

Settling human rights violations

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Citation for this version and the definitive version are shown below.

Citation to Publisher Version: Contesse, Jorge. (2019). Settling human rights violations. *Harvard International Law Journal* 60(2).

Citation to this Version: Contesse, Jorge. (2019). Settling human rights violations. *Harvard International Law Journal* 60(2). Retrieved from <http://dx.doi.org/doi:10.7282/t3-vwna-z077>.



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SETTLING HUMAN RIGHTS VIOLATIONS

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60 HARV. INT'L L.J. __ (forthcoming 2019)

In the past few decades, human rights courts have been widely established around the world, sparking the interest of legal scholars who devote significant attention to state accountability for human rights violations. Academic centers exclusively dedicated to the study of international courts have appeared, and conferences on the role of international adjudication now abound. International law has become a juricentric discipline.

With the enormous attention afforded to the international human rights judiciary, critical aspects of non-judicial human rights decision-making are often neglected. One understudied mechanism is that of friendly settlements, whereby victims of human rights violations, acting under the “good offices” of regional human rights bodies, enter into direct negotiations with respondent states toward a consensual resolution to a human rights dispute. Despite its prolific use in regional human rights regimes, legal scholars have largely neglected the friendly settlement mechanism. This Article fills

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that gap. Drawing on a review of all friendly settlements executed before the Inter-American Commission on Human Rights, as well as interviews with Commission personnel (including two of its former presidents), state officials from six Latin American countries, members of non-governmental organizations, and petitioners, this Article comprehensively analyzes the general practice of settling human rights disputes. The Article identifies various motivations underlying the practice: states avoid the “naming and shaming” that comes with human rights litigiousness; victims more quickly obtain reparations; and human rights bodies alleviate their backlog.

But friendly settlements also raise serious—and unnoticed—challenges. The Article unearths both normative and practical concerns with settling human rights violations and considers a novel alternative. It proposes an improved form of friendly settlement that (i) distinguishes between and affords differentiated procedural treatment to disputes concerning individual violations and those seeking structural remedies, and (ii) delegates negotiation and compliance functions to local authorities. With these improvements, the Article concludes, human rights settlements can play a critical role in holding states accountable, along with—and even more than—human rights adjudication.

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I. INTRODUCTION

In 2012, sexual orientation and gender identity became protected categories under inter-American human rights law. In February of that year, through a groundbreaking decision in a case brought by Ms. Karen Atala against Chile, the Inter-American Court of Human Rights declared for the first time in its history that states could not discriminate against individuals on the basis of sexual orientation or gender identity.¹ In its decision, the Inter-American Court found that Chile's Supreme Court had violated the rights of Ms. Atala and her three daughters when it stripped Ms. Atala of custody at the request of her ex-husband, who objected to their daughters living with Ms. Atala and Ms. Atala's same-sex partner.² That 2012 Inter-American Court judgment paved the way for subsequent decisions on sexual orientation and gender identity, from the recognition of social rights for same-sex couples³ to the finding that all members of the Organization of American States ("OAS") should legalize same-sex marriage as a matter of international law—a doctrine that no other international court had thus far articulated.⁴

Prior to the Inter-American Court's ruling, however, Ms. Atala and her daughters—like all petitioners before the inter-American human rights system—had to file their submission before the Inter-American *Commission*

¹ *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 91 (Feb. 24, 2012). I acted as leading co-counsel in Ms. Atala's petition before the Inter-American Commission on Human Rights, and later, in her case before the Inter-American Court of Human Rights. The views expressed in this Article are, of course, my own. See generally Rosa M. Celorio, *The Case of Karen Atala and Daughters: Toward a Better Understanding of Discrimination, Equality, and the Rights of Women*, 15 CUNY L. REV. 335 (2012) (detailing the implications of the decision for the rights of women and LGBTI individuals in the inter-American human rights system).

² The Supreme Court found that the children must be raised in a "traditional" Chilean household, with a father and a mother. By having her partner move in with the family, the Supreme Court declared that Ms. Atala neglected her children's best interest, notwithstanding that the three children had expressly said they wanted to live with their mother (and their mother's partner), and that no expert witness raised objections to Ms. Atala's parenting. See Corte Suprema de Justicia [C.S.J.] [Supreme Court], 13 mayo 2004, "Atala Riffo c. Chile," Rol de la causa: 1193-03 ¶ 20 (Chile).

³ See *Duque v. Colombia, Preliminary Objections, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310 (Feb. 26, 2016).

⁴ *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples* (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, In Relation to Article 1, American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017). The Inter-American Court of Human Rights is the first international tribunal to declare that same-sex marriage is an individual right protected by international human rights law. See Jorge Contesse, *Sexual Orientation and Gender Identity in Inter-American Human Rights Law*, 44 N.C. J. INT'L L. (forthcoming 2019).

on Human Rights.⁵ The Commission held a hearing for Ms. Atala's case against Chile, which was, like many other hearings that come before the IACHR, charged with emotion.⁶ In a room full of people from different countries and organizations, and under the uncomfortable gaze of the representatives of the Chilean state, Ms. Atala testified as a witness before an attentive panel that reacted with surprise and a kind of emotional distance toward the victim's display of arguments and personal experiences. At the time of Ms. Atala's testimony, in March 2006, Latin American countries were far from recognizing the right of same-sex couples to raise children.

At the end of the hearing, the Commission, as it often did, urged the parties to attempt to reach agreement through a "friendly settlement." Although the positions articulated by each side during the hearing made agreement seem unimaginable—a view bolstered by an acerbic quarrel between Karen Atala and the head of the Chilean delegation at the end of the hearing—both the state and the petitioners assented to the Commission's invitation. That same afternoon, at the headquarters of the Chilean Mission to the Organization of American States in Washington, D.C., Ms. Atala and her representatives met with officials of the Chilean government. This was the first of many meetings that would take place over the next two years in the hopes of reaching consensual resolution to the case. Ultimately, the parties did not reach an agreement, and the case continued before the Inter-American Commission, which eventually issued a merits report weighing in on the dispute and submitted the matter for consideration to the Inter-American Court. The Court went on to rule in favor of Ms. Atala in its 2012 decision heralded as "landmark,"⁷ "groundbreaking,"⁸ and "historic."⁹

⁵ In the Americas, all petitions asserting a violation of a right protected by the American Convention on Human Rights must be submitted before the Commission. It is the Commission that, after reviewing the admissibility and merits of the case—a process that usually takes many years—may decide to take the case before the Court. Only after the case is submitted before the Court may the individual petitioners access the Court. *See* American Convention on Human Rights, arts. 44, 48 and 61.2. In Europe, since the abolishment of the Commission in 1998, petitioners file their cases directly before the European Court of Human Rights.

⁶ Usually, the Commission does not hold hearings on both admissibility and merits. The admissibility phase is essentially a formal examination of the petition and does not require hearings. *See* American Convention on Human Rights, art. 46(1), 22 Nov. 1969, 1144 U.N.T.S. 123. According to the Commission's Rules of Procedure, the adoption of an admissibility report "does not constitute a prejudgment as to the merits of the matter." Rules of Procedure of Inter-Am. Comm'n H.R., art. 36(2) (2013).

⁷ *See* Penny Miles, *Challenging Heteronormativity: Atala Riffo and daughters v. Chile*, in *CHILE AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* 65, 74 (S. Smart, K. Fernandez & C. Peña eds., 2017); Human Rights Watch, *Chile: Gay Rights Ruling a Leap*

Despite the failure of the parties' attempt to reach a friendly settlement, the negotiation process had significant implications for the ultimate adjudication in favor of Ms. Atala and the resulting adoption of a new regional human rights standard for the right to equality.¹⁰ On the other hand, it also raised a number of questions regarding the use of this mechanism to hold a state accountable: for some, Chile's violation of Ms. Atala's and her daughters' human rights were being submitted to negotiation or mediation—was that correct? Was it convenient—and if so, for whom? For Karen Atala, as a victim? For her daughters? For Chile, then considered “Latin America's most socially conservative country”?¹¹ For other countries, or for the inter-American system? Or, as Inter-American Commission on Human Rights' attorneys note, in fact the matter of negotiation were the remedies available to the victims?¹² Was it at that time more important to obtain a judicial pronouncement by the Inter-American Court, or even a merits report from the Commission, declaring that the state had violated the human rights of the victims? Note that at that time, no precedent existed on the issue, and no international body had ever ruled that sexual orientation fell under the protected categories of the American Convention on Human Rights. Was it conceivable to obtain an international decision indicating that a lesbian woman had the right to have her family protected by inter-American human rights law?

Scholars interested in international human rights law devote a great deal of attention to the study of international courts. And with good reason: as

Forward (Mar. 23, 2012), <https://perma.cc/DXS5-A59T> (quoting Human Rights Watch's advocacy director of the LGBT Rights Program noting that “[t]his is a landmark ruling for the region. . . .”); Simon Romero, *Chile: Landmark Gay Rights Ruling*, N.Y. TIMES (Mar. 21, 2012), <https://perma.cc/Y8X8-BMPT>.

⁸ See Rosa M. Celorio, *The Case of Karen Atala and Daughters: Toward a Better Understanding of Discrimination, Equality, and the Rights of Women*, 15 CUNY L. REV. 335, 340 (2012).

⁹ See *The ICJ welcomes historic decision in Atala v. Chile*, INT'L COMM'N JURISTS (Mar. 23, 2012), <https://perma.cc/B8Z6-WS7W>; *LGBT Rights Upheld in Historic Inter-American Court Ruling*, OUTRIGHT (Mar. 22, 2012), <https://perma.cc/XVW5-R2CY>.

¹⁰ The main reason why the negotiations came to an end was the state's refusal to recognize its international responsibility for the events that led to the filing of the petition before the IACHR. Chile noted that the 2004 decision of the Supreme Court was not contrary to the rights established in the American Convention. For petitioners, the case transcended the individual interest of the victims and therefore, it was not acceptable for an agreement to be reached that did not include an express acknowledgment of the discrimination Ms. Atala and her daughters had faced. See Letter from petitioners on behalf of Karen Atala to the Chilean government (Aug. 30, 2008) (on file with author).

¹¹ See Larry Rohter, *Lesbian Judge Fights Chilean Court for Taking Her Children*, N.Y. TIMES (July 20, 2006), <https://perma.cc/B8JA-DDUN>.

¹² Interview with L5, staff attorney, Inter-Am. Comm'n H.R. (Dec. 12, 2018).

Karen Alter has put it, international courts are the “new terrain” of international law.¹³ Yet by focusing their attention so exclusively on judicial resolutions, scholars have neglected alternative mechanisms for the enforcement of international human rights law—mechanisms that may be as or even more effective than international adjudication. Friendly settlements are one such mechanism.¹⁴

The literature on friendly settlement is compact. The most comprehensive study on the matter addresses the European—not the inter-American—human rights system, and it does it only up to 2010.¹⁵ More significantly, in European human rights law the practice of friendly settlements largely concerns individual, not structural, reparations, that is, agreements in Europe concern individuals who expeditiously access the European Court to obtain reparations through the form of settlements as monetary compensations.¹⁶

The inter-American model is very different. Most cases in Latin America concern *collective*, not individual violations, that is, violations where society—and even the region as a whole—have a significant interest. Taking stock of this prominent difference is necessary to reflect on the overall practice of settling human rights violations. Also, studies on the inter-American practice of friendly settlements have focused on the practice “against a thought-provoking backdrop of political transition.”¹⁷ Yet, such

¹³ See KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2014). Along with the impressive number of academic conferences all around the world dedicated to the role of international courts, academic centers specifically devoted to the study of international courts have also been established (e.g., the Center of Excellence for International Courts, at the University of Copenhagen (iCourts), and the Center for the Study of the Legitimate Role of the Judiciaries in the Global Order, at the University of Oslo (PluriCourts)).

¹⁴ Another “non-contentious” mechanism that international bodies also use—and has also received little scholarly scrutiny—is the use of advisory jurisdiction. In recent years, the Inter-American Court has issued advisory opinions addressing pressing and contested issues, such as the rights of children in the context of immigration, extraterritoriality in international environmental law, and the right to same-sex marriage. On August 1, 2018, with entry into force of Protocol No. 16 to the European Convention of Human Rights, high courts and tribunals of European states will be able to request the European Court to give advisory opinions to interpret the rights defined in the Convention. See Protocol 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Oct. 2, 2013, C.E.T.S. No. 214.

¹⁵ See HELLEN KELLER, MAGDALENA FOROWICZ & LORENZ ENGI, *FRIENDLY SETTLEMENTS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS* (2010).

¹⁶ See *infra* Part II.A.1.

¹⁷ W. Michael Reisman & Susan Benesch, *The Use of Friendly Settlements in the Inter-American Human Rights System*, in MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 741, 743 (Lal Chand Vohrah et al.

backdrop has dramatically changed over the past two decades.¹⁸ Latin America has transitioned to democracy already, and the context in which friendly settlements must be studied has also changed in significant ways. A more recent study analyzes the practice of friendly settlement in Latin America between 2001 and 2011.¹⁹ Most importantly, the study reinforces the juristocratic approach that governs inter-American human rights scholarship, as commentators worry that friendly settlements may “weaken the ‘constitutional’ function of the [Inter-American Court]”²⁰ and that they “may not contribute” to the judicialization of Latin American law.²¹ Hence, none of these studies cover friendly settlements adopted after 2011—a period in which the Commission has approved critical settlements in a vast number of areas, covering a wide range of remedies.²² Nor does any of these studies address the normative implications of settling human rights violations, that is, the nature and implications of the remedies that victims can agree with states and the problems with a centralized model of implementation.

This Article examines in detail the use of friendly settlements in the inter-American human rights system. It draws from a review of all settlements reached before the Inter-American Commission on Human Rights since 1985, as well as interviews with petitioners, victims, staff attorneys at the Inter-American Commission (including two of its former presidents), and government officials from Argentina, Chile, Colombia, Ecuador, Mexico and Paraguay. I discuss how human rights constituencies use and understand friendly settlements, explore the motivations behind them, and shed light on both their practical and normative advantages. Despite their many benefits, friendly settlements in human rights law also present drawbacks. I identify these key problems and offer avenues to address them, with the goal of proposing an improved mechanism of settlement that is more efficient and better serving of the values enshrined by human rights law.

The Article proceeds as follows: In Part II, I survey the use of friendly

eds., 2003); *see also* Patricia E. Standaert, *The Friendly Settlement of Human Rights Abuses in the Americas*, 9 DUKE J. COMP. & INT’L L. 519, 522 (1999).

¹⁸ *See* Jorge Contesse, *Contestation and Deference in the Inter-American Human Rights System*, 79 LAW & CONTEMP. PROBS. 123 (2016).

¹⁹ *See* Natalia Saltalamacchia Ziccardi, Jimena Álvarez Martínez, Brianda Romero Castelán & María José Urzúa Valverde, *Friendly Settlements in the Inter-American Human Rights System: Efficiency, Effectiveness and Scope*, in THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: IMPACT BEYOND COMPLIANCE 59 (Pär Engström ed., 2018).

²⁰ *Id.* at 65.

²¹ *Id.*; *see also supra* note 5.

²² *See infra* Part III.B.2.

settlement in international human rights law, with special attention to its distinctive features in the human rights systems of Europe and Africa. I examine the literature on settlements of domestic disputes under U.S. law and connect issues there identified to the discussions on human rights settlements that follow. In Part III, I turn to the study of friendly settlements in the inter-American human rights system. I analyze the basic rules and regulations of settlements, the practices of the Inter-American Commission on Human Rights—the regional body charged with monitoring the adoption and enforcement of friendly settlements—, differing remedies agreed to by settling parties, and the reasons why both states and petitioners seek to settle human rights cases. I then identify four key problems with settlement as currently employed in the realm of human rights violations: (i) the misperception that settling human rights violations is normatively inferior than obtaining judicial decisions; (ii) the unnecessary exclusion of third parties from the settlement process; (iii) the inconsistent function of individual commissioners and underutilization of their institutional participation in settlements; and (iv) the difficulty of adequately enforcing settlement terms post-resolution. In Part IV, I address these problems by offering two proposed improvements to the current settlement model: I recommend that the Inter-American Commission distinguish between individual and structural remedies, and I propose that it establish formal avenues by which third parties can participate in settlement discussions and enforcement through decentralized negotiations and collective monitoring of post-settlement compliance. Part V concludes.

II. INTER-AMERICAN FRIENDLY SETTLEMENTS IN CONTEXT

International law contemplates different forms of conflict resolution: some are judicial, such as the submission of a case before an international tribunal like the International Court of Justice or regional human rights courts, and some are diplomatic, such as mediation or conciliation.²³ Multiple international treaties stipulate conciliation procedures as a mechanism for dispute resolution among states.²⁴ In contrast, friendly settlements are non-adversarial agreements between human rights victims and states, adopted under the “good offices” of human rights bodies. Some view friendly settlements as just an expression of the general principle of

²³ See U.N. Charter art. 33, ¶ 1 (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”).

²⁴ See, e.g., United Nations Convention on the Law of the Sea arts. 284, 285, Dec. 10, 1982, 1833 U.N.T.S. 397.

international law that aims for the peaceful resolution of conflicts.²⁵ According to this view, friendly settlements in human rights applications are a hybrid mechanism, including elements of both negotiation and conciliation.²⁶ This Section discusses theories on settlement as a dispute resolution mechanism and explains some of the basic features of the friendly settlement mechanism in human rights law.

A. Settlement regimes

The friendly settlement mechanism is found in regional human rights regimes,²⁷ as well as in the universal regime set up by the International Covenants on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, and their respective monitoring bodies, the Human Rights Committee²⁸ and the Committee on Economic, Social and Cultural Rights.²⁹ Under the overview of a third-party—for example, the African Court on Human and Peoples' Rights or the European Court of

²⁵ See Jorge Ulises Carmona Tinoco, *The Friendly Settlement of Human Rights Petitions in the Universal and Regional Spheres, with Special Reference to the Inter-American System*, 5 MEX. Y.B. INT'L L. 83 (2005); see also KELLER, FOROWICZ & ENGI, *supra* note 15, at 5.

²⁶ See Reisman & Benesch, *supra* note 17, at 751 (observing that international treaties since the founding of the League of Nations have established settlement mechanisms as a way of solving disputes).

²⁷ In the European system of human rights, friendly settlements are established in Article 39 of the European Convention on Human Rights: "At any stage of the proceedings [before the Court], the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto." See KELLER, FOROWICZ & ENGI, *supra* note 15, at 289.

In the African system, Article 9 of the Protocol on the African Court on Human and Peoples' Rights states: "The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter." Organization of African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 9, June 9, 1998, Doc. OAU/LEG/EXP/AFCHPR/Prot (III) (entered into force Jan. 25, 2004); see also KOFI OTENG KUFUOR, *THE AFRICAN HUMAN RIGHTS SYSTEM: ORIGIN AND EVOLUTION* 133–38 (2010).

Reisman and Benesch note that "the Inter-American Commission has the most elaborate statutory arrangement for friendly settlement of any of the regional human rights bodies." Reisman & Benesch, *supra* note 17, at 741, 748.

²⁸ Rule 79 of the Rules of Procedure of the Human Rights Committee states: "[s]ubject to the provisions of rule 78 of these rules, the Committee shall proceed to make its good offices available to the States parties concerned with a view to a friendly resolution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the Covenant." U.N. Human Rights Committee, Rules of Procedure of the Human Rights Committee, CCPR/C/3/Rev.10 (2012).

²⁹ G.A. Res. A/RES/63/117, Optional Protocol to the Int'l Covenant on Economic, Social and Cultural Rights (Dec. 10, 2008).

Human Rights—the parties examine under what conditions it is possible to resolve what could otherwise become a litigious matter. This Article focuses on settlements before the Inter-American Commission because of its use as a structural mechanism to redress human rights violations and the lack of attention it has thus far received. Before undertaking the study, however, it may be useful to situate it in the context of other human rights regimes. This will help us understand the prominence that the Inter-American Commission’s gives to remedies that go beyond the claims of individual petitioners, but address structural, social or collective interests.

1. European human rights law

In the European human rights system, friendly settlements have become mostly an individualized mechanism whereby applicants can find redress in the form of monetary compensation.³⁰ Friendly settlements in Europe seem to largely serve an efficiency goal: once the Court verifies that the agreement between the victim and the respondent state observes the rights enshrined in the European Convention, it issues a strike out decision and the case is eliminated.³¹ This use of the friendly settlement mechanism began when the Court became backlogged as a result of a dramatic increase in petitions that occurred with the accession of former Soviet countries to the Council of Europe.³² Since 2010, High-Level Conferences on the European human rights system have systematically encouraged European human rights bodies and member states to find ways to tackle the backlog of cases: making more use of the friendly settlement procedure has always been part of the Conferences Declarations.³³

³⁰ In *FRIENDLY SETTLEMENTS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE* (2010), Keller, Forowicz, and Engi’s research covers friendly settlements through 2009. See KELLER, FOROWICZ & ENGI, *supra* note 15. The practice since then has been stable: all 2,316 friendly settlements approved by the European Court of Human Rights in the past ten years include monetary compensation as the principal remedy.

³¹ See European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 39(3), Nov. 4, 1950, 213 U.N.T.S. 221; Rules of Court of the Eur. Ct. H.R., Rule 43.3, 2018.

³² See KELLER, FOROWICZ & ENGI, *supra* note 15, at 71 (“Following the accession of the Central and Eastern European States, the number of applications rose exponentially. . .”).

