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Canada

HUMAN RIGHTS FOR ALL

JAMAICANS FOR JUSTICE

STRATEGIC LITIGATION OF HUMAN RIGHTS ABUSES: A GUIDEBOOK FOR LEGAL PRACTITIONERS FROM THE COMMONWEALTH CARIBBEAN

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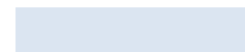

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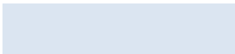

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PREFACE

Introduction to Lawyers Without Borders Canada & Inspiration for the Manual

Lawyers Without Borders Canada (LWBC) is an international NGO founded in 2002 whose mission is to support the defence of human rights for the most vulnerable groups through the reinforcement of access to justice and legal representation.

LWBC has been active in over twenty countries. Together with its local partners, it contributes to the defence and promotion of human rights and the rule of law, to the fight against impunity, to the reinforcement of the security and independence of human rights lawyers, and to capacity building through legal training of civil society and stakeholders within the justice system.

LWBC focuses on distinctive areas of action such as the strategic litigation of emblematic cases of gross human rights violations, meant to contribute to the emergence of jurisprudence favourable to the full realization of human rights. In the past twelve years LWBC has gained significant experience in supporting human rights advocates who represent victims of gross human rights abuses and who have successfully argued landmark cases.

In view of such experience and of the patterns of human rights violations in the Caribbean that victims must overcome in the pursuit of justice, LWBC and Jamaicans for Justice (JFJ), decided to establish a partnership whereby both institutions would commit to working together in an attempt to contribute to a significant increase in accountability across the region.

An exploratory mission to Jamaica in July 2013 allowed LWBC to get a clear sense of the most pressing human rights issues and patterns of persecution and to get acquainted with prominent legal experts and human rights organizations. Subsequently, the partners decided to draw on their respective expertise to design a tool to support strategic litigation of human rights cases in the region.

While there is a wealth of highly valuable information available to legal practitioners who wish to engage in "strategic litigation" in the area of human rights[1], this publication's usefulness lies in its practical nature. Indeed, our objective is to provide human rights lawyers and defenders[2] with concrete notions on how fellow advocates have managed to overcome obstacles and successfully litigate cases of this nature. In addition to the

[1] Child Rights Information Network (CRIN), "Children's Rights: A Guide to Strategic Litigation" (2008), online : CRIN <http://www.crin.org/docs/Childrens_Rights_Guide_to_Strategic_Litigation.pdf>.

[2] 2 For the purposes of this publication, the notion of "human rights lawyers" refers to trained attorneys who defend victims of human rights abuses in court proceedings [against alleged perpetrators]. The concept of "human rights defenders" is broader in scope and includes people who, individually or with others, act to promote or protect some variation of human rights.

normative framework applicable to constitutional challenges in common law systems, this guidebook addresses practical issues, drawing from the experience of attorneys from the Caribbean region and beyond.

Because both LWBC and JFJ sincerely hope the guide may be useful not only in Jamaica, but in the broader Caribbean region, efforts were made to ensure experience from countries other than Jamaica were shared with readers.

We hope this guide proves to be a valuable and enjoyable read.

Sincerely,

Pascal Paradis
Directeur général
Avocats sans frontières

What the manual means to human rights lawyers in the Caribbean

Caribbean culture has long accommodated widespread lack of State accountability, and mostly has been indifferent to extensive abusive practices and the disregard of human rights, including ignoring human rights abuses that harm vulnerable, marginalized groups who lack power to influence outcomes of abusive practices that harm them. Nevertheless, in recent years increasing numbers of Caribbean people, including members of the legal fraternity, are speaking out on human rights violations. Human rights advocacy organizations, such as Jamaicans for Justice (JFJ), and a number of lawyers are seeking legal redress for human rights abuses that various groups and persons with certain culture rejected characteristics have long suffered. Some lawyers including those that represent human rights advocacy groups like JFJ are using strategic litigation to challenge state accountability and impunity. Widespread police abuse including extrajudicial executions, violence against women and children, discrimination based on sexual orientation and more recently environmental abuse are commonplace abuses that Caribbean lawyers are presenting in Caribbean Courts.

In this context, the Strategic Litigation Manual is a valuable tool to inform Caribbean lawyers and human rights organizations on vital rights issues and litigation practices that will help inform their decisions on the types of cases that benefit most from strategic litigation, how to go about doing strategic litigation, and on available external support and partner organizations that provide Caribbean lawyers and their clients with valuable contributions towards building and winning human rights cases. Thus the manual is a valuable asset for Caribbean lawyers who represent victims of human rights abuses, in preparing and arguing winning cases, in gaining media attention, and encouraging public discourse on important human rights issues that plague the Caribbean. Taking a strategic litigation approach to case management potentially helps lawyers secure outcomes on cases that have far reaching effects, such as changing laws and the interpretation and the enforcement of these.

The manual serves to empower Caribbean human rights organizations, lawyers and their clients by providing relevant, practical information on important aspects of human rights litigation including less known considerations on troubling issues that Caribbean practitioners face in pursuing human rights cases in Caribbean Courts. These include dealing with issues of systemic injustice such as police unwillingness to investigate certain types of human rights abuses, prosecutorial bodies' reluctance to challenge powerful interests, unreasonable delays in getting cases through the court system, and various hoops and hurdles to redress that spawn Caribbean justice systems.

The manual provides Caribbean lawyers with practical information on bringing cases before the court, including objective, subjective, procedural and other criteria for selecting cases. It contains guidelines on case selection process, including case

presentation and analysis, developing a litigation strategy, and best practices considerations that are of special value to Caribbean human rights practitioners, lawyers and their clients.

Further, it highlights useful guidelines on legal remedies that are available to victims of human rights abuses in the Caribbean and information on applying for redress and on appeals tribunals that are available to Caribbean human rights teams.

The manual supplies information as well on less known strategic litigation external support and on accessing the Inter-American Human Rights System that is of value to Caribbean lawyers who may not be knowledgeable on these systems that provide last resort redress for victims of human rights abuse. An abbreviated description of the Inter-American Human Rights System as a last resort tool for victims of human rights abuse is helpful to Caribbean human rights lawyers and organizations and to their clients as increasing numbers of lawyers are motivated to pursue their clients' interests in an environment that increasingly is more open to being informed on legal strategies and remedies for Caribbean victims of human rights abuses including abuses that harm voiceless citizens including countless children.

Kay Osborne
Executive Director
Jamaicans for Justice

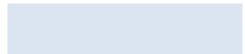

Table of Abbreviations

ACHR	American Convention of Human Rights
CCJ	Caribbean Court of Justice
HRDs	Human Rights Defenders
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
INDECOM	Independent Commission of Investigations
JFJ	Jamaicans for Justice
LWBC	Lawyers without Borders Canada
OAS	Organization of American States
URAP	University of the West Indies Rights Advocacy Project

Introduction

A. Scope of the Manual

The *Strategic Litigation Human Rights Abuses Manual* provides guidance on how to litigate strategically to further advance legal claims before domestic courts and supranational quasi judicial bodies such as the IACHR, so as to achieve important structural changes, at the legal as well as public policy levels. It looks into challenges faced by human rights lawyers before both domestic justice systems and the Inter-American human rights system.

While other countries across the Americas have made significant progress in terms of addressing State-sponsored violence through thorough investigations and criminal prosecutions, the Caribbean appears to be trailing behind. Allegations of police brutality seldom lead to disciplinary measures, let alone criminal charges, against alleged offenders[3].

Beyond the highly-publicized issue of police abuse, other serious human rights concerns deserve greater attention and a human rights-compliant response from policy-makers. Indeed, issues such as child abuse (specifically abuse against children in the care of State institutions), violence against women and discrimination based on sexual orientation have not yet been met with comprehensive policies that are respectful of the fundamental rights of these vulnerable populations.

However, let us not forget that the essence of strategic litigation transcends the simply judicial realm and aims at achieving regulatory, legal, institutional, and cultural changes, which have an important impact on society.

This perspective means that the objectives must go beyond the fate of the cases that are being litigated. The objectives of strategic litigation also include:

- promoting the modernization and democratization of State institutions in the areas of justice and security;
- breaking criminal patterns and structures that have permeated the State;
- exposing the mechanisms of impunity, real and procedural, that are a feature of these types of cases;

[3] Inter-American Commission on Human Rights (IACHR), "Report on the situation of human rights in Jamaica" (2012), online : < http://www.oas.org/en/iachr/docs/pdf/Jamaica2012eng.pdf >.

- taking steps to remove obstacles and eradicating the mechanisms of impunity, with the consequent benefit of strengthening the justice system and the Rule of Law; and, ultimately,
- democracy.

B. Types of Litigation Addressed in the Manual

The principal focus of this Manual is litigation in the defence of victims of systemic violations and cases where the perpetrators are agents of the State.

As human rights lawyers and advocates, we must be aware that we are dealing with a special type of litigation likely to bring about specific challenges, and which are complex so as to require a case-specific strategy and whose management must satisfy international regulatory and legal standards.

In light of the foregoing, this road is not an easy one. Along the way the process will encounter a deficient, bureaucratic and unresponsive justice system, which is inadequate to meet victims' demands for justice.

The design of any litigation strategy must consider this reality. In this type of litigation, you cannot start from scratch. There is precedent, based on the experience gained in the management of past cases, which, although they were litigated under adverse conditions, led to positive results for the benefit of the victims. Nowadays, while the context in which legal actions are taken often remains hostile, a positive outcome can ultimately be achieved.

PART I: LITIGATING HUMAN RIGHTS IN THE CARIBBEAN: COMPARATIVE EXPERIENCES

A. Human Rights Litigation in the Caribbean: How Far Have We Come?

Strategic Litigation: How Far Have We Come?

Since 1999 JFJ, one of the premier Human Rights Advocacy organizations in Jamaica, has documented gross and egregious violations of the rights of persons in Jamaican by agents of the State, particularly the police. The primary focus of the organization is advocacy against State abuse of rights and the strengthening of existing mechanisms for the protection of Rights. We have documented countless complaints from clients who have been intimidated and victimized by the police and from parents/guardians whose children have been locked up in adult correctional facilities for simply running away from home. We represent the interest of the family members of individuals who were killed by agents of the state at Coroner's inquests and have represented children who have been illegally locked up by the State although they have committed no criminal offence.

JFJ chose to work in this system because, due to ineffective investigations where persons are killed by state agents and what appears to be the lack of will to hold agents accountable for the questionable killings of persons by charging and bringing them to court to account for the deaths, these are the courts to which cases of police killings are most often sent for an inquest to be held. As such, these courts are the first step in the legal process holding state agents accountable for the extrajudicial killings that have become so rampant in Jamaica. The work of JFJ in this arena through judicial review of court practices, strenuous advocacy, and challenges to processes that have served to frustrate due process and the rule of law, has contributed to strengthening access to justice by highlighting the importance of a court that was once administered as the rubberstamp for accounts given by police officers in the unlawful deaths of persons. The use of "professional" jurors have come to an end, family members are now permitted to engage independent pathologists to observe the post mortems of their dead family members, a Coroner's Court dedicated solely to inquests into deaths caused by agents of the state has been established and a number of charges have been brought against state agents as a result of representation provided by JFJ attorneys to family members at inquests.

Judicial Review and constitutional challenges remain the primary tools in challenging the actions of the states, its agents and agencies, which undermine the Rights guaranteed to persons under domestic law. An example of a recent challenge to state action is the Judicial review brought in the case of *Jamaicans for Justice* v. *The Police Services*

Commission (PSC). In that case JFJ challenged the actions of the PSC in promoting a police officer who had numerous outstanding complaints of breaches of the fundamental rights of persons some of which amounted to breaches of the right to life of some of the victims. JFJ asked the court to agree that the PSC acted *ultra vires* when it failed to ensure that all allegations of serious misconduct and breaches of citizen's constitutional rights by police officers, brought to its attention, were thoroughly, impartially and independently investigated prior to its making recommendations for the promotion of such police officers. It was argued that the action of the PSC, in not considering those rights guaranteed to persons, breached those rights. The lower judicial review court did not find favour with JFJ's arguments. However, the matter was appealed to the Court of Appeal where it appeared that JFJ arguments were received favourably. We await the judgment of the court in the appeal.

The 2011 amendment to Jamaica's 1961 independence Constitution which saw the replacement of Chapter III of the Constitution with the Charter of Rights and Fundamental Freedoms (Constitutional Amendment) Act 2011, has strengthened those fundamental rights guaranteed to persons in Jamaica and the mechanism challenging breaches of those rights. Of utmost importance to rights seeking groups such as JFJ, in the furtherance of social issues and rights, is the Charter provision that allows that,

> *"Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter."*[4]

NGO's and other rights seeking groups, once they are able to establish that they have sufficient interest in the matter before the court are now able initiate action on behalf of those communities they serve.

While local challenges have focused primarily on bringing judicial review of the actions of the state and its agencies, internationally it has focused on bringing to the attention of the international rights organizations such as IACHR and UN through reports and petitions, the continued and willful breaches of the Human Rights guaranteed under local and international law, particularly the breach of the right to life.

JFJ has used the numerous documented complaints made to it and data collected as the foundation for a number of reports and shadow reports presented by JFJ to international

[4] Charter of Rights and Fundamental Freedoms (Constitutional Amendment) Act 2011 Jamaïca 2011, s 19(2) online : <.http://www.japarliament.gov.jm/attachments/341_The%20Charter%20of%20Fundamental%20Rights%20and%20Freedoms%20(Constitutional%20Amendment)%20Act,%202011.pdf>.

Human Rights bodies to which Jamaica is obligated to report on its duty to uphold and protect the rights of persons within Jamaica[5].

Successful Petitions before the IACHR has brought about significant changes in Jamaica in a number of areas. In relation to the impunity enjoyed by security force members who unlawfully take the life of persons, the Michael Gayle case has lead to the establishment of an independent body (INDECM) focused solely on investigating abuse of rights at the hands of state agents and deaths caused by state agents. The office of the Special Coroner has also been established and inquires into all deaths caused by state agents and where criminal charges have not been brought.

Petition to the IACHR addressing the woeful plight of children who are in need of care and protection and who have been placed in state care has brought about not only national awareness and sympathy towards the plight of these children, it has also brought about significant governmental policy changes that although far from being ideal for the children, has significantly improved the conditions under which they live, the quality of educational and developmental programs available to them and has brought about admissions from the State that the practice of holding children in adult facilities was a breach of their rights and illegal.

While submitting reports, judicial review and the filing of test cases by themselves will not combat impunity for the serious abuse of rights enjoyed by state agents. These actions signal a new and strengthened approach to ensuring accountability for breaches of rights. Since 2011 the Charter has strengthened those rights guaranteed and has expanded access to the court in order to challenge Constitutional breaches. This has ushered in an era increased legal action in support of rights. This can only be strengthened with the development of strategies for litigating rights issues before local courts. This in turn will result in increased rulings and recommendations which will define, enhance and protect rights in areas as diverse as sustainable development, environmental rights, the rights of women and the rights of minorities made vulnerable by sexual orientation or health status as well as land rights and social rights.

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[5] These and other JFJ reports are available in the document library on JFJ's website at www.jamaicansforjustice.org.
IACHR, "*Killing Impunity: Fatal Police Shootings and Extra Judicial Executions in Jamaica: 2005-2007; Report on The Situation of Children in* The Care of The Jamaican State" (2009), online : <www.jamaicansforjustice.org>.,
IACHR, "The State of Human Rights in Jamaica since the State of Emergency 2010 and recently, Report Updating The IACHR On The Situation Of Human Rights In Jamaica" (2014), online: <www.jamaicansforjustice.org>.
Reports to both the United Nations Human Rights Committee and Human Rights Council have included UN Human Rights Council Ninth Session, "Submission By Shareholder Coalition For The Universal Periodic Review Of Jamaica" (2010), online: <www.jamaicansforjustice.org>.
"Civil Society Report on the Implementation of the ICCPR, to the 103rd Session of the Human Rights Committee of the UN" (2012), online: < www.jamaicansforjustice.org >.

1. Police Abuse/Extrajudicial Executions

One of the principal factors explaining the persistence of unlawful police killings is the impunity, which has traditionally protected police from prosecution in the vast majority of such cases. This impunity coupled with the government's 'get tough on crime' agenda, has lead to the significant increase in the number of persons killed by the security forces. In 2013 alone, a total of 258 persons lost their lives at the hands of State Agents.[6]

Historically, the police have had sole authority to investigate allegations of mistreatment brought against them by citizens. The results have been the lack of proper investigation and the gathering of insufficient evidence, including the lack of forensic evidence. So, despite the high rate of extrajudicial killing that occurs within the jurisdiction, police officers in Jamaica engaging in excessive use of force causing death are rarely held accountable for their excesses. This is alarming given that there are credible reports of senior police officers with the belief that their actions are justified, admitting to extra-judicial killings during forensic polygraph examinations.[7]

2. Violence against Children

The protection of children from violence, abuse and exploitation in all its forms is one of the biggest challenges facing Jamaica. Unfortunately, reports of abuse and neglect also affect children in the care of the state and come from within both government and privately-run child care facilities. These deeply disturbing accounts from within the alternative care institutions that have been reported over an extended number of years, call into question the Government's commitment to protecting vulnerable children.

The primary problem facing child rights in Jamaica is not a lack of legislation aimed at protecting children, but rather a lack of meaningful implementation and heartfelt concern for the continued neglect, abuse and illegal treatment of children by the state. The practice of children being housed in adult correctional facilities, including prisons and police lock – ups, and the inhumane conditions in all or most of these facilities has long been a concern of JFJ.

Years of advocacy had resulted in very little movement from the government to address the issues raised. The manner in which children who are "in need of care and protection" as a result of being deemed "uncontrollable" are dealt with by the Jamaican courts has been of grave concern to JFJ for many years. These children, who have not run afoul of the law may have "fit person orders" made against them and are then remanded in adult correctional facilities contrary to the child Care And Protection Act (CCPA). These children

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[6] *INDECOM'S STATISTICS ON SECURITY FORCE RELATED FATALITIES* – 2013 *Available at:* http://www.indecom.gov.jm/2013%20Statistics%20Press%20Release.pdf

[7] http://www.wikileaks.org/cable/2009/03/09KINGSTON208.html

who are "in need of care and protection" are housed with adults and other juveniles who are in conflict with the law—some of whom have been convicted of serious offences. As a result, children come into physical contact with adult remandees and convicts on a daily basis. The conditions in most of these adult facilities are nothing short of inhumane.

After receiving a number of complaints from parents/guardians whose children had been locked up in adult correctional facilities for simply running away from home, it became clear that numerous girls considered to be in need of care and protection, or who had been ordered committed to the care of a fit person, were being illegally sent into adult correctional centres by the courts and detained in adult remand centres in the same way as children in respect of whom correctional orders have been made. Many of these girls, including those on correctional orders, had not committed any criminal offence but had 'run away' from home for a variety of reasons.[8]

Cases brought before the courts to further the rights of children are rare. In the instance of "CG" a minor child, assistance was offered to her mother who reported that her daughter had suffered tremendous mental anguish and physical abuse while being illegally detained at an Adult facility. JFJ attempted to assist a child and her mother to mount a court challenge of the illegal detention of the child in an adult correctional facility after the child had been deemed in need of care and protection by the court and was to have been placed in the custody of a "fit person". The case sought among other orders, a Declaration that a correctional institution as defined by section 2 of the Corrections Act is not a Fit Person or a place of safety designated by the Minister under the Child Care and Protection Act.

Data from the Office of the Children's Registry (OCR) painted a disturbing picture of pervasive child neglect that showed no signs of abating. In 2012, 8741 cases of child abuse were reported, almost a 1000 case increase from 2011. Neglect was the most commonly reported form of abuse, at 51%[i]. The OCR revealed that the data on child abuse was part of a national pattern, stating in a 2012 publication that it received over 5000 reports on average each year.[ii] Similarly, The OCA received more than 8000 reports of child abuse between January and August of 2013. The reports primarily involved neglect, missing children and physical, sexual and emotional abuse. [iii]

The petition to the IACHR addressing the woeful plight of children who are in need of care and protection and who have been placed in state care has brought about not only national awareness and sympathy towards the plight of these children, it has also brought about significant governmental policy changes that although far from being ideal for the children, has significantly improved the conditions under which they live, the quality of

[8] Jamaica, Office of the Children's Advocate, Focusing on the Uncontrollable Child: Recommendations to the Houses of Parliament (March 15, 2015).

educational and developmental programs available to them and has brought about admissions from the State that the practice of holding children in adult facilities was a breach of their rights and illegal.

The lack of prioritization of scarce resources on structures to safeguard the rights of children is a systemic problem that inhibits the government's ability to adequately meet its obligations both under domestic law and international conventions.

With the increased access to the courts to rights seeking groups, to challenge possible breaches of those rights guaranteed under the Charter of Rights and Fundamental Freedoms (Constitutional Amendment) Act 2011, the education of children in custody of the state may be an area ripe for challenge as the Charter now guarantees the right to protection and to an education for all Jamaican children.

3. Discrimination Based on Sexual Orientation

Violence towards the LGBT community in Jamaica has become extemely concerning. In Jamaica, consensual sex between adult males is proscribed by law. The LGTB community often falls victim to ill-treatment and harassment by the populace and the police. Some of the violence even includes acts of mobbing, stabbing, and in exteme cases, killing. For instance, on July 22, 2013, a transgendered teen, Dwayne Jones, was beaten, stabbed, shot and run over by a car when it was discovered that he was biologically male, but dressed as a woman.[9] It is essential that lawyers continue to fight against discrimination based on sexual orientation and to work towards a more just legal system.

4. Environmental Abuse

The protection of the environment is often viewed as a matter of competing interests, with those seeking to exploit natural resources for economic benefit and those seeking to preserve them for their natural beauty. Notwithstanding this perception, Caribbean countries have enacted local environmental laws to protect natural resources such as water, air, land, wildlife; ensure safe disposal of waste; and control development and pollution to ensure sustainable development for the benefit of present and future

[9] McFadden, David, Dwayne Jones, Jamaican Transgender Teen, Murdered By Mod: Report, Huffington Post (Aug. 11 2013) www.huffingtonpost.com/2013/08/11/jamaica-transgender-murder-_n_3739448.html [accessed June 12, 2014].

generations[10]. Over 100 countries, including Jamaica, Guyana and Haiti have a constitutional right to a healthy environment[11].

These Small Island Developing States (SIDS) tend to be ecologically diverse with a high level of endemic wildlife but are also highly dependent on natural resources for their economic survival. Environmental management is therefore critical if countries are to balance the sustainable development of their natural resources for traditional livelihoods such as fishing and farming and major industries including tourism and bauxite mining. In this reality short-term economic growth is often given precedence over environmental protection. Since 2001 there has been a steady increase in tourism-related developments with approximately 31 environmental impact assessments (EIAs) relating to significant hotel developments, a cruise ship terminal and other tourism-related activities being approved. These increases occur despite the limited carrying capacity inherent to SIDs. Indeed, the heavy dependence on natural resources has been identified as a major contributing factor to environmental degradation in Caribbean countries and there are reported concerns that Jamaica's three major resort areas: Montego Bay, Ocho Rios and Negril, had exceeded their carrying capacity resulting in a decline in the quality of the environment.[12]

Accountability in planning decisions and other regulatory mechanisms that affect the environment are critical, as the failure to effectively regulate the environment may put both the quality of life of individuals at risk. Judicial review of the permitting system has arguably become one of the most litigious areas of Caribbean environmental law.[13]

As we become more aware of the need to live in harmony with nature to ensure growth and prosperity, environmental protection is increasingly being viewed as a matter *in* the public interest and not merely *of* public interest. Nowadays more citizens are scrutinizing governmental decisions in particular as it concerns approvals for developments in areas that are perceived to be of ecological importance.

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[10] The widely accepted definition of sustainable development, as defined by World Commission on Environment and Development (Brundtland Commission) is development that meets the needs of the present 'without compromising the ability of future generations to meet their own needs.' See: World Commission on Environment and Development, Our Common Future (Oxford : 1987) at 43.

[11] The widely accepted definition of sustainable development, as defined by World Commission on Environment and Development (Brundtland Commission) is development that meets the needs of the present 'without compromising the ability of future generations to meet their own needs.' See: World Commission on Environment and Development, Our Common Future (Oxford : 1987) at 43. See also Constitution with 1996 reforms Guyana 1980, part I chap II, s 36. 1987 Constitution Haiti title XI chap II, s 253, 254 and 255.

[12] Winston Anderson, Review of the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States (SIDS POA) in the Caribbean Subregion 1994-2003, 2003, 4 LC/CAR/G. 749, 193.

