passive Virtues, 75 HARV. L. REV. 40, 42 (1961); see also infra notes 9-26 and accompanying text; cf. Owen M. Fiss, The Supreme Court, 1978 Term — Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 44-58 (1979) (discussing practical and political limitations on obtaining judicial remedies). Recent European interest in American theories of judicial review makes this approach particularly relevant. See Joseph H.H. Weiler, Methods of Protection: Towards a Second and Third Generation of Protection, in 2 Human Rights and the European Community: Methods of Protection 555, 559-60 (Antonio Cassese et al. eds., 1991) (noting that European Convention is closer than any other legal system in Europe to model of judicial review traceable to American constitutionalism encapsulated in doctrine of Marbury v. Madison).

---

goals. Parts III.C and D discuss the admissibility and standing requirements of the European and American Conventions to assess whether and how the current implementation of these requirements incorporate both political unity and due process concerns. Part IV summarizes our findings and presents recommendations.

II. SOURCES OF A PROCEDURAL JURISPRUDENCE

As judicial and quasi-judicial actors, decision-makers within the regional systems must operate under the same constraints courts face generally when confronted with conflicts whose resolution may test the scope of their powers. When parties seek to have human rights disputes resolved by regional bodies, those bodies must consider whether resolving such disputes would undermine the regional system itself. Would a state held in violation of a human rights instrument reject such a finding and withdraw from the regional system? Would individuals detecting adjudicators' unwillingness to defend human rights throughout the system or to prosecute human rights violations by certain states no longer seek redress from that system when their rights are violated?

Regional human rights adjudicators therefore must balance the protection of human rights in individual cases against the potential long-term consequences of their decisions, a balancing that requires a constant assessment of the social and political milieu. Adjudicators must understand how far rights can be realized under prevailing conditions. In addition, adjudicators must understand how best to encourage the governments and societies of their member states to accept rights — a necessary condition for the effective establishment of any right, regardless of its content.8 Because enforcement of international human rights depends upon the perceived legitimacy of the human rights systems, commissioners and judges must always consider how their decisions affect the unity and public support of those systems.

The question then becomes at what time, and in what manner, regional adjudicators should weigh these concerns. Allowing these considerations to affect a tribunal's decision on the merits of a petition would undermine the impartiality upon which its legitimacy is based. Failure to address these considerations, however, could jeopardize the political support on which these systems depend. A procedural jurisprudence must take these opposing concerns into account.

8. Widespread popular belief in human rights is a necessary condition for their effective establishment. As Professor Bickel noted in the context of the U.S. Supreme Court's decisions on constitutional issues, principled [adjudication] . . . often means the definition of principled goals, and the practice of the art of the possible in striving to attain them . . . . The goal itself — the principle — made sense only as an absolute, and as such it was to be maintained. As such it had its vast educational value, as such it exerted its crucial influence on the tendency of prudential policy. But expedient compromises remained necessary also, chiefly because a radically principled solution would collide with widespread prejudices, which no [court] resting on consent could disregard any more than it could sacrifice its goals to them.

Bickel, supra note 7, at 68.
The types of concerns outlined above have been addressed by commentators on the jurisprudence of the United States Supreme Court. These commentators submit that the Court should address political and legitimacy concerns by developing a jurisprudence supporting the disposition of constitutional cases in a manner that least disrupts the protection of individual rights and the Court's long-term legitimacy. This jurisprudence begins with the recognition that a court's duty to render principled decisions entails "the power to determine the timing and scope of such decisions — entails, in other words, [that court's] power to determine its own institutional capacity" in order to "reach an accommodation between ... [its] principles and the complex, murky, and often resistant reality on which these principles operate." This approach thus seeks to develop a jurisprudence that reaches an accommodation between principle and necessity that is itself principled.

Professor Alexander Bickel advocated a procedural jurisprudence for the Supreme Court based upon principled decision-making. According to Bickel, a court has three choices in deciding a constitutional case: it can uphold the government's action, it can invalidate the government's action as violative of a guaranteed right, or it can do neither. If a court chooses not to decide a case on the merits without providing a principled explanation for its choice, the court indirectly validates the government's action. By contrast, Bickel argued, when a court chooses not to decide and provides a principled reason for doing so, the court does not validate the government's action and does not relinquish its role as pronouncer and guardian of rights. So long as a court explains why it cannot address the issue presented in a particular case, the court leaves open the possibility that it will be able to address the same issue if it is presented by other litigants in other circumstances. Thus, the court does not abandon the right invoked by the petitioner in its entirety; rather, the court acknowledges that the right in question might be invoked successfully at a later date.

11. See BICKEL, supra note 7, at 59 ("Every complexity in a principle must itself be principled: it must have been introduced for a moral reason similar to the one that led to the adoption of the principle itself in the first place.").
12. See id. at 69.
13. See Kronman, supra note 10, at 1585 ("The passive virtues do not abolish the tension between principle and consent but merely postpone the time when it must be confronted directly."). Note that the ability to choose not to decide a case can help a court maintain its commitment to the rights and principles it is bound to uphold.

The requirement to decide every constitutional question in a principled fashion must inevitably force many more conflicts between principle and opinion than the Court can tolerate, and thus gives it a powerful incentive to conform its principles to public sentiment—a tendency that in the long run is certain to deaden the Court's appreciation of its educational responsibilities. The passive virtues are therefore not only consistent with a continuing commitment to principle, they actually help sustain this commitment by reducing some of the pressures that
As Bickel recognized, articulating principles of non-decision presents the following difficulty. The definition and refinement of principles generally is considered an internal demand of judicial review necessary to resolve the case at hand. However, a court concerned with the external demands of political unity and its educational role wants to articulate the grounds of its decisions in particular cases in as general a manner as possible. The tension between these internal and external demands is mitigated by the need to preserve flexibility, so that in the future the court might indeed address an issue it chooses not to resolve today. Thus, a court should articulate and apply principles of non-decision narrowly.

Accordingly, a court concerned with political unity must determine in a principled fashion whether a particular case presents a justiciable controversy: that is, whether the facts and timing of a case before a court make the issue presented by the case reviewable. By concentrating its discretionary decision-making power in the period when it determines whether a case is reviewable, a court is able to influence the time and manner in which particular issues appear. Moreover, by basing its reviewability decision on the narrowest possible ground, a court preserves flexibility and avoids the conflict of judicial and public opinion that might result from more sweeping dispositions. A principled, public decision not to decide thus enables a court to exploit time, allowing widespread public and governmental support for the right at issue to develop and allowing the court to discern public and governmental tolerance for that right at any particular point in time.

---

14. The strength of a court's reasoning depends on the degree to which it grounds its decisions on the facts of particular cases:

When it strikes down [governmental action, a court] must act rigorously on principle, else it undermines the justification for its power. . . . But it is not obligated to foresee all foreseeable relevant cases and to foreclose all compromise. Indeed, it cannot. It can only decide the case before it, giving reasons which rise to the dignity of principle and hence, of course, have a forward momentum and broad radiations. But the compelling force of the judgment goes only to the actual case before [a court]. If it were otherwise, another part of the justification for the existence of the power [of judicial review] would be destroyed. For . . . [a court's] peculiar capacity to enunciate basic principles inheres in large part in its opportunity to derive and test whatever generalization it proclaims in the concrete circumstances of a case.

BICKEL, supra note 7, at 69-70.

15. It is worth noting in the context of the European and Inter-American systems that each convention sets forth the jurisdictional mandates and decision-making discretion of the courts and commissions, and thus can be said to employ both "normative" and "allocative" discretion. Normative discretion is delegated to a court by a constitutive body; that is, the limits and extent of discretion conferred by the relevant human rights convention. Allocative discretion is the distribution of normative discretion within a judicial hierarchy to each of the varying levels (Secretariat, Commission, Court, Committee of Ministers or General Assembly). See Henry J. Friendly, Indiscretion about Discretion, 31 EMORY L.J. 747, 754-55, 778-79 (1982) (distinguishing between normative and allocative discretion); see also Maurice Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635, 637 (1971) (distinguishing between "primary" and "secondary" discretion).

16. See Deutsch, supra note 9, at 214.

17. See BICKEL, supra note 7, at 26. This is what Bickel calls a "colloquy" on matters of principle, a conversational evolution of principles. See id. at 240 ("When at last the Court decides that 'judgment cannot be escaped — the judgment of this Court,' the answer is likely to be a proposition 'to which
This approach has undeniable utility to human rights systems seeking to develop and maintain their political viability. Despite such utility, however, there exist several significant objections to a tribunal's use of reviewability criteria to limit decisions on the merits. First, exercising prudence through reviewability decisions potentially can dull a tribunal's capacity to see deficiencies in existing conditions. Thus, a procedural jurisprudence in which matters of political unity weigh heavily may perpetuate existing practices and may function as an apology for maintaining the status quo, however corrupt or illegitimate that existing order happens to be.

Second, and more seriously, use of a procedural jurisprudence governed by political unity concerns fails to take individual rights seriously enough. Human rights have a special status and cannot be overridden merely for reasons of social policy. If a person has a right, a decision to postpone its recognition or enforcement simply because governments object will never be legitimate. Any reviewability decision therefore is illegitimate if it delays the full protection of a right simply to avoid conflict among states parties to a regional regime. All legal structures, however, occasionally must suspend or subordinate the protection of a right for systemic reasons and it is most important to assure that this subordination occurs in a principled and open fashion. Furthermore, rights come into conflict with each other, and it is not always possible for a human rights tribunal to resolve these conflicts by an appeal to a higher order rule or general principle. Rather, a tribunal often is forced to balance two sets of competing rights, and it is often wisest to reduce the conflict by means of incremental measures, including decisions not to decide. Finally, even if a particular right is held to be absolute, and no widespread acceptance may fairly be attributed, because in the course of a continuing colloquy with the political institutions and with society at large, the Court has shaped and reduced the question, and perhaps because it has rendered the answer familiar if not obvious."


19. This argument, though not without merit, may go too far. A procedural jurisprudence based on political unity would not abhor change but rather would place a positive value on gradual change. Gradual reform within the framework of the existing institutions and traditions of each human rights system may be preferable to more dramatic change that threatens the framework. If reform comes too gradually, however, the system would be forced to reevaluate its incorporation of political unity concerns into its reviewability decisions.


21. This objection may neglect the fact that rights are absolutes only in the sense that they occupy a particularly important place in a large system of commitments. See Kronman, supra note 10, at 1613 ("We learn what rights people have by familiarizing ourselves with [their moral and legal tradition] and its own internal hierarchy of values. A right is an interest that stands at, or near, the top of this hierarchy, and the assertion that it is absolute is just a shorthand way of saying that its violation, in a particular case, would unsettle too much of the larger normative system of which it is a part.").

22. Thus the observation that procedural mechanisms require tribunals to exercise a high degree of discretion and to take into account a wide variety of considerations regarding political unity provides all the more reason for discretionary procedural decisions to be made in as principled and as public a manner as possible.

23. An absolutist argument also fails to consider (or necessarily devalues) the other human interests people possess that do not rise to the level of rights. Human beings are more than a bundle of rights; human beings exist in networks of social and personal relationships. Human rights courts considering
conflict exists with other rights, it still is not necessarily the case that its full and immediate enforcement will be appropriate in all circumstances. The individual rights not enforced due to a reviewability decision represent the price a human rights system must pay for maintaining tribunals capable of fulfilling their assigned tasks. While such political unity concerns warrant consideration, however, tribunals should not give these concerns dominant status over due process rights, as the tribunals' ultimate legitimacy would be undermined by the failure to protect the rights that form the essence of their mandates.

Finally, a third objection involves political responsibility: a regional tribunal perceptive of public and governmental support for its reviewability decisions could not help but permit such concerns to influence its decisions on the merits. The factors that influence when a tribunal reaches an issue may also influence how the tribunal decides the issue itself, as the same factors that provide justification for restrictive reviewability decisions can enter into decisions avowedly made on the merits. The tremendous interplay between reviewability and substantive decisions may require the consideration of political and practical limitations, but a procedural jurisprudence must not rest solely on the latter concerns. Rather, a human rights tribunal must look to due process rights in developing a procedural jurisprudence.

B. Due Process Concerns as a Basis for a Procedural Jurisprudence

Excessive concern with the problem of political unity may so undercut a regional system's protections of due process rights, including the right of access to the system's tribunals, that the public will lose faith in the system, thus vastly reducing the system's ability in the long term to protect both substantive and procedural rights. Human rights tribunals should prevent this result by establishing and applying procedures that comport with internationally recognized standards of due process.

