PRESUMPTION OF VERACITY, NONAPPEARANCE, AND DEFAULT IN THE INDIVIDUAL COMPLAINT PROCEDURE OF THE INTER-AMERICAN SYSTEM ON HUMAN RIGHTS

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A. INTRODUCTION

A mechanism of utmost importance for judicial or quasi-judicial systems is the default judgment. The power of an adjudicatory body to subject a person or state to its jurisdiction relies on the fact that the person or state is not able to defeat such jurisdiction by merely failing to appear to its proceedings. A decision can be rendered by the international body even if one of the concerned parties does not appear.

In domestic or municipal law, persons are compelled to appear by a superior entity, the state, that makes available to the judge the necessary means to enforce its jurisdiction. Consent of an individual is, in practice, irrelevant. Consent is remote and can only be conceived in political theory. Jurisdiction is presumed by the mere fact that persons are subject to the jurisdiction of the state. However, in international law, the consent of states is more immediate and necessary than is that of a person or corporation in domestic law. Sovereigns are equal powers and no clear enforcement mechanisms are available. States usually consider that their clear consent is necessary to be subject to the jurisdiction of a third entity (a Court, a Commission, an arbitration panel, among others).[1] *This may explain a trend in the proceedings before the*

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1. For a discussion on consent, jurisdiction and the duty to appear before an international tribunal *see* JEROME B. ELKIND, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 30 (1984).

International Court of Justice (ICJ) in which states use the "nonappearance technique," as it has been called, in litigation before the Court.[2]

When states give their consent to be subject to the jurisdiction of an international body that could interpret a treaty and establish the state's obligations, it is presumed that they do so in good faith. When their appearance before an international adjudicatory body is required by virtue of an application or petition filed against them, states are legally compelled to avail themselves to the international organism. If states consider that a tribunal has no jurisdiction in a case filed against them, the logical good faith response is to present a preliminary objection to such jurisdiction. The general principle of pacta sunt servanda, which generates a presumption of validity of international treaties,[3] implies that the lack of participation of a state in the proceedings before an international tribunal is internationally illegal.

Furthermore, a default decision by an international adjudicatory body implicitly recognizes that the state has violated an international treaty by not appearing at the proceedings or by disappearing.[4] Usually, however, international tribunals do not expressly declare the international responsibility of the nonappearing state for its default. When a tribunal establishes its jurisdiction in a case and one of the parties does not appear, such default is the first and more clear violation of the international agreement that supports such jurisdiction. The declaration of international responsibility itself could be the remedy.

In the inter-American system, states give their consent by ratifying the American Convention on Human Rights (hereinafter American Convention), which subjects them to the supervision of the Inter-American Commission on Human Rights (hereinafter Commission). States also give their by expressly accepting the interstate complaint procedure of the Commission, and by accepting the contentious jurisdiction of the Inter-American Court on Human Rights (hereinafter Court). Similarly, those countries that have not ratified the American Convention also give their consent to the Commission's jurisdiction as members of the Organization of American States (hereinafter OAS).[5]

2. *See* Keith Highet, *Nonappearance and Disappearance Before the International Court of Justice*, 81 AJIL 238 (1987) (reviewing J. ELKIND. J. W. A. NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE, (1984) and THIRLWAY, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE, (1985)).
3. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 616.(1990)
4. Prof. Keith Highet calls "disappearance" of states in the I.C.J. proceedings, a situation in which a state, initially, appears to the proceedings to present preliminary objections, but when the Court finds its jurisdiction it fails to participate in the discussion on the merits (HIGHET, *supra* note 2).
5. *See generally*, THOMAS BUERGENTHAL ET AL., PROTECTING HUMAN RIGHTS IN THE AMERICAS 24 (1990) *See* DANIEL. O'DONNELL, PROTECCIÓN INTERNACIONAL DE LOS DERECHOS HUMANOS 24 (1989). *See* HECTOR GROS ESPIELL, ESTUDIOS SOBRE DERECHOS HUMANOS 201-224 (1988).

The Inter-American system, as well as the United Nations system developed under the International Covenant on Civil and Political Rights (hereinafter ICCPR), have an important similarity: both include countries where democracy is not yet achieved, and where widespread systematic violations continue to occur. This is in contrast with the European system of protection of human rights, where most of the countries are long standing democracies, and where violations of the rights of people is exceptional. The inter-American and Universal systems constantly face the problem of nonappearance of state parties to the proceedings before the adjudicatory bodies, while in the European system this situation, until now, remains an exception.[6]

This comparison illustrates one of the most important aspects of nonappearance and default, namely that non-democratic countries are usually the ones that violate their international commitments. Even though we may consider that default decisions are not desirable from the perspective of building human rights standards and strengthening the international rule of law, they may be very useful from a political point of view. In the Americas, the Commission has developed most of its jurisprudence in the framework of widespread human rights violations, and its default decisions have been part of its overall strategy to overcome authoritarian regimes in the hemisphere.[7] Furthermore, the Court has faced the lack of cooperation of states in its proceedings and has developed legal mechanisms designed to confront those problems. This experience could be very useful in the future for those international bodies in other regions of the world that have not yet crafted legal tools to face gross, massive and systematic violations of human rights.

B. THE DUTY TO APPEAR AND THE CONCEPT OF DEFAULT AND NONAPPEARANCE

A distinction has been drawn between nonappearance and default.[8] Authorities consider that there are two types of default traditionally recognized in municipal jurisdictions, one involving the failure to appear, and the other involving the failure to plead. Consequently, default does not always refer to nonappearance. Furthermore, in order to establish that a nonappearing state is in default, the proceedings must be duly constituted, and an obligation to appear must exist for the state in question.[9]

6. Among the few default cases of the European Human Rights System *see Cyprus v. Turkey*, 4 Eur. Comm'n H.R.Rep. 482 (1982) (Commission report) LEXIS, Intlaw library, ECCASE file.
7. For a discussion on this issue *see generally*, BUERGENTHAL, *supra* note 5, at 277 (1990).
8. See ELKIND, *supra* note 1, at 82.
9. *Id.*, at 80.

