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Facilitating Friendly Settlements in the Inter-American Human Rights System: A Comparative Analysis with Recommendations\textsuperscript{1}

\textbf{Introduction}

Since the Council of the Organization of American States (OAS) created the Inter-American Commission on Human Rights (IACHR) in 1959, it has been “charged with furthering respect for [human] rights.”\textsuperscript{2} In pursuit of this mandate, the Organization of American States (OAS) adopted an amendment to the OAS Charter, under the 1967 Protocol of Buenos Aires, making the IACHR an organ of the OAS.\textsuperscript{3} Shortly thereafter, in 1969, a specialized conference on human rights convinced the OAS to adopt the American Convention on Human Rights which came into force in 1978.\textsuperscript{4} In addition to strengthening and defining the powers of the IACHR, the Convention also created the Inter-American Court of Human Rights (IACtHR).\textsuperscript{5} Together, the IACHR and the IACtHR comprise the primary adjudicative bodies of the Inter-American human rights system.\textsuperscript{6}

\footnotesize{\textsuperscript{1} Sean Burke (J.D. Candidate, University of Minnesota Law School) & Matthew Webster (J.D. Candidate, University of Minnesota Law School).


\textsuperscript{3} Introduction, supra note 2.

\textsuperscript{4} Id.

\textsuperscript{5} Id. The creation of the court gave the IACHR a dual role in its adjudicative functions. While it may decide to rule on an individual complaint and issue a judgment, it can also take an individual complaint to the IACtHR. In these instances, the IACHR ceases acting as judge and advocates for a party while the IACtHR hands down judgment of the case.

\textsuperscript{6} See Generally Inter-American Commission on Human Rights, What is the IACHR?, http://www.cidh.oas.org/what.htm (last visited Jan. 7, 2010). The IACHR fulfills other roles outside its adjudicative function as judge and advocate of individual complaints. On its own accord, the IACHR may visit a country that is a party to the Convention and reports about the human rights’ situation in that country. The IACHR may also advocate for the creation of new treaties and sponsor ongoing educational programs for the advancement of human rights in the
Although the Inter-American human rights system has succeeded in advancing human rights in the Western Hemisphere, the IACHR and the IACtHR receive a large number of human rights complaints each year and suffer from a severe backlog of these claims. Such a backlog creates administrative problems that require creative adjudicative solutions. A comparative analysis of the friendly settlement practices in other adjudicative systems, including the European Court of Human Rights, the African Court of Human Rights, and the United States domestic court system, indicates that several best practices should be incorporated into the IACHR’s current friendly settlement mechanism in order to make it more efficient and just.

Parts I-IV will examine the friendly settlement mechanisms of these other regional adjudicative systems, and Part V will assess the current situation of individual complaint backlog and friendly settlement process in the IACHR. Part VI will make several recommendations for the IACHR based on this comparative analysis that include: fostering a stronger culture of friendly settlement; strengthening settlement and judgment enforcement mechanisms within the IACHR, recognizing the need for and developing new settlement mechanisms such as judge training, more robust data collection, and pilot judgments; and instituting proper procedural rules to effectuate all of these changes.

I. Background of European Court of Human Rights

As the largest, most well-funded of the regional human rights systems, the ECHR provides the appropriate starting point for analyzing the effectiveness of friendly settlements in a regional human rights context. While the ECHR’s overall structure differs somewhat from the
Inter-American system, its development of innovative friendly settlement procedures and mechanisms provides the best blueprint for the Inter-American System to emulate.

Like the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms provides the overarching structure and content for the European Human Rights system. The Court is financed by the Council of Europe, whose member states make contributions annually based on their GDP and population. The European Convention is composed of three sections – the first guarantees fundamental human rights, the second establishes the ECHR, and the third contains miscellaneous provisions.

10 Eur. Ct. H.R., The ECHR in 50 questions, 1, 4 (2009). In 2009 the ECHR’s budget was 56 million euros and was used to fund the salaries of judges, staff, and the administrative overhead of general operations. Id.
11 Articles 1 through 18 protect rights such as right to life [Art. 2], prohibition of torture [Art. 3] and slavery [Art. 4], right to liberty [Art. 5] and a fair trial [Art. 6], freedom of thought [Art. 9] and expression [Art. 10], right to effective remedy [Art. 13] and right to be free from discrimination [Art. 14]. European Convention, supra note 8, art. 1–18.
12 Id. art. 19–51.
13 Articles 52 through 59 establish that High Contracting Parties shall not use other means of dispute settlement [Art. 55], they may make specific reservations [Art. 57], and they must explain to the Secretary General how their domestic law ensures the implementation of the Convention [Art. 52]. Id. art. 52–59. These miscellaneous provisions have little influence on the friendly settlement process of the ECHR.
A. Procedure

Article 19 of the European Convention established the ECHR, which is composed of one elected member for each of the forty-seven High Contracting Parties. The ECHR is organized into Committees of three judges, Chambers of seven, and a Grand Chamber of seventeen judges. The ECHR’s jurisdiction includes both interstate cases as well as individual claims. The Committees make declarations of inadmissibility by unanimous vote, disposing of the most manifestly inadmissible claims. Chambers rule on admissibility and the merits of a case by majority vote. The Chambers are composed of the Section’s President, the national judge elected in respect of the defendant state, and five other judges designated by the Section President on a rotating basis. Exceptional cases are referred to the Grand Chamber, either by relinquishment from a Chamber or when the parties accept a request for referral. The Grand Chamber includes the Court’s President and Vice-Presidents, the Section Presidents and the national judge, as well as other randomly selected judges.

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14 Id. art. 19. Currently, 46 judges comprise the ECHR – the judicial seat for the Ukraine is presently vacant. Eur. Ct. H.R., Composition of the Court (June 23, 2009), available at http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Judges+of+the+Court/.
15 Id. art. 27, ¶ 1.
16 Id. art. 33–34.
18 Id. In fact, the majority of judgments are delivered by these seven-judge chambers. Id.
19 Id. at 5.
20 Id. Relinquishment occurs when cases raises new question of law which would change the interpretation of the Convention or if a case may potentially create an inconsistency with a previous ECHR judgment. Id. at 5.
21 Id. To maintain impartiality on cases referred to the Grand Chamber, no judges who previously sat on the Chamber sit in the Grand Chamber. Id. For an overview of the Court’s procedure, see Eur. Ct. H.R., Some Facts and Figures: 1959-2009, 3 (2009), available at www.echr.coe.int (describing the procedure from lodging a complaint through judgment). Id.
Once a complaint is lodged, it is first assigned to either a Chamber or a Committee, depending on the complaint’s complexity, and these bodies rule administratively on the claim’s admissibility. When a claim is initially ruled admissible, it can either be immediately relinquished to the Grand Chamber’s jurisdiction, submitted to joint procedure where the admissibility and merits are considered together, or the admissibility and merits may be considered separately by the Chamber. If the admissibility and merits are taken separately, as is most common, the Chamber first rules on the admissibility before granting a judgment. After determining that a case is admissible, the Chamber examines the case, investigates the facts if necessary, and offers parties the option of friendly settlement. In either the joint or separate procedure, a judgment may state that just satisfaction is “reserved” or “included.” If included, the respondent state must carry out the judgment (be it monetary, remedial or legislative) under the supervision of the Committee of Ministers. If a judgment is entered on “reserved just satisfaction,” the respondent state must carry out the judgment (be it monetary, remedial or legislative) under the supervision of the Committee of Ministers.

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22 European Convention, supra note 8, art. 28–29. Committees hear individual complaints (that are usually against States or other individuals); the Chambers hear inter-state complaints and cases where the committees are not unanimous in their decision.

23 Id. art. 35. Complaints are inadmissible if brought by anonymous individuals or if they deal with a claim that is substantially similar to another claim already decided (res judicata). Id. See also Patricia Egli, Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism, 17 TRANSNAT’L L. & POL’Y 1 (2007) (explaining the procedures of the Court). For a general explanation of the ECHR’s judicial system, see Appendix A.

24 European Convention, supra note 8, art. 30. See also notes 20–21 and accompanying text.

25 Id. art. 29, §§ 2, 3. Inter-state claims are always submitted to joint procedure, but individual cases are only submitted to joint procedure in exceptional cases. Id.