Regional human rights systems strive to ensure that the domestic legal systems of their member states enable an individual to obtain a fair hearing before a legal, competent, impartial, and independent tribunal that employs fair, prompt, and public procedures (with minor exceptions), renders an effective, public decision, and affords an appropriate, enforceable remedy. These due process rights derive from the declarations of international and
regional law-making or norm-declaring bodies like the United Nations, the Council of Europe, and the Organization of American States. The formal declarations of these bodies in covenants and conventions establish the due process rights guaranteed to all individuals, and thus provide an important basis for a procedural jurisprudence for regional human rights adjudicators. The first such instrument is the Universal Declaration of Human Rights,\(^2\) which is widely accepted as a basis of customary international law establishing genuine obligations for states.\(^2\) The Universal Declaration guarantees to individuals the right to an "effective remedy" through a "fair and public hearing" before a "competent"\(^2\) "independent and impartial tribunal."\(^3\) A second significant instrument is the International Covenant on Civil and Political Rights,\(^3\) which requires its signatories to ensure that all persons deprived of the rights it guarantees have "an effective remedy" even when violations of those rights are committed by individuals "acting in an official capacity."\(^3\)

Regional instruments and institutions also establish due process rights. Article 13 of the European Convention incorporates the language of Article 2(3) of the Political Covenant,\(^3\) and its requirements have been interpreted


\(^{28.}\) This is so despite the fact that the original drafters asserted that the Declaration itself was not a source of international obligations but a reflection of international aspirations. See John P. Humphrey, The Revolution in the International Law of Human Rights, 4 Hum. Rts. 205, 207 (1975) (stating Declaration is "juridical conscience" of international community and its rules are "normatively binding").

\(^{29.}\) Universal Declaration, supra note 27, art. 8. ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

\(^{30.}\) Id. art. 10. ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").


\(^{32.}\) See Political Covenant, supra note 31, art. 2(3)(a). States parties undertake "[t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy." Id. art. 2(3)(b). The Political Covenant also provides that in "the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Id. art. 14(1).

\(^{33.}\) European Convention, supra note 4, art. 13. The European Convention adds the requirement that a hearing occur within a "reasonable time." Id. art. 6(1). The European Convention also affords to the individual the "right to a court" and echoes the guarantees of the Universal Declaration and the
broadly by the European Commission and Court. The European Court has articulated two basic due process principles: the "right to a court," derived from European Convention Article 6(1), and "equality of arms." In the Golder Case, the Court determined that a claimant has a right under Article 6(1) to have a court decide claims concerning rights provided by the Convention and other civil rights. The Court also held that denying an incarcerated claimant access to counsel denied him the right to access to a court. In the Delcourt Case the Court reaffirmed the importance of access to counsel, holding that a criminal defendant in Belgium facing appellate review of his conviction must be provided legal assistance. While the Court had previously determined that counsel was not required for hearings on provisional release, the Court held that in this situation counsel was required because of the potential consequence of the proceeding for the petitioner: a decision could overturn a prior finding of guilt and lead to his freedom. The Court based its conclusion on the concept of "equality of arms": the principle that two parties to a proceeding must stand in rough equality before the Court.

The American Declaration, which sets forth the duties and obligations of all OAS member states regardless of whether they have ratified the American Convention on Human Rights, provides for "resort to the courts" and offers a simple procedure for the protection of an individual’s fundamen-

Covenant. Article 6(1) of the European Convention, which is similar in form and substance to Article 14(1) of the International Covenant, provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Id.

34. See VAN DIJK & VAN HOOF, supra note 4, at 294-357 (discussing right to fair and public hearing), 520-31 (discussing right to effective remedy before national authority).


36. Id.


40. American Declaration of the Rights and Duties of Man, BASIC DOCUMENTS, supra note 5, at 18 [hereinafter American Declar].

41. The American Convention is the centerpiece of the Inter-American system, as it established the Inter-American Court and Commission and provides the Court with enforcement powers. American Convention, supra note 5, pmbl.
Article 8 of the Convention establishes a right to a fair trial, while Article 25 establishes the "Right to Judicial Protection." In addition, the Convention expressly links due process rights to the question of exhaustion of domestic remedies, providing that claimants need not exhaust domestic remedies before appealing to Inter-American institutions when available domestic remedies violate due process. In addition, the American Convention requires the Commission to review domestic judicial systems regularly to determine whether they are in compliance with Articles 8 and 25.

The protections contained in these and other international instruments collectively provide the following due process rights: an individual must have access to an effective remedy and must be able to obtain a fair hearing before a competent, impartial, and independent tribunal employing fair, prompt, and public procedures. These rights to access, fairness, and a competent tribunal

42. Article 18 of the American Declaration establishes: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." American Declaration, supra note 40, art. 18.

43. Article 8 states:

Every person accused of a criminal offense has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial judge or tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. American Convention, supra note 5, art. 8.

44. Article 25 provides:

Everyone has the right to a simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. Id. art. 25(1). In addition, states parties are obligated to guarantee that a "competent authority" in the state's legal system determines the rights of individuals seeking redress for the violations of the legal norms articulated in paragraph 1, "develop[s] the possibilities of judicial remedy," and ensures the enforcement by "competent authorities" of any remedies awarded in a proceeding. Id. art. 25(2)(a-c).

45. In general a petitioner must exhaust domestic remedies before seeking recourse through an international body. See, e.g., Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 6, 27 (March 21) (articulating exhaustion of domestic remedies as requirement of customary international law). In the American Convention, however, exhaustion is not required when the domestic legislation of the state concerned "does not afford due process of law for the protection of the right or rights that have allegedly been violated," when a party has been denied access to a remedy, or when a party has suffered "unwarranted delay" in the resolution of a case. See American Convention, supra note 5, art. 46(2)(a-c); see also App. No. 9213, Disabled Peoples' Int'l v. United States (Sept. 27, 1987) Inter-Am. C.H.R., at 71 (1986-87) (decision as to admissibility).


In accordance with this requirement, the Commission decided in March 1985 that Chile had violated the American Convention's due process requirements by expelling nationals who allegedly participated in subversive activities without providing an opportunity for judicial review of the factual basis of the government's determinations. Case No. 9269 (Chile), Res. No. 11/85 (Mar. 5, 1985), Inter-Am. C.H.R., at 37-43 (1984-85). The Commission held that "the procedure instituted for reviewing the measures adopted by the President under the [expulsion provision] converts the Executive Power into the sole authority for the appeal of revision, which thus violates the rules that regulate the exercise of the right to due process." Id. para. 21.
form a limit to the impact of political unity concerns in reviewability decisions. Just as the extent to which a state upholds democratic principles and human rights is a yardstick by which the international community judges the legitimacy of that nation, the legitimacy of domestic legal systems is measured by the degree to which the procedures they implement comport with internationally recognized notions of due process. A legal system that does not respect basic elements of due process cannot expect its substantive decisions to be afforded validity by other states. Regional human rights systems must maintain their own legitimacy, in order to continue their role in promoting human rights, by ensuring that their own procedures comport with internationally recognized principles of due process. While a human rights tribunal cannot ignore political unity considerations, therefore, any procedural jurisprudence must be based primarily upon these internationally recognized due process rights.

III. COMPARING THE EUROPEAN AND INTER-AMERICAN HUMAN RIGHTS SYSTEMS

A. Structure

At first glance, international human rights courts appear an impossible fantasy. Multiple factors threaten their independence and impartiality: within tribunals votes may follow politics or a flag, while outside tribunals interested parties may threaten witnesses, states may refuse to consent to investigation or to a court’s jurisdiction, or non-judicial actors may attempt to control the functioning of the tribunal itself. Further, international human rights courts possess no direct means of enforcing their decisions short of the suasion that other member states could exercise upon a losing state. The structures of the European and Inter-American systems demonstrate their drafters’ efforts to reduce these external and internal pressures while advancing their constitutive principles. Subsequent innovations likewise demonstrate mechanisms that serve to foster compliance with adjudicators’ decisions and thus reinforce the political unity of the systems. The existence of these mechanisms permits the development of a procedural jurisprudence that focuses on guaranteeing due process rights. This section outlines the basic structures of the two systems; the next section assesses the systems’ subsequent innovations.

Towards a Procedural Jurisprudence

1. The European System

The European Convention was signed on November 4, 1950, and entered into force on September 3, 1953. The Convention was drafted following the United Nations' adoption of the Universal Declaration of Human Rights in 1948, when it became clear that the members of the United Nations could not reach agreement on the instruments necessary to transform the Declaration into a binding treaty. The creation of the Council of Europe in 1949 also prompted the development of the Convention. Article 1 of the Council's constitution, the Statute of Europe, declares that the purpose of the Council is to achieve greater unity among the members, and recognizes that "the maintenance and further realisation of human rights and fundamental freedoms" is a primary means by which to achieve that goal. The European states not only saw human rights protection as a first step in an overall political plan for the unification of Europe, but also as a way to prevent the recurrence of one form of totalitarianism (fascism) and the intrusion of

---


49. Universal Declaration, supra note 27.

50. See Robertson, supra note 48, at 4-14.

51. Several movements prompted the desire to create a unified regional system for the protection of human rights, among them the Congress of Europe, which was called by the International Committee of Movements for European Unity, and which met in The Hague in May 1948. See id. at 6. Sixteen countries sent delegations and ten countries sent observers. The Congress produced a "Message to Europeans," which called for both a charter of human rights and the creation of a court of justice. Id. at 6-7. The International Juridical Section of the European Movement studied the proposal and issued a draft convention that was one of the first items on the agenda of the August 1949 first Ordinary Session of the Consultative Assembly (now known as the Parliamentary Assembly). Id. at 7-8; see generally Karel Vasak, The Council of Europe, in 2 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 457 (Karel Vasak ed., 1982) (discussing relationship between Council of Europe and European Convention).

The Preamble to the Convention clearly recognizes the desire for a mechanism of collective enforcement. See European Convention, supra note 4, prnbl. (convention framed "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights]"). This indicates that the signatory states believed their relations were strong enough to withstand a human rights regime built upon reciprocal scrutiny. The drafting of the additional protocols to the Convention, see supra note 4, and the European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35, demonstrate the states' willingness to pursue the goal of unity through an effort to guarantee a broad range of both "first generation" (civil and political) and "second generation" (economic, social, and cultural) rights.


53. Id. art. 1. Each signatory agrees in Article 3 to "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms . . . ." Id. art. 2. See also Commission of the European Communities, Accession of the Communities to the European Convention on Human Rights, 1979 BULL. EUR. COMMUNITIES 1 (Supp. 2).

54. Members of the Council believed that the best way to do so was to protect individual rights. For example, Pierre-Henri Teitgen of France advanced the following rationale for the drafting of the Convention in a speech in August 1949 to the Council of Europe's Consultative Assembly:

Democracies do not become Nazi countries in one day. . . . One by one, freedoms are suppressed, in one sphere after another. . . . A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption, to warn them of the peril . . . .
another (communism). The Convention thus reflects a deep concern for human rights. All twenty-three member states of the Council of Europe have now adopted the Convention.

The Convention established three institutions to review human rights petitions: the European Commission of Human Rights, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe. The twenty-three member Commission is the primary actor on the vast majority of human rights petitions. Any state party can file a petition with the Commission against any other state party. In contrast, individuals can only file petitions against those states that have explicitly consented to the Commission's competence to accept individual petitions against them. While this limitation originally insulated some of the states with the worst human rights records from action by the system's human rights tribunals, all twenty-three contracting states now have consented to the Commission's authority to receive individual complaints against them.

Upon receiving a petition, the Commission determines the petition's "reviewability" — that is, whether the petition meets admissibility and standing requirements. The Commission then investigates the facts surrounding the dispute and attempts to secure a settlement between the parties. The efforts of the Commission to reach settlement, which are

An international Court, within the Council of Europe, and a system of supervision and guarantees could be the conscience of which we all have need . . . .

*Quoted in Robertson, supra note 48, at 6.*

55. See European Convention, supra note 4, prmbll. (The contracting states reaffirm "their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.").


57. The number of members is determined by the number of states parties to the Convention. Commission members are elected by the Committee of Ministers to six-year terms. See European Convention, supra note 4, arts. 20-23.

58. Id. art. 25.

59. Turkey and Cyprus were accused of many human rights violations following their decisions to ratify the Convention, and each had not declared their acceptance of the individual right of petition until January 28, 1987 and January 1, 1989, respectively. See Berger, supra note 56, at 263 (presenting table of ratifications of European Convention and declarations of acceptance of optional articles, as of December 30, 1990).


61. European Convention, supra note 4, arts. 24-27.

62. Id. art. 28(a). Article 28(a) requires the respondent state to "furnish all necessary facilities, after an exchange of views with the Commission," to assist its investigation. The Commission investigates by holding hearings, receiving submissions from the parties, and interviewing relevant witnesses. The Third Protocol to the Convention, signed on May 6, 1963, abolished the Sub-Commission that formerly performed these investigatory duties, and permitted the Commission to reject a petition after reviewing all the evidence if it is found inadmissible under Article 27. See European Convention, Protocol No. 3, supra note 4 (amending arts. 29, 30, and 34 of Convention).