Hypothetically, when a state does not appear, or appears but does not argue the merits of the case, we could conclude that there is default. If the state appears at the proceedings and discusses some of the issues raised against it, but does not provide any evidence to support its submissions, we can also consider the state to be in default. But if the state appears and supports some, but not all, of its arguments with evidence, we cannot consider that there exists the type of default that would trigger a default provision such as Article 53 of the Statute of the ICJ. In this last hypothesis, the state may have simply conceded certain claims to the petitioners or applicants.

In the inter-American system, the obligation to appear before the Commission and the Court is based on the Charter of the Organization of American States (OAS) and/or the American Convention on Human Rights. Those countries that have not ratified the American Convention are subject to the jurisdiction of the Commission by virtue of the implied powers recognized in the OAS Charter,[10] which establishes that the principal function of the Commission "shall be to promote the observance and protection of human rights."[11] The Statute of the Commission interprets those powers as follows:

> ...the Commission shall have the... powers...: b. to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental rights;[12]

In Part II (Means of Protection) of the American Convention, Article 33 prescribes that "The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties." Interpreted in light of the principle of good faith, these provisions imply that states accept the jurisdiction of the Court and the Commission in accordance with the terms of the Convention and are therefore compelled to appear before those bodies when required. Article 33 implicitly establishes that the Commission and the Court have the power to decide if they have competence to determine their jurisdiction in a particular case.[13] Countries must submit to the authority of the Commission or the Court if those organs find that they have jurisdiction in a particular case.

10. *See* THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 131 (1988).
11. *Id.*, *see* Charter of the Organization of American States as *reprinted* at 475. The rights protected are the basic fundamental rights recognized in the American Declaration of the Rights and Duties of Man.
12. *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.II.82, doc. 6 rev. 1, July 1, 1992, p. 99.
13. The well established principle of *la competence de la competence*. A tribunal always has the jurisdiction to determine its jurisdiction.

Furthermore, the Statute of the Commission reaffirms the express consent of states to the jurisdiction of the Commission, both for those member states that are not parties to the American Convention as well as for those states that have ratified the treaty.

There is no express default provision under the American Convention. However, both the Commission and the Court have developed a default mechanism in their proceedings in order to guarantee that states will not evade their international obligations by failing to appearing before these regional bodies.[14] The nonappearance mechanism in the inter-American System is not limited to the mere fact of a state failing to participate in the written or oral proceedings of the Commission or the Court, but also applies to an unsubstantial, ambiguous or elusive participation on the merits. In this respect, when the Inter-American Commission or Court require the presence of a state in a case, there is a presumption that the proceedings have been duly constituted and that there is a treaty obligation on the state to appear.

C. FAILURE TO APPEAR BEFORE THE INTER-AMERICAN COMMISSION AND COURT ON HUMAN RIGHTS

1. Presumption of veracity in the Commission's proceedings

A default provision is expressly included in the Regulations of the Commission,[15] and all previous Commission Regulations have contained such a provision. A nonappearance provision was included for the first time in Article 51 of the 1960 Regulations. During the 1970's, the Commission frequently used the Article 51 "presumption of confirmation," which stated: "1. The occurrence of the events on which information has been requested will be presumed to be confirmed if

14. The legal framework of some international tribunals include non-appearance provisions. The Statute of the International Court of Justice (ICJ), for example, has such a provision in Article 53. However, in the case other international supervisory bodies there are no explicit default provisions. Such is the case with the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, under the Optional Protocol, as well as with the European Commission on Human Rights. On the other hand, the Rules of the European Court on Human Rights include, in Rules 40 and 46, several provisions that address specific non-appearance events that have procedural consequences. Rule 52 refers to the fact that "a party fails to appear or to present its case" in general.

15. The Commission has the authority to adopt its Regulations in accordance to Article 22, 23 and 24 of its Statute. The current Regulations of the Commission were approved on April 8, 1980. In 1985, 1987 and 1995 the Commission modified these rules, regarding matters not relevant to the default provision.

the Government referred to has not supplied such information within 180 days of the request, provided always, that the invalidity of the events denounced is not shown by other elements of proof."

The obligation of states to appear before the Commission when a claim is filed against them is implicit in these default provisions, and the legal consequences or effects are prescribed. The default mechanism adopted by the Commission has the very particular characteristic of presuming the veracity of the facts alleged by the petitioner if the respondent state fails to appear.

Article 42[16] of the Commission's Regulations presently in force reads as follows:

> **Article 42. Presumption**
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> The facts reported in the petition whose pertinent parts have been transmitted the government of the State in reference shall be presumed to be true if, during the maximum period set be 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.

This provision seeks to ensure adequate participation by states in the Commission's proceedings. It not only establishes the obligation of states to appear in a meaningful way before the Commission, but also spells out the legal consequences of failing to provide "pertinent information." In a sense, Article 42 prescribes a positive rule of evidence for certain situations.

Arguably, Article 42 could be read as a rule applicable in those cases where a respondent state fails to rebut one of the petitioner's claims, or to support or substantiate specific arguments with pertinent evidence. This interpretation would lead us to believe that Article 42 is not a nonappearance provision. However, the Commission has applied this provision in cases where the state has not appeared at all or when the state has appeared but has not discussed "in any instance" the allegations of the petitioners.[17] It is in these cases that the rule of evidence operates: the Commission must presume the facts alleged by the petitioner as true.

The Commission has consistently used the mechanism under Article 42[18] in cases where the state does not answer the Commission's requests of information, or where states give an ambiguous or elusive answer to such requests. This interpretation of the provision is consis-

16. Article 39 of the 1980 Regulations of the Commission is identical to the text of Article 42 of the present Regulations. They only differ in the article number and the number of the article referred in the text of the provision.

17. Case 10.970, Inter-Am. C.H.R. 172, OEA/Ser.L/VII.91, Doc. 7, (February 26, 1996).

18. A considerable portion of the Commission's decisions are based on Article 42 or similar provisions of previous Regulations, particularly in the previous decades.

tent with the distinction between failure to plead and failure to appear.[19] The Commission considers that failure to plead or discuss "in any instance" amounts to not appearing in the proceedings. This interpretation is confirmed by the fact that in certain cases states objected the jurisdiction of the Commission during the proceedings, but did not discuss the merits of the case, and the Commission applied Article 42 in its decision.