26 Id. art. 29, § 3.

27 Id. art. 29, § 1.

28 Id. art. 38, § 1, cl. a.

29 Id. art. 38, § 1, cl. b. Such friendly settlements are conducted confidentially. Id. at § 2.

30 Id. art. 46. The Committee of Ministers is comprised of the Foreign Ministers of each Council of Europe member state. Council of Europe, Supervision of Execution of Judgments of the European Court of Human Rights (2009), available at http://www.coe.int/T/CM/humanrights_en.asp. These forty-seven Ministers supervise the
satisfaction,” the respondent state reserves the right to request a re-hearing by the Grand Chamber.\footnote{id.}{31}

\section*{B. The Growth of the ECHR}


The subject matter of the ECHR’s jurisdiction consists largely of claims under the same five articles: right to fair trial,\footnote{European Convention, supra note 8, art. 6.}{37} right to effective remedy,\footnote{Id. art. 13.}{38} length of proceedings,\footnote{Id. art. 6, § 1.}{39} protection of property,\footnote{Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1952, 20.111, art. 1 [hereinafter 1952 Protocol].}{40} and right to security and liberty.\footnote{Id.}{41} From 1959 to 2009, twenty-eight percent of the execution of ECHR judgments, according to Art. 46 of the Convention, primarily at its four regular annual meetings. \textit{Id.}

\footnote{Id. art. 43, § 1. The Grand Chamber accepts such appeals only “if the case raises a serious question affecting the interpretation or application of the Convention . . . or a serious issue of general importance.” \textit{Id.} at § 2.}{31}


\footnote{Id.}{33}

\footnote{Id.}{34}

\footnote{Id. In 2005, 45,000 claims were logged with the Court’s forty-seven Judges. \textit{Id.}}{35}

\footnote{Id.}{36}
ECHR’s judgments dealt with the length of proceedings, twenty-one percent with right to fair trial, fourteen percent with protection of property, ten percent with right to liberty and security, and eight percent with right to effective remedy. Despite the significant increase in applications throughout the ECHR’s semi-centennial history, this distribution has remained relatively constant. In 2007, for example, forty-two percent of the claims consisted of an Article 6 violation of right to fair trial or length of proceedings, with the others equally similar to their fifty-year averages since the ECHR’s inception.

While the subject matter of the ECHR’s claims hasn’t changed significantly, other aspects of ECHR jurisprudence have. An influx of new democracies has shifted the ECHR’s task from that of incrementally “fine-tuning well-established and well-functioning democracies, to that of working to consolidate democracy and the rule of law in new and relatively fragile democracies.” Initially, the ECHR maintained a manageable caseload because few people in emerging democracies knew about the ECHR and its dispute resolution capabilities. The dramatic increase in cases in recent years, however, shows an increasing awareness of the

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41 European Convention, supra note 8, art. 5.
43 Id.
44 Paul Mahoney, New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership, 21 PENN ST. INT’L L. REV. 1, 3 (2002).
ECHR’s judicial functions.\textsuperscript{46} From 2004 to 2005, the ECHR decided thirty-three percent more cases than the previous year.\textsuperscript{47}

The introduction of Protocol 11 in November 1998 streamlined the Court’s administration by merging the prior court and the ECHR into a single judicial body.\textsuperscript{48} Another significant change could be the full entry into force of Protocol 14.\textsuperscript{49} This protocol would allow a single judge to rule on admissibility, reduce the size of the Chambers from seven to five judges, and enable judges to direct friendly settlement at any time in the proceedings.\textsuperscript{50} Protocol 14 may significantly change friendly settlements by permitting friendly settlement negotiations even before the Court declares a case admissible.\textsuperscript{51} Furthermore, Protocol 14 codifies a practice the ECHR has already adopted in recent years, namely, that friendly settlements are now decided through “judgments” as opposed to “decisions.” The Committee of Ministers directly oversees the implementation of “judgment” remedies, making the change in Protocol 14 an important step to improving the enforcement of friendly settlements.\textsuperscript{52} Every country in the Council of Europe has signed the protocol, and by October 2006, every country but Russia had ratified the

\begin{itemize}
  \item \textsuperscript{46} Id.
  \item \textsuperscript{50} Id., art. 39(1) (“At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement on the basis of respect for human rights”). \textit{See generally} Weber, \textit{supra} note 9, at 223.
  \item \textsuperscript{52} Id. § IV, cl. 94.
\end{itemize}
Several countries signed the Madrid Agreement, a resolution to implement the protocol’s mechanisms amongst themselves until the full Protocol 14 came into force. Finally, on January 15, 2010, the State Duma of the Russian Federation voted to ratify Protocol 14, thus enabling full implementation of Protocol 14 throughout all of the Council of Europe.

C. Friendly Settlement

Articles 38 and 39 of the European Convention govern the use of “friendly settlement.” Article 38 states that after the Court declares a case admissible, it shall “place itself at the disposal of the parties concerned with a view to securing a friendly settlement on the matter on the basis of respect for human rights.” Article 39 declares that if a friendly settlement is reached, “the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.”

The Rules of the Court also affect the implementation of friendly settlements in the ECHR. Rule 33 restricts public access to settlement negotiation documents. Rule 43 iterates

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53 Protocol 14, supra note 49.
57 Id. art. 38.
58 Id. art. 39.
the Committee of Ministers’ role in supervising settlement enforcement, and Rule 54A states that the Court may require parties to include settlement proposals in their initial responses of a joint procedure. Procedurally, Rule 62 governs the initiation of friendly settlement proceedings, stating that after a declaration of admissibility the Registrar “shall enter into contact with the parties with a view to securing a friendly settlement.” Furthermore, it reiterates that the proceedings are “confidential and without prejudice to the parties’ arguments in the contentious proceedings,” and that no offers, concessions, or statements made in friendly settlement discussions may be referred to in subsequent contentious proceedings. Although judges are not specifically trained in conducting friendly settlements, an experienced lawyer in the Registry of the Court (usually a Registrar familiar with the case) directs the proceedings and encourages settlement.

Throughout the history of the ECHR, friendly settlements have been applied to every one of the European Convention’s guaranteed freedoms. From 1999 to 2007, friendly settlements represented 12% of the resolved cases. This ratio, however, has seen significant decline, and in

60 Id. Rule 43, § 3 (“the Committee of Ministers . . . shall supervise the execution of the terms of the friendly settlement.”).
61 Id. Rule 54A, § 1. Joint procedures are those which a Chamber rules on both the admissibility and the merits simultaneously; the majority of cases in the ECHR are joint procedures. See Part II(A).
62 Id. Rule 62, § 1.
63 Id. Rule 62, § 2.
64 E-mail from Lawrence Early, Section Registrar, European Court of Human Rights, to David Weissbrodt, Professor of Law, University of Minnesota School of Law (Dec. 9, 2009, 06:32 CST) (on file with authors).
65 Weber, supra note 9, at 223. The wide application of friendly settlements is a testament to the flexibility of this judicial mechanism. Id.
2007 only 4% of the claims resulted in friendly settlement.\(^67\) Moreover, a large variance exists between the states that utilize friendly settlements and those that do not. As of 2007, eight states had not settled a case since November 1, 1998, including two countries (the Russian Federation and Ukraine) which faced a significant number of adverse judgments entered against them.\(^68\) Indeed, the five nations with the largest number of adverse final judgments in 2008 did not enter into a single friendly settlement, despite the fact they comprised 62% of the overall judgments that year.\(^69\) Conversely, the six nations that engaged in friendly settlements were countries with the least number of judgments, comprising only 11% of total cases in 2008.\(^70\) In the decade from 1998 to 2008, five nations comprised 71% of total friendly settlements.\(^71\) The great disparity between nations that settle and those countries that do not seems to suggest that certain countries have an unstated policy against friendly settlement.\(^72\)

Between 1999 and 2005, the two most frequent subjects of judgments on the merits were Article 6 claims [right to fair trial or length of proceedings] and Protocol claims.\(^73\) These were also the most common cases to lead to friendly settlement, including 620 Article 6 cases...

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\(^{68}\) Weber, *supra* note 9, at 229.

\(^{69}\) Eur. Ct. H.R., *Annual Report 2008*, 1–143 (Strasbourg 2009). Turkey was issued 264 judgments [17% of total judgments], Russia 244 [16%], Romania 199 [13%], Poland 141 [9%], and Ukraine 110 [7%]. *Id.*

\(^{70}\) *Id.*, at 130–131 (Strasbourg 2009). Six nations each entered one of the six friendly settlements for 2008 - Luxembourg [17% of its total cases], Slovakia [7%], Czech Republic [6%], France and the United Kingdom [3%], and Bulgaria [2%]. *Id.*

\(^{71}\) *Id.* 138–9. Those countries were Italy [332 friendly settlements], Turkey [203], United Kingdom [60], Portugal [54], and France [50]. *Id.*


and 202 Protocol-related claims in that six-year period. The ECHR increasingly encourages parties to accept offers made in friendly settlements and has begun removing cases where individuals refuse reasonable state remedies.