12 Winston Anderson, Principles of Caribbean Environmental Law (Environmental Law Institute: 2012) at pp 207 and 232.

[13] Winston Anderson, Principles of Caribbean Environmental Law (Environmental Law Institute: 2012) at pp 207 and 232.

Ensuring environmental justice in the approval process for developments

Environmental jurisprudence has grown substantially since the 1990s, with the acceptance of several international instruments[14]. Small Island Developing States (SIDS) in the Caribbean were encouraged to enact legislation to ensure that environmental considerations are taken into account in governmental decisions to approve developments. In particular, this meant the introduction and use of Environmental Impact Assessments (EIAs). An EIA reviews planned activities by identifying and assessing both the beneficial and adverse environmental impacts of a proposed project with a view to ensure sustainable development[15]. The EIA procedure typically requires (which may be voluntarily undertaken or mandated by statute), public disclosure of the EIA and an opportunity for public comments.

The development of environmental legislation reveals the range of approaches used to introduce adequate EIA procedures. The earlier approaches, as shown in Jamaican EIA legislation introduced in 1991, lack comprehensive legislative provisions to guide the EIA process. Later approaches adopted by Trinidad &Tobago and Belize were accompanied by subsidiary legislation and are more substantive.

The introduction of EIAs created added responsibility not just on developers who were now required to prepare these studies prior to receiving approval for a project but also on governments who must ensure that such studies are properly conducted. Along with this duty came added scrutiny by the general public who considered themselves affected (whether directly or not), by such development. This scrutiny has led people worldwide to resort to the courts for judicial review of adverse decisions said to have been taken unlawfully. “Unlawfully” in this sense means that the decision-maker may have erred in law, may not have followed proper procedure, reached an irrational decision, failed to take into account material considerations or was influenced by immaterial considerations.[16]

NGOs and public interest litigation

As environmental activism has increased worldwide in the last few decades, there has been a resulting increase in public interest litigation. In the Caribbean region, in particular Jamaica, Belize, Trinidad, the British Virgin Islands and the Bahamas, there has been a thrust from environmental public interest groups to use legal mechanisms such as judicial

[14] The Rio Declaration on Environment and Development (The Rio Declaration) was adopted by more than 178 Governments at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janerio, Brazil from June 3rd to 14th, 1992.

[15] Natural Resources Conservation Authority Act Jamaica 1991. 2000 of Trinidad and Tobago and the Environmental Protection Act of Belize, 2003.

[16] These are the common grounds for judicial review. (See Civil Procedure Rules Jamaica part 56.)

review to challenge the decision-making process relating to developments in environmentally sensitive areas. In many cases non-governmental organisations (NGOs) are in a better position, having the benefit of more resources and expertise, to effectively bring legal proceedings on behalf of the 'ordinary' citizen.

a) Hurdles in the way of Strategic Litigation in the Caribbean.

The first key requirement for any strategic human rights litigation process is a sound knowledge of the "terrain" in which it will unfold. In other words, an understanding of the real functioning of the national and/or regional justice systems is fundamental. The objectives pursued, both political and legal, must be defined bearing in mind the shortcomings of the system – those which have been known for years and others likely to emerge during the processing of the case. The better one understands these challenges, the more likely one can surmount them and bring the matter to a favourable conclusion. Being aware of possible challenges allows you to design strategies before difficulties arise or during the process. As we will see, all human rights cases in the Caribbean that resulted in decisions favourable to the victims issued by courts of law had to go through the same critical "bottlenecks" and face comparable challenges.

In this section, we shall look at the most salient obstacles faced different human rights cases and the hurdles that can obstruct strategic human rights litigation in the Caribbean.

b) Public Animosity and Lack of Support for Human Rights Defenders[17]

In societies plagued by high crime rates, law enforcement agencies often resort to draconian measures to maintain public order, which can result in arbitrary arrests and violations of human rights. In such contexts, lawyers willing to uphold the rights of victims of such violations do not only get little public recognition, but are often accused of siding with the criminals and therefore opposing the efforts of the police to curb criminality. Furthermore, acts of violence against sexual minorities, driven by discrimination against LGBT across the Caribbean, also put at risk human rights defenders (HRDs) advocating for the rights of these vulnerable groups. While the personal safety of HRDs is seldom jeopardized in the Caribbean in comparison with other regions of the Americas, some have been ostracized because of their work on behalf of victims of alleged abuses. In several instances, they have been deliberately cut off from families, have been denied work opportunities and housing. Consequently, several cases of human rights violations have led to threats and harassment against victims' representatives, the parties to the proceedings,

[17] see OHCHR's definition at http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx. See article 1 of the UN Declaration on HRDs: "Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels".

key witnesses, justice officers working on their cases, and, where such bodies exist, the personnel of national human rights institutions (NHRIs).

Amnesty International's latest report on the dangers faced by HRDs in the Americas[18], cites that intimidation, attacks, and harassment against HRDs are on the rise throughout the Americas, including the Caribbean. Some HRDs are particularly at risk, such as those working on the protection of land against abusive exploitation of natural resources and those who advocate for the rights of women, girls and minorities such as migrants and lesbian, gay, bisexual, transgender and intersex people (LGBTI)[19].

The situation is particularly worrying in some countries across the region. Indeed, according to the leading international NGO "Front Line Defenders"[20], HRDs in Jamaica face hostility from every side. Local authorities accuse them of "illegal interference", while the general public largely see them as "troublemakers" or "agitators". Front Line Defenders reports that HRD's freedom of expression is being questioned by conservative sectors, and that HRDs who work on extrajudicial killings cases are often the subject of death threats by the police. In the same vein, the Jamaican Police Federation has gone as far as calling HRDs "agents provocateurs", and has accused them of defamation[21]. Unfortunately, most of the time, hostility against HRDs is not reported, which further contributes to the climate of impunity for perpetrators of human rights violations.

These are but a few examples of HRDs who have been personally affected by such resentment:

- The situation of **Maurice Tomlinson**, a local business lawyer and legal adviser for "AIDS-Free World", a Jamaica-based NGO, is indicative of the situation faced by some HR lawyers in the region. Mr. Tomlinson has been the subject of death threats because of his work on behalf of LGBTI rights in and his public denunciation of a police raid in a gay bar in Montego Bay. Because the police failed to give credit to his version of the story and denied him adequate protection measures, Mr Tomlinson was first forced to turn to the IACHR and seek precautionary measures, which were granted to him in March 2011[22]. When local media published the news

[18] Amnesty International, "Transforming pain into hope: human rights defenders in the Americas", online: Amnesty.org <http://www.amnesty.org/fr/library/asset/AMR01/006/2012/fr/17203aa8-9881-42b5-8635-8be0150c846a/amr010062012en.pdf>.
[19] Amnesty International, "Transforming pain into hope: human rights defenders in the Americas", online: Amnesty.org <http://www.amnesty.org/fr/library/asset/AMR01/006/2012/fr/17203aa8-9881-42b5-8635-8be0150c846a/amr010062012en.pdf>.
[20] Front Line Defenders, "Jamaica", online: frontlinedefenders.org <http://www.frontlinedefenders.org/jamaica>.
[21] Front Line Defenders, "Jamaica", online: frontlinedefenders.org <http://www.frontlinedefenders.org/jamaica>.
[22] Organization of American States (OAS), "Democracy for peace, security, and development", online: OAS.org <https://www.oas.org/en/iachr/lgtbi/protection/precautionary.asp>.

of his marriage to another man[23], he was forced to leave Jamaica, fearing for his life.

- In Belize, Caleb Orozco, an activist from the United Belize Advocacy Movement against anti-gay legislation, has also faced threats of violence, which increased following the hearing at the Supreme Court in May 2013 of a constitutional challenge against existing anti-sodomy legislation[24].
- Employees of Jamaica's Office of the Public Defender were the subject of death threats from unknown sources who apparently resented the OPD's regular inspections of police lock-ups[25] as well as its investigations concerning land evictions[26].
- In Haiti, Patrice Florvilus, a lawyer who heads the human rights NGO, "Défenseurs des Opprimées/Opprimés" ("Defenders of the Oppressed") received death threats and harassment because of his work in favour of victims of human rights abuses. Mr. Florvilus and his family were forced to seek protection abroad on the day he was granted provisional measures by the IACHR[27].
- In 2008, Nicole Sylvester, President of both the St. Vincent and the Grenadines Bar Association and the St. Vincent and the Grenadines Human Rights Association (SVGHRA) and Kay Bacchus-Browne, who is also a lawyer as well as a member of SVGHRA, received anonymous threatening phone calls at home and were followed by a jeep which was the same type used by the police's Special Services Unit, most likely because they had agreed to represent a female police officer who was alleging that she had been raped by the Prime Minister of the country.[28]

In Jamaica, the situation is believed to be serious enough to warrant the attention of the United Nations Human Rights Committee (UNHRC), which, in its concluding observations following the examination in 2011 of Jamaica's periodical report on the implementation of the UN International Covenant on Civil and Political Rights, expressed its concerns about

[23] Jamaica Observer, "Jamaican gay activist marries man in Canada", online : jamaicaobserver.com <http://www.jamaicaobserver.com/latestnews/Jamaican-gay-activist-marries-man-in-Canada>.
[24] The Guardian, "Belize gay rights campaigner is facing more death threats, says lawyer", online : <http://www.theguardian.com/world/2013/may/10/belize-gay-rights-campaigner-threats>. and Savi Hensman, "Caribbean Anglican leaders: homophobia, debating sexuality, upholding human rights", online: <http://www.ekklesia.co.uk/node/18383>.
[25] Jamaica Observer, "Les Green called into public defender investigation", online : jamaicaobserver.com <http://www.jamaicaobserver.com/Les-Green-called-into-Public-Defender-investigation>.
[26] The Gleaner, "Public Defender's Staff Threatened", online : jamaica-gleaner.com <http://jamaica-gleaner.com/latest/article.php?id=28143>.
[27] ASFC, "L'avocat défenseur des droits humains Patrie Florvilus contraint de quitter Haïti", online : ASFcanada.ca < http://www.asfcanada.ca/fr/nouvelles/laeavocat-dafenseur-des-droits-humains-patrice-florvilus-contraint-de-quitter-haati-317>
[28] Amnesty International, "Document Saint-Vincent-et-les-grenadines. Craintes pour la sécurité...", online: amnesty.org: <http://www.amnesty.org/fr/library/asset/AMR57/001/2008/fr/5f860ff9-d63e-11dc-853e-752a5846367e/amr570012008eng.html>.

"threats, violent assaults and killings of human rights defenders in the State Party"[29]. The UNHRC urged Jamaica to guarantee the protection of HRDs who are threatened because of their professional activities. In order to achieve this, the UNHRC urged the Jamaican State to conduct effective, independent and impartial investigations on those allegations and to make sure that proceedings are undertaken diligently against the perpetrators of such violent acts.

Despite certain incidents, human rights groups in the Caribbean are generally able to do their work without interference from Caribbean's governments[30]. One would expect that, should a problem arise, human rights activists could turn to independent oversight bodies to file complaints and seek protection. However, such arm's length human rights institutions are scarce[31]. Those that exist are severely under-resourced[32] and do not enjoy the level of cooperation they need from the judiciary and the executive[33].

5. Widespread Disregard for Human Rights Law

The very idea that rights are inherent to the human condition and that the State has the responsibility to ensure its citizens can effectively exercise those rights is not something most people in the Caribbean take for granted. In general, citizens do not naturally think of themselves as rights-holders, and therefore will not call on State bodies to respect and enforce those rights.

This troubling trend is also reflected in the Jamaican judiciary. While it has the power to review and to declare State actions unconstitutional if they are in breach of human rights law, practice shows that the judiciary seems unwilling to address constitutional issues brought before them, particularly in the lower courts. Thus, attorneys often hold the view that rights issues can only be presented for consideration before the Constitutional Court and alleged unconstitutional actions are not usually brought before courts of first instance. The apparent absence of a "constitutional litigation mindset" across the entire

29 Human Rights Committee, "Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee on Jamaica", 2011.

30 Nevertheless, there is some complains about uncooperative and unresponsive attitude from States. See United States Department of State, Country Reports on Human Rights Practices for 2012 (Guyana), (Washington DC : Bureau of Democracy, Human Rights and Labor,) at p 13.

31 With the notable exception of Jamaica and St.Lucia, none of the CARICOM member States have independent bodies entrusted with the authority to investigate complaints of misconduct by public agents. St Lucia has a Parliamentary Commissioner and Jamaica established an Office of the Public Defender in 2000: See Commonwealth Forum of National Human Rights Institutions, Commonwealth Forum of National Human Rights Institutions website, online : <http://cfnhri.org/members/caribbean/>.

32 United States Department of State, Country Reports on Human Rights Practices for 2012 (Antigua and Barbuda), (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 8 and (for Belize) at p 13.

33 The irrelevance of these bodies in the eyes of government has direct repercussions in their capacity to attract good candidates. Indeed, some Ombudsman positions are not even occupied and still vacant for several years. The Ombudsman position is vacant since 2005 in Guyana, see United States Department of State, Country Reports on Human Rights Practices for 2012 (Guyana), (Washington DC :,Bureau of Democracy, Human Rights and Labor) at p 13.

legal profession appears to further complicate the development of human rights strategic litigation at the domestic level, both for judges and lawyers, who might need further transfer of knowledge.

Moreover, corruption and politically-tainted appointments of prosecutors and magistrates negatively impact the capacity of the judiciary to deliver justice in an impartial and independent manner[34].

6. Access to Justice

Access to justice is also hampered by the fact that the judiciary seems to discriminate against vulnerable sectors of the society. In its 2012 *Report on the Situation of Human Rights in Jamaica,* the IACHR stated that the justice system "is administered with one standard for the rich and another for the poor"[35], and that judges were sometimes prejudiced against certain types of rights-holders – such as LGBTs – a bias that can affect their judgment and influence their decisions.

The absence of a State-funded legal assistance scheme provided by States is also an indicator of the absence of a "rights culture" in the Caribbean. In Jamaica, "*there is a shortage of attorneys willing to serve as duty counsel or provide legal services, primarily because of a history of long delays of payment and inadequacies of fees*"[36]. It is sometimes impossible for detainees to have access to a lawyer at police stations, either because local police officers are unaware of their obligation to assign them an attorney, or because of the shortage of duty counsel[37]. Then, the large unavailability of competent representation directly affects impoverished sectors of the society, who possess limited knowledge of their rights and are routinely subject to disrespect and discrimination[38].

This widespread disregard for human rights – which is demonstrated by the lack of human rights education; the lack of access to justice; the difficulties faced by victims looking for an attorney to assist them; institutional discrimination; and the wide number of constitutional cases rejected by courts – makes it difficult for subjects of the law to believe that their rights can be upheld through legal proceedings.

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34 Commonwealth Human Rights Initiative, "Police accountability: too important to neglect, too urgent to delay" (2005) International Advisory Commission report at 45.

35 Inter-American Commission on Human Rights (IACHR), "Report on the Situation of Human Rights in Jamaica" (2012) OEA/Ser.L/V/II.144 Doc. 12 at para 64.

36 IACHR, «Report on the Situation of Human Rights in Jamaica» (2012) OEA/Ser.L/V/II.144 Doc. 12 at para 75.

37 IACHR, "Report on the Situation of Human Rights in Jamaica" (2012) OEA/Ser.L/V/II.144 Doc. 12 at para 75 and Human Rights Committee, "Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee on Jamaica", 2011 at para 24.

38 IACHR, «"Report on the Situation of Human Rights in Jamaica" (2012) OEA/Ser.L/V/II.144 Doc. 12 at para 72.

From the above, we may deduce that there is a crisis of legitimacy in the criminal justice system[39] due to high levels of violence and crime, instances of police abuse, sentencing disparities, arbitrary detentions and limited access to justice for HRDs. Bearing in mind the importance of preserving the separation of powers between the judiciary and the executive in the Caribbean States, a wide range of actions could help ensure the protection of human rights through strategic litigation. Thus, training activities in the field of human rights for members of the judiciary, the police, HRDs, and NGO employees are likely to contribute to enhanced awareness of the importance of human rights law in the justice system.

7. Structural Problems in the Justice Systems

Success of strategic litigation depends on numerous factors, over which the victims and their legal representatives have little control: the degree of independence of judicial officers, clarity of stakeholders' roles and mandates, resources available, effectiveness of witness protection schemes, and the time required to carry out investigations, hold trials and deliver judgements[40]. Consequently, victims must define strategies to overcome such issues.

History has shown that most cases of human rights abuses in the Caribbean can be attributed to police misconduct or to the inadequate action taken by individuals in positions of authority[41]. In this context, sensitive information that could warrant disciplinary measures or criminal charges will not be disclosed and the public officials who have been incompliant with human rights are unlikely to be held accountable for their actions. Statistics on police misconduct are not easily accessible[42], and that NGOs may well be the only sources able to present an accurate picture of the situation[43]. By any

39 United Nations Development Program, "Caribbean Human Development Report 2012", online: UNDP website <http://www.undp.org/content/dam/undp/library/corporate/HDR/Latin%20America%20and%20Caribbean%20HDR/C_bean_HDR_Jan25_2012_3MB.pdf> at p 139.

40 For instance, in Jamaica, the IACHR underscored the deficiencies of the justice system, particularly regarding the cases involving security forces or excessive use of force against civilians, such as "lack of effective, prompt, and thorough criminal investigations, the failure of judges and prosecutors to treat cases with impartiality, and irregularities in the selection process for juries, [...] that the overwhelming majority of cases of police abuse denounced to Jamaican authorities are not resolved, allegedly due to irregularities and partiality in the investigation and prosecution of cases of abuse of force by State agents". See IACHR, "Report on the Situation of Human Rights in Jamaica" (2012), OEA/Ser.L/V/II.144 Doc. 1 at para 66.

41 United Nations Development Program, "Caribbean Human Development Report 2012", online: UNDP website <http://www.undp.org/content/dam/undp/library/corporate/HDR/Latin%20America%20and%20Caribbean%20HDR/C_bean_HDR_Jan25_2012_3MB.pdf> at p 162.

42 United States Department of State, Country Reports on Human Rights Practices for 2012 (Suriname), (Washington DC: Bureau of Democracy, Human Rights and Labor) at p 1 and (Bahamas) at pp 2 and 7.

43 United Nations Development Program, "Caribbean Human Development Report 2012", online: UNDP website <http://www.undp.org/content/dam/undp/library/corporate/HDR/Latin%20America%20and%20Caribbean%20HDR/C_bean_HDR_Jan25_2012_3MB.pdf> at p 134.

standards, the number of victims reported by NGOs far exceeds the number of police officers found guilty of such crimes[44].

This casual attitude displayed by investigative and prosecutorial bodies (IPBs), undermines public confidence in the police and the judicial system[45] and can reinforce the perception by law enforcement officers that they are above the law. In this regard, the IACHR has pointed out that "*the effective investigation of an extrajudicial killing is an inseparable part of a state's duty to protect the right to life*" [46] and that "*where there is a pattern of extrajudicial killings, the failure to conduct effective investigations creates an environment of impunity, which promotes further killings and human rights violations*"[47].

Nevertheless, it appears that this low rate of prosecution against powerful interests results not only in an unwillingness of IPBs to proactively enquire into human rights issues, but also causes other problems which impact directly on proceedings, trials, detentions, and ultimately on the protection of human rights.

a) Corrupt Practices and Limited Independence of IPBs and Judicial Officers

Independence of IPBs is essential to genuine investigations of those responsible for violations of human rights and their prosecution. However, in the Caribbean, IPBs are subject to political oversight[48], and corruption within both the justice system and police departments obstructs any meaningful attempt to investigate, let alone prosecute, public officials allegedly responsible for serious violations of human rights[49]. Reports indicate that in Guyana and St. Lucia, the processing of abuse allegations by security forces

44 According to the IACHR 2012 Report on Jamaica, only 19 police officers arrested were convicted for different categories of offense (267 arrests), 19 were acquitted and another 161 against who arrest warrants have been issued. Moreover, only three police officers were found guilty of homicide since 1999, a surprisingly low number considering the magnitude of the phenomenon of extrajudicial killings. See IACHR, "Report on the Situation of Human Rights in Jamaica", (2012), OEA/Ser.L/V/II.144 Doc. 12 at paras 57-59.

45 "The courts are therefore implicated in the police use of excessive force in at least two ways. First, by failing to hold police officers accountable for the excessive use of force, courts may be implicitly supporting it. Second, by failing to hold offenders accountable for their crimes, they may be implicitly (and unintentionally) promoting the excessive use of force by police.", see United Nations Development Program, "Caribbean Human Development Report 2012", online: UNDP website <http://www.undp.org/content/dam/undp/library/corporate/HDR/Latin%20America%20and%20Caribbean%20HDR/C_bean_HDR_Jan25_2012_3MB.pdf> at p 134.

46 IACHR, "Report on the Situation of Human Rights in Jamaica", August 10th 2012, OEA/Ser.L/V/II.144 Doc. 12 at para 60.

47 IACHR, "Report on the Situation of Human Rights in Jamaica", August 10th 2012, OEA/Ser.L/V/II.144 Doc. 12 at para 60.

48 In Jamaica, the judicial system relies entirely on the Ministry of Justice for all resources, see United States Department of State, Country Reports on Human Rights Practices for 2012 (Jamaica), (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 9. and IACHR, "Report on the Situation of Human Rights in Jamaica", (2012) OEA/Ser.L/V/II.144 Doc. 12 at para 117.

49 In Jamaica, "At each stage of the investigation there are problems regarding impartiality, independence, and consistency that lead to the disservice of judicial due process in murder investigations", see IACHR, "Report on the Situation of Human Rights in Jamaica", (2012) OEA/Ser.L/V/II.144 Doc. 12 au para. 98.

happens behind closed doors, and seldom leads to indictments. On the few occasions when public agents have been required to respond to criminal charges, the proceedings have been characterized by sloppiness, excessive legalism and undue delays, and have led to few convictions[50]. Interestingly, in those few instances where law enforcement officers are prosecuted and found guilty[51], civilians have been given much heavier sentences than police officers.[52]

Even in countries where police officers who are allegedly involved in extrajudicial killings are automatically placed under investigation, the absence of job security for sitting judges, who are not granted tenure, may influence their decision and cast doubt on their independence[53].

In the same way, despite the willingness of certain IPBs, the pressure from government or police and the perceived danger of reprisals also explain the low number of criminal cases involving powerful economic and political interests.

As a general rule, Caribbean governments have too much power and influence over the police system. Because they can select and hire members of the police forces, the latter will feel they ought to serve the interests of the prime minister rather than those of the population. Internal and external mechanisms must be implemented to ensure the rights of the population are well protected and that police forces are independent from the government. These mechanisms can take the form of a police service commission, an internal police investigative division, an ombudsman or some other type of civilian oversight body[54].

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50 See United States Department of State, Country Reports on Human Rights Practices for 2012 (Guyana), (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 1, Trinidad and Tobago at p 1 and Saint Lucia at p 1.

51 In Antigua and Barbuda, it seems that police officers are held accountable for their actions by competent authorities, though such oversight process may take years to conclude. See United States Department of State, Country Reports on Human Rights Practices for 2012 (Antigua and Barbuda), (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 1.

52 “In some cases the government took steps to prosecute officials who committed abuses, both administratively and through the courts, but successful prosecutions generally were limited in number and tended to involve less severe infractions. There was apparent impunity for high-ranking officials, but authorities took action against 51 police officers and brought criminal charges against 48 of them for alleged abuses”. United States Department of State, Country Reports on Human Rights Practices for 2012 (Belize), (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 1.

53 This appears to be case for the Bahamas, where “[a]n analysis of the appellate court’s judgments between 2009 and February 2012 determined that procedural errors made by judges--including the allowance of inadmissible evidence and redirecting the jury--resulted in six murder retrials”, United States Department of State, Country Reports on Human Rights Practices for 2012 (Bahamas), (Washington DC : Bureau of Democracy, Human Rights and Labor) at pp 8-9.