According to the text of Article 42, the Commission must base its decision on those facts alleged in the petition that have been transmitted to the non-appearing State. This requirement is similar to that implied in Rule 94.1 Rules of Procedure[20] of the Human Rights Committee of the International Covenant on Civil and Political Rights, when there is default by the state.

Article 42 of the Commission's Regulations requires the Commission to take into account other elements of proof that may lead to a "different conclusion."[21] The Commission rarely finds that a violation cannot be established in an individual case reported under Article 42.[22] This practice may be attributed to the political importance of building pressure on those countries where massive violations of human rights are occurring, but also to the lack of a more serious scrutiny of the petitions themselves. The Commission has rarely made a juridical determination under Article 42 that permits a more profound analysis of the requirements and standards it has applied. However, in some earlier cases, the Commission made specific reference to its default provision. A few of these cases suggested some criteria, which were later substantially elaborated upon by the Commission.

a. Presumption of veracity with non-appearing states

As indicated previously, a very common situation in the Commission's proceedings during the period of dictatorships that affected Latin America was the failure of states to appear. *De facto*

19. *See* ELKIND, *supra* note 1, at 30.
20. Human Rights Committee, Rules of Procedure, U.N. Doc. CCPR/C/Rev.3 (1994) *available in:* University of Minnesota Human Rights Library Web Site (http://www.umn.edu/hum... committee/HRC-RULE.htm).
21. Velasquez Rodriguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 139, (1988), *available in: The Legal Dimension of Human Rights,* Inter-American Institute on Human Rights CD ROM (1995).
22. One of this rare exceptions is Case No. 10.948, Report 13/96, COMADRES v. El Salvador, 1995 Annual Report of the Commission. In this case the Commission established that there was no violation in six of the thirteen claims alleged by the petitioners. The Commission analyzed the petitioner's version of the facts alleged along with the evidence presented and the reported human rights situation prevailing in El Salvador during the period of time in which the events presumably occurred.

governments would not even discuss the jurisdiction of the Commission when they asked to provide information in a specific case. In these cases, the Commission only had the version of the petitioners, as well as general information on the situation of the state concerned. This practice by states triggered the application by the Commission of its default provision. The Commission applied Article 42 of its Regulations systematically, but in such a way that its decisions often appeared to be a mere reproduction of other decisions, without any analysis of the petition itself, or without reference to the human rights situation in the state concerned, or to other available reports of reliable sources. However, in some cases the Commission has made reference to specific circumstances or evidence in a case and implicitly suggested criteria to evaluate the information.

In Case 1757, *Amalia Rada and others v. Bolivia*,[23] the Commission stated that it was proper to apply Article 51 of its 1960 Regulations (the default provision) because the government had not responded within a certain period of time. The Commission concluded that "other evidence available to the Commission does not at all contradict the denunciation." It further stated that "the file includes reports that the Association of Journalists, the Bar Association, and the Commission on Peace and Justice of Bolivia confirmed the arrest of numerous persons for political reasons." In this case, the Commission considered that the presumption of veracity established in Article 51 of its 1960 Regulations required, as a condition regarding the facts alleged by the petitioner, that other evidence available should *not contradict* at all the denunciation. This element of consistency or lack of contradiction of the petitioner's version was further developed by the Commission in its 1995 Annual Report.[24]

Similarly, in Case 7458, *Marcelo Quiroga Santa Cruz v. Bolivia*,[25] the Commission considered that "The failure to reply gives rise to the presumption stipulated in the above Article 39 [the default provision], which would be enough in itself to indicate the truth of the events imputed to the Government of Bolivia. In this case, the presumption is amply supported and supplemented by the declarations of the witnesses."[26] The Commission seems to suggest in this deci-

23. Inter-American Commission on Human Rights, *Ten Years of Activities 1971-1981*, Organization of Americana States, p. 137.

24. *See. infra* notes 30 and 31.

25. Inter-American Commission on Human Rights, *Ten Years of Activities*, Organization of American States, Washington D.C. 1982, p.244.

26. Id.

sion that Article 39 of its 1980 Regulations validates the facts alleged in the petition when the state does not appear before the Commission, and that other evidence would only serve the purpose of confirming or supporting the presumption. The Commission's decision could be read as implying that in other cases where there is no evidence that supports or supplements the presumption, such presumption, nevertheless, could be sufficient to support its decision.

In Report 10/94,[27] relative to several cases of violations committed by the *de facto* Haitian authorities, the Commission stated that "By not responding, those who exercise power in Haiti have not met Haiti's international obligation to supply information within a reasonable time frame, as provided in Article 48 of the American Convention on Human Rights,..."[28] The Commission stated, in case 11.128, *Izméry v. Haiti*, that "the absence of a reply gives rise to the presumption contemplated in Article 42, and that Article 42 alone would be enough to presume that the charges against the (sic) those who exercise power in Haiti are true, but in this case, the presumption is reinforced by the testimony of persons who witnessed the events."[29] This view by the Commission follows previous precedents such as the above cited case 7458, although the Commission does not make direct reference to those cases. The Commission also considered the witnesses version as reinforcing the petitioner's version in the *Izméry Case*. By doing so, the Commission is in fact assessing the *credibility* of the claim.

Only recently has the Commission provided more comprehensive interpretations of Article 42. In case 10.948, *COMADRES v. El Salvador*,[30] and case 10.970, *Martin de Mejia v. Peru*,[31] both of which were included in the 1995 Annual Report, the Commission established more elaborated standards and criteria by which it would apply Article 42 of its Regulations. These cases integrated elements of the doctrine of the Commission on non-appearance of states and developed a rational test that could be applied in other cases.