D. Pilot Judgments

The most promising recent development in the use of friendly settlements in the ECHR is the pilot judgment. With the number of individual friendly settlements decreasing, this mechanism may potentially resolve a greater number of cases than isolated friendly settlements. The process begins when the ECHR determines that a large pool of potential claimants will likely begin introducing similar claims. The ECHR then rules on the “pilot case;” while the state party is implementing its remedy, all other cases in the “class” of similarly situated parties are “frozen” until the Committee of Ministers determines either that the remedy has been enacted or that the state has defaulted and the additional lawsuits may proceed. Through the use of several pilot judgments, the Court has already administratively disposed of more than 20 standing cases and potentially 1.1 million other related individual claims.

The two principal pilot judgment cases were both Polish friendly settlement decisions issued in 2005 and 2008. In Broniowski v. Poland, the plaintiff sued over the confiscation of his land beyond the Bug River which had been “repatriated” after Poland’s “Republican

74 Weber, supra note 9, at 231.
75 See e.g. Akman v. Turkey, Eur. Ct. H.R. (2001) (striking out the application because the plaintiff failed to accept the State’s offer of remuneration and legal fees).
77 Id.
agreements” with Ukraine.\textsuperscript{80} Poland had ceded Broniowski’s land to Ukraine through these peacemaking agreements, along with the land of 80,000 other Polish residents, but the antiquated compensation ceiling in Poland precluded effective remedy for these individuals.\textsuperscript{81} The ECHR urged Poland to reform its laws to allow for more adequate compensation. Prior to the decision, Poland responded by passing the 2005 Act which increased the ceiling to 20\% of the estimated value.\textsuperscript{82} Through the friendly settlement, Broniowski was awarded 54,300 € for non-pecuniary damages and 6,100 € for costs and expenses.\textsuperscript{83} Additionally, since this was a pilot judgment, the Committee of Ministers was responsible for periodically assessing Poland’s remedial actions, remedies which will continue to impact this substantial class of potential plaintiffs.\textsuperscript{84} Poland is still implementing the remedies of this pilot judgment as the Committee of Ministers continues monitoring the country’s progress.

In \textit{Hutton-Czapska v. Poland},\textsuperscript{85} a landlord sued Poland on the basis of Art. 1, Protocol 1, stating that she was unable to enjoy her property because holdover Communist-era regulations prohibited landlords from raising rent; as a result, landlords couldn’t even afford to pay maintenance costs.\textsuperscript{86} The ECHR ruled that Poland had a structural problem with its national legislation and ordered it to remedy its laws to balance the landlord and community interests with the property rights principles of the European Convention.\textsuperscript{87} The Court determined that this case might potentially affect 100,000 landlords and between 600,000 and 900,000 tenants, so it

\begin{flushright}
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{86} Eur. Ct. H.R., \textit{Cases or group of cases against Poland}, 1–51 (2009).
\textsuperscript{87} \textit{Id.} at 3.
\end{flushright}
postponed the eighteen standing applications similar to Hutten-Czapska until Poland had a chance to enact appropriate remedies. In addition, the friendly settlement agreement between Poland and Hutten-Czapska resulted in 30,000 € non-pecuniary damages and 22,500 € for costs and damages. As with the friendly settlement in Broniowski, Poland is still remedying its related violations, and the Committee of Ministers continues to monitor Poland’s ongoing compliance.

While the ECHR struggles to encourage all its member states to actively engage in friendly settlements, its Convention procedures, the Rules of its Court, its modification of procedures and rules through the implementation of new protocols, and its creative use of pilot judgments all promote friendly settlements and make them efficient procedures for both states and individuals. Furthermore, the use of the Committee of Ministers to monitor state compliance with friendly settlement remedies lends “teeth” to these judgments and ensures their continued judicial significance.

II. Background of the African Charter

A. Procedures

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88 Id. at 2–4. The individual plaintiff in Hutten-Czapska has already received his individual compensation, and the State continues to implement the systemic remedy under the oversight of the Committee of Ministers. Id.
89 See supra notes 67–72 and accompanying text.
90 See supra notes 14–31 and accompanying text.
91 See supra notes 59–64 and accompanying text.
92 See supra notes 48–54 and accompanying text.
93 See supra notes 76–88 and accompanying text.
94 See supra note 30 and accompanying text.
The African Union’s practice of “amicable settlements” is similar to the ECHR’s friendly settlement mechanisms and is based in the African Charter on Human and Peoples’ Rights, the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and People’s Rights, and the Rules of Procedure of the African Commission on Human and Peoples’ Rights. Friendly settlements in the African system generally proceed immediately after the claim has been declared admissible. The African Commission on Human and Peoples’ Rights (ACHPR) has stated that its primary objective “is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned,” although it depends on “the good faith of the parties concerned, including


98 Udombana, supra note 95, at 1 (explaining the procedural bases of friendly settlements in Africa, as well as their checkered history in application).

their willingness to participate in a dialogue.” If the parties decide to seek settlement through an “amicable solution,” the ACHPR appoints a rapporteur to their case. If a friendly settlement is reached, a report is issued containing the terms and bringing the case to an end; if no amicable solution is reached, the rapporteur submits a report and the ACHPR makes a decision on the merits.

Under the African Protocol, state parties agree to implement ACHPR decisions and remedies. Like the EHCR’s Committee of Ministers, the Executive Council is notified of judgments and then monitors their execution, reporting on non-compliance in its annual Assembly report. The Executive Council, however, lacks the ability to compel remedy beyond these yearly reports. If states continue to fail compliance, the African Union may issue a binding decision which could then lead to sanctions, though this rarely occurs.

**B. Practical Applications**

While procedural safeguards seemingly exist, in practice amicable settlements tend to favor states over individuals. The ACHPR often favors these friendly settlements even without clarifying terms or establishing compliance and verification guidelines. The ACHPR

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100 Id. See also Udombana, *supra* note 95, at 1 (noting that constructive dialogue also runs through other Commission activities, including state reporting procedures).


102 Id.

103 African Protocol, art. 30.

104 Id., art. 31.

105 FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA, 426-27 (Oxford University Press 2007) (providing a thorough explanation of the implementation of AU decisions).


107 Id.
has been criticized for encouraging amicable settlements which are incapable of compliance and verification, thereby defeating the justice the African Charter is designed to preserve.\textsuperscript{108} The African Charter does not garner the same attention from African states as the European Convention does from European states, so many African governments have not provided the Commission with adequate resources.\textsuperscript{109} Additionally, the lack of meaningful implementation through domestic legislation has precluded meaningful remedy for most individuals.\textsuperscript{110} As compared to the ECHR, the ACHPR’s use of friendly settlements is largely ineffective for aggrieved individuals because it favors states in such settlements\textsuperscript{111} and because its remedies are vague and not compelled by the Executive Council.\textsuperscript{112}

\textbf{III. Brief Summary of Other Treaty Body Friendly Settlement Provisions}

In addition to the African Charter, the European Convention, and the American Convention on Human Rights, several other international documents have express provisions for friendly settlement and may provide future insight for the improvement of IACHR friendly settlements. The Convention Against Torture states that its Committee “shall make available its

\textsuperscript{108} Id. Odinkalu’s article mentions several cases wherein amicable solutions absolved State responsibility for human rights violations. In 1990, the ACHPR found that a friendly settlement had been reached when Mr. Kalenga was released, without ever considering whether his imprisonment had been just. \textit{Id.} (citing Communication No. 11/88, Henry Kalenga v. Zambia (Amicable Resolution), adopted at the 7th Ordinary Session of the Commission, Banjul, The Gambia (April 1990). In another case, the ACHPR absolved the new Benin government of the previous government’s violations, assuming that Benin had rectified these procedures without consulting with the individual complainants. Odinkalu, \textit{supra} note 106 (citing Communication No. 16/88, Comite Culturel pour la Democratie au Benin v. Benin (Merits) in 3 Int'l Hum. Rts. Rep. 121–23 (1996)).

\textsuperscript{109} Id... \textit{See also} VILJOEN, \textit{supra} note 100, at 474 (explaining that without funding “institutional mechanisms [like the Commission] will remain empty shells”).

