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THE INTER-AMERICAN HUMAN RIGHTS SYSTEM:

▶▶ A PRIMER ◀◀

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In recent years U.S. civil rights and poverty lawyers, spurred in large part by an increasingly conservative judiciary and a nationwide rollback in civil rights and anti-poverty legislation and programming, have looked to international human rights law and fora as alternative avenues for domestic advocacy.¹ Public interest lawyers are inspired by the progressive and holistic ideals contained in international human rights treaties and jurisprudence but often speak in a common refrain: “These norms are fantastic, but how can I use them in my legal practice here in the United States?”

Indeed, U.S. lawyers face significant limitations in using international human rights law in domestic practice. The United States has declined to ratify most international human rights treaties and has removed the teeth of the few treaties it has ratified by attaching broad reservations, understandings, and declarations.² As a result, in most circumstances litigants may not directly raise international human rights claims in U.S. courts. The few international bodies with the authority to judge the human rights record of the United States may, at most, issue observations and recommendations, which are not directly enforceable. Given these limitations, along with the historic

¹See Cristóbal Joshua Alex, *The Rollback of Civil Rights in the Courts and the Potential Impact of the Civil Rights Act of 2008*, 42 CLEARINGHOUSE REVIEW 335 (Nov.–Dec. 2008); Cynthia Soohoo, *Preface*, 2 BRINGING HUMAN RIGHTS HOME X–xi (Cynthia Soohoo et al. eds., 2008) (general civil rights rollback of the 1990s).

²Reservations, understandings, and declarations, commonly known as “RUDs,” are qualifying statements attached to treaties on signing and ratification. The United States’ practice of attaching significant RUD “packages” to treaties severely compromises the effectiveness of the treaties, at times making them unenforceable in the United States (see Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 341 (1995)).

strength of our Constitution and judicial system as protectors of individual rights, many U.S. lawyers assume human rights law is applicable only in countries whose legal regimes explicitly incorporate international standards or which readily subject themselves to international scrutiny. In fact, while not *the* magic bullet, human rights law can be a useful element in a U.S. lawyer's toolkit.³

How can poverty lawyers use the Inter-American human rights system, particularly the Inter-American Commission on Human Rights, in the United States?⁴ Although the Inter-American human rights system may seem alien to U.S.-trained lawyers, its breadth, flexibility, and informality make it quite accessible. Civil society groups in other parts of the Western Hemisphere regularly turn to the Inter-American human rights system to hold governments accountable for corruption, abuse, negligence, and violence committed by both state actors and private individuals. The system's prominence in the international legal community is evident in the frequent citations it enjoys from the European Court of Human Rights, the United Nations treaty bodies, and some foreign courts. And the system is increasingly receiving the attention of U.S. lawyers, judges, and policymakers. Poverty and civil rights lawyers can use the Inter-American human rights system in a variety of ways—through direct participation in the system itself and by using it to bolster advocacy in the United States.

I. The Inter-American Human Rights System: An Overview

The Inter-American human rights system is composed of two autonomous organs of the Organization of American States (OAS): the Inter-American Commission on Human Rights based in Washington, D.C., and the Inter-American Court of Human Rights based in San José, Costa Rica.⁵ The OAS, founded in 1948, is composed of the thirty-five independent nations of the Americas and is the world's oldest regional organization.

The OAS Charter is the constitutional text of the organization.⁶ The Charter sets forth basic human rights principles, including representative democracy, human rights, equality, economic rights, and the right to education. These principles are further developed in other OAS human rights instruments, in particular the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights that delineate specific rights and obligations of states.⁷ The Declaration and Convention focus primarily on civil and political rights, although the Declaration also protects the rights to property, culture, work, health, education, leisure time, and social security.

The OAS Charter, Declaration, and Commission statute and regulations establish human rights standards for all OAS members and are generally considered

³For an excellent review of how poverty lawyers can use human rights law generally, see Martha F. Davis, *Human Rights in the Trenches: Using International Human Rights Law in "Everyday" Legal Aid Cases*, 41 CLEARINGHOUSE REVIEW 414 (Nov.–Dec. 2007).

⁴Several ideas in this article are inspired by the United States and the Inter-American Human Rights System Symposium (April 7, 2008) (sponsored by the Columbia Law School Human Rights Institute, Centro por La Justicia y El Derecho Internacional/Center for Justice and International Law, and the American Society of International Law). For a summary of the symposium, see www.law.columbia.edu/media_inquiries/news_events/2008/april2008/Interamerican.

⁵The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights act independently of each other and of other political or quasi-political organs of the Organization of American States.

⁶Organization of American States Charter, adopted April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, O.A.S.T.S. Nos. 1-C and 61 (A-41) and 119 U.N.T.S. 3 (entered into force Dec. 13, 1951), www.oas.org/juridico/english/charter.html [hereinafter OAS Charter].

⁷Organization of American States, American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States May 2, 1948, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 17 (1992) [hereinafter Declaration]; Organization of American States, American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 1, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 25 (1992) [hereinafter Convention]. Additional treaties and normative instruments (which are binding only on those states that have ratified them) in the Inter-American human rights system address torture; economic, social, and cultural rights; the death penalty; violence against women; forced disappearance; and disability rights (see Inter-American Commission on Human Rights, Basic Documents Pertaining to Human Rights in the Inter-American System, www.cidh.org/Basicos/English/Basic.TOC.htm).

binding on all OAS member states. While the Declaration does not contain a “general obligations” clause, which requires states to undertake positive measures to protect rights, the United States as a party to the Charter is legally bound by the Declaration’s provisions.⁸ The Convention and other treaties, by contrast, are binding only on member states that have ratified them. The United States has not ratified the Convention or any OAS member multilateral human rights treaty other than the Charter. The Declaration and OAS Charter are invoked primarily against member states that, like the United States, have not ratified the Convention or subsequent regional treaties.