In the *COMADRES case*, the Salvadoran government did not send any communication to the Commission regarding the petitioner's

27. The Report referred to cases 11.106, 11.108, 11.115, 11.119 and 11.121, and was issued in February 1, 1994, [1993] *Annual Report of the Inter-American Commission on Human Rights* 232-238 (1994).
28. Id. p. 236.
29. Case 11.128, *Izméry v. Haiti*, decision of February 1, 1994, [1993] *Annual Report of the Inter-American Commission on Human Rights* 247 (1994), p. 246.
30. Case 10.948, Inter-Am. C.H.R. 101, OEA/Ser.L/VII.91, Doc. 7, (February 26, 1996).
31. Case 10.970, Inter-Am. C.H.R. 157, OEA/Ser.L/VII.91, Doc. 7, (February 26, 1996).

complaint, even after the Commission had indicated to government that Article 42 of its Regulation could be applied. The Commission considered that according to Article 42 of its Regulations the Government of El Salvador had not appeared in the proceedings, and that it was nevertheless, compelled to make a determination in the case.[32]

A very important aspect of the *COMADRES* decision is that the Commission did not presume *per se* the veracity of the facts alleged by the petitioner, even though the government of El Salvador did not provide any evidence that could "lead to a different conclusion."[33] The Commission stated that in order to make a determination in the case, the petitioner had to provide the necessary information that would permit a *prima facie* analysis of the admission and admissibility requirements, as well as the merits of the case.[34]

The Commission also set forward specific guidelines regarding the information required from the petitioner, and established qualitative criteria by which the facts alleged by the petitioner should be evaluated. The petitioner's version of the facts, according to the Commission's test, should be consistent, credible and specific.[35] The Commission argued that the *Velasquez Rodriguez Case* implicitly referred to this criteria and defined these concepts as follows:[36]

> The determination of consistency is the logical/rational comparison of the information furnished by the petitioner, to establish that there is no contradiction between the facts and/or the evidence submitted.

It further stated:

> The credibility of the facts is determined by assessing the version submitted, including its consistency and specificity, in evaluating the evidence furnished, taking into account public and well-known facts and any other information the Commission considers pertinent.

The Commission analyzed each statement of the petitioners regarding events alleged to have occurred during the decade of the 80s and concluded that several of the episodes narrated were not sufficiently specific:[37] the date and hour of the assassination of one

32. *Case 10.948*, *supra* note 30, at 106.
33. Id., at 107.
34. Id., at 106.
35. Id.
36. Id.
37. The Human Rights Committee also requires the authors of a claim to provide a detailed version of the facts. The Committee has referred to the lack of specificity of the petitioner's claim noting "that the authors reply on 28 January 1981 and their submission 6 October 1981 do not furnish the Committee with any further precise information to enable it to establish with certainty what in fact occurred after 23 March 1976. The authors claim that, based on information provided by eye- witnesses arrested at the same

alleged victim was not stated;[38] similarly, the month and date of the alleged detention and torture of another victim was not mentioned;[39] an alleged detention and torture, with the result of a fractured skull of one of the victims, was not supported with a detailed version of the events or with medical certificates of the physical consequences to the survivor.[40]

The Commission found that several other alleged facts were sufficiently specific as to permit an analysis of their credibility and consistency. The Commission also considered that a detailed version of certain events, some of them supported with additional evidence such as paper clippings, was sufficient to presume their veracity.[41] However, some of the claims of the petitioners, which were sufficiently specific, had conflicting information (dates alleged did not coincide). Under the consistency test, the Commission considered that it could not presume the veracity of conflictive facts or events.[42]

Further the Commission referred to other sources of information in order to assess the credibility of the versions. For example, the Commission relied on the findings of the Truth Commission of El Salvador and used them to corroborate alleged facts.[43] In this respect, it must be noted that in other previous cases the Commission had used the testimony of witnesses to support its assessment on the veracity of petitions.[44] The Commission did not analyze or assess the *quantum* of evidence that could support the case, but only referred to the version of the petitioner and to that evidence that could contradict such version.

b. Presumption of veracity with states appearing in the proceedings

The Commission has applied standards similar to those used in cases where the state has not appeared in the proceedings, to those cases in which the states have appeared, and have even presented

time as Alberto Altesor and subsequently released, their father was subjected to torture following his arrest. No eye-witness testimonies have been furnished, nor a clear indication of the time-frame involved." (Human Rights Committee of the ICCPR, Alice Altesor and Victor Hugo Altesor (alleged victim's children) on behalf of Alberto Altesor v. Uruguay, 010/1977, views of 29 March 1982).

38. *Case 10.948*, *supra* note 30, at 108.
39. Id.
40. Id., at 109.
41. Id.
42. Id., at 108
43. Id., at 109, 110.
44. *See Case 11.128*, *supra* note 29.

jurisdictional objections, but have failed to provide relevant information on the merits of the case.

In the *Martin de Mejia* case, in contrast to the *COMADRES* case, the government of Peru appeared formally in the proceedings. However, the Commission considered that the government "limited itself to maintaining the inadmissibility of the case without in any instance discussing the detailed arguments submitted to the Commission by the petitioners."[45] The Commission concluded that Article 42 was applicable to the case on the following rationale:

> Accordingly, the presumption of acceptance of the facts of a petition derives not only from the assumption that a State which fails to appear before an international organ whose competence it recognizes accepts such facts, but also from the tacit message it conveyed when, having appeared, said State does not provide the information required or its responses are evasive and/or ambiguous.[46]

Interestingly, in the *Martin de Mejia case* the Commission referred to Article 53 of the Statute of the International Court of Justice, which contains the default provision governing non-appearance of states before the ICJ. The Commission distinguished this provision from Article 42 of its Regulation, on the basis that the former "must seek to preserve the interests of the parties in dispute," while the latter "must be interpreted in light of the basic purposes of the of the Convention, i.e. protection of human rights."[47] This approach by the Commission implies that Article 42 will not necessarily preserve the interests of the parties in dispute, but that it will give precedence to protecting the rights of victims in any case.

The Commission draws an important distinction between its default criteria and those of the ICJ's non-appearance provision. The proceedings before the Commission cannot presume the equality of the parties, because the petitioner is usually a victim or a private organization that does not have the powers that a state has. States, on the other hand, are capable of controlling evidence, and, by their nature, are able to provide important information available in their jurisdiction, such as copies of the domestic proceedings, among others. The Commission stated:

> In determining whether the facts are well founded, the State's failure to appear cannot force the petitioners to meet a standard of evidence equivalent or similar to the one they initially would have to meet if the Government had appeared. If the state of El Salvador had appeared or had answered the complaint, the petitioners would have had other opportunities to furnish further proof and/or controvert the government's reply, and the Commission would have had the opportunity to witness the litigious debate and enhance its evaluation of the facts.

45. *See*, Case 10.970, *supra* note 31 at 172.
46. Id., at 172.
47. Id., at 173.

