Settling Human Rights Violations

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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 jurisprudential 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 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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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 couples 3 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 on Human Rights (IACHR). 5 The Commission held a hearing for Ms. Atala’s


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. Atala Riffo and Daughters, Inter-Am. Ct. H.R., No. 239, ¶ 49; Corte Suprema de Justicia [C.S.J.] [Supreme Court], 13 mayo 2004, “Atala Riffo c. Chile,” Rol de la causa: 1193-03 ¶ 20 (Chile).


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), 5, 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. 353 (2019).

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
case against Chile, which was, like many other hearings that come before the IACHR, charged with emotion. 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,” “groundbreaking,” and “historic.”

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. 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"? For other countries, or for the inter-American system? 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 Karen Alter has put it, international courts are the "new terrain" of international law. 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.

The literature on friendly settlement is compact. The most comprehensive study on the matter addresses the European—not the inter-American—

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).


12. 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 for 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)).

13. 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.
human rights system, and it does it only up to 2010.\textsuperscript{14} 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.\textsuperscript{15}

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.”\textsuperscript{16} Yet, such backdrop has dramatically changed over the past two decades.\textsuperscript{17} Latin America has transited 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.\textsuperscript{18} 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]”\textsuperscript{19} and that they “may not contribute” to the judicialization of Latin American law.\textsuperscript{20} 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.\textsuperscript{21} 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

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\item[14.] See Hellen Keller, Magdalena Forowicz & Lorenz Engi, Friendly Settlements before the European Court of Human Rights (2010).
\item[15.] See infra Part II.A.1.
\item[17.] See Jorge Contesse, Contestation and Deference in the Inter-American Human Rights System, 79 LAW & CONTEMP. PROBS. 123 (2016).
\item[19.] Id. at 65.
\item[20.] Id.; see also supra note 5.
\item[21.] See infra Part III.B.2.
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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 I, I survey the use of friendly 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 II, 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 III, 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. I then conclude.

I. 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
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courts, and some are diplomatic, such as mediation or conciliation.\(^{22}\) Multiple international treaties stipulate conciliation procedures as a mechanism for dispute resolution among states.\(^{23}\) 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 international law that aims for the peaceful resolution of conflicts.\(^{24}\) According to this view, friendly settlements in human rights applications are a hybrid mechanism, including elements of both negotiation and conciliation.\(^{25}\) 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,\(^{26}\) 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 Committee\(^{27}\) and the Committee on Economic, Social and

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\(^{22}\) 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 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. Intl. L. 83 (2005); see also Keller, Forowicz & Engi, supra note 14, at 5.

\(^{25}\) See Reisman & Benesch, supra note 16, at 751 (observing that international treaties since the founding of the League of Nations have established settlement mechanisms as a way of solving disputes).

\(^{26}\) 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 14, at 289.


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 16, at 748.

\(^{27}\) 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).
Cultural Rights. Under the overview of a third-party—for example, the African Court on Human and Peoples' Rights or the European Court of 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 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. 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. 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. 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.

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29. 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 14. 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 Keller, Forowicz & Engi, supra note 15, at 71 (“Following the accession of the Central and Eastern European States, the number of applications rose exponentially. . . .”).

Starting in the 2000s, the European Court introduced two new mechanisms to tackle its backlog: "pilot friendly settlements" and "unilateral declarations." Through pilot judgments, the Court addresses matters that, due to their systemic nature, may give rise to many identical applications. 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. 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.

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

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. The legal lacuna, however, did not prevent the African Commission on Human

33. See Keller, Forowicz & Engi, supra note 14, at 70–74.
34. Keller & Suter, supra note 29, at 55.
37. 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.").
38. 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, 2005-6VI 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.").
39. See Ziccardi, Martínez, Castellán & Valverde, supra note 18, at 59, 65.
and Peoples’ Rights from seeking friendly settlements, and in 2010, both the African Commission and the Court adopted new rules of procedure that now formally allow for “amicable” settlement procedures. 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.” In general, individual petitions in the African human rights system are processed through contentious mechanisms, both before the Court and the African Commission.