54 Jamaica set up the Independent Commission of Investigations (INDECOM) in 2010, and amended its Coroners Act to establish the Office of the Special Coroner

b) Shortage of Resources

An important shortage of financial, material and human resources significantly limits the capacity of IPBs to carry out serious and genuine investigations. This lack of resources has significantly hindered the conduct of criminal investigations, a situation reflected in prosecution records across the region. In concrete terms, insufficient funding has resulted in the following problems:

- Important delays before the securing of crime scenes, which can be far from the investigators' headquarters;
- Loss of evidence due to the passage of time before investigators begin working on cases[55];
- Lack of qualified investigators, advanced knowledge and training related to investigation, preservation of evidence, recovering of testimonies, etc.;
- Insufficient forensics equipment;
- Inadequate and understaffed evidence storage facilities[56];
- Poor physical working conditions;
- Failure and delays within the forensic examinations and analysis;
- High staff turnover – and loss of institutional memory
- Delays in producing transcripts by court reporters;
- Deficient training for magistrates, especially in countries where they are not lawyers[57];
- Inefficiency and backlog within the judicial system[58].

c) Witnesses Participation and Protection

Institutional weaknesses of the judicial system largely explain why effective witness protection schemes are not in place in most Caribbean countries[59]. Several cases of witnesses being intimidated, threatened and even murdered have been documented in

55 Storage facilities were inadequate and understaffed, and evidence went missing, deteriorated in the warehouse, or could not be located when needed. United States Department of State, Country Reports on Human Rights Practices for 2012 (Jamaica), (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 9.
56 This results in missing and deterioration of evidence. United States Department of State, Country Reports on Human Rights Practices for 2012 (Jamaica), (Washington DC : Bureau of Democracy, Human Rights and Labor) at p.9.
57 United States Department of State, Country Reports on Human Rights Practices for 2012 (Saint Kitts and Nevis), (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 4.
58 In Belize, 82 cases of murder were pending in September 2012. United States Department of State, Country Reports on Human Rights Practices for 2012 (Belize), (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 8.
59 United States Department of State, Country Reports on Human Rights Practices for 2012 (Bahamas), (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 1.

the Caribbean[60]. Because they fear for their safety and that of their relatives, potential key witnesses are reluctant to come forward or to be present in court. This is highly problematic, as the absence of independent witnesses in certain types of cases – for example extrajudicial killings – means it will be impossible to contradict the police's perception of events in an authoritative way.

d) Unreasonable Delays

It is widely recognized that justice in the Caribbean is not nearly as timely as it ought to be. Undue delays are a direct consequence of political interference and under-funding. Flawed internal procedures further complicate the situation.

Justice systems in the Caribbean are struggling with an important backlog of cases, which keeps growing because the resources necessary to process those cases are not available[61]. Because of the overloading of court dockets, several cases of human rights violations are cloaked in complete impunity many years after the facts. Indeed, there is a strong possibility that it will not be possible to recover the investigation documents that were prepared in the aftermath of the crime, that those will no longer be relevant, or that they simply do not exist. Thus, the passage of time makes it extremely difficult to ascertain the truth in evidentiary issues as problematic circumstances are likely to emerge, such as:

- The death of key witnesses who were direct victims or who witnessed the acts;
- Elderly or sick witnesses whose memory of the facts has faded over time;
- Death of the perpetrators, their advanced age, or severely deteriorated health;
- Disappeared or altered material evidence;

Increased criminality logically results in increased impunity unless it is matched with an equally important surge in the capacity of IPBs to process crimes. For instance, from 1999 to 2008, there was a sharp increase of homicides reported in Trinidad and Tobago, but only 20% of those fatal incidents were effectively investigated by the police during the last four years of this period[62]. Furthermore, those suspects who were arrested did not see

60 Twenty five witnesses have been killed between 2007 and 2012 in the Bahamas. United States Department of State, Country Reports on Human Rights Practices for 2012 (Bahamas), (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 9. See also the report on Belize at p 8, Trinidad and Tobago at p 6 and Saint Vincent and the Grenadines at p 5.

61 For instance, in Guyana, the hearing of a pending case was postponed five times because the trial judge failed to appear in court. In several instances, trials have been delayed for months and years. In this country, there were 235 cases to be heard in January 2013, and an even higher number were yet to be scheduled. In Bahamas, the coroner's court backlog reached 846 cases in 2012, even if 1,278 were resolved the year before: United States Department of State, Country Reports on Human Rights Practices for 2012 (Bahamas), (Washington DC : Bureau of Democracy, Human Rights and Labor) at pp 2-7.

62 United Nations Development Program (UNDP), "Caribbean Human Development Report 2012", online: UNDP website <http://www.undp.org/content/dam/undp/library/corporate/HDR/Latin%20America%20and%20Caribbean%20HDR/C_bean_HDR_Jan25_2012_3MB.pdf> at p 123.

their cases processed swiftly, and only a handful was actually convicted[63]. As a matter of fact, prolonged pre-trial detention periods are a serious problem caused by the slowness of the judicial system[64]. Persons under arrest may be detained for several months, or years for that matter, before being brought before a court or a judicial officer. Moreover, in some appeal cases, many prisoners had to serve their full original sentence before they could be heard because there were not enough judges to process their case at the appeal stage[65].

Strategies of Caribbean governments to improve efficiency of their justice systems

- Guyana tried to reduce its human resources deficiency by hiring part-time judges, but estimates put forward that, "even if two judges were assigned and even if each one concluded one civil matter every working day of the year (249 days), this would only lead to the completion of 498 cases out of an average of 5,600 cases filed, thus leaving a backlog of 5,102 cases"[66].
- Trinidad and Tobago tried in 2005 to diminish the number of cases not yet solved because of the inability of the chemists to process ballistic evidence and decided to hire foreign firearms examiners from the United Kingdom and the United States to make such data analysis more efficient and help reduce delays, but since this short-term measure did not address root causes, this problem came back to haunt local authorities as soon as the foreign experts left the country[67].
- The Bahamas added a fifth criminal trial justice and court at the Supreme Court level in 2011 and increased the number of judges, magistrates, prosecutors and

63 "*Although more than three quarters of the 160 defendants charged with murder in the Port of Spain Magistrate's Court from 2003 through 2006 were committed to the High Court to stand trial for murder, very few of these cases had been concluded as of July 2008... Only seven of the defendants had been convicted by trial or plea and 20 had been acquitted at trial. Although most defendants suspected of murder were charged within 60 days of the homicide, the median time to disposition in Magistrates Court was 107 days and the median time to case filing in the High Court was 271 days*". See United Nations Development Program (UNDP), "Caribbean Human Development Report 2012", online: UNDP website <http://www.undp.org/content/dam/undp/library/corporate/HDR/Latin%20America%20and%20Caribbean%20HDR/C_bean_HDR_Jan25_2012_3MB.pdf> at p 133.

64 United States Department of State, *Country Reports on Human Rights Practices for 2012 (Antigua and Barbuda)*, (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 3, Bahamas at pp 1 and 9, Belize at p 6, Guyana at p 6 and Trinidad and Tobago at p 6.

65 United States Department of State, *Country Reports on Human Rights Practices for 2012 (Surinam)*, (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 5.

66 United Nations Development Program (UNDP), "Caribbean Human Development Report 2012", online: UNDP website <http://www.undp.org/content/dam/undp/library/corporate/HDR/Latin%20America%20and%20Caribbean%20HDR/C_bean_HDR_Jan25_2012_3MB.pdf> at p 124.

67 United Nations Development Program (UNDP), "Caribbean Human Development Report 2012", online: UNDP website <http://www.undp.org/content/dam/undp/library/corporate/HDR/Latin%20America%20and%20Caribbean%20HDR/C_bean_HDR_Jan25_2012_3MB.pdf> at p 124.

courts. However, it seems that these actions are insufficient to address the backlog, considering the parallel growth of criminal cases[68].

- St. Vincent and the Grenadines invited a Jamaican judge in January 2012 to hear some cases and thus closed a significant number of pending cases[69].

In 2010, Jamaica established the Independent Commission of Investigations (INDECOM)[70]. This organization was mandated to investigate complaints from the public against members of Security Forces or other State agents allegedly responsible for death, injury or abuses of their rights. This was an important step towards the end of the prevailing climate of impunity in this country. However, there is a lack of clarity in the mandates of INDECOM and the Director of Public Prosecutions (DPP), concerning the conduct of investigations and prosecutions[71]. Rather than referring cases to the Bureau of Special Investigations (BSI)[72], the INDECOM has tended to pass them on directly to the DPP.

Nevertheless, the authority of the INDECOM to arrest persons and to bring them to court is challenged by the DPP, which states that this power belongs exclusively to it, thereby increasing delay and complexity of those cases and affecting the independence of the INDECOM[73]. Such jurisdictional issues undermine the INDECOM's capacity to discharge its mandate thoroughly and independently[74]. Among others, the IACHR has expressed concerns about limitations on the powers of the INDECOM to investigate certain types of potentially harmful and abusive acts by the police, such as illegal detention and false imprisonment or failure to investigate[75]. Without a commitment from political and judicial authorities, the lack of accountability for crimes will continue to result in an enormous amount of cases pending litigation.

To date, the units created within existing overseeing bodies[76] for the investigation of human rights cases do not meet the demand for justice, with human and logistics resources being inadequate in light of the level of complexity and the amount of work required to deal with those cases. These challenges explain why only a small minority of

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68 United States Department of State, *Country Reports on Human Rights Practices for 2012 (Bahamas)*, (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 9.

69 United States Department of State, *Country Reports on Human Rights Practices for 2012 (Saint Vincent and the Grenadines)*, (Washington DC : Bureau of Democracy, Human Rights and Labor) at p 5.

70 See INDECOM website for more information <http://www.indecom.gov.jm/index.htm>.

71 Human Rights Committee, "Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee, Jamaica", 103rd (2011) at para 10.

72 The BSI is mandated to investigate cases of shootings by the police, both fatal and non-fatal. According to the IACHR, "[b]etween 1999 and 2007, the BSI [Bureau of Special Investigations] failed to complete over 1400 investigations of police shootings, and enormous backlog that constitutes over 40 percent of the total number of recorded incidents", IACHR, "Report on the Situation of Human Rights in Jamaica" (2012) OEA/Ser.L/V/II.144 Doc. 12 at para 112.

73 IACHR, "Report on the Situation of Human Rights in Jamaica" (2012) OEA/Ser.L/V/II.144 Doc. 12 at para 159.

74 Independent Commission of Investigations Act, s 5.

75 IACHR, "Report on the Situation of Human Rights in Jamaica" (2012) OEA/Ser.L/V/II.144 Doc. 12 at para 163.

76 Such as Jamaica's INDECOM and the Office of the Public Defender.

law enforcement officers allegedly responsible for extrajudicial killings have effectively been investigated[77] charged or judged[78].

77 As an example, in 2009, Amnesty International examined three cases of extrajudicial executions by the police that had not been thoroughly looked into by IPBs. The families of the victims did not know why they had been killed; they assumed it was just an act of wanton violence from the police officers. See Amnesty International, "Jamaica: Public Security Crisis – Case Studies", online: Amnesty-Carribean.org <http://www.amnesty-caribbean.org/en/jm/news/jm2009_3.html>.

78 In Jamaica, "*[b]etween 2006 and 2008, only 4.5 percent of officers under investigation for fatal shootings were charged by the DPP*", see IACHR, "Report on the Situation of Human Rights in Jamaica" (2012) OEA/Ser.L/V/II.144 Doc. 12 at para 134.

PART II: STRATEGIES FOR CHOOSING AND DEVELOPING CASES FOR LITIGATION

A. SELECTING THE RIGHT CASES: CHOOSING BATTLES WORTH FIGHTING

From the outset, when choosing cases to litigate, it must be borne in mind that it will not be possible to take on all cases that would theoretically be worth taking. Unfortunately, the reality is overwhelming. Therefore, due prioritization and case selection becomes a task of paramount importance in the demand for justice.

1. Criteria for Case Selection

There is no set hierarchy within selection criteria of cases for litigation, nor is such criteria designed to be static. On the contrary, they are complementary and adaptable. However, in order to determine priorities, the legal team may want to establish a certain hierarchy among the criteria. The following basic criteria are suggested:

- Choosing cases that will have the highest impact
- Choosing cases with reasonable chances of success
- Choosing the right petitioner
- Ensuring adequate resources

These criteria are explored below.

Choosing cases that will have the highest impact

Given that it is impossible to take on all cases, it is recommended that the legal team choose cases with the greatest chance of having an important impact. These cases may have the following features:

- The wrongdoings at issue are representative and reveal systematic patterns of human rights violations.
- The facts at issue reveal systemic problems within the state apparatus.
- The case could be used to build collective cases of systematic and large-scale violations, which reveal criminal patterns and structures.
- The wrongdoings are often related to:
    - Victimization of marginalized population groups or minority groups.

- Gender-based crimes (i.e. sexual violence and torture).
- Crimes against children or other vulnerable sectors.
- Perpetrators who are often members of the security forces, preferably high-ranking officers who hold hierarchically key posts in the chain of command for the execution of illegal operations and who have directly participated in crimes or are the intellectual authors.

Choosing cases with reasonable chances of success

Sometimes, there may be cases that cry out for justice, and fulfill the criteria listed above. However, due to certain factors, often lack of admissible evidence, the chances of success are very limited. Therefore, it is recommended that the above criteria be balanced with the need to choose cases with reasonable chances of success.

It should be stated that although 'success' is normally defined by a favourable decision by the court, there are often cases where the context makes a win very unlikely, and the goal is something else, such as raising awareness of an issue, or hoping to shape the law as it develops in the future. Sometimes, even if the prospect of success is remote, the fact that it raised awareness may pave the way for another case with respect to the same issue even though this other case only takes place years later. A social debate on a specific problem may raise further questions and may facilitate the case for other victims.

Therefore, with the above caveat in mind, generally cases with a reasonable chance of success have sufficient information available, which describes the central facts of the violation, and available evidence which is strong and unambiguous. On this point, it is the quality not the quantity of evidence which is important. Particularly strong evidence includes:

- DNA evidence;
- Living witnesses who are willing and are able to collaborate;
- Recognizable patterns of violations;
- Possible perpetrators are identifiable and can be located;
- Strong expert evidence.

It should be noted that it is sometimes possible for legal counsel to get involved with a client before it is appropriate for specific legal action to be taken. In these circumstances, legal counsel can provide guidance on conduct, or with respect to the content of documents exchanged, in order to set the stage for the client to have good quality evidence in the event court action is appropriate.

Choosing the Right Petitioner

The legal team will have to work closely with the petitioner (normally the victim(s) or their relatives). In this regard, it is recommended that the following criteria be considered:

- The petitioner must show a firm desire to obtain justice and a commitment to undertake the corresponding legal actions with the relevant technical and legal advice;
- They must understand the steps involved in the legal actions and the requirements of their participation (including the realities of giving testimony before a court);
- The petitioner must be ready to be on the frontline and may be needed to assume the figurehead of the legal action, as well as play a political role;
- Willingness is important, but it is also important that the petitioner is credible, and can be presented as such before a court. Therefore, it is important to interview the potential petitioner, and carryout necessary assessments and background checks
- If a rights defense organization is involved, a willingness to work with this organization in the development of the legal strategy;

Ensuring Adequate Resources

Adequate logistical and human resources must be available to be assigned to the case, both by the legal team and the petitioner/plaintiff. It is a question of professional ethics and fairness to clients that a case shouldn't be accepted unless you can dedicate the required time and resources.

When funding is limited, there are often alternative sources of funding from certain organizations, which should be reviewed prior to accepting a case.

2. Case Selection Process

A case selection process is proposed, taking into account three stages, which are:

First Step: Prepare Summary of the Case

When determining whether to accept a case using the criteria listed above, it is good practice to begin by taking the information available and creating a summary of the case.

Depending on the context, a summary could be prepared by either by a social organization involved, or the legal team itself, through interviews with the victims, relatives etc. The summary must include all available relevant information about the case to allow attorneys to determine whether or not to take on the case, and subsequently, allow the legal team

to design the path of investigation or the first procedural steps to take into account and, more generally, the legal strategy.

The summary of the case must include at least the following information:

i. Identification information for the alleged victim(s)

- Exact name of the victim(s), and other used names such as aliases or nicknames.
- Age, including date of birth.
- Place of birth.
- Level of education.
- Marital status.
- Profession or trade.
- Work activity.
- Physical description at the time of the acts.
- Social or political activities of the victim.

** This type of data gives the legal team a profile of the victim, which can guide them on how to conduct further investigations and legal actions.*

ii. Information on the acts: When, how and where?

- Date of the human rights violation(s). When?
- Place of the violation, exact location (address, location, etc.): Where?
- Description of the acts (circumstances of the violation): How?

iii. Alleged perpetrators: Who did it?

- Exact name of the perpetrator(s), and other used names such as aliases or nicknames.
- Position, profession, trade etc.
- Present location, and any other known addresses.
- Social or political activities etc.
- Established or possible links to any other crimes.
- Anything else known.

* *In this regard, the possible attribution of responsibility to State agents must be clearly established. There are cases where, based on the narration of the acts by the informant, it can be gleaned that there was involvement by elements of the public service or there is a direct association.*

iv. Possible witnesses of the act(s)

- All known information about the potential witnesses (names, positions, addressees etc.).
- Whether it is known if they are willing to collaborate.
- Possible subject-matter of their testimony.

* *The summary should address the possible existence of direct or indirect witnesses of the violation, as well as information on how to locate these persons.*

v. Actions taken by the petitioner, relatives of the victim or others, after the violation.

* *The petitioner may provide other information on criminal complaints, habeas corpus, special inquiry, or any other legal action taken after the occurrence of the acts.*

vi. Whether there is knowledge of the case being presented to an international human rights organization or a State institution that has already ruled on the case (i.e. Ombudsman's Office).

vii. Whether there is knowledge of the case appearing in other official documentary sources.

viii. Legal status of the case, at what procedural stage it is.

Second Step: Case Analysis and Determining the Scope of the Mandate

The lead attorney will analyse the summary and accompanying documents, interviews etc. If the summary was not prepared by the legal team, it may be necessary to expand on it, to conduct more interviews or research to ensure there is enough information to make a decision.

If necessary, an executive report on the case may be made, which presents the legal analysis and recommendation as to whether or not to accept the case.

If others are involved in whether or not to accept the case, further analysis may be appropriate, as well as further coordination, and a decision made. If the case is accepted, a decision must be made on what actions should be taken, and finally, the decision will be

communicated to the petitioner by the lead attorney for the case, giving due justification for the decision and, if necessary, the scope of the mandate.

Third step: preparation of the procedural and substantive case

Once a decision has been made to accept a case and the scope of the mandate is clear, the next step is to build the case and prepare it to move forward. Therefore, the legal team must determine the following:

- The forum (i.e. which court, coroner, commission, tribunal etc.)
- The type of litigation (i.e. criminal prosecution, constitutional challenge, civil action, judicial review)
- The legal vehicle(s) or tool(s) (for example, the type of motion and most importantly, the remedy sought) to be used to advance the case;
- The legal tests that will have to be met to be successful;
- The evidence already available to support each aspect of the legal tests (testimonial, documentary and other);
- If the presently available evidence is not sufficient, evidence that will need to be obtained to fulfil the legal tests;
- A theory of the case, which explains how the facts meet the legal tests and how the evidence supports this theory;
- The strengths and weaknesses in the case, and chances of success; and
- A timeline and list of procedural motions and other documents to be filed to advance the case.

B. Developing a litigation strategy

Given the complexity of strategic litigation, proper preparation of the procedural and substantive case is generally not sufficient. Preparing the legal case must be part of a larger, more all-encompassing litigation strategy, which requires the interaction of:

- advocacy;
- communication;
- education;
- pressure strategies such as media-work and lobbying;
- negotiations; and

- security concerns.

3. Defining your Objectives

The general objectives for the litigation must be determined, based on the analysis of the situation and the consensus between the lawyer, the victims, and interested nongovernmental human rights organizations. Based on the general objectives, the specific objectives for each component of the litigation strategy will be defined. As mentioned above, sometimes it is quite unlikely that a case will be successful before the courts, for various reasons, and the objectives might be more about creating awareness, changing the law etc.

4. Defining Decision-making Processes

The decision-making process, meaning who will take responsibility for determining strategies and actions to be taken, must be clearly defined. When there is a victim involved, the most important decisions must involve that individual. The lawyers should give them legal advice but, ultimately, it is the victim who will spearhead the advocacy work done around the case. That being said, seeing that strategic litigation is advanced with the hopes of having impacts beyond providing justice to the individual victim(s), it is very important that the victim understands the approach from the very beginning, and understands the reasons and repercussions for all decisions. If a rights defense organization is also involved, it is important to clearly define the roles and responsibilities of the victim and the rights defense organization with respect to the legal strategy and the instructions (or the confirmation thereof) for the legal team.

5. Distribution of Responsibilities

Generally, the lead attorney is responsible for the conduct of the case and the legal advice provided. In ideal situations, although there is a lead attorney responsible for the final litigation decisions, the legal team should include various players and be flexible. The team should be composed of litigators, researchers, lobbyists and negotiators who are well coordinated. This allows the litigators to keep the pressure on through the legal actions while the lobbyists and (at the right moment), the negotiators try to find out-of-court solutions. It should be noted that the negotiated settlement can sometimes encompass an even larger spectrum of issues than the litigation itself.

6. Other Considerations for Case Management

The litigation strategy may be determined based on a single case or on a group of cases, depending on whether the issues to be dealt with affect only one case or are likely to impact a significant number of them.

In achieving the objectives set out in the general strategy, care must be taken with the procedural and substantive management of the case. Strategic litigation requires effective and efficient management of the process from the start.

a) Need for Flexibility

A litigation strategy has to be flexible. As time goes by, sometimes new facts or evidence are discovered which may require a change in strategy. It is important that both legal counsel and the client remain flexible with a constant eye on the ultimate objectives of the case.

Certain other developments could also require a change in litigation strategy. For example, negotiation opportunities may arise. In such circumstances, as discussed above, the legal team and the petitioner have to carefully assess the seriousness of the potential negotiation opportunities, the impacts, the possibility to keep the litigation active, the possibility to suspend the litigation or slow it down and so forth.

Another example of when a strategy needs to be reassessed is in response to the receptivity of the court to the case. If the court appears non-receptive to the particular litigation, the legal team and the petitioner have to assess whether they want to pursue this particular case or avenue, or if another case or legal avenue should be pursued.

b) Possibility of Interveners in Civil Proceedings

Interveners in civil cases are parties to a case who, while not specifically implicated in the case, either have certain expertise or knowledge of the case that allow them to provide information and clarity to the judge on certain points, either in support of one of the parties, or as a neutral third-party.

Judges are often concerned with the impact of their decisions on others or society at large. Therefore, it may be useful to consider trying to get an organization to intervene in the case to share their specific knowledge of the case or the issues raised with the judge. Judges want to be reassured with respect to the impact of their decision on third parties. Interveners are often local, national or international organizations that work in specific fields related to the case.

c) Negotiations

There are certain situations where negotiations are simply not possible or appropriate. However, depending on the objectives of the case (not only for the specific petitioner, but also for other victims or potential victims, subject to proper coordination with the specific petitioner), it may be well advised to undertake negotiations in certain circumstances to advance the cause through changes to legislation or the conclusion of an agreement.

If negotiations are appropriate, one nonetheless always has to keep in mind the potential pitfalls. First, the opposing party could try to convince you to drop the litigation in exchange for the opportunity to negotiate. One must be very prudent when such an offer is made. Indeed, once the litigation is dropped, the opposing party may lose interest in the negotiation without the threat of a court decision against them. There is no doubt that successful negotiations only occur when there is momentum. Sometimes momentum can only be achieved when there is a sufficient pressure. It is therefore extremely important to evaluate with great care any requests for discontinuance, suspension or otherwise when the other side tries to impose a pre-condition to negotiation. This is particularly true when there are time limitations which may prevent you from re-filing in the future.

d) Linking Advocacy and Litigation

The activities to be implemented in connection with the political or non-court advocacy component of the case must be determined based on the specific objectives established. The advocacy component must be undertaken by the organization related to the case, the victims, or the plaintiff, and duly coordinated with his or her attorney.

The proper handling of the case must not be sacrificed for political considerations. Public advocacy should be contemplated if it will benefit the case.