63. Id. art. 28(b). Once the Commission has ruled a petition admissible and has undertaken an examination of the facts, it must "place itself at the disposal of the parties concerned with a view of securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this
ongoing throughout the decision-making process, are the substantive justification for both the heavy secrecy of the Commission’s activities and the bifurcation (between Commission and Court) of the decision-making roles in the Convention.\footnote{6}{Id. For a discussion of settled cases, see EUROPEAN COMM. OF HUM. RTS., STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A PERIODIC NOTE ON THE CONCRETE RESULTS ACHIEVED UNDER THE CONVENTION 115-44 (1984).}

If the Commission cannot mediate the dispute it presents a report of the facts and its recommendations for the resolution of the case to the Committee of Ministers of the Council of Europe.\footnote{6}{In practice, the Commission has never refused to approve a settlement reached between the parties, as its representatives generally are involved closely with the negotiations, and it is unlikely to find that the settlement falls outside the broad scope of the Convention’s settlement requirements. See Hans C. Krüger, The European Commission of Human Rights, 1 HUMAN RTS. L.J. 66, 84 (1980).} Once a petition has been referred to the Committee, the Commission or a state party has three months within which to refer the case to the Court.\footnote{7}{See Torkel Opsahl, Written Communication on "Settlement Based on Respect for Human Rights Under the European Convention on Human Rights," in COUNCIL OF EUROPE, PROCEEDINGS OF THE SIXTH INTERNATIONAL COLLOQUIUM ABOUT THE EUROPEAN CONVENTION ON HUMAN RIGHTS 996, 998 (1985). Opsahl notes that while the Commission obtained only 37 formal settlements of the 11,295 registered petitions by December 1984, most settlements occur informally. Id. at 984-94 (Appendix).} If this does not occur within the three-month period, the Committee of Ministers must determine whether the petition presents a violation of the Convention.\footnote{6}{If the Commission cannot mediate the dispute it presents a report of the facts and its recommendations for the resolution of the case to the Committee of Ministers of the Council of Europe. If the petition presents a violation of the Convention, the Committee considers the case and makes a final determination.} The Committee’s proceedings have no formal structure, and a final decision is not guaranteed. However, the Committee is empowered to prescribe a remedy,\footnote{9}{The decision whether to take a Convention."} give opinions to the respondent state, or make non-binding recommendations related to the perceived violation of the Convention.\footnote{7}{The Committee’s decision-making role at this stage of the proceedings reflects a compromise between those who sought to institute a Court with compulsory jurisdiction, and those who sought to retain a Commission supervised by the Committee as the primary decision-maker. Under the compromise, a state can opt out of the Commission and Court jurisdiction over individual petitions against it; the Committee, however, can decide cases that are not or cannot be submitted to the Court. See KAREL VASAK, LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 198-99 (1964) (detailing compromise).} The decision whether to take a
petition from the Committee and refer it to the Court is left to the discretion of the Commission or state party; the Convention does not prescribe any guidelines to govern the decision. Further, the Convention does not provide individual petitioners with any means to compel the submission of their case to the Court. While the Court must hear all cases referred to it, it retains full authority to review the procedural decisions made by the Commission.

When the Court makes its judgment it transmits its order to the Committee of Ministers. Once judgment has been entered, the Court can use several mechanisms to obtain enforcement. For example, the President of the Court may order the publication of judgments and of any other documents in order to place pressure on a state to comply with the Court's decision. Article 50 of the Convention also empowers the Court to determine whether specific performance of the remedy sought is necessary, thereby giving the decision more than a simple declaratory effect. The ultimate enforcement mechanism in the European Convention remains the Committee of Ministers. Article 32 of the Convention confers the power of injunction on the Committee. If the Committee decides the case itself and upholds the petition by a two-thirds vote, it may prescribe a period of action in which the respondent state

---

71. It makes sense to have a final limitation on an appeal. But does it make sense for another body to set that limit, or should the final court of appeal decide for itself? There is a danger, if another agency besides the court of last resort controls that court's docket, that a significant case or issue will evade its scrutiny.

72. See De Wilde, Ooms and Versyp Cases ("Vagrancy" Cases), 12 Eur. Ct. H.R. (ser. A) at 29 (1971) ("Once a case is duly referred to it ... the Court is endowed with full jurisdiction and may thus take cognisance of all questions of fact and of law which may arise in the course of the consideration of the case.").

The Court consists of a number of judges equal to the number of member states in the Council of Europe, thus technically differing from the Commission in that the latter's composition is determined by the number of states parties to the Convention. As all of the members of the Council of Europe are now states parties to the Convention, this distinction no longer is significant. The Convention also outlines certain qualifications for judges, including "high moral character" and possession of qualifications necessary for appointment to high judicial office. European Convention, supra note 4, art. 39(3). While the Convention does not mention judicial independence, the Court has integrated this requirement into its judicial oath. See Rules of Court, European Court of Human Rights, R.3, reprinted in COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 151 (1987) [hereinafter Rules of the European Court].

The Court sits in chambers of seven judges to hear individual cases; six judges are chosen by lot by the President of the Court, while the seventh is a concerned state national or other person sitting in ex officio capacity and chosen by the defendant state party. European Convention, supra note 4, art. 43. This assures that at least one member of the Chamber is familiar with the laws of the respondent state. The Court also employs an expert on the domestic law of the respondent state. In addition, a Chamber must return a case to the full Court if it raises serious interpretative questions and may lead to a result inconsistent with prior rulings. See, e.g., Ireland v. United Kingdom, 27 Eur. Ct. H.R. (ser. A) at 4 (1978); Belgian Linguistic Case, 5 Eur. Ct. H.R. (ser. A) at 4 (1967).

73. European Convention, supra note 4, art. 54. The Court itself lacks the capacity to enforce its judgments.

74. Id. art. 32.

75. Id. art. 50; see Delmas-Marty, supra note 3, at 101, 102.

76. European Convention, supra note 4, art. 32.
must comply with the relief sought.\textsuperscript{77} If the respondent state does not comply, the Committee may publish the report of the Commission and take any other action necessary to gain compliance, including ejecting the state from the Council of Europe.\textsuperscript{78}

2. The Inter-American System

The principles and institutions of the Inter-American human rights system developed gradually through the work of the Organization of American States (OAS). Representatives of the various American states adopted both the Charter of the Organization of American States (OAS Charter) and the Inter-American Declaration of the Rights and Duties of Man (American Declaration)\textsuperscript{79} at the Ninth International Conference of American States, held in Bogota in 1948.\textsuperscript{80} The OAS Charter makes little mention of human rights, focusing primarily on the security of member states.\textsuperscript{81} Twelve years later, however, the OAS Council established the Inter-American Commission for Human Rights, which became an OAS Charter organ with the adoption of the Protocol of Buenos Aires in 1967.\textsuperscript{82} The American Convention on Human Rights was signed two years later and came into force in 1978.\textsuperscript{83} Because all OAS members are not parties to each of these instruments, the Inter-American Commission or Court must consider the different status and obligations of each defendant in relation to the different instruments they have ratified and are party to when reviewing an alleged human rights violation.\textsuperscript{84}

The Inter-American human rights system is composed of three organs: the Inter-American Commission for Human Rights, the Inter-American Court of...
Human Rights, and the General Assembly of the Organization of American States. The original role of the Commission was to promote respect for the rights set forth in the American Declaration. In 1965 the Second Special Inter-American Conference expanded this role when it authorized the Commission to act on individual petitions alleging human rights violations. However, the Commission did not gain secure constitutional footing until the American Convention came into force in 1978.

The Commission consists of seven members chosen by the General Assembly to serve four-year terms; several measures are designed to protect the independence and impartiality of its members. The Commission has the right to draft its own regulations and statutes, subject to the approval of the General Assembly, and is supported by an independent Secretariat. The Statute also empowers the OAS Secretary General to choose the Secretariat's Executive Secretary, thereby giving the Secretary General a limited amount of control over the Commission.

85. Article 9 of the original Commission Statute gave the Commission the power to prepare studies and reports and to make recommendations to the governments of member states which would foster the development of human rights within the domestic law of these countries. See Original Commission Statute, OAS/Ser.L.V/1 (Sept. 26, 1960). Out of this original mandate came the Commission's practice of conducting country studies, in which the Commission prepares ongoing general reports on human rights conditions in the OAS nations.

86. The Commission was to give "particular attention" to the "preferred" rights: the right to life, liberty and security of person; equality before the law; freedom of religion; freedom of expression; freedom from arbitrary arrest; and the right to due process of law. See Final Act of the Second Conference, Official Documents, OEA/Ser.E/XIII.1 (1965), at 45-46. The Conference also asked the Commission to provide an annual report to the Inter-American Conference or the Meeting of Consultation of Ministers of Foreign Affairs. Id.

87. American Convention, supra note 5, arts. 34-37; Statute of the Inter-American Commission on Human Rights, reprinted in BASIC DOCUMENTS, supra note 5, art. 2(1) [hereinafter Commission Statute]. Members of the Commission are selected by the General Assembly from a field of up to three candidates proposed by each of the member states; no two members of the Commission can be nationals of the same state. If a state chooses to submit three names to the Assembly, at least one must be a non-national of that state. American Convention, supra note 5, arts. 36(2), 37(2); Commission Statute, supra, arts. 3(8), 7.

88. The Commission's Statute requires members to avoid conflicts of interest through the so-called "incompatibilities" clause, which provides: "Membership on the Inter-American Commission on Human Rights is incompatible with engaging in other functions that might affect the independence or impartiality of the member or the dignity or prestige of his post on the Commission." Commission Statute, supra note 87, art. 8(1). Similar language is found in the Regulations of the Inter-American Commission on Human Rights, reprinted in BASIC DOCUMENTS, supra note 5, art. 4(1) [hereinafter Commission Regulations]. The Commission polices itself, and if such a conflict is found the Commission refers the case to the General Assembly. If the General Assembly confirms the Commission's conclusions by a two-thirds majority it expels the member. Commission Statute, supra note 87, art. 8(2)-(3).

89. American Convention, supra note 5, art. 39.

90. The Secretariat staff "prepare the draft reports, resolutions, studies and any other papers entrusted to it by the Commission or by the Secretariat;" insure that summary minutes and any documents which the Commission is considering are submitted to all of the members; receive petitions submitted to the Commission; request information from a relevant government if necessary; and "make the necessary arrangements to initiate any proceedings to which such petitions may give rise." Commission Regulations, supra note 88, art. 14(1-2).

91. The Executive Secretary heads the Commission's permanent Secretariat and controls the Commission's budget. Commission Statute, supra note 87, art. 21; Commission Regulations, supra note 88.
Towards a Procedural Jurisprudence

Once the Commission declares a petition reviewable, the Commission determines the applicable law by looking to the status of the state involved. The Commission next performs critical investigatory and conciliatory functions both for individual petitions against parties to the Convention and

88, art. 24. The role of the Executive Secretary has significant consequences. For example, Commission regulations state that the Commission shall not meet for more than eight one-week sessions per year, although the Commission may hold "special sessions" if the Chairman chooses or an absolute majority of the Commission so requests. Commission Regulations, supra note 88, art 15(1). The Executive Secretary, however, can effectively curtail this power — which may be needed in emergency situations — by limiting staff and budget. In fact, the Commission's budget is so restricted that it is unable to record all the petitions it receives. Thus, the power of the Executive Secretary and the eight-week limit greatly increase the importance of the permanent Secretariat vis-à-vis the Commission. MOWER, supra note 5, at 83. One former President of the Commission has criticized this structure, saying that Commission control over its own staff and budget would "magnify" the Commission's "efficacy, independence and prestige." TOM J. FARER, THE UNITED STATES AND THE INTER-AMERICAN SYSTEM: ARE THERE FUNCTIONS FOR THE FORMS? 70 (1978).

The Court appoints its own Secretary, see American Convention, supra note 5, at 58(2), giving the Court "the power to ensure that its chief administrative officer does not have divided loyalties." Thomas Buergenthal, The Inter-American Court of Human Rights, 76 Am. J. Int'l L. 231, 234 (1982) [hereinafter Buergenthal, Inter-American Court]. However, the OAS General Secretary still appoints the members of the Court's Secretariat. American Convention, supra, art. 59. The Court therefore does not have control over its budget, or over most of the Secretariat appointments.

These controls over personnel and budget threaten the effective enforcement of human rights in the Inter-American system by stifling the potential creativity of a system that has been most effective when it has been free to apply its powers in flexible, industrious, and intelligent ways. See Weissbrodt & Bartolomei, supra note 5, at 1033.

92. The substantive rights protected by the Inter-American Commission and Court derive from several sources: the Charter of the OAS, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the Statutes and Regulations of the Court and Commission. See American Convention, supra note 5; Commission Statute, supra note 57; Commission Regulations, supra note 58; Statute of the Inter-American Court of Human Rights, reprinted in BASIC DOCUMENTS, supra note 5 [hereinafter Court Statute]; Rules and Procedure of the Inter-American Court of Human Rights, reprinted in BASIC DOCUMENTS, supra note 5; OAS Charter, supra note 81; American Declaration of the Rights and Duties of Man, OASOR at 23, OEA/Ser. I/IV, doc. 21 rev. 2 (English 1975).

The subtle differences of jurisdiction and competence of the Commission and Court in relation to their convention-based, treaty-based, statutory, and regulatory powers have been summarized as follows: [B]oth the Inter-American Commission and the Inter-American Court (but especially the Commission) operate beyond, as well as within, the framework of the American Convention. The Commission is as much an organ of the OAS Charter as it is of the American Convention, with powers and procedures that differ significantly depending on the source of the Commission's authority, particularly, in relation to human rights petitions and communications. The Court, while primarily an organ of the Convention, nonetheless has jurisdiction to interpret human rights provisions of treaties other than the American Convention, including the human rights provisions of the OAS Charter.