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 between domestic law and international adjudication. In Europe, doctrines emanating from the European Court of Justice, such as “supremacy” and “direct effect,” and the European Court of Human Rights—most saliently, the “margin of appreciation doctrine”—receive incessant attention. In the Americas, the same happens with the work of the Inter-American Court of Human Rights and, to a lesser extent other, tribunals, such as the Andean


48. See, e.g., Laurence Burgorgue-Larsen & Amaya Úbeda de Torres, The Inter-American Court of Human Rights: Case-Law and Commentary (2011); Alexandra Huneem, 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
Court of Justice.49 The work of the younger African Court of Human Rights is also the subject of legal commentary.50 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.51 Those efforts that do analyze 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.52 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.”53 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 increasing use of settlement in private litigation because, in his view, it under-
mines 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.55 The use of settlement—which he sees as “a capitulation to the conditions of mass society”—should thus not be encouraged insofar as it privatizes disputes.56

Fiss’ view has been labeled a “public-life conception” of adjudication.57 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.58 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.59 This conception, exemplified by “quarrels between neighbors,”60 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.61

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.62 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.”63 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?”64 The question is critical for an analysis of human rights settlements, where the issues at stake far account to Fiss’, see Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 Harv. L. Rev. 668 (1985).

57. See Luban, supra note 54, at 2654–55.
58. Id.
60. Fiss, *Against Settlement*, supra note 54, at 1075.
61. Luban, supra note 54, 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.”).
62. But see Bilsky & Fisher, supra note 54, at 103 (analyzing settlement in the context of transnational Holocaust litigation).
63. See Luban, supra note 54, at 2631 (arguing that, for Fiss, “structural transformation suits [have] public significance”).
64. Id. at 2629.
more resemble cases like \textit{Brown} than they do private disputes over damages or “quarrels between neighbors.”

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. 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” through a sort of “fast track procedure.” 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). Petitioners in human rights procedures before the Inter-American Commission seek not only individual redress—they also seek structural remedies. In seeking broader structural remedies, such petitioners are like the \textit{Brown} plaintiffs; yet, unlike the \textit{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 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

65. See infra Part II.C.
66. Keller & Suter, supra note 29, at 70.
67. Id. at 89.
68. See infra Part II.C.3.b.
69. In the \textit{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 \textit{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.
against the public’s interest. Remedies in such instances may prove critical to protect the human rights regime’s legitimacy.

The key question, addressed in Part III, 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.

II. 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. As the first draft of the Convention had already contemplated a provision on the friendly settlement, under the rules of procedure before the Inter-American Commission on Human Rights (Article 37(e)), the states’ delegates to the Inter-American Conference who were tasked with the adop-

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70. 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, FOROWIĆZ & ENGI, supra note 14, 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.”).

71. 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.


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.

tion 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."73

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.74 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."75 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 progress toward professionalization of the friendly settlement mechanism.76 As the Commission, petitioners, and

73. 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, “Specialized Conference,” supra note 72, at 28, 78, 114, 387, 494.

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

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


(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 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.
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 III 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,77 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 example, by paying a monetary compensation.78 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.79 Further, both petitioners and the Commission itself had reservations about

78. See infra Part III.
79. 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 16, at 742.
the potential of the friendly settlement procedure to hold states accountable for their human rights violations, and the Commission had a tacit understanding that not all petitions were eligible for an amicable solution. 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. Similarly, most petitioners held a strong view that the human rights matters submitted for consideration of the Commission were unegotiable. Petitioners thus favored the Commission’s merits reports on human rights violations—or judicial pronouncements by the Inter-American Court—over friendly settlements.

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. 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. The Court rejected the state’s argument, declaring that the Commission had “the sole discretion” to decide whether or not to offer the option of a friendly settlement, and the discretionary approach toward friendly settlement thus became one of its first prominent features.

