THE ADVISORY PRACTICE OF THE INTER-AMERICAN HUMAN RIGHTS COURT

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I. INTRODUCTION

The American Convention on Human Rights entered into force in 1978[1]. To date, 18 OAS member states, out of 31, have ratified it. Included among the states parties to the Convention are all the Central American Republics[2] as well as Panama, Mexico, the Dominican Republic and Haiti. The five Andean Pact nations[3] have ratified, as have Jamaica, Barbados and Grenada. Argentina is the latest state to become a party; it did so on September 5, 1984, and thus became the first and, to date, only Southern Cone country to do so. The others –Chile, Paraguay and Uruguay– have not ratified; nor have Brazil, the United States, Suriname and a number of English-speaking Caribbean states.

The Convention establishes two supervisory organs, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.[4] The Commission provided for by the Convention is a successor to the Inter-American Commission on Human Rights that came into being in 1959 as an "autonomous entity" of the Organization of American States and subsequently was transformed into an organ of the Organization.[5] The new Commission retains the functions of its predecessor in addition to those conferred on it by the Convention. It is thus both an OAS Charter organ

and a Convention institution.[6] The Court, on the other hand, is not an OAS Charter organ as such. The Convention does, however, confer judicial powers on it in relation to both the OAS and those of its member states that are not parties to the treaty.[7] Without expressly mentioning the Court, the OAS Charter in turn anticipates its establishment and recognizes that its powers will be determined by the Convention.[8] The Court's authority to exercise them not only with regard to the states parties to the Convention, but also with regard to the OAS and all of its member states, was confirmed by the OAS General Assembly when it adopted the Statute of the Court.[9]

Hence, besides being a Convention organ, the Court is a judicial institution of the OAS in matters relating to human rights. As a Convention organ, it has the power to decide disputes relating to the interpretation and application of the Convention involving any states parties to it that have accepted the Court's contentious jurisdiction.[10] Only these states and the Commission may refer such cases to the Court or be required to appear before it.[11] The decisions of the Court in these cases are final and binding for the parties to the disputes.[12]

The role of the Court as a judicial institution of the OAS is grounded in its advisory jurisdiction. It may be invoked by all OAS organs and all OAS member states, whether or not they have ratified the Convention. In the exercise of this jurisdiction, the Court has the power to interpret the Convention and any other human rights treaty applicable in the Americas.[13] Although the Court's contentious jurisdiction has been resorted to in only one case in the first 5 years of its existence, it has in that same period rendered four advisory opinions. They have enabled the Court to clarify the scope of its advisory jurisdiction and the role it performs in human rights matters within the inter-American system. These opinions are important also for the contributions they make to the development of international human rights law. The purpose of this article is to analyze the Court's advisory jurisdiction practice.

II. ADVISORY JURISDICTION: ITS ROLE AND SCOPE

The advisory power of the Court is spelled out in Article 64 of the Convention, which reads as follows:

> 1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos

Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

Since the Court performs a different role depending upon whether it acts under Article 64(1) or 64(2), it is useful to analyze these provisions separately.

Jurisdiction under article 64(1)

Standing. The right to request advisory opinions from the Court under Article 64(1) is conferred on "member states of the Organization of American States" as well as, "within their spheres of competence," on "the organs listed in Chapter X" of the OAS Charter. The Convention, in its various provisions, distinguishes between "member states" of the Organization and "States Parties" to the Convention.[14] It is clear, therefore, that the right of states to seek advisory opinions under Article 64(1) extends to all OAS member states, whether or not they have ratified the Convention,[15] and that it is not restricted by the jurisdictional requirement applicable to OAS organs, which limits the latter to matters falling "within their spheres of competence."

In identifying the organs that have standing to request advisory opinions, the Convention refers to chapter X of the OAS Charter. Chapter X consists of one provision, Article 51. It lists the following organs: the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils (the Permanent Council of the OAS, the Inter-American Economic and Social Council, and the Inter-American Council for Education, Science and Culture), the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences and the Specialized Organizations. The Specialized Conferences are intergovernmental meetings convened by the OAS "to deal with special technical matters or to develop specific aspects of inter-American cooperation."[16] These conferences are not permanent entities, but rather meetings that are convened from time to time. The Specialized Organizations, by contrast, are permanent institutions. They are defined in Article 130 of the OAS Charter as "inter-governmental organizations established by multilateral agreements and having specific functions with respect to technical matters of common interest to the American States." Six organizations have this status at this time: the Inter-American Commission of Women, the Pan American Health Organization, the Inter-

American Children's Institute, the Pan American Institute of Geography and History, the Inter-American Indian Institute and the Inter-American Institute for Cooperation on Agriculture.[17]

Organs may only seek advisory opinions "within their spheres of competence." In its opinion on *The Effect of Reservations,* the Court interpreted this phrase to require a showing by the petitioning organ of a "legitimate institutional interest" in the questions posed in the request.[18] The existence of this interest is to be deduced from the legal instruments and other legal norms applicable to the particular organ. "While it is initially for each organ to decide whether the request falls within its sphere of competence, the question is, ultimately, one for this Court to determine by reference to the OAS Charter and the constitutive instrument and legal practice of the particular organ."[19] The requirement will not present significant problems for organs such as the OAS General Assembly and the Human Rights Commission, which have broad powers relating to the promotion and enforcement of human rights. Thus, the Court has already emphasized that because of the extensive powers that the OAS Charter, the American Convention and the Commission's Statute confer on it, the Commission, "unlike some other OAS organs,... enjoys, as a practical matter, an absolute right to request advisory opinions within the framework of Article 64(1) of the Convention."[20] The same reasoning no doubt applies to the General Assembly, the "supreme organ" of the OAS, which has plenary powers to determine the Organization's actions and policies.[21]

Here it should be noted that the Court's advisory power applies not only to the American Convention but also to the interpretation of "other treaties concerning the protection of human rights in the American states."[22] Given the large number of treaties that have an impact on the work of various OAS organs, it should not prove difficult for most of them, including some of the specialized organizations, to demonstrate a "legitimate institutional interest" in an advisory opinion request that relates to their activities and involves the interpretation of one of these treaties. To date, such requests have come only from the Inter-American Human Rights Commission. But since other organs also deal with human rights matters on a more or less regular basis, in due course they, too, will no doubt begin to file requests for advisory opinions. A prime candidate might be the Inter-American Commission of Women whose activities include efforts to promote the human rights guaranteed by UN, ILO and OAS treaties of special concern to women.