Weston et al., supra note 5, at 608 (footnotes omitted). For a brief outline of the litigation stages before the Commission, see Buergenthal, Inter-American Court, supra note 91, at 237-38.

The Commission enforces the Declaration's human rights protections against all OAS member states because all OAS member states are bound by the Declaration. The Commission and Court enforce the Convention against all states party to it. In addition, the broad advisory opinion power of the Court permits states party to the Convention, the Commission, and other OAS organs to request advisory opinions on a broad range of subject matter so as to enable the Court to issue determinations on the acts of states not necessarily party to the Convention.

93. Unlike states party to the European Convention, see supra note 58, infra note 115 and accompanying text, states party to the American Convention automatically subject themselves to the individual petition process. American Convention, supra note 5, arts. 41(0), 44-51.
for inter-state complaints involving states that have accepted the Commission’s inter-state jurisdiction. The process begins with a request for information from the respondent state. After the state has provided the requested information or after the time has elapsed for such submissions, the Commission again determines whether the petition remains reviewable, and if so the Commission begins its investigation by requesting information from the petitioner and receiving oral or written statements.

During this initial period the Commission attempts to assist the parties in reaching a settlement. The decision to settle must be made within three months. If a settlement cannot be reached during this time the Commission must draft a report for the parties setting forth the facts and stating its conclusion. and it may also make such proposals and recommendations as it sees fit. Either the Commission or the state concerned can then submit the case to the Court for adjudication. The Commission is also empowered to make recommendations and to prescribe a period within which the state must remedy the situation. After the prescribed period of time has elapsed, the Commission can vote on whether the state has adequately resolved the situation and whether to publish its report. It can also decide whether to refer a case to the Court, provided that the state involved has accepted the Court’s jurisdiction.

94. American Convention, supra note 5, art. 48(1)(a).
95. Id. art. 48(1)(b).
96. Id. art. 48(1)(e).
97. If a settlement is reached, the Commission prepares a report outlining the case and the agreement between the parties and submits it to the parties and to the Secretary General of the OAS for publication. American Convention, supra note 5, art. 49; see also Commission Regulations, supra note 88, art. 45(6). The Commission presently considers that one of its principal functions is to provide advice to states parties, and not to act as judge or prosecutor of their actions. The Commission also regularly has emphasized its harmonizing and educating missions, and thereby has developed an important reputation for impartiality. See Fernando Volio, The Inter-American Commission on Human Rights, 30 AM. U. L. REv. 65, 71 (1980).

Unfortunately, settlement efforts remain a relatively insignificant aspect of the Commission’s work because of the difficulties inherent in the settlement process: cases in which the possibility of settlement exists generally resolve before the filing of a petition, while an individual petitioner who has had to endure the often arduous path to bringing a petition frequently would decline to resolve the controversy by settlement. Further, the possibility of resorting to settlement procedures often is ruled out by the type of injury complained of, e.g., disappearances. See Mower, supra note 3, at 77-78.

98. American Convention, supra note 5, art. 50(1).
99. Id. art. 50(3).
100. Commission Regulations, supra note 88, art. 47(3).
101. American Convention, supra note 5, art. 51(3); Commission Regulations, supra note 88, art. 48(1).
102. The Commission also can request that a state submit to the Court’s jurisdiction for the purposes of a specific case. Commission Regulations, supra note 88, art 50(3). Private petitions filed against a state not party to the Convention are subject to an abbreviated procedure, following Articles 32-43 of the Commissions Regulations. Such petitions cannot make use of the settlement procedure and do not have access to the Court. Rather, the Commission makes its determination directly on the merits, presenting a written decision to the respondent state. The Commission can include in this decision any recommendations for action by the state along with pertinent deadlines. Id. art. 53(1). The Commission can publish its decision in its annual report or in any other manner it sees fit if the state fails to comply with these deadlines. Id. art. 53(4).
Once the Commission or a state refers a case to the Court, the Com-
mission must appear before the Court either as an advocate (for cases
involving individual petitions) or in a "quasi-judicial role" as the guaran-
tor of the integrity of the system (for cases involving inter-state petitions).
The Court, which consists of seven judges, reviews petitions de novo and
can conduct its own investigation of any matters it finds appropriate. Where the Court determines that there has been a violation of the Convention,
the Court can "rule that the injured party be ensured the enjoyment of his
right or freedom that was violated," and can order "fair compensation"
for the victim. Where a judgment awards compensatory damages, that
portion of the judgment "may be executed in the country concerned in
accordance with domestic procedure governing the execution of judgments
against the state." Judgments of the Court are transmitted to all states
party to the Convention. The Court reports cases involving noncompliance
to the General Assembly, which can then issue sanctions against the
respondent state.

103. In disappearance cases, the Commission has acted as a "true prosecutor"; in one case it openly
stated that "its task was to demonstrate that during a specific period (1981-1984) in Honduras, there was
an official policy of disappearances carried out or tolerated by the government." Méndez & Vivanco,
supra note 5, at 554.

104. See Inter-American Court, Government of Costa Rica (In the Matter of Viviana Gallardo et
[hereinafter Gallardo Case]. The Inter-American Commission thus has a function similar to that of the
European Commission. See supra notes 61-65 and accompanying text.

105. The judges of the Court serve six-year terms and are "elected in an individual capacity from
among jurists of the highest moral authority and of recognized competence in the field of human rights."
American Convention, supra note 5, art. 52(1). As is the case with Commission members, each state
can select up to three nominees. If a State submits three nominees, at least one must be a non-national
of that State. In addition, no two judges can be nationals of the same state. Id. arts. 52, 53; Court
Statute, supra note 92, arts. 4, 7. If a judge is a national of a party to a case, the judge may hear the
case and "any other State Party in the case may appoint a person of its choice to serve on the Court as
an ad hoc judge." American Convention, supra note 5, art. 55(2). If there are no nationals on the Court
from any of the States involved in a dispute, each has the right to appoint an ad hoc judge. Id. art.
55(5).

106. See Velasquez-Rodriguez Case, Preliminary Objections, Judgment of June 26, 1987, Inter-

107. American Convention, supra note 5, art. 63(1).

108. Id. Article 66(1) requires the Court to present reasons for its judgments, as well as any
dissenting or separate decisions. Id. art. 66(1). All judgments of the Court are final and non-appealable,
although parties can request clarification or interpretation. Id. art. 67. The Court submits a report of
its work to each session of the General Assembly. This report "shall specify, in particular, the cases
in which a state has not complied with its judgments, making any pertinent recommendations." Id. art.
65(2).

109. Id. art. 68(2). All states that have accepted the jurisdiction of the Court must comply with
its judgments. Id. art. 68(1).

110. Id. art. 69.

111. Id. arts. 65, 68(2). The General Assembly also reports on human rights conditions in member
states by issuing declarations, condemning the acts or omissions causing those conditions, or referring
the issue to the OAS meeting of Consultation of Foreign Ministers for sanctions through that body.
B. Significant Innovations in the European and Inter-American Systems

Respondent state compliance with human rights judgments often can be achieved only at the risk of alienating the respondent state and thereby threatening the ongoing development of the system. Both the European and Inter-American systems rely heavily on informal political mechanisms to obtain compliance. The strength and continuing development of these post-reviewability mechanisms diminish the need for adjudicators to consider political unity concerns at the reviewability stage.

The European Convention's most significant innovation is the individual right of petition against governments. This provision was the subject of much debate, as several governments feared that it could be abused. The Convention's framers compromised, making a state's submission to Commission and Court jurisdiction over individual applications against it optional. Nevertheless, all members of the Council of Europe currently accept individual petitions against them.

Several other innovations moderate the potentially contentious nature of the individual right of petition. First, a member of the Commission may be

---

112. There exists a dearth in research and analysis on the impact of international and regional mechanisms on the actual protection of human rights. See Weissbrodt & Bartolomei, supra note 5, at 1009 n.1 (listing studies that attempt to assess effectiveness of human rights mechanisms). This gap makes difficult any estimation of the price paid in individual rights for a greater certainty that a unified system with the full support of its member states will be better able to protect individual rights in the future. It seems reasonable to assume, however, that concessions made to preserve political unity affect the protection of individual rights.

113. For example, a combination of a number of factors, including a visit by the Inter-American Commission and the publication of its report, United Nations activity, and the cut-off of military aid by the United States ultimately led to a reduction in the numbers of disappearances that took place in Argentina in the late 1970's. See id. at 1023-24, 1034.

114. European Convention, supra note 4, art. 25; see supra note 58 and accompanying text; see also COUNCIL OF EUROPE, TENTH ANNIVERSARY OF THE ENTRY INTO FORCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 20 (1968) (detailing history of drafting, and describing provision for private suits as "the cornerstone of the Convention . . . [imparting] to the Convention its full significance and [constituting] an outstanding contribution to the status of the individual in international law").

115. See supra note 68. In addition, individuals cannot present their claims to Court. They must rely upon either the Commission or a state to advance their petition to the Court. As a result, disputes are presented to the Court (and to the Committee) by political representatives, not individual complainants. However, the Commission does accept the input of individual petitioners when presenting their cases to the Court. See Practice and Procedure on Individual Applications Under the European Convention on Human Rights, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 133, 149 (Hurst Hannum ed., 1984) [hereinafter HUMAN RIGHTS PRACTICE] ("[t]he Commission accepts the practice, sanctioned by the Court, to invite the applicant or lawyer to assist the Commission in both the preparation and presentation of its case before the Court.").

The Court also permits counsel to represent individuals and grants applicants legal assistance free of charge if necessary. See COUNCIL OF EUROPE, COLLECTED TEXTS 315-16 (1979) (Addendum to Rules of Procedure); Paul Mahoney, Developments in the Procedure of the European Court of Human Rights: The Revised Rules of Court, 3 Y.B. Eur. L. 127, 134-35 (1983). The Court's assessment of the need for counsel takes into account whether the applicant has legal training herself and whether the submissions demonstrate the applicant's inability to advance her case adequately. The applicant's financial need must be certified by an appropriate domestic authority; decisions refusing legal aid are not published. See Krüger, supra note 64, at 85.

116. See supra text accompanying note 60.
a national of the respondent state, and the seventh member on a panel of the Court is chosen by the respondent state to represent its interests, which assures that at least one member of the panel is familiar with the respondent state’s laws.\footnote{117} This assists compliance, as states are more apt to accept a decision made by a panel of jurists that includes a member perceived as not adverse to their interests. Second, the fact that the Commission presents all admissible individual petitions to the Committee assures respondent states of an opportunity to obtain informal resolution of the dispute.\footnote{118} Third, respondent states can also choose to submit a case to the Court if they perceive the Committee to be adverse to their interests.\footnote{119} Fourth, the ongoing settlement efforts, monitored by the Commission and undertaken in complete secrecy, permit the political resolution of disputes at the lowest cost to the respondent state.\footnote{120}

Finally, the willingness of respondent states to comply with adverse decisions cannot be viewed outside the context of the relationship of the European system to the domestic courts of its member states. Soon after the signing of the Convention national legislatures began adopting the Convention into their domestic legal structures,\footnote{121} and the Convention now enjoys the status of domestic law in about one half of the signatories.\footnote{122} Even in states where such implementing legislation has not been passed, domestic courts frequently look to the Convention to aid them in interpreting legislation to be consistent with the Convention.\footnote{123} This replication of protected rights in domestic law, when seen in the context of the political and economic integration of Europe over the life of the Convention, strengthens the political unity of the European system because states are reluctant to undercut the legitimacy of a legal regime on which their own courts depend.

Political unity remains much more of a concern in the Inter-American system, which therefore has developed more procedural mechanisms to investigate facts and resolve disputes in a manner that will help preserve the system.\footnote{124} For example, with the permission of a respondent state the
Commission can undertake on-site investigations, which involve interviewing witnesses, reviewing documents, and any other efforts necessary to explore the claims of a petition. The Commission's ability to conduct on-site investigations serves both conciliatory and fact-finding functions. The process of initiating on-site investigations demonstrates the Commission's efforts to confront political unity concerns. For an investigation to take place, the Commission must first ask the potential host state to issue the Commission an invitation to investigate. By providing the potential host state with the opportunity to issue the invitation, the Commission formally recognizes that state's sovereignty. This recognition often fosters greater host state cooperation. If the state does not issue the invitation the Commission can inform the state that an investigation is necessary to verify facts concerning alleged violations of the Convention. States that wish to refute allegations are likely to permit the Commission to conduct an on-site investigation under these circumstances.

In addition, on-site investigations help mitigate the practical and political barriers to meritorious claims. On-site investigations help widen access to the Commission and reduce the unfairness of burdensome filing requirements. The presence of Commission representatives offsets the high cost of legal advice by disseminating free information about advancing claims in the Inter-American system. The presence of Commission representatives within a country also may prevent retribution against victims or witnesses who come forward in a case, although harassment still can occur before or after the visit. Furthermore, on-site investigations permit the gathering of information that can only be found in situ, such as through the inspection of jails, cemeteries,

---

125. Article 41(c) of the Convention empowers the Commission "to prepare such studies or reports as it considers advisable in the performance of its duties." American Convention, supra note 5, art. 41 (c). The history of the Commission's country study and on-site investigations pre-dates the Convention. The Commission originally was granted limited functions and powers. It had no authority to review individual petitions, but was designed to study the human rights situation in particular states in order to provide general recommendations to their governments, and thereby to stimulate public awareness of the rights contained in the American Declaration. As it matured, however, the Commission assumed new functions. By regularly moving the selected location for its meetings from state to state, the Commission's original authority to hold meetings in any OAS member state evolved into a power to conduct on-site investigations. This evolution was the most significant development in the work of the Commission during the eighteen-year period of its existence prior to the coming into force of the Convention. See Cerna, supra note 5, at 312-13.