Such an approach to friendly settlement, however, did not last long. By the mid-1990s, the Commission’s understanding of friendly settlements be-

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81. 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.”).
82. Reisman & Benesch, supra note 16, at 759–60; see also interview with L5, staff attorney, Inter-Am. Comm’n H.R. (July 30, 2018).
84. See Standaert, supra note 16, at 522 (describing friendly settlements as “an institutional framework that is often asked to resolve ‘disputes’ involving allegations of gross violations of human rights.”).
86. See id. ¶ 44.
88. During the time of the “discretionary approach” only three settlements were signed. See infra Part II.C.2.
gan to change.\textsuperscript{89} 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.\textsuperscript{90} The discretionary approach stood as an obstacle to this, effectively usurping petitioners’ right to seek redress.\textsuperscript{91} 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.\textsuperscript{92}

Another factor that led to the Commission’s change in its approach to 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.”\textsuperscript{93}

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.\textsuperscript{94} Hence, friendly set-

\textsuperscript{89} interview with L3, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018).
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} 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
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lements would be available for all human rights petitions—an approach labeled as the "universalization" of friendly settlements.95

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 Grossman96—was critical to the development of a "friendly settlement culture."97 This new culture favored a more active role for the Commission in working toward finding substantive solutions to human rights violations.98 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.99

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.100 The Commission retained its powers under the friendly settlement mechanism to seek an amicable solution to individual petitions before taking them to the Court.101 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 toward the friendly settlement mechanism when it created a special Section dedicated exclusively to friendly settlement procedures.102 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

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96. Both from the American University Washington College of Law.
98. Id.
99. See infra Part II.C.4.c.
100. 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").
institutionalize the cumulated knowledge and practice on friendly settlements.103

2. Institutionalization

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.104 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.”105 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.106 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.107 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.108

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

103. Id.
104. 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, govt. official, Ministry of Justice and Human Rights, Argentina (July 31, 2018); interview with S5, former govt. official, Ministry of Foreign Affairs, Chile (July 3, 2018); interview with S2, 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, govt. official, Para. (Aug. 2, 2018); interview with Rolando Jiménez, President, Movilh (July 28, 2018).
106. Id.
107. Id.
108. 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. 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. Hence, the second phase of the Commission’s plan was mostly 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. 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,” 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, and created a latent tension between the Commission and states.

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. States favored the use of friendly settlements, and the Commission was already working to promote their use. It was, unlike the issue of precautionary measures or the naming of

111. 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. 175 (2019) (discussing the role of Brazil and Venezuela as promoters of the revision process).
114. 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 APORTE DPLF 9, 9 (2014).
116. Id.
certain countries as human rights violators, an uncontested matter. 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” in order to then “facilitate more friendly settlements and prepare more friendly settlement reports.” The Commission announced that enhancing the mechanism would be one of the goals of the Commission’s Strategic Plan of 2011-2015.

The Special Working Group then made six recommendations on the matter of friendly settlements. 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, created a dedicated website on friendly settlements, convened a meeting with alternative dispute resolution experts and human rights specialists at the Commission’s headquarters in Washington, D.C., circulated (and posted online) a questionnaire among states, and NGOs on the uses, advantages, and difficulties of the mechanism, and convened a regional meeting to discuss and analyze the use of the friendly settlement procedure.

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.126 Despite the rejection, the discussion on friendly settlement allowed the parties to find common ground despite increased mistrust among the parties.127

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.128 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.129 Under the new vision, the Commission would take a more proactive role in parties’ negotiations—a feature that both petitioners and state officials agree is of great import to the success of friendly settlements.130 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.131 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.132
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. 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. Some states officials tend to see the Commission as normally siding with the victims. 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.

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. 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.