> Accordingly, the Commission cannot, in reaching a decision on the matter, require the same or a similar amount of evidence as it would have required from the petitioners if the Government had appeared, furnishing evidence and contesting the evidence of the petitioner. The Commission must necessarily confine itself to the evidence furnished by the petitioner, and to other evidence available to it in order to resolve the issue.[48]

Article 53 of the Statute of the ICJ provides that the Court must "satisfy itself" by finding that both the jurisdictional and the substantive components of a case are well-founded,[49] while Article 42 of the Commission's Regulations contains stronger language by referring to the presumption of veracity if other evidence does not contradict this conclusion. The ICJ has to find sufficient evidence that supports the claim of the applicant state in order to consider that it is well-founded, whereas the Commission does not have to find that the evidence supports the case, but only that existing evidence is not inconsistent with the petitioner's version.

In fact, in the proceedings before the Commission, whenever the petitioner alleges, for example, that remedies have been exhausted or that it is futile to do so, the burden of proof to demonstrate the contrary shifts to the state concerned.[50] This situation can be triggered simply by a *prima facie* allegation by the petitioner of such

48. *Case 10.948, supra* note 30, at 107.

49. The ICJ stated in *Corfu Channel* case that "While Article 53 obliges the Court to consider the submissions of the Party which appears, it does nor compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded." (Corfu Channel (U.K. v. Albania), 1949 I.C.J. 248 (April 9)).
In other words, it appears as if the ICJ has to examine the accuracy of the submissions of the appearing state "in all their details" if it is possible to do so. In the *U.S. Diplomatic and Consular Staff in Teheran* case the Court applied a very flexible interpretation of Article 53, and relied mainly on information supplied by the Applicant state. The Court argued that the Iranian Government had not denied or questioned the facts and that "The information available, however, is wholly consistent and concordant as to the main facts and circumstances of the case." (United States Diplomatic and Consular Staff in Teheran (U.S.A. v. Iran) *1986 I.C.J. 10 (May 24)*) It is interesting to note, in this later case, that the criteria used by the Court was similar to that used by the Inter-American Commission in its more recent cases. The ICJ used a consistency and non-contradiction criteria to evaluate the version of the U.S. Such similarity could be a consequence of the extreme situation created by the recalcitrant conduct of Iran, which severely affected the balance of the parties in the proceedings, due to the total lack of participation by Iran. The situation created is very similar to that usually existing between an individual and a state in a human rights case.

50. Exceptions to the exhaustion of domestic remedies, Advisory Opinion OC-11, Inter-Am. Ct. H.R. (ser. A) No. 11, para. 41, and *see* also Velasquez Rodriguez Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 12, paras. 39 and 88, and Fairen Garbi and Solis Corrales Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 2, paras. 39 and 87, all *available in: The Legal Dimension of Human Rights*, Inter-American Institute on Human Rights CD ROM (1995)

circumstances, as it usually happens in the Commission's proceedings. If the state does not appear to the proceedings, this allegation by the petitioner must be sufficient, according to Article 42.

If, on the other hand, the state had appeared and contested the petitioners exhaustion of domestic remedies claim, the petitioner would have another opportunity to prove his allegation. The petitioner would have to comply with a higher standard of evidence if the state contradicts the petitioner's version. In other words, if the state does not appear, the Commission is not to satisfy itself that the claim is well founded, but rather must presume the petitioner's version as true if other evidence does not lead to a different conclusion;[51] it is compelled to appreciate and give the highest value to the version of the petitioner, according to the rule of evidence established in Article 42.

A different interpretation of Article 42 would defeat the object and purpose of the Convention, namely the protection of human rights. If a state is allowed to increase a victims's burden of proof in the Commission's proceedings by not appearing or by failing to provide pertinent information to the Commission, states could consider that it is more useful, as a strategy of litigation, to fail to appear in certain cases. With such an approach, the inter-American system of protection of human rights could be seriously damaged.[52]

The views of the Commission are consistent with the position of the Human Rights Committee and the ICJ. The Committee has stated the following in the context of a default decision:

> The Committee notes that the State party had ignored the Committee's repeated requests for a thorough inquiry into the authors' allegations." "...With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to relevant information and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional

51. Cecilia Medina refers to the evidentiary issue in the presumption of veracity by stating that its application "may lead to the Commission's conclusion that the government has violated the Convention, even though the evidence rendered in the case may be insufficient by itself to support it." Professor Medina considers that the way in which the Commission applies Article 42 of the Commission's Regulations "may not appeal to the legal mind" and finds that such situation is a necessary consequence of massive violations of human rights that characterized the system until recently. (CECILIA MEDINA, THE BATTLE FOR HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS OF HUMAN RIGHTS AND THE INTER-AMERICAN SYSTEM 149 (1988). However we believe that the application of such provision can be strengthened with a more rigorous legal approach that should not affect those legitimate claims filed before the Commission.

52. As we have mentioned previously in reference to Article 53 of the ICJ's Statute, non-appearance in ICJ proceedings is increasing as a strategy of litigation. This could also be attributed to the fact that the ICJ default provision appears to suggest that states, by not appearing to the proceedings, are forcing applicant states to litigate against the Court.

> Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.[53]

The Human Rights Committee considers that a petitioner's good faith allegations supported with "substantial witness testimony" are sufficient to find a violation of the Covenant if the State fails to provide information that is not available to the Committee or the petitioners. This approach is similar to that of the Commission, in the sense that it relies on the fact that the state did not provide the necessary information and that other information available did not lead to a different conclusion. In theory, some differences can be identified, if we consider that petitioners are required to provide to the Committee all information available to them. However, it is not possible for the petitioners to prove that they have provided *all* information available to them, and therefore government participation in the proceedings is also necessary to determine whether petitioners failed to provide information that they had access to.

On the other hand, the ICJ standards for nonappearance do not differ substantially form the criteria used by the Commission in its default cases. The basic common elements are defined by Thirlway in the following words: "The mere fact of non-appearance is not to be treated as an admission, and the applicant must produce such evidence as is available to it in order to prove its allegations to the satisfaction of the Court."[54]

In determining what information may be available to the Commission or to the petitioner, the Commission takes into account the lack of balance between the state involved and the petitioner. The Commission also takes into account its own limitations to collect evidence, considering that such evidence is usually under the jurisdiction of the state concerned.[55]

53. U.N. Human Rights Committee of the ICCPR, *Irene Bleier Lewenhoff and Rosa Valino de Bleier (alleged victim's daughter and wife, respectively) on behalf of Eduardo Bleier v. Uruguay* 030/1978, views of March 29, 1982.