126. See Norris, supra note 5, at 301. The Commission's efforts to visit Argentina in 1978 provide an excellent case study of its management of the problems surrounding an on-site investigation in a resisting state. See Weissbrodt & Bartolomei, supra note 5, at 1019-20 (discussing investigation).
or places of torture. Overall, commentators regard the Commission’s on-site investigation procedures as quite successful.

On-site investigations do have practical limitations, however, because some respondent states do not consent to investigation, and because some that do formally consent effectively deny the Commission access. Nevertheless, on-site investigations can highlight practices that might violate the Convention and can attract a level of publicity unattainable by a private petition, thereby encouraging a national government to alter objectionable practices and making it more difficult for a respondent state to reject an adverse decision further down the road. In the long run, therefore, on-site investigations may foster unity in the Inter-American system by encouraging states to accept adverse judgments.

A second significant procedural mechanism relied upon in the Inter-American system is the broad advisory opinion power of the Court.

127. See generally Thomas M. Franck & H. Scott Fairley, Procedural Due Process in Human Rights Fact-Finding by International Agencies, 74 AM. J. INT’L L. 308 (1980) (assessing fact-finding procedures of Commission); Norris, supra note 5, at 317 (same); Shelton, supra note 5 (same). Tracing the socioeconomic and political factors that make on-site investigations largely unnecessary in the European system is beyond the scope of this article. It is important to note that the human rights complaints in the European system have tended to be individual-specific, and not abuses consistently directed against groups of individuals. The European Commission possesses narrower authority than its American counterpart, and has none of the broad investigatory experience of the latter institution. This does not mean, however, that the on-site investigation would not prove a valuable tool to the European Commission in particular circumstances, particularly in the review of systemic abuses against ethnic and religious groups. See Weston et al., supra note 5, at 620-21 (discussing applicability of on-site investigation mechanism to European Commission).

128. Success is attributed to the fact that the Commission’s stability and experience have won general respect and the fact that the Commission has actively sought to develop useful and creative precedents to adopt the procedures to new conditions. See Norris, supra note 5, at 317-18; Weissbrodt & Bartolomei, supra note 5, at 1023 (“The Commission’s report, widely disseminated outside Argentina, was very influential in focusing world public opinion on the human rights abuses in Argentina.”).

129. See, e.g., Norris, supra note 5, at 295 (detailing difficulties of Commission in its visit to Guatemala, caused in part by mission’s inability to separate from their military "escorts").

130. Alleged events in a state may warrant a report even if an on-site investigation is impossible because of logistical considerations or continued resistance by the state. From 1978 through 1987, for example, Paraguay formally consented to an on-site visit by the Commission yet effectively denied the visit by not agreeing to set a date. See INTER-AMERICAN COMM’N ON HUM. RTS., REPORT ON THE SITUATION OF HUMAN RIGHTS IN PARAGUAY at 1, OEA/Ser.L/VI/II.71, doc. 19 rev. 1 (1987) (Original: Spanish). Because the Commission can prepare a report based on evidence collected by other human rights organizations, it can bypass the political difficulties caused by requests for on-site investigations yet still publicize the human rights abuses in a particular OAS state.

131. See THOMAS BUERGENTHAL ET AL., PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS 180 (3d ed. 1990) (“[T]he effectiveness of the Commission’s ‘country-study’ practice depends on its prestige and credibility, in the public opinion pressure that is likely to be exerted to support its recommendations, and on the resolutions that the OAS General Assembly is willing to adopt to back the Commission.”).

132. American Convention, supra note 5, art. 64(1-2). The Court has noted that the ability of state parties and OAS organs to seek advisory opinions as an alternative means of resolving conflicts, "is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process." Restrictions on the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83 of Sept. 8, 1983, para. 43, in 5 THOMAS BUERGENTHAL & ROBERT NORRIS, HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, Booklet 25.1, at 19. The Court can, if necessary, incorporate any of
Advisory opinions possess persuasive force, are less threatening to the state involved because they do not result in express orders requiring compliance, and offer flexibility and speed of decision through proceedings which are less litigious in character. Advisory opinions thus help to develop political support for the Court by building a much-needed record on particular issues, which in turn enables states to anticipate potential liability and to change their practices accordingly. This process entrenches expectations and assists enforcement, both important factors in developing the political unity and legitimacy of a regional system.

Finally, the Inter-American System employs various mechanisms, including class action determinations, default provisions, and emergency powers to advance petitions on substantive grounds. "Class action" determinations allow the Commission to assess alleged injuries that may be hard to document on an individual basis by allowing petitioners to meet a lesser burden of proof if their allegations indicate a pattern of abuse by a member state. By expediting determinations of fact in cases where a practice is both difficult to deny in general yet hard to verify in particular instances, the Commission accepts cases which it might otherwise reject as inadmissible. Default provisions permit the Commission to accept the alleged facts of a petition as true when a respondent state has not provided adequate testimony to refute the petition's claims or has not answered the Commission's requests
within the time allowed. If either of these outcomes occur, the Commission will find the state in violation of the Convention. Emergency powers permit the Court to issue provisional measures in emergencies if necessary to prevent "irreparable damage to persons." All of these provisions have the countervailing tendency to convince respondents to settle, because they increase the chances that petitioners will prevail in the courtroom.

C. Admissibility

Despite the significance of the innovative mechanisms discussed above, admissibility and standing requirements are perhaps the most important procedural mechanisms for any human rights tribunal. Admissibility requirements are the chief means by which the Commissions control which petitions they consider. These requirements reflect three general concerns. First, the systems must be able to screen petitions quickly to ensure that investigatory mechanisms will not be employed for claims that lie outside their mandates. Second, the systems must ensure that applicants seek the services of their Commissions only after domestic remedies have failed; this maintains respect for a state's effort to develop its own legal system and reflects the maxim that "international protection begins only when domestic security ends." Lastly, admissibility procedures ensure that human rights systems are not manipulated for improper purposes, a situation that would undermine their fragile political mandates. At the same time, however, due process concerns require that the Commissions' admissibility decisions reflect the core due process rights to access, to fairness, and to a competent tribunal. This section considers the political unity and due process considerations that guide the admissibility requirements of the two systems, and the degree to which the decisions of the Commissions enable the development of a procedural jurisprudence.

1. The European System

The admissibility statistics of the European Commission's decisions on individual petitions demonstrate the degree to which it utilizes admissibility

---

137. Article 42 of the Commission Regulations provides:

The facts reported in the petition whose pertinent parts have been transmitted to the government of the State in reference shall be presumed to be true if, during the maximum period set by the Commission under the provisions of Article 34 paragraph 5, the government has not provided the pertinent information, as long as other evidence does not lead to a different conclusion.

Commission Regulations, supra note 88, art. 42.

138. American Convention, supra note 5, art. 63(2).

139. See supra note 63 and accompanying text (discussing settlement). The frequency of settlement would be increased if the OAS established an optional protocol permitting states not party to the Convention to take advantage of settlement procedures in contentious cases. After dealing with the Commission on these terms, states may be more willing to participate more fully in the system, leading to further ratifications and broader participation.

140. Volio, supra note 97, at 75.
to control its caseload. In 1991, for example, the Commission opened 5,550 provisional files. Following an initial response to each petitioner, the Secretariat formerly registered 1,648 applications. The Commission subsequently deemed 1,261 of the petitions inadmissible following a full review, and declared 180 more inadmissible upon communication with the respondent state. The Commission ultimately declared only 217 petitions admissible, and later rejected one of these petitions on admissibility grounds during its review of the merits.\footnote{4}

While early in its history the Commission declared that it would treat procedural rules with less rigor than do national courts,\footnote{142} in practice the Commission relies heavily on several general rules that act to exclude the vast number of applications. Initial complaints must provide information alleging that admissibility requirements are met and must allege a prima facie violation of the Convention.\footnote{143} Prior to registration of the application, the Commission’s Secretariat ensures that the case file is as complete as possible, corresponding with the applicant if necessary. In these communications the Secretariat notes potential admissibility problems, often thereby making a de facto decision on admissibility for the Commission.\footnote{144} The Secretariat’s activities result in the formal registration of only approximately one in eight applications,\footnote{145} although the Secretariat does not refuse to register a complaint if the party insists.\footnote{146}

Once a complaint is registered, the Secretariat directs inter-state applications to the attention of the President of the Commission, and assigns individual applications to one member of the Commission as rapporteur, who writes a report on admissibility based on further requests for information from the petitioner and the state concerned.\footnote{147} The Commission can rely upon these reports to dismiss applications summarily as inadmissible, or it can

\footnote{141. See Council of Europe, European Commission of Human Rights: Survey of Activities and Statistics 21 (1991). It is important to note that the initial communication between the Secretariat and the individual petitioner reduced the number of petitions by the largest percentage (71%). This communication informs the petitioner of the requirements the petition must meet to be formally registered; thus, this step forms an important (and largely private and undocumented) stage through which the Commission limits the number of petitions. See generally Van Duk & Van Hoof, supra note 4, at 61-63 (“The Secretariat has been instructed to draw the attention of potential applicants to the possibility of rejection of the complaint in cases where the case-law of the Commission points in that direction. The Secretariat does so by means of standard letters.”).}

\footnote{142. See Lawless v. Ireland, App. No. 332/57, 1958-1959 Y.B. Eur. Conv. on H.R. 308, 326 (Eur. Comm’n. of H.R.) (1959) (“the present Commission, as an international tribunal, is not bound to treat questions of form with the same degree of strictness as might be the case in municipal law”) (citation omitted). In Lawless the Commission applied the principle of effectiveness to exhaustion determinations, noting that exhaustion need be required only where the domestic remedy can be deemed “effective.” Id. at 318-22.}


\footnote{144. This process violates the formal requirement that the Commission itself make admissibility decisions. See Laurids Mikaelsen, European Protection of Human Rights 40-42 (1980).}

\footnote{145. See id. at 40.}

\footnote{146. See Krüger, supra note 64, at 71-72.}

\footnote{147. Rules of the European Commission, supra note 143, R. 40(2).}
accept the petition for review before the entire Commission. If the entire Commission considers a petition, it can again address questions to the parties, particularly to the state if its opinions on admissibility have not yet been solicited. The Commission can also decide to hold hearings on both admissibility and the merits.

Once the full Commission accepts a petition for review, it assesses whether the petition meets the requirements of Articles 26 and 27 of the Convention. Article 26 dictates that the Commission only handle disputes within six months after domestic remedies have been exhausted with a final decision. Article 27 requires that a petition present a prima facie case of a violation of a Convention right. Article 27 also imposes additional requirements on individual petitions.

The exhaustion requirement in Article 26 follows the "local remedies rule" of international procedural law, and is based upon the rationale that legal issues should be resolved through domestic courts if possible. The exhaustion requirement applies to both state and individual petitioners, and applies only to the allegations that appear in the petition. If the petition is not rejected but is referred to the respondent state for comment, the respondent state can then plead non-exhaustion, but the state carries the burden of proof.

148. Id. Rs. 42(1)-(3).
149. See Krüger, supra note 64, at 78-80.
150. European Convention, supra note 4, art. 26.
151. Article 27(c) states that petitions cannot be "manifestly ill-founded." Id. art 27(c).
153. See, e.g., Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 6, 27 (March 21); see also HENRY J. STEINER & DETLEV F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 247 (2d ed. 1976) ("In deciding whether to espouse the claim of a national, government officials generally require evidence of his having pursued all meaningful local remedies.").
155. A state bringing an interstate petition can assert that the requirement does not apply, since a state cannot be forced to submit to the jurisdiction of another state. However, the Commission, has rejected the argument that the principle of the collective guarantee of rights and the public interest make the exhaustion requirement generally inapplicable to petitions brought by states. Therefore, as applied to state petitions, the exhaustion rule requires that the individuals on whose behalf the state brings the petition must have exhausted their local remedies. See Austria v. Italy, App. No. 788/60, 1961 Y.B. Eur. Conv. on H.R. 116, 146-52 (Eur. Comm’n of H.R.); see also Cyprus v. Turkey, App. Nos. 6780/74 & 6750/75, 1975 Y.B. Eur. Conv. on H.R. 82, 120-22 (Eur. Comm’n of H.R.).
156. See Rules of the European Commission, supra note 143, R. 42.
The burden of proof. The state can also waive the requirement. The Commission has stated that the exhaustion requirement is not absolute, but that each case should be judged "in the light of its particular facts." The Commission has forgiven the exhaustion requirement where pursuing a domestic remedy would be futile, although a determination of futility requires that the petitioner have made reasonable efforts to exhaust if domestic law conflicts with the petitioner's claims. The requirement does not apply to challenges to domestic legislation or administrative practice, which are ongoing (and therefore not final), or to individual petitions alleging injuries of such a nature as to have no hope of domestic remedy. These exceptions to the exhaustion requirement acknowledge that political unity concerns should not always trump due process considerations.