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133. The Plan’s Strategic Objective 1 (“SO1”) is “to contribute to the development of a more effec-

134. See U.N. Charter, supra note 22, art. 33(1)–(2).

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

136. See id.

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

138. 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 

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 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 III, 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 to settlements; the exclusion of third-parties from negotiations; the heterogeneity among commissioners who lead negotiations; and the problems with enforcement. This discussion lays the groundwork for Part III, 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. 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 gen-

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139. See Carmona Tinoco, supra note 24, at 121.
eral, states are more eager to enter into negotiations with petitioners.\footnote{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. \textit{Su Press Release, Inter-Am. Comm’n 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/TXK2-VZY2.}}

Other states, however, seem less interested in preventing 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.\footnote{See \textit{interview with Uriel Salas, Dir. of Section on Cases, Human Rights and Democracy Section, Ministry of Foreign Affairs of Mex. (Sep. 3, 2018).}} 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.\footnote{For example, Mexico’s Victims Act (\textit{Ley General de Víctimas}) establishes implementation mechanisms for remedies obtained in international human rights procedures. \textit{Ley General de Víctimas [LGV], Diario Oficial de la Federación [DOF] 09-01-2013, últimas reformas DOF 03-01-2017.}} 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.\footnote{See \textit{interview C1, petitioner, int’l human rights org. (Apr. 6, 2018).}}

\textit{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,\footnote{See generally U. Tex. Sch. L. Human Rights Clinic, \textit{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. \textit{See Inter-Am. Comm’n H.R., Res. 1/16 (Oct. 18, 2016), https://perma.cc/76KN-7Z!}.} and many times petitioners obtain the same or larger remedies in negotiations that they would have in a Court’s decision,\footnote{See Reisman & Benesch, \textit{supra note 16, at 749.}} without having to wait years before their cases are adjudicated.\footnote{See \textit{interview C1, petitioner, int’l human rights org. (Apr. 6, 2018).}} 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 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.147 "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."148

Court proceedings are mediated through the highly technical language of the law. These solemn proceedings aimed 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 settlement 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.149 Insofar as friendly settlements involve interactions and iterations between states and petitioners (and the Commission), the parties’ different positions are more susceptible to being 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 2018,150 LGBTI advocates fervently praised the ruling.151 But the opinion also sparked an unprecedented


148. Id.

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


pushback from conservative leaders across the region, effectively catapulting those running on an "anti-inter-American system" platform to the frontlines.152

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,153 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 2010,154 sexuality laws in Latin America underwent unprecedented changes. In 2008, Uruguay became the first Latin American country to legalize civil unions,155 and then promptly turned to discuss a same-sex adoption law.156 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.157 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,158 the field having been opened a few years earlier by the Colombian Constitutional Court’s recognition of rights of heterosexual and homosexual couples based on the principle of constitutional equality.159

The social landscape of conservative Latin America was changing—and the Commission could not ignore it.160 The many legal developments helped

152. 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, Feroe Opositores al “Intervencionismo” de la OEA componen Red de Parliamentarios de Fabricio Alvarado, Voz y Voto (Aug. 13, 2018), https://perma.cc/7VNX-Y7G5.


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


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.161

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 only when they are coerced, but also when they are “acculturated.”162 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.163 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, “[i]t 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.”164 Acculturation is thus a critical factor in persuading states to settle human rights petitions.


Similarly, in the friendly settlement procedure on same-sex marriage that I discuss below, see infra Part II.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)).


163. See supra Part II.C.3.iv.

164. Interview with Rolando Jiménez, President, Movilh (July 28, 2018).
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.165 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.166 In friendly settlements, the state contributes to the terms of the settlement and agrees to comply with said terms because it has been persuaded (or “acculturated”) that it is valuable to accept international responsibility and act accordingly—for example, through the adoption of measures of non-repetition.167 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.168 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% of all friendly settlements subject to public follow-up have been fully implemented,169 while 63% have been “partially implemented.”170 Commentators observe that, despite the not “particularly flattering” numbers of total compliance with friendly settle-

165. See Ziccardi, Martínz, Castelán & Valverde, supra note 18, at 75–77.


167. 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 95, ¶¶ 187–264.