54. *See* J. W. A. THIRLWAY, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 128 (1985).

55. In some cases, the Commission has requested a state's consent to make an in situ investigation in order to verify the facts alleged in a case. Countries that deny the Commission its consent for an in situ investigation assume the burden to provide the Commission with reliable and detailed information on a case. Examples include cases 1702, 1748 and 1755 against Guatemala, where the Commission requested the "permission of that Government to allow a subcommittee to conduct an on-site investigation." It further stat-

These limitations necessarily have an effect on the proceedings, by shifting the burden of proof to the state once the petitioner has made a *prima facie* case.[56] In making a *prima facie* case the petitioner is required to present a detailed exposition of the alleged violations and has to provide the evidence available to him. By not appearing, the state cannot overburden the petitioner; the petitioner will have to substantiate its case only to the extent of information available. In the words of Christian Tomuschat, in an individual opinion appended to the Committee's views in *Alberto Grille Motta v. Uruguay*:[57]

> I can see no justification for a discussion of article 19 of the Covenant in relation to the last sentence of paragraph 13. To be sure, the petitioner has complained of a violation of article 19. But he has not furnished the Human Rights Committee with the necessary facts in support of his contention. The only concrete allegation is that, while detained, he was interrogated as to whether he held a position of responsibility in the outlawed Communist Youth. No further information has been provided by him concerning his political views, association and activities. Since the petitioner himself did not substantiate his charge of a violation of article 19, the State party concerned was not bound to give specific and detailed replies. General explanations and statements are not sufficient. This basic procedural rule applies to both sides. A petitioner has to state his case plainly. Only on this basis can the defendant Government be expected to answer the charges brought against it. Eventually, the Human Rights Committee may have to ask the petitioner to supplement his submission, which in the present case it has not done.

A very particular decision is that in case 1684 on Brazil. The case dealt with a general situation of torture, abuse and maltreatment of persons in detention in Brazil. The Commission considered case 1684 "to be a "general case" of violations of human rights, thus exempting the Commission from requiring compliance with Article 9 (bis) of its Statute, on exhaustion of internal remedies..."[58] At the same time, however, the Commission applied Article 51 (the default provision) in the context of what it called its "general" jurisdiction (in contrast to its individual jurisdiction), and agreed to declare that:

> because of the difficulties that have hindered the carrying out of the examination of this case, it has not been possible to obtain absolutely conclusive proof of the

ed that "permission was... denied through a cable dated November 3, 1973."Inter-American Commission on Human Rights, *Ten Years of Activities 1971-1981*, p. 130, 131.The Commission also uses this mechanism to exert pressure on the state to provide, by its own hand, the necessary information. It also operates as an ad hoc interim mechanism of protection based on its deterring effects, considering that states are very sensible to visits by the Commission. However, the financial and logistical constraints make it difficult for the Commission to exercise such powers consistently.

56. MEDINA, *supra* note 50, at 154.

57. U.N. Human Rights Committee of the ICCPR, *Alberto Grille Motta v. Uruguay*, 011/1977, views of July 29, 1980.

58. Inter-American Commission on Human Rights, *Ten Years of Activities 1971-1981*, p.120 (1982).

truth or untruth of the acts reported in the denunciations. However, the evidence collected in this case leads to the persuasive presumption that in Brazil serious cases of torture, abuse, and maltreatment have occurred to persons of both sexes while they were deprived of their liberty.[59]

The "general" jurisdiction mentioned in this atypical case creates more questions than it answers. According to the Commission's practice, the fact that this case has a number (No. 1684) implies that it was afforded the treatment of an individual case. How useful are these types of cases? Is it desirable to give a contentious treatment to these complaints? Can these cases be referred to the Court? What is the relevance of the concept of "victim"?

Notwithstanding other legal implications, in the more recent practice of the Commission, general human rights situations are approached through Special Reports (which are separate from the Commission's Annual Report), and General Reports are usually included in Chapter 4 or Chapter 5 of the Annual Report. With Special and General reports, the Commission intends to promote progressive implementation of the rights recognized in the system. However, the Commission sometimes declares in these reports that certain domestic legislation is incompatible with the Convention.[60] States complain[61] that they do not have the opportunity to present their views on those issues when they are raised in General reports, which may be a legitimate concern in those reports where the Commission declares such incompatibilities. It remains to be seen how the Commission would deal with a case of nonappearance or default by a state in a "general" case, as it occurred with Brazil in the seventies.

c. Cases initiated *motu proprio* by the Commission and nonappearance

One very troubling situation is the application of Article 42 of the Commission's Regulations in those cases where the Commission may initiate *motu proprio*, in accordance to Article 26 of the same Regulations.[62] How does the Commission deal with a nonappearing

59. Id., at 121.

60. *See* Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights, *in:* [1994] *Annual Report of the Inter-American Commission on Human Rights* 197 (1995).

61. In the 1994 sessions of the Commission on Juridical and Political Affairs of the Permanent Council of the OAS, states called the Commission to transmit its general reports to the states concerned before they are published. (*see* INTERNATIONAL HUMAN RIGHTS LAW GROUP, LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS Y SU MANDATO EN EL CAMPO DE LA DEMOCRACIA Y LOS DERECHOS HUMANOS 15 (1995).

62. This provision was introduced for the first time by the Commission in Article 26.2 of the 1980 Regulations of the Commission.

state in a case that it has initiated *motu proprio*? This issue raises complex questions respecting how the Commission must interpret Article 42.[63]

The problem is even more difficult if we consider that the *motu proprio* mechanism is likely to be used when victims in a country are not able to file petitions for themselves. This is usually the situation under authoritarian regimes that perpetrate systematic and widespread violations; these are precisely the type of governments that are unlikely to appear in the Commission's proceedings.

Furthermore, it is difficult to take an international comparative approach to the problem, because other international adjudicatory bodies, such as the Human Rights Committee or the European Commission or Court, do not have a *motu proprio* faculty contemplated in their legal framework nor have developed any practice in this regard.