³³ High-Level Conference on the Future of the European Court of Human Rights, *Interlaken Declaration*, ¶ D.7.a.i (Feb. 19, 2010), <https://perma.cc/NYN8-69J8> (“The Conference calls upon States Parties to . . . facilitate . . . the adoption of friendly settlements and unilateral declarations”); High-level Conference on the Implementation of the European Convention on Human Rights, our shared responsibility, *Brussels Declaration*, ¶ 9 (Mar. 27, 2015), <https://perma.cc/L7JX-858B> (“The Conference . . . [e]ncourages . . . States Parties to give priority to alternative procedures to litigation such as

Starting in the 2000s, the European Court introduced two new mechanisms to tackle its backlog: “pilot friendly settlements”³⁴ and “unilateral declarations.”³⁵ Through pilot judgments, the Court addresses matters that, due to their systemic nature, may give rise to many identical applications.³⁶ To prevent an influx of applications concerning the same matters, the Court may issue a “pilot” judgment if a systemic problem affects a class of individuals, and if general measures are required to address such a problem.³⁷ Once the Court has issued a pilot judgment, friendly settlement procedures can be carried out as well under the rules and principles set forth by said judgment.³⁸

Through unilateral decisions, the respondent state offers a public, adversarial statement acknowledging its responsibility for a human rights violation. Under certain circumstances, the Court may find it appropriate to strike out the application even if the applicant refuses to end the case and wishes it to be examined by the Court.³⁹ With both friendly settlements and unilateral decisions, much of the Court’s case load is thus lightened. Hence, settlements in European human rights law serve efficiency goals while at the same time ensuring respect with human rights law. Commentators

friendly settlements and unilateral declarations”); High Level Conference, *Copenhagen Declaration*, ¶ 54.b (Apr. 12, 2018), <https://perma.cc/H6GH-VWTT> (“The Conference . . . [i]nvites the Committee of Ministers . . . to [explore] how to facilitate the prompt and effective handling of cases, particularly repetitive cases, that the parties are open to settle through a friendly settlement or a unilateral declaration”).

³⁴ See KELLER, FOROWICZ & ENGI, *supra* note 15, at 70–74.

³⁵ Keller & Suter, *supra* note 30, at 55.

³⁶ See Lize R. Glas, *The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice*, 34 NETH. Q. HUM. RTS. 41, 44 (2016).

³⁷ See Eur. Ct. Hum. Rts., *The Pilot-Judgment Procedure*, <https://perma.cc/PJQ5-A5ZX>. On the main features of the pilot judgment mechanism, see Dilek Kurban, *Forsaking Individual Justice: The Implications of the European Court of Human Rights’ Pilot Judgment Procedure for Victims of Gross and Systematic Violations*, 16 HUM. RTS. L. REV. 731 (2016).

³⁸ See, e.g., *Broniowski v. Poland*, Friendly Settlement, No. 31443/96, 2005-IX Eur. Ct. H.R. (2005) (observing that whenever the parties settle after the Court has rendered a pilot judgment the Court must “consider not only . . . the applicant’s individual situation but also measures aimed at resolving the underlying general defect . . . identified in the principal judgment,” at 3).

³⁹ The European Court has stated that it must analyze the circumstances of a unilateral decision on a case by case basis to determine if it may or not accept the respondent state’s declaration. See *Tahsin Acar v. Turkey*, Preliminary Issue, 2003-VI Eur. Ct. H.R. 1, 21–22 (“Relevant factors . . . include the nature of the complaints made, whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases, and the impact of these measures on the case at issue.”).

criticize the European friendly settlement system as one that fosters a “monetization, and potential trivialization, of fundamental rights.”⁴⁰

2. The African human rights system

The African human rights system—the youngest of all regional human rights regimes—did not initially contemplate a friendly settlement mechanism for human rights cases, but only for intra-state communications.⁴¹ The legal lacuna, however, did not prevent the African Commission on Human and Peoples’ Rights from seeking friendly settlements,⁴² and in 2010, both the African Commission and the Court adopted new rules of procedure that now formally allow for “amicable” settlement procedures.⁴³ The mechanism has been used less in Africa, however, than in Europe and Latin America. It is, like in its sister regimes, a confidential procedure that allows a petitioner to negotiate the terms of an agreement with a state to resolve a dispute. An interesting feature of the African Commission’s Rules of Procedure, however, is the Commission’s duty to submit to the African Court “all the evidence . . . concerning the communication, *including documents related to any attempts to secure a friendly settlement*, and the Commission’s decision.”⁴⁴ In general, individual petitions in the African human rights system are processed through contentious mechanisms, both before the Court and the African Commission.⁴⁵

B. Human rights settlements theory

The proliferation of international tribunals has prompted scholars to devote significant energy to the examination of international courts’ jurisprudence. The most salient area of study is arguably the interaction

⁴⁰ See Ziccardi, Martínez, Castelán & Valverde, *supra* note 19, at 59, 65.

⁴¹ See Frans Viljoen, *A Human Rights Court for Africa and Africans*, 30 BROOK. J. INT’L L. 5 (2004–2005).

⁴² See Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights*, 97 AM. J. INT’L L. 1 (2003).

⁴³ Protocol to the African Charter on Human and Peoples’ Rights, *supra* note 27, art. 9 (“The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.”); see also Rules of Court of the African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], R. 26(1)(c) (June 2, 2010); Rules of Procedure of the African Commission on Human and Peoples’ Rights 2010, [Afr. Comm’n H.P.R.] R. 109 (Aug. 18, 2010).

⁴⁴ Rules of the African Commission, *supra* note 43, R. 121 § 4 (emphasis added).

⁴⁵ See Michelo Hansungule, *African Courts and the African Commission on Human and Peoples’ Rights*, in HUMAN RIGHTS IN AFRICA: LEGAL PERSPECTIVES ON THEIR PROTECTION AND PROMOTION 233, 265 (Anton Bösl & Joseph Diescho eds., 2009).

between domestic law and international adjudication.⁴⁶ In Europe, doctrines emanating from the European Court of Justice, such as “supremacy” and “direct effect,”⁴⁷ and the European Court of Human Rights—most saliently, the “margin of appreciation doctrine”—receive incessant attention.⁴⁸ In the Americas, the same happens with the work of the Inter-American Court of Human Rights⁴⁹ and, to a lesser extent other, tribunals, such as the Andean Court of Justice.⁵⁰ The work of the younger African Court of Human Rights is also the subject of legal commentary.⁵¹ We live in an era of “juricentric” international law scholarship.

Yet, as noted, scholars have largely neglected the study of settlement in international law, despite its pervasiveness.⁵² Those efforts that do analyze

⁴⁶ See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 282–90 (1997); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 12 (2005); ALTER, *supra* note 13, at 3.

⁴⁷ See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413–15 (1991).

⁴⁸ See ANDREW LEGG, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY* (2012); Andreas Føllesdal & Nino Tsereteli, *The Margin of Appreciation in Europe and Beyond*, 20 INT’L J. HUM. RTS. 1055 (2016); Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843 (1999); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEG. STUD. 705 (2006).

⁴⁹ See, e.g., LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE-LAW AND COMMENTARY* (2011); Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights* 44 CORNELL INT’L L. J. 493 (2011). The Inter-American Court’s conventionality control doctrine is currently the one that receives the most attention in legal scholarship. See, e.g., Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT’L L. J. 45 (2015); Jorge Contesse, *The Final Word? Constitutional dialogue and the Inter-American Court of Human Rights*, 15 INT’L J. CONST. L. 417 (2017); PABLO GONZÁLEZ-DOMÍNGUEZ, *THE DOCTRINE OF CONVENTIONALITY CONTROL: BETWEEN UNIFORMITY AND LEGAL PLURALISM IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* (2018).

⁵⁰ See Laurence R. Helfer & Karen J. Alter, *The Andean Tribunal of Justice and Its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, 41 N.Y.U. J. INT’L L. & POL. 871, 874 (2009).

⁵¹ See, e.g., Frans Viljoen, *Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples’ Rights*, 67 INT’L & COMP. L. Q. 63 (2018).

⁵² See Carmona Tinoco *supra* note 25, at 114–15 (discussing the friendly settlement mechanism in inter-American human rights law); see also Karlos Castilla, *Ideas respecto a la solución amistosa en el Sistema Interamericano de Derechos Humanos*, 3 REV. CENTER JUST. & INT’L L. 124, 125 (2007); Luis Manuel Lasso-Lozano, *Reflections on Colombia’s Friendly Settlements with the Inter-American System of Human Rights Protection*, ISHR (1994–1997), 18 COLOM. J. INT’L L. 89, 92 (2011); María Carolina Estepa, *La solución amistosa en el Sistema Interamericano de Derechos Humanos*, 13 REV. ESTUDIOS SOCIO-

some of the features and implications of settlement in international law—whether in human rights law or the law of investor-state arbitration—rely on the literature scholars have produced regarding alternative forms of dispute resolution at the domestic level.⁵³ As Hafner-Burton *et al.* observe, however, although that literature on domestic settlements is “huge,” “many of [its] findings of this literature tend not to be relevant when the state or government agency is a party to the process.”⁵⁴ Such is the case in human rights settlements, where the state is *by definition* a party to the disputes.

Much of the alternative dispute resolution literature is preoccupied with the secrecy and the privatization of legal disputes that are the norm in the settlement process—two concerns that Owen Fiss captured more than three decades ago in his seminal article, *Against Settlement*.⁵⁵ Fiss criticizes the increasing use of settlement in private litigation because, in his view, it undermines the value of open and transparent processes of decision-making. A champion of adjudication, Fiss understands the judicial process to be something that helps elucidate and give meaning to public values that are fundamental to our political life.⁵⁶ The use of settlement—which he sees as “a capitulation to the conditions of mass society”—should thus not be

JURÍDICOS 327, 330 (2011).

⁵³ See, e.g., Lorna McGregor, *Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the European Court of Human Rights*, 26 EUR. J. INT’L L. 607, 608 (2015); Emilie Marie Hafner-Burton, Sergio Puig & David G. Victor, *Against Secrecy: The Social Cost of International Dispute Settlement*, 45 YALE J. INT’L L. 3 (2017).

⁵⁴ Hafner-Burton, Puig & Victor, *supra* note 53, at 15, 17.

⁵⁵ See Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1085 (1983–1984). Owen Fiss’s work on settlement, which has shaped much of the academic debate on the topic, has recently begun to influence international lawyers as well. See Hafner-Burton, Puig & Victor, *supra* note 53, at 65 (“international law is living a *Fissian* moment”). On the extensive literature that discusses Fiss’s work, see, for example, David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Kenneth R. Feinberg, *Reexamining the Arguments in Owen M. Fiss, Against Settlement*, 78 FORDHAM L. REV. 1171 (2009); Samuel Issacharoff & Robert Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009); Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173 (2003); Leora Bilsky & Talia Fisher, *Rethinking Settlement*, 15 THEORETICAL INQ. L. 77 (2014); Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995); Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL’Y 103, 104 (1986). For a contemporaneous account to Fiss’, see Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668 (1985).

⁵⁶ See Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 15 (1979).

encouraged insofar as it privatizes disputes.⁵⁷

Fiss' view has been labeled a "public-life conception" of adjudication.⁵⁸ This vision, which Luban identifies with theorists who see democratic deliberation as the constitutive element of political freedom, contrasts with (what Luban calls) the "problem-solving conception" of governmental legitimacy and the role of adjudication.⁵⁹ Under the "problem-solving conception," articulated by leading alternative dispute resolution scholars, adjudication's role—and, more generally, the government's—is to arbitrate disputes between private individuals who cannot solve them on their own.⁶⁰ This conception, exemplified by "quarrels between neighbors,"⁶¹ sees the exercise of freedom as essentially circumscribed to the private sphere. In contrast, the "public-life conception" of adjudication understands the exercise of freedom as essentially linked to the public sphere.⁶²

What is the relevance of these ideas to the discussion addressed in this Article? Fiss was not thinking about human rights disputes when he wrote his critique of settlement—nor were his critics.⁶³ The claim he formulates, however, has validity for the discussion of human rights settlements. Fiss opposes settlements because he believes they cannot achieve what adjudication can, which is "structural transformation."⁶⁴ Adjudication advances and elucidates public values by bringing about *social* transformation, that is, reforms that go beyond the actual parties to a dispute. The best articulation of this function is offered by Luban, when he notes that Fiss' position is based on an "unspoken question": "where would we be," Luban asks, "if *Brown v. Board of Education* had settled quietly out of court?"⁶⁵ The question is critical for an analysis of human rights settlements, where the issues at stake far more resemble cases like *Brown* than they do private disputes over damages or "quarrels between neighbors."

⁵⁷ Fiss, *Against Settlement*, *supra* note 55, at 1075.

⁵⁸ See Luban, *supra* note 55, at 2634–35.

⁵⁹ *Id.*

⁶⁰ See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

⁶¹ Fiss, *Against Settlement* *supra* note 55, at 1075.

⁶² Luban, *supra* note 55, at 2633 (1995) ("the 'public-life conception' . . . derives from the political thought of the ancient world and has enjoyed a periodic revival from Machiavelli to Rousseau to contemporary civic republicans. The best known modern defender of the public-life conception is Hannah Arendt.").

⁶³ *But see* Bilsky & Fisher, *supra* note 55, at 103 (analyzing settlement in the context of transnational Holocaust litigation).

⁶⁴ See Luban, *supra* note 55, at 2631 (arguing that, for Fiss, "structural transformation suits [have] public significance").

⁶⁵ *Id.* at 2629.

To the extent that human rights settlements concern human rights violations, that is, social (and even, universal) wrongs, they inherently refer to what Fiss calls “structural transformation” cases.⁶⁶ This feature may not be too salient in Europe, where—as discussed in the previous Section—human rights settlements’ chief function is “to quickly dispose of clone cases”⁶⁷ through a sort of “fast track procedure.”⁶⁸ But in the Americas, where multiple agreements deal with non-individualized pleas, the implications of structural transformation cases are very relevant. As explained in Part III, one-third of all settlements adopted by the Inter-American Commission include structural remedies (“guarantees of non-repetition,” in the language of inter-American human rights law).⁶⁹ Petitioners in human rights procedures before the Inter-American Commission seek not only individual redress—they also seek structural remedies.⁷⁰ In seeking broader structural remedies, such petitioners are like the *Brown* plaintiffs; yet, unlike the *Brown* plaintiffs, rather than litigating their claims, petitioners negotiate.

For these reasons, the public-life conception of adjudication provides insight for the analysis of human rights friendly settlements. First, settlements concerning human rights violations must not affect, but protect and even enhance, the public legitimacy of human rights norms and human rights regimes. To do so, settlement procedures should be designed so they do not transform human rights petitions into privatized disputes. Second, human rights regimes must also examine the scope of remedies that the

⁶⁶ See *infra* Part III.C.

⁶⁷ Keller & Suter, *supra* note 30, at 70.

⁶⁸ *Id.* at 89.

⁶⁹ See *infra* Part III.C.3.b.

⁷⁰ In the *Atala* case this characteristic had a concrete manifestation. The representatives of the Chilean state insisted during a good part of the process that the petitioner always had the possibility of requesting a Chilean court to review the decision regarding the custody of her children. By doing so, the state wanted Ms. Atala to withdraw her petition before the inter-American system and seek remedies at the domestic level. Notwithstanding the exhaustion of domestic remedies (the case was motivated by a final decision of the Supreme Court), the state argued that the doctrine of “formal” *res judicata* applied to custody disputes. Under this doctrine, a claimant who loses in a family court may seek a review of the decision whenever she proves that the circumstances have changed, and thus the case merits reconsideration. In the *Atala* case negotiations, the petitioner’s decision to reject the state’s proposal was based on her understanding that *her* case had ceased to be one about who should have the custody of the children—the issue of the “domestic” case—but rather was about the violation of the human rights that she *and her daughters* had suffered as a result of the Supreme Court’s decision. Ms. Atala, as a petitioner, understood the public (that is, regional) relevance of her individual petition, regardless of whether it was resolved in an agreement with the state or whether it reached the Inter-American Court. It was not a family law dispute, but a human rights case.

parties agreed on when they decided to settle a human rights case. If a case concerns massive and gross human rights violations, there may be strong reasons against settlement—or at least reasons to balance the parties’ will to settle against the public’s interest.⁷¹ Remedies in such instances may prove critical to protect the human rights regime’s legitimacy.

The key question, addressed in Part IV, will therefore be, under what circumstances do friendly settlements promote the public values that human rights law enshrines? The literature on domestic settlements thus helps in conducting the balancing inquiry that human rights regimes must strike between justice and efficiency when facing practical questions on human rights settlements. In the next Part, I describe the mechanism in the inter-American human rights context.

III. FRIENDLY SETTLEMENTS IN INTER-AMERICAN HUMAN RIGHTS LAW

This Part explains the development of the friendly settlement mechanism in Inter-American human rights law. It first presents the legal framework that regulates friendly settlements, and then shows how the mechanism has evolved from being an unregulated and underused tool to a salient and promising avenue for human rights redress.

A. Legal framework

The friendly settlement mechanism is established in the American Convention on Human Rights, the region’s main human rights treaty adopted in 1969.⁷² As the first draft of the Convention had already

⁷¹ For example, examining the case of Turkey, where the European Court of Human Rights has approved settlements in cases concerning police brutality, torture, and even the loss of life, scholars maintain that such settlements “are highly problematic.” KELLER, FOROWICZ & ENGI, *supra* note 15, at 100–03 (“Financial compensation could hardly be adequate with regard to such severe human rights violations . . . [a]s a general rule, torture cases are therefore not suitable for settlements.”).

⁷² Article 48(1) of the American Convention states: “When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.” American Convention on Human Rights, art. 48(1)(f), Nov. 22, 1969 1144 U.N.T.S. 123.

In addition, Article 49 states: “If a friendly settlement has been reached in accordance with paragraph 1(f) of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to this Convention, and shall then be communicated to the Secretary General of the Organization of American States for publication. This report shall contain a brief statement of the facts and of the solution reached. If any party in the case so requests, the fullest possible information shall be provided to it.” *Id.* art. 49.

contemplated a provision on the friendly settlement, under the rules of procedure before the Inter-American Commission on Human Rights (Article 37(e)),⁷³ the states' delegates to the Inter-American Conference who were tasked with the adoption of the Convention did not spend much time debating the friendly settlement mechanism. In fact, the wording of the first draft is essentially the same as the current provision in Article 49, which establishes that, once a friendly settlement is reached, the Commission must issue a report containing "a brief statement of the facts and of the solution reached."⁷⁴

The provisions on friendly settlement in the American Convention do not give much guidance beyond basic procedural steps that the Commission and the parties must take.⁷⁵ In 1980, the Inter-American Commission on Human Rights adopted its own Regulations, which took what was already established in the American Convention and merely added a clause authorizing the Commission "to place itself at the disposal of the parties concerned, at any stage of the examination of a petition or case."⁷⁶ It then took two decades, until the year 2000, for the Commission to amend its Rules of Procedure on a number of matters, including friendly settlements, after which the Commission's regulations provided more detailed information as to how the Commission was to proceed in friendly settlement procedures.

The amendment to the Inter-American Commission's Regulations is significant because it shows the steady process toward professionalization of the friendly settlement mechanism.⁷⁷ As the Commission, petitioners,

⁷³ See Organization of American States, "Inter-American Specialized Conference on Human Rights," 27, OEA/Ser.K/XVI/1.2 (Nov. 7–22, 1969).

⁷⁴ States delegates suggested thorough amendments to the draft of the Convention; however, they did not propose any relevant amendments to the provision on friendly settlements. The revised draft, submitted for final consideration of states' delegates on November 21, 1969, one day before the end of the Specialized Inter-American Conference, added a key clause on transparency and information: "If any party in the case so requests, the fullest possible information shall be provided to it." See Organization of American States, "Inter-American Specialized Conference on Human Rights," 27, OEA/Ser.K/XVI/1.2, at 28, 78, 114, 387, 494 (Nov. 7–22, 1969).

⁷⁵ See American Convention on Human Rights, *supra* note 6, arts. 48(1)(f), 49.

⁷⁶ Rules of Procedure of Inter-Am. Comm'n H.R., *supra* note 6, art. 40(1).

⁷⁷ Since 2000, the Commission has amended its rules of procedure in 2002, 2003, 2006, 2008, 2009, 2011, and 2013. The regulations on friendly settlements have remained unaltered since 2000. Article 40 of the current Rules of Procedure states:

(1) On its own initiative or at the request of any of the parties, the Commission shall place itself at the disposal of the parties concerned, at any stage of the examination of a petition or case, with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the American Convention on Human Rights, the American Declaration and other applicable

and states all began to understand the potential of the mechanism, the need to have regulations that promote and facilitate the adoption of settlements also became more pressing. The evolution of the Commission's understanding that I now discuss demonstrates why the Commission has had the need to adopt new regulations, and perhaps more significantly, why the proposals that I formulate in Part IV are in line with the reforms processes that the Commission has so far undertaken.

B. Historical background

As discussed above, the Commission's regulations merely provide a procedural framework on friendly settlements, without providing further guidance. To understand how the Commission truly understands the scope and implications of the friendly settlement mechanism, simply reviewing the resulting agreements themselves may not be enough, as they only provide a narrative of the facts and the solution to which the parties have agreed. Therefore, this Section relies on extensive interviews with both current and former members of the Inter-American Commission on Human Rights, as well as litigators, petitioners and victims who have come before the Commission. It explains how the Commission's approach toward friendly settlements has evolved since 1985, when the Commission adopted its very first settlement,⁷⁸ and how such evolution may inform the proposals that I make at the end: in particular, the distinction between claims that are collective, and therefore require structural remedies, and claims that are individual, where the issue can be more expeditiously addressed—for

instruments. (2) The friendly settlement procedure shall be initiated and continue on the basis of the consent of the parties. (3) When it deems it necessary, the Commission may entrust to one or more of its members the task of facilitating negotiations between the parties. (4) The Commission may terminate its intervention in the friendly settlement procedure if it finds that the matter is not susceptible to such a resolution or any of the parties does not consent to its application, decides not to continue it, or does not display the willingness to reach a friendly settlement based on the respect for human rights. (5) 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. Prior to adopting that report, the Commission shall verify whether the victim of the alleged violation or, as the case may be, his or her successors, have consented to the friendly settlement agreement. 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. (6) If no friendly settlement is reached, the Commission shall continue to process the petition or case.