Treaties Subject to Interpretation. Article 64(1) extends the Court's advisory jurisdiction to the interpretation of the "Convention or... other treaties concerning the protection of human rights in the American states." While the reference to the "Convention" needs no explanation, the same is not true of the meaning of "other

treaties." Some of the issues it raises were dealt with by the Court in its first advisory opinion.[23] In that case, the Government of Peru asked the Court to decide "how... the phrase 'or of other treaties concerning the protection of human rights in the American states' [should] be interpreted."[24] Without taking a position on the meaning of the phrase, Peru suggested that it might be interpreted to refer either to treaties adopted within the framework of the inter-American system, to treaties concluded solely among American states, or to treaties that included one or more American states as parties. The Court ruled that, in principle, the provision conferred on it "the power to interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the inter-American system."[25] In short, the treaty need not be one that was adopted within the inter-American system or a treaty to which only American states may be parties. It may be bilateral or multilateral, and it need not be a human rights treaty as such, provided the provisions to be interpreted relate to the protection of human rights.[26]

This holding is probably narrower than it appears at first glance. After concluding that there was no valid reason, in principle, to distinguish between regional and international human rights treaties, the Court emphasized that its power to comply with a request to interpret these instruments was discretionary. Whether it would exercise the power depended upon various factors related to the purposes of its advisory jurisdiction. "This jurisdiction," the Court declared, "is intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field." Consequently, "any request for an advisory opinion which has another purpose would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court."[27] After reviewing the considerations that had to be taken into account in making this assessment, the Court declared:

> [T]he Court may decline to comply with a request for an advisory opinion if it concludes that, due to the special circumstances of a particular case, to grant the request would exceed the limits of the Court's advisory jurisdiction for the following reasons, *inter alia:* because the issues raised deal mainly with international obligations assumed by a non-American State or with the structure or operation of international organs or bodies outside the inter-American system; or because granting the request might have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being.[28]

In its view, Article 64(1) of the Convention permits the Court to interpret any international treaties affecting the protection of human rights in an American state. This might include, for example, the human rights provisions of the United Nations Charter or of the Geneva Conventions.[29] But the answer to the question whether the Court will exercise its power in a specific case will depend upon the purposes for which the interpretation is sought and the consequences it might have on states or organs outside the inter-American system. If this analysis is sound, the Court can be expected to be more reluctant, for example, to comply with requests for advisory opinions seeking the interpretation of UN treaties, particularly if they have their own enforcement machinery, than it would be to interpret an OAS human rights treaty. It is equally clear, however, that in a proper case, the Court has the power and would not refuse to interpret a UN or other universal treaty –especially if it was thought that the opinion might help an American state to comply with its human rights obligations or an OAS organ to discharge its functions.

Two other questions bearing on the meaning of the phrase "other treaties concerning the protection of human rights in the American states" suggest themselves. They have not as yet been dealt with by the Court. One has to do with the definition of "human rights". It has already been noted that the reference is not only to human rights treaties as such, and that it permits the Court to interpret the human rights provisions of bilateral or multilateral treaties, whether or not such treaties deal exclusively with human rights. Examples here might be the human rights provisions of an extradition treaty or of a bilateral commercial agreement. But, and this is a question that remains to be answered, what is a "human rights" provision? In dealing with this problem, the Court might look to the catalog of rights found in the principal international and regional human rights instruments and in the constitutions of the states constituting the inter-American system. The OAS Charter and the American Convention, it should be noted, refer expressly not only to civil and political rights, but also to economic, social and cultural ones.[30] The same is true of many international human rights instruments, which suggests the pervasive scope of the Court's advisory jurisdiction.

The second question is more difficult. It concerns the Court's jurisdiction to interpret the American Declaration of the Rights and Duties of Man. The Declaration was adopted in 1948 in the form of an inter-American conference resolution.[31] As such, it is clearly not a "treaty" within the meaning of Article 64(1) of the American Convention. It is generally recognized, however, that the Protocol of Buenos Aires, which amended the OAS Charter, changed the legal status of the Declaration to an instrument that, at the very least,

constitutes an authoritative interpretation and definition of the human rights obligations binding on OAS member states under the Charter of the Organization.[32] This view is reflected in the Statute of the Inter-American Commission on Human Rights, which was adopted by the OAS General Assembly in 1979 pursuant to Article 112 of the OAS Charter and Article 39 of the American Convention.[33] Article 1 of the Statute, after declaring in paragraph 1 that the Commission is an OAS organ "created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter," reads as follows:

> 2. For the purposes of the present Statute, human rights are understood to be:
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> a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;
>
> b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

The Statute also relies on the Declaration in defining the powers of the Commission in relation to all OAS member states as well as with respect to states that have not ratified the Convention.[34] Since the Commission's powers with regard to the latter states are derived from the OAS Charter it can be argued that the General Assembly, in approving the Commission's Statute and the references to the Declaration, confirmed the normative status of the Declaration as an instrument giving specific meaning to the vague human rights provisions of the Charter. If these considerations justify the conclusion that the Charter incorporates the Declaration by reference or that the Declaration constitutes an authoritative interpretation of the human rights provisions of the Charter, the Court's power under Article 64(1) to interpret the Charter would embrace the power to interpret the Declaration as well. It remains to be seen whether the Court will adopt the approach just indicated or opt for a strict textual construction, concluding that since the Declaration is not a "treaty," it does not fall within the Court's jurisdiction under Article 64(1).

A related question concerning the status of the Universal Declaration of Human Rights, which raises similar issues, might be presented to the Court in the context of a request for an advisory opinion seeking an interpretation of the human rights provisions of the UN Charter. Here it is relevant to note that the Convention makes specific reference to the American Declaration[35] and to the Universal Declaration of Human Rights.[36] The reference to the American Declaration in Article 29(d) of the Convention is particularly signifi-

cant, for it declares that no provision of the Convention shall be interpreted as "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." To the extent that the Court, in applying Article 29, may be called upon to interpret the American Declaration, it has the power to do so under Article 64(1); it would merely be interpreting the Convention.

Disguised Contentious Cases. International tribunals exercising advisory and contentious jurisdiction have at times had to confront a problem that arises when they are asked to render an advisory opinion on an issue that is, at one and the same time, the subject of a dispute between two or more states or between a state and an international organization. Here the argument frequently made is that the request for an advisory opinion is a disguised contentious case and that it should be heard only if all the parties have accepted the tribunal's contentious jurisdiction. The International Court of Justice, for example, has consistently rejected such arguments and complied with the requests.[37] The inter-American human rights system adds a new dimension to this problem that is unique to the advisory functions of the Court. Under Article 64(1) of the Convention, the Court's advisory jurisdiction may be invoked not only by organs or organizations, as is the case in the UN system, for example, but also by states. The Court might therefore confront a petition by a state asking it to render an advisory opinion relating to a dispute between the petitioner and another state, which dispute could not be referred to the Court as a case because one of the states had not accepted its contentious jurisdiction. Moreover, the Inter-American Commission on Human Rights, which has the right to request advisory opinions, exercises powers under the Convention comparable to that of a tribunal of first instance in dealing with charges alleging violations of human rights by a state party and may also refer contentious cases to the Court.[38] Since the Commission may only bring such cases to the Court if the states concerned have accepted the Court's jurisdiction, the question arises whether the Commission has the power, in the absence of a state's consent, to seek an advisory opinion under Article 64(1) regarding a legal issue in dispute in a case being considered by the Commission.

To date, the Court has dealt with only one case bearing on these issues. Here the Inter-American Commission had embarked on a country study of the human rights situation in Guatemala, which was charged with numerous human rights violations.[39] The authority of the Commission to prepare country reports derives from its status as an OAS Charter organ and is governed by different provisions of the Convention and its Statute from those which deal with the disposition of petitions filed by individuals and communications presented by states parties charging another state party with

violations of the human rights guaranteed in the Convention.[40] When the Commission prepares country studies and reports, it acts first and foremost as an OAS Charter organ; whereas, when it deals with petitions and communications filed under the Convention, it discharges the functions of a tribunal of first instance or Convention institution which, together with the Court, comprises the judicial and enforcement machinery provided for by the Convention.