\textsuperscript{110} Odinkalu, \textit{supra} note Error! Bookmark not defined., at 359.

\textsuperscript{111} \textit{See supra} note 104–105 and accompanying text.

\textsuperscript{112} \textit{See supra} notes 100–103 and accompanying text.
good offices to the States Parties concerned with a view to a friendly solution of the matter,”  

even setting up ad hoc conciliation commissions. The International Covenant on Civil and 
Political Rights also makes the “good offices” of its Committee available to states to issue “a 
friendly solution of the matter.” The International Convention for the Elimination of Racial 
Discrimination allows for ad-hoc conciliation commissions with the objective of facilitating “an 
amicable solution of the matter on the basis of respect for this Convention.” Indeed, even the 
United Nations Human Rights Committee opens its “good offices . . . with a view to a friendly 
solution of [a] matter.”

Despite the proliferation of friendly settlement mechanisms in these various international 
treaties, most of these treaty bodies are relatively small-staffed and under-funded compared to 
the ECHR, ACHPR, and IACHR. These treaty bodies’ relatively minor contributions to the 
topic of friendly settlements, therefore, stand outside the scope of this paper’s analysis.

IV. Background of United States Settlement Mechanisms

International systems are not the only source of models for improving the friendly 
settlement mechanism in the Inter-American human rights system. Over the last twenty-five 
years, the United States federal courts, motivated by federal legislation and judge’s own 
initiatives, have adopted a wide range of measures designed to enhance and facilitate the use of

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113 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 21(1)(e), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 UNTS 85, 113 [hereinafter Convention Against Torture].
114 Id. art. 23.
friendly settlements for cases. The specific legislation, combined with the training and guidance
given to federal judges, has created a culture of friendly settlement that the IACHR should emulate.

A. A Culture of Settlement – The Role of ADR in U.S. Federal Courts

The U.S. federal judicial system encourages mediation and arbitration (the specific forms
of friendly settlement in the U.S. domestic courts)\textsuperscript{118} through legislative compulsion and judicial
courts themselves provide the enforcement of such agreements. 
In the U.S. federal district court system, the judge takes a primary role in the facilitation of
settlements.\textsuperscript{119} 

In order to facilitate settlement, federal courts may compel or recommend parties
formally enter into Alternative Dispute Resolution (ADR) through arbitration with a third-party
arbitrator or mediation with a third-party mediator.\textsuperscript{120} An arbitrator will generally solve the
dispute with a binding judgment on the parties.\textsuperscript{121} In contrast, the mediator will work with the

\textsuperscript{118} See generally Dispute Resolution – Definitions, http://www.constructiondisputes-cdhrs.com/definitions.htm [hereinafter Dispute Resolution]. The main difference between the two mechanisms is that arbitration is usually a binding judgment while mediation is always a nonbinding process where the facilitator attempts to get parties to settle.
\textsuperscript{119} See Marc Galantar, Most Cases Settle: Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339, 1340 (1994) [hereinafter Galantar, Most Cases Settle] (explaining that in federal district courts of the United States, most cases are settled out of court before they reach the trial stage and that judges play a significant role in pressing the parties towards settlement).
\textsuperscript{120} William W. Schwarzer and Alan Hirsch, THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES 8 (2006) (explaining that many judges will recruit another district judge or a magistrate judge as a settlement judge, while other courts have established relationships with third part ADR programs to which they refer cases).
\textsuperscript{121} See Dispute Resolution, supra note 118.
parties so as to highlight the areas in which they are close to a resolution and work towards facilitating an amicable settlement that is appropriate from both parties’ perspectives.\textsuperscript{122}

Judges have been encouraged to steer parties towards settlement at a very early stage, where parties are not usually focused on the specifics of resolution and have rarely formed a realistic evaluation about the appropriate damages.\textsuperscript{123} Furthermore, each party’s limited knowledge about the relative strength of its case and its opponent’s case makes it necessary for the judge to set parties on an early path towards considering settlement.\textsuperscript{124}

The various concerns about this system pertain to judges being over-active and influencing the outcome of a settlement in an unfair manner. Too much or too little pressure may put one party at a disadvantage in settlement.\textsuperscript{125} Once a case moves into the ADR process, judges adopt varying levels of involvement. Some judges become actively engaged in settlement negotiations for their own cases, while others choose instead to delegate negotiation monitoring to third parties.\textsuperscript{126} The rise of independent arbitrators and mediators makes it less necessary for

\begin{flushleft}
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} Schwarzer, \textit{supra} note 120 at 8.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.} (encouraging Judges to “avoid using their position of authority to apply undue pressure on parties to settle . . . [and] should facilitate, not coerce, settlement.”).
\textsuperscript{126} \textit{Id.}
\end{flushleft}

This is a legitimate concern, because participation in the negotiations will sooner or later require the judge to evaluate and express a view on the strength of a claim or defense. Doing so will jeopardize the appearance of impartiality in future proceedings,
judges to be involved in the process and if they can facilitate a settlement, greatly increase the efficiency of the court.

**B. Legislative Mandate and the Enforcement of Settlements**

Various legislative adoptions of ADR programs have helped increase the use of arbitration and mediation in Federal Practice. The adoption of Federal Rule of Civil Procedure 16 in 1983 signaled the Federal Court system’s formal recognition of the importance of settlement.\(^{127}\) The Administrative Dispute Resolution Act of 1996\(^{128}\) revealed an even greater legislative willingness to push cases to these types of early settlement mechanisms. Since the advent of this legislation, the ADR bodies have experienced significant growth in their field and now have sufficient resources, structures, and experience to settle claims even more fairly and more efficiently.\(^{129}\) The explicit federal mandate encouraging and, in some cases, requiring ADR has greatly increased the efficacy of these mechanisms in U.S. courts.

These legislative changes have not only increased the use of ADR in the United States, but they have also helped ensure credibility of the system by enabling judicial enforcement of arbitration awards.\(^{130}\) Parties are much more likely to consider settlement if its decisions are judicially enforced and monitored, and the legislative enactment of ADR programs has ensured that settlements will receive the full weight of other judicial rulings.

**V. Background of Friendly Settlements in the Inter-American System**

In order to incorporate any of the procedures and mechanisms outlined in the various

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\(^{127}\) See generally Galantar, *Most Cases Settle*, supra note 119.


\(^{129}\) Schwarzer, *supra* note 120, at 8.

\(^{130}\) Id.
systems discussed above, the basic issues causing the backlog of individual claims in the Inter-American System must be understood. Furthermore, analyzing the current role of friendly settlements in the system helps identify the most obvious places for improvement and innovation.

A. The Need for Friendly Settlements in Addressing the Backlog

While the IACHR pursues a variety of methods of to promote human rights in the region,\(^\text{131}\) it serves a unique dual role with regard to its central legal duties. As codified in articles 44–51 of the Convention, the IACHR performs an adjudicative role as it “receives, analyzes, and investigates individual petitions which allege human rights violations.”\(^\text{132}\) In its role as advocate and petitioner, the IACHR recommends and presents cases before the IACtHR.\(^\text{133}\) The number of individual complaints accepted by the IACHR has more than doubled since the late 1990s.\(^\text{134}\) The lack of funding and ability to quickly expedite these often complex claims have helped lead to a significant backlog. In 2007 the IACHR’s team of thirty lawyers faced 1,250 open cases.\(^\text{135}\) With over 1,400 petitions coming in each year and the IACHR unable to settle all open cases in a year, the growing backlog means that the IACHR will

\(^{131}\) The Commission periodically publishes reports on human rights situations of member states; analyzes human rights in various other countries by conducting on-sight visits; promotes human rights through various academic seminars, conferences, and meetings; recommends to the General Assembly of the OAS the adoption of appropriate human rights norms. See Generally Inter-American Commission on Human Rights, What is the IACHR?, http://www.cidh.oas.org/what.htm (last visited Jan. 7, 2010).

\(^{132}\) Id.