A. The Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights was created in 1959 “to promote the observance and defense of human rights” in OAS member states.⁹ It is composed of seven commissioners, who are independent human rights experts nominated by their home countries and elected by the OAS General Assembly. They serve in their personal capacity on a part-time basis for four-year terms.¹⁰ The Commission is divided into regional and language specialty groups, and a full-time Secretariat processes all petitions, correspondence, and communications and prepares draft reports, resolutions, and press releases.¹¹

The Commission has both contentious and promotional functions. It acts as an arbiter and adjudicator of cases in which discrete human rights violations are alleged against individuals or groups. It is also a forum for generalized grievances or issues that are not appropriate or ripe for adjudication but which the Commission may consider and investigate. In its latter function the Commission uses its influence to promote human rights issues in member states.

In its role as arbiter and adjudicator the Commission accepts human rights complaints, or “petitions,” against OAS member states and considers them in light of relevant human rights instruments and jurisprudence. The Commission explains its decisions in published reports and recommendations that state the Commission’s findings, its determination as to whether a violation occurred, and its suggested remedies. Remedies may include the payment of damages, a public apology, an investigation into the source of a violation, and suggested changes in law, action, or policy.¹² This contentious function is unique to the Commission: it is the only international forum in which individuals, or nongovernmental organizations acting on behalf of individuals, may bring human rights complaints against the United States and have those complaints adjudicated by a decision-making body.¹³ The Commission also

⁸See Petition No. 1490-05 (Admissibility), *Gonzales v. United States*, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L/V/II.128, doc. 19 (2007) (a case in which I participated; see *infra*). For examples of international agreements that do contain a general obligations clause, see Convention, *supra* note 7, arts. 1(1), 2; International Covenant on Civil and Political Rights art. 2, opened for signature Dec. 16, 1966, with selected reservations, understandings, and declarations, S. Exec. Doc. No. 95-2 (1978), 999 U.N.T.S. 171 (entered into force March 23, 1976).

⁹Statute of the Inter-American Commission on Human Rights art. 1(1), O.A.S. Res. 447 (IX-0/79), OEA/Ser.P/IX.0.2/80, vol. 1 at 88 (1979) [hereinafter Inter-Am. C.H.R. Statute]; OAS Charter, *supra* note 6, art. 106 (“to promote the observance and protection of human rights”). For an overview of the Commission, see Tara J. Melish, *The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW* (Malcolm Langford ed., 2009); Dinah L. Shelton, *The Inter-American Human Rights System*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 127 (Hurst Hannum ed., 4th ed. 2004).

¹⁰Convention, *supra* note 7, arts. 34, 36–37; Inter-Am. C.H.R. Statute, *supra* note 9, arts. 2–3, 6; Rules of Procedure of the Inter-American Commission on Human Rights art. 1.3, OEA/Ser.L/V/II.4 rev. 12 (2008), www.cidh.org/Basicos/English/Basic.TOC.htm [hereinafter Inter-Am. C.H.R. R. Proc.].

¹¹Inter-Am. C.H.R. Statute, *supra* note 9, art. 21; Inter-Am. C.H.R. R. Proc., *supra* note 10, arts. 11–13.

¹²Inter-Am. C.H.R. Statute, *supra* note 9, arts. 18, 20; Convention, *supra* note 7, art. 41.

¹³The United Nations treaty bodies can serve a function similar to the Commission’s contentious role in that they receive communications alleging state responsibility for individualized human rights violations. The United States has not ratified the Optional Protocols to the three United Nations human rights treaties to which it is a party and thus is not subject to the individual petition process.

considers claims for “precautionary measures”—akin to temporary restraining orders or injunctions—and helps negotiate “friendly settlements” between the parties in contentious cases.¹⁴

In its promotional role the Commission presides over thematic hearings (also known as “general hearings”), publishes thematic or country-specific human rights reports, and conducts on-site visits to regions with problematic human rights situations.¹⁵ Each commissioner also serves as a country or thematic rapporteur or both.¹⁶ The current rapporteurships are freedom of expression, women’s rights, migrant workers and families, children, indigenous peoples, persons deprived of liberty, human rights defenders, and racial discrimination and the rights of Afrodescendants.¹⁷ The Commission’s promotional authority is broader and more flexible than its adjudicatory role and allows it to address large structural or historic inequities, which would not necessarily be cognizable through the individual petition process because of jurisdictional or substantive limitations.

B. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights, established in 1979 as “an autonomous judicial institution” of the OAS, is composed of seven judges and is charged with applying and interpreting the principal human rights treaty in the region:

the American Convention on Human Rights.¹⁸ As is true of the Commission, the Inter-American Court has two roles: contentious and advisory.

In its contentious role the Inter-American Court has jurisdiction only over those states that have ratified the Convention and its Optional Protocol.¹⁹ Since the United States has not ratified the Convention or its Optional Protocol, the court may not hear cases against the United States. The Court receives its cases by submission from the Commission after proceedings at the Commission level end. Since U.S. petitioners may not reach the Inter-American Court level, I focus primarily on Commission proceedings and the Inter-American Court’s advisory opinions.

The Inter-American Court’s broad advisory jurisdiction

can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable to the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.²⁰

The Court, which has issued nineteen advisory opinions since 1982, has charac-

¹⁴Inter-Am. C.H.R. R. Proc., *supra* note 10, art. 25; Inter-Am. C.H.R. Statute, *supra* note 9, art. 23(2).

¹⁵Convention, *supra* note 7, art 41; Inter-Am. C.H.R. Statute, *supra* note 9, arts. 9, 18; Inter-Am. C.H.R. R. Proc., *supra* note 10, art. 64.