168. 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 id.
ments,171 levels of compliance are still “impressive” when compared to the Commission’s merits reports that contain recommendations for states.172 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 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.173 Between 1985 and 1995, only three friendly settlements were signed: two cases on Argentina and one on Honduras.174 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”175 could the Commission withhold an amicable solution to a case, five reports were signed.176 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,177 along with a newly embedded culture of conciliation and negotiation within the Commission,178 the number of friendly settlements increased dramatically: the following year thirteen agreements were concluded179—in one year the

171. See Ziccardi, Martínez, Castelán & Valverde, supra note 18, at 73.
172. 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.”).
175. Caballero Delgado and Santana Case, Preliminary Objections, supra note 94.
177. See Gomez, supra note 100, at 115–16.
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.\(^{180}\) (Figure 1).

![Figure 1](image1.png)

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).

![Figure 2](image2.png)

\(^{180}\) See Inter-Am. Comm’n H.R., Impact of the Friendly Settlement Procedure, \textit{supra} note 95, ¶ 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 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.” \textit{id.} ¶¶ 56–60.

\(^{181}\) Data from all Figures obtained by the author via original research.
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 the right to life.191 Also, insofar as 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).

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 III.
188. See supra Part II.B.1.
189. American Convention on Human Rights, supra note 6, art. 5.
190. Id. art. 7.
191. Id. art. 4.
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

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,

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 95, ¶¶ 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).

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"—are “restoring a person’s liberty . . . [and] the return of land and reinstatement of one’s employment.” 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 Argentinian Supreme Court, the state pledged to repeal the implicated provisions of the country’s Penal Code. Once the law entered into force, the applicant benefited from it and his conviction was overturned and nullified. 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].” In many cases, family members and relatives of human rights victims receive “scholarships for study and technical training.” In other instances, states have pledged to provide funding for training and the provision of goods, or to provide a victim with “professional mentoring . . . in order to allow her to obtain a small business loan.” 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.

The Commission defines satisfaction measures as those that "make it possible to ascertain facts [and] restore the victims’ dignity and reputation."
The inter-American human rights system—in particular, the Inter-American Court—is known and praised for its creative remedies.\textsuperscript{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;\textsuperscript{206} the erection of monuments and memorials\textsuperscript{207} and, in general, the involvement of artists in the shaping of works to honor the memory of human rights violations.\textsuperscript{208}

Through compensatory measures, “victims of human rights violations and their heirs have received monetary payments as reparation for the harm caused by the violations.”\textsuperscript{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% of all agreements adopted.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{212} Also, non-repetition measures re-

\textsuperscript{205} See Antkowiak, supra note 193; see also Dinah Shelton, Remedies in International Human Rights Law 232–45 (2015).
\textsuperscript{207} See Inter-Am. Comm’n H.R., Impact of the Friendly Settlement Procedure, supra note 95, ¶ 166–73.
\textsuperscript{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 efficacy of symbolic reparations for victims of gross violations of human rights.” See About Us, SYMBOLIC REPARATIONS RESEARCH PROJECT, https://perma.cc/63PY-HDLY.
\textsuperscript{209} See Inter-Am. Comm’n H.R., Impact of the Friendly Settlement Procedure, supra note 95, ¶ 176.
\textsuperscript{210} See id. ¶ 177.
\textsuperscript{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).
\textsuperscript{212} See Inter-Am. Comm’n H.R., Impact of the Friendly Settlement Procedure, supra note 95, ¶ 189.
fer 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 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 toward friendly settlements was changing from discretion to obligation.219 The principal remedy of the Verbitsky settlement agreement was the repeal of a provision of the Argentine Penal Code that criminalized defamatory expressions against public officials.220 This settlement prompted the Commission to articulate regional