\(^{133}\) Id.


not be able to adjudicate a majority of the cases in a timely manner and risk losing credibility as an effective agent for the protection of human rights.\footnote{136 Id. at 882-83.}

B. The Current Approach of Friendly Settlements in the Inter-American System

1. Processing Individual Claims

If an individual petition submitted to the IACHR meets preliminary requirements for review,\footnote{137 See generally INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THE HUMAN RIGHTS SITUATION OF THE INDIGENOUS PEOPLE IN THE AMERICAS, OEA/Ser.L/V/II.108 doc. 62 (2000) [hereinafter Indigenous] (explaining that the IACHR receives complaints only after all domestic remedies and avenues have been exhausted by the petitioner).} the IACHR then engages in an initial fact-finding phase to gather relevant information from the specific government named in the claim.\footnote{138 See American Convention, supra note Error! Bookmark not defined., Art. 44(a).} Through the course of its investigation into the claim, the IACHR may request comments and observations regarding the claims from both parties and in some cases carry out an on-site investigation within the country.\footnote{139 Id. at 44(c).} If the IACHR remains unsatisfied with the information gathered from this process, it may hold a hearing into the claim in which both sides present the legal and factual claims of the dispute.\footnote{140 Id.}

While the rules of procedure authorize the IACHR to facilitate a friendly settlement at any time during this process,\footnote{141 Inter-American Commission on Human Rights, Rules of Procedure (Nov. 13, 2009) art. 40(1) [hereinafter IACHR Rules of Procedure]. This updated version of the rules of procedure entered into force on Dec 21, 2009. The primary changes in the friendly settlement section includes the explicit allowance of settlements “at any stage of the petition or case” and that the IACHR can designate a specific member to facilitate the settlement. No mention is made of this member’s training or process for his selection. Id.} it is usually towards the end of the fact-finding period that the Commission will alert the parties that it will be available to facilitate a settlement for a fixed
If the settlement satisfactorily meets the IACHR standard of respecting human rights, it will approve the settlement and consider the claim fully resolved.

2. Challenges of Friendly Settlements

Various factors discourage the settlement process within the Inter-American system, including uncooperative states, the demands of full justice by complainants, and the logistical and financial limitations of the Commission. All of these factors contribute to a settlement rate of 10% (4 out of 40) of reports issued by the IACHR in 2008.

Uncooperative states are often unwilling to heed contentious claims or friendly settlement negotiations until the case is actually brought before the IACHR or IACtHR for a final judgment. Many countries realize that the great backlog of cases and large volume of inadmissible claims means most cases will never reach a judicial decision in a timely fashion and can use such delays as a stall tactic. Lacking a full mandate to compel friendly settlement, the IACHR is unable to effectively encourage friendly settlement at an early stage in most cases, unless the parties are predisposed to settlement. Additionally, settlements may only be effective alternatives for certain types of claims. For example, the claims involving right to life and right to humane treatment may leave advocates and petitioners with a sense of “justice denied” if the claims

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142 While there is no formal time limit mandated by the Rules of Procedure or the Convention, the IACHR usually states that it is available to facilitate settlement for set period of time depending on the complexities of the claim. See Indigenous, supra note 137.
143 Convention, supra note 138, at art. 44(f).
144 Id.
145 See 2008 IACHR Report, supra note 134 (listing the four settlement reports and the 36 other reports decided on the merits and on admissibility). In the ECHR, however, 12%, or nearly 2 out of every fifteen cases, resulted in a friendly settlement from 1999-2007. See supra note 71 and accompanying text.
146 See Goldman, supra note 135, at 882-83 (2009).
147 American Convention, supra note 7, art. 4(1).
148 Id., art. 5(1).
result in confidential friendly settlement rather than a public judicial opinion.\textsuperscript{149} Since cases brought before the IACtHR have often already undergone significant discovery and litigation through the IACHR’s own process, parties are already substantially invested and may be reluctant to settle.\textsuperscript{150} Without any pressure from the judge presiding over the case in the IACtHR, parties often overestimate their chances at success in the adjudication process and therefore remain reluctant to engage in friendly settlement.\textsuperscript{151}

Under these guidelines and without any official office or committee specializing in the facilitation and processing of settlements, the current percentage of cases that are actually settled is lower than the ECHR and ACHPR and much lower than US domestic court rates.\textsuperscript{152} In 2008, the IACHR only facilitated a total of 4 friendly settlements out of a total of 1323 complaints received.\textsuperscript{153} With no procedures in place to evaluate the large numbers of backlogged cases which have exceeded the window of settlement time suggested by the IACHR,\textsuperscript{154} it is not possible to gauge how many may be amenable to settlement with the proper facilitation and guidance.

3. Categories of Friendly Settlements

A key pattern arising in the IACHR settlements of the last decade is the “bunching phenomenon” in which states will often have multiple cases regarding the same general human

\textsuperscript{149} For a full analysis of the misuse of friendly settlements, see supra Part III(B).
\textsuperscript{150} See Goldman, supra note 135.
\textsuperscript{151} Id.
\textsuperscript{152} See supra note 145; See generally Galantar, Most Cases Settle, supra note 119, at 8 (arguing that the true settlement rate in U.S. courts is closer to sixty percent).
\textsuperscript{153} See 2008 IACHR Report, supra note 134.
\textsuperscript{154} The Rules of Procedure for the IACHR do not mandate any window, but the general understanding and procedure of the IACHR is to set out a timeline for settlement. See Generally Indigenous, supra note 137. This is not the general practice of the ECHR and the concerns are that this settlement time becomes an obstacle to overcome rather than a genuine opportunity for settlement.
rights issue. Currently, there is no specific mechanism within the IACHR to identify states that are willing to submit to settlements for various offenses. While some patterns can be tracked and interpreted simply based on the frequency of various types of cases that achieve settlement, experts monitoring the political and judicial developments in the American states should develop significant tools that can help the IACHR predict and target countries and cases ripe for settlement.

The individual petitions submitted to the IACHR allege violations of the wide range of human rights codified within the Convention. For purposes of organizing claims potentially ripe for friendly settlement, the individual petitions may be categorized according to two broad type of norms implicated within the claim. The two broad categories of cases most conducive to friendly settlement are rule of law cases and right to life cases. Over the past ten years, approximately half of the settled cases have concerned rule of law issues. Nearly sixty percent of the right to life claims included one or more rule of law issue(s) connected to the primary claim. This data seems to support the notion, already recognized by the ECHR, that rule of

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155 As an example, the Peruvian cases from 2004-2007 that deal with the granting of fair remedies for the violation of judicial protection rights for individuals ousted from governmental positions during President Fujimora’s ascension to power in 1992. These settlements made up over twenty-five percent of all settled cases in that time period (7 out of 26). See Appendix C; See generally Goldman, supra note 135, at 877-88 (arguing that the IACHR’s pressure against the Fujimora government stands as its most successful campaign against a single ruler or government).

156 See infra Part VII(A)(1).

157 Rule of Law issues include the right to participate in government, the right to equal protection under the law, and the right to judicial protection.

158 See supra notes 19, 20.

159 See Appendix C, Table 1. Cases were categorized in Appendix C based upon the main thrust of the complaint. The determination of whether a rule of law offense caused or was caused by a right to life offense in a particular case is outside the scope of this paper. The case, therefore, was determined to be a rule of law or right to life case based upon which category was represented by
law cases (and right to life cases intimately connected to rule of law issues) are repetitive, and by their nature, more amenable to settlement. Future developments in this arena, therefore, should seek to maximize this inherent quality among these specific claims.

VI. Recommendations for Improving Inter-American Commission’s Case Management

In analyzing the IACHR and IACtHR process toward a more effective friendly settlement mechanism, recommendations can be developed in five primary areas: (1) fostering a stronger culture of friendly settlement; (2) creating a Friendly Settlement Subcommittee to identify, encourage, and enforce friendly settlements; (3) training friendly settlement facilitators and instituting thorough statistical analyses of case data; (4) instituting proper procedural rules to effectuate all of these changes; and establishing pilot judgments through judicial training and procedural amendments. Some of these proposed recommendations are important for the integrity of any new system and will be mentioned below, while others are specifically tailored to the needs of the IACHR. Although pilot judgments should be viewed simply as one tool in the development of new mechanisms, they deserve particular attention because of their relative complexity and novelty in relation to the other recommendations.