Under the six-month rule, an applicant can only file a petition with the Commission within six months of a final decision on the matter in the highest applicable domestic court. Like the exhaustion requirement, the six-month rule is inapplicable when violations of the Convention are continuous or when


there are no domestic remedies available. This rule exists "to prevent the past judgments [of domestic courts from] being constantly called into question."  

2. The Inter-American System

The American Convention sets forth several admissibility requirements for both individual and inter-state petitions that closely parallel those found in the European system. Domestic remedies must be exhausted "in accordance with generally recognized principles of international law," the petition must be filed within six months from the date the complaining party "was notified of the final [domestic] judgment," and the petitioner cannot be advancing her case in another international forum. The petition must also state a prima facie violation of rights guaranteed by the Convention, cannot be "manifestly groundless or obviously out of order," and cannot be substantially duplicative of a petition previously considered by the Commission or by another international organization.

The most important requirement is that petitioners must state "facts that tend to establish a [state party] violation of the rights guaranteed by this Convention." The Commission has dismissed complaints that did not meet this requirement. The Commission has also dismissed petitions on mootness grounds when the complaints have been resolved and no human rights violations remain outstanding. However, the Commission will not

---

166. American Convention, supra note 5, art. 46(1)(a).
167. Id. art. 46(2).
168. Id. art. 46(1)(c).
169. Id. art. 47(b).
170. Id. art. 47(c).
171. Id. art. 47(d).
172. Id. art. 47(b).
173. For example, in a case challenging the practices of the United States Immigration and Naturalization Service Border Patrol, the petition alleged that the Border Patrol's sweeps for undocumented aliens through farms in California led to chases along canals and waterways that had resulted in ten deaths. The Commission dismissed the petition as inadmissible on the ground that the deaths did not result from a practice or policy of the Border Patrol and therefore the petition failed to assert a claim under the American Convention. Case 9447 (United States), Res. No. 38/85 (July 1, 1985), OEA/ser.L/V/II.65, doc. 14 (1985) (Original: English), reprinted in 3 BUERGENTHAL & NORRIS, supra note 132, Booklet 21.1, at 250 ("[I]t is clear that these deaths were due to the actions of the victims in fleeing from Border Patrol agents who were conducting lawful search operations for undocumented aliens and did not flow from a practice or policy of the INS Border Patrol calculated to cause these deaths.").
174. Thus, the Commission rejected a petition to review a conflict between Guatemala and Costa Rica that involved a wounded Guatemalan guerrilla hiding in the embassy of Costa Rica in Guatemala because Guatemala had complied with the Commission's request for safe passage and medical assistance. Case 2600 (Guatemala), Res. No. 37/79 (March 8, 1979), Inter-Am. C.H.R., OEA/ser.L/V/II.46, doc. 32 (1979) (Original: Spanish).
The requirement that petitioners exhaust domestic remedies reveals the tension between the need to address both political unity and due process concerns. The general requirement addresses state concerns about interference with their domestic judicial systems and the desire on the part of states to prevent the elevation of a dispute to regional or international fora prior to their attempts to resolve the matter domestically. Yet states could abuse this requirement to prevent individuals from bringing petitions to the Commission. To confront this problem, the American Convention provides for three specific exceptions to the exhaustion requirement: when domestic law does not guarantee due process; when the petitioner has been denied access to available domestic remedies; and when there has been "unwarranted delay" in the provision of a final judgment in a domestic court. Commission judgments on exhaustion have developed other exceptions, including cases in which the domestic recourse available to a petitioner was of a political and not of a judicial nature, cases in which the domestic entity investigating the petition was the body most likely responsible for the alleged violations, and cases in which pursuing domestic remedies would be futile.

175. For example, the Commission accepted a petition lodged against Argentina that met the formal requirements under Article 46, even though it "describe[d] the events that are the subject of the complaint . . . in somewhat disorganized fashion and without being quite precise as to the causa petendi." Case 10109 (Argentina), Res. No. 26/88 (Sept. 13, 1988), Y.B. Inter-Am. C.H.R. 173, 180, OEA/ser.L/II.74, doc. 10 rev. 1 (1988) (Original: Spanish).

176. American Convention, supra note 5, art. 46(2)(a-c). Thus in a case involving the disappearance of a journalist in Peru in which local courts failed to produce genuine results even two years after the disappearance, the Commission held:

[In this case it is not appropriate to wait until internal remedies are exhausted, as requested by the Government of Peru . . . because since these events occurred [two years ago], sluggishness and lack of results in this investigation constitute an obvious case of unjustified delay in the administration of justice that, in fact, imply a denial of the same which would permit clarification of the facts, all of which make completely applicable the provisions of Article 37 paragraph 2 of the Commission’s Regulations.


178. For example, in a case against the government of Suriname alleging a summary execution, the Commission concluded:

[It was impossible for the complainants to exhaust domestic remedies in this matter since the authorities that would have been responsible for the investigation, namely the military police, form part of the military establishment accused of the violations in question, and . . . it can reasonably be deduced that the inaction of military in this and other cases clearly demonstrates an unwillingness to investigate, prosecute, and punish those responsible for the violations.


179. For example, the Commission considered an allegation that Chilean government agents abducted two youths during a protest march, one of whom died after the soldiers doused them with fuel and lit them on fire. Case 9755 (Chile), Res. No. 01a/88 (Sept. 16, 1988), Y.B. Inter-Am. C.H.R. 220, OEA/ser.L/II.74, rev. 1 (1988) (Original: Spanish). The Commission waived the exhaustion
Inter-American Court has also made determinations on the futility issue, including the landmark Velasquez-Rodriguez Case, in which the Court ruled that the exhaustion requirement should be waived when domestic remedies are "ineffective" or are "mere formalities."180

Because the exhaustion requirement can be burdensome, the Commission has developed other procedural practices to widen access and advance due process rights. One is the "class action determination" to assess alleged injuries that may be hard to document on an individual basis.181 As noted previously, the class action procedures require petitioners to meet a lesser burden of proof if their allegations concern patterns of human rights abuse. This procedure is useful because the Inter-American system often confronts petitions alleging similar abuses by authorities in which appeal to domestic courts would be dangerous or futile, as was the case following the Commission's 1979 on-site investigation in Argentina, when the Commission received approximately 4,000 individually filed petitions, mostly allegations of disappearances.182 The Commission did not consider each case individually; rather, it used the cases as evidence of the practice of disappearances when preparing a country study on the situation of human rights in Argentina.183 By making class action determinations in such cases of widespread human rights abuse, the Commission accepts cases that it might otherwise be forced to reject as inadmissible.

Another procedure that helps to counterbalance the exhaustion of domestic remedies requirement and to increase access to the Inter-American system is the on-site investigation.184 These investigations have become an effective means of documenting human rights abuses and increasing popular awareness of the Inter-American system.185 The high cost of legal assistance prevents many potential claimants from advancing claims, and many individuals are forced to make decisions concerning their claims with imperfect knowledge, particularly as they may not understand their options before the Commission when domestic remedies are non-existent, futile, or already exhausted. Having a Commission body in the state in which abuses have allegedly occurred helps overcome these problems.

180. Velasquez-Rodriguez Case, Judgment of July 29, 1988, 4 Inter-Am. Ct. H.R. (ser. C) at 914. The Court found that domestic proceedings were ineffective because "the imprisonment [of the victims] was clandestine; formal requirements made [the procedures] inapplicable in practice; the authorities against whom they were brought simply ignored them, or because attorneys and judges were threatened and intimidated by those authorities." Id.

181. See supra note 136.

182. Another case in which class action procedures were applied to allegations of thousands of disappearances at the hands of military, police, or paramilitary groups acting with the acquiescence of the government authorities, was Cases of Disappearance of Persons in Guatemala, Res. No. 25/86 (April 9, 1986), Inter-Am. C.H.R. R. 37, OEA/ser.L/IV/II.68, doc. 8 rev. 1 (1985-86) (Original: Spanish).

183. Cerna, supra note 5, at 314.

184. See supra note 126.

185. The Commission’s stability and experience has contributed to the success of these investigations. See Norris, supra note 5, at 317-18; Weissbrodt & Bartolomei, supra note 5, at 1023.
3. Analysis

Admissibility procedures are the single most important method by which tribunals in the two systems attempt to balance individual rights and political unity considerations. Admissibility rules allow the human rights systems to discard of claims beyond their competence; in so doing, the human rights systems eliminate some of the most politically difficult claims. Admissibility rules also permit the human rights institutions to delay petitioners who have not yet exhausted domestic remedies. This rule helps to ensure that the human rights systems do not unnecessarily intrude upon state sovereignty and emphasizes that members states have the responsibility to address potential human rights violations within their borders. If taken to an extreme, however, the political unity goals inherent in these admissibility rules could serve to undermine the legitimacy of the human rights systems by discouraging individual victims from pursuing claims in human rights courts. Therefore, the European and Inter-American institutions have been careful to temper the political unity goal with important due process rights, such as the right to a court. As such, the commissions and courts have interpreted the admissibility requirements broadly when a petition presents cognizable claims. In particular, the regional institutions have held that fairness concerns temper the effect of the exhaustion requirement; therefore, petitioners need not exhaust domestic remedies in a variety of cases, such as when trying to do so would be futile or would endanger the life of the petitioner. These exceptions to the exhaustion requirement promote individual rights at low cost to political unity, because the commissions may always suspend investigation to give the respondent state an opportunity to resolve the problem if it so requests and because settlement procedures can blunt the political salience of such a claim at a later stage.

It is significant that the admissibility decisions of both Commissions have not come under serious attack by respondent states. This indicates that admissibility decisions can be made principled and public through an articulated procedural jurisprudence, without significantly affecting the political unity of each system. Nonetheless, the human rights institutions thus far have failed to expressly consider the impact of alternative procedural mechanisms, such as settlement procedures, on their decisions to admit petitions that may not meet the letter of the admissibility rules.

D. Standing

Standing represents the second major requirement considered by the Commissions at the reviewability stage. While the European and Inter-American systems differ in the procedures their respective Commissions employ for individual petitions, neither system permits individuals to bring
Towards a Procedural Jurisprudence

their own cases before the Court. It is in the standing area, however, that the Commissions' decisions most evidence a trend towards protecting individual petitioners' rights of access to the systems, irrespective of political unity concerns. This result is consistent with the decisions of adjudicators in both systems to interpret the provisions of the Conventions broadly and demonstrates the importance of due process concerns for a procedural jurisprudence.

1. The European System

As noted earlier, the European Convention permits both individuals and states to file human rights petitions with the Commission. However, the requirements for and restrictions upon the two types of petitions differ. The Convention allows inter-state petitions in a range of circumstances with remarkably liberal standing requirements. Under Article 24, a state can lodge a complaint against another state on behalf of individuals, even if those persons are not its nationals, nor the nationals of any other member states. Petitioning states need not show any special interest or relationship to the victim to submit a complaint; rather, the state submitting the petition does so in the interest of furthering the terms of the Convention itself. States may lodge "abstract applications" — that is, petitions alleging that another state's legislative or administrative practice violates the Convention — without naming a specific injured party. Finally, states can file petitions collectively when acting in the interest of the Convention.

The Convention's provisions represent a remarkable departure from traditional principles of international law, which permitted an international action against another state only when the state itself or one of its diplomats

---

186. Most commentators consider international and regional systems that grant individual standing to be more effective, which perhaps explains why states agree to individual standing only reluctantly or seek to restrict that right, and why enforcement mechanisms relating to individual petitions are generally weaker than those applicable to inter-state complaints. See, e.g., Buergenthal, Similarities and Differences, supra note 5, at 159 (noting distinctions between individual and inter-state standing).