These different functions need to be kept in mind when analyzing the Court's advisory opinion involving Guatemala.[41] Here the Court was asked by the Commission to render an advisory opinion on a legal issue only. The issue was one of a number of disputed matters, both legal and factual, to arise between the Commission and the Government of Guatemala while the former was examining the human rights situation in that country. In rejecting Guatemala's claim that there was a dispute between it and the Commission and that, as a result, the Court lacked the power to hear the dispute because Guatemala had not accepted its jurisdiction, the Court emphasized that the Commission's request was designed to assist it in performing its functions under Article 112 of the OAS Charter:[42]

> The powers conferred on the Commission require it to apply the Convention or other human rights treaties. In order to discharge fully its obligations, the Commission may find it necessary or appropriate to consult the Court regarding the meaning of certain provisions whether or not at the given moment in time there exists a difference between a government and the Commission concerning an interpretation, which might justify the request for an advisory opinion. If the Commission were to be barred from seeking an advisory opinion merely because one or more governments are involved in a controversy with the Commission over the interpretation of a disputed provision, the Commission would seldom, if ever, be able to avail itself of the Court's advisory jurisdiction. Not only would this be true of the Commission, but the OAS General Assembly, for example, would be in a similar position were it to seek an advisory opinion from the Court in the course of the Assembly's consideration of a draft resolution calling on a Member State to comply with its international human rights obligations.[43]

This language suggests that the Court treated the request for an advisory opinion in this case as it would have treated a similar request from any other OAS organ acting in the discharge of its OAS Charter functions. If the holding is limited to matters under consideration by the Commission in its role as OAS Charter organ, it permits the argument that the advisory route may not be used to circumvent

the restrictions applicable to the contentious process, which is initiated by individual petition or interstate communication. There is a great deal of language in the Court's opinion, however, that suggests that the holding is much broader. Thus, for example, the Court noted that "[t]he mere fact that this provision [Article 4] may also have been invoked before the Commission in petitions and communications filed under Articles 44 and 45 of the Convention" did not affect the Court's conclusion about the legitimacy of the Commission's request.[44] The Court indicated, moreover, that

> the Convention, by permitting Member States and OAS organs to seek advisory opinions, creates a parallel system to that provided for under Article 62 [on the Court's contentious jurisdiction] and offers an alternate judicial method of a consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process.[45]

If the advisory route is in fact seen as in all respects a "parallel system" and "alternate judicial method" to the Court's contentious jurisdiction, the Commission or any interested state would be able to resort to it in the midst of a pending contentious proceeding. Here one might hypothesize a situation in which an individual has lodged a petition with the Commission against state *X*, a party to the Convention, alleging that *X* has violated various rights guaranteed in the Convention. Let us assume further that in the course of the proceedings state *X* and the individual litigant disagree as to the meaning of one of the disputed provisions of the Convention. May the Commission at that stage request an advisory opinion from the Court on the meaning of the disputed provision? May state *X* do so? Does it matter at all whether state *X* has accepted the jurisdiction of the Court? Is the consent of state *X* necessary before the Commission may request the advisory opinion?

The Court's advisory opinion relating to Guatemala does not provide any ready answers to these questions. However, one consideration mentioned in the opinion deserves to be noted. In dealing with the question whether to comply with the Commission's request, the Court made the following observation:

> The Court has already indicated that situations might arise when it would deem itself compelled to decline to comply with a request for an advisory opinion. In *Other Treaties*... the Court acknowledged that resort to the advisory opinion route might in certain situations interfere with the proper functioning of the system of protection spelled out in the Convention

> or that it might adversely affect the interests of the victim of human rights violations... .
>
> ...The instant request of the Commission does not fall within the category of advisory opinion requests that need to rejected on those grounds because nothing in it can be deemed to interfere with the proper functioning of the system or might be deemed to have an adverse effect on the interests of a victim.[46]

It may well be, therefore, that the crucial question for the Court will not be whether the advisory opinion is or is not tied to proceedings pending in the Commission. Instead, the Court might seek to ascertain what impact in a particular case its decision to grant the request for an advisory opinion would have on the victim or on the Convention system.

Jurisdiction under Article 64(2)

Article 64(2) of the Convention provides that "[t]he Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments." This provision enables all OAS member states, and not only the states parties to the Convention, to ask the Court to determine whether provisions of their domestic laws conform to the obligations they assumed in the Convention or in the other human rights treaties to which Article 64(1) refers.[47] The wording of Article 64(2) suggests that the applicant state may only request an interpretation of its own laws rather than the laws of another state. But to the extent that treaties ratified by a state can also be considered to be its domestic law, the state should be able to request an advisory opinion concerning their compatibility with the Convention or other human rights treaties. One might imagine a situation, for example, in which a state is served with an extradition demand pursuant to a treaty that is alleged to be in conflict with the provisions of a human rights treaty. A request for an advisory opinion under Article 64(2) concerning that treaty would in one sense seek an opinion regarding the state's domestic law even though the extradition treaty is at one and the same time an international agreement binding on other states, where it may also have the status of domestic law.

The reference in Article 64(2) to "domestic laws" leaves open the question whether the phrase refers to laws actually in force at the time the advisory opinion is requested or whether it permits the Court also to deal with proposed or draft legislation. The Court had to consider this problem in the Advisory Opinion on *Proposed Amendments.*[48] *desde* Here the Government of Costa Rica filed a

request for an advisory opinion under Article 64(2), asking the Court to determine whether certain proposals to amend the Costa Rican Constitution then under consideration by the National Assembly were compatible with the Convention.[49] Since the proposed amendments remained to be adopted, the Court had to decide whether draft legislation qualified as "domestic laws" under Article 64(2). The Court answered the question in the affirmative and ruled the request admissible.[50]

In reaching this decision, the Court noted that the purpose of its advisory function was to assist OAS member states and organs in complying with their international human rights obligations; it also enabled them to avoid the contentious legal process and the sanctions associated with it.[51] This purpose would be frustrated, the Court asserted, if a state could obtain a ruling on its legislation only after the law entered into force.

> [I]f the Court were to decline to hear a government's request for an advisory opinion because it concerned "proposed laws" and not laws duly promulgated and in force, this might in some cases have the consequence of forcing a government desiring the Court's opinion to violate the Convention by the formal adoption and possibly even application of the legislative measure, which steps would then be deemed to permit the appeal to the Court. Such a requirement would not "give effect" to the objectives of the Convention, for it does not advance the protection of the individual's basic human rights and freedoms.
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> ...Experience indicates, moreover, that once a law has been promulgated, a very substantial amount of time is likely to elapse before it can be repealed or annulled, even when it has been determined to violate the state's international obligations.[52]

The Government of Costa Rica, the Court emphasized, could have raised the same issues in an Article 64(1) proceeding by merely rephrasing the questions. It made little sense, therefore, to adopt a strict construction of the term "domestic laws" when the only difference between an Article 64(1) and an Article 64(2) proceeding was one of procedure.[53] In an Article 64(1) proceeding, notice must be given to all OAS member states and organs that the proceedings have been instituted, and they must be accorded the right to present their views.[54] No such notice need be given in the case of Article 64(2) proceedings; here "the Court enjoys broad discretion to fix, on a case by case basis, the procedures to be followed".[55]

The Court's holding in this case appears to have a consequence that the opinion does not address, but which is implicit in its reason-

ing. It seems to permit states to seek advisory opinions on the legitimacy of reservations they would like to attach to human rights treaties whose ratification they are contemplating. This conclusion follows because a reservation that has not as yet been adopted and attached to an instrument of ratification is the conceptual analogue of draft legislation. The Court has already had occasion, moreover, to interpret Article 75 of the Convention, which deals with reservations;[56] it declared that "Article 75 must be deemed to permit States to ratify or adhere to the Convention with whatever reservations they wish to make, provided only that such reservations are not 'incompatible with the object and purpose' of the Convention."[57] The Court also emphasized that "[t]he States Parties have a legitimate interest... in barring reservations incompatible with the object and purpose of the Convention" and that this interest may be asserted "through the adjudicatory and advisory machinery established by the Convention."[58] States contemplating reservations that might be incompatible with the object and purpose of the Convention should therefore be able to obtain a clarifying ruling on the subject by requesting an opinion from the Court.