¹⁶Inter-Am. C.H.R. R. Proc., *supra* note 10, art. 15. A rapporteur is an independent expert in a particular area with the mandate to investigate an issue or situation and deliver a report. E.g., the women’s rapporteur’s mandate is to study the extent to which the policies and practices of member states comply with state obligations under Inter-American human rights treaties and instruments to respect and ensure women’s rights.

¹⁷For a list of current rapporteurships, see www.cidh.oas.org/relatorias.eng.htm. A new rapporteurship on economic, social, and cultural rights is reportedly under consideration (see Melish, *supra* note 9).

¹⁸Statute of the Inter-American Court of Human Rights art. 1 Oct. 1979, O.A.S. Res. 448 (IX-0/79), OEA/Ser.P/IX.0.2/80, vol. 1 at 98 (1979) (entered into force Jan. 1, 1989), www.cidh.org/Basicos/English/Basic.TOC.htm; Convention, *supra* note 7, art. 62.3. For an overview of the Inter-American Court of Human Rights, see Tara J. Melish, *The Inter-American Court of Human Rights: Beyond Progressivity*, in *SOCIAL RIGHTS JURISPRUDENCE*, *supra* note 9.

¹⁹The state party must also have acceded to the court’s jurisdiction through the Optional Protocol to the Convention.

²⁰“Other Treaties” Subject to the Advisory Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, 1982 Inter-Am. Ct. H.R. (ser. A) No. 1 ¶ 52, www.corteidh.or.cr/opiniones.cfm.

terized its advisory jurisdiction as “more extensive than that enjoyed by any international tribunal in existence today.”²¹ The Court’s advisory function may serve a useful purpose for U.S. advocacy.

II. Proceedings Before the Inter-American Commission and Court: Tips for Effectively Engaging the System

Petitioners with claims that are against the United States or its subnational entities and are cognizable under the American Declaration may turn to the Inter-American Commission on Human Rights for relief if they have exhausted all appeals or if domestic procedural restrictions (such as those imposed in *Ledbetter v. Goodyear Tire and Rubber Company*) or legal precedent preclude the pursuit of remedies in U.S. courts.²² While many U.S. advocates find that the Commission’s enforcement limitations make it a less desirable forum than a domestic decision-making body, hearings before the Commission can be particularly powerful places for victims to have their “day in court”—a luxury that is often denied them in domestic fora. And winning a case before the Commission can have far-reaching domestic and international implications and cause other regional human rights bodies and the United Nations to take notice.

Advocates may advance human rights concerns before the Commission in a number of ways. Through the Commission, they may pursue individual case adjudication, seek precautionary measures, or request thematic or general hearings on a particular issue or series of issues. They may request the Commission to conduct on-site investigations and issue reports. They may also seek Inter-American Court advisory opinions to effectuate change.

Of particular relevance for poverty lawyers are the Declaration’s provisions invoking the rights to life (which has been interpreted to include quality of life), equality, family life, special protections for women and children, health and well-being, education, work and fair remuneration, social security, fair trial, property, and petitioning one’s government. Remember that, although the offending actor might be a state or municipality, the U.S. government is ultimately answerable to the Commission. So if a local unit of government does not provide sufficient space for families to live together in homeless shelters or denies adequate health care to individuals with the human immunodeficiency virus, the United States must ultimately answer to the Commission as to why its subnational entities are not complying with the Declaration.²³

A word of caution is appropriate here, however. The Inter-American human rights system is not intended to be a site of first relief for individuals complaining of human rights abuse but rather, when national safeguard mechanisms fail, provides an additional pressure point on the United States and an alternate forum for individuals and communities experiencing the effects of human rights abuses.

A. Litigating a Contentious Case

Any individual or group, or “petitioners,” may petition the Commission for adjudicatory relief, claiming that a federal government, or “respondent state,” is responsible for human rights violations.²⁴ Because the United States is not a party to the Convention or any regional human rights treaty other than the Charter, the recognized rights for petitions against the United States are those contained in the Declaration (see sidebar).²⁵

²¹*Id.* ¶ 14; see also Convention, *supra* note 7, art. 64.

²²*Ledbetter v. Goodyear Tire and Rubber Company*, 550 U.S. 618 (2007).

²³*Roach and Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R., Report No. 3/87, OEA/Ser.L.V/II.71, doc. 9 rev. 1 (1987).

²⁴Inter-Am. C.H.R. R. Proc., *supra* note 10, art. 23.

²⁵Inter-Am. C.H.R. Statute, *supra* note 9, art. 1(2)(b); Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10 ¶¶ 43, 45, 47; Petition No. 1490-05 (Admissibility), *Gonzales*, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L.V/II.128, doc. 19 rev. ¶ 56 (Declaration “constitute[s] a source of legal obligations on OAS member States, including in particular those states that are not parties to the American Convention”).

The Commission considers only petitions alleging violations of human rights by the federal government or its agents (including subnational entities, such as states and municipalities), not allegations focused on purely private conduct.²⁶ In some cases causal responsibility can be imputed to the federal government through its omission or failure to respond appropriately to private conduct that violates human rights.²⁷

Individuals and groups may submit petitions on their own behalf or on behalf of third parties. Petitions may be submitted without the victim's knowledge or authorization. The Commission accepts collective petitions, indicating numerous victims of a specific incident or practice, but not "actio popularis," or class action suits that set forth generalized harms not limited to a specific group or event. Claims of widespread, generalized harm are excluded from the Commission's case-based jurisdiction and instead are considered in general hearings and country reports.