A. Procedural And Mechanistic Changes to IACHR and IACtHR Friendly Settlement Process

1. Encouraging Friendly Settlements

Beyond the concrete suggestions set forth below, the IACHR should pursue a broad program of change by creating a culture of settlement among the judges, staff, and all members of the IACHR. This idea derives from the U.S. federal court system in which the judges create an ADR culture for their courts in order to encourage opportune cases into settlement. Cases

the most listed complaints. For a complete listing of settlement cases by year, see Inter-American Commission on Human Rights – Annual Reports, http://www.cidh.oas.org/annual.eng.htm.
concerning due process of law and the right to judicial protection are very common subjects of Inter-American human rights jurisprudence and are particularly ripe for settlement.\footnote{Appendix C, Table 2 shows an approximation of the percentages of settlement cases for each type of claim. No specific statistics exist, however, to track the specific types of claims the total number of reports on the merits or cases under consideration by either the IACHR or the IACtHR. For an example of a detailed analysis of claims organized by type of offense, see Eur. Ct. H.R., Annual Report 2008, 138–39 (categorizing types of claims brought against specific member states). This type of tool is particularly helpful in the funneling of cases and is a primary recommendation in Section VII(A)(4).} By specifically encouraging certain legal disputes toward friendly settlement, like these rule of law issues, the Inter-American System could devote more resources to areas of jurisprudence that need more guidance while leaving claims involving well-settled areas of law to the alternative procedure of friendly settlements.

This principle of channeling certain repetitive claims to friendly settlements is the foundation of pilot judgment and has already found broad acceptance in the European system.\footnote{See supra Part II(D).} Pilot judgments have been particularly useful in convincing non-participating states to engage in settlement proceedings. Some countries in Europe, particularly the countries with the most cases against them, appear to have a policy of refusing friendly settlements.\footnote{See supra note 71.} This tactic can be and has begun to be discouraged through the use of pilot judgments discussed above and judicially-encouraged friendly settlements. In Latin America, those states that refuse to participate until a claim finally appears before the IACtHR, may cooperate more readily with the quasi-judicial proceedings of the pilot judgments, given their greater judicial weight and potential remedy.

2. **Creation of Friendly Settlement Subcommittee**

Furthermore, to encourage effective friendly settlement proceedings the IACHR should create a Subcommittee with the purpose of encouraging pre-trial friendly settlements and holding
countries accountable in meeting their remedial requirements. This Friendly Settlement Subcommittee should be composed of judges from different countries, in order to minimize prejudicial interference with fair friendly settlements. If the Subcommittee is working with one judge’s home country, that judge should be required to recuse himself or herself from the proceedings to encourage an objective friendly settlement and remedial implementation. The working group on admissibility already provides the template for this Friendly Settlement Subcommittee, and depending on the financial constraints, such a committee could be an additional subgroup of the current working group. The Subcommittee’s duties could be added to the duties currently on the working group as additional gate-keeping measures designed to funnel appropriate cases into a “settlement” track after the initial analysis of the jurisdiction and merits of the case.

The Friendly Settlement Subcommittee will certainly face some cases which entail mixed remedies and multiple issues. The IACHR rules of procedure should enable the Friendly Settlement Subcommittee to separate claims from mixed cases. For example, a mixed case could be divided into rule of law and right to life claims, with the Friendly Settlement Subcommittee settling the rule of law issues while leaving the right to life claims to proceed along the normal route of judicial disposition. Moreover, the Friendly Settlement Subcommittee should be free to issue both individual remedies and ongoing, large-scale remedies like those issued in the EHCR’s pilot judgment cases.163

This suggestion for greater flexibility comes from the ECHR’s recognition that certain cases are more likely to be the subject of friendly settlement. Cases which deal strictly with rule of law issues, rather than both rule of law and right to life issues, may be particularly well suited

163 See supra notes 82, 91, and accompanying text.
to friendly settlement and the ongoing cooperation of states in the remedial process.\textsuperscript{164} Additionally, cases which have clear, quantifiable damages are well suited to friendly settlement, because little discovery or judicial resources need be expended to determine a just remedy. The goal of the Subcommittee should be to identify the current rule of law issues that are most apt for settlement, either by traditional settlement methods, pilot judgment, or any other methods at the disposal of the Commission. A recommendation can then be made to the IACHR itself that for the case to proceed, it must first pass through one (or more) of the suggested settlement procedures.

3. Enforcement and Accountability

The Commission can create a culture of enforcement and accountability by ensuring that the terms of settlements are implemented. While a full exploration of enforcement mechanisms of regional human rights courts is beyond the scope of this particular paper, it is important for the IACHR and IACtHR to realize that adopting any European suggestions may not automatically yield the same results.

The Committee of Ministers is composed of the Ministers of Foreign Affairs (or their equivalent) from each country in the Council of Europe. The Committee of Ministers is in charge of the enforcement and ongoing implementation of ECHR judgments. In the ECHR, the Committee of Ministers has successfully compelled state remedies through its use of advisory opinions and periodic reporting, including with Poland, the only country yet with pilot judgments

\textsuperscript{164} For example, the ECHR has issued friendly settlements in cases dealing with Art. 8 right to respect for private and family life (granting a friendly settlement where a petitioner was unable to change the designation of her nearest relative), Art. 38 cooperation with judicial process (encouraging friendly settlement proceedings for a government’s refusal to disclose or submit documents for ongoing investigation), and Art. 6 right to a fair trial (initiating a friendly settlement to determine lack of impartiality or lack of adequate representation). Eur. Ct. H.R., \textit{Some Facts and Figures: 1959-2009}, 3–13 (2009), available at www.echr.coe.int.
against it. Starkly contrasted, the Executive Council of the ACHPR largely fails to compel state parties to meet remedial obligations and has not required strict adherence to its friendly settlements.

For friendly settlements to be an effective mechanism for all parties involved, the Friendly Settlement Subcommittee must have some authority to compel and encourage settlement. While it is unlikely that such authority will be granted through any legislative process, the soft power created with a “culture of settlement” stands as attainable goal for the IACHR and the Subcommittee. The IACHR must emphasize its role in compelling remedies from parties for the pilot judgment procedure to be a successful tool for efficiently and fairly deciding cases rather than a means of silencing plaintiff’s complaints or merely disposing of a growing caseload.

4. Training and Other Tools

Once the Friendly Settlement Subcommittee recommends a case for friendly settlement, effective mechanisms must be in place to foster potential settlement. The process of ADR may seem unpredictable because the parties themselves become the crucial players in ultimately accepting the settlement as an agreement. Hence, it becomes necessary for the IACHR to more effectively broker friendly settlement negotiations at this stage of the adjudicative process. Improving the IACHR ability as settlement facilitators can be achieved in a number of ways, including better training for the judges and members of the commission and more resources allocated to the settlement process.

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165 See supra notes 79–88 and accompanying text.
166 See supra notes 107–108.
167 See generally Goldman, supra note 135 (contrasting the work of the Committee of Ministers in the ECHR with OAS’s lack of political pressure on offending governments and arguing that this lack of enforcement stands as a key challenge to the effectiveness of the IACHR).
More resources must be directed to compiling data about the IACHR’s decisions. In comparison to the annual reports of the ECHR, the IACHR lacks the breadth of statistical analysis and tracking of its cases, claims, and settlements. The backlogged cases should be thoroughly categorized and tracked in order to provide the judges and IACHR members more information and better predictability measures. Crucial measurements include but are not limited to: specific backlog tracker, the type of claim of each case, and the timeline of the case.¹⁶⁸

The other source of training available to the IACHR and IACtHR is the vast resources of the U.S. federal judicial system already dedicated to improving friendly settlements in its own domestic courts. Institutions in the United States such as the ABA Section on Dispute Resolution and the U.S. Federal Judicial Center are dedicated to the advancement of friendly settlement techniques. It may be pertinent for the members of both IACHR and IACtHR to attend the conferences and workshops provided by these U.S. organizations so as to become exposed to the basic methods and benefits of ADR. Furthermore, judges within the IACtHR should become well-versed in the Federal Guidebook’s material about the ADR process so as to increase awareness about these procedures.

5. Procedural Changes

In the spirit of improving the IACHR mandate to protect human rights, the Commission should take some basic steps to lay the foundation for more effective settlements. Chief among them is the ability of the IACHR to compel settlements at any time and to change the current settlement procedure into a more compulsory mechanism.

¹⁶⁸ For an example of specific data that is helpful in predicting cases ripe for settlement, see Eur. Ct. H.R., Annual Report 2008, 138–39.
A key difference between ECHR procedural rules for settlement and the IACHR is the ability to encourage settlement at any stage of the process. While no strict limit exists in the IACHR for settlement after the initial discovery phase, parties are no longer strongly encouraged or pushed to settlement once placed before the IACHR or IACtHR for judgment proceedings.\(^\text{169}\)

This problem stems from the same fundamental issue that also makes the IACHR seem weak in brokering settlements. The spirit of the language in the procedures is simply to “make itself at the disposal” of the parties for settlement. Along with the creation of a Friendly Settlement Subcommittee, the language of the rules of procedure should grant the IACHR discretion to compel or strongly recommend the friendly settlement process.