Any advocacy activities should be undertaken with a proper understanding of the following:

- The shortcomings, obstacles or weaknesses that the litigation team will face, as well as the strengths that will help overcome such difficulties;
- The political context in which the litigation process will be carried out;
  - * *This is also key to know when or if it is appropriate to negotiate. Indeed, there are moments where only the litigation efforts may be pursued. However, the legal team has to be sensitive to changes in the political environment or even in the bureaucracy in order to maximize the chances of success of the case. A case is not only successful if a favorable judgment is rendered. A case may be successful if a fair settlement is achieved.*
- Public support or possibility for public support, and possible impact of the case on the public at large;
- The key institutions and actors;
- Plans for working with directly affected victims;

Certain non-media related advocacy activities that have been undertaken to further establish the legitimacy of the victims' claim include the following:

- Reports on progress and obstacles in cases to be presented to international bodies, such as, for example, thematic hearings, cases, or working meetings at the Inter-American Commission on Human Rights;
- Carrying-out studies or investigations that determine the problems in the justice sector and make recommendations;
- Various representations to specific instances within the Executive, the Legislature, or any other authority or public entity, as the situation warrants;
  - * *This is very important. Litigation normally does not solve the entire problem. Parallel approaches maximize the chances of success whether through a judgment or a fair settlement.*
- Interviews or presentations to international bodies or organizations (embassies, cooperation organizations, etc.);
- Protest activities such as marches, posters, sit-ins, vigils or strikes;
- Communiqués and other advocacy instruments submitted to international bodies, according to their mandate;
- Strategic alliances established with other institutions or organizations interested in the issues at stake, such as key public figures, with a view to promote reforms and monitor compliance with international human rights standards in the handling of cases, among others.
  - * *This is very important. Litigation normally does not solve the entire problem. Parallel approaches maximize the chances of success whether through a judgment or a fair settlement.*

It will be very important to define and implement a communication and information strategy for cases, as a means to effectively disseminate information about the case and make the public aware of what is at stake. The media plays a fundamental role in the empowerment of victims and social organizations that represent them. This requires:

- Maintaining a constant presence in the communication media, especially at the most crucial times during the process;
- Ensuring effective coordination between the communication staff of the organizations committed to the case;
- Publishing paid advertisements when necessary;
- Appointing a representative to speak with media;
- Designing and using web pages dedicated to the emblematic case (test case), which is being litigated;
- Using social networks (Facebook, Twitter, Flickr, YouTube);

- Issuing bulletins or press releases with executive summaries on the matter being debated in court or on the procedural situation of the legal cases in question;
- Carrying out awareness-raising activities through local, regional and national media, depending on the situation;
- Designing training modules and communication strategies;
- Meeting with journalists – whether reporters, editors or columnists - and providing them with the overview of the case or the issue at stake.

  * *This course of action is normally resorted to in times of crisis or crucial stages of the proceedings. The idea here is not to litigate through the media, but rather to inform and get coverage on a periodic basis so that the public knows what is going on and is made aware of the broader meaning of the case. The format and content of the message ought to be carefully defined to avoid distortion in the way the information is transmitted by the media.*

Another very important point is that good coordination between litigation and advocacy is key. It is important to ensure that the right hand does not contradict the left hand! In particular, it is essential to ensure that whatever is said in the media does not negatively impact the litigation or the legal strategy. In other words, you should ensure that the message transmitted to the media corresponds to what is being said before the judge. It is also important to limit your comments to what is included in the evidence and to be conscious of the rules (for example rules applicable to juries) and any publication bans which could affect your professional duties.

e) Security

The insecurity that surrounds human rights cases is what shapes the nature of the security measures considered in strategic litigation.

Certain examples of the security measures used by human rights organizations and plaintiffs are to:

- Apply to the Inter-American Commission on Human Rights for precautionary measures;
- Seek support and ongoing accompaniment from like-minded foreign legal associations for the most vulnerable persons in the organization or those who play a leading role in the case;
- Constantly provide national and international bodies with reports on attacks and threats against the plaintiff or the organization(s) involved in the case;
- Periodically draft and publish reports on the situation of insecurity surrounding the case in order to keep the issue in the spotlight;

- Address and lobby the United Nations and the Inter-American systems, requesting *in loco* visits or the presence of the special rapporteurs whose mandates are relevant to the issue(s) at stake;
- Report security incidents to National Human Rights Institutions (NHRIs) where they exist[79] so that they can issue statements condemning this situation;
- Hold press conferences at critical moments in proceedings where the situation of insecurity is heightened;
- Meet with powerful decision-making authorities to report security incidents and seek solutions to the problem;
- Arrange for direct victims and relatives to temporarily leave the country if their security is at risk;
- Meet with international organizations based in the country where the litigation process is being carried out to request timely support for the safety of all actors involved;
- Put in place, and activate if warranted, a telephone network for immediate assistance in situations of great vulnerability;
- Install security systems in the premises of organizations with substantial resources (closed circuit cameras, alarms, security guards);
- Implement self-protection mechanisms for the personnel within the organization, such as constant change of itineraries and professional routines, regular check-in calls, among others.

C. PUTTING TOGETHER A LITIGATION TEAM

The complexity and challenges associated with strategic litigation require the use of an efficient case management system. This section will provide general guidelines on how to organize a litigation work team, which includes case assignment , a system of follow-up, management and case monitoring .

79 National human rights institutions (NHRIs) are State bodies with a constitutional and/or legislative mandate to protect and promote human rights. Though they are part of the State apparatus and are funded by the State, they operate and function independently from government.
In the Caribbean, only Jamaica (Office of the Public Defender), en ligne : <http://secretariat.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/24777185-E579-46BA-84D8-C1225870C9F2_JAMAICA.pdf>. and Trinidad-and-Tobago (Office of the Ombudsman), en ligne : <www.ombudsman.gov.tt/>. have set up oversight mechanisms of this nature with a fair degree of autonomy. For more information about NHRIs across the region and the rest of the world: International Coordination Committee of national institutions for the promotion and protection of human rights (ICC), en ligne: ohchr.org <http://nhri.ohchr.org/EN/Pages/default.aspx>.

As mentioned above, ideally, the team should be composed of more than just lawyers, but also researchers, lobbyists and negotiators who are well coordinated. With this approach, the litigators can maintain the momentum within the court process while, when appropriate, the lobbyists and the negotiators can advance the cause outside the courtroom.

7. Criteria for Case Assignment

Generally speaking, the strengths of each individual on the litigation team should be maximized. Some individuals are more at ease in the preparation stages of a case and others are better when they get to the court room. Respect for each others' strengths and weaknesses will help maintain team unity.

Other criteria for the assignment and distribution of cases to individual lawyers could include:

- *The type of violation*. The advantage of this criterion is that with time it allows team members to specialize in certain types of human rights abuses, and develop greater knowledge of the characteristics and problems surrounding the legal response to these human rights breaches, as well as a particular methodology.
- *The complexity of the case*. The complexity may be defined by the nature and seriousness of the offence, the number of witnesses involved, the complexity of evidence that will be put forward by the claimant, the types of legal and procedural issues which will need to be addressed, or any other element that may objectively make the case difficult to manage.
- *Timeframe of the violations*. This criterion corresponds to the moment when the violation occurred. Periods may also be prioritized, either according to the number of cases that emerged during these periods, because these periods are linked to a specific context or to specific alleged perpetrators, or for whatever other reason linked to specific dates.
- *Profile of the victim*. In particular, gender-based abuses could be assigned to female lawyers, because of the psychological implications of this offence on its victims. This could also be the case for child victims.
- *Specialization or experience of the lead lawyer*. This criterion does not depend on the nature of the case, but rather on the capacities of the lawyer expected to litigate, and the experience she/he has in these types of cases.
- *The profile of the petitioners*. There are some cases where the petitioner (victim or organization) demands a lot of time to deal with their requests (i.e. correspondences, meetings).

- *Confidential treatment of information.* Certain cases involve dealing with sensitive information, access to which must be restricted to specific persons on the team.

8. Sharing the Workload Within the Team

- The most important element here is to respect each individual's strengths and weaknesses and ensure to maximize, as much as possible, everyone's strength.
- The workload assigned to lawyers must be as fair as possible, to avoid overload of work on one lawyer or assistant. The load should not be measured solely by the number of cases but also by their level of complexity.
- The way cases are assigned to specific lawyers and assistants will depend on the size of the legal team.
- In determining how cases ought to be assigned within the team, attention must be paid to the other tasks that the lawyers and assistants within the legal team have already been asked to undertake. Theses tasks may not be directly related to the processing of cases and may include: reviewing documents, drafting reports, attending meetings, organizing events or workshops, among others.
- Make sure that focusing on another case does not result in disregard for professional obligations towards other clients and cases. If necessary, hire additional personnel to prevent this during periods of greatest activity in a case.
- Implement a working methodology that is conducive to the sharing of experiences and resolution criteria, the making of effective joint, as well as the common design of strategies for each case.
- There should be ongoing evaluation of the progress of cases and their obstacles, to determine new assignments or redistribution of work.
- A computer-based information tool should be developed to facilitate the management of the tasks performed. If such a tool is not available, then utilize direct oversight by trustworthy personnel.
- Although the designation of a case to a lawyer means that she/he assumes responsibility for the procedural and substantive management of the case, this designation should not be seen as incompatible with joint work or team work. Internal coordination activities and mutual support require that the flow of information on procedural aspects of the cases be open to all.
- With regard to sensitive information in cases, mechanisms to safeguard and protect confidential data must be established.

9. System of Follow-up, Management and Monitoring of Cases

A case management system should be established in order to optimize the use of available resources, and at a minimum must include:

- A classification system that ensures easy tracking;
- Each case must have a file and file number, which will be properly organized[80]. The file must document the different procedural acts, which will include all the current and future documents related to the case. When possible, a physical and electronic copy of all documents should be kept. Some basic tools that may be used to organize case files include:
    - A binder of proceedings, which clearly lays out chronologically (according to date of notification), all the Court proceedings, and motions which have been filed by all parties, as well as judgments rendered, including an index;
    - There may need to be several binders of procedural documents if there are various types of the legal action;
    - Binders with all investigative documents, including an index for easy reference;
        - This could be subdivided according to the type of document:
            - witness statements;
            - expert evidence,
            - other documents;
        - Testimonial evidence may be arranged alphabetically or according to the importance of the testimony based on your theory of the case or according to what needs to be proven to meet the legal tests;
    - Each file must have an index of its contents, related to both the procedural aspects as well as the investigative documents. It should be attached to the cover or the front page of the file.
    - Each file should have an executive summary of the case, which includes the basic legal strategy, the theory of the case, the legal tests to be met, and the basic evidence to support the theory of the case (including the basics of what is expected to be said by each witness), as well as a

80 Although organizing the physical file appears to be an administrative task, which may be left in the hands of an assistant or secretary, this task requires guidelines on how to do it, as the organization of a file has its own rationale in litigations, and finally, it is the lawyer who will use the file throughout the entire process.

record of the actions that have been undertaken, or that are to be undertaken.

* *This is very important, since if there is a change in the lawyer responsible or any other temporary or permanent circumstance that removes the person responsible for the case, this document can be consulted in order to determine the status of the case, without having to waste time unnecessarily reading the entire bundle of documents in the file and starting from scratch. It would be advisable to develop an instrument, based on discussions among the legal team, which standardizes the criteria and themes that should be contained in the executive summary of each case.*

- According to the type of violation, the folders containing the files may be differentiated by colours, for example, extrajudicial executions in red, arbitrary arrests in blue etc.;
- The records or files should be kept, regardless of their legal situation, ongoing, stymied or closed;
- With regard to the location of the files, it is preferable to place them in cabinets (that will be locked when no one is in the office), archived according to the name used to identify the case and the file number derived from the judiciary. The archives are also divided according to the type of case.
- There must be a control system for those files that lawyers, assistants or others physically remove from the cabinets. This can simply be a sheet on which the person removing the file signs, indicating that it is in his/her custody; and
- A procedure must be implemented for monitoring, follow-up and evaluation of the progress of cases underway.

B. CLIENT RELATIONS

As in all cases, developing and maintaining a relationship of trust with the client is essential. This is even truer in cases dealing with human rights abuses. You must always respond promptly to phone-calls, e-mails and other communications from the client. Any and all developments should be promptly communicated to the client, and they should be informed of any offers to settle, even if it will likely be rejected. As discussed above, all decisions should be fully discussed with the client in light of the litigation strategy already determined.

As a matter of professional ethics, all communications with the client by the opposing side should go though you, as the attorney on file, and similarly, all your communications with the opposing side should go through their lawyer on file.

Generally, by definition, strategic litigation is designed to have benefits beyond the individuals named in the court actions. They are designed to benefit larger groups of victims or potential victims, or society at large. If such a decision is made to fight an individual case for the benefit of a larger group, the concerned individual has to be informed that the case will be handled accordingly and she or he must be fully aware of the strategy. Indeed, it is possible, in such cases, that strategies that could be more beneficial for the larger group are not strategies that are beneficial to the concerned individual. This has to be handled very carefully. It is important that the individual never gets lost in the fight for the greater good.

PART III: BEST PRACTICES AND METHODOLOGICAL CONSIDERATIONS

A. LEGAL REMEDIES AVAILABLE TO VICTIMS OF HUMAN RIGHTS ABUSE IN THE CARIBBEAN

1. Constitutional Challenge

The redress clauses in the Constitutions of the respective Commonwealth Caribbean countries provide that if any person alleges that any of their fundamental rights and freedoms has been, is being or is likely to be violated that person may apply to the court for a remedy. A constitutional challenge enables the court to review laws or actions of a public official or authority and in some cases that of a private individual to determine if it is in breach, violates or is inconsistent with the provisions of the Constitution. Where the court has found that there is a breach of the fundamental rights the court has the ability to find the legislation or actions illegal, unconstitutional or inconsistent with the Constitution, thereby rendering it void to the extent of its inconsistency with the Constitution.

2. Other Recourses

a) Ombudsman

In the Commonwealth Caribbean there is a position of Ombudsman provided for in the Constitution. The principal function of the Ombudsman is to investigate any complaint relating to any Government or Statutory body's actions in any case in which a member of the public claims to be aggrieved, or appears to the Ombudsman to have sustained injustice as a result.

The Ombudsman also investigates public complaints alleging abuse of power by state officials and departments. Further, many cases of maladministration also often implicitly involve fundamental rights and freedoms. Where, the Ombudsman is of the opinion that there is evidence of any breach of duty, misconduct or criminal offence on the part of any officer or employee of any department or authority, the Ombudsman may refer the matter to the authority competent to take such disciplinary or other proceedings against him.

b) Equal Opportunity Commission and Tribunal (T&T)

Another recourse to a breach of a fundamental right may be found in the Equal Opportunities *Act* in Trinidad and Tobago. The Equal Opportunities Act prohibits discrimination that is unfair or unequal treatment of an individual (or group) based on certain characteristics. The Act is concerned with discrimination in four areas: employment, education, the provision of goods and services and the provision of accommodation. The characteristics that are protected from being discriminated against are:(i) sex, (ii) race, (iii) ethnicity, (iv)origin, (v) religion, (vi) marital status, and (vii) disability.

The Equal Opportunity Act created two institutions: the Equal Opportunity Commission and the Equal Opportunity Tribunal. If a complaint is not resolved at the Commission stage, it can, with the consent of the person making the complaint, be referred to the Tribunal. The Tribunal is the equivalent of a High Court, and it has all powers that a High Court has.

c) Inter-American Human Rights System

* *The IAHRS will be dealt with in detail in Part IV of the guidebook.*

B. APPLYING FOR REDRESS

1. Who can you Bring a Claim Against?

The Commonwealth Caribbean countries have adopted what is called the state action doctrine to determine against whom a claim can be brought for a breach of constitutional rights. This doctrine stipulates that an action by an individual to protect one's fundamental rights and liberties usually lies against the State or against some public authority. The leading case in the Caribbean is *Maharaj v AG of Trinidad and Tobago (No.2)*.[81] Here, Lord Diplock stated that the protection afforded by the Constitution against breaches of fundamental rights and freedoms was against contravention of those rights or freedoms by the State or by some other public authority endowed by law with coercive powers.

The courts have generously interpreted what constitutes a public authority. In the case of *Rambachan v Trinidad and Tobago Television Company (TTT)* the defendant was a private company incorporated under the Companies Act. It was the sole television station in Trinidad and Tobago and was fully owned by the State. The applicant claimed that in refusing to broadcast a pre-recorded show, TTT was infringing his fundamental rights,

81 *Maharaj v AG of Trinidad and Tobago (No.2),* 1978 2 All E R 670.

which included the freedom of expression and equality of treatment under the Trinidad and Tobago Constitution. TTT provided broadcast time to the government free of charge. The court defined public authority endowed with coercive powers as meaning any entity, however constituted, in which the government as a matter of deliberate policy decided in the public interest to participate in a substantial way whether financially or otherwise. TTT was found to be a public body with coercive powers for the purpose of being subject to the Constitution.

In *Wade v Roches*, Roches was an unmarried teacher who was dismissed from her position when she indicated that she was pregnant. She was working for a Catholic school in Belize. The courts held that the Education Act and Rules clearly demonstrated that the church and State are inextricably linked in so far as the provision of education is concerned. According to the Act, the Ministry of Education was under a duty to work in partnership with religious organisations in providing education. This school received grants from the government and as such was required to appoint a managing authority to ensure that the provisions of the Act and Rules were observed. The managing authority had to provide financial statements to the Ministry. The Ministry of Education, having to follow a regulatory pattern set out in those statutes, extensively controlled the public funding of the organisation. This brought it into the public domain. The Court of Appeal held that the private school was therefore exercising coercive powers to the extent that the managing authority could appoint, suspend, release or dismiss a teacher.

In *Fort Street Tourism*, the Belize Court of Appeal confirmed the standard of public authority exercising coercive powers. It said that in deciding whether the body was a public authority, one should look to whether it was performing a public function, which could make an act that was otherwise private, public. Statutory authority could indicate this over the function or control over the function by another public body. However, it was not enough that a public regulatory body supervised the body. This is known as vertical application (or top-down: from the government to the people). This position has been relaxed in Jamaica, providing the possibility of the direct horizontal application of its Bill of Rights. Section 13(5) of the Charter of Fundamental Rights and Freedoms a provision borrowed South Africa's Constitutional provision that it binds, in addition to the State, both "natural and juristic persons, if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right."

A few Constitutions provide for the horizontal application of the antidiscrimination provision. For example in Belize the anti discriminatory section provides that *"no person shall be treated in a discriminatory manner by any **person** or authority."* The Court however, has been reluctant to use this provision, rather relying on the state action doctrine.

2. Who is the Best Claimant?

The best Claimant is a person who is directly affected by the legislation or action being challenged. Where a legal challenge by personally affected individuals is unlikely due to potential stigma, lack of resources to pay for litigation or in obtaining expert evidence, public interest litigants such as organisations representing LGBTI and environmental interests would be the best claimants.

3. Where does one Apply for Redress?

The redress clauses of the Constitutions of the Commonwealth Caribbean provide that where the Constitution's fundamental rights and freedoms, are being or are likely to be contravened an individual may apply to the High Court for redress.

a) Courts of First Instances

The Eastern Caribbean Supreme Court has nineteen High Court Judges each assigned to, and reside in, the various member states under the jurisdiction of Court. The Court has jurisdiction for Anguilla, Antigua and Barbuda, Dominica, Grenada, Monsterrat, St. Kitts and Nevis, St. Vincent and the Grenadines, St. Lucia and the Virgin Islands.

The other territories, the Bahamas, Barbados, Belize, Guyana, Jamaican and Trinidad and Tobago each have a High Court Division where constitutional claims are heard before a High Court Judge. In Jamaica, where there is Constitutional Division of the High Court, more than one judge sits on a Constitutional case.

b) Appeal tribunals

The Eastern Caribbean Court of Appeal hears appeals from all subordinate courts in the OECS territories. The jurisdictions in relation to hearing appeals in both civil and criminal jurisdictions are:

1. In respect of the Magistrates Courts, the Court of Appeal has jurisdiction to hear appeals from "any judgment, decree, sentence or order of a Magistrate in all proceedings."
2. In respect of the High Court subject to certain exceptions, the Court of Appeal is empowered to "hear and determine the appeal from any judgment or Order of the High Court in all civil proceedings."
3. In respect of "any matter arising in any civil proceedings upon a case stated, or upon a question of law reserved by the High Court or by a judge." The Court of Appeal also has jurisdiction to hear and determine the matter. This is, however,

subject to "any power conferred in that behalf by a law in operation in that State."

The Eastern Caribbean Supreme Court of Appeal is comprised of the Chief Justice, who is the Head of the Judiciary and four Justices of Appeal. The Eastern Supreme Court is an itinerant Court; therefore it travels to each member state, and sits at various dates during the year to hear appeals from the decisions of the High Court and Magistrates Courts in member states. The Court of Appeal judges are based at the Court's Headquarters in Castries, Saint Lucia.

The Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council ('the Privy Council') is the final appellate Court for the following Commonwealth Caribbean countries:

- Anguilla
- Antigua and Barbuda
- The Bahamas
- Bermuda
- British Virgin Islands
- Cayman Islands
- Dominica
- Grenada
- Jamaica
- Montserrat
- St Christopher and Nevis
- St. Lucia
- St. Vincent and the Grenadines
- Trinidad and Tobago
- Turks and Caicos Islands

The Privy Council sits in Downing Street in London England.

Appeals to the Privy Council are governed by the rules set out in legislation in the various territories. In order to bring an appeal to the Privy Council, the litigant must be granted leave or permission by the lower court whose decision is being appealed. If that lower court does not grant leave, the litigant would have to seek leave or permission to appeal directly from the Privy Council. In some cases there is an appeal as of right and a slightly

different procedure applies. There are therefore three broad categories of appeals to the Privy Council:

1. Appeals as of right, that is, without the need for permission to appeal (involving civil claims for amounts or property above a certain minimal value or involving proceedings for dissolution or nullity of marriage or matters involving the interpretation of the constitution or redress for infringement of the fundamental rights and freedoms).
2. Appeals at the discretion of the local Court of Appeal (if in the opinion of the Court, the matter is one which, by virtue of its great general or public importance, ought to be referred to Her Majesty in Council for decision); and
3. Appeals by Special leave from the Privy Council (typically in criminal cases where leave is always required).

The Privy Council has been comprised of members of the Supreme Court of the United Kingdom (the final Appellate Court of the United Kingdom itself) as well as of other eminent jurists appointed from the senior judiciary of other Commonwealth Courts.

c) The Caribbean Court of Justice

The Caribbean Court of Justice (CCJ) is a regional Court established by the Agreement Establishing the Caribbean Court of Justice. It was conceived in the 1970's when the Jamaican delegation at the CARICOM Sixth Heads of Government Conference proposed the establishment of a Caribbean Court of Appeal in substitution for the Judicial Committee of the Privy Council.

The CCJ is the highest appellate Court for those Commonwealth Caribbean territories that are CARICOM member states and are parties to the Agreement Establishing the CCJ. In the exercise of its appellate jurisdiction, the CCJ will consider and determine appeals in both civil and criminal matters. The CCJ is currently the final appellate court for Barbados, Belize and Guyana.

The CCJ is made up of a President and not more than nine other Judges of whom at least three shall possess expertise in international law including international trade law. The seat of the CCJ is in Port of Spain, Trinidad, but it is an itinerant Court, that is, it can move and have hearings in any of the countries within the Court's jurisdiction.

Appeals to the CCJ are of right, and do not the need permission to appeal in the following circumstances:

1. Cases involving civil claims for amounts or property above a certain minimal value or involving proceedings for dissolution or nullity of marriage or where a

matter involving the interpretation of the Constitution or redress for breaches of fundamental rights,

2. Appeals at the discretion of the local Court of Appeal (if in the opinion of the Court, the matter is one which, by virtue of its great general or public importance, ought to be referred to the CCJ for decision); and
3. Appeals by special leave from the CCJ

The CCJ has one very unique aspect that distinguishes it from the Privy Council and that is its peculiar hybrid jurisdiction: the appellate jurisdiction and the original jurisdiction in which it has exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty of Chaguaramas. This is in the area of international law. All CARICOM member states are signatories to the treaty and are therefore subject to Court's original jurisdiction.

Member states that sign the agreement that establishes the CCJ agree to enforce its decisions in their respective jurisdictions like decisions of their own superior courts.

C. PREPARATION FOR TRIAL[82]

Developing the Theory of the Case

It is important to have a clear and simple theory of the case to go through the complexities of bringing a case from its beginning to its conclusion.

The development of the theory of the case is essentially a single, coherent framework for the case that will maximize its prospect of success. The theory of the case organizes and structures the set of facts for which their demonstration in court, through appropriate evidence, will result in the desired legal effects. It gives a clear picture of what an attorney must prove, how to counter the other party's position and the strengths and weaknesses of both positions.

Having a clear theory of your case will:

- provide a plausible explanation for as many of the important events as possible, and explain troubling aspects of the case;
- allow to tie together what may appear as disparate and unconnected facts and documents into a meaningful whole, in a sensible and persuasive way;

82 Certain parts of the present section are inspired from the teachings of the following book: Thomas A. Mauet et al, Technique de plaidoirie (Sherbrooke: Les Éditions Revue de Droit Université de Sherbrooke, 1986)

- be apparent to the judge throughout the trial as reflected in every step, from opening statement, through examination-in-chief of our witnesses, cross-examination of opposing witnesses, objections and responses to objections, to closing argument; and
- explain in a persuasive way why the court should rule in your client's favour, based on (i) fairness, (ii) the facts, and (iii) the applicable law.