Whether or not one agrees with the Court's conclusion that it has jurisdiction under Article 64(2) to review draft legislation as well as national laws already in force, it must be recognized that the application of the advisory function to draft legislation harbors certain risks. It has the potential of embroiling the Court in internal partisan political controversies, particularly if the decision to resort to the tribunal's advisory power is motivated by a government's desire to use the opinion to defeat or to win the adoption of the legislation. The Court dealt with this problem as follows in its Advisory Opinion on *Proposed Amendments:*

> The foregoing conclusion [regarding draft legislation] is not to be understood to mean that the Court has to assume jurisdiction to deal with an and all draft laws or proposals for legislative action. It only means that the mere fact that a legislative proposal is not as yet in force does not *ipso facto* deprive the Court of jurisdiction to deal with a request for an advisory opinion relating to it... .
>
> ...In deciding whether to admit or reject advisory opinion requests relating to legislative proposals as distinguished from laws in force, the Court must carefully scrutinize the request to determine, *inter alia*, whether its purpose is to assist the requesting state to better comply with its international human rights obligations. To this end, the Court will have to exercise great care to ensure that its advisory jurisdiction in such instances is not resorted to in order to affect the outcome of the domestic legislative process for narrow partisan political ends.

> The Court, in other words, must avoid becoming embroiled in domestic political squabbles, which could affect the role which the Convention assigns to it.[59]

The Court's language suggests that it will scrutinize with particular care the reasons for and implications of a request under Article 64(2) that deals with draft legislation as distinguished from laws already in force. Here it is worth noting that in *Proposed Amendments,* the Costa Rican Government asked for the advisory opinion only after receiving a unanimous request from a multiparty committee of the Costa Rican legislature to which the draft legislation had been assigned. In other words, this was a case in which there was internal political consensus that an advisory opinion be sought. It remains to be seen how the Court will act in a case in which there is no such consensus.

Selected Procedural Issues

Amicus Briefs and Related Issues. Each of the requests for an advisory opinion filed to date under Article 64(1) has produced amicus curiae briefs from nongovernmental human rights organizations. The Convention, the Statute of the Court and its Rules of Procedure are silent on the issue of amicus briefs, mentioning them neither in connection with contentious cases nor in connection with advisory proceedings. Article 34(1) of the Rules of Procedure does contain some language, however, that has a bearing on the subject. It reads as follows: "The Court may, at the request of a party or the delegates of the Commission, or *proprio motu,* decide to hear as a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function." Although this provision applies to contentious proceedings, it can also be applied to advisory proceedings.[60] Since the provision authorizes the Court *motu proprio* to hear persons whose statements might assistit in carrying out its function. it can also be argued that it permits the receipt of amicus briefs. The Court has not expressly addressed this issue. But, without commenting on their admissibility, it has formally noted the receipt of these briefs in each of the opinions rendered under Article 64(1).[61] Implicit in this action is the holding that such briefs are admissible. It should be noted, however, that the admissibility of these briefs was not challenged in any of these proceedings. Such challenges are more likely to be made by the states parties to contentious cases, where private individuals and organizations may try to compensate for their lack of formal standing before the Court by filing amicus briefs. How the Court will deal with these briefs remains to be seen;[62] no amicus brief has thus far been submitted in a contentious case and none was filed in the one Article 64(2) proceeding decided by the Court.

Also, the Court has not as yet had to rule on a formal request by a nongovernmental organization or individual for permission to make an oral presentation in an Article 64(1) proceeding. It is not clear whether or under what circumstances the Court would grant such a request. Article 34(1) of its Rules of Procedure appears to empower the Court to do so in cases where this would assist the tribunal "in carrying out its functions." A related question arose in an Article 64(2) proceeding.[63] Here Costa Rica asked the Court to review the compatibility with the Convention of certain proposed amendments to its Constitution. The Government of Costa Rica opposed the amendments, but the draft legislation had the support of various Costa Rican legislators who convinced the Government to request the advisory opinion under Article 64(2). Had this been an Article 64(1) proceeding, the Court would have been required under its Rules of Procedure to transmit copies of the Costa Rican request to all OAS member states and organs, to invite them to present their written observations, and to fix the format of the oral proceedings.[64] No comparable requirements are included in the Rules of Procedure for Article 64(2) proceedings, presumably because it was assumed that other states and OAS organs would have little interest in the domestic law issues arising in such proceedings. Leaving aside questions about the soundness of this assumption[65] and recognizing that the Court has the authority to give the requisite notice to the OAS member states and organs whenever this appears appropriate,[66] no such notice was given in *Proposed Amendments* and none was requested. But because the legislative and executive branches of Costa Rica held different views on the issues raised in the proceedings, as did various other public and private entities in the country, the Court decided on its own motion to invite interested groups to submit their views and to be heard by the Court.

Five representatives, selected by the Court in consultation with the Government of Costa Rica, were subsequently heard in the only public session held in the case. These representatives, in addition to the Minister of Justice, who was the Costa Rican Agent, were the President of the Supreme Electoral Tribunal, a member of the Legislative Assembly, the Director of the Civil Registry Office and a member of the University of Costa Rica Law Faculty. The first two representatives opposed the constitutional amendment; the remaining three strongly supported it. Apparently, no other individuals asked to be heard and no one attempted to file additional papers.

The approach that was adopted in this case appeared to be well suited to Article 64(2) proceedings because it enabled the Court to hear divergent views about the legality of the proposed amendment and about its domestic legal impact. The procedure is likely to be followed in the future, although it remains to be seen how the Court will deal with a case in which a government opposes granting a

hearing to a private group or individual. In the Costa Rican case, the Government did not object to any of the representatives who wanted to be heard. This will not always be true. The Costa Rican case is not the strongest precedent, therefore, for according private groups or individuals an opportunity to be heard in advisory proceedings, particularly when their views differ from those of the government.

Jurisdictional Challenges. An interesting procedural issue was presented to the Court in the Advisory Opinion on *Restrictions to the Death Penalty.*[67] This request was filed by the Commission, which sought an interpretation of Article 4 of the Convention and a Guatemalan reservation to it. Guatemala challenged the Court's right to hear the matter, contending that the request was a disguised contentious case brought against Guatemala, which had not accepted the tribunal's contentious jurisdiction. Guatemala asked the Court to render a preliminary ruling on the jurisdictional issue before considering the merits. The Court rejected this motion and upheld the decision of its President to join the jurisdictional objections to the merits of the request.[68]

The holding draws a sharp distinction between contentious cases and advisory proceedings, and notes that in the former, "the Court's jurisdiction ordinarily depends upon a preliminary and basic question, involving the State's acceptance of or consent to such jurisdiction." In the Court's view, it made no sense in a contentious case "to examine the merits of the case without first establishing whether the parties involved have accepted the Court's jurisdiction."[69]The same was not true in advisory proceedings. Here the Court's jurisdiction depends on "the identity and legal capacity of the entities having standing to seek the opinion, that is, OAS Member States and OAS organs acting 'within their spheres of competence.'"[70] Where those prerequisites are present and readily apparent on the face of the pleadings, no good reason exists to separate the jurisdictional objections from the merits. "The delay that would result, moreover, from the preliminary examination of jurisdictional objections in advisory proceedings would seriously impair the purpose and utility of the advisory power that Article 64 confers on the Court."[71] Moreover, the Court emphasized, contentious cases and advisory opinions differed significantly in their effect on the rights and interests of states. In advisory proceedings, unlike in contentious cases,