Apart from discussing whether such a provision could be considered *ultra vires*, one approach to the problem, under the American Convention, is to interpret Article 42 as not applicable when there is no petitioner. The text of the provision itself establishes that a petition must have been filed before the Commission. If there is no petition in the proceedings, then Article 42 is not applicable. However, the failure of the state to appear before the Commission may trigger some type of default criteria that remains to be developed.

Should Article 42 default criteria apply in such circumstances, it could be suggested that the presumption of veracity is not applicable. Rather, the Commission would likely have to satisfy itself by applying a higher standard of proof to the case. This means that the Commission would have to gather enough information that could clearly indicate a violation of the Convention.[64]

In any case, as a matter of policy, it is preferable for the Commission to file all *motu proprio* cases before the Court, in order to avoid

63. The Commission does not use its *motu proprio* faculties frequently. One of the few examples is the *Caballero Delgado Case* where the Commission initiated *motu proprio* the case based on an urgent action. However, the petitioners subsequently filed a "formal communication" and the Colombian government appeared before the Commission and the Court, which in fact transformed the case into a typical contentious proceeding. Therefore, the exercise of the *motu proprio* powers had no legal effect in the case, and consequently have no relevance to our discussion.

64. Prof. Medina refers to the faculty of the Commission as an "extremely broad power" that involves "less important admissibility requirements" and suggests that it creates and independent procedure for individual cases brought under the Commission's own motion. (MEDINA, *supra* note 50, at 145).

being placed in a conflictive position: being "petitioner" and judge in its proceedings. In practice, the Commission would effectively act as a prosecutor gathering evidence to be presented before the Court in the contentious case.

d. Remedies granted by a default decision

In the context of default decisions, the Commission always declares the international responsibility of the non-appearing state involved in the violations when it finds that the facts can be presumed true. It also usually makes specific recommendations to the non-appearing state. These recommendations generally request investigation and punishment of those responsible for the alleged violations, as well for compensation of the victims and/or their relatives.

However, the Commission has developed a special practice when applying the default provision in an individual case where a government excluded from the OAS does not appear in its proceedings. This has been the case with Cuba and more recently with Haiti. Castro's regime as well as that of Cedras have rarely responded to the Commission's request of information in individual cases. When the Commission has issued an individual report in cases against those states, it declares the international responsibility of the state involved. But it consistently refrains from requesting the government to adopt certain measures.

In case 4429, *Capote Rodriguez v. Cuba*,[65] the Commission applied Article 39 of its Regulations (default provision) and declared that "the Government of Cuba violated the right to life, liberty and personal security ...and the right to the preservation of health and to well-being." But it did not issue recommendations. The same position was assumed by the Commission in case 1604, *Boitel v. Cuba*,[66] and in case 1804, *Cabelo del Sol and others v. Cuba*,[67] where the Commission stated:

> In view of the systematic silence of the present Government of Cuba in the face of the numerous communications received from the Commission, it would serve no practical purpose to make recommendations to the government of the type envisaged in Article 9 b and 9 (bis) b of the Statute. However, this does not prevent the Commission from making known to the General Assembly the judgements merited by the events denounced.[68]

In its 1981-1982 Annual Report,[69] the Commission referred again to several cases regarding Cuba and again avoided any reference to

65. Inter-American Commission on Human Rights, *Ten Years of Activities 1971-1981*, at 242.
66. Id. at 101.
67. Id. at 153.
68. Id. at 103.
69. 1981-1982 *Annual Report of the Inter-American Commission on Human Rights* 65-81 (1982).

specific remedies. Reports No. 9/94, 10/94, and 11/94[70] on Haiti do not refer to specific remedies is the cases denounced. The Commission simply states that the Government of Haiti illegally overthrown has been unable to investigate and punish those responsible. No reference is made to compensation.

It is not clear why the Commission draws a distinction between non-appearing states that have authoritarian regimes and those states whose governments have been excluded from the OAS. In practical terms, both types of non-appearing states have triggered a default decision and both have violated international law. This distinction has an effect, not on the governments themselves, but on the victims who, in a later period of transition to democracy, could use the Commission's declaration and recommendations as a claim against the state for compensation. The mere declaration by an international body of the specific obligations that a state has violated in an specific case, and the recommendations of measures to be adopted in the individual situation, could provide moral relief to the victim and satisfaction to other democratic states of the hemisphere.

e. Problems that arise form the practice prevailing in the Commission

The Commission has made use of its default and nonappearance mechanisms in rather persistent ways, which in turn appears consistent with the need to confront gross and systematic violations in the hemisphere, as indicated previously. Usually, those countries that have a more settled democratic system appear before the Commission and adequately discuss the cases on the merits. Many of the countries that violate human rights in a systematic way do not discuss the case or even answer to the Commission in an adequate way. This was more notorious during the 1970's and 1980's.

This situation in turn has created a contradictory and perverse effect on the system: because the Commission had to concentrate its action on cases brought against countries where gross and systematic violations were occurring, Article 42 decisions taken by the Commission in those cases have prejudiced or harmed the juridical or compelling value of some of the Commission's reports.[71] An example of such a practice can be observed in the Commission's Annual Report for the year 1990-1991. The individual cases report-

70. The Reports adopted on February 1, 1994 are included in 1993 *Annual Report of the Inter-American Commission on Human Rights* 224, 232, 239 (1994).

71. In an interview with a representative of the *Coordinadora Nacional de Derechos Humanos del Peru* (February, 1996), Peruvian NGO's consider that Article 42 reports have a lesser impact for the Peruvian authorities.

ed on Peru in Chapter 3[72] consisted of a short reference to the facts alleged by the petitioners and a proforma finding.

Furthermore, due to this practice in the Commission, an Article 42 decision may be perceived as having a "less binding" character, and consequently it is less effective for the victim. However, the participation of states in the proceedings does not depend on the Commission. If states continue to avoid this international duty, the Commission has no other alternative but to apply Article 42.

Strengthening the juridical value of default decisions is a positive step that should be undertaken by the Commission. The fact that the Commission has recently structured a test by which cases with non-appearing states can be evaluated contributes to the credibility of the Article 42 decisions. The traditional juridical weakness of this type of decisions can be ameliorated with a more rigorous legal approach.[73]

This step, however, must not be understood as making it more difficult for victims of a regime that violates systematically the rights of persons to file a petition and to have a prompt response by the Commission. To the contrary, an established doctrine or jurisprudence on the presumption of veracity will make it easier and expedient for the Commission to review of petitions. A clear jurisprudence permits the systematized processing of petitions and a prompt response to the victims. The legitimacy of those decisions will be strengthened, in the interests of the Commission and of the victims.