Thus, the theory of the case ensures consistency in the attorney's position and arguments throughout the phases of the case and provides the basic position from which every action during the trial will be determined.

The theory of the case should be as simple as possible and inherently plausible. The theory of the case should be determined in consideration of:

i. the applicable legal framework (what are the legal tests that have to be fulfilled);
ii. each fact that needs to be proven to fulfill the legal tests;
iii. the evidence to be gathered and presented; and
iv. the anticipation of the other party's strategy.

Remember that the ultimate and only goal here, is to manage your case in such way that you will successfully present all evidence supporting your theory of the case to the court.

1. Evidence Gathering & Organization of Facts

Generally speaking, a great deal of effort should be put into evidence gathering for the very simple reason that without solid preponderant evidence, a case has no merit and, notwithstanding the skills of the attorney and the sophistication of her/his submissions, chances are that the case will most certainly be dismissed. A case built on clear, simple and non-equivocal evidence is the best guarantee to prevail in any litigation or advocacy file.

Should you be practicing alone with very basic tools and assistance or practicing with more means, assistance and equipment, the situation remains the same: you need to build and administer solid, clear and preponderant evidence. Should it be testimonial or documentary, it is your job to put together the most complete evidence available. Therefore, it is important to learn and apply the following basic rules in evidence gathering and management to the reality of your case.

2. Testimonial Evidence

Testimonial evidence is often the most important element or tool at your disposal to prove your case on the merit. Consequently, during or immediately after developing your theory of the case, you should, as soon as possible:

a) Identify all your witnesses and the purpose of their testimony in relation to your theory of the case;

b) Meet with them immediately while their factual recollection is fresh;

c) Indicate to them clearly and in simple words what the process involves, as a reluctant or a coerced witness can make the case more difficult and could have a devastative impact for your case;

d) Spend the necessary time with each witness to put them at ease with her/his eventual testimony;

e) Regardless of the simple or complex aspects of the facts that need to be proven by a witness, it is important to assess the person's basic credibility and communication abilities. This covers the verbal as well as the non-verbal communication skills. A great deal of attention should be given to analyse the person's background or criminal record. When in doubt, do not rely on, or call the individual as a witness to support your case if the facts can be proven otherwise. If you feel you have no choice to call such a witness, proper witness preparation becomes absolutely critical;

f) Once all the details and aspects of a testimony are mutually agreed upon between the witness and you, it is generally recommended that you ask the witness to draft his version of facts on the crucial aspect of his or her potential testimony and to have it signed and dated. The witness will keep a copy and you should keep the original in a safe place. It is also recommended to have said witness sign a statement sworn before a Notary Public or a Commissioner of Oath (other than yourself). This document could eventually serve many purposes, the main one being to help the witness refresh or her memory before any examination on discovery or trial date. Moreover, in certain jurisdictions, the said written and sworn statement of facts could also become admissible as valid secondary evidence. However, the witness must be very comfortable with the facts as described in the event the document is released so that inconsistencies do not come out through examination;

g) Assuming that all above mentioned steps have been successfully undertaken and depending on the complexity and length of your case, you should, while awaiting the beginning of the examination or trial, be regularly in touch with the witness and, if needed, rehearse the witness's testimony. As tedious and

delicate that such task could be, it is often your best insurance policy against potential last minute “cold feet”, panicked or reluctant witnesses;

h) It is recommended to sit with the witness to explain exactly how the court hearing will proceed (*i.e.* who sits where, who will say what, how the cross-examination works) and explain certain feelings that could arise and how that could be dealt with (*i.e.* asking for a break, slowing down, etc.) approximately one or two days prior to the testimony. You should go through the testimony and practice a cross-examination. Although practicing a cross-examination could be difficult for the witness, once again, such preparation will only help them with the realities of presenting often difficult, complex and emotional facts to the court;

i) Unless you could not do otherwise (ex: judiciary compulsory disclosure), it is strongly recommended that you keep the names and the substance of your witness’s testimony secret and that you advise them to do the same. These documents are generally protected by solicitor-client privilege.

3. Expert Evidence

Expert evidence is a very important and delicate part in a case. Whenever you need to base your submissions on the opinion of one or many experts, some basic fundamental questions need to be asked to assess the probative value of expert evidence. A court or a tribunal will assess the probative and determinative value of the evidence provided by an expert in light of certain criteria. Therefore, the attorney should carefully ask themselves the following:

a) Over and above her/his basic professional qualifications, what are the expert’s real qualifications in connection with the point to be established?

b) What are the expert’s qualifications? Set aside the expert’s academic qualifications, does she/he possess enough practical experience to be credible?

c) From the outset, you need to assess your expert witness’s ability to clearly and simply communicate complex topics;

d) You need to review in detail your expert’s qualifications/resume or credentials. Experience reveals that many experts are inclined to exaggerate some parts (academic or practical) of their curriculum vitae and this, unfortunately, is discovered too late, for example during the cross-examination on the admissibility of your witness’s status as an expert at the outset of a trial. Take the time with your expert to review each and every detail of his or her credentials and inform your expert on the potential disastrous impact that any false or inaccurate information may have on his or her basic credibility;

e) What is the expert's approach regarding the method(s) or theories raised by other experts in the file? Does she or he bring a unique or untested theory or does she or he rely on proven, well documented and established principles?

f) Is the expert's work serious and methodical? Would a judge or a jury be easily able to follow and understand every step of the expert's logical path and conclusion(s)?

g) Does the expert demonstrate a minimum of objectivity, absence of unreasonable bias and respect for other experts' theories or school of thoughts?

h) Is your expert's opinion based on unequivocal and clear facts as opposed to uncertain, disputable facts or popular generalities?

i) Does your expert possess all necessary available documentation supporting the thesis or opinion(s) raised in her or his report?

j) Are the scientific principles or theories raised in your expert's report or testimony supported by plausible and preponderant factual evidence?

4. Documentary Evidence

In the hand of a skilled attorney and with the right timing, documentary evidence could have an amazing impact in favour of your theory of the case. Properly introduced, written/documentary evidence produces a very strong effect on a judge. Human nature being what it is, people find documents or written instruments on paper not only more interesting but more reliable. Therefore, you should learn and possess on the tip of your fingers all pertinent rules on the introduction of written/documentary evidence. Moreover, you need to bear in mind that the timing for introduction of such evidence is sometimes as much, if not more, important than the content of the document itself. Generally speaking, you should ask yourself the following question: in strict respect of applicable rules, when am I going to get the most favourable impact on a judge or a jury of the introduction of my document?

Here are few practical and general recommendations on documentary evidence management:

1. A great deal of care should be taken in the conservation of written/documentary evidence. As long as you are not breaking any rules of practice, you should file only copies and substitute them for originals at trial time. In the meantime, you should offer to other parties' attorneys the possibility of consulting or comparing the copies disclosed to them with the original documents in person and in your presence at your office.

2. You need to implement a simple and very "user friendly" type of documentary evidence classification system. A good classification system is one where the attorney could:
   - Immediately find the document he is looking for;
   - Remember the purpose of a document;
   - In an instant, know the way it should and will be introduced as pertinent admissible evidence (and by which witness).
3. In certain cases there may be a significant number of documents, which the opposing side will not contest (particularly certain background documents which provide context to the court without being particularly harmful or helpful to either side). In such a case, the opposing attorney may agree to sign a document admitting to the authenticity of such documents. This means that you do not have to introduce each of these documents through a witness, which can save precious trial time.

A great deal of technical progress has been implemented in many jurisdictions to facilitate the introduction, disclosure and management of documentary evidence, but it is still a work in progress in many others. This being said, whether you decide to rely on a sophisticated electronic documentary data system or to use a classical "paper" method, you need to find and rely on a method that you will be comfortable at all stages of the case.

In complicated cases, we strongly recommend that you rely on an easy-to-consult systematic chart which should be kept in your docket or file vault and which will facilitate your understanding and/or recollection of all the above-mentioned points.

Many other approaches to documentary or written evidence management do exist and are accessible on the web or in law libraries. You should find the one that works best for you and stick to it.

5. Anticipating the Strategy Put Forward by the Opposing Side

The anticipation of the opposing side's strategy is the corollary of the development of your theory and management of the case. This aspect of a trial or any other form of hearing on the merit needs to be analysed and given all your vigilance and attention at all stages of the case, particularly after the completion of compulsory evidence disclosure obligations has been fulfilled by the opposing side. Although surprises could always happen, you should normally be able to anticipate the other party strategy without much difficulty.

Anticipating the strategy or particular arguments of the other side allows you to strengthen certain aspects of your case. If you believe certain arguments will be raised, but you cannot be sure, it may be best to keep your response to such arguments and supportive evidence ready but in the side-lines. This way, in the event such arguments by the opposing arguments are indeed raised, you are able to respond quickly and thoroughly.

6. Assessing the Value of the Evidence

The attorney must be familiar with and assess the value of the evidence. He identify how each fact and each element of the legal tests at issue will be proven in court. One must analyze how to ensure that the "good" facts are admissible. This is a crucial part of your mission as an attorney. It is also important to note that even if a certain fact or evidence is not in your favour, this weakness in your case must be addressed and dealt with from the outset. Ignoring weaknesses in your case will often come back to haunt you when it is too late to respond. As well, being open with the court about certain weaknesses in the evidence or in the law will often serve to bolster your credibility with the court.

Although much could be said on this point, fundamentally speaking, this aspect comes down to your basic skills (with all the rules and procedural tools at your disposal) to assess or weigh the opposing party's evidence, as well as your own. Therefore, you need to make sure that you use all the disclosure and/or evidence communication means available in your jurisdiction to its fullest potential. Although certainty is rare, once this has been done, and subject to any other useful and legal out-of-court information gathering methods (ex: private investigation), you should be able to reasonably assess the merit of both parties' positions.

It should be noted that your theory of the case should also consider emotional factors. Cases generate positive and negative emotional reactions and one must anticipate such reactions in the jury and prepare accordingly.

Preparation of Documents for Trial

7. Opening statement

There are many ways to physically prepare your documents for a hearing on the merit of a case and most of them have been proven successful. If you haven't adopted a method, here are two of them that are widely appreciated by attorneys. They are called the "Trial Folder" and the "Trial Binder" methods. Before examining them in more detail, let's talk about general considerations on the classification of a typical attorney's file for trial. Although data and file management is also addressed in other parts of this guide, it is

discussed again here given its fundamental importance and particularly in view of preparing your files for trial.

8. The Organization of the Attorney's File

The amount of documents generated by average length litigation is impressive and you need to be able to successfully manage this mass of documentation and to rapidly find what you are looking for when you need it.

Usually from the outset of the case, you will begin by relying on "accordion type" file folders in which you should place in logical order:

i. Court proceedings
   - All procedures and Court documentation in their chronological order of production or service (with an index);
   - The examinations on discovery or any other type of examination as well as any witness or third parties written statement(s), including undertakings;
   - Any incidental motions initiated by the parties in the file;
   - Interim or interlocutory Court orders;
   - Subpoenas and proof of service documents.

ii. Evidence
   - Put your documentary evidence in different, well identified legal size folders bearing a clear and in bold characters the type of documents it contains, for example:
     - Bills, invoices, purchase orders, receipts, etc.;
     - Correspondence exchanged between the parties;
     - Photos, maps, schematic documentation, etc.

iii. Attorney documents
   - Factual summary of the case and its different aspects, personal interview notes;
   - Written client/solicitor professional retainer agreement;
   - Case correspondence with the opposing attorney or the Crown;
   - All relevant jurisprudence or doctrinal articles pertinent to the case;

- Miscellaneous documents or notes.

The cardinal rule here is to organize the file in a logical and “user friendly order” that suits your preferences and by which each and every document could be found in a matter of seconds.

9. The Trial Folder and the Trial Binder Methods

Without limiting the generality of the foregoing and with the arrival of the trial date, you will need to adapt your file document management to the courtroom environment. The objective for using the trial folder or trial binder method is to facilitate and simplify your work in the courtroom. As you know, it would be great if you could concentrate on one thing at the time during an examination or cross-examination, but it is rarely the case and this is the reality by which every trial attorney is confronted. Moreover, and as the popular saying goes, “timing is everything”. This could not be more true than during a hearing on the merit of a case.

Let’s suppose for an instant that you have been successful in the cross-examination of a crucial witness and that you need to immediately confront him with a contradictory or inconsistent statement that he made in the past. In this type of situation, a litigator cannot afford any gap in his or her cross-examination timing and he or she will need to have the proper documentation ready.

Those two documentation management methods constitute a variation on a same theme, and they are designed with the same goal: the implementation of a systematic and simple way to facilitate the administration of any type of evidence during any hearing.

a) The Trial Folder Method

In this method, the pertinent information on each and every phase of a trial is noted in individual color folders classified inside a main accordion vault and the barrister simply has to rely on the appropriate section to find what he needs. This method is more appropriate to lengthy and more complicated court cases were the documentation is too voluminous to fit in a Trial Binder.

b) The Trial Binder Method

In this second method, all the documentation necessary for each phase of the trial is placed in a “three metal holes binder” with properly marked dividers. The trial binder can be adapted to each attorney particular’s needs, but in most cases, it is divided in a sufficient number of easily identifiable sections. We often find in a trial binder the following sections:

i. Facts: This section should contain a factual summary and each and every witness's signed and unsigned written statements. You should also include in a sub-section a summary enumerating all essential facts of the case and a summary of events in chronological order;

ii. Procedures/applicable law: this section should display in chronological order all procedures or Court documents pertinent to the case. Moreover, it should also include all pertinent excerpts of applicable legislation;

iii. Examinations: Examinations, examination summaries with an index, and all past and current party or witness undertakings (document or verbal information);

iv. Preliminary and interlocutory motions: all preliminary or other motions made or decided prior or before final judgment on the merit of the case;

v. Witness information and testimony sheets: you should note on individual sheets (one for each potential or possible witness) all the pertinent details: name, address, phone number, electronic address and a short summary of the purpose and object of their testimony.

vi. Exhibits: A list of all exhibits that you intend to produce at the hearing, as well as the originals to be provided to the court as well as 3 copies: one for your use and the others to be distributed to the witness and the other parties. The following table could be used as a way to organize the information collected in relation to your exhibits:

Exhibit number	Description	Witness	Date of Productio	Admitted	Refused	Reserved
P-1	Birth certificate of [insert name of victim]			X		
P-2	Photographs				X	

vii. Your witness "will say" sheets: this is your case road map! Put in this section in logical order of appearances one sheet per witness where you will draft in bold letters – the identity of the witness – the purpose and object of his testimony

(what do you need him to say) – each and every documentary exhibit that you want to be introduced as evidence by this particular witness – each and every factual circumstance that you want to be covered or commented on by the witness;

viii. The other party's witness "will say" cross-examination sheets: this is the corollary of the above-mentioned category, with the addition of questions or areas of cross-examination that you intend to deploy against the other party's witnesses;

ix. Pleadings and submissions: subject to any adjustment you may need to do after the completion of the hearing, you should put in this section a long or abbreviated form of your submissions for the tribunal;

x. Jurisprudence and doctrine: you should put in this section sufficient numbers of cases or doctrine in favour of your theses that you intend to file in support of your pleadings.

Trial

10. Opening comments

The trial or the hearing is the culmination of all the litigation lawyer's careful preparation and work. Generally speaking, if you have invested time and efforts in all the previous stages of your file, you should not worry about your performance at the trial. This being said, you should never underestimate your opponent and it is perfectly normal to feel a certain stress before the opening date of a trial. A lot has been said and published on all the various aspects of the trial and more specifically on the conduct of the attorney during this most important phase of a case. It is not our intention to repeat what was published on the subject, but we feel that it would be important and appropriate for us as well as useful for the readers of this manual to share the following practical tips and advice selected among some of the best professional practices.

We have divided our text in two distinct, but nonetheless complementary sections. Firstly, tips and advice regarding the examination /cross examination of witnesses and the various approaches to evidence management during trial and, secondly, proven tips and sound advices applicable to the oral argument at the tribunal.

The Examination/Cross-examination of Witnesses and Evidence Management during Trial

11. Ordinary Witnesses

As discussed further above, the most important aspect to remember here is that you need to invest enough time in the adequate preparation of your witnesses. It is your most important duty to review with a witness each and every aspect of his/her testimony and to ensure they understand exactly how the court date will unfold for both the examination in chief, as well as the cross-examination by the opposing counsel.

You should bear in mind and explain to your witnesses that in most cases you cannot ask your witness leading questions. A leading question is one that suggests a certain answer, such as “Isn’t that true that the car that hit you was blue and white?” It’s a question where the answer is often yes or no. These questions are inappropriate because it looks like it is the lawyer that is testifying and it impacts negatively on the witness’ credibility.”. However, leading questions are generally acceptable under cross-examination, and in fact generally preferable because they are a better way of creating inconsistencies and testing the witness’ credibility.

Questions to your witnesses should be short, clear, and preferably open. By open questions, we mean the types of questions which command a developed and detailed answer, as opposed to what is called a closed type of question, which could simply be answered by yes or no.

As a general rule, and based on your theory of the case, you should be able to identify the strengths and the weaknesses of your case before the trial begins. Do not try to overlook or skip aspects of the evidence that are not in your favour and prepare your witnesses accordingly, as it is almost certain that the opposing party lawyer will address those same points. You may want to address these witnesses directly in direct examination in order to do damage control before the cross-examination.

You should familiarize yourself with the pertinent rules of service of subpoenas and witness travel expenses applicable in the jurisdiction of the trial.

Usually, the order of introduction of your witnesses will follow the logical order of the components of your theory of the case, but in some cases, for strategic or other reasons, you will need to re-arrange the order of presentation of your witnesses. As we have mentioned earlier in this manual, remember that it is highly preferable to start and finish the hearing with your strongest witnesses and leave the weakest for the middle of your list of appearance.

Finally, the following advice should be followed for the examination or cross-examination of the witnesses:

- A witness examination or cross-examination should never be vexatious or abusive;
- You should never interrupt the answer of your witnesses, but you should never hesitate to repeat or re-formulate your question if you need to, as the witness needs to clearly understand what you are asking him/her;
- In order to shorten the testimonies of all witnesses, you should draft and file with the other party's attorney of a list of admissions at the beginning of the trial;
- It is tempting to take as many notes as possible during the examination or cross-examination of a witness by the opposing counsel. However, while it is important to take sufficient notes, you should still ensure that you are able to nonetheless concentrate your attention on the witness's answers and non-verbal body language or general attitude. Whenever possible, it is best to have a co-counsel present who can take notes to allow you to properly follow the examination. This is also true for note-taking during your own examination;
- While examining or cross-examining a witness, pay attention to the presiding judge's attitude. Is she/he taking notes? And does her/his body language show any degree of indifference to your line of questions and the witness's answers?;
- Although this may vary as you gain more experience, it is generally good practice to never ask a question to which you don't think you know the answer;
- It is important to be properly prepared and to understand exactly what facts you want to prove with each testimony. Often this means that you will have a list of questions ready as well as an understanding of the answer you will receive for each question. Once you have more experience, it may be better practice to simply have a list of what facts you hope to prove through the testimony, which allows you greater flexibility to lead the examination;
- Despite the above note about being prepared, it is essential that you are not too bound to your list of questions. With a good understanding of what you need to prove, you must ask your question and then carefully listen to your witness. Often information comes out in ways that are unpredictable, even after care ful witness preparation. You need to listen carefully and ask follow-up questions as necessary. Counsel should follow his witness' train of thought and not stick to pre-established questions as this can be disastrous. This is even more important for cross-examinations;
- After you have finished asking your questions, before finishing the examination it is good practice to take a minute to look at the list of questions or list of facts you

need to prove in order to ensure that everything has been covered and to see whether any final questions are needed;

12. Expert Witnesses

In most jurisdictions, it is compulsory to send a copy of your expert report within a reasonable period of time before the hearing on the merit of the case, and this rule is usually strictly enforced by judges.

A meeting with your expert(s) is highly recommended before the trial to identify the elements of divergence with the other party's expert as well as areas where the witnesses agree. By doing so, you will be able to spend more time on the real opinion issues at stake.

It is important to remember to ask your expert to supply an original and a sufficient number of copies of his resume.

As experienced as your expert could be, he/she must adopt an attitude of competence, objectivity and neutrality and address the tribunal in simple and clear language. In the event that the expert needs to use a more technical and specialized vocabulary, it is highly recommended that he/she attach a glossary to their expert report.

Oral submissions (Legal arguments)

Apart from the presentation of evidence to the court, there is generally an opening statement and closing arguments. The opening statement is your first critical opportunity to frame the case for the court and to inform the judge or jury what the theory of the case is, and how you intend to prove each element of your case. The opening statement should be clear, simple and should rely not only on legal argument, but the court's sense of logic and fairness. The opening statement sets the stage or the lens though which the judge or jury will see and understand the evidence to be presented.

The closing legal argument is delivered at the end of the trial, when all of the evidence has been presented. The closing argument is essentially the oral presentation of the facts and arguments in support of your case, using the documentary and testimonial evidence already presented to support such arguments as well as the required legal authorities. Its purpose, whether you are prosecuting or defending, is to convince the court of the merits of your claim.

A closing argument should be structured and presented in accordance with your theory of the case, as previously developed, to ensure consistency in the presentation of the facts before the jury and/or the judge throughout the trial.

The closing argument can be presented in the following order:[83]

- Presentation of the legal background
- Determination of the undisputed facts
- Statement of the questions in dispute
- Presentation of the thesis
- Argument: factual and legal elements

13. Conclusion of the argument

During both the opening statement and closing argument, it is important to be well prepared, but not to be overly bound by your notes. This means you should not be simply reading from your notes. You should be able to engage with the judge to ensure that your pace is appropriate and that she or he are following. If the judge is obviously engaged in taking notes and not able to listen, it is usually appropriate to wait until she or he finish and is once again ready to listen. The judge will generally appreciate you following their pace and will ensure they are able to properly follow the logic of your argument. If questions are asked, you should be able to respond to the question, and readjust the remainder of your argument. However, it may be appropriate to respond simply to a question while informing the judge that you will answer the question in more depth at a later stage in your argument (but always answer the question).

Following the judge's pace means not making her or him wait while you scrounge for a document. Therefore, before beginning, you should make sure that all documents you intend to refer to are easily accessible.

In addition, during or at the end of your submissions, the tribunal may ask you questions on a particular aspect of the case. In most instances, these questions address factual or legal matters of interest to the court. If this happens, please give a clear answer to the question(s) and, if you do not know the answer, tell the judge. It is important not to try to come up with an answer if you are not totally convinced of its merit.

Although it may be tempting to try to over-sell your case, you should avoid the use of too many adjectives and 'false intensifiers' such as "completely wrong", "absolutely" "unfounded", "very serious error", "clearly", "certainly", "blatant violation", etc. It is much more persuasive to present your case clearly, concisely and with conviction. While it may seem counter-intuitive, the more you use these words, the less persuasive you will be.

83 Yves Gratton, Réal Ouellet, *Représentation – Collection des habiletés 2013-2014*, (Québec : École du Barreau du Québec, 2013), p.81

Presenting your case clearly and honestly, and by acknowledging where there may be weaknesses, will make you more credible and ultimately more persuasive.

The litigant should pace his words in a regular manner. The pace should be controlled, neither too fast nor too slow, with breaks when needed. Remember that, generally, the judge who hears the argument will take notes, so that the flow of speech should be adjusted depending on who is listening and if the person wants to write down some arguments that are presented to him. Wherever possible, it is best to avoid long interruptions caused by retrieving one's documents in the file or scouring through handwritten notes used in preparation of the closing argument.

To make a good closing argument, you must properly articulate and pronounce the words and sentences used. It is opportune to change your voice in supporting the important points that should emerge, which will make your presentation more interesting. Diction and tone are important tools that litigants need to learn to use in order to increase their ability to convince.

By maintaining eye contact with the judge, you will be able to see his reactions to some of your arguments and respond to his questions accordingly.

Lawyers always stand up when addressing the court and when the judge addresses them. Although it goes without saying that you do not to interrupt a judge when he/she speaks, the same applies for your fellow lawyers. Generally, lawyers do not interrupt each other (unless there is an objection during examination) and recognize the other's right to apply to the Court or to make his argument without being interfered. Showing respect to the court and everyone in it will only help you to develop a reputation as a respectful, well-prepared and courteous lawyer.