> [t]here are no parties in the sense that there are no complainants and respondents; no State is required to defend itself against formal charges, for the proceeding does not contemplate formal charges; no judicial sanctions are envisaged and none can be decreed. All the proceeding is designed to do is to

enable OAS Member States and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American states.[72]

In contentious proceedings, by contrast, the consenting states become formal parties and are under a legal obligation to comply with the Court's judgments. That was not true of advisory proceedings, although it could not be denied that "a State's interest might be affected in one way or another by an interpretation rendered in an advisory opinion." It was clear, however, that "[t]he legitimate interests of a State in the outcome of an advisory opinion proceeding are adequately protected... by the opportunity accorded it under the Rules of Procedure of the Court to participate fully in those proceedings... ."[73]

The importance the Court attaches to an expeditious advisory process is prompted by the conviction that the states and organs must be enabled to obtain relatively speedy judicial interpretations without lengthy procedural wrangles. This approach is consistent with the broad advisory powers the Convention confers on the Court and has the potential of making the advisory process a useful tool for the implementation of the international human rights obligations applicable in the Americas.

III. SOME EMERGING CONCEPTS

Advisory opinions appear to lend themselves more readily than contentious cases to the articulation of general legal principles. The contentious process, being more fact specific, will usually require a greater accumulation of decisional law to clarify or establish basic doctrines. This may explain why, in a relatively short period of time and by means of a few advisory opinions, the Court has been able to make important contributions to the conceptual evolution of the international law of human rights.

Before analyzing some of these contributions, it may be useful to look at the Court's approach to interpretation in general. The Court's starting point in interpreting the Convention has been the Vienna Convention on the Law of Treaties. In its first advisory opinion, for example, the Court declared that "in interpreting Article 64, [it] will resort to traditional international law methods, relying both on general and supplementary rules of interpretation, which find expression in Articles 31 and 32 of the Vienna Convention on the Law of Treaties."[74] It reaffirmed this proposition in subsequent opinions, stating that it "will apply the rules of interpretation set out in the Vienna Convention, which may be deemed to state the relevant international law principles applicable to this subject."[75]

The methodology of the Court is reflected in a recent advisory opinion, where it had to determine whether the phrase "domestic laws" in Article 64(2) of the Convention applied only to laws in force or also included proposed legislation. Invoking Article 31(1) of the Vienna Convention, the Court noted that the provision required it to "interpret the Convention 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'" Although the reference to "domestic laws", standing alone, might be understood to mean laws in force, the Court emphasized that "the 'ordinary meaning' of terms cannot of itself become the sole rule, for it must always be considered within its context and in particular, in the light of the object and purpose of the treaty."[76] In weighing the factors bearing on the meaning of "domestic laws," the Court pointed out that it the phrase were interpreted to prevent states from obtaining advisory opinions on draft laws, some governments would be forced to promulgate laws that might violate the Convention before they could submit them to judicial review. "Such a requirement would not 'give effect' to the objectives of the Convention, for it does not advance the protection of the individual's basic human rights and freedoms."[77]

On the subject of the object and purpose of the Convention, the Court observed:

> The Convention has a purpose –the international protection of the basic rights of human beings– and to achieve this end it establishes a system that sets out the limits and conditions by which the States Parties have consented to respond on the international plane to charges of violations of human rights. This Court, consequently, has the responsibility to guarantee the international protection established by the Convention within the integrity of the system agreed upon by the States. This conclusion, in turn, requires *that the Convention be interpreted in favor of the individual,* who is the object of international protection, as long as such an interpretation does not result in a modification of the system [emphasis added].[78]

This "favorable to the individual" interpretation is consistent with the Court's analysis of the nature of the Convention as "a multilateral legal instrument or framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction."[79] It is also in line with Article 29 of the Convention, the provision that deals with "Restrictions Regarding Interpretation." It provides, inter alia, that "[n]o provision of this Convention shall be interpreted as: ...c. precluding other rights or guarantees that are inherent in the human personality..."

This approach to the interpretation of the Convention explains the Court's holding that Article 64(1), in conferring on it advisory jurisdiction to interpret "other treaties concerning the protection of human rights in the American states," cannot be deemed a priori to impose geographic or regional limits. The limits must be sought elsewhere in the "purposes of the Convention" and in the fact that the Court's advisory jurisdiction "is intended to assist the American States in fulfilling their international human rights obligations."[80] Viewed in this light, it is reasonable to interpret Article 64 as conferring on "the Court... the power to interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the inter-American system."[81] The protection of the individual thus becomes the critical or determinative element in fixing the Court's jurisdiction, provided always that the result does not distort or weaken the system established by the Convention.

The Special Character of Human Rights Treaties

The emergence of international human rights law as a branch of public international law and the acceptance of the notion that individuals have rights enforceable on the international plane without the intervention of their state of nationality have played havoc with certain basic international law principles and assumptions. A legal system developed over centuries to regulate relations between states must make considerable conceptual adjustments to accommodate the extension of its normative reach to individuals.

The Court encountered an interesting example of this problem in its Advisory Opinion on *The Effect of Reservations.*[82] Here the Inter-American Commission on Human Rights sought a ruling regarding the date on which the Convention entered into force for a state that ratified it with a reservation. Two provisions of the Convention have some bearing on this issue. Article 75 declares that "[t]his Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969." Article 74(2), which deals with ratification and adherence, provides that the Convention shall enter into force as soon as it has been ratified by eleven states and that "[w]ith respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence." If this latter provision is deemed to apply to ratifications whether or not they contain reservations, then the Convention would enter into force for the ratifying state on the date of the deposit of its instrument of ratification. But if ratifications containing reservations are not governed by Article 74(2), then the effect of a reservation will have to be determined by reference to Article 75, which in turn gives rise to some conceptual problems.

The Commission asked for the advisory opinion because the OAS Legal Counsel determined that two states, which had ratified the Convention with reservations,[83] could not be deemed to have become parties to it on the date of the deposit of their ratifications; for them the effective date of entry into force was governed by Article 75, viz., the Vienna Convention on the Law of Treaties. According to the Legal Counsel, the relevant provisions of the Vienna Convention were Article 20(4) and 20(5). Under these provisions, a ratification containing a reservation, to be effective, had to be accepted by at least one other contracting party.[84] Moreover, the "reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."[85] This interpretation, if valid, would postpone by at least 1 year the entry into force of the Convention for a state that ratifies it with a reservation, and thus would deny individuals the protection of the treaty as against a state that wished to be bound by it.[86]

The views of the Legal Counsel made very good sense when applied to a traditional international agreement in which the states parties granted each other rights and assumed state-to-state obligations of a reciprocal character. If a state attached a reservation to such a treaty, it was not unreasonable to give every other state party the option to accept or reject the reservation, to enter or not to enter into a treaty relationship with the reserving state, to agree or not to agree to a modification of a specific treaty obligation *pro tanto* the reservation that acceptance of the reservation implied.