Id. art. 40.

⁷⁸ See Luis Alonzo Monge v. Honduras, Friendly Settlement, Case 7956, Inter-Am. Comm'n H.R., Resolution No. 5/85 (Mar. 5, 1985).

example, by paying a monetary compensation.⁷⁹ I also suggest that stakeholders (the Commission, petitioners, victims, and states) should consider decentralizing some of the enforcement functions of settlements. The evolution in the Commission's understanding of settlements—initially seeing them as a tool not to be used in all cases, to designing a sophisticated framework to handle negotiations—points toward a model of friendly settlements that could work in parallel with, and at times better than, human rights adjudication.

1. From discretion to obligation

In its early years, the Inter-American Commission made little use of friendly settlements, and when it did there was no clear criterion whereby the Commission offered its good offices to the parties seeking a settlement.⁸⁰ Further, both petitioners and the Commission itself had reservations about the potential of the friendly settlement procedure to hold states accountable for their human rights violations,⁸¹ and the Commission had a tacit understanding that not all petitions were eligible for an amicable solution.⁸² The reasoning was simple: there could not be a “friendly” settlement with states that commit grave human rights violations, such as extra-judicial executions or forced disappearances.⁸³ Similarly, most petitioners held a strong view that the human rights matters submitted for consideration of the Commission were unnegotiable.⁸⁴ Petitioners thus favored the Commission's merits reports on human rights violations—over judicial pronouncements by the Inter-American Court—over friendly settlements.⁸⁵

⁷⁹ See *infra* Part IV.

⁸⁰ Interview with L3, staff attorney, Inter-Am. Comm'n H.R. (Apr. 5, 2018). As Reisman and Benesch note, by the mid-1980s the Inter-American Commission “had only made four attempts at friendly settlement” and in only one of them the parties did in fact reach an agreement. See Reisman & Benesch, *supra* note 17, at 742.

⁸¹ Interview with L1, staff attorney, Inter-Am. Comm'n H. R. (Apr. 5, 2018).

⁸² See Christina Cerna, *The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 100 (David John Harris & Stephen Livingstone eds., 1998) (“The reason for this was that the Convention procedure revolves around the central notion that human rights violations can be solved by means of a friendly settlement, whereas the Commission had historically been used to documenting violations of a kind which it considered did not lend themselves to a friendly solution.”).

⁸³ Reisman & Benesch, *supra* note 17, at 759–60; see also interview with L5, staff attorney, Inter-Am. Comm'n H.R. (July 30, 2018).

⁸⁴ Interview with L3, staff attorney, Inter-Am. Comm'n H. R. (Apr. 5, 2018).

⁸⁵ See Standaert, *supra* note 17, at 522 (describing friendly settlements as “an institutional framework that is often asked to resolve ‘disputes’ involving allegations of gross violations of human rights”).

On the other hand, the Commission also failed to articulate the criteria under which friendly settlements were acceptable. After screening individual petitions, the Commission would sometimes offer the parties its good offices for attempting to negotiate an agreement; other times, without providing an explanation, the Commission would not offer its good offices for a negotiation between the parties. In the Inter-American Court's first ruling ever, in which it address the state's preliminary objections in the case of *Velásquez Rodríguez v. Honduras*—concerning the forced disappearance of a student at the hands of the Honduras military police—the Court upheld the Commission's discretionary approach.⁸⁶ In *Velásquez Rodríguez*, the respondent state argued that the Inter-American Commission had a duty to offer them the option of conducting a friendly settlement and that it had failed to do so.⁸⁷ The Court rejected the state's argument, declaring that the Commission had “the sole discretion”⁸⁸ to decide whether or not to offer the option of a friendly settlement, and the discretionary approach towards friendly settlement thus became one of its first prominent features.

Such an approach to friendly settlement, however, did not last long.⁸⁹ By the mid-1990s, the Commission's understanding of friendly settlements began to change.⁹⁰ One factor leading to this change was that the Commission noticed that victims of serious human rights violations were willing to seek agreements with states, despite states' responsibility in gross violations of fundamental rights. For many victims, it was important to have the chance to voice their grievances in a forum where they felt protected and where states had to account for their failures to respect basic rights.⁹¹ The discretionary approach stood as an obstacle to this, effectively usurping petitioners' right to seek redress.⁹² The Commission thus concluded that because petitioners and victims were amenable to settling human rights violations disputes, a new approach to friendly settlements was in order.⁹³

Another factor that led to the Commission's change in its approach to

⁸⁶ See *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶ 44 (June 26, 1987).

⁸⁷ See *id.* ¶ 42.

⁸⁸ See *id.* ¶ 44. The Court reiterated this formula in two other decisions, handed down on the same day of *Velásquez Rodríguez*. See *Fairén Garbí and Solís Corrales v. Honduras, Preliminary Objections*, Inter-Am. Ct. H.R. (ser. C) No. 2, ¶ 49 (June 26, 1987); *Godínez Cruz v. Honduras, Preliminary Objections*, Inter-Am. Ct. H.R. (ser. C) No. 3, ¶ 47 (June 26, 1987).

⁸⁹ During the time of the “discretionary approach” only three settlements were signed. See *infra* Part III.C.2.

⁹⁰ Interview with L3, staff attorney, Inter-Am. Comm'n H.R. (Apr. 5, 2018).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

friendly settlements stemmed from a practical concern. As more petitions were submitted to the Commission for adjudication, backlog became a serious problem. To partially address the matter, the Commission decided to articulate a new criterion whereby *all* petitions would be eligible for friendly settlement. In the words of a Commission staff member, “the Commission understood that the matter subject to negotiation was not the specific *rights* at stake, but the *issue* itself, that is, the proceedings pending before the Commission. Rights would be non-negotiable, but still subject to settlement, depending on the type of state action concerned . . . the Commission adopted a procedural, instead of substantive approach.”⁹⁴

The distinction is not entirely neat. If the next of kin of a forced disappearance sits down at a negotiating table with the government that is ultimately responsible for the person’s disappearance, the parties are in fact negotiating. In any case, the distinction allowed the Commission to depart from the *Velásquez Rodríguez* discretionary approach, declaring that, although the *nature* of rights could not be subject to negotiations, the *means* to address violations (and to grant reparations) could be negotiated. Once the state was found to have violated, say, the right to life of an individual disappeared at the hand of a country’s secret police, the negotiation would not concern the victim’s right to life, but the way to redress the violation to her right.

The Inter-American Court took note of the Commission’s new “mandatory approach,” eventually embracing the Commission’s view on friendly settlements. In the case of *Caballero Delgado and Santana v. Colombia*—concerning the forced disappearance of a union leader and his wife at the hands of a military patrol—the Court declared that only in “exceptional cases and, of course, for substantive reasons” could the Commission withhold the option of friendly settlement to the parties.⁹⁵ Hence, friendly settlements would be available for *all* human rights petitions—an approach labeled as the “universalization” of friendly settlements.⁹⁶

⁹⁴ *Id.*

⁹⁵ *Caballero Delgado v. Colombia*, Preliminary Objections, Inter-Am. Ct. H. R. (ser. C) No. 17, ¶ 27 (Jan. 21, 1994). The Court further noted it was “unacceptable for the Government to argue as a preliminary objection that the Commission did not implement the peaceful settlement procedure, considering that it enjoyed that very same power [to propose an agreement] under the provisions of the Commission’s Regulations. One cannot demand of another an action that one could have taken under the very same conditions but chose not to.” *Id.* ¶ 30.

⁹⁶ See Inter-Am. Comm’n H.R., Impact of the Friendly Settlement Procedure, ¶ 45, 65, OEA/Ser.L/V/II.167 doc. 31 (Mar. 1, 2018); interview with L5, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018).

As the Inter-American Commission's work became both more complex, in terms of the array of petitions, and larger, insofar as the number of individual petitions grew each year, the Commission pushed forward the "universalization" of friendly settlements. Staff attorneys at the Inter-American Commission observe that the role played by specific commissioners—in particular, American University law professors Robert Goldman and Claudio Grossman⁹⁷—was critical to the development of a "friendly settlement culture."⁹⁸ This new culture favored a more active role for the Commission in working toward finding substantive solutions to human rights violations.⁹⁹ To that end, staff attorneys observed that the personal involvement of individual commissioners proved critical. This personal involvement, as I discuss below, might also be problematic, as the fate of these procedures may fall on the varying skills of specific individuals instead of the institutional mechanism in place.¹⁰⁰

In 2000, with the adoption of new Rules of Procedure, the inter-American human rights system gave petitioners and victims greater opportunity to intervene in cases before the Court.¹⁰¹ The Commission retained its powers under the friendly settlement mechanism to seek an amicable solution to individual petitions before taking them to the Court.¹⁰² By the end of the 2000s, under the leadership of former Chairman (and Notre Dame law professor) Paolo Carozza, the Commission took a decisive step toward institutionalizing what was until then a rather informal culture or approach towards the friendly settlement mechanism when it created a special Section dedicated exclusively to friendly settlement procedures.¹⁰³ Commissioners understood that, just as there were specialized working groups on precautionary measures or litigation before the Inter-American Court, friendly settlements occupied a critical role in the Commission's work, and it was necessary to institutionalize the cumulated knowledge and practice on friendly settlements.¹⁰⁴

2. Institutionalization

⁹⁷ Both from the American University Washington College of Law.

⁹⁸ Interview with L3, staff attorney, Inter-Am. Comm'n H.R. (Apr. 5, 2018).

⁹⁹ *Id.*

¹⁰⁰ *See infra* Part III.C.4.c.

¹⁰¹ *See* Rules of Procedure of Inter-Am. Comm'n H.R., *supra* note 6; *see also* Veronica Gomez, *Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: New Rules and Recent Cases*, 1 HUM. RTS. L. REV. 111, 115 (2001) (observing that the new rules and regulations "provide victims *locus standi* to argue their own cases before the Court at the earlier stages of the procedure").

¹⁰² *See* Rules of Procedure of Inter-Am. Comm'n H.R., *supra* note 6, arts. 38(2), 41.

¹⁰³ Interview with L3, staff attorney, Inter-Am. Comm'n H.R. (Apr. 5, 2018).

¹⁰⁴ *Id.*

All individuals interviewed for this study—Commission staff, government officials, litigators and NGO leaders—agree that the success of friendly settlements procedures may depend too much on the negotiation skills of individual commissioners.¹⁰⁵ As a staff attorney observes, “especially in the past, some commissioners had tremendous clarity as to the Commission’s power and how to use it to negotiate with a state, while other commissioners didn’t have the same vision.”¹⁰⁶ The overdependence on the personal skills of commissioners, the backlog that the Commission faced and still faces, and the increased understanding that allows for parties to participate in the resolution of their conflicts, have transformed the place that friendly settlements occupy in the Commission’s work.

With the creation of the specialized Section, the Commission’s work on friendly settlements became more professional, beginning with the development of a two-stage plan aimed at institutionalizing the mechanism.¹⁰⁷ Between 2010 and 2013, the Commission obtained funding from the European Union to assess the first 25 years of the mechanism. “There was no institutional information on the matter, no annual reports, nothing but the personal experience accumulated throughout the years,” observes a staff attorney at the Commission.¹⁰⁸ Hence, it was crucial to review the Convention’s *travaux préparatoires*, the Commission’s several rules of procedure, documentation on friendly settlements, and the Commission’s best practices on the matter.¹⁰⁹

The Commission then took a number of steps to improve the salience of the friendly settlement procedure. It hired an expert on alternative dispute resolution to write a report identifying the mechanism’s advantages and

¹⁰⁵ Interview with L2, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018); interview with L5, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018); interview with L6, staff attorney, Inter-Am. Comm’n H.R. (Apr. 6, 2018); interview with S1, gov’t official, Arg. Ministry of Justice and Human Rights (July 31, 2018); interview with S6, former gov’t official, Ministry of Foreign Affairs, Chile (July 3, 2018); interview with S3, Colom. (July 17, 2018); interview with Uriel Salas, Dir. of Section on Cases, Human Rights and Democracy Section, Ministry of Foreign Affairs of Mex. (Sept. 3, 2018); interview with L11, gov’t official, Para. (Aug. 2, 2018); interview with Rolando Jiménez, President, Movilh (July 28, 2018).

¹⁰⁶ Interview with L3, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ A petitioner interviewed for this study criticizes the dynamics that stem from external funding: “the Commission used friendly settlements in an excessive way because they had to show results to the European Union. At times we had to call them up and tell that there was no way we would enter into negotiations; they failed to realize that sometimes settlement was just not possible.” Interview with C1, petitioner, int’l human rights org. (Apr. 6, 2018).

problems.¹¹⁰ While the report identified a number of areas where the Commission could make improvements to the friendly settlement procedure, there was one key finding: in spite of the mechanism's success in terms of the matters settled and, more significantly, the scope of remedies agreed upon, victims and human rights advocates lacked information on the availability of the friendly settlement procedure.¹¹¹ Hence, the second phase of the Commission's plan was mainly devoted to the creation of promotional tools for friendly settlements, as well as the establishment of an implementation methodology for signed agreements.

At the time these developments took place, the Commission was engulfed in a revision of its powers under the American Convention. Tensions between the Commission and certain countries had increased due to states' uneasiness with the Commission's recommendations and the adoption of precautionary measures in areas where many countries thought the Commission ought not to intervene.¹¹² In December 2011, the Permanent Council of the Organization of American States established a Special Working Group to initiate a review process of the Inter-American Commission, known as the "strengthening process,"¹¹³ which ended in March 2013 with the adoption of fifty-three reforms aimed at the Commission. The process elicited concern among the inter-American human rights system's stakeholders,¹¹⁴ and created a latent tension between the Commission and states.¹¹⁵

¹¹⁰ See Inter-Am. Comm'n H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶ 20.

¹¹¹ See interview with L3, staff attorney, Inter-Am. Comm'n H.R. (Apr. 5, 2018).

¹¹² One of the most salient cases concerned the Commission's order to the Brazilian government to halt the construction of the country's largest hydroelectric dam, located in the Amazonas, for the government's failure to consult affected indigenous communities. See Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 YALE J. INT'L L. (forthcoming 2019) (discussing the role of Brazil and Venezuela as promoters of the revision process).

¹¹³ See Permanent Council of the Organization of American States, Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System for Consideration by the Permanent Council, OEA/Ser.G. GT/SIDH-13/11 rev.2, at 1 (Dec. 13, 2011).

¹¹⁴ See Gabriela Kletzel, *The Inter-American Commission on Human Rights' new Strategic Plan: an opportunity for true strengthening*, 22 INT'L J. HUM. RTS. 1249, 1251 (2018).

¹¹⁵ As noted by the Chief of Staff of the General Secretariat of the Organization of American States, tensions between states and the Commission "resulted in a significant degree of misunderstanding on both sides, frequently marked by mistrust and misconceptions of the reasons behind some actions." Hugo de Zela, *The Process of Strengthening the Inter-American Human Rights System*, 19 APORTES DPLF 9, 9 (2014).

During the process, the Commission's work on friendly settlements created a pathway for constructive dialogue among the Commission, OAS states and civil society organizations.¹¹⁶ States favored the use of friendly settlements, and the Commission was already working to promote their use.¹¹⁷ It was, unlike the issue of precautionary measures or the naming of certain countries as human rights violators, an uncontested matter.¹¹⁸ In September 2011, the Commission's Executive Secretariat made a presentation before the Special Working Group explaining the Commission's two-phase plan: first, "to assess practice"¹¹⁹ in order to then "facilitate more friendly settlements and prepare more friendly settlement reports."¹²⁰ The Commission announced that enhancing the mechanism would be one of the goals of the Commission's Strategic Plan of 2011-2015.¹²¹

The Special Working Group then made six recommendations on the matter of friendly settlements.¹²² The Commission took note and responded positively. With funding from the Organization of American States, it undertook a study of the first 112 agreements and coded them according to the reparations states and petitioners agreed upon, as well as the level of compliance with such reparations. Further, it prepared a Handbook for practitioners,¹²³ created a dedicated website on friendly settlements,¹²⁴ convened a meeting with alternative dispute resolution experts and human rights specialists at the Commission's headquarters in Washington D.C.,¹²⁵ circulated (and posted online) a questionnaire among states, and NGOs on

¹¹⁶ Interview with L3, staff attorney, Inter-Am. Comm'n H.R. (Apr. 5, 2018).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Permanent Council of the Organization of American States, Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the IACHR, *Presentation by the Executive Secretariat of the IACHR on the topic "Friendly Settlement,"* OEA/Ser.G, GT/SIDH/INF.41/11, at 3 (Dec. 2, 2011).

¹²⁰ *Id.* at 4.

¹²¹ *Id.* at 2.

¹²² The Working Group recommended that the Commission "[g]radually strengthen the working group on friendly settlements"; "[g]ive a commissioner direct responsibility for the working group on friendly settlements to be created"; "[b]roaden the availability of friendly settlements"; "[s]et deadlines in order to expedite the issuance of reports"; "[p]repare a practical guide or manual on friendly settlements", and "[p]rovide training to IACHR staff on facilitation of friendly settlement processes." Rep. of the Special Working Group, *supra* note 113, at 14–15.

¹²³ Inter-Am. Comm'n H.R., Handbook: Friendly Settlement Mechanism in the Petition and Case System, OEA/Ser.L/V/II.3 (2015), <https://perma.cc/6DR4-UCMS>.

¹²⁴ See Org. of Am. States, "Friendly Settlement Proceedings of the Inter-American Commission on Human Rights," <https://perma.cc/S9HV-U45X> (last visited Mar. 2, 2018).

¹²⁵ Inter-Am. Comm'n H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶18.

the use, advantages and difficulties of the mechanism, and convened a regional meeting to discuss and analyze the use of the friendly settlement procedure.¹²⁶

During an Inter-American Human Rights Conference in June 2013, representatives of thirteen governments and several human rights NGOs addressed a number of issues pertaining to the current practice and future of the friendly settlement mechanism. The triggering question was whether there should be “country facilitators” for friendly settlement procedures: that is, one or more persons located in each country with the capacity to act on behalf of the Commission. Both state representatives and NGO leaders rejected the proposal, because they consider that the Commission has the legitimacy to facilitate dialogues among the parties due to its mandates, and composition.¹²⁷ Despite the rejection, the discussion on friendly settlement allowed the parties to find common ground despite increased mistrust among the parties.¹²⁸

The “strengthening process” culminated with an OAS Permanent Council resolution approving the recommendations that the Working Group made for both the Commission and the Inter-American Court.¹²⁹ By then, the Commission’s Special Section on Friendly Settlement had made significant progress assessing the procedure and elaborating tools for practitioners.

3. Promotional tools

In January 2017, the Commission’s Executive Secretariat proposed a new approach to friendly settlements to the sitting members of the Commission.¹³⁰ Under the new vision, the Commission would take a more

¹²⁶ The “First Inter-American Conference on Human Rights and the Exchange of Best Practices on Friendly Settlement” was held in Antigua, Guatemala, in June 2013, during a regular meeting of all OAS member states. *See id.* ¶ 21.

¹²⁷ *See* interview with L3, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018). In the words of a petitioner interviewed for this study: “the Commission’s objective was to outsource friendly settlement negotiations!” Interview with C1, petitioner, int’l human rights org. (Apr. 6, 2018).

The Inter-American Commission also organized conferences in Argentina, Bolivia, Colombia, Mexico and Paraguay, where government officials, civil society leaders, and members of foreign governments met with experts on alternative dispute resolution to share their experiences litigating cases before the inter-American human rights system and, in particular, negotiating friendly settlements. *See* interview with L3, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018).

¹²⁸ *See* de Zela, *supra* note 115, at 10.

¹²⁹ *See* Org. of Am. States, Res. 1 (XLIV-E/13), AG/RES. 1 (XLIV-E/13) rev. 1 (July 23, 2013).

¹³⁰ *See* interview with L3, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018).

proactive role in parties' negotiations—a feature that both petitioners and state officials agree is of great import to the success of friendly settlements.¹³¹ In particular, staff attorneys would now convene meetings, without having to wait for the parties to request them, and, more importantly, staff would relay information on the areas of potential agreement (in Spanish, “ZOPA”: *Zonas de Posibles Acuerdos*) through bilateral communications—without the need to hold trilateral meetings or communications, as had been the practice.¹³² The new approach was crystallized in the adoption of a Protocol, known as the “San Francisco Protocol,” which puts significant emphasis on the use of techniques on alternative conflict resolution.¹³³

In its Strategic Plan 2017–2021, the Commission has placed great emphasis on the use of the friendly settlement as a means both to obtain reparations for human rights victims as well as to address the Commission's procedural backlog.¹³⁴ Whether or not the new approach will result in greater access to justice and greater compliance is yet to be seen.