Irony, vulgarity, emotional abuse, sarcasm or satire are not appropriate. Insulting your opponent or anyone else involved in the case will not make you win your trial; the exact contrary could instead happen, the judge could have more sympathy for the opposing party. You must have confidence in yourself and present your arguments with an unwavering assurance. This does not mean that you should be pretentious, snooty or arrogant.

With respect to the content of your argument, preparation is the key to success. Before preparing your pleading plan and the arguments you will use, you must have made a thorough study of the case, which includes the legislative provisions and applicable case law. The theory that you will support in front of the court must be carefully elaborated and well structured. In this way, you will decrease greatly the chances of being caught by surprise after a question from the judge and your entire presentation will be delivered with greater ease.

At the beginning of the closing argument, it is recommended to summarily present the legal framework of the dispute, that is to say, indicate the remedy requested, its procedural vehicle and applicable legislation. Then, you should briefly outline the facts that will help to identify properly the dispute and state the relevant undisputed facts resulting from admissions.

Then comes the questions in dispute. They must be exposed briefly, usually in the form of proposals. The questions in dispute can be of two kinds. There are those of factual or legal importance and those related to the merits of the case.. Clarity and conciseness are of utmost importance. A well-phrased question guides the debate and arguments.

The presentation of the thesis consists in stating the relevant elements put into evidence at the hearing and relates to matters of law that will support the thesis. Right at the beginning of your argument, you will need to present your theory of the case by answering the questions in dispute. It is not to reaffirm all of what was said at the trial, but rather to focus on proven facts that are relevant to your thesis and relate it to each component of the burden of proof. The thesis statement tells the court the direction that the lawyer gives to the dispute.

During the argument about the matters of fact and law, you will have to present to the judge convincing arguments that are favourable to the maintaining of the thesis. It is important to do a reminder of the applicable legislation and a review of the case law and doctrine that have interpreted these provisions. The next step is to re-examine and analyze the evidence presented at trial and to integrate the facts in the review of the questions of law. Your objective is to bring the judge to be in a position where he will have no choice but to draw to the conclusions that you seek.

Once this analysis is completed, it is appropriate to finish by stating that these elements have shown that, on the balance of probabilities (or beyond a reasonable doubt, depending on the burden of proof), the defendant has committed an offense against the applicant, or, on the opposite, if you represent the defendant, that the plaintiff has not discharged his burden of proof.

Anticipating the arguments of the opposing party must be done with great rigor. It is essentially an analysis based on the evidence presented by your opponent and not just what you expect. It is always between to comment on the weaknesses of the legal and factual reasoning of your opponent's thesis, and respond to it immediately. In addition, it is relevant to mention the weakness of your own arguments by presenting the necessary nuances, rather than leaving this task to your opponent alone.

In the conclusion of your closing argument, it is suggested to express again a summary of the findings of the pleading or to briefly restate the aims of the demand and to conclude

by saying that the applicant's request should be granted or that the accused must be convicted.

When possible, provide to the Court a written detailed summary of your submission, in the same order as your oral submissions. This is a useful tool for the Court when drafting its judgment. You never know, the Court may be tempted to use parts of your written submission when writing its judgment!

Above all, think of yourself as a story-teller. Litigation is at its most simple, a clash of competing stories. Your closing argument is a chance to bring everything together into one cohesive and persuasive story. Make sure all the pieces fit together (the facts, the evidence the legal tests and arguments) and that the conclusions you seek are a logical and fair outcome of your story. Strategic litigation is often long, complex and extremely emotional. Your closing argument is a chance to bring it all together, to frame the case and to convince the judge of your story and that the outcome requested is simply a natural consequence of the facts.

Building case profiles

14. Extrajudicial police killings (Jamaica)

The story of the 1999 fatal beating of Michael Gayle, a mentally ill young man, by members of the security forces horrified all those who heard it. Ms. Jenny Cameron, the mother of Michael Gayle came to JFJ seeking legal assistance in order to know the truth about the death of her son. JFJ's work on the case came to define the organization in the public eye.

a) Background

In 1999, Michael Gayle's tragic death was merely one of 151 deaths of persons at the hands of members of the Jamaican Constabulary Force (JCF) that year and one of hundreds of such killings committed by members of the JCF every year in Jamaica. Indeed, between 1990 and 2000, according to official statistics, an average of 140 people per year were shot and killed by Jamaica's police, a shockingly high figure in a country of only 2.6 million people. A widespread pattern of police extrajudicial executions has been documented by international organizations,[84] international and national human rights

84 *See U.N. Commission on Human Rights, Special Rapporteur on Extrajudicial* Executions, "*Summary or Arbitrary Executions, Addendum to the Report of the Special Rapporteur Philip Alston (Follow-Up to Country Recommendations)*" (2006) *E/CN.4/2006/53/Add.2 at pp 45-75* (*http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/121/29/PDF/G0612129.pdf?OpenElement*). *see also* *U.N. Commission on Human Rights, Special Rapporteur on Extrajudicial* Executions, *"Summary or Arbitrary Executions, Addendum to the Report of the Special Rapporteur Asma Jahangir submitted pursuant to Commission on Human Rights*

NGO's,[85] and the State.[86] According to Amnesty International, police extrajudicial executions, abuse and brutality have been a longstanding tradition in Jamaica, stretching back at least to the early 1970s.[87] Amnesty International documented that police shot dead more than 1,400 people in that decade, a total that "borders on a human rights emergency."[88] Things only got worse in the new century. Between 2000 and 2002, the number of deaths rose to 150 per year and then, after decreasing slightly in 2003 and 2004, rose again to 168 in 2005.[89]All in all, between October 1999 and February 2006, at least 700 and potentially more than 800 persons died in the line of fire of police.[90] In 1986, an Americas Watch Committee report, "Human Rights in Jamaica", concluded that there existed in Jamaica: "a practice of summary executions by the police.[91]" In 2012, the US State Department listed summary executions and corruption as major issues within the Jamaican security forces[92].

b) Extra Judicial Killing Impunity

UN Special Rapporteur on Torture, Dr. Manfred Nowak, noted the issue of impunity following his visit to Jamaica in February 2010:

> *"The Special Rapporteur is also concerned about the high number of murders committed each year, including the large number of people who are killed in police operations in circumstances that are not always clear. The Special Rapporteur*

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resolution 2003/53 (Mission to Jamaica)" (2003) *Doc. E/CN.4/2004/7/Add.2* at pp *59-77* (*http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/162/17/PDF/G0316217.pdf?OpenElement*).

85 *See, e.g.,* Jamaicans For Justice and The George Washington University Law School International Human Rights Clinic, "*Killing Impunity: Fatal Police Shootings and Extrajudicial Executions in Jamaica: 2005-2007*" (2008), online: Jamaicans for justice website <*http://jamaicansforjustice.org/download/others/Report%20on%20Extra%20Judicial%20Executions%20in%20Jamaica%20Combined%20%20(with%20out%20Kraal%20%20Report).pdf* >; Jamaicans For Justice, "Pattern of Impunity: A Report on Jamaica's Investigation and Prosecution of Deaths at the Hands of Agents of the State" (2005), online: Jamaicans for justice website <http://jamaicansforjustice.org/?s=pattern+of+impunity&submit=Go>.
Human Rights Watch, Jamaica: Investigate Police and Military Killings, (2001), en ligne : Human Rights Watch website <*http://hrw.org/english/docs/2001/07/12/jamaic127_txt.htm*>.

86 *In the 2003 UN Report, the Special Rapporteur based her conclusions on official statistics provided by the JCF's Bureau of Special Investigations ("BSI"), the Police Statistics Unit of the JCF, and the Ministry of National Security. See 2003 UN Report, supra note 1, ¶ 22.*

87 Killings and Violence by Police: How many more victims*?, Amnesty International Report, published April 9, 2001, at pages 3 and 9 – available at: http://www.amnesty.org/en/library/asset/AMR38/003/2001/en/d104e266-dc2d-11dd-9f41-2fdde0484b9c/amr380032001en.pdf ; 2003 UN Report, supra note 1, ¶ 22;*

88 *Amnesty Int'l, Jamaica - Police Killings: Appeals Against Impunity, at 2, AMR 38/012/2001, Aug. 2001, available athttp://www.amnesty.org/en/library/info/AMR38/012/2001/en*

89 *2006 UN Report, supra note 1, ¶ 46*

90 *Id., supra note , ¶ 47; Press Release, Amnesty Int'l, Jamaica: First police officer in over six years convicted of murder while on duty (Feb. 23, 2006), available at http://web.amnesty.org/library/Index/ENGAMR380012006?open&of=ENG-JAM*

91 *Supra Note 4* Killings and Violence by Police, *at 7.*

92 US State Department, *Human Rights Report 2012, full reference. Available at: http://www.state.gov/documents/organization/204673.pdf*

> *heard accounts of murders as a result of excessive use of force by the Jamaican Constabulary Forces or the Jamaica Defence Forces, which in some cases may amount to extrajudicial executions. He was also concerned that many investigations are not prompt or effective, and that prosecutions in cases involving the security forces are rare (our emphasis)*[93]

Dr. Nowak's assessment of investigations of extrajudicial executions allegedly perpetrated by security forces echoes that of his colleague Dr. Philip Alston, UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions from 2004 to 2010 following his own visit to Jamaica, which took place five years earlier:

> *[W]hile the number of persons shot by the police [in Jamaica] reached a new all-time high in the year 2005, the inexcusable situation of nearly complete impunity for these killings persists, reinforcing the tendency of law enforcement officials to substitute extrajudicial executions for investigation and criminal procedure.* [94]

It has long been recognized that it the obligation of governments to carry out exhaustive and impartial investigations into all allegations of violations of the right to life, to identify, bring to justice and punish their perpetrators, and to take effective measures to avoid recurrence of such violations[95]. However, it appears all in Jamaica do not necessarily adhere to such obvious truths.

c) Michael Gayle's Death

It is reported that in August 1999, security forces had stopped Michael Gayle during the course of an unannounced curfew in the area. An eyewitness reported that when he was stopped, Michael told the security personnel that he was going to get some weed and asked them, "Why you corralling off the place?" He then attempted to ride away on his bicycle, but the police and soldiers knocked him off and beat him, causing him to go unconscious. Michael Gayle's mother further reported that she had tried to stop the beating of her son by telling them that he was mentally ill, but her entreaties were ignored. Michael was subsequently arrested and taken to a police station where he was

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93 *UN Doc. A/HRC/16/52/Add.3 (11 October 2010), par. 35; see:* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/169/27/PDF/G1016927.pdf?OpenElement

94*See Report of the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Detention -- Follow-up to Country Recommendations (E/CN.4/2006/53/Add.2, 27 March 2006) - Note 1, at ¶ 75;* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/121/29/PDF/G0612129.pdf?OpenElement

95 UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 11 (Rev.1), Extrajudicial, Summary or Arbitrary Executions*, October 1997, No. 11 (Rev.1), available at: http://www.refworld.org/docid/479da6e02.html [accessed 30 April 2014] *In this connection the Special Rapporteur draws on principles 9 to 19 of the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions and principle 7 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. See also the Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (United Nations publication, Sales No. E.91.IV.1) and the Guidelines for the conduct of United Nations inquiries into allegations of massacres (United Nations Office of LegalAffairs, 1995).*

charged with assaulting a police officer. While there, he began vomiting blood. Ms. Cameron begged the police for permission to take him to the hospital. Only after she was made to clean up the vomit was she given permission. Michael Gayle died three days later of a ruptured stomach, caused by the brutal beating by the security forces.

d) Difficulty with the Autopsy

JFJ attempted to assist Ms. Cameron by attaining an independent pathologist to observe the autopsy of Michael's body. However, because of intimidation by Jamaica's chief forensic pathologist, it was difficult to get a local pathologist to attend to the autopsy. A forensic pathologist stationed in Barbados had to be brought to Jamaica to observe the Post Mortem.

When the independent observer, Dr. Ramalu, arrived at the morgue on the morning of the post mortem, the Government's pathologist recognized him as a colleague as they had trained together in India. The independent observer was still refused admission to the morgue to observe the post mortem. It was stated that departmental rules prohibited this. However, quick phone calls to the Director of Public Prosecutions (DPP) by Ms. Cameron's attorney confirmed that there were no legal obstacles to someone observing a post mortem on behalf of a family member. This made no difference to the stance of the government pathologists, who steadfastly refused to allow Dr. Ramalu to observe. Eventually, they said that while Dr. Ramalu could not observe, he could perform the post mortem.

After further delay, due to Dr. Ramalu's insistence on ensuring the presence of a police photographer during the autopsy, it went ahead. The cause of Michael's death was documented to be "peritonitis secondary to a ruptured stomach" confirming the horrific nature of the beating.

e) No Charges Brought – The Inquest

The DPP ruled that no charges would be brought in the killing of Michael Gayle and the case was referred to the Coroner for an Inquest to be held.

The Inquest was held over a two-week period in December 1999 and the Coroner's Jury returned a verdict that 'all the Security Force personnel present at the barricade on the night of the beating of Michael Gayle' should be charged with Manslaughter. Despite this verdict the DPP refused to charge any of the Security Force personnel involved.

The IACHR

JFJ referred the case to the Inter-American Commission on Human Rights. In the commission's view, the tragic circumstances of Mr Gayle's death starkly illustrates the

dangers that arise when states fail on a systematic basis to ensure strict accountability on the part of its own agents for serious human rights violations.

The Commission went on to hold that the State was responsible for violating Mr. Gayle's right to life (art. 4 of the American Convention on Human Rights), right not to be subjected to torture and other inhumane treatment (arts 5(1) and 5(2)), right to personal liberty (art. 7 of the Convention) and rights to a fair trial and to judicial protection (arts 8 and 25 ACHR)[96].

The Inter-American Commission also made the following recommendations on the Michael Gayle case:

> *Grant an effective remedy, which includes the payment of compensation for moral damages suffered by Michael Gayle's mother and next-of-kin, Jenny Cameron, and a public apology by the State to the family of Michael Gayle.*
>
> (i) *Adopt such legislative or other measures as may be necessary to undertake a thorough and impartial investigation into the human rights violations committed against Mr. Gayle, for the purpose of identifying, prosecuting and punishing all the persons who may be responsible for those violations.*
>
> (ii) *Adopt such legislative or other measures as may be necessary to prevent future violations of the nature committed against Mr. Gayle, including training for members of Jamaican security forces in international standards for the use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, summary executions and arbitrary detention, and undertaking appropriate reforms to the procedures for investigating and prosecuting deprivations of life committed by members of Jamaica's security forces to ensure that they are thorough, prompt and impartial, in accordance with the findings in the present report. In this respect, the Commission specifically recommends that the State review and strengthen the Public Police Complaints Authority in order to ensure that it is capable of effectively and independently investigating human rights abuses committed by members of the Jamaican security forces.*

The Commission went on to hold at paragraph 94 of its judgment:

> *Accordingly, the commission considers that in the present case, the investigation into Mr. Gayle's death should have been conducted from the outset by a body*

96 IACHR, Report no 92-05, Case 12.418, MERITS, MICHAEL GAYLE *vs* JAMAICA (October 24, 2005*), par. 110-113; see at* http://cidh.org/annualrep/2005eng/Jamaica.12418eng.htm.

independent from both the Jamaican constabulary force and the Jamaican defence force, with the authority to fully and effectively investigate both of these bodies and their respective roles in Mr. Gayle's wrongful death in a manner that would result in the criminal prosecution and punishment of those responsible.

f) The Results

The impunity and lack of accountability of the security forces and credible allegations of systematic and continuing abuse of citizens' rights up to and including the ultimate breach of rights – the loss of life by citizens at the hand of security forces, was brought to the attention of the IACHR by the Michael Gayle case. As a result of the ruling and recommendations put forward by the IACHR in the case the Government of Jamaica enacted two pieces of legislation aimed at ensuring an independent and thorough investigation into incidences involving the abuse of rights of persons by members of the Security Forces and other State agents.

(i) The Independent Commission of Investigation Act (2010) established the Independent Commission of Investigations (INDECOM) as a Commission of parliament mandated "to undertake investigations concerning actions by members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of the rights of persons..."

(ii) Amendments to the Coroners Act provided for the establishment of the Office of the Special Coroner mandated to "exercised jurisdiction and functions of the Coroner in respect of any death occurring at any place in Jamaica where there is reasonable cause to suspect that the death occurred as a result of the act or omission of an agent of the State."

(iii) An 'Administrative Policy re Attendance At Post Mortem Examinations' was developed less than a year after the post-mortem of Michael Gayle. The difficulties getting a local observer for the post mortem, the unsatisfactory conditions which existed at the morgue at Spanish Town Hospital and the extra-legal forensic pathology departmental policy of not allowing observers on behalf of family members at autopsies were brought to light by the death of Michael Gayle. The public exposure of the problems with observers at post mortems and the public outrage that resulted, lead to a meeting with the then Minister of National Security, under whose portfolio the Forensic Pathology Department fell. And, out of this meeting the policy document which outlined the process of applying for an observer to attend post mortems on behalf of family members was developed. That policy is still in force and the attendance of independent observers

at the post mortem of persons killed by the police is an everyday occurrence.

g) Lessons learnt

The death of Michael Gayle and the exposure of many of the problems faced by those trying to hold the State and its agents responsible for the death of their family members, has lead to significant changes in the way in which the State of Jamaica now investigates deaths caused by its agents. The ruling of the IACHR in the case forced the Jamaican Government to implement laws that meet its international obligation to protect its citizen's right to life.

The Independent Commission of Investigations (INDECOM), was given broad legislative powers under the *Independent Commission of Investigations Act*97 to conduct investigations into all police wrongdoing began operations in August 2010. While this is a positive step, INDECOM has yet to make inroads into the systemic impunity that exists for members of the JCF who commit breaches of rights against persons including breaches of the right to life.

The leadership of the INDECOM has shown strong commitment to carrying out the legislative mandate. The court has settled challenges to the investigative body's authority and the Government has acknowledged that it may need to clarify (and strengthen) the powers granted to INDECOM under the *Independent Commission of Investigations Act*.

INDECOM investigations have uncovered what is reported to be "death squads" in the Jamaica Constabulary Force. In April 2014, eight police officers were arrested and charged by INDECOM for the murders of individuals that were previously thought to have been murdered by gunmen. Those officers are suspected of being involved in up to 40 killings.[98]

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97 *The Independent Commission of Investigations Act*, 2010, online: japarliament.gov.jm <(http://www.japarliament.gov.jm/attachments/341_The%20Independent%20Commission%20of%20Investigation%20Act,%202010,.pdf>.

98 StabroekNews.com, "Accused Jamaica "death squad" cops being probed over 40 deaths" (2014) online: stabroeknews.com <http://www.stabroeknews.com/2014/news/regional/04/11/accused-jamaica-death-squad-cops-being-probed-over-40-deaths/>.

15. Discrimination Based on Sexual Orientation

Case: Kenneth Suratt and Others v. Attorney General of Trinidad and Tobago

a) Case outline

The Government of Trinidad and Tobago passed the Equal Opportunity Act in 2000, which sought to prohibit certain kinds of discrimination, to promote equality of opportunity between persons of different status and to grant relief to persons who experience discrimination as defined by the Act. The Act sought to prohibit discrimination in the spheres of employment, housing, education, medical care and other areas of public life on the grounds of sex, race, ethnicity, origin, religion, marital status and disability. Section 3 explicitly stated that, “sex does not include sexual preference or orientation.”

There was an election shortly after the Act had passed and the new Government did not implement the Act. The applicants which included the visually impaired, the physically challenged and an employee of a state-owned company alleged that they were unable to obtain relief under the Act because of the failure, refusal or neglect of the Government to implement the Act and was a breach of their constitutional right to due protection of the law. They also requested an order compelling the government to establish an Equal Opportunity Commission and Tribunal as mandated under the Act

The Government argued that they could not be compelled to establish the Commission or Tribunal because the Act itself was unconstitutional because inter alia it omitted “sexual orientation” or “sexual preference” from the definition of ‘sex’, and persons who allege discrimination on these grounds are denied the equality of treatment under the law. The first instance Court found the Act to be unconstitutional but upheld the exclusion of sexual orientation or preference. The Court of Appeal reversed the decision of the trial judge on this exclusion.

The Court of Appeal per Archie JA made a distinction between the concepts of sex and gender and stated that while the Act specified that sex did not include sexual preference or orientation, ‘gender’ wasn’t so defined. He indicated that the concept of ‘gender’ was a broader concept than ‘sex’, which to him refers to the biological division of species between male and female in respect of reproductive roles. He indicated that gender was more of ‘a social, cultural and even psychological construct’ and can include ‘sexual orientation’.

In relation to criminalization of homosexual conduct in Trinidad and Tobago at the time Archie JA distinguished between sexual orientation and sexual conduct or behaviour. He indicated that it is not a crime to have a homosexual or lesbian orientation something

which was not a matter of 'choice' or 'preference' and later such would be a conflation of orientation with actions.

He held that since all legislation has to be interpreted and applied in conformity with the Constitution and the fundamental right to equality of treatment and equality before the law, there must be a compelling reason to justify any law that is on its face discriminatory. He stated that sexual 'preference' or 'orientation' was not a reasonable basis for distinction, because the distinction was subjective and often based on prejudice and stereotyping. The exclusion of sexual orientation from the Equal Opportunities Act therefore denied a particular category of persons protection of the law and equality of treatment under the law.

Archie JA further argued that fundamental rights arose from the inherent dignity and value of every human being, that human rights were universal, regardless of an individual's sexual orientation. To discriminate against persons on the basis of sexual orientation would amount to double punishment in that it would deny that person his or her fundamental rights and impose a severe criminal sanctions for engaging in a homosexual act. He described the Act as 'invidious' because even after a criminal has paid his debt to society they would be vulnerable to ongoing discrimination and their constitutional rights could not unjustifiably be infringed.

He acknowledged that while a conviction or even an orientation may be a relevant consideration for certain types of jobs, the general nature of the discrimination permitted by the Act was not justified and so unconstitutional. Therefore, the Equal Opportunities Act was held to be unconstitutional on this basis, among others and the petitioner's claim was dismissed.

In 2007 the Privy Council overturned the Court of Appeal, ruling that the Equal Opportunity Act was not inconsistent with the Constitution of Trinidad & Tobago. The Privy Council's majority decision did not specifically deal with the exclusion of sexual orientation or preference but addressed the other aspects of invalidity. Baroness Hale delivered the majority decision. She allowed the appeal on the other grounds of invalidity argued by the Attorney General. She said that not every Act of Parliament that impinges on fundamental rights is necessarily unconstitutional for that reason alone, provided that the limitation on the right pursues a legitimate aim that is proportionate to the limit. Hale went on to explain that Parliament holds the responsibility in the first instance to strike the balance between individual rights and the public interest. She found that the balance Parliament had struck with this Act was justifiable and consistent with the Constitution. She found that by including gender, as well as racial or religious hatred, it was bringing the law into conformity with all modern human rights instruments, which include sex or gender among the prohibited grounds of discrimination. Baroness Hale did not explain how the balance was struck or whether it applied to the issue of sexual orientation.

The dissenting opinion of Lord Bingham addressed the issue of whether 'sex' should include sexual preference or orientation only in a limited way. He stated that while it was not necessary for him to decide the point he would not understand 'sex' in the Constitution to embrace sexual preference or orientation, and so couldn't see that a prohibition framed in less should be thought to infringe the Constitution.

Order: The Petitioner's appeal was allowed by the Privy Council. The Privy Council in overturning the Court of Appeal's decision ruled that the Equal Opportunity Act was not inconsistent with the Constitution of Trinidad & Tobago and the government was forced to implement the Act.

b) Lessons Learnt

The Privy Council overturned the progressive development of the law in relation to LGBT discrimination, summarily and without dealing with the issue in any meaningful way. Dr. Arif Bulkan of U-RAP commented on the case in an article entitled "The Poverty of Equality Jurisprudence in the Commonwealth Caribbean".[99] He highlighted the problems inherent to the decision. He noted that since an earlier English case, *Pearce v Mayfield School*, held that discrimination on the basis of sexual orientation was one species of sex discrimination, Baroness Hale should have treated the Suratt decision differently. The case noted that those "who treat homosexuals of either sex less favourably than they treat heterosexuals do so because of their sex: not because they love men (or women), but because they are men who love men (or women who love women). It is their own sex, rather than the sex of their partners, which is the problem." Furthermore, this decision failed to address whether 'sex' included 'sexual orientation'. Dr. Bulkan noted that the Trinidad and Tobago Constitution does not protect against discrimination on the basis of any specified grounds, but instead provides an expansive guarantee to "equality before the law". The better approach in Suratt was that taken by the Court of Appeal, which found sexual orientation to be analogous to "sex" as listed in the introductory section, which is prohibited from being discriminated against. The Court of Appeal recognised that the Constitution does not provide a closed list of grounds, and sexual orientation was viewed as a ground in its own right. Therefore, the decision of the Privy Council did not provide reflect the true equality provisions provided for in the Trinidad and Tobago Constitution.