187. European Convention, supra note 4, art. 24.

188. See, e.g., Ireland v. United Kingdom, 25 Eur. Ct. H.R. 91 (ser. A) (1978) (permitting inter-state challenge where breach of Convention "results from the mere existence of a law which introduces, directs or authorises measures incompatible with the rights and freedoms safeguarded [by the Convention]"); Pfunders Case (Austria v. Italy), 1961 Y.B. Eur. Conv. on H.R. 116, 140 (Eur. Comm'n of H.R.) (state bringing application on behalf of private party "is not to be regarded as exercising a right of action [for] the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe."). The Commission has noted that "it follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves." Id. at 140.


had been a victim of violations of international law.\textsuperscript{191} Despite this important advance, however, diplomatic implications have deterred states from filing inter-state petitions if the states' own interests are not involved; therefore, very few states have filed inter-state complaints. Virtually all inter-state petitions have been lodged against states that do not recognize the right of private petition and thus could be attacked only through an inter-state proceeding.\textsuperscript{192}

The standing requirements for individual petitions are less permissive than those for inter-state petitions. While a person, a non-governmental organization, or a group can file an individual petition with the Commission, the applicant must be a victim of the violation of a right protected by the Convention.\textsuperscript{193} In theory, therefore, individuals cannot bring the same types of abstract complaints as states. To redress the discrepancy between the types of complaints that may be brought by states and the types of complaints that may be brought by individuals, the Commission has adopted a fairly broad view of what it means to be a "victim" of a violation. Thus, the Commission has interpreted Article 19, which states that the Commission must "ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention,"\textsuperscript{194} to require the Commission to review facts beyond those presented in the petition if necessary. This permits the Commission to inquire into circumstances beyond those surrounding the specific injury to the petitioner.\textsuperscript{195}

Thus in \textit{Donnelly v. United Kingdom}, for example, several persons from Northern Ireland alleged that British authorities tortured them while in detention.\textsuperscript{196} They also claimed that this treatment was part of "a systematic


\textsuperscript{192} An exception to this tendency occurs when a state seeks to protect its nationals or related persons who are under the jurisdiction of another state. In Ireland v. United Kingdom, for example, Ireland alleged that legislation and official treatment of Roman Catholics in Northern Ireland violated the Convention, 1972 Y.B. Euro. Conv. on H.R. 76 (Eur. Comm'n of H.R.) and Austria advanced the \textit{Pfunders} Case on behalf of six men convicted by Italy for the murder of a border guard in a region claimed by both countries. Austria v. Italy, 1961 Y.B. Eur. Conv. on H.R. 116 (Eur. Comm'n of H.R.); see also Cyprus v. Turkey, App. Nos. 6780/74 & 6950/75, 1975 Y.B. Eur. Conv. on H.R. 82 (Eur. Comm'n of H.R.); Cyprus v. Turkey, App No. 8007/77, 1977 Y.B. Eur. Conv. on H.R. 98 (Eur. Comm'n of H.R.) (application by Cyprus on behalf of Cypriot nationals, claiming mistreatment during Turkish invasion of Cyprus).

\textsuperscript{193} \textit{European Convention, supra} note 4; art 25 (individuals must claim "to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention"). If a petition sufficiently alleges a prima facie violation of the Convention the Commission will investigate to determine the sufficiency of the claim. See, e.g., \textit{X} v. Federal Republic of Germany, 1955 Y.B. Eur. Conv. on H.R. 150, 151 (outlining requirements for prima facie allegation sufficient to meet requirements of article 27(2) admissibility, even though applicant failed to state expressly that he was victim of challenged act).

\textsuperscript{194} \textit{European Convention, supra} note 4, art. 19.


They sought a full investigation into the facts surrounding their detention and the general British detention practices in Northern Ireland, and sought to have these administrative practices declared a violation of the Convention. The British government argued that the request to have general practices declared a violation was not admissible because individual applicants could not make abstract complaints. The Commission concluded, however, that individual applications could extend beyond the personal interest of the individual party to the public interest, so long as the petitioner "brings prima facie evidence of a practice and of his being a victim of it." The Commission has also wrestled with the requirement that an individual petitioner allege a specific, sufficient injury. In X v. Norway, for example, the Commission found that an applicant who sought to petition on behalf of men whose potential offspring would be aborted and on behalf of those fetuses who would be aborted had failed to allege a sufficient, personal injury. Similarly, in Brüggemann v. Federal Republic of Germany the Commission held inadmissible the petitions of an organization and a man who challenged legislation that increased penalties for abortion. The Commission found that the legislation could not be applied to the petitioners, who thus had failed to prove that the existence of the law caused them any injury. As such, they could not be considered victims. Yet in the same case the Commission agreed to review the petitions of two women who were not pregnant and who had not been denied abortions, holding that the women were injured by the legislation due to its intrusive effect on their reproductive decisions.

In other cases the Court has used a more liberal test for determining whether the applicant had met the "victim" element of the standing requirement. The Klass Case, for example, involved a challenge to a German law that allowed surveillance of postal, telegraph, and telephone communications without requiring the authorities to identify the observed parties or to provide judicial protection. This meant that it was impossible for the petitioners to determine whether or not they had actually been injured by the law. The Court found that the secrecy fostered by the law in question would permit

---

197. Id. at 216.
198. Id.
199. Id. at 236.
200. Id. at 260. Once these requirements are met, the Commission concluded, "neither Article 25, nor any other provisions in the Convention, inter alia Article 27(1)(b), prevent an individual applicant from raising before the Commission a complaint in respect of an alleged administrative practice in breach of the Convention." Id. The Commission subsequently held the applications inadmissible, however, on the ground that the petitioners had failed to exhaust domestic remedies. Donnelly v. United Kingdom, App. Nos. 5577-5583/72, 1976 Y.B. Eur. Conv. on H.R. 84, 248-52 (Eur. Comm'n of H.R.).
203. Id.
204. Id. at 115.
violation of Convention rights without an affected party's knowledge. The Court then declared a "principle of effectiveness": Convention procedures must be applied in such a way as to make the system of individual applications effective — that is, in such a way as to preserve access to the Commission.206 To do so, the Court concluded, standing must be determined "according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures."207

The Commission and Court have extended this principle of effectiveness quite far. Thus, in X v. Belgium the Commission held that a petitioner alleging that his brother had been wrongfully detained in a state institution, where he died, had standing as an indirect victim.208 In the Marckx Case, which involved an application alleging injury from Belgian legislation concerning illegitimate children, the Court held that Article 25 "entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it,"209 thus permitting those at risk of being affected by legislation to challenge it.

206. Id. at 17-18. The Court concluded:
The question arises . . . whether an individual is to be deprived of the opportunity of lodging an application with the Commission because, owing to the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him. In the Court's view, the effectiveness (l'effet utile) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.

The Court therefore accepts that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him.

Id. at 18.

207. Id. at 18-19.


209. Marckx Case, 31 Eur. Ct. H. R. (ser. A) at 12, 13 (1979) (citation omitted). See also Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) at 18 (1982); Campbell and Cosans Case, 42 Eur. Ct. H.R. (ser. B) at 12, 42 (1980-83) (Commission's Report of May 16, 1980) (deciding two mothers' challenge on behalf of their children to system of corporal punishment in Scottish schools children attended; Commission relied on Klass to hold that "to be accepted as victims under Article 25, individuals must satisfy the Commission that they run the risk of being directly affected by the particular matter which they wish to bring before it.").
Finally, the Commission has on occasion continued to review an application after an individual withdraws it, on the grounds that doing so would advance the public interest. These decisions have the net result of admitting individual complaints that might well be considered "abstract." At the least, once an individual has alleged a specific injury the Commission may investigate a state's broader practices, even though the petitioner can claim injury in a specific instance only.

2. The Inter-American System

The Inter-American system's rules on standing are distinctive in several respects. First, the Inter-American system attempts to curb vexatious inter-state proceedings by allowing every state to decide whether it will be subject to the inter-state petition process. Second, the Inter-American system compels states to submit to the Commission's jurisdiction to accept individual petitions against them. Third, despite broad individual standing to submit complaints to the Commission, standing requirements before the Court do limit direct individual access to contentious jurisdiction and the broad advisory services of the Court. Fourth, the Convention empowers the Court to take provisional measures in emergency situations, even if a case is not yet properly before it.

Article 45 of the American Convention sets forth special procedures for inter-state complaints before the Commission. Any time after a state ratifies the Convention, it may submit to the Commission's jurisdiction on inter-state petitions for "an indefinite time, a specified period, or for a specific case." By making a state's submission to inter-state petitions voluntary, the Inter-American system explicitly recognizes that states could manipulate the inter-state petition process by bringing groundless claims for purely political reasons. The system of permissive jurisdiction therefore encourages states that fear being victims of such political abuse to sign the Convention because they can eschew compulsory jurisdiction. This result comes at a cost: no contentious inter-state petitions have ever been filed with the Commission, and inter-state petitions against the majority of the states are

---

211. American Convention, supra note 5, art. 45(1)-(2).
212. Id. art. 45(3).
213. As Judge Buergenthal notes:

The drafters of the American Convention opted for this approach in part because of Latin America's historical opposition to, and experience with, governmental intervention in the internal affairs of other governments. . . . Experience with inter-state complaints indicates that they contribute to the politicization of the human rights enforcement process.

Buergenthal, Similarities and Differences, supra note 5, at 160 (footnote omitted).
foreclosed because fewer than half the states party to the Convention have accepted the Commission's jurisdiction over inter-state petitions.  

In addition to the possibility of groundless inter-state petitions brought to harass or embarrass other states, the inter-state petition process is subject to another kind of abuse: states may decide not to bring valid claims against other states for political reasons. In recognition of this fact, Article 44 of the Convention grants the Commission mandatory jurisdiction over individual petitions alleging any violation of the Convention by a state party. As the Inter-American Court has recognized, in this respect the Convention is atypical among human rights documents. Any person, group, or nongovernmental entity can file a petition with the Commission denouncing violations of the Convention.

While the Convention provides all individuals with standing before the Commission, individuals have no direct access to the Court. Under Article 61 of the Convention, only the Commission and states have standing to petition the Court. Individuals only have access to the Court via the Commission, which has the discretion to bring an individual petition before the Court. Moreover, states desiring access to the Court or expressing a willingness to accept the Court's binding jurisdiction can define the terms of the jurisdiction they accept.

The foregoing standing rules also play a role in the Court's extensive advisory jurisdiction. Advisory opinions are effective, though limited, tools in the protection of human rights. While a state disobeying an


215. American Convention, supra note 5, art. 44.

216. See Gallardo Case, supra note 104, para. 22 ("The Convention is unique among international human rights instruments in making the right of private petition applicable against States Parties as soon as they ratify the Convention; no special declaration to that effect is required for individual petitions, although it must be made for inter-State communications.").

217. American Convention, supra note 5, art. 44.

218. This barrier raises questions about the system's ability to protect an individual's due process rights. When an individual has direct access only to the Commission, the individual is being denied access to a juridical entity; the Court itself has recognized that the Commission is not a juridical body. See Gallardo Case, supra note 104, para. 24. Several commentators have noted that this situation weakens the Court's ability to advance its mandate. See, e.g., Manuel D. Vargas, Individual Access to the Inter-American Court of Human Rights, 16 N.Y.U. J. INT'L L. & POL. 601, 616 (1984) (discussing different means by which individuals may attempt to gain access to Court, e.g., by trying to convince Commission or state party to advance petition); see also Méndez & Vivanco, supra note 5, at 575 (suggesting methods for Commission to submit more cases to Court for adjudication).

219. American Convention, supra note 5, art. 61(1).

220. Commission Regulations, supra note 88, art. 50(1).

221. American Convention, supra note 5, art. 62(2) (state accepting jurisdiction of Court must do so "unconditionally, on the condition of reciprocity, for a specified period, or for specific cases."); see also Commission Regulations, supra note 88, art. 50(3); Mower, supra note 5, at 79.

222. See supra notes 132-134 and accompanying text.

223. Decisions in contentious cases and in advisory opinions from the International Court of Justice and the Permanent Court of International Justice are quite similar, despite the fact that advisory opinions
Towards a Procedural Jurisprudence

adverse contentious ruling faces the stigma of having its delinquency published in the Court’s report to the General Secretary, there are no specific penalties imposed upon a state that chooses not to conform to the letter of an advisory opinion. Advisory opinions thus help establish the legitimacy of the Court by building a much-needed record on particular issues without forcing the Court to run the greater political risks associated with contentious cases. Advisory opinions also enable states to anticipate potential liability and to change their practices accordingly.

The Court can render an advisory opinion at the request of the Commission, an OAS organ requesting an opinion with regard to an issue within its sphere of competence, or an OAS Member State requesting an opinion regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

Under this last provision, the Court accepted a request by Costa Rica to determine the international human rights validity of a proposed amendment to its constitution. The Court concluded that requiring Costa Rica to await passage of the amendment and a subsequent violation of an individual’s rights “would not ‘give effect’ to the objectives of the Convention, for it does not advance the protection of the individual’s basic human rights and freedoms.” However, the Court stressed the importance of caution in granting this type of request.

Despite the Court’s generous interpretation of the Convention’s broad grant of advisory jurisdiction, the Court has no advisory powers over private petitions. An individual may only gain access to the advisory jurisdiction indirectly, through the Commission, the efforts of a sympathetic state willing to adopt the individual’s cause, or a competent OAS organ. The individual remains dependent on outside assistance.

are not legally binding on the parties. See Buergenthal, Similarities and Differences, supra note 5, at 163.

224. The Court has expressly found that the Commission’s right to submit an issue is “absolute,” and that the Commission’s power to seek an advisory decision extends to all issues within its own jurisdiction. See The Effect of Reservations on the Entry Into Force of the American Convention (Arts. 74 and 75), Advisory Opinion No. OC-2/82, Sept. 24, 1982, para. 16, in 5 Buergenthal & Norris, supra note 132, Booklet 25, at 92.

225. American Convention, supra note 5, art. 64. The scope of this jurisdiction is extremely broad because it extends to “the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.” Id. The OAS bodies that can request advisory opinions are: the General Assembly, the Meeting of Consultation of the Ministers of Foreign Affairs, the different Councils, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences and the Specialized Organizations. Id. art 64(1); see also Buergenthal, Advisory Practice, supra note 134, at 3.