Before a petition may be filed, petitioners must "exhaust domestic legal remedies" or show that the pursuit of certain legal avenues would have been futile.²⁸ Petitions must be filed within six months of notification of final judgment or, under certain circumstances, within a "reasonable period" of time thereafter.²⁹ The Commission is not a "court of fourth instance" and will not substitute its judgment for that of the domestic trier-of-fact. The Commission will, however, consider cases that allege that the domestic adjudication violated the

petitioner's due process or denied petitioner a fair hearing resulting in an ineffective remedy. The Commission will not consider petitions that are duplicative of cases pending before or resolved by other international tribunals, or cases that the Commission itself has already resolved.³⁰

A contentious case before the Inter-American Commission proceeds in two phases.³¹ In the first phase, known as the "admissibility" phase, a panel of commissioners decides whether the petitioner has met the procedural requirements and whether the Commission has competence (akin to jurisdiction) to examine the human rights claims contained in the petition. If the Commission determines that it has competence, it registers the petition, assigns it a number, and then transmits the petition to the state in question. The state (the Department of State represents the United States in these matters) normally has two months to respond to the petition. The Commission may request further submissions from the parties, and the petitioner may request an admissibility hearing.

If the Commission deems a case admissible, the case enters the second, or "merits" phase, to determine whether a human rights violation took place. At the merits phase, the Commission considers evidence presented before it and may hold hearings or even conduct investigatory field or on-site visits in which it does its own fact-finding. Petitioners may also request that key local, state, or federal government officials participate as part of the government's delegation. At case-

²⁶See, e.g., *Roach and Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R., Report No. 3/87, OEA/Ser.L.V/II.71, doc. 9 rev. 1 (1987) (the federal government's failure to preempt the states from executing juveniles "results in a pattern of legislative arbitrariness throughout the United States" in violation of the rights to life and equality before the law).

²⁷Petition No. 1490-05 (Admissibility), *Gonzales*, Inter-Am. C.H.R., Report No. 52/07 (recognizing the Commission's competence to consider a case involving the state duty to protect an individual from private acts of violence); *Brazil*, Case 7615, Inter-Am. C.H.R., Report No. 12/85, OEA/Ser.L.V/II.66, doc. 10 ¶¶ xi, x (1985) (Brazil liable "for having failed to take timely and effective measures to protect the human rights of the Yanomami [Indians] ... from highway construction workers, geologists, mining prospectors, and farm workers desiring to settle in th[eir] territory").

²⁸Inter-Am. C.H.R. R. Proc., *supra* note 10, art. 31.

²⁹*Id.* art. 32. The six-month rule does not apply, for instance, where there is a continuing violation (*Dominguez Domenichetti v. Argentina*, Case 11.819, Inter-Am. C.H.R., Report No. 51/03, OEA/Ser.L.V/II.118 doc. 70 rev. 2 ¶ 48 (2003)).

³⁰Inter-Am. C.H.R. R. Proc., *supra* note 10, art. 33.

³¹*Id.* arts. 26–43.

based hearings and at the working meetings described below, petitioners may have the opportunity to develop the factual record, clarify legal arguments, offer victim statements and expert testimony, and request face-to-face time with the Commissioners.

Throughout the merits phase, the Commission will encourage “friendly settlement” between the parties. The Commission may do so by granting a “working meeting” during one of its sessions in which it will meet privately with the parties to discuss progress in settlement discussions. When settlement is not possible and when the Commission determines that there is a violation, it will send the offending state a preliminary report with the proposals and recommendations it deems pertinent. States have three months to comply with the recommendations.

In most cases, particularly in cases involving the United States, which only once has participated in settlement negotiations and does not generally take steps to comply with the proposals and recommendations in a preliminary report, the Commission publishes a merits report on state culpability.³² The Commission considers the facts of the case in light of the precedential jurisprudence of the Inter-American Court and Commission and sometimes looks to other relevant human rights treaties for persuasive authority or interpretive guidance in drafting its report. If the Commission deems the state responsible for a human rights violation, the Commission then issues a recommendation outlining the general contours of a remedy that will make the victim whole and create legal and policy reforms to prevent repetition of the harm.

After the issuance of the Commission’s report, petitioners may request a “work-

ing meeting” with the Commission and the state in question to discuss state progress in implementing the Commission’s recommendations. The Commission continues to supervise state compliance with its recommendations and publishes statistics on compliance in its Annual Report.³³ While no enforcement mechanism ensures state compliance with Commission decisions, the Commission’s merits reports contribute to international standard setting and carry significant moral and political weight that can be useful in advocacy campaigns.

The Commission holds all hearings, including merits hearings and thematic hearings, during the Commission’s semi-annual sessions, usually in Washington, D.C. Hearing and meeting requests must be submitted to the Secretariat at least fifty days in advance of a hearing session.³⁴ Other than those designated private to ensure victim confidentiality or for other reasons, all hearings are open to the public.³⁵ The Commission grants approximately one-third to one-half of the requests for hearings (including admissibility, merits, and thematic hearings) that it receives. The factors that the Commission takes into consideration when determining whether it will grant a hearing are, among others, how urgent and prevalent the human rights concerns are, how relevant the hearing is to similar human rights concerns in other parts of the Americas, and whether the hearing is related to the focus areas of the rapporteurships or the issues that are of priority to the Secretariat.

Examples from Practice. In recent years U.S. lawyers have creatively and strategically litigated before the Inter-American Commission. Long before the U.S. Supreme Court’s 2004 decision in *Roper v. Simmons*, which held that the death penalty for juvenile offenders was unconstitutional disproportionate punish-

³²*Id.* art. 45. (The United States engaged in settlement talks in Petition No. 1490-05 (Admissibility), *Gonzales*, Inter-Am. C.H.R., Report No. 52/07.) If the respondent state is subject to the jurisdiction of the Inter-American Court (the United States is not), the Commission can refer the case to the court for a final binding resolution instead of publishing its merits report (Inter-Am. C.H.R. R. Proc., *supra* note 10, art. 44).