Some may question whether such procedural implementation should be instituted only after the creation of a settlement process. It seems more prudent for the IACHR to change the rules and procedures first, even without full structural change, so as to establish the culture and aspirational goals of the IACHR. This tactic of implementing procedural rules first is currently being employed in the European system in regards to Protocol 14, the very procedural rules designed to facilitate better friendly settlements in the ECHR.\(^\text{170}\) While their actual implementation was delayed for years for lack of political acquiescence by Russia,\(^\text{171}\) several

\(^{169}\) *See* Indigenous, *supra* note 137 (emphasizing that the settlement phase is open to parties for a set period of time but not encouraged later).

\(^{170}\) *See supra* notes 51–54 and accompanying text.

\(^{171}\) Russia blocked the passage of Protocol 14 for years in fear that such advanced settlement procedures would increase pressure to settle various claims, including those brought by Chechnya. Interview with Grzegorz Lewocki, Human Rights Worker, Polish Ministry of Justice, in Minneapolis, Minn. (Dec. 1, 2009). This particular political struggle is important to understand in the context of the Inter-American system, where it is doubtful that a single country has the political control or clout of Russia in terms of blocking such protocols. *Id.*
nations still agreed to be bound by its provisions in the Madrid Agreement until Russia’s recent ratification.\textsuperscript{172}

\textbf{B. Pilot Judgments}

\textbf{1. Applying Pilot Judgments to the Inter-American System}

In addressing the ECHR’s excessive caseload, Judge Bratza recently stated “an imaginative use of pilot judgments could do much to reduce the Court’s burden.”\textsuperscript{173} The increasing caseload in the IACHR could also be alleviated by pilot judgments similar to those already successful in the ECHR. Most cases in the ECHR stem from struggling new democracies,\textsuperscript{174} involving repetitive issues and no new issues of fact or law. It is these cases which are particularly well-suited for pilot judgments. Since over sixty percent of cases that have settled in the last decade have involved repetitive issues, it is most efficient to initially isolate these specific types of claim and funnel them into a pilot judgment proceeding.

The IACHR is inundated with similarly repetitive cases.\textsuperscript{175} In friendly settlements over the last eight years, countries such as Peru and Ecuador have experienced a tremendous number of claims involving core principles of the rule of law, particularly claims for effective remedies of civil and political rights infractions.\textsuperscript{176} These countries already presented particularly amenable situations because of the influx of claims from a previous government system and the desire of current political leaders to cooperate with the OAS and the IACHR. The IACHR must

\begin{footnotesize}
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\item[\textsuperscript{172}] See supra note 54 and accompanying text.
\item[\textsuperscript{174}] See supra note 44 and accompanying text.
\item[\textsuperscript{175}] See Appendix 3, Tables 1, 2. The most repetitive rule of law claims lie in effective remedies for violations of civil and political rights as codified in article 25 of the Convention. \textit{Id.}
\item[\textsuperscript{176}] See \textit{Id.} See also supra note 155.
\end{enumerate}
\end{footnotesize}
have the ability to recognize such situations so as to identify countries that will be the most amenable to this form of friendly settlement. This ability to identify governments where the IACHR leverage is greatest will also aid with the success rate of a new pilot judgment program. As detailed below, once implemented in Europe, even Poland (long resistant to such measures) began preempting pilot judgments through independent state action.

2. Procedural Implementation

The IACHR would bear the administrative burden of creating binding pilot judgment cases and assigning class counsel, but its increased efficiency would offset this increased responsibility. Pilot judgments, like class action proposals, must be “fair, reasonable, and adequate” if they will be binding for class members.177 The court must appoint class counsel, and in doing so must also assure that counsel has: (1) initiated investigation for the cases; (2) experience; (3) knowledge of applicable law; and (4) has the resources to represent the class.178

Pilot judgments would work most effectively if introduced in the preliminary fact-finding phase of the IACHR process. Procedurally, the IACHR has an extra procedural step as compared with the ECHR, one which is burdensome and taxing on its judicial resources. While the ECHR Chambers or committees initially make only administrative decisions regarding cases,179 the IACHR begins with a preliminary fact-finding phase which often proves time intensive.180 Shifting the focus of this first step from fact-finding to administrative determinations would free up Commission resources. In this phase, the Subcommittee could

177 FED. R. CIV. P. 23(e)(2).
179 See supra note 23.
180 See, Indigenous, supra note 137 (explaining that intensive preliminary findings occur before the IACHR proposes its settlement timeline).
identify potential claims conducive to pilot judgment so that the IACHR could decide them the
most efficiently.

Procedurally, instituting pilot judgments would involve designating a subcommittee of
members on the IAHCR to oversee the management of the cases. As new cases emerge, they
would be categorized by country and the Article implicated by the claim. This Pilot Judgment
Subcommittee would then administratively group suitable cases into pilot judgments and fast-
track them to friendly settlement proceedings and/or judicial determination.

The IACHR also needs a Friendly Settlement Subcommittee, akin to the ECHR’s
Committee of Ministers,181 that will compel and monitor the effective implementation of
remedies by state actors. The two pilot judgment friendly settlements in Europe have met with
overwhelming response from the state actor. In Broniowski, Poland even began implementing
remedies before the Court issued the final conclusive friendly settlement decision.182

Lastly, the IACHR should create and distribute educational materials to promote the use
of pilot judgment procedures among legal advocates. If pilot judgments only occur sua sponte,
their effects will be much less than if advocates begin framing their arguments and case theories
with pilot judgments in mind. This approach will only succeed, though, through a media
campaign, continuing legal education courses, and community outreach materials.

a. Judges

Pilot judgment procedures could be codified in the IACHR similarly to the U.S. Federal
Rules of Civil Procedure, which encourages judges to join “any or all matters at issue in the

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181 See supra note Error! Bookmark not defined. and accompanying text.
182 See supra note 82 and accompanying text.
actions” which “involve a common question of law or fact.”\textsuperscript{183} IACHR members should be encouraged and trained to identify common causes of action and scenarios where neither plaintiffs nor defendants would be unreasonably prejudiced.\textsuperscript{184} Commission members would be trained to make similar determinations as domestic judges, including whether the “claims or defenses of the representative parties are typical of the claims or defenses of the class”\textsuperscript{185} and whether the “representative parties will fairly and adequately protect the interests of the class.”\textsuperscript{186}

While pilot judgment proceedings should be implemented as soon as possible, it is foreseeable that some cases will only present a class or a repetitive issue later in the proceedings. The rules of procedures for the IACHR should grant discretion to compel pilot judgment procedures \textit{sua sponte} at any time throughout the proceedings when the opportunity arises.\textsuperscript{187}

\textbf{b. Advocates}

Additionally, advocates for either plaintiffs or defendants should be able to request consolidation of parties at the outset of the proceedings or at any time prior to the hearing. If advocates begin to bring class action pilot judgment cases before the Court, the Court would not need to determine each class action case \textit{sua sponte}. This would then inform plaintiff strategies and streamline the judicial procedures by allowing parties to construct a class \textit{prior} to filing a claim. While this option will not always be viable due to the individualized nature of certain

\begin{footnotesize}
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\item[183] \textit{FED. R. CIV. P. 42(a)}.  \\
\item[184] \textit{See Federal Court Handbook For Judges}, 23.  \\
\item[185] \textit{FED. R. CIV. P. 23(a)(3)}.  \\
\item[186] \textit{FED. R. CIV. P. 23(a)(4)}.  \\
\item[187] The Rules of Procedure already allow for settlement at any phase, so conceivably this is already covered in the procedural rules at article 40(1). The IACHR should clarify in the procedures if alternative settlements, specifically pilot judgments, qualify as the types of friendly settlements envisioned in the Rules. \textit{See Rules of Procedure for IACHR, supra} note 141, at art. 40(1).
\end{enumerate}
\end{footnotesize}
human rights abuses or violation of rights, certain classes will be readily identifiable at the outset and can be argued as such.

C. Potential Impact of Friendly Settlement Changes

Since pilot judgments were only first implemented in the ECHR in 2005, their overall impact on the Court has not yet been fully quantified. It is already evident that after only two pilot judgments, the ECHR has judicially disposed of twenty cases and potentially 1.1 million applicants. Additionally, pilot judgments seem to be disposed to friendly settlements. Pilot judgments cause states to take human rights claims seriously, because states are unable to stall an entire class of plaintiffs through extensive fact-finding in individual cases and the potential liability is far greater for pilot judgments.