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213. See supra Part I.B.
214. See supra Part I.A.1.
215. As Keller, Forowicz, and Engi demonstrate, even in cases concerning Articles 2 and 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 14, at 117.
216. According to official data, 32.8% 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 95, ¶ 190.
217. I use "structural" and "social" remedies interchangeably.
219. See supra Part II.B.1.
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 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

221. See id. ¶ 17.
222. As the Special Rapporteur’s website notes: “Through the Office of the Special Rapporteur, the Commission sought to encourage the defense of the right to freedom of 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).
227. Id. ¶ 12.
228. Id. ¶¶ 12–13. Mr. Pereira and another man, named “Paraná,” tried to escape from the Espirito Santo estate. Guarch 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," 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." Secondly, 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." 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" 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. 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. 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. 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 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 ser-
vice.236 Before he made his petition to the Commission, Mr. D´ıaz 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. D´ıaz’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. D´ıaz the status of conscientious objector.238 Mr. D´ıaz 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. D´ıaz 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. D´ıaz with documents certifying Mr. D´ıaz’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 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

236. [Citation]
237. [Citation]
238. [Citation]
239. [Citation]
240. [Citation]
241. [Citation]
242. [Citation]
243. [Citation]
244. [Citation]
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 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 agree-

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. 6778-2010, 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).
248. César Antonio, Peralta Wetzel 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.” 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 18, at 77.
ment include the government’s commitment “to initiate a public debate” on same-sex marriage, in which all segments of society shall take part, and to introduce legislation seeking to legalize same-sex marriage. The agreement also includes a number of comprehensive measures, such as the promotion of policies on sexual and reproductive health; the revision of the curriculum on religion in public schools “to ensure that both teachers and students are not subject to discrimination”; the amendment of the Adoption Act, in order to allow same-sex couples to exercise adoption rights; the use of statistics on the LGBTI population in all official surveys; 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.” 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.

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.

In a settlement signed by Venezuela in 1999, concerning the massacre of Yanomami indigenous individuals in the Amazonian Venezuelan/Brazilian border, the state agreed to both individual measures as well as structural remedies. 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. The measure, insofar as it involves criminal punishment, has of course a social element. 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. But the state also agreed to important structural remedies, such as the creation and funding of a health program targeted to the Yanomami people, 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,” and the ratification of the International Labor Organization Convention 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. Venezuela signed ILO 169 in 2002, becoming the eleventh Latin American country to ratify the treaty.

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. 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. 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). Less
than a year later, the petitioners reached a comprehensive agreement with
the state, in which the state recognized the importance of indigenous af-
fairs,271 and undertook “to insist on a constitutional reform before the Na-
tional 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 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 oppo-
sition 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 fea-
ture, especially when compared to other prominent regional human rights
systems, such as the European system, is the scope of the remedies the par-
ties 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

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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 mecha-
nisms provided under the country’s laws, full recognition and protection for said rights . . . the indige-
nous question is an affair of State . . . its adequate solution is essential to ensure social unity and peace
. . . .” Id. ¶ 33.
272. See id. On the issue of constitutional recognition of indigenous peoples in Chile, see Jorge Con-
tesse, Indigenous Peoples in Chile: The Quest to Become a Constitutional Entity, 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.
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

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.” 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.” 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. As a consequence, settle-

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
ment 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 dispute 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, as 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.

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

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 Anamí Nasco requested the Commission to do it 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 II.B.4.


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. 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 regime and that judicial decisions are normatively superior to settlements. 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. 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 as they control the outcome of the process in ways they cannot when they litigate before the Inter-American Court. Settlements allow victims and petitioners to sit with the state, in a series of meetings, to listen and be listened to, as the arguments from both sides, as well as the Commission’s guidance, shape the contours of what 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

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282. See supra Part II.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 values in the same way as courts.” See McGregor, supra note 52, at 611.
284. See, e.g., Ziccardi, Martínez, Castelán & Valverde, supra note 18, 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 63.
286. See generally supra Part II.C.1.b.
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. 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 Negotiations

Parties to settlement 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 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

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.
more generally, the human rights system, for its secrecy in dealing with matters contested at the domestic level. In a context of increasing resistance against the inter-American human rights system, such criticism may have damaging impact to the system’s legitimacy, insofar as 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.