³³Inter-Am. C.H.R. R. Proc., *supra* note 10, art. 57.

³⁴*Id.* art. 64.

³⁵*Id.* art. 66.

ment, U.S. advocates had challenged the juvenile death penalty before the Commission.³⁶ That work resulted in a 2002 landmark decision from the Commission finding that the execution of persons who were under 18 at the time of the crime violated *jus cogens*, or fundamental human rights norms.³⁷ The Commission's decision, though not explicitly mentioned in *Roper*, is widely believed to have influenced the Court. Indeed, the Court cited the Convention and other international treaties to support its finding that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."³⁸ In 2006 advocates seeking to build from the momentum of *Roper* submitted a petition to the Commission on behalf of individuals sentenced to life without parole for crimes they were convicted of committing as juveniles; the advocates alleged that such sentences constituted human rights violations.

In 2007 the Commission issued an admissibility decision in *Gonzales v. United States*, a case in which I participated, concerning the government's duty to protect a woman and her children from domestic violence.³⁹ The Commission held the United States to well-established international standards of state responsibility requiring it to exercise "due diligence" to prevent, investigate, and punish violent acts committed by nonstate actors and to protect and compensate victims. In the fall of 2008 the State Department engaged in friendly settlement discussions with petitioners. While the United States ultimately declined to settle (likely due to resistance from local authorities and the U.S. Department of Justice), that settlement discussions concerning in-

ternational human rights litigation even took place was extraordinary and unprecedented.

In a landmark case against the United States regarding indigenous land rights, sisters Mary and Carrie Dann, members of the Western Shoshone tribe, claimed that the U.S. government had improperly appropriated and interfered with their use of their ancestral land. The Commission found that the United States violated the Dannes' rights under the American Declaration and issued a recommendation that the United States ensure fair and equal access to local tribunals for the protection of petitioners' property rights.⁴⁰ In response the federal government took meaningful steps toward compliance. The State Department participated for the first time in a working group to discuss compliance with the Commission's decision. The State Department sent the Commission's decision to local authorities, recognized the legitimacy of the international body, and urged compliance. Local authorities ultimately refused to comply with the decision. The state's noncompliance prompted international outrage, and the United Nations subsequently formally recognized the state's failure with respect to the Dannes' human rights.⁴¹ Nevertheless the State Department's participation in this working group demonstrates the potential for creating channels and pressure points between the federal and local governments.

B. Filing an Amicus Brief

U.S. lawyers should consider submitting amicus briefs in support of petitioners to the Commission and attending Commission hearings. In *Gonzales* more than

³⁶*Roper v. Simmons*, 543 U.S. 551 (2005).

³⁷*Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L/V/II.116, doc. 33 ¶¶ 84–85 (2002).

³⁸*Roper*, 543 U.S. at 578.

³⁹Petition No. 1490-05 (Admissibility), *Gonzales*, Inter-Am. C.H.R., Report No. 52/07.

⁴⁰See *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1. (2002).

⁴¹Office of the United Nations High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination—Early-Warning Measures and Urgent Procedures, Decision 1(68), U.S., CERD/C/USA/DEC/1 (April 11, 2006), www2.ohchr.org/english/bodies/cerd/early-warning.htm (scroll down and look under "B. Decisions").

eighty domestic violence, women's rights, human rights, and legal services organizations from across the United States and the globe signed on to eight amicus briefs in support of the petitioner.⁴² Collectively these briefs underscored the significance of the case at both the national and international levels. One result of their involvement has been increased attention to the case and to general domestic violence issues from the media, other nongovernmental organizations, and the Commission itself.

C. Seeking Precautionary Measures

In “serious and urgent cases, and whenever necessary,” the Commission can request, on its own initiative or at the request of a party, that an OAS member state take immediate precautionary measures “to prevent irreparable harm to persons.”⁴³ The Commission issues a report and recommendations for immediate action. Precautionary measures do not require prior exhaustion of domestic remedies and allow the system to respond rapidly to urgent human rights concerns without prejudging the merits of a case.⁴⁴ A request for precautionary measures forces the Commission to engage immediately in a supervisory and monitoring role in a new substantive dispute and thus “can also act as a catalyst for involving the Commission ... in new substantive areas of human rights law.”⁴⁵

Examples from Practice. In 2002 Guantánamo detainees' representatives, faced with a government that unilaterally declined to grant their clients prisoner-of-war status under the Third Geneva Convention, sought precautionary measures from the Inter-American Commission.⁴⁶

In March 2002 the Commission became the first international body to find doubt as to the legal status of the detainees and the sufficient protection of their human rights. The Commission requested that the United States take “urgent measures” to have the detainees' status determined by a competent tribunal.⁴⁷ Advocates hope that the Obama administration will comply with the Commission's request.

The Commission's precautionary-measures reports can also effect change at the local level. In 2002 the Commission requested that the United States take precautionary measures against the execution by Texas of a Mexican national who alleged that the state had violated his rights under the Vienna Convention on Consular Relations.⁴⁸ Using impressive creative lawyering skills, the defendant's attorneys persuaded the district attorney and state judge—neither of whom had been aware of the Commission's existence—not to set an execution date out of deference to Inter-American proceedings.

D. Requesting a Thematic Hearing

Thematic, or general, hearings allow advocates to raise awareness about serious human rights issues that may not be justiciable due to jurisdictional bars or other reasons but nevertheless merit the Commission's attention in its promotional function. General hearings may focus on a particular human rights issue that is cross-regional or on a particular region that experiences multifaceted human rights problems. Thematic hearings allow for greater flexibility in theme, form, and structure than case-based hearings. Advocates may find more opportuni-

⁴²Petition No. 1490-05 (Admissibility), *Gonzales*, Inter-Am. C.H.R., Report No. 52/07.