Serious conceptual problems arise, however, when one attempts to apply these traditional rules to human rights treaties. What does reciprocity mean in this context? Does it mean, for example, that if state *X* makes a reservation to a due process provision of the treaty, a national of state *X*, who was denied due process by state *Y*, may not invoke that treaty clause against state *Y* because the latter's acceptance of state *X's* reservation has modified the treaty as between them, and consequently for their national, to the extent of the reservation? To ask the question is to recognize that it founded in a concept that is basic to traditional international law: that the rights of the individual under international law derive from and are dependent on the rights of the state of his nationality. It is equally obvious, of course, that this concept conflicts with international human rights law and modern human rights treaties whose principal objective is the protection of the individual against his own state. The Court articulated this conclusion as follows in its Advisory Opinion on *The Effect of Reservations:*

> [M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction... .
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> ... .
>
> ...Viewed in this light and considering that the Convention was designed to protect the basic rights of individual human beings irrespective of their nationality, against States of their own nationality or any other State Party, the Convention must be seen for what in reality it is: a multilateral legal instrument or framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.[87]

If a human rights treaty can in fact be characterized as being basically little more than an instrument that enables states "to make binding *unilateral* commitments not to violate the human rights of individuals within their jurisdiction," then the concept of reciprocity, a critical aspect of bilateral and multilateral government-to-government treaty making, loses much of its relevance for the application and interpretation of human rights instruments. This analysis led the Court to declare that "it would be manifestly unreasonable to conclude that the reference in Article 75 to the Vienna Convention compels the application of the legal regime established by Article 20(4), which makes the entry into force of a ratification with a reservation dependent upon its acceptance by another State."[88] Accordingly, the reference in Article 75 to the Vienna Convention had to be interpreted "as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty."[89] Under the Vienna Convention, a reservation made in accordance with a treaty expressly authorizing reservations does not have to be accepted.[90] The Court's interpretation permitted it to apply the provisions of Article 74 and to hold that the Convention must be deemed to enter into force for states ratifying or acceding to it, with or without a reservation, on the date they deposit their instruments of ratification or adherence. The protection of the Convention consequently extends to all individuals within the jurisdic-

tion of a state as soon as it has indicated its adherence.[91] This result is consistent with the character of modern human rights instruments.[92]

Nonderogability and Incompatibility

As we have seen, the Court has interpreted Article 75 to mean that all states eligible to ratify or adhere to the Convention, that is, all OAS member states,[93] may do so with reservations, provided these are not incompatible with the object and purpose of the treaty.[94] We also have some pronouncements by the Court to indicate which reservations might not pass the incompatibility test or, put another way, which reservations fall into a suspect category.

In the Advisory Opinion on *Restrictions to the Death Penalty,* the Court was asked to interpret Article 4 of the Convention, which deals with the right to life, and to pass on the scope of a reservation that Guatemala made to one clause of the provision. Before interpreting the reservation, the Court emphasized that it had to determine whether the reservation was permitted.[95] The Court raised this issue because Article 4 of the Convention is among the provisions specifically listed in Article 27. That article permits the states parties, "[i]n time of war, public danger, or other emergency that threatens [their] independence or security," to suspend the application of the rights guaranteed in the Convention.[96] Article 27 also provides, however, that certain rights, among them those proclaimed in Article 4, may not be suspended even in emergency situations. The principal international human rights treaties have similar nonderogation clauses.[97] The same catalog of rights from which no derogation is permitted also appears, with some exceptions and variations, in these treaties.[98] There seems to be an almost universal consensus about rights that are considered the most fundamental and these, in general, are the rigths from which no derogation is permitted. It is therefore extremely important to know whether states, by means of a reservation, may avoid assuming the obligation to guarantee the most basic rights. The Court dealt with this issue in the following manner:

> Article 27 of the Convention allows the States Parties to suspend, in time of war, public danger, or other emergency that threatens their independence or security, the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or derogate from certain basic or essential rights, among them the right to life guaranteed by Article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the nonderogable fundamental rights must be deemed to be incompat-

ible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention.[99]

This holding indicates that a reservation that sought to exclude totally the application of a right whose suspension is not permitted even in time of a serious national emergency would be incompatible with the object and purpose of the treaty. States would appear to be free, however, to make reservations to rights from which no derogation is permitted, provided the reservations do not weaken the right as a whole to a very substantial extent. The Guatemalan reservation found by the Court to be not incompatible with the object and purpose of the Convention dealt with Article 4(4), which provides that "in no case shall capital punishment be inflicted for political offenses or related common crimes." The reservation sought to preserve for Guatemala the right to apply the death penalty in cases involving "related common crimes" but left unaffected the remaining and much more basic provisions of Article 4.

The test devised by the Court was easy to apply in this case; this will not always be so. More important in the long run, however, is the fact that the opinion constitutes the first unambiguous international judicial articulation of a principle basic to the application of human rights treaties, that nonderogability and incompatibility are linked. The nexus between nonderogability and incompatibility derives from and adds force to the conceptual interrelationship which exists between certain fundamental human rights and emerging *jus cogens* norms.[100]

IV. CONCLUSION

This study of the Advisory jurisdiction of the Inter-American Court of Human Rights and of the manner in which the Court has exercised it cannot, of necessity, yield more than some tentative conclusions. The Court, after all, has been in existence only since 1979. In that time, it has had an opportunity to render no more than four advisory opinions and to decide one contentious case. The result can hardly be called a substantial body of law, although by international standards, sad to say, the number of opinions is quite respectable. More important, however, is the fact that the requests for ad-

visory opinions submitted to the Court have enabled it to define the scope of its advisory jurisdiction to a significant extent and to give judicial expression to certain principles that are basic to the development of the international law of human rights.

In delineating the scope of its advisory jurisdiction and specifying the rules applicable to it, the Court has sought to avoid burdening the advisory process with formalistic and time-consuming obstacles. Instead, its practice reflects the view that, to be useful and effective, the advisory process has to be expeditious and capable of providing OAS organs and member states with legally sound judicial rulings conceived in an atmosphere that inspires trust in the deliberative and interpretative processes. The Court has interpreted its advisory jurisdiction broadly, while reserving the right to restrict its scope to safeguard the rights of individuals and to maintain the integrity of the protective systems established by the Convention.

Whether the scope of the Court's advisory jurisdiction will expand further or begin to contract is closely related to the perceived needs of the inter-American system for the protection of human rights. To date, only 6[101] out of 18 states parties to the Convention have accepted the contentious jurisdiction of the Court.[102] If more states do and if the Commission and the states parties begin to submit contentious cases to the Court, resort to its advisory jurisdiction may decline and its importance diminish. For the time being, however, that is not likely to happen. It should be kept in mind, in this connection, that the effectiveness of an advisory process such as the one provided for by the Convention depends to some extent –whether to a greater or lesser extent is difficult to say– upon a working contentious judicial system that can be invoked to give teeth to the advisory process. On the other hand, the advisory process has the advantage, and this is particularly so in the human rights context, of making it politically easier for a government to comply with advisory opinions: by their very nature, they do not stigmatize the state as a lawbreaker and permit a delinquent government to make its compliance appear to be a voluntary act.

The advisory opinions that it has thus far rendered have given the Court, as we have seen, an opportunity to address some of the doctrinal problems that result from the emergence of international human rights law as a branch of public international law. The basic premise of the international law of human rights –the individual as the direct subject of rights– is not all that easily accommodated within a system of law geared to interstate relations and based on the concept of the state as exclusive subject of rights and obligations. Assumptions about treaty interpretation, about the prerogatives of states parties to international agreements, about the functions of international judicial institutions and many others require conceptual rethinking and doctrinal adjustments when the context is the

international protection of human rights rather than traditional international legal relations among states. We have touched on only some of these problems in this article, limiting our analysis to the practice of the Inter-American Court of Human Rights. As a result, we have merely scratched the surface of the conceptual difficulties that exist and that are likely to arise in the future in this field. The Court's opinions also indicate that, notwithstanding the historical baggage encumbering traditional international law, international tribunals can contribute to the restructuring and revitalization of a legal system whose relevance today depends in large measure on its ability to protect the individual from massive abuse by governmental authorities.