For states, the system will increase its level of predictability and its capacity to respond authoritatively to serious situations of human rights, which is a fundamental interest of the international policy of democratic states. It also will serve to filter those claims that intend to use the system for illegitimate reasons.

2. Non-appearance before the Inter-American Court

The Court has also resorted to the default mechanism in individual cases brought before it. The Court has in its Rules of Procedure a default provision[74] that has not yet been applied in a case. However, the

72. 1990-1991 *Annual Report of the Inter-American Commission on Human Rights* 251-423 (1991). Around 50 cases on Peru were reported by the Commission.

73. The Commission has been called upon nongovernmental organizations to adopt a more rigorous and transparent approach in its proceedings. *See* INTERNATIONAL HUMAN RIGHTS LAW GROUP, LA ORGANIZACION DE LOS ESTADOS AMERICANOS Y SU MANDATO EN EL CAMPO DE LA DEMOCRACIA Y LOS DERECHOS HUMANOS (1995).

74. Article 25 (Article 27 since September 16, 1996) of the Rules of Procedure of the Court states: "1. When a party fails to appear in or to continue with a case, the Court shall, on

Court developed a default mechanism through its case law. In the Court's history, no state has yet failed to appear to the proceedings. However, the problems that the Court has faced deal with the lack of cooperation by the states. Consequently, the mechanism developed by the Court is intended to operate as a default provision based on the failure to plead adequately.

The most relevant decision for our purposes is the *Velasquez Rodriguez Case*. In this decision, the Court articulated an important distinction: a state may appear and discuss the jurisdiction of the case, but the lack of adequate participation in the merits of the case by Honduras could amount to default:

> The manner in which the Government conducted its defense would have suffice to prove many of the Commission's allegations by virtue of the principle that the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law.[75]

The Court further considered that the lack of adequate participation by Honduras in the proceedings did not forfeit the Court's authority to render a decision in the case:

> Since the Government only offered some documentary evidence in support of its preliminary objections, but none on the merits, the Court must reach its decision without the valuable assistance of a more active participation by Honduras,...[76]

However, the Court in *Velasquez* did not clearly apply the criteria of its default doctrine regarding direct evidence in order to decide the case. The Court was reluctant to apply its default criteria and decided to "compensate" for the lack of Government collaboration. The Court, notwithstanding this approach, considered that it would do so "without prejudice to its discretion to consider the silence or inaction of Honduras..."[77]

The Court appeared to rely on evidence of an existing systematic practice of forced disappearances in Honduras and on the nexus between the victim and this practice. This approach may very well be attributed to the fact that, even though there was no direct evidence available due to the nature of the violation (a forced disappearance), the Commission was able present indirect evidence of the alleged violations. The Court appeared to suggest that in a case already proven through a construction of systematic practice, the application of its

its own motion, take whatever measures are necessary to complete consideration of the case. 2.When a party enters a case at a later stage of the proceedings, it shall take the proceedings at that stage." OAS/Ser.L.V/II.92, doc. 31 rev. 3, May 3, 1996.

75. *Velasquez Rodriguez Case*, *supra* note 21, para. 138.

76. *Id.*, para. 137.

77. *Id.*, para. 138.

default doctrine was not appropriate. This implies that the international state responsibility in the *Velasquez case* was not established on the basis of default by Honduras, but by the fact that there was enough circumstantial evidence to find such state responsibility.[78]

The decision also suggests that the standards required by the Court in its default doctrine are lower than those required in a case where direct or indirect evidence is available. In this sense we must say that the avenue chosen by the Court is stronger than the alternative of using its default doctrine. As we have seen, a decision on the grounds of existing direct or indirect evidence regarding an alleged violation is more desirable for the victim's interests than a default decision, because the former type of decision is more credible. Baring in mind that the Court's authority relies heavily on the credibility of its decisions, we must conclude that the Court will remain reluctant to use its default doctrine in future cases.

D. CONCLUSION

The Inter-American Commission systematically applies its default provision when states fail to appear in its proceedings. However, the Inter-American Court has not expanded on this issue because most states do appear in its judicial proceedings. According to the practice of the Inter-American System, it is clear that failure to appear before an international tribunal or a quasi-judicial international body has negative legal consequences for the state in default and for the system itself.

Nonappearance in the Inter-American Commission is known as "presumption of veracity" which refers to the legal effects of not appearing before the adjudicatory body. According to the current jurisprudence, the Commission does not, *per se*, presume the veracity of an uncontested claim. It analyzes the information provided in order to establish if its consistency, specificity and credibility.

The presumption of veracity, established in article 42 of the Regulations of the Commission, has played an important role in the adjudication of individual cases brought by petitioners over the past decades, particularly in cases in which recalcitrant governments simply disregarded such proceedings as political attacks. Evidently, the Commission had to

78. Note that in case 10.970 the Commission made a similar construction (systematic practice) on the issue of rape in Peru, but finally applied Article 42 presuming the veracity of the facts alleged by the petitioners, due to Peru's default. In this regard, the Commission appears to have established a *prima facie* case using the "systematic practice" construction, in order to be able to apply the presumption of veracity. Circumstantial evidence was used by the Commission to examine the consistency and credibility of the petitioner's version of the events rather than to indirectly prove the alleged violation.

respond to an environment of gross and massive violations of human rights and Article 42 provided the necessary legal tool to exert pressure on those countries that failed to appear in individual cases. Although the Commission case law in default cases is abundant, it is of doubtful legal value for the purpose of setting human rights standards.

As the political and democratic environment in the hemisphere improves, the Commission responds by enhancing its juridical approach to individual cases. This enhancement, however, is only possible with the adequate and technical participation of states in the Commission's proceedings. In light of this, the Commission's recent default decisions, which reflect a more sophisticated legal approach in their juridical reasoning, are clearly intended to relay to the States of the hemisphere the Commission's support for a more democratic way of interacting with an international regional supervisory body, in the same way European States engage with the Commission and Court in the European System.