⁴³Inter-Am. C.H.R. R. Proc., *supra* note 10, art. 25.1.

⁴⁴*Id.* art. 25.4.

⁴⁵Melish, *supra* note 9.

⁴⁶Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁴⁷Certain Foreign Nationals Detained in the United States, Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission on Human Rights 2002, Precautionary Measures 2002, OEA/Ser.L./II.117, doc. 1 rev. ¶ 80 (2003) (petition regarding detention by United States of detainees at Guantánamo Bay, Cuba).

⁴⁸Roberto Moreno Ramos, Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission on Human Rights 2002, Precautionary Measures 2002, OEA/Ser.L./II.117, doc. 1 rev. ¶ 88 (2003) (petition regarding United States).

ties for coalition building and a broader framing of the issues at thematic hearings than before domestic tribunals.

During thematic hearings nongovernmental organizations may present information on the particular theme to a panel of commissioners. The Commission decides, based on a number of factors, whether the state or states at issue will be invited to the hearing; if they are, they usually have the opportunity to rebut the nongovernmental organization's presentation. The Commission does not issue a written report at the conclusion of a general hearing. However, the Commission does issue a press release at the end of each hearing session. The press release may refer to some or all of the general hearings that took place during the session and may even express concern regarding the matters raised at the hearings.

Thematic hearings are often used to stimulate media interest in an issue and to mobilize stakeholders as part of a larger organizing campaign. These hearings often lay the groundwork for subsequent litigation in a particular area by educating the commissioners about human rights issues that the Commission has not considered. Poverty lawyers and advocates may request a thematic hearing related to structural discrimination and the economic justice concerns that are a fundamental reality for so many clients. The Commission has paid increasing attention to housing and other economic and social justice issues in recent years and in 2007 published a report, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights*, which identifies common economic, social, and cultural rights themes across the Americas.⁴⁹ If the Commission creates a new Thematic Rapporteurship on Economic, Social, and Cultural Rights, the rapporteurship could offer a mechanism for placing additional pressure on states and the federal government to modify problematic

laws and policies on housing, health, employment, and public benefits.

Thematic hearings can also be used to support ongoing litigation and the Commission's report-writing work. For example, a general hearing on how structural discrimination operates to marginalize women of color could support a case alleging gender discrimination against immigrant and minority domestic workers or a report on a similar theme from the Thematic Rapporteur for Women's Rights.

Examples from Practice. In 2005 the Commission held a thematic hearing on the right to housing in the United States, Canada, and Brazil. The U.S. petitioners, among whom were antipoverty and housing rights activists, sought to use the hearing and a rally that same day outside OAS headquarters in Washington, D.C., to mobilize their constituents and to lay the groundwork for a future case on adequate housing before the Commission.

In 2008 the Commission heard testimony and statistical information at a thematic hearing on the human rights violations implicated in the construction of a Texas-Mexico border wall. At the end of the hearing session the Commission issued a press release expressing concern over the "troubling information" that the Commission had received regarding the impact of the border wall on the human rights of area residents, "in particular its discriminatory effects."⁵⁰

E. Engaging with a Country or Thematic Rapporteur and Soliciting an On-Site Visit and Report

Individuals or groups may request that the Commission or specific commissioners, in their capacities as country or thematic rapporteurs, make on-site visits to investigate allegations of widespread human rights violations within a country or region or among a particular cross-

⁴⁹Inter-American Commission on Human Rights, Organization of American States, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L.V/II.129, doc. 4 (2007).

⁵⁰Press Release, Inter-American Commission on Human Rights, IACHR Concludes 133rd Period of Sessions (Oct. 31, 2008), www.cidh.oas.org/comu.eng.htm.

section of a population.⁵¹ During the visits, Commission representatives interact with the victims, nongovernmental organizations, and government officials. The Commission often issues a press release at the conclusion of a visit and sometimes issues a country or thematic report highlighting its key findings.

The Commission's country or thematic reports offer comprehensive analyses and recommendations regarding the general human rights situation in a particular country or a specific human rights issue in one or several countries.

Examples from Practice. Advocates have strategically used the rapporteurships to focus national and international attention on human rights violations at all levels—local, state, and national. Many advocates have focused on how human rights violations affect vulnerable groups such as children, victims of gender-motivated violence, and undocumented immigrants. Advocates may request that a thematic rapporteur undertake a focused on-site visit, prepare a special report, formulate general guidelines or a declaration of principles, or issue general recommendations or observations on a discrete issue, or advocates may request the rapporteur to do all.⁵²

The Commission's thematic rapporteur on migrant workers and families recently agreed, at the behest of domestic advocates, to make an on-site visit to U.S. immigration detention facilities to observe detainee conditions. Though approved by the State Department, these visits recently hit procedural roadblocks with the U.S. Department of Homeland Security. The Commission instead visited with ex-detainees and their families outside detention centers in Texas, Virginia, and Pennsylvania. The Commission has committed to the development of a comprehensive analysis and report on immi-

gration detention in the United States.