FOOTNOTES

1) The American Convention on Human Rights [hereinafter cited as Convention] was opened for signature in San José, Costa Rica, on Nov. 22, 1969, and entered into force on July 18, 1978. For the text, see ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM [hereinafter cited as HANDBOOK], OEA/Ser.L/V/II.60, Doc. 28, at 29 (1983), 9 ILM 673 (1970). The relevant *travaux préparatoires* are reproduced in 2 T. BUERGENTHAL & R. NORRIS, HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM (1982).
2) Costa Rica, El Salvador, Honduras, Guatemala and Nicaragua.
3) Bolivia, Colombia, Ecuador, Peru and Venezuela.
4) The functions of these organs are described in Buergenthal, *The Inter-American System for the Protection of Human Rights*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 439 (T. Meron ed. 1984), which also contains an extensive bibliography on the subject. *Id.* at 491.
5) The Protocol of Buenos Aires, 21 UST 607, TIAS No. 6847, which entered into force in 1970 and amended the 1948 OAS Charter, effected this change. *See* OAS CHARTER arts. 51(e), 112, and 150; Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AJIL 828 (1975).
6) *See* Statute of the Inter-American Commission on Human Rights [hereinafter cited as Commission Statute], Arts. 1, 18-20. For the text of the Commission Statute, see HANDBOOK, *supra* note 1, at 107, and 1 OAS GENERAL SECRETARIAT, THE INTER-AMERICAN SYSTEM: TREATIES, CONVENTIONS AND OTHER DOCUMENTS [hereinafter cited as THE INTERAMERICAN SYSTEM], pt. 2, at 98 (F. V. Garcia-Amador ed. 1983).
7) *See* Convention, Art. 64, which deals with advisory jurisdiction.
8) *See* OAS CHARTER art. 112, which, after providing for the establishment of the Inter-American Commission on Human Rights, declares in paragraph 2 that "[a]n inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, *as well as those of other organs responsible for these matters*" (emphasis added).
9) For the Statute of the Court, see HANDBOOK, *supra* note 1, at 147. Article 60 of the Convention provides that "[t]he Court shall draw up its Statute which it shall submit to the [OAS] General Assembly for approval." The OAS General Assembly gave that approval in October 1979 and the Statute entered into force on January 1, 1980.
10) To date, the following states have accepted the Court's jurisdiction: Argentina, Costa Rica, Ecuador, Honduras, Peru and Venezuela.
11) Convention, Art. 62. *See* Buergenthal, *The Inter-American Court of Human Rights*, 76 AJIL 231, 235-41 (1982).
12) Convention, Arts. 67-68.

13) *See id.*, Art. 64.
14) *See, e.g.*, Convention, Arts. 41(d), 43 and 62.
15) "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion No. OC-1/82 of Sept. 24, 1982 [hereinafter cited as "Other Treaties"], Inter-American Court of Human Rights, ser. A: Judgments and Opinions, No. 1, para. 14 (1982), *reprinted in* 3 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 25, at 21 (1983), and 22 ILM 51 (1983).
16) OAS CHARTER art. 128.
17) For a description of these entities, see 1 THE INTER-AMERICAN SYSTEM, *supra* note 6, pt. 1, at 198-200 (1983).
18) The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75), Advisory Opinion No. OC-2/82 of Sept. 24, 1982 [hereinafter cited as Effect of Reservations], Inter-American Court of Human Rights, ser. A: Judgments and Opinions, No. 2, para. 14 (1982), *reprinted in* 3 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 25, at 39 (1983), and 22 ILM 37 (1983).
19) *Id.*
20) *Id.*, para. 16. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of Sept. 8, 1983 [hereinafter cited as Restrictions to the Death Penalty], Inter-American Court of Human Rights, ser. A: Judgments and Opinions, No. 3, para. 42 (1983), *reprinted in* 23 ILM 320 (1984).
21) OAS CHARTER arts. 52-58.
22) The meaning of this phrase and the subject as a whole are discussed in the pages that follow.
23) "Other Treaties," *supra* note 15. For a valuable analysis of this case, see Parker, *"Other Treaties": The Inter-American Court of Human Rights Defines its Advisory Jurisdiction*, 33 AM. U.L. REV. 211 (1983).
24) "Other Treaties," *supra* note 15, para. 8.
25) *Id.*, para. 21.
26) *Id.*, para. 34.
27) *Id.*, para. 25.
28) *Id.*, para. 52.
29) The four Geneva Conventions, 75 UNTS 31, 85, 135 and 287, deal with the following subjects: the Amelioration of Conditions of the Wounded and Sick in Armed Forces in the Field; the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; the Treatment of Prisoners of War; and the Protection of Civilian Persons in Time of War. The four Conventions were opened for signature on Aug. 12, 1949, and entered into force on Oct. 21, 1950.
30) OAS CHARTER art. 3 and chs. VII, VIII, and IX; Convention, Art. 26.
31) Res. XXX, Final Act of the Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948, at 38 (Pan-American Union 1948), *reprinted in* 1 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 5, at 1 (1982), and 1 THE INTER-AMERICAN SYSTEM, *supra* note 6, pt. 2, at 5.
32) For an express holding to that effect, see Inter-American Commission on Human Rights, Res. No. 23/81, Case 2141 (U.S.) of Mar. 6, 1981, IACHR, ANNUAL REPORT, 1980-1981, OEA/Ser.L/V/II.54, doc. 9, rev. 1, at 25, paras. 16-17 (1981), *reprinted in* 2 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 21, at 6, paras. 16-17 (1983). *See generally* Shelton, *Abortion and Right to Life in the Inter-American System: The Case of "Baby Boy,"* 2 HUM. RTS. L.J. 309 (1981); Buergenthal, *supra* note 5, at 835.
33) Commission Statute, *supra* note 6. For the legislative history of the Statute, see Norris, *The New Statute of the Inter-American Commission on Human Rights*, 1 HUM. RTS. L.J. 379 (1980); 1 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 9 (1982).
34) Commission Statute, *supra* note 6, Arts. 18 and 20.
35) *See* Convention, Preamble, para. 3 and Art. 29(d).
36) Convention, Preamble, paras. 3 and 4.
37) *See e.g.*, Western Sahara, 1975 ICJ REP. 12 (Advisory Opinion of Oct. 16). The Permanent Court of International Justice reached a contrary decision in the Advisory Opinion on Eastern Carelia, 1923 PCIJ, ser. B, No. 5, but the case has been consistently distinguished by the ICJ. *See* Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure*, 24 BRIT. Y.B. INT'L L. 1, 140-42 (1958). *See also* M. POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N. ERAS 277 (1973).
38) *See* Convention, Arts. 46, 51 and 62.
39) *See* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF GUATEMALA, OEA/Ser.L/V/II.61, doc. 47, rev. 1 (Oct. 5, 1983).

40) Country studies and reports are authorized by Article 41(c) of the Convention and Article 18(c), (d) and (g) of the Commission's Statute; they may be carried out by the Commission in relation to all OAS member states. The power of the Commission vis-à-vis states not parties to the Convention flows from the general grant of authority contained in Article 112 of the OAS Charter, which refers specifically to the Convention. *See* Buergenthal, *supra* note 4, at 475-79. The power of the Commission to decide individual petitions is contained in Article 41(f) of the Convention and applies only to states parties. *See* Norris, *The Individual Petition Procedure of the Inter-American System for the Protection of Human Rights*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 108 (H. Hannum ed. 1984). The power of the Commission to receive communications by one state party against another is restricted to states that have made a special declaration under Article 45 of the Convention.