226. American Convention, supra note 5, art. 64(2).


228. The Court noted that the decision whether to admit or reject a request for an advisory opinion on a legislative proposal requires the Court to determine, inter alia, “whether its purpose is to assist the requesting state to better comply with its international human rights obligations. To this end, the Court will have to exercise great care to ensure that its advisory jurisdiction in such instances is not resorted to in order to affect the outcome of the domestic legislative process for narrow partisan political ends.” Id. at 53.
In the Other Treaties Case\(^\text{229}\) the Court concluded that two factors govern the wisdom of issuing advisory opinions, regardless of the identity of the petitioner: whether a petition concerns the international obligations of a non-state party or international body, and whether "granting the request might have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being."\(^\text{220}\) By enunciating the second factor, the Court explicitly recognized the connection between political unity concerns and its procedural decisions.

Finally, the Convention allows the Court to adopt provisional measures in emergency situations. Article 63(2) of the American Convention states that:

In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.\(^\text{221}\)

Pursuant to this power, the Court in 1988 issued two provisional decrees in the disappearance cases brought against Honduras, on the ground that two individuals, one who had testified and another who was prepared to testify on behalf of the Commission before the Court, had been assassinated.\(^\text{222}\) The Court ordered the government of Honduras to insure the safety of all those involved in the case and to investigate the attacks against witnesses and parties.\(^\text{223}\)

The Court may also issue provisional measures in cases not yet before it at the request of the Commission.\(^\text{224}\) These measures can be employed to assist an individual petitioner seeking protection in a case alleging violations by an OAS member state not a party to the Convention.\(^\text{225}\) The fact that only

\(^{229}\) "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, of Sept. 24, 1982, para. 52, in 5 BURGENTHAL & NORRIS, supra note 132, Booklet 25, at 69.

\(^{220}\) Id. at 84.

\(^{221}\) American Convention, supra note 5, art. 63(2). In addition, "[I]n urgent cases, when it becomes necessary to avoid irreparable damage to persons, the Commission may request that provisional measures be taken to avoid irreparable damage in cases where the denounced facts are true." Commission Regulations, supra note 88, art. 29(2). For a discussion of the provisional measures employed in the disappearance cases, see Méndez & Vivanco, supra note 5, at 557-58.

\(^{222}\) Velasquez-Rodriguez, Fairen Garbi and Solís Corrales, and Godínez Cruz Cases, Order of Jan. 19, 1988, 1988 Y.B. Inter-Am. Ct. H.R. 1010 [hereinafter Order of Jan. 19, 1988]. The Court had been informed of "a campaign of calumny against Hondurans who have testified in these cases, portraying them as disloyal to their country and exposing them to public hatred and disrespect and even physical or moral attacks." Id.


\(^{224}\) American Convention, supra note 5, art. 63(2).

\(^{225}\) The plain language of the Convention says nothing about whether or not provisional remedies can be applied in such a situation. However, the expression "with respect to a case not yet submitted to the Court," id., could be read to indicate that the case could come to the Court. This would not foreclose the possibility that the respondent state, any concerned state party, the Commission, or any competent OAS organ could submit the issue to the Court for an advisory opinion. In addition, the Commission's powers to issue precautionary measures do not preclude their application to states not party to the Convention.
Towards a Procedural Jurisprudence

the Commission is capable of procuring such protection, however, undercuts the importance of provisional measures as a procedural innovation.  

3. Analysis

The regional systems’ standing requirements demonstrate an expansive interpretation of individuals’ right of access. While both systems provide access for individual petitioners to their respective Commissions, however, many of the available remedies remain inaccessible to individuals. The unavailability of certain remedies for individuals indicates that political unity concerns do play a role in the standing rules, as states continue to limit the access of individual petitioners to the full adjudicatory powers of the systems.

Political unity should not be of significant concern at the reviewability stage given the innovative procedural mechanisms developed by the human rights systems. As discussed above, the powerful informal mechanisms the tribunals have developed allow parties to settle disputes through political channels, permitting respondent states to resolve matters in a non-adversarial manner. The potential for politically embarrassing cases arising before the Courts is less likely than states commonly believe, due to the existence of "friendly settlement" procedures and in-country studies, which can be conducted to investigate issues that may not lend themselves to full resolution in a human rights tribunal.

Moreover, the danger of limited standing rules is much more severe than that of a generous standing requirement, because whereas the risk of the latter is offset by the foregoing innovative mechanisms, the risk of the former is not correspondingly offset. In other words, whereas political unity concerns are addressed by the systems beyond the reviewability stage, right of access concerns are not. Thus, the risk that limited standing (and admissibility) requirements will damage the legitimacy of the systems and violate internationally recognized due process rights is far greater than the risk that broad standing and admissibility rules will undermine political unity. Currently, private petitioners are subject to the political interests of those entities that do have full access to the systems’ dispute resolution mechanisms. Clearly infected by the political concerns of these entities, the limitations on access hinder the systems’ abilities to protect individual rights, and thus significantly endanger the legitimacy of the systems. While the European and Inter-American systems’ standing requirements are certainly broader than those of the International Court of Justice, the human rights systems’ standing rules still fall short of meeting the requirements of due process.

Despite these shortcomings, there are several indications of a more expansive trend. The European Commission has employed several innovative mechanisms to subject member states to suit by another state for alleged violations of human rights. Because the Commission can investigate beyond

---

236. Private parties depend upon the Commission to bring their claims to the Court because other entities capable of bringing private party claims to the Court are unlikely to do so.
the facts of a particular application and can continue an investigation should a particular application be withdrawn, a state cannot easily avoid prosecution for systematic violations by improving its treatment of one individual or coercing him to withdraw his petition. In addition, although states may opt out of the individual petition jurisdiction of both the Court and the Commission, states may still be brought to task by the Committee, which can decide cases that cannot be submitted to the Court.

These mechanisms are rarely used, however. Instead, the predominant form of application is the individual petition. In this context the principle of effectiveness enunciated in the Klass Case, requiring that the Convention's procedures be applied in the manner that best contributes to the effectiveness of the system, takes on additional importance.237 The Court has used this principle to justify extending standing limits for individual petitions and has thus been able to circumvent some of the Convention's original procedural limitations — which were in effect concessions to political unity — in order to protect individual rights. Nevertheless, protection of individual rights in the European system remains circumscribed by other procedural limitations. For example, Article 25 of the European Convention contains a requirement not found in the American Convention: under Article 25 an individual petitioner must claim to be a "victim" of an alleged violation of the Convention. While the European Commission and Court have developed several exceptions to this requirement, it remains more restrictive than the American Convention's Article 44, as the victim requirement does not permit individuals to submit petitions on behalf of the public.

The Inter-American system also incorporated several effective and critical innovations into its standing rules, but it maintains barriers similar to those found in the European system. The extensive powers of the Court to render advisory opinions and issue provisional measures provide powerful options, yet these options are foreclosed to individual petitioners, who have no ability to bring cases before the Court. Petitioners seeking access to the Court or to emergency protective measures remain subject to the policy calculations of the Commission, other OAS organs, or states party to the Convention. This restriction greatly limits individuals' effective right to access.

It is also important to note that formal access alone will not guarantee that the systems truly will encourage all cognizable wrongs to be remedied. Additional factors condition whether an individual or group will apply for redress, including knowledge that the system exists, socioeconomic and political conditions, fear of retaliation from the state,239 and availability of

238. See supra notes 196-209 and accompanying text.
239. The 1980s were marked by a climate of fear in which many potential petitioners did not seek recourse through the Inter-American system. As one commentator notes:

Much of the information needed by the Commission to determine the existence and extent of rights violations came through communications complaining of abuses. As several members of the Commission testified, however, there was some tendency on the part of victims of abuses to refrain from writing to the Commission because of their fear of reprisals.

MOWER, supra note 5, at 81.
counsel. Individuals are particularly vulnerable to these factors; thus, states are better able to avail themselves of the human rights regimes they created than are private parties. To grant effective standing to individuals, a human rights system must address these issues. First, availability of counsel is vital to an individual’s ability to advance her petition since legal representation provides a permanent address for communication, decreases the likelihood of procedural default, and usually provides a Court or Commission with a better-argued petition. Second, and perhaps most important, all parties involved—from the organs of the regional systems to the member states themselves—must assume the general task of ensuring that petitioners and potential petitioners will not face retribution for the simple act of pursuing their cases. Given the existence of mechanisms that address political unity concerns after the reviewability stage, advancing the right to access by broadening standing requirements and making these practical improvements can be accomplished at the reviewability stage without significant threat to the political unity of the human rights systems.

IV. CONCLUSIONS AND RECOMMENDATIONS

Adjudicators in the European and Inter-American systems do not currently employ an explicit procedural jurisprudence. As a result, reviewability decisions are largely made in secret and are unsupported by any consistent rationale. This article has argued that developing a procedural jurisprudence would advance the substantive aims of the two systems, and has outlined the political and due process concerns that should inform any future development of such a jurisprudence. The evolution of more liberal interpretations of the reviewability requirements of admissibility and standing demonstrates that political unity concerns have diminished, particularly in the European system. Furthermore, this evolution suggests that increased access and broader due process protection by regional adjudicators can enhance the perceived legitimacy of a regional system among both its member states and their populations. Thus a procedural jurisprudence that emphasizes due process over political unity concerns will bolster the unity of the system in the long term.

Political unity concerns have not disappeared entirely, but each regional system has developed informal investigation and dispute resolution mechanisms that foster political unity at the post-reviewability stage. The success of the European system in reducing the threat of political disunity can be traced in part to the effectiveness of these mechanisms. As a result, the European

240. Weston et al., supra note 5, at 615.
242. Id.
243. See Brian Walsh, The European Court of Human Rights, 2 CONN. J. INT’L L. 271, 284 (1987) ("[I]t would now be politically impossible in most countries to withdraw from the [European] Convention, as it has captured the minds of the public to a great extent.")
system is the more publicly accessible and well-known of the two human rights regimes, and receives a large number of individual petitions. Nonetheless, the European Commission should strive to increase access by clarifying reviewability standards and removing secrecy requirements at most stages of the process. One step toward doing so would entail replacing the Secretariat of the Commission, which currently plays a vital role assisting the Commission in its decisions and providing continuity but which operates in a largely hidden fashion, with a European Ombudsman or European Commissioner for Human Rights. This official’s function would be to advise individual applicants about the European Convention to assure that well-founded complaints would be presented to the Commission more properly and quickly, while encouraging applicants without well-founded complaints to refrain from petitioning. The Commission itself therefore could deal more directly with the merits of the petitions it receives, with greater assurance that they are worthy of consideration.

Political threats to the continued existence and viability of the Inter-American system are far more serious, however, and hamper its quest to provide broad-based protections of individual rights. One manifestation of this phenomenon is the standing requirement that prohibits individuals from taking their cases to the Court. Although the European system maintains similar requirements, the limitations in access to the Inter-American Court have significantly curtailed its ability to develop a strong body of case law. Political constraints on the Inter-American system thus have retarded the development of a systemic human rights jurisprudence by keeping individual complaints from the Court even when they pose serious questions of law that may not reach the Court in any other way. Rather than leaving the decision of whether or not the Court should hear a case to the Commission, the Court should have the ability, possibly through a broad right of certiorari, to grant individuals the opportunity to state their cases. In exercising this power the Court should consider the extent to which a particular legal claim would require the Court to determine issues outside of its proper jurisdiction or to render unenforceable decisions. If the Court decided to deny a petition on procedural grounds it should state its reasons clearly and unambiguously, and explain how dismissal advances the unity and legitimacy of the system.

The Inter-American system could also advance its normative goals more effectively by encouraging the Court and Commission to make more liberal use of informal mechanisms such as the advisory opinion, the class action determination, and the on-site investigation. These tools provide a means to declare norms and to publicize the activities of member states, but create less political tension than do contentious cases. These tools also shift the focus away from specific individual or group victims and witnesses, thus lessening the chance that states will punish complainants with further abuses, and enable
the system to review claims that might not otherwise be brought by claimants, such as disappearances. Information obtained from class action suits or country reports could also become the basis for more frequent findings of futility that remove the exhaustion requirement, thereby helping to protect claimants who should not be forced to bring domestic claims when they may be persecuted for doing so.

It is important to place any discussion of regional human rights systems in perspective. Many commentators burden these institutions with unrealistically high expectations regarding the potential spread of international human rights law in general and the adjudicative reach of human rights courts in particular, while paying too little attention to the constraints within which the systems function. A clear articulation of the principles guiding human rights courts' procedural decisions can help do this, and is especially necessary at a time when appeal to these system is becoming ever more popular. The development of a procedural jurisprudence that explicitly considers both due process and political unity concerns is a necessary first step in this process.

---


247. See id. at 2400 ("A broader look at the shape of international legal process reveals that we stand at a moment of startling, perhaps unprecedented, revival in transnational adjudication."). Professor Koh notes that while international adjudication has failed as a political institution, "the legal regime of transnational adjudication [has] adapted, and steadily shifted into fora other than plenary review in contentious cases before the [International Court of Justice]." Id. at 2400-01. See also Harold H. Koh, Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation, 22 Tex. Int'l L. J. 169, 193-201 (1987) (noting growth of transnational public law litigation).