99 Arif Bulkan, "The Equal Rights Review" (2013) Vol10 at p 11.

16. Environmental Abuse

The Northern Jamaica Conservation Association and Others v. The Natural Resources Conservation Authority and Another (the "Pear Tree Bottom case")

a) Case Outline

Pear Tree Bottom was an ecologically sensitive coastland, rich in biodiversity. Its importance was reflected in the fact that since 1997 the area had been slated for designation as a protected area under Jamaica's policy for creating a National System of Protected Areas. In 2003, a Spanish hotel development company, Hotels Jamaica Pinero Limited (HOJAPI), purchased the property with plans to build a 1,918-room facility on the site. The government issued an environmental permit to HOJAPI in July of 2005. Shortly thereafter, two NGOs, Northern Jamaica Conservation Association (NJCA) and Jamaica Environment Trust (JET), along with four individuals brought a claim for judicial review challenging the decision of the permitting agencies to grant HOJAPI an environmental permit. The government agencies in question were the Natural Resource Conservation Authority (NRCA) and the National Environment and Planning Agency (NEPA). Leave to apply for judicial review was granted in November 2005. By the time the judicial review hearings began in April 2006, the hotel was fully under construction.

The issues addressed by the court were whether the NRCA failed to properly consult with other relevant government departments as provided by statute, whether the NRCA adequately addressed concerns raised by the Water Resource Authority (WRA), whether the agencies gave adequate weight to empirical data (or lack thereof) contained in the environmental impact assessment (EIA), whether the NRCA and NEPA met the legal standard of public consultation, and whether the public meetings held by NRCA and NEPA met the legitimate expectations of the public. It should be noted that the statutory regime for EIAs is vastly different from that of Belize, in that Jamaica has not enacted regulations to deal with the procedure for conducting EIAs and instead relies on NEPA's internal guidelines.

Through this judicial process, the Applicants sought (1) An order of certiorari to quash the decision to grant a permit granted pursuant to Section 9 of the NRCA Act to HOJAPI to construct the Bahia Principe Resort at Pear Tree Bottom, Runaway Bay; (2) an order of mandamus to direct the NRCA to reconsider its grant of a permit to HOJAPI Ltd.; (3) a declaration that procedures of the NRCA were not complied with in granting this permit, and (4) such further or other relief as may be just.

Ultimately, the Supreme Court of Jamaica quashed the decision granting the permit, holding, in part, that the NRCA "failed in its statutory duty to consult according to law with the relevant government department and agencies by failing to circulate the marine

biology report to them." Additionally, NRCA did not properly take into consideration concerns raised by the WRA regarding sewage disposal; a particularly grievous oversight for a project in an ecologically sensitive area with a water table only three-meters underground. Likewise, the court also concluded that the agencies "failed to give adequate weight to the obvious empirical failings of the EIA," and that such "significant empirical shortcomings" rendered any monitoring program based on the EIA practically useless. Furthermore, although the court found the form of the public meetings held by NRCA and NEPA adequately met recommended guidelines, the substance did not. The court held that the agencies failed to meet legal standards for consultation because they withheld from the public an important ecological report and two addenda to the EIA. The court also found the agencies abused their decision-making power by knowingly circulating an incomplete EIA, thereby increasing the possibility that the public would make inaccurate and erroneous conclusions about the impact of the development at Pear Tree Bottom. This action deprived the public of information necessary to make a fully informed and intelligent decision and constituted a breach of the public's legitimate expectation of fair and meaningful participation. The court applied what is referred to as the 'Sedley definition' for the legal standard for public consultation which was approved by Lord Woolf in R v North and East Devon Health Authority, Ex Parte Coughlan :

> *It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R v Brent London Borough Council Ex p. Gunning (1985) 84 LGR 168.*

The hotel company intervened after the judgment citing that they had not been served with the claim required by Rule 56.11 of the Civil Procedure Rules and that the hotel company would suffer undue hardship since the project was well underway to completion and considerable money – 80 millions USD – had been expended. A subsequent court ruling varied the decision by revoking the order to quash the permit but upheld the declaratory orders that the procedure for consulting the public and governmental agencies were inadequate. The Court cited the Chalillo Dam case in particular it quoted from the dissenting judgment of Lord Walker of Gestingthorpe that "the rule of law must not be sacrificed to foreign investment, however desirable".

b) Lessons Learnt

- This was Jamaica's first environmental case filed by NGOs in Jamaica challenging the approval process for a development. This case showed that the courts will

uphold the rule of law to protect the rights of the public to participate in decisions affecting the environment.

- That where NEPA and NRCA embark on a consultation process whether voluntary or not, there is a duty to consult properly by providing full fair and accurate information in order for persons to make an intelligent response
- The Claimants had not requested an interim injunction and the hotel developer continued to construct the hotel after the claim had been filed and the claimants were awaiting a hearing date for the trial. As a consequence, they were able to intervene in the court case and claim hardship due to the extent of work completed. In Jamaica, a Claimant is generally required to give an undertaking for damages where an injunction is requested. In the event the Claimant is unsuccessful in his claim, this undertaking is to compensate the Respondent for the loss suffered during the period of the injunction. This is a financial barrier to bringing public interest cases to Court and was the reason no injunction was sought in this case.

c) Impact of the Trial

The judgment in this case received extensive media coverage as this was the first Jamaican case brought by an NGO challenging the grant of a permit. There was little public support for the case as it concerned a major foreign investment and the implication of the first judgment was that the development could not proceed. Since this case, NEPA has revised and expanded their guidelines for public consultation. JET has noticed that public consultations are now conducted more frequently and in accordance with NEPA's guidelines.

d) Trends in Environmental Jurisprudence in the Caribbean

The special circumstances inherent to Small Island Developing States (SIDS), the level and pace of socio-economic advancement and severe resource constraints, do little to foster a comprehensive system for environmental management. The limitations in legislation dealing with public participation in the EIA process, in particular in Jamaica, is a concern, especially in light of increased international recognition of the right to public participation in decision-making and access to justice in environmental matters.

Although the notion of EIAs is fairly new to the Caribbean, having been developed in the last one or two decades, the cases have shown that as the protection of the environment is increasingly subjected to regulation, there is a resulting increase in the use of judicial review, in particular by NGOs, as a mechanism to access the courts and obtain environmental justice. All the cases discussed in this paper were initiated since 2000 and were brought by NGOs with some willing to go as far as the Privy Council in the defence of the environment. Many of the cases either considered or applied the ratio decidendi from

preceding Caribbean cases and it is becoming increasingly possible to trace the evolution of environmental jurisprudence in the Caribbean.

Transparency in government decision-making is crucial. Although judges cannot be called upon to decide on the merits of a decision, that is, whether a particular development such as an aluminium smelter is a "good' or 'bad' form of development, judicial review can be used to scrutinize the decision-making process and ensure accountability. In the absence of comprehensive legislation to guide the decision-making process, there are common law principles, based on the notion of fairness and natural justice that can be applied.

PART IV: ACCESSING THE INTER-AMERICAN RIGHTS SYSTEM

Unlike their Latin American counterparts who have long grown familiar with the Inter-American human rights system (IAHRS) and have learnt to use it to its full potential, most Caribbean human rights advocates remain largely unaware of this institution and of the body of law that it applies, and seldom turn to it for redress when domestic remedies are exhausted or simply do not exist.

Several reasons explain why most Caribbean governments and non-governmental stakeholders do not engage in a substantial manner with the IAHRS. On the one hand, since the Organization of American States (OAS) is comprised in its majority by Latin American countries that share a common language – with the notable exception of Portuguese-speaking Brazil – and largely similar civil law traditions, it is only natural that Spanish has become the *lingua franca* within the IAHRS and that the latter has tended to focus on legal issues emanating from Latin American countries. On the other hand, the fact that the Caribbean sub-region is predominantly made up of relatively small island States has not helped raise its profile in the eyes of the IAHRS policy-makers and adjudicators.

As a matter of fact, the Inter-American Court of Human Rights (IACtHR) has jurisdiction over none of the Caribbean countries. Though Jamaica, Grenada and Dominica have ratified the American Convention on Human Rights (ACHR) – unlike the rest of the Commonwealth Caribbean – they have refused to accept the jurisdiction of the IACtHR, thus making it impossible for this tribunal to hear cases coming from these countries.

In spite of those defining features, the Caribbean clearly belongs to the IAHRS. As OAS members, these States are expected to abide by the American Declaration of the Rights and Duties of Man (hereinafter referred to as “American Declaration”), which was adopted in 1948 – a mere few months before the UDHR was adopted at the United Nations – and whose content covers the full spectrum of human rights, from civil and political rights to economic, social and cultural rights

In this respect, Caribbean rights-holders are entitled to the same degree of attention from the IAHRS as any Latin American citizen. English is an OAS official language, on equal footing with Spanish, Portuguese and French. It is also one of the two working languages

of the IACHR Executive Secretariat, alongside Spanish. Finally, the 7-member IACHR generally counts commissioners from the Caribbean within its ranks [100].

Beyond the complaint-handling system, which is further described below, the Commission has engaged the Caribbean governments at several other levels. To give but a few examples, the Commission conducted on-site visits to Caribbean countries[101], organized training seminars to raise awareness about the IHRS[102], and published country-specific reports on member States of the region.

The IACHR has acknowledged on several occasions that Caribbean people feel largely estranged from its work, and has taken steps to engage more substantially with the sub-region[103]. The recent election of Ms. Tracy Robinson from Jamaica as President of the Commission can be seen as a step in this direction. It is our view that Caribbean human rights advocates would do well to acquaint themselves with this comprehensive system, which can ultimately benefit their cause(s).

A. THE IAHRS: A TWO-PRONGED REGIONAL MECHANISM

The IAHRS was built over sixty years, and remains in constant evolution. In May 1948, when the Ninth International Conference of American States took place in Bogota, Colombia, delegates from 21 countries agreed to found the OAS, and adopted the *American Declaration on the Rights and Duties of Man* ("Declaration")[104].

The first pillar of the IAHRS, the Commission, was created in 1959 – that is to say before the British colonies of the Caribbean gained their independence – by a resolution adopted at the 5th Meeting of Consultation of Foreign Ministers. In its early days, the IACHR was essentially asked to examine the human rights situation in the Americas, and to formulate recommendations to OAS member States to help them comply with the Declaration. Starting in 1965, the Commission was expressly authorized to examine specific cases of human rights violations, and adjudicate complaints submitted by individuals from any of the OAS member States. Based in Washington D.C., the Commission is a quasi-judicial body that does not issue "rulings", but rather "recommendations". As discussed further

[100] At the time of writing, Ms Tracy Robinson from Jamaica and Ms Rose-Marie Belle Antoine, who has dual citizenship of St. Lucia and Trinidad & Tobago, served as IACHR commissioners.

[101] In 1994 alone, the IACHR travelled to Jamaica to look into conditions of detention, and to the Bahamas to check on Haitian refugees. Another visit to Jamaica took place in December 2008 at the invitation of the government: http://www.cidh.org/comunicados/english/2008/59.08eng.htm.

[102] A seminar was convened in Antigua in 1998 for regional ombudsmen, as well as in Belize and Grenada in 2001.

[103] See Auro Fraser, "*From Forgotten through Friction to the Future: The Evolving Relationship of the Anglophone Caribbean and the Inter-American System of Human Rights*", Inter-American Institute of Human Rights Law Review, vol. 43, 2006, pp. 207-237; http://www.corteidh.or.cr/tablas/R08060-5.pdf

[104] *American Declaration of the rights and duties of Man,* 1948, online: cidh.org <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.html>.

on, these recommendations should nonetheless be followed as authoritative interpretations of States' commitments under international law. Nothing prevents non-lawyers from being appointed as commissioners, although the overwhelming majority of past and present commissioners had a legal background.

The IACHR holds ordinary Period of Sessions twice every year (March/April and October/November). On those two-week long occasions, commissioners – who do not serve full-time on the Commission – State officials and NGO representatives gather in the Washington secretariat to discuss long-standing and emerging human rights issues across the continent. Extra-ordinary Periods of Sessions can also be organized and have been held in other cities.

Commissioners are elected by the General Assembly of the OAS for a 4-year term, and sit in their own capacity rather than as representatives of their country of origin, even though they ought to be from a country that is part of the OAS. Their decisions are taken by unanimity. Commissioners are not hired on a full-time basis nor remunerated for their work, and generally hold other appointments in their own countries during their mandate, which limits their availability. As a consequence, the day-to-day work of the Commission is carried out by the staff of the Executive Secretariat, under the responsibility of the Executive Secretary and the Deputy Executive Secretary.

The Court is an autonomous judicial body headquartered in San José (Costa Rica) and established by the ACHR. Founded in 1979, shortly after the Convention entered into force, the Court is composed of seven judges who are also elected in their personal capacity, even though they must be nationals of a member State of the OAS. Its role is to interpret and apply the ACHR, as well as other inter-American human rights instruments, in particular by issuing judgments on cases and advisory opinions. The judges are not hired on a full-time basis either, nor remunerated for their work.

It is important to bear in mind that individual petitioners are not authorized to submit a case directly to the Court. That power is reserved to the Commission and to the States parties that have accepted its contentious jurisdiction. Petitions introduced by individuals will need to be processed first by the Commission.

B. THE IAHRS PETITION SYSTEM: A LAST RESORT TOOL FOR VICTIMS OF HUMAN RIGHTS ABUSES IN THE AMERICAS[105]

By virtue of States' adherence to the Charter of the Organization of American States, the Commission can receive and handle complaints from individuals against any member State without the affected State having to recognize its jurisdiction explicitly. It is important to bear in mind that domestic judgments that are contrary to a person's interests do not necessarily constitute per se a violation of his/her rights. The IAHRS is not an appellate court and will not settle disputes or review any alleged error by domestic tribunals. The system's purpose is to review possible violations of the rights entrenched in Inter-American human rights instruments, including treaties and declarations.

Lodging a complaint before the IACHR[106]

The procedure by which such petitions can be submitted is relatively informal, is entirely free of charge, and does not require the assistance of an attorney.

Every person, either on his/her own or on someone else's behalf, NGO or group can present a petition for an alleged breach of a right contained in the Declaration, or one of the OAS human rights treaties [provided the country where the abuse was allegedly committed is party to it]. The only requirement is that the alleged victims be identifiable, so that the State can respond to the allegations presented in the petition[107]. In case the petitioner does not wish to have his/her identity revealed, he/she may make a special request to the Commission. The victims themselves cannot withhold their identity from the State. Nonetheless, victims or petitioners may request a protection of the victim's identity and outline the reasons why the disclosure of her/his identity to third parties may cause him/her harm. If the Commission considers that the reasons in support of this request are valid and legitimate, it will protect the identity of the alleged victim in all public documents related to his/her case, and use a pseudonym instead.

Petitions can be submitted by using the online secured from, by email (cidhdenuncias@oas.org), fax (+1 202 458-3992) or postal mail to the following address:

[105] For more information on this, see Global Rights, "Using the Inter-American System for Human Rights; a practical guide for NGOs", March 2004; http://www.globalrights.org/sites/default/files/docs/ENGLISH_-_REVISED_7-19.pdf
[106] See https://www.cidh.oas.org/cidh_apps/instructions.asp?gc_language=E for instructions on how to file a complaint.
[107] *American Declaration of the rights and duties of Man,* 1948, online: cidh.org <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.html>.

Inter-American Commission on Human Rights
1899 F Street
Washington, DC
20006 USA

For reasons of efficiency and economy, digital correspondence with the Commission is preferred.

In order for the Commission to process a petition, the Executive Secretariat conducts the Initial Review provided by Article 26 of its Rules of Procedure. The following basic information is necessary[108]:

- the personal information of the alleged victim(s) and that of his/her next of kin
- the personal information on the petitioner(s), such as complete name, phone
- number, mailing address, and email;
- a complete, clear, and detailed description of the facts alleged that includes how, when, and where they occurred, as well as the State considered responsible;
- an indication of the State authorities considered responsible;
- the rights considered violated, if possible;
- the judicial bodies or authorities in the State to which one has turned to remedy the alleged violations;
- the response of the State authorities, especially of the courts of justice;
- if possible, uncertified and legible copies of the principal complaints and motions filed in pursuit of a remedy, and of the domestic judicial decisions and other annexes considered relevant, such as witness statements; and
- an indication as to whether the petition has been submitted to any other international organization competent to resolve cases[109].

Petitions and their accompanying documents must be presented in an official language of the concerned State, except in exceptional circumstances.

Once the Initial Review is completed, the IACHR complaints-handling mechanism is a two-step process. The latter will first need to decide whether the petition is admissible and

[108] For more information, see IACHR, "Petition and Case System: Informational Brochure" (2010), online: cidh.org <https://www.cidh.oas.org/cidh_apps/manual_pdf/MANUAL2010_E.pdf>. [IACHR Brochure]
[109] *American Convention on Human Rights,* 1969, s 46(1)(c) and 47(d).

publish a public report explaining its decisions. Once the admissibility stage is completed, it will the review the merits of the case[110].

Before turning to the IACHR for redress, it is important to ensure that victims do not expect their case to be processed swiftly. Indeed, the treatment of complaints by the Commission is a lengthy process, and its outcome is uncertain. The Initial Review step itself may take several years because of the quantity of cases to be processes. At the admissibility and merit stages, depending on the level of complexity of the case, on the responsiveness of the State and on the diligence of the victims and petitioners themselves to reply to the questions put by the Commission the assessment may, again, take several years. Between the filing of a petition and the publication of a report on the merits of a case, as many as 12 years may go by. The ever-increasing backlog faced by the Commission is the direct effect of a surge in the number of complaints filed combined with the lack of the resources necessary to cope with its workload.

As a consequence, it is in the petitioner's interest to provide the Commission with up-to-date information, in order to ensure the adjudicative process is carried out based on accurate facts despite the passage of time. Furthermore, although petitions are reviewed in chronological order, the article 29 of the Rules of Procedure provide that certain cases may be studied in priority in very specific circumstances:

a) when the passage of time would deprive the petition of its effectiveness,
b) when the alleged victims are persons deprived of liberty,
c) when the State formally expresses its intention to enter into a friendly settlement process in the matter,
d) when the petition would permit addressing structural human rights violations.

The complaints-handling procedure is essentially written, and will not request that petitioners travel to Washington and appear before the Commission, unless the latter decides otherwise and calls a special meeting on the case, something that only occurs exceptionally.

Based on article 40 of the Rules of Procedure, the parties can also reach a **friendly settlement** once a petition has been submitted. The Commission increasingly insists upon the need to give serious consideration to this possibility, in order to alleviate its enormous backlog. The Commission will offer its good services and will accompany both parties as

[110] The first stage of the complaints-handling procedure is that of the preliminary examination, which is a fairly straightforward process aiming to identify those petitions that appear patently unfounded and reject them *ex officio* (art. 47b) and c) ACHR). Once that initial step is completed, the Commission may decide not to go forward and proceed with the analysis of the admissibility of the petition, may seek additional information or documents, or decide to open the petition for processing.

they try to find a mutually acceptable solution. If a friendly settlement is reached, the Commission shall adopt a report with a brief statement of the facts and of the solution reached, shall transmit it to the parties concerned and shall publish it. In all cases, the friendly settlement must be based on respect for the human rights recognized in the American Convention on Human Rights, the American Declaration and other applicable instruments.

Admissibility Criteria

a) Exhaustion of Domestic Remedies

In accordance with its rules of procedure[111] and article 46 of the American Convention, the IACHR is not meant to handle cases that can be processed domestically. Indeed, the IACHR's role is subsidiary and its jurisdiction will not be activated unless petitioners can demonstrate they have exhausted all domestic remedies at their disposal, and that a final and non-appealable judgment has been handed down.

There are exceptions to this rule, the objective of which is to give a chance to the States to resolve alleged violations through their own institutions. Domestic remedies presumably available to victims ought to be both adequate and effective, meaning that they should provide suitable redress for the rights allegedly violated. If petitioners are able to convince the IACHR that existing remedies are not effective, the Commission will agree to examine the merits of the case at hand. The four following scenarios are provided:

- Disrespect for due process: when domestic laws do not provide judicial guarantees for alleged victims wanting to seek redress for the damages they [claim they have] suffered " (art. 46(2)a) ACHR);
- Practical impossibility to resort to domestic remedies: "when the alleged victim has not been allowed access to domestic remedies or has been kept from exhausting them" " (art. 46(2)b) ACHR);
- Unjustified delays: "if there is delay in the issuance of a final decision on the case with no valid reason" (art. 46(2)(c) ACHR);

[111] The Rules of Procedures were approved by the Commission at its 137th regular period of sessions, held in 2009, and entered into force on August 1st, 2013. *Rules of Procedure of the Inter-American Commission,* online: oas.org <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>. See section 31 RP on exhaustion of domestic remedies. See also *American Convention on Human Rights,* 1969, s 44 to 50.

a) Time Limitation

Unless the case a victims wishes to submit to the Commission falls under one or the other of the exceptions to the "exhaustion of domestic remedies" rule, in which case the plaintiff will be expected to file his her petition within a reasonable period of time, the petition ought to be presented within six months of the date of notification of the final judicial decision[112]. This delay is strictly enforced and petitioners should ensure themselves that their petition is sent electronically or has received a stamp from the mail at the very latest 6 months after the day on which they were notified of the final judgement rendered by domestic tribunals in their case.

b) The Activation of its Jurisdiction by the IACHR

When a petition reaches the admissibility stage, it will be sent to the State for observations. As the Commission makes it a point to give both parties equal chances to make their cases and present their own perspectives on the dispute, it may request additional information from either or both parties to decide whether the petition is admissible. Any information submitted by a party will be forwarded to its opponent. Hearings before the Commission at the admissibility stage may be held, although they are not frequent.

For a complaint to be handled by the Commission, some basic criteria must be met:

- Matter competence: The complaint must be based on an alleged violation of a right protected by the Declaration, the ACHR or another treaty that allow rights-holders to turn to the Commission, and eventually the Court, for redress.
- Territorial jurisdiction: The IACHR can process complaints originating from any member State of the OAS by authority of the Declaration, but the Court will only be able to rule on cases form States that have ratified the Convention and accepted its contentious jurisdiction.
- Temporal jurisdiction: The complaint must be based on facts that occurred after the ratification by the concerned State of the treaty invoked (the American Declaration in relation with the OAS Charter or the American Convention). If these facts occurred before the ratification date, they must have a continuous nature that lasted until after this date.

If an Admissibility Report is adopted and published by the Commission and no friendly settlement is reached, a petition reaches the merits stage. The Commission will examine whether the alleged violations are well-founded and genuinely correspond to a breach of

[112] Article 32 of the Rules of Procedure and Article 46(1)(b) ACHR.

the rights protected by the Declaration and/or the Convention and/or other human rights instruments[113].

Cases will move forward – albeit at a slow pace – regardless of whether the State agrees to engage with the Commission or not. Surprising as it may sound, some countries routinely fail to respond to requests coming from the IACHR, and will not bother to send representatives to hearings. This lack of engagement may be due to financial constraints and the unavailability of qualified legal counsels. This factor should not be underestimated: small countries can hardly spare their key personnel, and limited funds will rather be allocated to what qualifies in their view as "more essential tasks". However, passive attitudes can also be due to a lack of political will and/or excessive bureaucratic red tape. This is unfortunate and should be denounced, but it shall not prevent the IACHR from discharging its mandate.

If and when the Commission comes to the conclusion that the petitioners' rights were indeed violated by the State, it will publish a confidential report that will present the reasoning behind this decision and include a set of recommendations meant to help the State bring a halt to the acts that are in violation of human rights; clarify the facts, carrying out an thorough investigation, and impose a sanction; make reparation for the harm caused; make changes to the law; and/or require the adoption of other measures or actions by the State.

In the event that the State refuses to comply with the recommendations put forward by the Commission within a period of 3 months, the latter may decide to publish its report on the merits or, provided the State in question has accepted its contentious jurisdiction, to refer the case to the Inter-American Court of Human Rights.

The interpretative value of IACtHR rulings

While none of the Caribbean countries has recognized the jurisdiction of the IACtHR to settle disputes, its caselaw has an interpretative value relevant to the work of the Commission and to domestic tribunals responsible for adjudicating disputes over human rights legislation, regardless of whether the State in question has ratified the ACHR or not.