4. Mediation or prosecution?

The Commission's role is unclear. Under the general classification of mechanisms for international dispute resolution, friendly settlement has elements of conciliation, negotiation, and good offices—mechanisms that international law fosters in its founding documents, Such as the United Nations Charter.¹³⁵ Some states officials tend to see the Commission as

¹³¹ See interview with Francisco Quintana, Program Dir. for the Andean, N. Am. and Caribbean Region, Ctr. for Justice and Int'l Law (Apr. 6, 2018); interview with Rolando Jiménez, President, Movilh (July 28, 2018); interview with Uriel Salas, Dir. of Section on Cases, Human Rights and Democracy Section, Ministry of Foreign Affairs of Mex. (Sep. 3, 2018).

¹³² See interview with L3, staff attorney, Inter-Am. Comm'n H.R. (Apr. 5, 2018). The Special Section also adopted three criteria to assess impact of friendly settlements: first, through the number of “Expression of Interest” letters submitted by both petitioners and states; second, through the adoption of indicators on compliance; and finally, through an assessment of the types of measures agreed upon by the parties. *See id.*

¹³³ See Press Release, Inter-Am. Comm'n H.R., IACHR Celebrates Progress on Friendly Settlements in 2017–2018, Inter-Am. Comm'n H.R. Press Release No. 004/19, <https://perma.cc/UR5Z-FKHA> (Jan. 9, 2018); Inter-Am. Comm'n H.R., San Francisco Protocol, Jan. 2017, <https://perma.cc/NJ3B-CHNH>.

¹³⁴ The Plan's Strategic Objective 1 (“SO1”) is “to contribute to the development of a more effective and accessible system of inter-American justice in order to overcome practices of impunity in the region and achieve comprehensive reparations for victims through . . . friendly settlements,” and other measures. *See* Inter-Am. Comm'n H.R., Strategic Plan 2017–2021, OEA/Ser.L/V/II.161 Doc. 27/17, at 44 (Mar. 20, 2017).

¹³⁵ *See* U.N. Charter, *supra* note 23, art. 33(1)–(2).

normally siding with the victims.¹³⁶ They believe it is unlikely that the Commission will look into the petitions with a fully impartial view, although they posit that impartiality should be the Commission's approach.¹³⁷

The Commission, of course, must examine petitions impartially. And when it invites parties to seek an agreement under its good offices, it must do so with a view to obtaining an agreement that satisfies both parties and that also respects the rights established in the American Convention. The Commission's role is thus intrinsically connected to the promotion and protection of such rights, which should be its principal function in the context of individual petitions. Yet the Commission also acts as a kind of prosecutor, insofar as it has the power to take the case before the Court at any time if the Commission (or any party) decides to put an end to the process.¹³⁸ This prosecutorial nature of the Commission's work may be in tension with its role as a mediator or conciliator in friendly settlement negotiations—a tension that can cause damage to the Commission's credibility and legitimacy in front of states.¹³⁹

On the other hand, the Commission plays a key role in accompanying the victims of human rights violations in international proceedings. It is precisely that role which allows for victims' empowerment and agency, as explained above. In this sense, the Commission can hardly be impartial: a certain level of partiality seems to be what allows the victim to control part

¹³⁶ See interview with L11, gov't official, Para. (Aug. 2, 2018); interview with S6, gov't official, Chile (July 3, 2018).

¹³⁷ See *id.*

¹³⁸ See Rules of Procedure of Inter-Am. Comm'n H.R., *supra* note 6, art. 40(4).

¹³⁹ In the case of *Yean and Bosico v. Dominican Republic*, Dominican officials, acting under the 1944 Civil Status Act, denied the issuance of birth certificates to two Dominican girls of Haitian descent. Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶¶ 160, 164, 168 (Sep. 8, 2005). The girls filed a petition before the Inter-American Commission and a friendly settlement procedure was initiated. See *Dilicia Yean and Violeta Bosica [sic] v. Dominican Republic*, Case 12.189, Inter-Am. Comm'n H.R., Report No. 28/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 4 (2000). As a result of the negotiations, the state eventually issued birth certificates and requested that the Commission close the case. *Yean and Bosico, Inter-Am. Ct. H.R.*, No. 130, ¶ 25. The Commission did not oblige because the law remained in effect and decided to submit the case to the Inter-American Court, which eventually ruled against the state. See *id.* ¶¶ 26, 174. A senior human rights litigator observes that the Dominican state "felt that the Commission had betrayed them." Interview with C1, petitioner, int'l human rights org. (Apr. 6, 2018). The matter is especially relevant considering, among other topics, that the Dominican Republic became one of the harshest critics of both the Inter-American Court and the Commission in the past years. See Contesse, *Resisting the Inter-American Human Rights System*, *supra* note 112.

of the negotiation process and its possible outcomes. If the Commission recedes to a neutral, third-party function, negotiations will likely be less fruitful for victims, as they will need to face states' enormous bargaining power on their own. The tension in the Commission's mediator/prosecutor role seems hard to avoid. As I discuss below, more than attempting to dissolve or avoid the tension, inter-American human rights law should look for institutional mechanisms to channel the different positions—the state's, the petitioner's and victims' *and the Commission's*—that play a role in friendly settlement procedure. In Part IV, I suggest a way to do it by decentralizing the process that is today entirely concentrated on the Commission.

C. Settlement practice

This Section discusses in detail how the Commission has carried out its friendly settlement practice. I first explain some of the reasons behind, and the implications for, settlements in human rights law. Then, I offer some data on the practice of settlements in inter-American human rights law. Third, I review the Commission's taxonomy for the different kinds of remedies that parties can agree on when they settle cases, and finally, I discuss some of the problems with friendly settlements, in particular: the idea that adjudication is normatively superior than settlements; the exclusion of third-parties from negotiations; the heterogeneity among commissioners who lead negotiations; and the problems with enforcement. This discussion lays the ground for Part IV, where I offer proposals to improve the settlement model.

1. Why are petitions settled?

a. Avoiding the Court

States settle for a number of reasons. First, they wish to avoid being found internationally responsible for human rights violations in a contentious proceeding before the Inter-American Court.¹⁴⁰ Settling a case allows states to avoid the naming-and-shaming process that accompanies international litigation. In countries where the inter-American human rights system is well-known not only to human rights advocates but also to practitioners in general, states are more eager to enter into negotiations with petitioners.¹⁴¹ Other states, however, seem less interested in preventing

¹⁴⁰ See Carmona Tinoco, *supra* note 25, at 121.

¹⁴¹ For instance, there was a spike in petitions from Argentina after the 2001–2002 economic crisis. Private attorneys used the regional human rights regime as another instance to address the consequences of the *corralito*, the government's measure ordering a complete freeze of bank accounts. Within a few months, the Commission received more than two thousand petitions from account holders. See Press Release, Inter-Am. Comm'n

litigation and settle infrequently.

Another factor that affects the number of agreements signed is the level of understanding and preparedness within countries' foreign services. Countries with sophisticated diplomacy agencies are better able to directly negotiate with victims and petitioners; Mexico is one such example. According to a high-ranking official at the Mexican Foreign Ministry, the country has an active policy to seek friendly solutions in cases before the inter-American human rights system.¹⁴² This policy has led the government to enact legislation to secure implementation mechanisms for both decisions by the Inter-American Court as well as friendly settlements signed before the Commission.¹⁴³ But, as some civil society leaders note, the experience of savvy Mexican negotiators can allow the country to effectively halt petitions by entering into lengthy negotiations, thereby preventing cases from ever reaching the Court.¹⁴⁴

b. Agency

Victims and petitioners may also have reasons to favor entering into negotiations over litigation. First, proceedings before the inter-American human rights system may be very lengthy,¹⁴⁵ and many times petitioners obtain the same or larger remedies in negotiations that they would have in a Court's decision,¹⁴⁶ without having to wait years before their cases are adjudicated.¹⁴⁷ Friendly settlements allow for a more expeditious consideration of cases, and, if the negotiations are handled well, victims may obtain full reparations.

Second, the friendly settlement mechanism has a critical feature not found in judicial proceedings: it gives victims agency. Before the

H.R., Inter-American Commission on Human Rights Concludes Visit to the Argentine Republic, Inter-Am. Comm'n H.R. Press Release No. 33/02 (Aug. 6, 2002), <https://perma.cc/7LAC-97NV>; see also Oliver Galak, *Acusan a la Argentina ante la OEA*, LA NACIÓN (Aug. 16, 2004), <https://perma.cc/R7TP-5MTG>.

¹⁴² See interview with Uriel Salas, Dir. of Section on Cases, Human Rights and Democracy Section, Ministry of Foreign Affairs of Mex. (Sep. 3, 2018).

¹⁴³ For example, Mexico's Victims Act (*Ley General de Víctimas*) establishes implementation mechanisms for remedies obtained in international human rights procedures. *Ley General de Víctimas [LGV]*, Diario Oficial de la Federación [DOF] 09-01-2013, últimas reformas DOF 03-01-2017.

¹⁴⁴ See interview C1, int'l human rights org. (Apr. 6, 2018).

¹⁴⁵ See generally U. Tex. Sch. L. Human Rights Clinic, *Maximizing Justice, Minimizing Delay: Streamlining Procedures of the Inter-American Commission on Human Rights* (Dec. 2011), <https://perma.cc/D33J-BFXP>. In October 2016, the Commission adopted Resolution 1/16 to take measures to address the backlog problem. See Inter-Am. Comm'n H.R., Res. 1/16 (Oct. 18, 2016), <https://perma.cc/TXR2-VZV2>.

¹⁴⁶ See Reisman & Benesch, *supra* note 17, at 749.

¹⁴⁷ See interview with C1, petitioner, int'l human rights org. (Apr. 6, 2018).

Commission there are two parties that initially—in fact, domestically—have a radically unequal power relationship: at the request of a supranational human rights body, the state that has allegedly wronged an individual now meets with the applicant under conditions of parity. This dynamic gives victims the potential to direct the procedure rather than “just ask,” as a former high-ranking official of the Commission puts it.¹⁴⁸ “Victims are empowered: because they can withdraw from the procedure if they feel it is not satisfactory, their participation has real impact. They are able to decide.”¹⁴⁹

Court proceedings are mediated through the highly technical language of the law. The solemn proceedings aim at finding whether or not the state committed a wrongful act may seem more distant to petitioners than the less intimidating atmosphere of a meeting room, where the parties can act more freely. In friendly settlements negotiations, although contained by the law governing human rights, petitioners do not take the stand in front of the respondent state—her own state, let us not forget—, expert witnesses, judges in robes and the public. In friendly settlement negotiations, petitioners sit at the table with the other parties. The physical horizontality of the layout is expressive of the normative principle underlying these proceedings.

c. Acculturation

Petitioners may also favor friendly settlements because negotiations give flexibility to the parties involved and can lay the groundwork for future changes in inter-American human rights law. Unlike a friendly settlement, a decision by the Inter-American Court, as with any tribunal, is binary: either the petitioner is right, and hence the state is wrong; or the state prevails, and no violation of human rights is found. In LGBTI cases, for example, the process of friendly settlement has proved critical in persuading the Commission of the merits of the petitions, as well as the need to further the rights of LGBTI individuals notwithstanding the political climate of Latin American conservatism.¹⁵⁰ Insofar friendly settlements involve interactions and iterations between states and petitioners (and the Commission), the parties’ different positions are more susceptible to be affected than in a non-negotiation setting, such as adjudication. For example, when the Inter-American Court released an advisory opinion on same-sex marriage and the right to name change, in January 2018,¹⁵¹ LGBTI advocates fervently

¹⁴⁸ See interview with L7, former official, Inter-Am. Comm’n H.R. (July 3, 2018).

¹⁴⁹ *Id.*

¹⁵⁰ See interview with Rolando Jiménez, President, Movilh (July 28, 2018).

¹⁵¹ See *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples* (Interpretation and Scope of

praised the ruling.¹⁵² But the opinion also sparked an unprecedented pushback from conservative leaders across the region, effectively catapulting those running on an “anti-inter-American system” platform to the frontlines.¹⁵³

The friendly settlement mechanism can thus be effective when a state is reluctant to engage with petitioners regarding certain issues or when the Commission believes that, for one reason or another, addressing the issues may not be a good idea. In the friendly settlement process that took place in *Atala Riffo*,¹⁵⁴ for example, from the time of the admissibility hearing—March 2006—to the decision of the Inter-American Commission to submit the case before the Court in September 2010,¹⁵⁵ sexuality laws in Latin America underwent unprecedented changes. In 2008, Uruguay became the first Latin American country to legalize civil unions,¹⁵⁶ and then promptly turned to discuss a same-sex adoption law.¹⁵⁷ In March 2010, the Legislative Assembly of the Federal District of Mexico made that city the first in Latin America to legalize same-sex marriage.¹⁵⁸ A few months later, Argentina’s National Congress passed a historic reform that made it the first Latin American country to legalize same-sex marriage,¹⁵⁹ the field having been opened a few years earlier by the Colombian Constitutional Court’s

Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017).

¹⁵² See Daniel Berezowsky Ramirez, *Latin America Could Lead the Way for LGBT Rights in 2018*, HUMAN RIGHTS WATCH (Feb. 6, 2018), <https://perma.cc/RU3F-2HUV>.

¹⁵³ See Jorge Contesse, *Sexual Orientation and Gender Identity*, *supra* note 4. More than six hundred Latin American conservative lawmakers have formed a coalition, the “Hemispheric Lawmakers Network,” that accuses the Inter-American Court of usurping the sovereign powers of states when it comes to the regulation of sexual orientation and gender identity matters. See Luis Valverde Tenorio, *Férreos Opositores al “Intervencionismo” de la OEA componen Red de Parlamentarios de Fabricio Alvarado*, VOZ Y VOTO (Aug. 13, 2018), <https://perma.cc/V7NX-Y7G5>.

¹⁵⁴ See *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012); see also *supra* Part I.

¹⁵⁵ Press Release, Inter-Am. Comm’n H.R., IACHR Takes Case Involving Chile to the Inter-American Court, Inter-Am. Comm’n H.R. Press Release No. 97/10 (Sep. 20, 2010), <https://perma.cc/X88N-6QPD>.

¹⁵⁶ Law No. 18,246, Union Concubinaria. Derechos y Obligaciones. Regimen. [Concubinary Union. Rights and Obligations. Regime.], 27 diciembre 2007, DIARIO OFICIAL D.O. (Uru.).

¹⁵⁷ See *Uruguay Nears Same-Sex Adoption Law*, CNN (Aug. 29, 2009), <https://perma.cc/8DH6-BAZ8>.

¹⁵⁸ See Elizabeth Malkin, *Gay Marriage Puts Mexico City at Center of Debate*, N.Y. TIMES (Feb. 6, 2010), <https://perma.cc/J6G5-JT8S>.

¹⁵⁹ See Alexei Barrionuevo, *Argentina Approves Gay Marriage, in a First for Region*, N.Y. TIMES (July 15, 2010), <https://perma.cc/2AYK-S5AW>.

recognition of rights of heterosexual and homosexual couples based on the principle of constitutional equality.¹⁶⁰

The social landscape of conservative Latin America was changing—and the Commission could not ignore it.¹⁶¹ The many legal developments helped ease any resistance that the Commission may have had toward ruling on (what was in March 2006) the highly contested social issue of whether a same-sex couple may be permitted to live together and raise children. While the negotiations between Ms. Atala and the state did not succeed (the case, as explained, was submitted to the Court in September 2010), the friendly settlement process was key in persuading the Commission of the validity of Ms. Atala's claim under the American Convention, the need to obtain reparations and, more importantly, to hand down a robust submission.¹⁶²

But friendly settlement processes may also help to persuade *states* of the need for internalizing human rights standards. As Ryan Goodman and Derek Jinks have shown, states abide by international human rights law not

¹⁶⁰ See Julieta Lemaitre Ripoll, *Love in the Time of Cholera: LGBT Rights in Colombia*, 11 SUR-INT'L J. HUM. RTS. 73, 78 (2009); see also Joshua Goodman, *Colombia to Recognize Rights of Gays*, WASH. POST (July 15, 2007), <https://perma.cc/V4LN-AKQ7>.

¹⁶¹ The trend for the recognition of equal rights to homosexual couples did not stop. In 2011, the Brazilian Supreme Court ruled that same-sex couples have the same rights as heterosexuals. See Amnesty Int'l, *Brazil Supreme Court Recognizes Same-Sex Civil Unions* (May 6, 2011), <https://perma.cc/6MMC-QZWN>. In 2013, Uruguay became the second country in the region to legalize same-sex marriage. See Law No. 19,075, *Matrimonio Igualitario. Normas. Código Civil. Modificación. [Equal Marriage. Rules. Civil Code. Modification.]*, 3 mayo 2013, DIARIO OFICIAL [D.O.]; see also *Same-Sex Marriage Bill Comes into Force in Uruguay*, BBC NEWS (Aug. 5, 2013), <https://perma.cc/6LKC-XACF>.

¹⁶² *Karen Atala and daughters v. Chile*, Application before the Inter-American Court of Human Rights, Inter-Am. Comm'n H.R. Case 12.502 (Sep. 17, 2010) <https://perma.cc/RJH6-C449>.

Similarly, in the friendly settlement procedure on same-sex marriage that I discuss below, see *infra* Part III.C.3.iv, negotiations, along with other strategies—such as thematic hearings, where the Commission convenes a session and listens to various points of view on the matter—were key to making the state realize that the petition had merit and sensitize the Commission about the issue. See interview with Rolando Jiménez, President, Movilh (July 28, 2018).

In 2009, Movilh and several other organizations requested a thematic hearing on the status of same-sex civil unions in Latin America. Jiménez notes that the goal was “to raise awareness, to let the Commission know that it was time to give recognition to same-sex couples in the region.” *Id.* Along with Movilh, other civil society organizations from Peru and Bolivia also participated in the hearing, “to convey the message that the concern was on the matter not limited to one country only.” *Id.*; see also Inter-Am. Comm'n H.R., *Absence of Regulation for Homosexual Civil Unions*, Thematic Hearing (Nov. 6, 2009) (with participation of Fundación Igualdad Legal y Social para Lesbianas, Gays, Bisexuales y Trans (Igualdad LGBT), Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX)).

only when they are coerced, but also when they are “acculturated.”¹⁶³ When state officials see other countries moving in a certain direction by adopting human rights laws, or promoting resolutions within the Organization of American States political bodies, they may feel more eager to join their peers in that process. The *Atala* settlement and the same-sex marriage settlement discussed below are good examples.¹⁶⁴ The remarkable progress of Latin American states as to sexuality rights while Chile negotiated with petitioners in *Atala* had a “peer-pressure” effect on officials, who understood that Latin American human rights (and constitutional) law was moving in the direction of Ms. Atala’s petition. Likewise, consider that negotiations for the same-sex marriage settlement took place when same-sex marriage had already been legalized in several countries in the region. As the leading petitioner explains, “It was not possible for the state’s negotiators to deny what was becoming a Latin American reality. We would just point at what was happening in Argentina, our neighbor country.”¹⁶⁵ Acculturation is thus a critical factor in persuading states to settle human rights petitions.

d. Enforcement

Connected to the acculturation mechanisms, the Commission, and inter-American human rights, in general, may also favor the adoption of friendly settlements in that settlements can enhance states’ compliance with international human rights standards.¹⁶⁶ Scholars of state compliance in inter-American human rights law focus on decisions by the Court, but largely fail to analyze instances of compliance that take place *outside* of the adjudicatory realm of an international tribunal.¹⁶⁷ In friendly settlements,

¹⁶³ See Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, 19 EUR. J. INT’L L. 725, 726 (2008) (defining acculturation as “the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture”); see also Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

¹⁶⁴ See *supra* Part III.C.3.b.v.

¹⁶⁵ Interview with Rolando Jiménez, President, Movilh (July 28, 2018).

¹⁶⁶ See Ziccardi, Martínez, Castelán & Valverde, *supra* note 19, at 73–77.

¹⁶⁷ Alexandra Huneus, *Compliance with International Court Judgments and Decisions*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 438 (Karen J. Alter, Cesare Romano & Yuval Shany eds., 2013); Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT’L L. & INT’L REL. 35 (2010); Courtney Hillebrecht, *Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals*, 1 J. HUM. RTS. PRAC. 362 (2009); Damian Gonzalez-Salzberg, *The Effectiveness of the Inter-American Human Rights System: A Study of the American States’ Compliance with the Judgments of the Inter-American Court of Human Rights*, 15 COLOM. J. INT’L L. 115 (2010).

the state contributes to the terms of the settlement and agrees to comply with said terms because it has been persuaded (or “accultured”) that it is valuable to accept international responsibility and act accordingly—for example, through the adoption of measures of non-repetition.¹⁶⁸ It may matter whether the state's position responds to a robust conception of human rights—that is, whether it genuinely understands that it wronged the victim—or simply to an instrumental calculation of the advantages of avoiding international condemnation. There may be greater possibility for a state's internalization of human rights standards if the state assumes a genuine commitment and is less motivated by utilitarian calculus. As social theorists have observed, such attitudes can affect a legal system's overall legitimacy.¹⁶⁹ However, whatever its motives, the fact that the state settles because it consents to an agreement may enhance the chances of compliance: the agreement is the fruit of autonomy, not heteronomy.

According to official data, 35 percent of all friendly settlements subject to public follow-up have been fully implemented,¹⁷⁰ while 63 percent have been “partially implemented.”¹⁷¹ Commentators observe that, despite the not “particularly flattering” numbers of total compliance with friendly settlements,¹⁷² levels of compliance are still “impressive” when compared to the Commission's merits reports that contain recommendations for states.¹⁷³ The observation that friendly settlements may be more effective for victims is sound, but misses an important fact: when states sign an agreement, they commit to *willingly* comply (or attempt to comply) with the terms of the agreement. If the Commission issues a merits report, because either one of the parties—or both—have rejected the terms of a potential agreement, then the Commission will find *against* the state. In the face of disagreement and a report finding that the state has violated human rights, it

¹⁶⁸ Interview with Uriel Salas, Dir. of Section on Cases, Human Rights and Democracy Section, Ministry of Foreign Affairs of Mex. (Sept. 3, 2018); interview with S1, gov't official, Arg. Ministry of Justice and Human Rights (July 31, 2018); interview with L12, gov't official, Colom. Agency for State Defense (Dec. 18, 2018); interview with S6, former gov't official, Ministry of Foreign Affairs, Chile (July 3, 2018); *see also* Inter-Am. Comm'n H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶¶ 187–264.

¹⁶⁹ *See generally* Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 391 (2006) (“Legitimacy is a valuable attribute for an institution if it promotes acceptance of its decisions and the rules it promulgates, and stability and institutional effectiveness are virtues that benefit all members of society.”).

¹⁷⁰ *See* Inter-Am. Comm'n H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶ 267. The remaining two percent of agreements have not been implemented at all.

¹⁷¹ *See id.*

¹⁷² *See* Ziccardi, Martínez, Castelán & Valverde, *supra* note 19, at 73.

¹⁷³ *See id.* at 74 (“32% for friendly settlements, compared to just 5% for reports on the merits . . . suggests that, for victims, petitions are more effective when they are channeled through the friendly settlement mechanism instead of through the ordinary procedure”).

is understandable that the merits report will find little, if any, compliance. Thus, the case will move to its contentious phase before the Inter-American Court. The friendly settlement may not just help the state to avoid the Court as a matter of “naming and shaming;” it can allow for greater compliance as states (and petitioners) have control over the outcome of the process.

2. Data

Since 1985, inter-American human rights law has facilitated 137 friendly settlements.¹⁷⁴ Between 1985 and 1995, only three friendly settlements were signed: two cases on Argentina and one on Honduras.¹⁷⁵ Between 1996 and 1999, after the Commission adopted a mandatory approach toward friendly settlements and the Inter-American Court established that only in “exceptional cases”¹⁷⁶ could the Commission withhold an amicable solution to a case, five reports were signed.¹⁷⁷ In 2000, with the Commission’s adoption of the new Rules of Procedure, which were intended to enhance participation of victims and petitioners before the human rights system,¹⁷⁸ along with a newly embedded culture of conciliation and negotiation within the Commission,¹⁷⁹ the number of friendly settlements increased dramatically: the following year thirteen agreements were concluded¹⁸⁰—in one year the Commission adopted more than four times the number of settlements it did in the first ten years. Currently, no less than four settlements are signed every year, with an average of between five and eight settlements per year.¹⁸¹ (Figure 1).

¹⁷⁴ Inter-Am. Comm’n H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶ 1.

¹⁷⁵ *Monge v. Honduras*, Friendly Settlement, *supra* note 78; *Vaca Narvaja et al. v. Argentina*, Friendly Settlement, Cases 10.288, 10.310, 10.436, 10.496, 10.631, 10.771, Inter-Am. Comm’n H.R., Report No. 1/93 (Mar. 3, 1993); *Verbitsky v. Argentina*, Friendly Settlement, Case 11.012, Inter-Am. Comm’n H.R., Report No. 22/94 (Sep. 20, 1994).

¹⁷⁶ *Caballero Delgado and Santana* Case, Preliminary Objections, *supra* note 95.

¹⁷⁷ *See Pablo et al. v. Guatemala*, Friendly Settlement, Case 11.212, Inter-Am. Comm’n H.R., Report No. 19/97 (Mar. 13, 1997); *Guardatti v. Argentina*, Friendly Settlement, Case 11.217, Inter-Am. Comm’n H.R., Report No. 31/97 (Oct. 14, 1997); *Rubiano v. Colombia*, Friendly Settlement, Case 11.525, Inter-Am. Comm’n H.R., Report No. 45/99 (Mar. 9, 1999); *Jaime et al. v. Colombia*, Friendly Settlement, Case 11.531, Inter-Am. Comm’n H.R., Report No. 46/99 (Mar. 9, 1999).

¹⁷⁸ *See supra* n. 101.

¹⁷⁹ Interviews with L1, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018); interview with L3, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018).

¹⁸⁰ *See* Inter-Am. Comm’n H.R., Annual Report of the Inter-American Commission on Human Rights, OEA/Ser./L/V/II.111 doc. 20 rev. (April 16, 2001), <https://perma.cc/3KXL-J64R>.

¹⁸¹ *See* Inter-Am. Comm’n H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶ 52. According to the Commission, the new Rules made “the friendly settlement procedure more flexible”; gave a more important role to the parties “to request that the

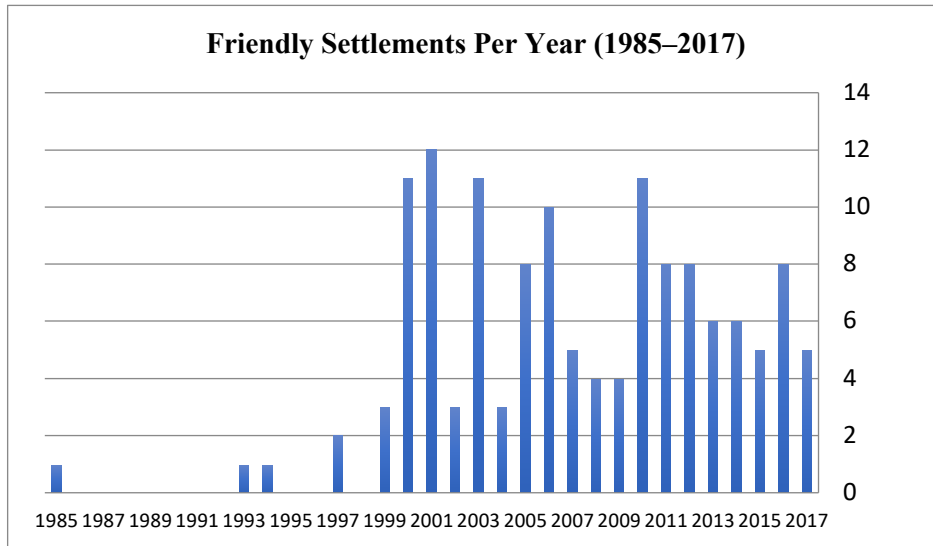
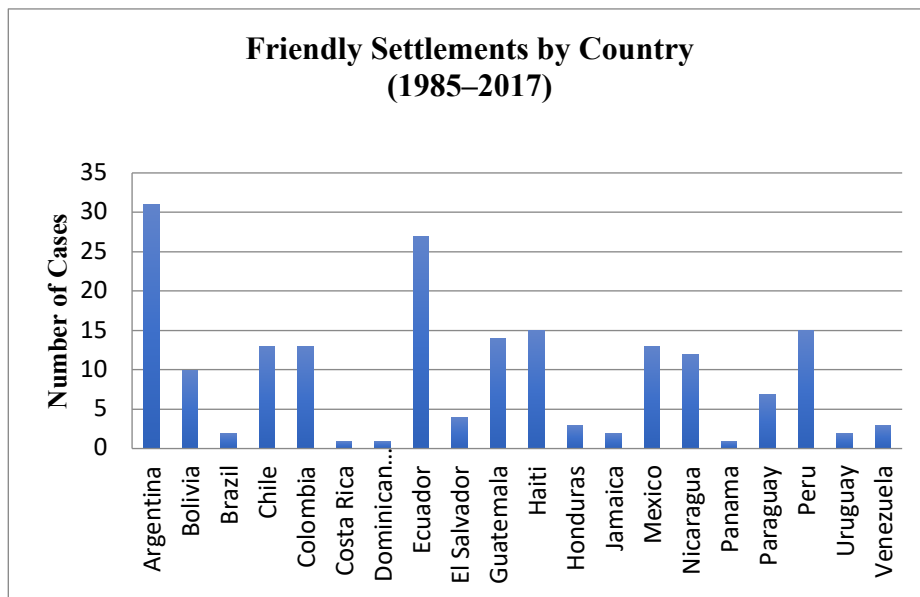


Figure 1

Argentina has signed the most settlements (31 agreements), followed by Ecuador (27), Peru (15), Guatemala (14), Chile and Colombia (both with 13 settlements) (Figure 2).



procedure be instituted, continued or concluded”; introduced “criteria for approval of the friendly settlement reports,” and gave the Commission “authority to institute follow-up measures and verify compliance with the agreements.” *Id.* ¶¶ 56–60.

Figure 2

3. Remedies

The array of matters in which parties have reached settlement is vast: from the release of persons from prison,¹⁸² to the repeal of criminal laws punishing criticism against political leaders,¹⁸³ to land reform in favor of indigenous peoples,¹⁸⁴ to the legalization of same-sex marriage.¹⁸⁵ Understanding how the friendly settlement mechanism works beyond the information that is publicly available is critical in order to assess the favorable opinion that most stakeholders have of the friendly settlement procedure,¹⁸⁶ as well as to suggest avenues for improvement.¹⁸⁷

a. The Commission's taxonomy

As explained previously, the Inter-American Commission sees all petitions amenable to settlement.¹⁸⁸ There are no distinctions made between cases concerning gross and systematic human rights violations—the type of cases that in the early 1990s the Commission understood could not be subject to settlement—and petitions concerning rights infringement that could be deemed less serious or non-systematic. In inter-American human rights law, anything can be settled. Most settlements concern the infringement of basic rights as a result of serious human rights violations, such as the right to humane treatment,¹⁸⁹ the right to personal liberty,¹⁹⁰ or

¹⁸² See, e.g., Ricardo Ucán Seca v. Mexico, Friendly Settlement, Case 12.660, Inter-Am. Comm'n H.R., Report No. 91/10 (July 15, 2010).

¹⁸³ See Horacio Verbitsky v. Argentina Friendly Settlement, Case 11.012, Inter-Am. Comm'n H.R., Report No. 22/94 (Sept. 20, 1994).

¹⁸⁴ See, e.g., Enxet-Lamenxay Kayleyphapopyet (Riachito) Indigenous Communities v. Paraguay, Friendly Settlement, Case 11.713, Inter-Am. Comm'n H.R., Report No. 90/99 (Sept. 29, 1999); Mercedes Julia Huentao Beroiza et al. v. Chile, Friendly Settlement, Petition 4617-02, Inter-Am. Comm'n H.R., Report No. 30/04 (Mar. 11, 2004).

¹⁸⁵ César Antonio Peralta Wetzels and others v. Chile, Friendly Settlement, Case P-946-12, Inter-Am. Comm'n H.R. (June 11, 2016) (on file with author).

¹⁸⁶ The Inter-American Commission has stated that “the friendly settlement provisions of the American Convention make it possible to conclude individual cases in a non-contentious manner, and has proved in cases regarding several countries, to be an important means of resolving alleged human rights violations that can be used by both parties (petitioner and state).” See Rodrigo Elicio Muñoz Arcos et al. v. Ecuador, Case 11.441, Inter-Am. Comm'n H.R., Report No. 104/01, OEA/Ser./L/V/II.114 doc. 5 rev. (2001), ¶ 11.

¹⁸⁷ See *infra* Part IV.

¹⁸⁸ See *supra* Part III.B.1.

¹⁸⁹ American Convention on Human Rights, *supra* note 6, art. 5.

¹⁹⁰ *Id.* art. 7.

the right to life.¹⁹¹ Also, insofar petitioners file their claims as a result of their states' failure or unwillingness to address the issues domestically—that is, through the courts—all settlement agreements invariably refer to the right to fair trial, protected in Article 8 of the American Convention (*see* Figure 3 *infra*).

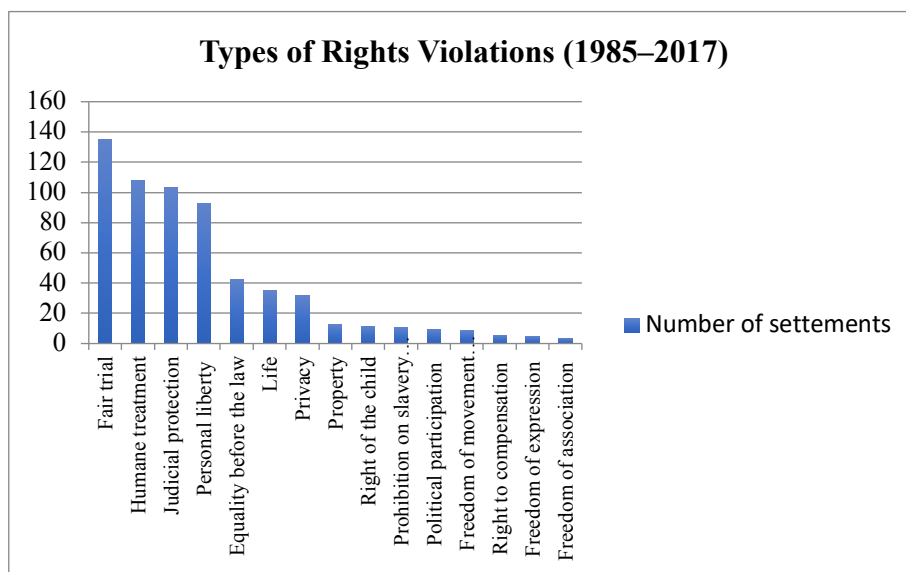


Figure 3

Settlements can be distinguished by the type of reparations to which the parties have agreed. The Commission's system of reparations is based on the United Nations' "Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law"¹⁹² as well as on the Inter-American Court's rich case law on remedies.¹⁹³

¹⁹¹ *Id.* art. 4.

¹⁹² See G.A. Res. 60/147, Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law (Mar. 21, 2006).

¹⁹³ See Inter-Am. Comm'n H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶¶ 72–74. Since its very first decisions, the Inter-American Court established that reparations include "the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm." *Id.*; see also Velásquez Rodríguez v. Honduras, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 26 (July 21, 1989); Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008) (detailing the Inter-American Court's remedial jurisprudence).

Following said standards, the Commission divides friendly settlement reparations into five categories: i) restitution, ii) rehabilitation, iii) satisfaction, iv) compensation, and v) guarantees of non-repetition.¹⁹⁴ The first four categories encompass *individual* remedies, while the last category is linked to *social* or *structural* remedies. Although the Commission does not make such distinction, it is crucial to my prescriptions in Part IV. The approach that human rights bodies adopt toward settlement may vary from region to region and from case to case, as seen in the European Court's rather individualistic approach compared to the Inter-American Commission, which—as shown in this section—finds no issue in promoting the adoption of structural, social or collective remedies.

Some classic examples of restitution remedies—which are used “relatively infrequently”¹⁹⁵—are “restoring a person’s liberty . . . [and] the return of land and reinstatement of one’s employment.”¹⁹⁶ These measures are mostly individual in nature. However, the Commission also includes in this category measures that have impact beyond the actual petitioners. For example, in a friendly settlement concerning the criminal conviction of a journalist who published a defamatory article against a sitting justice of the Argentinean Supreme Court, the state pledged to repeal the implicated provisions of the country’s Penal Code.¹⁹⁷ Once the law entered into force, the applicant benefited from it and his conviction was overturned and nullified.¹⁹⁸ To be sure, the measure had a direct restitutive effect on that individual petitioner; yet the repeal of legislation necessarily has an impact that transcends the singular petitioner in a friendly settlement. In this sense, the measure is more of a non-repetition type of measure.

Rehabilitation remedies include “measures of medical and psychological rehabilitation, as well as social assistance aimed at favoring the personal development of those affected [by a human rights violation].”¹⁹⁹ In many cases, family members and relatives of human rights victims receive “scholarships for study and technical training.”²⁰⁰ In other

¹⁹⁴ See Inter-Am. Comm’n H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶¶ 73–74.

¹⁹⁵ See *id.* ¶ 76. Restitution measures figure in 24 out of the 137 agreements approved through 2017. See *id.* ¶ 77. That number represents 17.5 percent of all friendly settlements.

¹⁹⁶ See *id.* ¶ 77.

¹⁹⁷ See Horacio Verbitsky v. Argentina, Friendly Settlement, *supra* note 175; see also *infra* Part III.C.2.b.i.

¹⁹⁸ See Inter-Am. Comm’n H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶ 87.

¹⁹⁹ See *id.* ¶ 102. Rehabilitation measures represent 32.8 percent of all friendly settlements.

²⁰⁰ See *id.* ¶¶ 115–16.

instances, states have pledged to provide funding for training and the provision of goods,²⁰¹ or to provide a victim with “professional mentoring . . . in order to allow her to obtain a small business loan.”²⁰² Under rehabilitative reparations, a state agreed to relocate a rape survivor (who was abused by a doctor at a public hospital), paying for the victim’s relocation expenses and providing her with land and materials to build a house, as well as giving her ownership of a vendor’s stand at a public market.²⁰³

The Commission defines satisfaction measures as those that “make it possible to ascertain facts [and] restore the victims’ dignity and reputation.”²⁰⁴ The inter-American human rights system—in particular, the Inter-American Court—is known and praised for its creative remedies.²⁰⁵ Satisfaction measures in friendly settlements provide an additional layer of creativity to its remedies. Examples are public acts of atonement, including the recognition of responsibility by a state’s president, as Colombian president Ernesto Samper famously did in the Trujillo Massacre case;²⁰⁶ the erection of monuments and memorials²⁰⁷ and, in general, the involvement of artists in the shaping of works to honor the memory of human rights violations.²⁰⁸

²⁰¹ See Alba Lucía Rodríguez Cardona v. Colombia, Friendly Settlement, Case 12.376, Inter-Am. Comm’n. H.R., Report No. 59/14, OEA/Ser.L/V/II.151, doc. 24, ¶¶70-72 (July 24, 2014).

²⁰² See Marcos Gilberto Chaves and Sandra Beatriz Chaves v. Argentina, Friendly Settlement, Case 12.710, Inter-Am. Comm’n. H.R., Report No. 102/14, OEA/Ser.L/V/II.153, doc. 18, III.C.2 (Nov. 7, 2014).

²⁰³ See M. M. v. Peru, Friendly Settlement, Case 12.041, Inter-Am. Comm’n. H.R., Report No. 69/14, OEA/Ser.L/V/II/151, doc. 34 (July 25, 2014).

²⁰⁴ See Inter-Am. Comm’n. H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶¶ 122–23. Satisfaction measures break down into five categories: “acknowledgement of responsibility and public admission of the facts; search for and return of the remains of victims of human rights violations; official declarations and court rulings to restore the victim’s honor and reputation; enforcement of judicial and administrative sanctions against those responsible for the violations; and measures designed to keep the victims’ memory and/or legacy alive by building monuments, memorials, and the like.” *Id.* ¶ 124.

²⁰⁵ See Antkowiak, *supra* note 193; see also DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 232–45 (2015).

²⁰⁶ See Trujillo Massacre v. Colombia, Friendly Settlement, Case 11.007, Inter-Am. Comm’n. H.R., Report No. 68/16, OEA/Ser.L/V/II.159, doc. 77 (Nov. 30, 2016); Reisman & Benesh, *supra* note 17, at 746–47.

²⁰⁷ See Inter-Am. Comm’n. H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶¶ 166–73.

²⁰⁸ Consider the Symbolic Reparations Research Project, defined as “a group of humanities and legal scholars specializing in human rights, art, and culture . . . committed to fostering the arts, cultural practices, and humanities as a crucial means of developing the

Through compensatory measures, “victims of human rights violations and their heirs have received monetary payments as reparation for the harm caused by the violations.”²⁰⁹ These measures are widely used in inter-American friendly settlements—104 out of 137 agreements signed between 1985 and 2017 have included compensatory measures, that is, almost 76 percent of all agreements adopted.²¹⁰ They are also, along with the acknowledgment of violations, a remedy with a high rate of compliance (see *infra* Figure 4). Unlike the recognition of responsibility, however, compensatory measures are intrinsically individual. In fact, some staff attorneys at the Inter-American Commission believe that the increase of the friendly settlement mechanism is partly due to domestic attorneys’ understanding that the mechanism may allow them to seek pecuniary redress at the international level.²¹¹ As I argue in Part IV, this feature should inform the Commission’s approach toward settlement: the distinction between cases or claims that can be addressed through individual measures, and those that require structural remedies.

Finally, guarantees of non-repetition are among the most important remedies in human rights law, as “their purpose is to prevent the commission of human rights violations in the future.”²¹² Also, non-repetition measures refer to the public value of human rights adjudication: whether it is the order by an international court or a settlement that a petitioner reaches with a respondent state, measures of non-repetition attest to the fact that human rights violations and their remedies concern all members of the political community—whether it is a domestic or transnational community, as in the case of inter-American human rights law. They are similar to “structural” cases.²¹³ One of the core differences between the European regime of friendly settlements and the Inter-American regime, as explained above, lies precisely in the importance that each regional system assigns to “non-repetition” remedies. In Europe, friendly settlements are essentially conceived of as a “fast-track procedure,”²¹⁴ where measures of non-repetition are almost nonexistent.²¹⁵

efficacy of symbolic reparations for victims of gross violations of human rights.” See *About Us*, SYMBOLIC REPARATIONS RESEARCH PROJECT, <https://perma.cc/63PY-HDLY>.

²⁰⁹ See Inter-Am. Comm’n H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶ 176.

²¹⁰ See *id.* ¶ 177.

²¹¹ See interview with L2, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018); interview with L6, staff attorney, Inter-Am. Comm’n H.R. (Apr. 6, 2018).

²¹² See Inter-Am. Comm’n H.R., Impact of the Friendly Settlement Procedure, *supra* note 96, ¶ 189.

²¹³ See *supra* Part II.B.

²¹⁴ See *supra* Part II.A.1.