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. There are several possible avenues for third-party 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 settling 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). 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

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 111.
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. H.R. (ser. A) No. 24, ¶ 6 (Nov. 24, 2017).
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. During the rest of the year, commissioners must work remotely sometimes to address requests for urgent precautionary measures by e-mail. It is the Commission’s staff, particularly the Friendly Settlement Section, which processes and monitors the more than 100 negotiations ongoing at any given time.

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. 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. 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. 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

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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).


297. In 2016, the Commission was close to losing 40% 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 former 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://perma.cc/8EVJ-HNNP.

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 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](image-url)

However, friendly settlements still face important compliance problems. First, settlement agreements—just like remedies stipulated by a final Court


300. Ziccardi, Martínez, Castelán & Valverde, supra note 18, at 80.
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 securing 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 settlement 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 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 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,

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303. Interview with Rolando Jiménez, President, Movilh, leading petitioner (July 28, 2018). A staff attorney at the Inter-American Commission noted 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 III.B, or the recent passage in Bolivia of a Law on Friendly Settlements, *Personal communication with L5, staff attorney, Inter-Am. Comm’n H.R.* (Dec. 12, 2018).

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 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). To begin, we note that twelve years after a settlement was signed, the Commission sent a similar dispute to the Court for judicial resolution. 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 on Human Rights 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. 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, impacts 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.

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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.
III. 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 settlement 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 toward 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 of what the Court does when it considers advisory jurisdiction questions.310 In these cases, there will also be strong reasons to publicize settlements re-

308. See, e.g., Rep. of the Special Working Group, supra note 112.
309. See supra Part II.C.3.b.
310. See supra note 13.
ports 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.\footnote{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).} 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 Laparra\footnote{See Ananías Laparra Martínez and Family v. Mexico, Friendly Settlement, supra note 277.} and the Bolivian case on conscientious objection are good examples.\footnote{See supra Part II.C.3.b.iii.} In both cases, the settlements reports elaborated on international law far beyond a mere statement of the facts. This is not only important with regards to 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.\footnote{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 Con-tesse, The Final Word?, supra note 48.}

Structural remedies could also require the commitment of branches of government other than the executive—for example, Congress. The Commission should address \textit{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.\footnote{Interview with Rolando Jiménez, President, Movilh, leading petitioner (July 28, 2018).} 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, as shown historically.\footnote{See supra Figure 4.} By articulating this differentiated treatment for different types of negotiated settlements, 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. If a commissioner is not personally involved, petitioners will try to have at least a Commission staff member involved in the negotiations.

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. One way the Commission has addressed the matter is by holding sessions in different countries and cities. 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, 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 time constraints and strict 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.”

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).


320. Since 2014, the Commission has held public hearings in Kingston (May 2019); 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.

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 is “sometimes extremely passive: supposedly its role is to medi-
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.\footnote{322}{Interview with L5, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018).} Such delegates would be based in the country where the negotiations and the compliance monitoring are taking place (\textit{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.\footnote{323}{Interview with L3, staff attorney, Inter-Am. Comm’n H.R. (Apr. 5, 2018).} The reaction was wholly negative.\footnote{324}{Interview with C1, petitioner, int’l human rights org. (Apr. 6, 2018).} As a senior petitioner noted: “Would they want to outsource their work? That is unacceptable.”\footnote{325}{Interview with C1, petitioner, int’l human rights org. (Apr. 6, 2018).} 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 \textit{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 the 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 improving their chances for enforcement.327 For these mechanisms to 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—thus contributing 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 offer critical normative benefits.

**CONCLUSION**

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 human rights law elaboration. 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.