Another example of the Commission's thematic reporting comes from the national security arena. The Commission, in the wake of the events of September 11, 2001, issued a 2002 thematic report on terrorism and human rights. The landmark report examined the implications of counterterrorism initiatives within the framework of several core international human rights: the rights to life, humane treatment, personal liberty and security, fair trial, freedom of expression, and judicial protection.⁵³

F. Soliciting an Advisory Opinion from the Inter-American Court of Human Rights

Advocates may also work with foreign governments and the Commission to request advisory opinions from the Inter-American Court on matters relevant to the United States. For instance, the U.S. Supreme Court's 2002 ruling in *Hoffman Plastic Compounds Incorporated v. National Labor Relations Board* that undocumented workers fired for engaging in union organizing activity have no meaningful recourse in U.S. courts under the National Labor Relations Act prompted just such cooperative action.⁵⁴ The government of Mexico, assisted by U.S. advocates, requested an advisory opinion from the Inter-American Court on the legal obligations of all OAS member states toward migrant workers. Migrant workers employed in OAS member states are entitled to workplace protections, and member states have the obligation to ensure that these rights are respected and protected, regardless of a worker's authorized or unauthorized status, the court found in a 2003 advisory opinion.⁵⁵

The Inter-American Court has issued five advisory opinions—on the death penalty, naturalization, habeas corpus, consular

⁵¹Inter-Am. C.H.R. Statute, *supra* note 9, art. 18.

⁵²Melish, *supra* note 9.

⁵³Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L./VII.116, doc. 5 rev. 1 (2002).

⁵⁴*Hoffman Plastic Compounds Incorporated v. National Labor Relations Board*, 535 U.S. 137 (2002).

⁵⁵Judicial Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003), www.corteidh.or.cr/opiniones.cfm?CFID=555441&CFTOKEN=89743566.

assistance, and undocumented migrant workers—that are relevant for U.S. legal practice. Advocates could work with the Commission, international nongovernmental organizations, or other national governments in the Americas to request an advisory opinion from the Court on issues of hemispheric significance related to economic, social, and cultural rights, such as the right to counsel in civil cases where basic needs are threatened or a state’s duties to progressively realize the right to adequate housing.⁵⁶ An advisory opinion affirming these rights could ultimately be used in domestic advocacy.

III. Bringing It Home: Using the Inter-American System in Domestic Advocacy

Advocates can incorporate Inter-American human rights norms and jurisprudence into local, state, and federal advocacy—the systems and frameworks more familiar to U.S. lawyers. Poverty lawyers can use the Commission strategically for “impact” or “policy” purposes: to hold state actors domestically and internationally accountable; to foment normative developments before international tribunals and domestic courts; to urge policy changes from legislators and the executive branch; to create new avenues for mobilization, coalition building, and community organizing; and to spark public interest in an issue or change the framing of a debate.

The Inter-American Commission’s reports and recommendations or the Inter-

American Court’s opinions will not, in and of themselves, cause a change in state practice, but they can be a powerful tool in a larger advocacy strategy. Here I identify seven ways in which poverty law advocates can use the Inter-American system in their everyday practice.⁵⁷

Domestic Litigation. Consider dropping a footnote in your brief that cites Inter-American jurisprudence on the best interests of the child or the right to the highest attainable standard of health services. Or submit an amicus brief or expert report—perhaps in partnership with members of the Bringing Human Rights Home Lawyers’ Network (see below) or a law school human rights clinic—that focuses on the relevant international law arguments in a case about educational equity. While international norms may not be controlling in U.S. federal and state courts, they have served as persuasive authority in the U.S. Supreme Court (*Roper* and *Lawrence v. Texas*) and in several state courts where judges have cited human rights norms in support of their decisions under state constitutional or common law.⁵⁸ Although some courts explicitly find that international jurisprudence is nonbinding in domestic fora, a judge may grant the decisions and opinions of the Inter-American Commission and Court some degree of deference as persuasive authority or as interpretative tools and may even cite these decisions as evidence of “customary international law”—internationally accepted norms that are binding on the United States.⁵⁹

⁵⁶The United Nations Committee on Economic, Social, and Cultural Rights at its fifth session in 1990 stated that “the concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. Nevertheless, the fact that realization over time ... is foreseen under the International Covenant [on Social, Economic and Cultural Rights] should not be misinterpreted as depriving the obligation of all meaningful content” (United Nations, International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment Number 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1 of the Covenant)*, HRI/Gen/1/Rev.9, May 9, 2008). For an example in the housing context, see Maria Socorro I. Diokno, *Monitoring the Progressive Realization of Housing Rights*, ASIA-PACIFIC NEWS, June 1999, www.hurights.or.jp/asia-pacific/no_16/no16_monitoring.htm.

⁵⁷This list is based in part on ideas suggested by Doug Cassel and Sandra Babcock at the United States and the Inter-American Human Rights System Symposium, *supra* note 4.

⁵⁸*Roper*, 543 U.S. 551; *Lawrence v. Texas*, 539 U.S. 558 (2003); see Opportunity Agenda, Legal and Policy Analysis: Human Rights in State Courts (2008), http://opportunityagenda.typepad.com/the_state_of_opportunity/files/state_courts_and_human_rights_2008_edition.pdf.

⁵⁹See, e.g., *Garza v. Lappin*, 253 F.3d 918, 924–26 (7th Cir. 2001) (international law is nonbinding). But see *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) (requiring courts to interpret U.S. laws, where reasonably possible, so as not to violate international law). See also National Economic and Social Rights Initiative, Columbia Law School Human Rights Institute & Northeastern University School of Law, Program on Human Rights and the Global Economy, HUMAN RIGHTS, SOCIAL JUSTICE, AND STATE LAW: A MANUAL FOR CREATIVE LAWYERING (2008), www.nesri.org/fact_sheets_pubs/legal_training%20_manual.pdf.

Domestic Legislative Advocacy. Offer public testimony or a white paper on the international law arguments corresponding to a piece of local legislation. Or try to incorporate Inter-American standards into the legislation's substance or even its preamble or into an ordinance or resolution. Federal, state, and local policymakers may be open to learning about international opinion on the subject of pending or proposed legislation. Also, consider educating state and local human rights commissions about the international principles that support their traditional civil rights approach and explore other ways to implement international norms at the local, state, or federal level.