²¹⁵ As Keller, Forowicz, and Engi demonstrate, even in cases concerning Articles 2 and

That is not the case in the Americas, where friendly settlements, as I show below, are often used to affect policy and legislation.

b. Structural remedies

Although there are not as many settlements that include measures of non-repetition as there are settlements that include other remedies, their actual and potential impact on the whole human rights regime is significant.²¹⁶ In fact, as I argue in the next Part, the importance of structural (or “social”) remedies may not lie in their quantity, but rather in their qualitative impact.²¹⁷ A closer look at these remedies, therefore, is required to fully understand the potential impact they can have in the context of non-contentious proceedings, such as the friendly settlement procedure.

i. *Desacato* laws

The first case to include significant guarantees of non-repetition—although, as explained, the Commission misleadingly classifies it under “restitution” measures—is *Verbitsky*.²¹⁸ This Argentinean case was decided around the time the Commission’s approach towards friendly settlements was changing from discretion to obligation.²¹⁹ The principal remedy of the *Verbitsky* settlement agreement was the repeal of a provision from the Argentinean Penal Code that criminalized defamatory expressions against public officials.²²⁰ This settlement prompted the Commission to articulate regional standards on the compatibility of such laws—present in many Latin American countries and known as “*desacato* laws”—with the regional human rights norms.²²¹ A few years after the adoption of the *Verbitsky* settlement, the Commission established a special rapporteurship to promote and protect the right of freedom of expression.²²² The rapporteurship took

3 of the European Convention of Human Rights—the right to life and the prohibition of torture—remedies are largely pecuniary. As they note, in cases against Turkey concerning said rights, “a recipient received on average approximately 3,000 EUR more in [Court] judgments than in friendly settlement and arrangements.” KELLER, FOROWICZ & ENGI, *supra* note 15, at 117.

²¹⁶ According to official data, 32.8 percent of all settlements contemplate measures of non-repetition (the same percentage of settlements that include rehabilitation measures). See Inter-Am. Comm’n H.R., *Impact of the Friendly Settlement Procedure*, *supra* note 96, ¶ 190.

²¹⁷ I use “structural” and “social” remedies interchangeably.

²¹⁸ *Verbitsky v. Argentina, Friendly Settlement*, *supra* note 175.

²¹⁹ See *supra* Part III.B.1.

²²⁰ See *Verbitsky v. Argentina, Friendly Settlement*, *supra* note 175, ¶¶ 2, 17.

²²¹ See *id.* ¶ 17.

²²² As the Special Rapporteurship’s website notes: “Through the Office of the Special Rapporteur, the Commission sought to encourage the defense of the right to freedom of

the *Verbitsky* standard and applied it to many cases that were pending before the Commission,²²³ thus making “*desacato* laws” a prominent subject in inter-American human rights case law.²²⁴ More importantly, many countries followed suit, adopting the *Verbitsky* standard and repealing their existing *desacato* laws, under the understanding it was their legal duty to do so.²²⁵ Non-repetition measures obtained in this settlement can thus have normatively powerful effects on other countries.

ii. Slavery

In 2003, Brazil signed an agreement with petitioners representing a victim of slavery in the state of Pará.²²⁶ Mr. José Pereira filed a complaint before the Commission in 1994, arguing that the Brazilian government had failed to protect his rights and those of sixty other persons who worked at the Espirito Santo estate.²²⁷ The petition noted that there was a “general practice of slave labor” in the region and that the state had failed to adopt measures to stop it, despite the repeated complaints that Mr. Pereira and other workers had filed with local authorities.²²⁸ Although the purpose of the settlement agreement was “to make reparation for *the damage caused to*

thought and expression in the hemisphere, given the fundamental role this right plays in consolidating and developing the democratic system and in protecting, guaranteeing, and promoting other human rights.” See Special Rapporteur for Freedom of Expression, *History*, INTER-AM. COMM’N H.R. (last visited Mar. 2, 2019), <https://perma.cc/QCR2-TZ5X>.

²²³ During that time, Latin American states were transitioning from authoritarian regimes to democratic regimes and many adopted new constitutions or passed constitutional reforms (e.g., Brazil in 1988, Colombia in 1991, Peru in 1993, and Argentina in 1994). The inter-American human right system started receiving petitions concerning “new” violations of human rights—new in the sense that these violations did not stem from the dictatorial periods of the 1970s and 1980s and/or did not concern egregious violations, such as forced disappearances or extrajudicial executions. Freedom of expression cases were the first type of “new” cases brought to the Commission. See FELIPE GONZÁLEZ MORALES, SISTEMA INTERAMERICANO DE DERECHOS HUMANOS 125–43 (2013).

²²⁴ In 1999, the Special Rapporteur documented that “*desacato* laws” were present in sixteen Latin American countries. See Santiago Cantón, Special Rapporteur for Freedom of Expression, Inter-Am. Comm’n H.R., *Annual Report 1999*, OEA/Ser.L/V/II.106, at 17 n.19 (Apr. 13, 2000).

²²⁵ See generally Luis Alejandro Gutiérrez Eklund, Ian Miranda Sánchez, Carlos Andrés Peredo Molina & Camila Calvi Baldivieso, *Las leyes de desacato y la difamación criminal en América Latina*, 6 REV. INT’L DERECHOS HUMANOS 121 (2016).

²²⁶ José Pereira v. Brazil, Friendly Settlement, Petition 11.289, Inter-Am. Comm’n H.R., Report No. 95/03 (Oct. 24, 2003).

²²⁷ *Id.* ¶ 12.

²²⁸ *Id.* ¶¶ 12–13. Mr. Pereira and another man, named “Paraná,” tried to escape from the Espirito Santo estate. Guards saw them and shot them, seriously wounding Mr. Pereira and killing “Paraná.” Their bodies “were dumped on a lot near where they were taken in a pick-up truck by the killers.”

José Pereira,²²⁹ in this case the remedies to which the parties agreed extended well beyond Mr. Pereira.

First, the state recognized its responsibility under international law even though the violations were committed by private actors and, as the settlement agreement establishes, “state organs were not capable of preventing the occurrence of the grave practice of slave labor, nor of punishing the individual actors involved in the violations alleged.”²³⁰ Second, the state established a National Commission for the Eradication of Slave Labor and undertook “to implement the actions and proposals for legislative changes contained in the National Plan for the Eradication of Slave Labor, drawn up by the Special Commission of the Council for the Defense of Human Rights.”²³¹ Third, in somewhat vague terms, the state undertook “to defend the establishment of federal jurisdiction over the crime of reduction to conditions analogous to slavery”²³² and to strengthen the work of the Office of the Public Prosecutor and the Division of Repression of Slave Labor and Security of Dignitaries, established under the Department of the Federal Police.²³³ Finally, the agreement stipulated that the Brazilian government was to carry out a national campaign to raise awareness of and oppose slave labor, and that the campaign was to include the publicization of the friendly settlement agreement.²³⁴ As I discuss in the next Part, publicizing settlement agreements can be a critical function of human rights settlements, since keeping the terms of the agreements confidential may undermine the public value of human rights adjudication.²³⁵ In any event, this case also shows the importance that structural remedies have in the Commission’s case law on friendly settlements, as Brazil agreed to undertake measures that went well beyond

²²⁹ *Id.* ¶ 24 (emphasis added).

²³⁰ *Id.*

²³¹ *Id.* ¶ 10. In particular, the state undertook “to make every effort” to enact legislation making a violation of economic basic principles to use slave, semi-slave labor and the exploitation of children, and to amend Article 149 of the Brazilian Penal Code. *Id.* ¶ 11.

²³² *Id.* ¶ 12. Along with these reparations, the parties agreed to a monetary compensation for moral and material damages. *Id.* ¶ 8.

²³³ *Id.* ¶ 15.

²³⁴ *Id.* ¶ 17.

²³⁵ A senior petitioner interviewed for this study noted that friendly settlements agreements have “much less impact” than they should because they are not publicized. Interview with C1, petitioner, int’l human rights org. (Apr. 6, 2018). Similarly, a staff member at the Inter-American Commission observed that “judgments from the Inter-American Court get a lot of publicity; many times, victims obtain the same, or, and in some cases even more, through friendly settlements. Yet it’s the decision by the Court what really seems to matter. It shouldn’t be interpreted like that. There are more mechanisms at the injured party’s disposal.” Interview with L4, staff attorney, Inter-Am. Comm’n H.R. (Apr. 6, 2017).

the specific petitioners in the case.

iii. Conscientious objection

In 2004, Alfredo Díaz Bustos, a Bolivian citizen, filed a petition before the Inter-American Commission accusing the Bolivian State of failure to recognize his status as a conscientious objector to compulsory military service.²³⁶ Before he made his petition to the Commission, Mr. Díaz Bustos, a Jehovah's Witness, had made his case before the Ministry of Defense that his religious beliefs prohibited him from receiving military instruction, as well as from paying the tax imposed on men called up for military service.²³⁷ Local authorities refused to accommodate Mr. Díaz's request: the Minister of Defense responded by declaring that "no law on conscientious objection has been enacted [and] nowhere in our laws is there any provision that could be invoked" to give Mr. Díaz the status of conscientious objector.²³⁸ Mr. Díaz then unsuccessfully sought constitutional relief with the court, which declared that "conscientious objection is not a claimable right."²³⁹

Through his petition to the Commission, however, Mr. Díaz was able to reach an amicable solution with the government that incorporated both individual measures and structural reparations. First, the government agreed to individual measures that included providing Mr. Díaz with documents certifying Mr. Díaz's fulfillment of his military service obligations as well as a statement issued declaring his status as a conscientious objector.²⁴⁰ The agreement also included non-repetition remedies, that is, structural remedies, in that Bolivia agreed "to include the right to conscientious objection to military service in the preliminary draft of the amended regulations for military law currently under consideration by the Ministry of Defense and the armed forces . . . in accordance with international human rights law,"²⁴¹ and "to encourage congressional approval of military legislation that would include the right to conscientious objection to military service."²⁴² Importantly, the Commission did not limit itself to approving the agreement by simply confirming that the terms of the settlement observed the standards set forth by the American Convention. In a remarkable passage, the Commission declared that the settlement was

²³⁶ Alfredo Díaz Bustos v. Bolivia, Friendly Settlement, Petition 14/04, Inter-Am. Comm'n H.R., Report No. 97/05 (Oct. 27, 2005).

²³⁷ *Id.* ¶ 12.

²³⁸ *Id.* ¶ 13.

²³⁹ *Id.* ¶ 15.

²⁴⁰ *Id.* ¶ IV.I.a), IV.1.c).

²⁴¹ *Id.* ¶ IV.I.d).

²⁴² *Id.* ¶ IV.I.e).

consistent with “the evolving nature of international human rights law” and cited a full paragraph from General Comment No. 22 by the United Nations Human Rights Committee on the right to freedom of thought, conscience, and religion recognized by the International Covenant on Civil and Political Rights.²⁴³ The passage is notable in that the Commission’s usual practice is to simply state the facts and the parties’ solution.²⁴⁴ Further, friendly settlements generally do not include references to the case’s merits or the applicable international standard. The Bolivian case demonstrates how friendly settlements can be used to advance international human rights norms and not just to state the facts that give rise to a petition before international human rights bodies.

iv. Same-sex marriage

In June 2016, the Chilean government signed a landmark settlement with petitioners acting on behalf of three same-sex couples who unsuccessfully sought to register their foreign marriages in Chile (where marriage is only between a man and a woman).²⁴⁵ Initially, after the Chilean Civil Registry refused to register the foreign marriages, the three couples sought relief by filing a constitutional injunction before the Court of Appeals of Santiago.²⁴⁶ The Court referred the matter to the Constitutional Court, which avoided the matter by finding it did not have jurisdiction, and that instead Congress must decide how to regulate marriage.²⁴⁷ The three affected couples then filed a petition before the Inter-American Commission on Human Rights in 2012, and four years later, petitioners and the

²⁴³ U.N. Human Rights Comm., General Comment No. 22, CCPR/C/21/Rev.1/Add.4, ¶ 11 (July 30, 1993).

²⁴⁴ See American Convention on Human Rights, *supra* note 6, art. 49 (“This report shall contain a brief statement of the facts and of the solution reached.”); Rules of Procedure of Inter-Am. Comm’n H.R., *supra* note 6, art. 40(5) (“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.”).

²⁴⁵ César Antonio, Peralta Wetzel and others, Friendly Settlement, *supra* note 185.

²⁴⁶ Corte de Apelaciones de Santiago [Court of Appeals of Santiago], 20 octubre 2010, “Peralta Wetzel, César Antonio, and others,” Rol de la causa: No. 6787-2010, *recurso de protección* (Constitutional Injunction).

²⁴⁷ There were two dissenting opinions, however. One found that both the Chilean Constitution and international human treaties *prohibit* same-sex marriage, while the other reached the opposite conclusion—that both the Constitution and international human rights law *require* that marriage be extended to same-sex couples. See Tribunal Constitucional de Chile [T.C.] [Constitutional Court of Chile], 20 noviembre 2011, “Peralta Wetzel, César Antonio, and others,” Rol de la causa: No. 6787-2010, Sentencia, No. 1881; see also Jorge Contesse, *Matrimonio civil y Constitución Política: la sentencia del Tribunal Constitucional sobre matrimonio para parejas del mismo sexo*, 8 ANUARIO DE DERECHOS HUMANOS 155 (2012).

government reached a friendly settlement.²⁴⁸ The terms of the agreement—which has not yet been approved by the Commission—stipulate structural remedies in a number of areas.

The state did not explicitly acknowledge its international responsibility, that is, it did not mention that Chile had violated any fundamental rights by rejecting the registration of said foreign marriages.²⁴⁹ The state simply acknowledged, in the first clause of the agreement, “the facts that motivated the petitioners’ complaint.”²⁵⁰ Despite the clause’s vague wording aimed at avoiding an explicit recognition of state responsibility, the scope of the agreement’s remedies is very precise. The measures stipulated in the agreement include the government’s commitment “to initiate a public debate” on same-sex marriage, in which all segments of society shall take part,²⁵¹ and to introduce legislation seeking to legalize same-sex marriage.²⁵² The agreement also includes a number of comprehensive measures, such as the promotion of policies on sexual and reproductive health;²⁵³ the revision of the curriculum on religion in public schools “to ensure that both teachers and students are not subject to discrimination”;²⁵⁴ the amendment of the Adoption Act, in order to allow same-sex couples to exercise adoption rights;²⁵⁵ the use of statistics on the LGBTI population in all official surveys;²⁵⁶ the “revision and potential repeal” of Chile’s Penal Code provisions that criminalize consensual same-sex intercourse with a minor, and the vague crime of “offenses to the public morals.”²⁵⁷ Finally, the agreement stipulates that the government is to pursue the gender identity legislation that was pending before Congress at the time of the agreement.²⁵⁸

²⁴⁸ César Antonio, Peralta Welzel and others, Friendly Settlement, *supra* note 185, ¶ I.

²⁴⁹ The agreement stipulates that “The State of Chile acknowledges the facts that originated the petition and agrees that it is necessary to keep perfecting the institutional bases to prevent any discrimination against LGBTI population.” *See id.* ¶ II.1.

²⁵⁰ *See id.* ¶ II.1. Ziccardi and co-authors note that this vague clause is a common feature of friendly settlements signed by the Chilean state. *See* Ziccardi, Martínez, Castelán & Valverde, *supra* note 19, at 77.

²⁵¹ César Antonio, Peralta Welzel and others, Friendly Settlement, *supra* note 185, ¶ III.1.

²⁵² *See id.* ¶ III.2.

²⁵³ *See id.* ¶ III.4.

²⁵⁴ *Id.* ¶ III.7.

²⁵⁵ *See id.* ¶ III.8.a.

²⁵⁶ *See id.* ¶ III.8.e.

²⁵⁷ *Id.* ¶ III.8.g.

²⁵⁸ *See id.* ¶ III.8.h. In September 2018, Congress passed the Gender Identity Act. *See* Eva Vergara, *Chile’s Congress Passes ‘Historic’ Gender Identity Law*, ASSOCIATED PRESS (Sept. 13, 2018), <https://perma.cc/C9Z7-PKY4>. The administration of former president Michelle Bachelet created a website with information regarding the then bill, and why it

v. Constitutional amendments and international treaties

Finally, there are cases where states have agreed not only to enact legislation, but also to ratify international treaties. The importance of such remedies lies in the fact that, unlike the implementation of ordinary legislation, undertaking the ratification of a treaty implies a major commitment to securing super-majorities in Congress. By signing on to international human rights treaties, states cede part of their sovereignty, and, under general principles of public international law, they commit to observing international obligations, including through—although not limited to—the adoption of domestic legislation.²⁵⁹

In a settlement signed by Venezuela in 1999, concerning the massacre of Yanomani indigenous individuals in the Amazonian Venezuelan/Brazilian border, the state agreed to both individual measures as well as structural remedies.²⁶⁰ Venezuela agreed “to monitor the judicial investigation of the criminal proceeding that was brought in Brazil, in order to establish responsibility and to apply the corresponding criminal sanctions.”²⁶¹ The measure, insofar as it involves *criminal* punishment, has of course a social element.²⁶² The remedy, however, seems to redress the *particular* situation of the victims and the victims’ relatives. In that sense, it may count as an *individual* reparation.²⁶³ But the state also agreed to

was important for Chile to enact a gender identity law. Significantly, the first measure that the website lists under “governmental actions” is the friendly settlement agreement signed by the government and Movilh in 2016. *Ley de Identidad de Género*, GOBIERNO DE CHILE, <https://perma.cc/Q755-ZX34>.

²⁵⁹ See Vienna Convention on the Law of Treaties art. 27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF INTERNATIONAL LAW* (2012).

²⁶⁰ The settlement details the facts of the case: after Brazilian “*garimpeiros*” (metals seekers) entered into fights with local indigenous community members they stormed the Yanomani camp. Once there, *garimpeiros* “kicked an elderly blind woman (*sic*) to death and wrapped a baby in a rag and murdered him with a machete [killing] a total of twelve Yanomani indigenous persons: one man and two elderly women, a young woman (*sic*) from the Homoxitheri community, who was visiting, three adolescent girls, a one-year-old girl and a three-year-old girl and three 6 to 8-year-old boys . . . prior to leaving the site of the massacre, the *garimpeiros* set the camp on fire.” See Yanomami Indigenous People of Haximu v. Venezuela, Friendly Settlement, Petition 11.706, Inter-Am. Comm’n H.R., Report No. 32/12, ¶ 27 (March 20, 2012). Defendants were convicted in Brazil to 20 years in prison under the Heinous Crimes Act. *Id.* ¶¶ 33–36.

²⁶¹ See *id.* ¶ 37.3.

²⁶² See JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 155 (2016) (observing that “social harm is the ‘very essence’ of all crime”).

²⁶³ Other remedies stipulated in the settlement concern the Yanomani “people” and “area,” or “indigenous peoples” and “matters,” in general. See Yanomami Indigenous People of Haximu v. Venezuela, Friendly Settlement, Petition 11.706, Inter-Am. Comm’n H.R., Report No. 32/12, ¶ 37 (March 20, 2012).

important structural remedies, such as the creation and funding of a health program targeted to the Yanomani people,²⁶⁴ the establishment, in conjunction with the Brazilian government, of “a Joint and Permanent Surveillance and Control Plan to monitor and control the entry of *garimpeiros* and illegal mining in the Yanomami area”,²⁶⁵ and the ratification of the International Labor Organization Covenant No. 169 on Protection of Indigenous and Tribal Peoples in Independent Countries (ILO 169), the world’s most important international binding instrument on the matter.²⁶⁶ Venezuela signed ILO 169 in 2002, becoming the eleventh Latin American country to ratify the treaty.²⁶⁷

Amending the Constitution and ratifying ILO Convention 169 was also a core remedy in a settlement that Chile signed with five Mapuche indigenous women who refused to give up their lands for the construction of a hydroelectric dam in the country’s southern Bío-Bío region.²⁶⁸ Initially, once the company secured a permit to flood the area in which the indigenous community lived, the women unsuccessfully sought judicial remedies before the courts in Santiago.²⁶⁹ Finding no redress at the domestic level, they resorted to the inter-American human rights system, filing a petition before the Commission in December 2002 (along with precautionary measures).²⁷⁰ Less than a year later, the petitioners reached a comprehensive agreement with the state, in which the state recognized the importance of indigenous affairs,²⁷¹ and undertook “to insist on a constitutional reform before the National Congress” to grant constitutional recognition to indigenous peoples—something indigenous groups had demanded for many years.²⁷² The state also pledged to “initiate a broad

²⁶⁴ See *id.*, ¶ 37.2.

²⁶⁵ Yanomami Indigenous People of Haximu v. Venezuela, Friendly Settlement, *supra* note 260, ¶ 37.1.

²⁶⁶ See *id.* ¶ 37.4.

²⁶⁷ See *Ratifications of C.169 — Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, INT’L LABOR ORG., <https://perma.cc/L7HR-BFVG>. Other Latin American countries that are parties to ILO 169 are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, and Peru. *Id.*

²⁶⁸ See Mercedes Julia Huenteao Beroiza et al. v. Chile, Friendly Settlement, *supra* note 184.

²⁶⁹ See *id.* ¶ 26.

²⁷⁰ See *id.* ¶¶ 5–6.

²⁷¹ According to the first clause of the Agreement: “The State of Chile reiterates its respect for the rights of indigenous peoples and their communities, as well as its will to promote, through the mechanisms provided under the country’s laws, full recognition and protection for said rights . . . the indigenous question is an affair of State . . . its adequate solution is essential to ensure social unity and peace . . .” See *id.* ¶ 33.