As Professor Del Toro Huerta pointed out:

> *[D]omestic judges of the States that are parties to the American Convention will have to apply such decisions in light of the "control of conventionality" to which they obligated under the terms specified by IACtHR jurisprudence. Regarding States that are not parties to the [ACHR], their domestic judges are fully capable of*

[113] See *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,* 1994,s 12. *Convention on Enforced Disappearances*, s 13.; *United Nations Convention against Torture*, 1984, s. 8 and 16; *Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights*, 1988, s 19.

> *justifying their decisions in conformity with the opinions of the IACtHR as authorized interpretative opinions, in light of the growing importance of international law and comparative law, continuing the practice, each time more constant, of judicial dialogue among courts and tribunals at the international level. On the other hand, the jurisprudence of the IACtHR also affects and fertilizes the other organs of international monitoring, such as the Inter-American Commission on Human Rights, that have already applied the opinions regarding the right to property of indigenous communities, including those regarding States that are not part of the American Convention, within the context of international and inter-American systems of human rights and in light of the evolution of the field of international human rights law. All of this enhances the practical importance of the jurisprudential opinions of the IACtHR [...]."*[114]

As stated by former IACHR staff attorney Brian D. Tittemore:

> *"[i]n their rulings of cases dealing with mandatory death penalty, appellate courts in the Caribbean region explicitly relied upon the jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights in interpreting and applying rights that are protected under national constitutions"*[115]*.*

a) The Implementation of IACHR's Recommendations

While many argue that by adhering voluntarily to the OAS, American States agreed to surrender part of their sovereignty and to implement recommendations issued by its organs, including the IACHR, others challenge this assumption and consider these recommendations as "mere directive policy". For one, the United States has traditionally shown a great reluctance to implement IACHR's recommendations formulated in particular cases, invoking the supremacy of domestic law and courts.

Caribbean countries that were the object of IACHR recommendations have displayed a similar lack of enthusiasm. Because the IACHR has no mechanism to impose enforcement of its recommendations, their implementation essentially relies on the principle of good faith applicable in international law. However, before doing so, States would be well-advised to assess the political price of turning a blind eye on adverse determinations.

[114] Mauricio Iván Del Toro Huerta, "The Contributions of the Jurisprudence of the Inter-American Court of Human Rights to the Configuration of Collective Property Rights of Indigenous Peoples" at p 23, online: law.yale.edu <http://www.law.yale.edu/documents/pdf/sela/Del_Toro.pdf>.

[115] Brian D. Tittemore, "The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System : An Evolution in the Development and the Implementation of International Human Rights Protections" (2004) 13 Wm & Mary Bill Rts J. 445 at pp 446-447, online: scholarship.law <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1238&context=wmborj>.

Accessing the Inter-American Court of Human Rights

a) Contentious Jurisdiction

The Court was created following the entry into force of the American Convention on Human Rights and began operating in 1979. Complaints can only be referred to the Court by the Commission – if the State that has been found in breach of its obligations under the Convention refuses to follow up on the recommendations formulated by the IACHR – or by States themselves. The Court will analyse the evidence brought before it, and decide cases. In the event that the Court concurs with the Commission in finding the State responsible of human rights violations, it will identify forms of reparation deemed most adequate in light of victims' right to redress.

b) Consultative Function

In accordance with article 64 of the ACHR, member States and organs of the OAS may ask the Court to issue advisory opinions on the provisions of the Convention or of other human rights treaties that were adopted under the authority of the regional organization. The faculty to seek advice from the Court is not restricted to those States that have ratified the Convention and accepted the Court's contentious jurisdiction and extends to all OAS member States. States that are not party to those treaties may ask the Court to enlighten them with respect to the compatibility of their domestic legislation with these instruments[116].

Throughout the 1980s, the Court issued several advisory opinions which shaped the scope of the Convention and set the parameters within which the IAHRS was meant to evolve. The most notorious of those opinions is certainly the one dealing with the Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Arcticle 64 of the American Convention on Human Rights[117], according to which the Court recognizes that it is authorized to interpret the Declaration and gives this document a legal force superior to that of most declarations.[118]

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[116] *American Convention on Human Rights,* 1969, s 64(2).

[117] Advisory Opinion OC-10/89 (1989), Inter-Am. Ct HR (Ser. A) No. 10, online: <http://www1.umn.edu/humanrts/iachr/b_11_4j.htm>.

[118] Advisory Opinion OC-10/89 (1989), Inter-Am. Ct HR (Ser. A) No. 10, at par 45 to 47, online: <http://www1.umn.edu/humanrts/iachr/b_11_4j.htm>. :

> *"45. For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.*
>
> *46. For the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself. It must be remembered, however, that, given the provisions of Article 29(d), these States cannot escape the obligations they*

Non-judicial Functions of the IACHR

In addition to its complaints-handling powers, the IACHR carries out a variety of tasks, which can ultimately support the claims put forward by human rights lawyers and the victims they represent in their petition.

2. Human Rights Monitoring

a) On-site Visits

In its early days, in the 1960s, the IACHR realized on-site visits to various countries, against which repeated allegations of massive human rights violations had been made. In those days, several American countries were ruled by ruthless regimes, and the individual complaints mechanism was clearly not designed to respond to crisis of such proportions. This duty to uphold human rights in particularly precarious contexts is what visits in situ to the Dominican Republic (1961, 1963 and 1965), Chile (1974) and Haiti (1978), among other places119.

Permission of the government is always required for a visit to take place. In most cases, the Commission itself will seek invitations if the situation so warrants. The assessment of the seriousness of the human rights crisis will be done on the basis of information obtained from various sources, including NGOs. Regardless of whether or not a visit is considered necessary, NGOs should regularly feed the Commission with information to make sure the IACHR's perception of that country's human rights record is not only based on the State's self-assessment.

In-country visits by members of the Commission will usually be preceded by a preparatory mission conducted by the staff attorney in charge of the country that is to be visited at the IACHR Secretariat. Official visits will generally last between 5 and 10 days, depending on the size of the country, the gravity of the human rights abuses presumably perpetrated, and the agenda. With respect to this, it is important to know that commissioners will make it a point to discuss with all stakeholders – including government officials at the highest level – and will generally travel beyond the capital city and visit places such as jails, military barracks, or indigenous communities. The choice of places to visit will be

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have as members of the OAS under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto.
47. That the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it within the framework of the principles set out above."

[119] On-site visits by the Commission are of an exceptional nature, and respond to extraordinary circumstances. Recently, the IACHR decided to visit the Dominican Republic in the aftermath of a ruling issued by its Constitutional Tribunal which deprived second-generations migrants of Haitian origin of their right to the Dominican nationality, this converting over 200,000 people in stateless persons.

determined based on the information received from civil society, hence the need for NGOs to proactively suggest the Commission meets specific individuals and sees specific places.

b) Rapporteurships

This oversight function was progressively systematized, notably since the early 1990s when the first thematic rapporteurships were created. Over the years, the number of rapporteurships has increased, in order to address emerging human rights issues. Rapporteurs conduct country visits, issue observations and recommendations, and feed standard-setting processes aimed at strengthening the protection of the vulnerable groups whose rights they have been asked to monitor. The IACHR has the responsibility to advise the political bodies of the OAS when there is a need for the development of new legal standards in order to enhance the protection of human rights across the continent.

Unlike the UN, where mandate-holders are picked among candidates with proven expertise (i.e. scholars, NGO leaders) put forward by member States, rapporteurships in the IAHRS are distributed among commissioners.

These are thematic mandates of particular interest to the Caribbean:

- Rapporteurship on the Rights of Afro-Descendants and against Racial Discrimination (created in 2005)

The first mandate-holder was Antigua-born Mr Clare Roberts. While concern was expressed early on regarding the scope of the mandate – which was thought to be too focused on citizens of African descent, a limitation resented by communities of East Indian origin whose coexistence with the former in countries such as Trinidad and Guyana has been marked by repeated episodes of tension – it has shed light on the fate of racial minorities across the continent, notably through the publication in 2011 of a comprehensive report, which was launched at the 33rd meeting of CARICOM Heads of Government on July 6th, 2012, in St. Lucia[120].

- Rapporteurship on the Rights of Indigenous Peoples (1990)

This mandate is of particular relevance to countries such as Belize[121] and Guyana, which harbour significant indigenous populations. In 2009, a report on indigenous and tribal peoples' rights over their ancestral lands and natural resources was published[122].

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[120] Inter-American Commission on Human Rights, "The situation of people of African descent in the Americas" (2011), online: oas.org <http://www.oas.org/en/iachr/afro-descendants/docs/pdf/AFROS_2011_ENG.pdf>.

[121] Organization of American States, "IACHR issued a public release whereby it urged the State of Belize to guarantee the rights of Mayan indigenous communities" (2013), online: oas.org <http://www.oas.org/en/iachr/media_center/PReleases/2013/032.asp>. ;

- Rapporteuship on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons LGBTI)

In recognition of the importance of the hardships faced by sexual minorities, the LGBTI Unit which had been set up in 2011 under the supervision of the Executive Secretary of the Commission, was upgraded to the rank of rapporteurship in February 2014.

- Rapporteurship on Human Rights Defenders (2011)

The situation of human rights defenders was initially entrusted in 2001 to a Unit, under the supervision of the IACHR's Executive Secretary. While it made sense to ask the Secretariat to harbour the unit, so that the situation of HRDs could be monitored on a constant basis, the fact that none of the commissioner was ultimately responsible for this theme may have been interpreted as a lack of interest / prioritization in an issue that alarmed the people who gave the Commission its relevance and importance. The second report on the situation of HRDs across the Americas was published in 2011[123].

- Future Special Rapporteur on Economic, Social, and Cultural Rights

During the 146th regular session, in 2012, the Commission, in response to suggestions made by the States and by civil society, decided to create a Unit on Economic, Social, and Cultural Rights, led by Commissioner Rose-Marie Antoine. On April 3, 2014, the Commission announced its intention to initiate a process to create an Office of the Special Rapporteur on Economic, Social, and Cultural Rights (ESCR).

c) Thematic Studies/Country Reports

The country reports published by the IACHR are of two types: comprehensive reports – such as the 2012 Jamaica report[124]– dealing exclusively with one country and presenting an exhaustive analysis of emerging and long-standing human rights issues, or shorter reports that are incorporated in Chapter IV of the IACHR annual report[125].

Inter-American Commission on Human Rights, "Report no 40/04" (2004), online: cidh.org <http://www.cidh.org/annualrep/2004eng/belize.12053eng.htm>.

[122] Inter-American Commission on Human Rights, "Indigenous and Tribal peoples' rights over their ancestral lands and natural resources" (2009), online: oas.org <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.

[123] Inter-American Commission on Human Rights, "Second Report on the situation of Human Rights Defenders in the Americas" (2011), online: oas.org <http://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>.
The first report was published in 2006: Inter-American Commission on Human Rights, "Report on the situation of human rights defenders in the Americas" (2006), online: cidh.org <http://www.cidh.org/countryrep/Defenders/defenderstoc.htm>.

[124] Inter-American Commission on Human Rights, " Report on the situation of human rights in Jamaica" (2012), online: oas.org <http://www.oas.org/en/iachr/docs/pdf/Jamaica2012eng.pdf>

[125] The Chapter IV – which seeks to present the situation of those countries "with the most pressing human rights concerns" – has been under attack from several governments which consider that singling out specific States is highly stigmatizing and can hardly be defined as a constructive way to get "rogue States" to engage with the Commission.

The contents of these reports can easily be referred to in written arguments in support of complaints. It provides background information on the political and social context prevailing in the country, and can give domestic tribunal an indication of the level of concern certain issues have raised in light of applicable regional standards.

In addition to country reports, the IACHR has released a number of studies dealing with a variety of issues, ranging from judicial independence to juvenile justice[126]. These reports shed a comparative light on human rights concerns that are common to several – or all – countries.

d) Thematic Hearings

Commissioners meet in private to deal with pending matters and process complaints, but a fair share of their time is allocated to Hearings of a General Nature, also known as "thematic hearings", in accordance with article 66 of its Rules of Procedure. While some hearings will address the treatment of specific population groups throughout in the Americas, others will focus on particular countries[127].

Though concerned States are given the opportunity to attend sessions and to respond to criticism, these hearings are not an adversarial process. Specific recommendations do not necessarily come out of this exercise, and States may not be asked to perform specific tasks and provide additional information. Such exchanges are essentially meant to enlighten the Commission on a given situation. That being said, these hearings are a key advocacy opportunity. These sessions are open to the public[128], and broadcast live via the IACHR website.

The IACHR receives on average around 400 requests from groups eager to be given the chance to convey their concerns at hearings, and normally responds positively to some 60 organizations per Period of Sessions. The Commission has recently introduced a new process whereby NGOs are invited to submit their requests online.

Because the time at the disposal of intervening organizations is strictly limited, it is important for speakers to prepare accordingly and split available time amongst themselves to ensure that every issue they wish to address is properly covered. As State

[126] Inter-American Commission on Human Rights, "Thematic Reports", online: oas.org <http://www.oas.org/en/iachr/reports/thematic.asp>.

[127] For example, on October 28th 2013, a hearing was held at the request of four local NGOs (Society against Sexual Orientation Discrimination, Family Awareness Conscious Together, Artists in Direct Support and Red Threat) on the situation of sexual minorities in the Caribbean, and looked into the problems faced in Guayana by children who are believed to be homosexual. See at: https://www.youtube.com/watch?v=vFTa6ZL1UBk

[128] Private hearings may be held under exceptional circumstances

representatives are likely to challenge the merits of the claims made by civil society organisations and Commissioners will be expected to ask questions, significant preparation time must go into anticipating what those questions and opposing arguments might be.

3. Standard-setting[129]

The Commission is called upon to advise the General Assembly of the OAS on needs for further elaboration of human rights standards. A good example of this are the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, which were adopted by the Commission in 2008 through its Resolution 01/08 following a consultative process begun in 2005 under the leadership of the then Rapporteur on the Rights of Persons Deprived of Liberty in the Americas, Mr Florentín Meléndez. Following extensive discussions with governments of the OAS Member States, experts, universities, international agencies, and national, regional, and international nongovernmental organizations, Mr Melendez's team was able to expand on existing standards which prohibit torture and other forms of cruel, inhuman or degrading treatment and draft a document meant to help relevant stakeholders identify how such standards could translate in practical terms[130].

4. Issuance of Precautionary Measures

The power of the IACHR to grant precautionary measures stems from article 25 of its Rules of Procedures, which states that "[...] *the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures. Such measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system"*.

Section 2(a) of that same provision defines the notion of "***serious*** *situation*" as "*one that can, through the action or omission of State agents, have a grave impact on a protected right of the intended beneficiary. The* ***urgency*** *is supplied by the imminence of the risk or threat that can materialize, requiring immediate preventive or protective action"*. (our emphasis)

129 ICHRP and ICJ, W. Tayler, "Note on Standard-Setting in the Inter-American System of Human Rights Protection" (2005) online: ichrp.org <http://www.ichrp.org/files/papers/86/120B_-_Note_on_Standard-setting_in_the_Inter-American_System_of_HR_Protection_Tayler__Wilder__2005.pdf>.

130 Organization of American States, "Resolution 1/08 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas", online: cidh.org <http://www.cidh.oas.org/pdf%20files/RESOLUTION%201_08%20-%20PRINCIPLES%20PPL%20FINAL.pdf>.

Precautionary measures are not meant to last indefinitely, and are revised by the Commission on a regular basis, based on information shared by the parties.

Some States resent what they perceive to be an unforeseen – and in their view unjustified – expansion of the scope of PM granted. They are particularly unpleased with the fact that entire communities have in the recent years been granted PM by the Commission, based on the perception that their cultures and livelihoods could be irreversibly affected by major economic development projects planned by their governments and private corporations without prior consultation.

The openness shown by the Commission to those arguments has backfired and ultimately weakened it. Those States fell that such far-reaching decisions exceed the powers of the IACHR and adversely affect their sovereignty. Indeed, influential countries such as Brazil have jumped on the bandwagon of States displeased by the work of the Commission and threatened to suspend their financial contribution in the aftermath of the recognition in 2011 of PM for the indigenous communities living in the Amazonian area where the Belo Monte dam was being built[131].

While the Commission will most certainly be more cautious in the future and more demanding regarding the level of risk faced by individual members of the community that claim to be threatened, this prerogative is unlikely to disappear as a result of the reform process currently underway.

Some entities in the Caribbean have made use of this mechanism. To give but a one examples, Jamaicans for Justice sent a request in May 2013 on behalf of "XXX – an unnamed 15 years old girl and the well-defined population of girls as yet unidentified in State custody in Jamaica to which she belongs" in which it asked for PM to be granted in favour of those minor girls who are placed in adult detention facilities after being deemed "uncontrollable" by domestic courts. This group is comprised of some 60 minor girls held in three correctional and remand centres, that JFJ wishes to see transferred to appropriate juvenile facilities, arguing that minor girls kept at detention centres are treated like prisoners, are often subjected to abuse from their adult cellmates, and that they are not provided with adequate health and psychological care. In its petition, JFJ claimed it had conveyed its concerns to competent State authorities in a variety of ways (letters, meetings with government officials, press releases) and lamented that in spite of the seriousness of the situation, no legislative steps had been taken to place juvenile correctional and remand facilities under the jurisdiction of the Child Development Agency.

The very notion of "imminent risk" varies according to the type of right allegedly jeopardized. In the case of the girls deprived of liberty in adult detention centres, the

131 See PM 382/10 - Indigenous Communities of the Xingu River Basin, Pará, Brazil; see at: http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp

IACHR formally requested the adoption of urgent measures in favor of the beneficiaries from the government of Jamaica on July 31st, nearly three months after precautionary measures were sought by JFJ on their behalf, on May 2nd. Within the constraints imposed by its limited resources, the Commissions attempts to rule on cases presenting a more urgent risk to persons' right to life or physical integrity within a shorter period of time.

Once precautionary measures have been granted by the IACHR, governments are expected to negotiate with the beneficiaries to ensure that protection measures that will be enforced respond to their needs and are adapted to them, their culture, and their environment. Sadly, some governments question the binding nature of precautionary measures and fail to genuinely consult the beneficiaries to ensure the protection measures that will be put in place are not alien to their reality and effectively provide them with a greater sense of safety. In other instances, they fail to take action and leave beneficiaries totally unprotected.

The binding nature of precautionary measures has been challenged, including by prominent scholars[132], based on arguments such as the following:

- The quasi-judicial nature of the Commission
- The fact that, unlike the provisional measures issued by the Court (art. 63(2)), the Commission's power to grant precautionary measures does not flow from the ACHR but from the Rules of Procedure, a document that is not subject to ratification
- It makes no sense to have a dual system – precautionary vs provisional measures – if the prerogatives are similar
- The wording: while the Rules of Procedure of the IACHR state that "*the Commission may, on its own initiative or at the request of a party, request that a State [...]",* article 26 of the Court's Rules of Procedure stipulates that "*the Court may, at the request of a party or on its own motion, order such provisional measures as it deems pertinent [...]"*

Yet, it must be borne in mind that States have a general duty to safeguard human rights in good faith and that the Commission's precautionary measure request represent an authoritative interpretation of States international human rights obligations rendered by a highly specialised body[133].

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[132] Ricardo Abello, "Las medidas cautelares de la CIDH no son vinculantes" (2014), online: El Espectador <http://www.elespectador.com/noticias/elmundo/medidas-cautelares-de-cidh-no-son-vinculantes-articulo-490877>.

[133] *Charter of the organization of American States,* 1951, s 106. ;
American Convention on Human Rights, 1969, s 41(b). ;
Statute of the Inter-American Commission on Human Rights, 1979, s 18(b).

C. GETTING SUPPORT FROM INTERNATIONAL NGOS

Civil society organizations may wish to complement their own legal arguments with participation other actors in the form of *amicus curiae* briefs in support of their claims, or joint participation in thematic hearings. The added value of such external support can hardly be questioned when local NGOs are small, have limited resources to allocate to the preparation of the intervention before the IACHR and count within their ranks few, if any, trained legal professionals.

The situation is different for a minority of human rights groups that enjoy a more significant level of support from foreign [and/or private] donors, and can consequently hire highly skilled legal counsels who have been trained in – or have had some degree of exposure to – international human rights law. While such groups may have the resources they need to build a strong and compelling case, they may still consider that the implication of international NGOs could further improve the persuasiveness of their submission.

The Centre for Justice and International Law (CEJIL; www.cejil.org/en) is widely known throughout the Americas for facilitating the access of local human rights NGO to the IAHRS. Indeed, CEJIL has helped a wide range of NGO and victims' legal representatives in the elaboration of their petitions, and the subsequent preparation of their oral arguments. Other INGOs have also provided a similar type of support, including LWBC[134].

The Role Played by the Inter-American Human Rights System in the Litigation Strategy at the Domestic Level

In several cases of human rights violations referred to the Inter-American System, there have been discussions on, among many other things, the scope of articles 8 and 25 ACHR, the interpretation of which led to the definition of criteria for a sound administration of justice. This became necessary primarily because State parties to the ACHR have more often than not failed in their duty to effectively investigate, process, and try cases of gross human rights violations, in a reasonable time.

In this context, international litigation must be seen as complementary to national justice. On one hand, it serves as a catalyst for the internal process, and on the other, it helps to strengthen the justice system and align domestic legislation and policies with international standards in the area of human rights, as well as eradicate practices that impede access to

[134] See Lawyers Without Borders,"Audiance thématique à la commission interamériaine des droits humains: ASFC et le Collectif contre l'impunité préoccupés par les entraves à l'accès à la justice dans l'affaire Duvalier" (2014), online: Lawyers Without Borders <http://www.asfcanada.ca/fr/nouvelles/affaire-duvalier-asfc-et-le-collectif-contre-l-impunite-comparaissent-devant-la-commission-interamericaine-des-droits-humains-340>.

justice by victims. In fact, parallel litigation of a case at the domestic level and another in the international sphere, has shown the effectiveness of both courses of action.

The extensive caselaw on forced disappearances and extra-judicial killings developed within the IAHRS may not be as relevant to the Caribbean as to some Latin American countries which have experienced long periods of dictatorship characterized by the systemic hunt and elimination of real or perceived political opponents. Still, isolated incidents of this nature have happened in the Caribbean, as illustrated by the case *Franz Britton (a.k.a. Collie Wills)* vs *Guyana*, which involved a person taken into custody by police, never to be seen again[135].

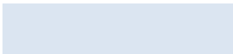
In recent years, the Commission has dealt with Caribbean cases that had little or nothing to do with the mandatory death penalty, a human rights issue which until the turn of the century virtually monopolized the attention of the IAHRS insofar as the sub-region was concerned[136].

Before seeking a chance to be heard by the Commission, human rights organizations need to reflect on the added value of this exercise. Hearings only serve a limited purpose, but their impact can be significant if the hearing is combined with other actions aimed at giving a case or a situation more exposure and raising awareness in the general public.

Through the use of standards set under the Convention, press releases, thematic hearings, awarding of precautionary measures, and friendly settlement domestic and international litigation may reinforce one another. Complementarity initiates a dialogue between the two levels and is aimed at making the domestic justice system operate more effectively.

[135] Inter-American Commission on Human Rights, "Report no 1/06, Case 12.264" (2006), online: cidh.oas <https://www.cidh.oas.org/annualrep/2006eng/guyana.12264eng.htm>.

[136] Indeed, the IACHR has dealt with issues as varied as freedom of expression, indigenous rights, etc : Auro Fraser, "From Forgotten through Friction to the Future: The Evolving Relationship of the Anglophone Caribbean and the Inter-American System of Human Rights" (2006) vol 43 Inter-American Institute of Human Rights Law Review at pp. 230 et ss.



PART V: CONCLUSION

Through advancing legal claims before domestic courts and supranational quasi-judicial bodies, strategic litigation holds the potential to achieve significant, fundamental changes, at both the legal and policy levels. This legal tool may be used to further human rights issues in the Caribbean, such as the fight against extra-judicial killings, violence against children, discrimination based on sexual orientation, and environmental abuse. It is essential that human rights defenders are able to effectively utilize strategic litigation in the context of international and domestic legal proceedings so as to further their pursuit of justice.

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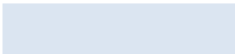

[i] Ibid

[ii] Office of the Children's Registry, "2007-2012 Anniversary Publication," 2013, p. 30.

[iii] The Jamaica Observer, "Child abuse shocker – 8,030 cases reported between Jan &Aug.," Tuesday, December 3, 2013, http://www.jamaicaobserver.com/news/Child-abuse-shocker_15553230