Pilot judgments are still in their infancy in Europe, are still compelled by judges *sua sponte*, and have occurred in a relatively *ad hoc* fashion. While these pilot judgments have only begun to free up judicial resources in the ECHR, the IACHR should begin implementing pilot judgments in an organized, procedural fashion which will increase the mechanism’s efficiency and soon begin disposing of the IACHR’s multiplying caseload. With over 1300 cases brought before the IACHR in 2008 alone and approximately 1200 total cases on backlog at the commission, the potential improvement created by a pilot judgment would be significant. Recognizing that approximately sixty percent of all settled cases implicate some type of rule of

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188 See *supra* note 78.
189 See *supra* 79–88. Both pilot judgment cases so far have resulted in friendly settlements, which is particularly noteworthy since Poland has a high number of cases pending against it and has previously avoided such friendly settlements. See Appendix B.
law issue that is readily addressed in pilot judgments, an Inter-American Pilot Judgment system could presumably alleviate the current case overload by a substantial margin.

VII. Conclusion

In 1959, the IACHR was “charged with furthering respect for [human] rights,” but since then the IACHR and IACtHR have increasingly struggled to achieve fairness and efficiency in the adjudication of individual complaints. Through the creative use of friendly settlements, the IACHR may increase its effectiveness and work through its mounting backlog. The IACHR may improve its current friendly settlement mechanism by implementing some or all of the following: 1) by creating a general judicial culture favorable to such settlements; 2) by establishing a Friendly Settlement Subcommittee to identify, facilitate, and enforce friendly settlement judgments; 3) through the training of friendly settlement facilitators and the analysis of statistical data; 4) by amending judicial procedure and the language of the rules of procedure to allow friendly settlements to be encouraged at any time throughout the proceedings; and 5) by institution pilot judgments through procedural changes and that training of judges and advocates. These recommendations would begin to streamline the Inter-American human Rights system so that they can better protect the rights of individuals and states in the Western Hemisphere.

191 See Appendix C, Table 2.
192 See supra note 2 and accompanying text.
193 See supra Part VII(A)(1).
194 See supra Part VII(A)(2–3).
195 See supra Part VII(A)(4).
196 See supra Part VII(A)(5).
197 See supra Part VII(B)(1–2).
Appendix A
Appendix B

<table>
<thead>
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<tr>
<td>Russia</td>
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<td>Romania</td>
<td>5,242</td>
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<tr>
<td>Poland</td>
<td>4,369</td>
<td>0</td>
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<tr>
<td>Ukraine</td>
<td>4,770</td>
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<td>Turkey</td>
<td>3,706</td>
<td>0</td>
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<td>Luxembourg</td>
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<td>1</td>
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<tr>
<td>Slovakia</td>
<td>488</td>
<td>1</td>
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<tr>
<td>Czech Republic</td>
<td>721</td>
<td>1</td>
</tr>
<tr>
<td>France</td>
<td>2,724</td>
<td>1</td>
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<tr>
<td>United Kingdom</td>
<td>1,253</td>
<td>1</td>
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<tr>
<td>Bulgaria</td>
<td>890</td>
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Appendix C

Table 1

Friendly Settlement Agreements approved by the Inter-American Commission

<table>
<thead>
<tr>
<th>Year</th>
<th>Right to Life Settlements</th>
<th>Rule of Law Settlements</th>
<th>Total</th>
</tr>
</thead>
</table>
| 2008 | 1 Argentina (Police abuse of right to life)  
      | 2 Columbia (right to life and integrity) | 1 Peru (Govt. discrimination) | 4     |
| 2007 | 1 Mexio (Abortion Rights) | 2 Bolivia (failure of judicial remedy for employment discrimination in government)  
      | 2 Peru (governmental discrimination) | 5     |
| 2006 | 1 Brazil (Failure of Police protection and prevention of future child violence)  
      | 1 Columbia (Attack by government forces) | 1 Ecuador (Prolonged prison sentence)  
      | 1 Ecuador (Detention without adequate state justification)  
      | 1 Ecuador (right to fair trial / judicial remedy)  
      | 1 Ecuador (fair trial / right to judicial remedy for pursuing criminals)  
      | 3 Peru (dismissal of prosecutors and) | 10    |

198 Cases taken from the annual reports of each from 2000-2008 where the full settlement reports are found at [http://www.cidh.oas.org/annual_eng.htm](http://www.cidh.oas.org/annual_eng.htm); See also Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission on Human Rights 2007 Chapter 3(B)(3)(C) chart on Friendly Settlements (a discrepancy in this chart shows only 2 friendly settlements in 2002 although three reports exist in the archives).

199 Includes the reports in which Articles 4-6 of the American Convention on Human Rights were the primary emphasis of the settlement.

200 Includes the reports in which Articles 8 or 23-25 of the American Convention on Human Rights were the primary emphasis of the settlement.
<table>
<thead>
<tr>
<th>Year</th>
<th>Country 1</th>
<th>Issue 1</th>
<th>Country 2</th>
<th>Issue 2</th>
<th>Country 3</th>
<th>Issue 3</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>Argentina</td>
<td>Police responsible for death</td>
<td>Bolivia</td>
<td>equal protection / religious discrimination</td>
<td>Peru</td>
<td>fair trial / judicial protection</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Columbia</td>
<td>Massacre</td>
<td></td>
<td>(judicial protection – right to participate in government)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Guatemala</td>
<td>extrajudicial killing / one case was a consolidation of 45 others</td>
<td>Mexico</td>
<td>due process of law / judicial protection</td>
<td>Peru</td>
<td>fair trial / judicial protection</td>
<td></td>
</tr>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>Guatemala</td>
<td>disappearances</td>
<td>Peru</td>
<td>judicial protection / enforcement of judicial decision</td>
<td></td>
<td></td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Chile</td>
<td>indigenous rights to property</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>Argentina</td>
<td>illegal detention/mistreatment/death</td>
<td>Ecuador</td>
<td>fair trial/judicial protection</td>
<td>Ecuador</td>
<td>punishing perpetrators</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>Brazil</td>
<td>slave labor</td>
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<td></td>
<td>Guatemala</td>
<td>judicial protection</td>
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<tr>
<td></td>
<td>Mexico</td>
<td>abduction/torture</td>
<td></td>
<td></td>
<td>Guatemala</td>
<td>punishing perpetrators</td>
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<tr>
<td></td>
<td>Peru</td>
<td>forced sterilization</td>
<td></td>
<td></td>
<td>Peru</td>
<td>punishing perpetrators</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Guatemala</td>
<td>indigenous rights to property and equal protection</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>2002</td>
<td>Chile</td>
<td>right to seek redress for wrongful expulsion</td>
<td>Chile</td>
<td>personal liberty / right to compensation</td>
<td>Peru</td>
<td>fair trial / judicial protection</td>
<td>3</td>
</tr>
<tr>
<td>2001</td>
<td>Ecuador</td>
<td>detention / right to life at hands of police/authorities</td>
<td>Argentina</td>
<td>judicial protection / due process</td>
<td>Ecuador</td>
<td>due process</td>
<td>8</td>
</tr>
<tr>
<td></td>
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<td></td>
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</tr>
</tbody>
</table>


Table 2

Rule of Law Articles from the American Convention on Human Rights Implicated in Friendly Settlement Reports

<table>
<thead>
<tr>
<th>Name of Rule of Law Article from the American Convention on Human Rights</th>
<th>Total Number of Claims Implicated</th>
<th>Percentage of Claims in which Article is Implicated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 7 Right to Personal Liberty</td>
<td>22</td>
<td>34%</td>
</tr>
<tr>
<td>Article 8 Right to Fair Trial</td>
<td>49</td>
<td>75%</td>
</tr>
<tr>
<td>Article 10 Right to Compensation</td>
<td>1</td>
<td>2%</td>
</tr>
<tr>
<td>Article 23 Right to Participate in Government</td>
<td>10</td>
<td>15%</td>
</tr>
<tr>
<td>Article 24 Right to Equal Protection</td>
<td>18</td>
<td>28%</td>
</tr>
<tr>
<td>Article 25 Judicial Protection</td>
<td>52</td>
<td>80%</td>
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</table>

Statistics taken from all settlement reports found in the annual reports from 2000-2008. See Inter-American Commission on Human Rights – Annual Reports, http://www.cidh.oas.org/annual.eng.htm. The percentages were calculated by adding the total number of settlement reports for the time period (65).