²⁷² See *id.* On the issue of constitutional recognition of indigenous peoples in Chile, see Jorge Contesse, *Indigenous Peoples in Chile: The Quest to Become a Constitutional Entity*,

dialogue process on the contents of International Labour Organization (“ILO”) Convention 169, and create areas of understanding with a view to achieving the necessary parliamentary consensus for its adoption.”²⁷³ Although it took another five years for the country to ratify the ILO Convention, the commitment that the state took before the regional human rights body bolstered the claims by indigenous groups and those who supported their demand in the face of pervasive opposition to the adoption of the treaty.²⁷⁴

* * *

Friendly settlements adopted before the Inter-American Commission do more than just address a wide range of matters. Their truly distinctive feature, especially when compared to other prominent regional human rights systems, such as the European system, is the scope of the remedies the parties are willing to agree on. In inter-American human rights law, structural remedies are not exceptional. As I explain in Part IV, this feature of inter-American human rights settlements is key to the articulation of a framework that can help to hold states accountable for their human rights violations—wrongs that, as discussed in Part II, are almost always inherently structural. Because of the types of remedies that the parties—acting under the Inter-American Commission’s good offices—may agree on in friendly settlement procedures, settlement can be a better avenue than adjudication to obtain reparations. Both the Court, in judicial rulings, and the Commission, through the approval of friendly settlements, can issue structural remedies which favor the victim but also society in general. The significant difference is that states may be more reluctant to implement structural policy or legislative changes if states *lose* a case before a tribunal than if they *agree* to implement such changes in a non-contentious proceeding. In this sense, structural remedies, as the ones discussed in the previous sections, may be more suitable for settlements.

4. Problems with settlements

55 STUD. L. POL. & SOC. 19 (2011).

²⁷³ See Mercedes Julia Huentao Beroiza *et al.*, Friendly Settlement, *supra* note 184, ¶ 33.

²⁷⁴ See Jorge Contesse, *The Rebel Democracy: A Look into the Relationship between the Mapuche People and the Chilean State*, 26 CHICANA/O-LATINO/A L. REV. 131 (2006). The agreement included a noteworthy clause that reveals the government’s preoccupation with the adoption of international human rights standards that could, as opponents claimed, prompt secessionist claims among indigenous leaders and communities: “[t]he parties are aware that the use of the category ‘indigenous peoples’ is in keeping with the provisions of the Chilean Constitution and, as the Constitutional Court has ruled, in no way can their recognition signify the creation of State within a State.” Mercedes Julia Huentao Beroiza *et al.*, Friendly Settlement, *supra* note 184, ¶ 35.

Friendly settlements can be an effective tool to hold states accountable and to ensure the protection of human rights. The benefits of settlement, however, come with associated costs. Identifying the problems with settlement in human rights law is the first step to improving this important form of resolution. This Section aims to do just that. I identify four key issues: (1) the misperception that settling human rights violations is normatively inferior than obtaining judicial decisions; (2) the unnecessary exclusion of third parties from the settlement process; (3) the inconsistent function of individual commissioners and underutilization of their institutional participation in settlements; and (4) the difficulty of adequately enforcing settlement terms post-resolution.

a. The allure of adjudication

As observed by an Inter-American Commission staff attorney, “friendly settlements can have great impact. Through settlements, the Commission has achieved impressive results. Yet it seems that the only thing that matters are the Court’s decisions, historically the jurisdictional exercise has been overemphasized.”²⁷⁵ These words reflect an understanding—and a frustration—that many of those interviewed for this study share: beyond the settling parties themselves and a few advocates, settlements are not well-known, despite the structural impacts they can have on human rights protection. Judicial decisions receive all the attention, at the expense of friendly settlements.

Two factors are likely to blame for this underappreciation. First, settlement negotiations are typically confidential. If and when the parties do reach an agreement, they must (per Commission rules and regulations) communicate that resolution to the Commission in a report “with a brief statement of the facts and of the solution reached.”²⁷⁶ The report delivered to the Commission will become public only if the Commission adopts it, and it may take years for it to do so. At any rate, while settlement reports do include a recitation of facts, unlike judicial opinions they contain no legal analysis of international human rights standards.²⁷⁷ As a consequence,

²⁷⁵ Interview with L4, staff attorney, Inter-Am. Comm’n H.R. (Apr. 6, 2017).

²⁷⁶ Rules of Procedure of Inter-Am. Comm’n H.R., *supra* note 6, art. 40(5).

²⁷⁷ The only case in which the Commission did elaborate on the legal standards applicable to the situation is the *Ananías Laparra* case. *Ananías Laparra Martínez and Family v. Mexico*, Friendly Settlement, Petition 1171-09, Inter-Am. Ct. H.R., Report No. 15/16 (Apr. 14, 2016). In that case, the Commission developed the legal standards that it had articulated in other merits reports to address the petitioners’ request in a separate case before the Inter-American Court, which concerned similar facts (the obtainment of a forced confession under torture. *See García Cruz and Sánchez Silvestre v. Mexico*, Friendly Settlement, OC-80/03, Inter-Am. Ct. H.R. (Nov. 18, 2013). Because the Court refused to issue a merits decision, the parties in *Ananías Laparra* requested the Commission to do it

settlement reports may be of little value to the development of international human rights law or to future potential litigants despite the impressive expertise of attorneys working at the Friendly Settlements Unit—both on issues of substantive law and on alternative disputes resolutions.²⁷⁸ In this sense, the Commission’s facilitation of settlement rather than judicial adjudication could (incorrectly) be seen as an abdication of its duties as a regional human rights body.

One could argue that it is the role of the Inter-American Court, and not that of the Commission, to elaborate standards for human rights protection. The Commission, I have explained, acts as a mediator/prosecutor.²⁷⁹ It processes petitions, invites the parties to find an agreement, supervises the process and, depending on the outcome of negotiations, may play a passive role (if the parties reach agreement on their own) or an active one, for instance, by issuing a merits report explaining its view of the dispute and further submitting the matter to the Inter-American Court for judicial resolution. But the Commission in fact is generally tasked with and does perform a number of *substantive* obligations regarding the articulation of regional human rights standards; it is not consumed with merely procedural functions. For example, through the work of its multiple special rapporteurships²⁸⁰ and the publication of thematic reports, the Commission formally advances its understanding of and contributions to current human rights matters.²⁸¹ The Commission, like the Court, interprets regional human rights norms. By refraining from advancing those interpretations when a friendly settlement sufficiently resolves the dispute, the Commission contributes to the (mis)perception that settlements are secondary compared to judicial decisions.

in its final report. *See* interview with L5, staff attorney, Inter-Am. Comm’n H.R. (July 30, 2018).

²⁷⁸ Staff attorneys working at the Friendly Settlements Unit have specialization and graduate studies on alternative dispute resolution mechanisms. This is a critical function as the Unit has become more professional over the past years. *See* interview with L5, staff attorney, Inter-Am. Comm’n H.R. (July 30, 2018).

²⁷⁹ *See supra* Part III.B.4.

²⁸⁰ The Inter-American Commission has established special rapporteurships on the rights of indigenous peoples (1990), women (1994), migrants (1996), freedom of expression (1997), children (1998), human rights defenders (2001), persons deprived of liberty (2004), afro-descendants and racial discrimination (2005), LGBTI persons (2011), and economic, social and cultural rights (2012). *See Thematic Rapporteurships and Units*, INTER-AM. COMM’N H.R., <https://perma.cc/E22C-LJZH>.

²⁸¹ The Commission has released more than seventy thematic reports on a wide range of issues, such as children’s rights (2008, 2017), terrorism and human rights (2002), violence against LGBTI persons (2015), indigenous peoples’ rights over lands (2009), women’s political participation (2011), pretrial detention (2013), among many others. *See id.*

As a result of this (mis)perception, settlements are further disparaged by the legal community as failing to properly hold to account states guilty of human rights law violations. The mere statement of facts and solution reached may also allow states to avoid recognizing their international responsibility, as the same-sex marriage case exemplifies.²⁸² If the state simply acknowledges the facts without taking responsibility, the solution reached resembles too much a private agreement between two quarreling neighbors. But a settlement can itself entail a full and proper admission for wrongdoing. Where a state within the terms of the settlement accepts that it has violated its international human rights obligations, the human rights system is ultimately reinforced. The system's norms are vindicated, and the facts are assessed as the type of wrongs they really are—human rights violations.

Commentators fail to see the potential normative value that settlements thus hold. They maintain the view that settlements cannot play the function of elucidating the norms and standards of a regional human rights regime²⁸³ and that judicial decisions are normatively superior to settlements.²⁸⁴ The notion that a victim may prefer a ruling by the Court “as a matter of principle” seems to reduce settlements to a second place, as if only judicial proceedings may serve as a forum of principle. The expansion of judicialization of inter-American human rights law has come along an understanding that the Inter-American Court acts a regional *constitutional* court and, according to this view, out-of-court settlements may “weaken” that constitutional function.²⁸⁵ It seems as if only judicial decisions may carry the dignity of serving as instruments to hold states accountable for human rights violations.

But settlements need not be so morally overshadowed by judicial resolutions. As discussed previously, settlement mechanisms give petitioners and victims agency, insofar they control the outcome of the process in ways they cannot when they litigate before the Inter-American Court.²⁸⁶ Settlements allow victims and petitioners to sit with the state, in a series of meetings, to listen and be listened as the arguments from both sides, as well as the Commission's guidance, shape the contours of what

²⁸² See *supra* Part III.C.3.b.iv.

²⁸³ For example, Hollander-Blumoff and Tyler believe that private forms of dispute resolution, such as arbitration, “fail to promote rule of law values in the same way as courts.” See McGregor, *supra* note 53, at 611.

²⁸⁴ See, e.g., Ziccardi, Martínez, Castelán & Valverde, *supra* note 19, at 63 (observing that human rights victims may wish to seek a ruling by the Inter-American Court as “a matter of principle”).

²⁸⁵ *Id.* at 65.

²⁸⁶ See *generally supra* Part III.C.1.b.

may become an agreement—and with it, a potential structural change of policy. This is not to minimize the importance of a court’s decision. Petitioners and human rights victims can find important relief through a court order. But, on the one hand, a court ruling will take much longer and, on the other hand, such order is usually handed down in a top-down fashion. Settlements can allow for the creation of law in both a bottom-up and horizontal way—something that court decisions may not do. Furthermore, when it comes to contested issues, *e.g.* the debate on same-sex marriage in conservative societies, the iterations that come with settlement negotiations can be critical to bring the parties closer.

An improved approach to settlement process and settlement formulation can arm this form of resolution with the same scale of moral importance as court decisions. For example, revisions to the way settlements are articulated and reported can better enunciate the facts and more firmly attribute wrongdoing. The Commission could explore these potential improvements to settlement reports both for the importance of the moral weight of resolutions and for the benefit of better elaborating human rights standards for future disputes.²⁸⁷ It has much to say and the human rights community would benefit from the Commission saying it.

b. The exclusion of third-parties from settlement negotiation

Parties to settlements negotiations are limited to the petitioner (on behalf of the victim(s)) and the state. If cases are understood as a kind of private negotiation, it is difficult to justify the participation of third parties unrelated to the object of the case. However, as I have argued in this

²⁸⁷ See, *e.g.*, Alfredo Díaz Bustos v. Bolivia, Friendly Settlement, *supra* note 236; Ananías Laparra Martínez and Family v. Mexico, Friendly Settlement, *supra* note 277. The Ananías Laparra case concerns the unlawful and arbitrary detention of Mr. Laparra and his subsequent conviction based on a confession obtained under torture by agents of the Judicial Police of the State of Chiapas, in Mexico, along with the torture of Mr. Laparra’s wife and minor children to force them to sign a statement incriminating Laparra in the murder of a man. The settlement is noteworthy because the Mexican state acknowledged its international responsibility (including statements from the ministry of Interior and the ministry of Foreign Affairs) and the parties agreed to an ambitious set of reparations, including non-repetition measures and individual reparations. But it is most notable because petitioners requested the Commission to take all the facts stated in the agreement “as established, ‘without abridgment, summary, or amendment through the inclusion of conditionals . . . , so that Ananías Laparra and his family may finally have an official account of the facts in their case impartially confirmed by the [Inter-American Commission on Human Rights],” *id.* ¶ 12, and jointly requested the Commission “to elaborate on the international standards governing the guarantees that must be observed for a confession to be considered valid evidence, on the doctrine of procedural immediacy, and on the exceptions of ‘urgency’ and ‘flagrancy’ used in this case to detain a person without a court order, in the light of the guarantees provided in the Convention,” *id.* ¶ X.

Article, such understanding may be misplaced when the matter under negotiation is a human rights violation. In these cases, other actors—such as civil society organizations and even third states—may naturally maintain an interest in the outcome of settlement negotiations.

Scholars have failed to consider in any depth the proper role of third parties in friendly settlement negotiations. In cases where violations concern structural matters, such as those discussed in the previous Part, the public interest inherent to the negotiations may require that the system allow third parties to intervene. For example, while the negotiations between petitioners and the Chilean government were underway, a conservative presidential candidate running on a platform against same-sex marriage did not criticize the government or the petitioners, but rather the Commission, and more generally, the human rights system, for its secrecy in dealing with matters contested at the *domestic* level.²⁸⁸ In a context of increasing resistance against the inter-American human rights system,²⁸⁹ such criticism may have damaging impact to the system's legitimacy, insofar transparency is a core function of the legitimacy of public decisions. This particular presidential candidate may not have realized that he was fashioning a democratic theory argument: if issues that are relevant to the *demos* are being addressed behind closed doors—and furthermore, in a place removed from where domestic policies are deliberated—without affected parties having the chance to participate, the resulting decision (that is, the agreement) may be seen as lacking democratic legitimacy.²⁹⁰

In cases concerning structural remedies, the Commission may need to explore ways to give voice to all interested and potentially affected parties, in a similar way as the Inter-American Court does when it considers advisory opinions.²⁹¹ There are several possible avenues for third-party

²⁸⁸ Cristina Perez Stadelman, *Candidato presidencial chileno acusa a la OEA de injerencia en los países*, EL HERALDO DE MÉXICO (June 14, 2017), <https://perma.cc/4TC7-EAL2>.

²⁸⁹ See Ximena Soley & Silvia Steininger, *Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights*, 14 INT'L J. L. IN CONTEXT 237 (2018); Contesse, *Resisting the Inter-American Human Rights System*, *supra* note 112.

²⁹⁰ See generally CARLOS S. NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY (1996).

²⁹¹ In recent years, the Court has begun to open participation channels for interested parties in advisory proceedings, such as states, civil society organizations, academic institutions and international organizations. For example, in the context of the Advisory Opinion on Gender Identity and Same-Sex Marriage (OC-24/17, from Nov. 24, 2017), the Court received more than ninety briefs, and held a public hearing where many organizations could participate and express their views. See Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Inter-Am. Ct.

participation in Commission considerations. For example, interested parties could participate by submitting *amicus curiae* briefs, or by attending and participating in thematic hearings convened by the Commission. Importantly, these forms of participation do not require that the details of negotiation become public. The setting parties can maintain their privacy and protect the integrity of their controversial negotiations even while third parties weigh in on the human rights issues at stake.

To be sure, third-party interventions must abide by fundamental requirements of international human rights law, most notably that the petition or pending case is one between a victim and the state: those are the actual parties. This is important as third-parties may want to unduly influence the outcome of a case by pretending to be a party to it, as it has happened in cases before the Inter-American Court (for example, when former Peruvian dictator Alberto Fujimori requested to participate *as a party* to monitoring proceedings, in 2018).²⁹² Also, the Commission must be aware about large third-parties—such as transnational corporations developing projects that affect indigenous peoples—that may wish to influence the outcome of negotiations. Channels of participation must ensure that those who lack a voice at the domestic level—and have thus been the victims of rights violations—may obtain redress at the international level.

Appropriate third-party participation would render friendly settlements an even more powerful tool for human rights accountability—a point I develop in the following Section.

c. Heterogeneity among commissioners

Commissioners' job is a part-time one. They meet three or four times a year to attend Commission sessions, where they conduct hearings (both thematic and on individual petitions), meet with petitioners and victims, and participate in side events, whether at universities or at OAS bodies.²⁹³ During the rest of the year, commissioners must work remotely sometimes to address requests for urgent precautionary measures by e-mail.²⁹⁴ It is the Commission's staff, particularly the Friendly Settlement Section, which processes and monitors the more than 100 negotiations ongoing at any

H.R. (ser. A) No. 24, ¶ 6 (Nov. 24, 2017).

²⁹² See *Caso Barrios Altos y Caso La Cantuta vs. Peru*, Inter-Am. Ct. H.R., ¶ 10 (May 30, 2018).

²⁹³ Interview with P1, former president, Inter-Am. Comm'n H.R. (July 16, 2018); interview with P2, former president, Inter-Am. Comm'n H.R. (July 14, 2018).

²⁹⁴ *Id.*

given time.²⁹⁵

All persons interviewed for this study share the view that the role of commissioners is fundamental to the success of friendly settlements. When commissioners are personally engaged in the negotiations, settlement processes are far more efficient and, perhaps more importantly, solutions are fairer—or at least the parties perceive them thus.²⁹⁶ The other side of the coin, however, is that where negotiations depend on individual commissioner involvement, resolutions vary depending on the individual skills of the particular commissioner involved.

The Commission's limited budget necessarily restricts their job to part-time status and their staff to the minimal numbers.²⁹⁷ Thus, the Commission must find ways to institutionalize the roles of its members—particularly, Commissioners, as permanent staff have developed extensive skills on alternative dispute resolution.²⁹⁸ The staff's expertise has become a critical feature of the Commission's work on friendly settlements. However, personal skills may vary from Commissioner to Commissioner, and since every dispute must enjoy the benefit of experienced and trained assistance, Commissioners should also obtain training on how to conduct negotiations with governments. (This issue is of course relevant to *all* procedures and mechanisms within the Commission, not just those concerning friendly settlements.) The *in situ*, decentralized model that I offer below aims at addressing this problem as well.

d. Failed enforcement of settlement terms

Compliance is the Achilles heel of international law—and of human rights law in particular. Much of the academic debate on the value of human rights law is centered on the question of how much impact this area of law really has.²⁹⁹ Friendly settlements can have significant impact, but only if a

²⁹⁵ Interview with L5, staff attorney, Inter-Am. Comm'n H.R. (July 30, 2017).

²⁹⁶ See Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 391 (2006).

²⁹⁷ In 2016, the Commission was close to losing 40 percent of its personnel due to structural lack of funding. Most of the funding came from external sources, such as European states that were cutting the external aid to address their refugee and immigration crisis. Under the leadership of president James Cavallaro (a Professor at Stanford Law School), the Commission could secure funding through a pledge from Latin American states to fund the Inter-American Commission. See Press Release, Inter-Am. Comm'n H.R., *IACHR Overcomes its Severe Financial Crisis of 2016 and Thanks Countries and Donors who Made it Possible*, Inter-Am. Comm'n H.R. Press Release No. 145/2016 (Sept. 30, 2016), <https://bit.ly/2OyFEMe>.

²⁹⁸ Personal communication with L5, staff attorney, Inter-Am. Comm'n H.R. (Dec. 12, 2018).

²⁹⁹ See ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014). *But see*

state is willing to commit to its agreed settlement terms. As Figure 4 below shows, state compliance rates with various forms of remedies, such as monetary compensations and the acknowledgment of violations, are in fact high, and, as commentators note, structural remedies “tend[] to be honored as a whole.”³⁰⁰

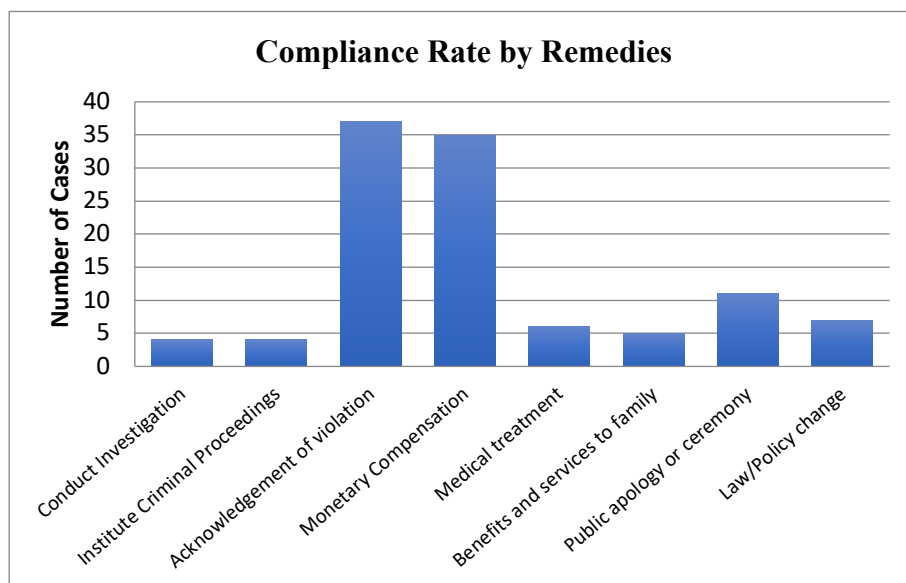


Figure 4

However, friendly settlements still face important compliance problems. First, settlement agreements—just like remedies stipulated by a final Court judgment—depend on a state’s willingness to commit to the terms of its agreement (or the judgment). But “the state” in this context really refers primarily to the executive branch. Officials from the state’s administration are typically those tasked with negotiating before the Commission with a view toward secure an agreement. Although from an external viewpoint they act on behalf of *the state*, administration officials must also respond to domestic constituencies. Thus, if there is a change in the relations between a government and the regional human rights system, or simply a change in the government, friendly settlements negotiations and compliance with past settlement agreements may be compromised. The problem is neatly exemplified in the Yanomami Indigenous People of Haximu case discussed above. In that case, the Venezuelan government made several attempts to

KATHRYN SIKKINK, *EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY* (2017); BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 42–56 (2009).