Training. U.S. lawyers can incorporate human rights norms into the training of city or state actors, such as judges, police officers, caseworkers, teachers, and city agency directors. For instance, the Inter-American Court's advisory opinion on the rights of undocumented migrant workers might be useful in wage-and-hour or labor rights advocacy on behalf of unauthorized workers in the restaurant industry. Or an expected decision from the Commission in the *Gonzales* case that the United States has a duty to protect victims of domestic violence might be used in judicial or police training on enforcement of restraining orders.

Political Pressure. Think about how to use the Inter-American human rights system, or international standards generally, to exert political pressure at the federal, state, or local levels. As one Congress member, referring to the *Gonzales* case, once told me, "Do you know how embarrassing it would be for an international body to call the United States a violator of the rights of women and children?"⁶⁰ The threat of international shaming can stimulate policy changes, especially at the executive level. The State Department is particularly attuned to international and foreign policy issues—more so, at least, than most judges or state and local policymakers.

Public Opinion, Education, and Advocacy. Frame a social justice issue in the

context of human rights to add value to your public messaging and advocacy. The language of "human rights" may give your case broader appeal, bringing in additional support or increased media attention. Indeed, many stakeholders, such as immigrants from countries where human rights rhetoric is common or individuals from marginalized communities in the United States, are familiar and comfortable with human rights language even if lawyers are not. Going to the Commission or simply using Inter-American jurisprudence in your advocacy may mobilize new forms of community support for an issue.

Coalition and Movement-Building. File amicus briefs in Commission cases or request thematic hearings before the Commission to drive new coalitions or to reinvigorate a movement. Public interest lawyers in the United States often lament that they feel confined to "silos"—housing, public benefits, immigration, or family law, to name a few. The advantage of human rights law and the growing human rights movement in the United States is that it bridges many of these silos and reflects the interdependence of rights. How might a human rights framing of your issue area allow you to reach out across practice areas? Participating in Commission proceedings can lead to building coalitions and giving new life to a movement. Moreover, a forum that values substance over procedure, that equates governmental immunity laws with unacceptable impunity, and that rejects the notion of a right without a remedy can be a valuable organizing tool.

Join the Bringing Human Rights Home Lawyers' Network. A concrete way that poverty lawyers can engage with the Inter-American system is by joining the Bringing Human Rights Home Lawyers' Network. Based in the Columbia Law School Human Rights Institute, the network is composed of over 200 U.S. lawyers (including legal aid, civil rights, and human rights attorneys) and encourages U.S. compliance with international human rights law and the development of

⁶⁰In Washington, D.C., March 1, 2007; name withheld for confidentiality.

strategies to use human rights law in U.S. courts and domestic policy-making and debate.⁶¹ Each year the network coordinates a meeting with high-level Commission staff members to discuss issues related to U.S. advocacy and strategies for enhancing the Commission's impact in the United States. The network recently started an "Inter-American Working Group" to make the Inter-American system more visible and accessible domestically, to guide domestic lawyers interested in using the system in their advocacy, and to facilitate contact between the Commission and U.S. lawyers.

IV. The Inter-American Human Rights System, the Obama Administration, and Beyond

With the arrival of a new administration, we will undoubtedly see a shift in the way in which our executive branch relates to the international community. There is a reasonable possibility that the United States will in the next four to eight years ratify the American Convention, albeit with several reservations, understandings, and declarations. The United States is far less likely to submit to the jurisdiction of the Inter-American Court. The OAS may elect a new commissioner from the United States, and President Obama may appoint a new ambassador to the

OAS. These policy changes could have a spillover effect on our judicial and legislative branches and prod judges and policymakers to accept increasingly the relevance of international human rights law to U.S. laws and policies.

No matter how things change in the foreign policy front, lawyers will still need to use creative, outside-the-box strategies when appearing before the Commission or when using Inter-American jurisprudence in domestic advocacy. Choosing one's cases and causes strategically, in consultation with grounded practitioners and international law experts, is essential to avoid presenting conflicting or inappropriate legal arguments before the Commission and creating bad law.

The Inter-American human rights system, with its base in Washington, D.C., offers a particularly appealing venue for poverty lawyers and legal aid organizations, whose mandates are typically local, to incorporate an international human rights dimension to their advocacy. They also allow advocates to explore new possibilities to bring human rights home.

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⁶¹For more information on the Bringing Human Rights Home Lawyers' Network, see www.law.columbia.edu/center_program/human_rights/HRinUS/BHRH_Law_Net. To join the Network, email hri@law.columbia.edu.

American Declaration of the Rights and Duties of Man (Articles 1–27)

The American Declaration of the Rights and Duties of Man sets forth a wide spectrum of civil, political, economic, social, and cultural rights in Articles 1–27:

- | | |
|---|--|
| 1. Life, liberty, and personal security (includes quality of life) | 14. Work and fair remuneration |
| 2. Equality before the law | 15. Leisure |
| 3. Religious freedom and worship | 16. Social security |
| 4. Freedom of investigation, opinion, expression, and dissemination | 17. Juridical personality and civil rights |
| 5. Privacy | 18. Fair trial |
| 6. Family | 19. Nationality |
| 7. Protection for mothers and children | 20. Vote and participation in government |
| 8. Residence and movement | 21. Assembly |
| 9. Inviolability of the home | 22. Association |
| 10. Inviolability of correspondence | 23. Property |
| 11. Preservation of health and well-being | 24. Petition |
| 12. Education | 25. Protection from arbitrary arrest |
| 13. Benefits of culture | 26. Due process of law (criminal context) |
| | 27. Asylum |

Source: Organization of American States, American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States May 2, 1948, OEA/Ser.L./VII.82 doc. 6.

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