³⁰⁰ Ziccardi, Martínez, Castelán & Valverde, *supra* note 19, at 80.

reach an agreement and later abandoned agreed-to terms with the claim that settlement had been reached by officials acting without proper authority.³⁰¹ Similarly, in the Chilean same-sex friendly settlement, the agreement was signed in 2016 by the center-left government of Michelle Bachelet (who in 2018 became the United Nations High Commissioner for Human Rights).³⁰² Two years later, the settlement stalled when a new right-wing government came to a power.³⁰³

Second, scholars measure compliance by confirming that the state has implemented the remedies it committed to deploying.³⁰⁴ But there are other ways in which compliance—or non-compliance, for that matter—may manifest. Timeliness is one salient factor. Once parties sign a settlement agreement—a process that itself can take years—the human rights system must ensure that agreed-to remedies are implemented in a timely fashion. Here, failed compliance affects not only the immediate victims of the resolved dispute. Especially in structural cases, if a state does not timely comply with, and the Commission cannot timely enforce, settlement terms, the matter may very well become another unresolved dispute before the

³⁰¹ Yanomami Indigenous People of Haximu v. Venezuela, Friendly Settlement, *supra* note 260, ¶ 40. In reality, the issue was that the Chavez government had begun a campaign against the inter-American human rights system, accusing the Commission of serving the interests of the U.S. government, and leveling criticism against the Commission’s “imperial” attitude as a way to strengthen the government’s domestic position. The first agreement was signed in October 1999, only nine months into the presidency of Hugo Chávez. By July 2004, the Venezuelan government’s attitude toward the Commission was overtly hostile. Juan Forero, *Venezuela Abused Protesters, Human Rights Groups Charge*, N.Y. TIMES (Apr. 10, 2004), <https://perma.cc/3WK8-9M9K>; see also *The State of Democracy in Venezuela: Hearing Before the Subcomm. On W. Hemisphere, Peace Corps, and Narcotics Affairs of the S. Comm. On Foreign Affairs*, 108th Cong. 12–17 (2004) (statement by Ambassador John F. Maisto, Permanent Rep. to the Organization of American States); Committee on Foreign Relations Subcommittee on Western Hemisphere, Peace Corps And Narcotics Affairs, UNITED STATES SENATE (June 24, 2004), <https://perma.cc/HS2K-D2D4>; *Defensores derechos humanos temen por su integridad en Venezuela*, EL UNIVERSO (Apr. 3, 2004), <https://perma.cc/F4V6-M7XU> (reporting that the Venezuelan ambassador to the Organization of American States accused the Inter-American Commission of “launching an operation to distort the reality of human rights in Venezuela”).

³⁰² César Antonio Peralta Wetzel and others v. Chile, Friendly Settlement, *supra* note 185.

³⁰³ Interview with Rolando Jiménez, President, Movilh, leading petitioner (July 28, 2018). According to a staff attorney at the Inter-American Commission, notes that states could address this problem by adopting and implementing domestic mechanisms of enforcement, along the lines of what Mexico has done, see *infra* Part IV.B, or the recent passage in Bolivia of a Law on Friendly Settlements, see Personal communication with L5, staff attorney, Inter-Am. Comm’n H.R. (Dec. 12, 2018).

³⁰⁴ Ziccardi, Martínez, Castelan & Valverde, *supra* note 19. In the European context, see KELLER, FOROWICZ & ENGI, *supra* note 15, at 67–68.

international human rights system. Where a friendly settlement has purportedly solved a dispute with both individual and structural remedies, and that the matter then arises again, with separate but parallel facts, before the Commission (and potentially, the Court), the system has essentially proven itself incapable of adequately addressing human rights violations.

Consider, for example, the 2016 decision of the Inter-American Court against Brazil for the slave labor of 85 workers in the state of Pará (the same location featured in the 2003 friendly settlement on slavery).³⁰⁵ To begin, we note that twelve years after a settlement was signed, the Commission sent a similar dispute to the Court for judicial resolution.³⁰⁶ This issue calls serious attention to the Commission's (and the system's) failure to monitor compliance with the terms of a settlement. But it also shows an additional problem: the disconnect between the Commission's settlement mechanism and the Court's contentious jurisdiction. The *Fazenda Verde* opinion is considered a landmark decision as it was the first time the Court applied the right to be free from slavery in Article 6 of the American Convention to the prohibition of forced labor—evidencing, again, the high profile of the Court's decisions compared to the largely unnoticed work of the Commission.³⁰⁷ Significantly, the Court's opinion does not once mention the 2003 friendly settlement, notwithstanding that the Court was addressing the same issue in the same location and with similar facts. The failure to acknowledge the previous related work of the other body of the inter-American human rights system can be explained by the fact that settlements, as noted, do not generally elaborate on the human rights standards. The mismatch in enforcement between settlements and decisions, however, impact the system's overall strength: instead of finding a common set of norms and standards that domestic actors can use to mobilize for a social problem—in this case, slavery in Brazil—victims may understandably see settlements as an inferior and even powerless weapon against human rights violations.

³⁰⁵ *Hacienda Brasil Verde Workers v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 318 (Oct. 20, 2016).

³⁰⁶ The petition in the *Hacienda Brasil Verde* case was filed in November 1998 and the Commission submitted the case to the Court in March 2015. *See id.*, ¶¶ 1–2.

³⁰⁷ Anna-Sophie Gross, *Brazil Ordered to Pay \$5m to Workers Formerly Enslaved on Cattle Ranch*, GUARDIAN (Jan. 9, 2017), <https://perma.cc/89GZ-G3T2>; *see also* Irit Weiser, *Inter-American Court Issues its First Decision on Modern Day Slavery: Case of Hacienda Brasil Verde*, 2 PKI GLOBAL JUST. J. 4 (2018), <https://perma.cc/A6SH-TGHF>; Tatiana Gos, *Hacienda Brasil Verde Workers v. Brazil: Slavery and Human Trafficking in the Inter-American Court of Human Rights*, OXHRH BLOG (Apr. 24, 2017), <https://perma.cc/3BPC-CGBF>.

IV. PROPOSED IMPROVEMENTS TO THE SETTLEMENT MODEL

This Article has thus far explained what the friendly settlement mechanism is; how the Inter-American Commission, states, and petitioners understand it; various remedies employed by settling parties; and the main problems with the settlement mechanism as it currently stands. This Part addresses those problems identified by offering two proposed improvements that render the friendly settlement procedure more effective. Under my proposed model, the Commission should distinguish between petitions seeking *individual* remedies and those seeking *structural* remedies, and apply differentiated treatment to each. Second, I propose that friendly settlements negotiations be mostly carried out *in situ*, that is, where the violations have occurred and where remedies will be implemented. To accomplish this, the Commission's role must be strengthened so as to decentralize its mediating functions and better contribute to enforcement efforts. As states consistently call for greater use of the friendly settlement mechanism, both motive and opportunity exist to implement this reformed model.³⁰⁸

A. Differentiating between individual and structural claims

Settlement agreements in inter-American human rights law include both individual and structural remedies.³⁰⁹ Presently, the Commission treats all claims and subsequent remedies alike and does not formally distinguish between claims on this or any other basis. In order to make better use of the friendly settlement mechanism, and taking into account the issues identified in the previous section, the Commission should consider adopting guidelines that distinguish between individual and structural claims and adjust treatment accordingly.

Separating claims that are individual from those that seek structural remedies may result in a differentiated approach towards negotiations and ultimately compliance. Take the role of third parties as an example: if a petition includes individual claims, there are not strong reasons to allow third parties to intervene. This is not to say that third-parties—*e.g.*, another state or a transnational human rights organization—should be barred from participating entirely, but it understands that negotiations on individual reparations are in fact of a more private nature.

If a case has structural implications—*e.g.*, multiple states are affected by the negotiations or a large part of the population of a country is—then the Commission should consider opening participatory channels along the lines

³⁰⁸ See, *e.g.*, Rep. of the Special Working Group, *supra* note 113.

³⁰⁹ See *supra* Part III.C.3.b.

of what the Court does when it considers advisory jurisdiction questions.³¹⁰ In these cases, there will also be strong reasons to publicize settlements reports more extensively, and to include in these reports more than “a statement of the facts and of the solution reached,” as the Commission’s rules and regulations currently require.³¹¹ In such cases, the Commission plays a critical role as the arbiter of agreements that must observe inter-American human rights law. By failing to include any analysis on human rights standards, it is ultimately the human rights system’s constituencies that lose the opportunity to learn the Commission’s understanding of a particular human rights issue and later apply it to related disputes. The Mexican case of Ananías Laparra³¹² and the Bolivian case on conscientious objection are good examples.³¹³ In both cases, the settlements reports elaborated on international law far beyond a mere statement of the facts. This is not only important in regards the articulation of substantive human rights standards; it also means that states have actively participated (by their participation in negotiations) in crafting human rights law at the domestic level. This, I argue in the next section, could be a distinctive feature of a bottom-up model of international human rights law.³¹⁴

Structural remedies could also require the commitment of branches of government other than the executive—for example, Congress. The Commission should address *ex ante* the possibility that settlements may not be enforced because of changes in governmental circumstances. In the same-sex marriage case, the new conservative administration in Chile seemed uninterested in moving forward the settlement that the prior administration had signed with petitioners.³¹⁵ Since most of the remedies in that settlement were structural in nature, the Commission could have explicitly declared that in such cases the state’s representatives must secure the will of all implicated agencies and branches of government.

In contrast, for individual claims, failed compliance is less of a concern,

³¹⁰ See *supra* note 14.

³¹¹ See American Convention on Human Rights, *supra* note 6, art. 49; Rules of Procedure of Inter-Am. Comm’n H.R., *supra* note 6, art. 40(5).

³¹² See Ananías Laparra Martínez and Family v. Mexico, Friendly Settlement, *supra* note 277.

³¹³ See *supra* Part III.C.3.b.iii.

³¹⁴ Elsewhere I have argued in favor of a bottom-up model of transnational adjudication for the Inter-American Court of Human Rights, that is, a model whereby the Court integrates constitutional law into its case law as a way of amplifying domestic understandings of fundamental rights, making the Court’s jurisprudence be grounded on national law and, as a result, enhancing its legitimacy. See Contesse, *The Final Word?*, *supra* note 49.

³¹⁵ Interview with Rolando Jiménez, President, Movilh, leading petitioner (July 28, 2018).

as shown historically.³¹⁶ By articulating this differentiated treatment for different types of negotiated settlement, the Commission's work could be rendered more effective, and other actors could anticipate the grounds for negotiations, either to prevent violations from happening (the goal of non-repetition measures) or to help elucidate international standards applicable at the domestic level.

B. Decentralized resolution and enforcement

Inter-American human rights law would further benefit from the decentralization of some Commission functions. Once the Commission invites parties to try to reach an agreement, working meetings ensue, some with the Commission in attendance and others with the parties alone. As persons interviewed for this study observed, the presence of a commissioner is usually of great importance to the success of negotiations.³¹⁷ If a commissioner is not personally involved, petitioners will try to have at least a Commission staff member involved in the negotiations.³¹⁸

The Commission, however, is located in Washington, D.C., and for many petitioners and victims, travel from Latin America to the United States is not always feasible. Addressing this logistical issue has been a consistent preoccupation for the Inter-American Commission in recent years.³¹⁹ One way the Commission has addressed the matter is by holding sessions in different countries and cities.³²⁰ Through local sessions, citizens have better access to, and knowledge about, the work of the Commission and the human rights system, in general. During those sessions,

³¹⁶ See *supra* Figure 4.

³¹⁷ Interviews with C1, petitioner, int'l human rights org. (Apr. 6, 2018); interview with Rolando Jiménez, President, Movilh, leading petitioner (July 28, 2018); interview with L11, gov't official, Para. (Aug. 2, 2018); interview with S1, gov't official, Arg. Ministry of Justice and Human Rights (July 31, 2018); interview with S6, former gov't official, Chile (July 3, 2018); interview with S3, Colom. (July 17, 2018); interview with Uriel Salas, Dir. of Section on Cases, Human Rights and Democracy Section, Ministry of Foreign Affairs of Mex. (Sept. 3, 2018); L2, staff attorney, Inter-Am. Comm'n H.R. (Apr. 5, 2018); interview with L3, staff attorney, Inter-Am. Comm'n H.R. (Apr. 5, 2018); interview with L5, staff attorney, Inter-Am. Comm'n H.R. (Apr. 5, 2018); interview with L6, staff attorney, Inter-Am. Comm'n H.R. (Apr. 6, 2018).

³¹⁸ Interview with C1, petitioner, int'l human rights org. (Apr. 6, 2018); interview with Rolando Jiménez, President, Movilh, leading petitioner (July 28, 2018).

³¹⁹ Interview with P1, former president, Inter-Am. Comm'n H.R. (July 16, 2018); interview with P2, former president, Inter-Am. Comm'n H.R. (July 14, 2018).

³²⁰ Since 2014, the Commission has held public hearings in Sucre (Feb. 2019); Boulder, Colorado (Oct. 2018); Santo Domingo (May 2018); Bogotá (Mar. 2018); Montevideo (Oct. 2017); Mexico City (Sept. 2017); Lima (July 2017); Buenos Aires (May 2017); Panama (Dec. 2016); Santiago (June 2016) and Mexico City (Aug. 2014). See *IACHR Sessions*, INTER-AM. COMM'N H.R., <https://perma.cc/D8YD-P35P>.

commissioners participate in many activities, from public hearings to academic conferences to private meetings to negotiate the terms of friendly settlements. The problem, of course, is that the success of such working meetings requires extensive travel from commissioners already limited by strict temporal and financial budgets. The Commission has also addressed the issue by holding videoconferences with the parties, so that meetings do not have to wait until the next period of hearings. The use of technology is an important tool to enhance the work on friendly settlements. However, as a state official notes, “videoconferences do not have the same effect as a mediation in person.”³²¹

The Organization of American States has considered—but so far rejected—the possibility of creating local posts to act as delegates or representatives of the Commission.³²² Such delegates would be based at the country where the negotiations and the compliance monitoring are taking place (*in situ*) and would work (remotely) alongside the Commission’s D.C.-based staff. The advantage of a system of decentralized compliance is that the negotiations would be monitored more directly by local Commission staff, acting with and under the color of the OAS, with a fuller understanding of the local particularities involved in given disputes. A decentralized mechanism for friendly settlements could also enhance compliance, as local delegates may have greater access to, and understanding about, domestic authorities. Negotiations and monitoring could adopt a “bottom-up” approach, better empowering the parties themselves to steer the outcome of their disputes and giving them a greater role in the elaboration of the public values sustaining inter-American human rights law.

At a conference on the use of the friendly settlement mechanism the Commission flagged the idea of using local counterparts to promote agreements.³²³ The reaction was wholly negative.³²⁴ As a senior petitioner

³²¹ Personal communication with S1, gov’t official, Arg. Ministry of Justice and Human Rights (Dec. 13, 2018). As the official notes, “the Commission’s role is too passive, mainly because of the distance and the difficulties that the parties must overcome to meet with commissioners.” *Id.* Another state official agrees that the Commission’s is “sometimes extremely passive: supposedly its role is to mediate, but sometimes we observe that they do not do much to mediate—precisely because they see that in so doing they may be taking positions with which the victims and their representatives may disagree . . . The Commission could do more so that the victims feel comfortable in a process where mistrust is normal.” Personal communication with L12, gov’t official, Colom. Agency for State Defense (Dec. 18, 2018).

³²² Interview with L5, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018).

³²³ Interview with L3, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018).

³²⁴ In December 2017, the Commission and the Court organized the First Inter-American Human Rights Forum, aimed at “promot[ing] a debate on the present and future

noted: “Would they want to outsource their work? That is unacceptable.”³²⁵ Considering some of the existing obstacles for effective use of the friendly settlement mechanism, the idea may not be as unacceptable as some actors perceive it. To begin with, as noted, decentralizing negotiations has practical advantages, such as immediacy, as negotiations and compliance would be monitored by individuals with greater understanding about local *mores* and faster access to the negotiating parties. But the mechanism would also avoid the financial strain on would-be parties asking the Commission to facilitate their settlement discussions and the geographical constraints of a D.C.-only Commission. The decentralized mechanism could work with local counterparts that are not private mediators, but OAS officials located in different countries and acting in an official capacity, similar to the function of United Nations officials based in several Latin American countries.

Finally, the proposed decentralized model aligns with remarkable new developments in human rights law compliance in the Americas. Some states have moved to implement innovative tools to enforce human rights settlements, demonstrating the need to decentralize the friendly settlement model in order to achieve higher compliance. Two examples are worth mentioning. In Argentina, when the state signs a friendly settlement agreement, the determination of the actual remedies for the implementation phase is assigned to the state, which undertakes to set-up of ad-hoc arbitral tribunals tasked with determining the scope of the remedies for the victims.³²⁶ Such tribunals—composed by local jurists—can have the advantage of direct knowledge about the local social and political culture, thus favoring its chances for enforcement.³²⁷ For these mechanisms to

of human rights in the region, the effectiveness of the inter-American human rights system, the need to increase Member States’ levels of compliance with the recommendations of the IACHR and the judgments of the Inter-American Court, and other key issues on the human rights agenda in the Americas.” See Press Release, Inter-Am. Comm’n H.R., IACHR and Inter-American Court Extend Invitation to First Forum of the Inter-American Human Rights System and Call for Proposals for Side Events, Inter-Am. Comm’n H.R. Press Release No. 172/17 (Nov. 3, 2017), <https://perma.cc/D3YY-8DHT>. During the sessions on friendly settlements, held on December 5, participants “roundly rejected the idea.” Personal communication with L5, staff attorney, Inter-Am. Comm’n H.R. (Dec. 12, 2018).

³²⁵ Interview with C1, petitioner, int’l human rights org. (Apr. 6, 2018).

³²⁶ Interview with senior official, Arg. Ministry of Justice and Human Rights (July 31, 2018).

³²⁷ Interview with S1, gov’t official, Arg. Ministry of Justice and Human Rights (July 31, 2018). However, some leading petitioners believe that “ad-hoc tribunals should not be established at all . . . and should not perform functions that pertain to the agreement between the victims and the state. The determination of remedies should not be delegated on these tribunals.” According to this view, “in reality ad-hoc tribunals only work to delay the enforcement of reparations.” Personal communication with Gabriela Kletzel, Dir. of the

properly work, they must establish meaningful participation channels for victims.

In 2013, Mexico established a “Human Rights Obligations Compliance Trust” (*Fideicomiso para el Cumplimiento de Obligaciones en Materia de los Derechos Humanos*) to facilitate enforcement of judgments by international tribunals and human rights settlements agreements.³²⁸ The trust came as a response to the obstacles that the government faced each time it sought to enforce an international decision: administrative agencies would struggle over budgetary lines and formal requirements to comply with reparations ordered by international bodies.³²⁹ The trust allows the state to smooth the process of compliance and, in the specific case of friendly settlement agreements, to open institutional channels between petitioners, victims and the government agencies in charge of enforcing agreed terms. These mechanisms allow for greater local engagement in the processes of enforcement, as victims and petitioners can maintain the conversation and contribute to monitoring post-settlement results. Once again, these interactions can help with the elaboration of a bottom-up domestic practice on *international* human rights law.

These are just examples of how domestic mechanisms can help strengthen the inter-American human rights procedures, both in negotiations and post-settlement. By decentralizing what is today a wholly centralized set of procedures, the model promotes important practical and normative goals. First, it alleviates the Commission’s present over-burden, contributing to one of the main goals of the Commission’s Strategic Plan: the adoption of measures to address procedural delay and backlog.³³⁰ Second, it ensures that the shaping of inter-American human rights law is carried out not only by regional human rights bodies but also by local constituencies—both states and individuals—contributing thus to the collective elucidation of the values promoted by inter-American human rights law. Friendly settlements should not be seen just as a mechanism with practical procedural advantages. They also, particularly with the benefit of the improvements proposed herein, can also offer critical normative benefits.

V. CONCLUSION

Int’l Team, the Center for Legal and Soc. Studies (Dec. 4, 2018).

³²⁸ See *Fideicomiso para el Cumplimiento de Obligaciones en Materia de los Derechos Humanos (Mexico)*, OFFICIAL GAZETTE (May 29, 2014), <https://perma.cc/NSE6-K8SL>.

³²⁹ Interview with Uriel Salas, Dir. of Section on Cases, Human Rights and Democracy Section, Ministry of Foreign Affairs of Mex. (Sept. 3, 2018).

³³⁰ See Inter-Am. Comm’n H.R., Strategic Plan 2017–2021, *supra* note 134, at 51.

Although most human rights regimes contemplate friendly settlements as a mechanism to resolve disputes, legal scholarship focuses almost exclusively on the role of international courts in human rights cases, leaving alternative methods of human rights accountability largely unstudied. Exploring the friendly settlement procedure in the context of inter-American human rights law—with its wide range of settlements and remedies—contributes to fill that scholarly gap by shedding light on the practical advantages of this mechanism as well as its unnoticed normative advantages. Friendly settlements should not be seen as a second-best mechanism. They allow more flexible interactions between states and human rights victims, enhance the possibility of compliance with human rights reparations, and favor a decentralized form of creation of human rights law. Through the settlement of human rights disputes, regional human rights regimes can effectively hold states accountable and, at the same time, make both states and victims participants in a multi-party conversation on the creation and enforcement of human rights law.