41) Restrictions to the Death Penalty, *supra* note 20.

42) *Id.*, para. 37.

43) *Id.*, para. 38.

44) *Id.*, para. 41.

45) *Id.*, paras. 36 and 37.

46) *Id.*, para. 43.

47) For and analysis of the meaning of the phrase "other treaties concerning the protection of human rights in the American states," found in Article 64(1), see pp. 5-8 *supra*.

48) Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion No. OC-4/84 of Jan. 19, 1984 [hereinafter cited as Proposed Amendments], Inter-American Court of Human Rights, ser. A: Judgments and Opinions, No. 4 (1984).

49) The proposed amendments related to Articles 14 and 15 of the Costa Rican Constitution, which govern the acquisition of Costa Rica nationality. The amendments sought to make it more difficult to acquire that country's nationality by imposing longer residency requirements and prescribing additional qualifying standards and examinations. *Id.*, para 7.

50) *Id.*, para. 28.

51) *Id.*, para. 19.

52) *Id.*, paras. 26 and 27.

53) *Id.*, paras. 16 and 17.

54) Rules of Procedure of the Inter-American Court of Human Rights [hereinafter cited as Rules of Procedure], Art. 52, in HANDBOOK, *supra* note 1, at 159.

55) Proposed Amendments, *supra* note 48, para. 17.

56) Article 75 of the American Convention reads as follows: "This Convention shall only be subject to reservations in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969."

57) Effect of Reservations, *supra* note 18, para. 22.

58) *Id.*, para. 38.

59) Proposed Amendments, *supra* note 48, paras. 29 and 30.

60) *See* Article 53 of the Court's Rules of Procedure, *supra* note 54, which provides that "[w]hen the circumstances require, the Court may apply any of the rules governing contentious proceedings to advisory proceedings."

61) *See* "Other Treaties," *supra* note 15, para. 5; Effect of Reservations, *supra* note 18, para. 5; Restrictions to the Death Penalty, *supra* note 20, para. 5.

62) The European Court of Human Rights, by amendment of its Rules of Court, adopted on Nov. 24, 1982, has now established a procedure enabling individuals and states not parties to the proceedings to request permission to file "written comments" in contentious cases. European Court of Human Rights, Revised Rules of Court, Rule 37(2), Council of Europe, Cour (82) 107 (Dec. 2, 1982). The Revised Rules of Court entered into force on Jan. 1, 1983. This important step by the European Court may well influence the decision of the Inter-American Court on this subject. It should be noted, moreover, that the European Court now also permits individuals that instituted proceedings before the European Commission of Human Rights to participate in the proceedings before the European Court, even though they lack standing to take these cases to the tribunal. *Id.*, Rule 33(1)(d) and 33(3)(d); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 213 UNTS 221, Art. 48. *See also* L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1118-48 (1973).

63) Proposed Amendments, *supra* note 48, para. 17.

64) Rules of Procedure, *supra* note 54, Art. 52.

65) The assumption that Article 64(2) proceedings are basically "domestic" and therefore of no interest beyond the borders of the applicant state overlooks the fact that the Court's task here is to interpret the Convention or other human rights treaties; it is not its function in Article 64(2) proceeding to interpret domestic law. Other states and OAS organs may therefore have as much

of an interest in Article 64(2) proceedings as in those filed under paragraph 1, and they should routinely receive the requisite notice in both instances.

66) Proposed Amendments, *supra* note 48, para. 17.

67) Restrictions to the Death Penalty, *supra* note 20.

68) *Id.*, para 29.

69) *Id.*, para 21.

70) *Id.*, para 23.

71) *Id.*, para 25.

72) *Id.*, para 22.

73) *Id.*, para 24.

74) "Other Treaties," *supra* note 15, para 33.

75) Restrictions to the Death Penalty, *supra* note 20, para. 48; Proposed Amendments, *supra* note 48, para. 21.

76) Proposed Amendments, *supra* note 48, paras. 21 and 22.

77) *Id.*, para. 26.

78) Government of Costa Rica (In the Matter of Viviana Gallardo, *et al.*), Decision of Nov. 13, 1981, Inter-American Court of Human Rights, No. G 101/81, para. 16 (1981), *reprinted in* 3 T. BUERGENTHAL & R. NORRIS, *supra* note 1, Booklet 25, at 7 (1983), and 20 ILM 1424 (1981).

79) Effect of Reservations, *supra* note 18, para. 33.

80) "Other Treaties," *supra* note 15, para. 25.

81) *Id.*, para. 21.

82) Effect of Reservations, *supra* note 18.

83) The two states in question were Barbados and Mexico. Mexico ratified with a reservation to Article 23(2) of the Convention, which deals with the right to participate in government. The Mexican reservation declared some rights guaranteed by that provision inapplicable to ministers of all religious denominations to the extent that they were barred, under Article 130 of the Mexican Constitution, from participation in certain political activities. HANDBOOK, *supra* note 1, at 95, 96. Barbados made three reservations. The first applied to Article 4(4) of the Convention, which prohibits capital punishment for "political offenses or related common crimes," and reserved the right of Barbados to apply the death penalty to treason. Its second reservation related to Article 4(5) of the Convention, which prohibits the execution of individuals who were under 18 years of age or over 70 at the time they committed the crime punishable by death. Barbados made this reservation, noting that its laws permit the execution of individuals who are over 16 and over 70. The third Barbadian reservation applied to Article 8(2)(e), which guarantees an "inalienable right" to counsel. Barbados declared that its laws do not ensure such a right. HANDBOOK, *supra*, at 69-70.

84) Vienna Convention on the Law of Treaties, Art. 20(4), UN Doc. A/CONF.39/27 (1969), *reprinted in* 63 AJIL 875 (1969), 8 ILM 679 (1969).

85) *Id.*, Art. 20(5).

86) For the various arguments that were made in the case, see Inter-American Court of Human Rights, ser. B: Pleadings, Oral Arguments and Documents (The Effect of Reservations on the Entry into Force of the Convention on Human Rights (Arts. 74 and 75)), No. 2 (1983).

87) Effect of Reservations, *supra* note 18, paras. 29 and 33. The European Commission of Human Rights had earlier intimated a similar view, Application No. 788/60 (Aus. v. Italy), 4 EUR. Y.B. HUM. RTS. 116, 140 (1960), as did the International Court of Justice in its Advisory Opinion on Reservations to the Convention on Genocide, 1951 ICJ REP. 15 (Advisory Opinion of May 28); but no international tribunal has thus far articulated this principle as clearly as the Inter-American Court.

88) Effect of Reservations, *supra* note 18, para. 34.

89) *Id.*, para. 35.

90) Vienna Convention on the Law of Treaties, *supra* note 84, Art. 20(1).

91) See, on this subject, the resolution of the Inter-American Juridical Committee, adopted on Aug. 15, 1984, entitled Guidelines that the Depositor of a Convention Must Follow within the Inter-American System, in respect of Matters Not Clearly Regulated, OEA/Ser.G, CP/doc. 1492/84 (Sep. 10, 1984). This resolution, which applies to treaties in general and makes no mention of human rights treaties, rejects the 1-year waiting period altogether and calles for consultation prior to the deposit of instruments of ratification with reservations consistent with earlier OAS practice. On the latter subject, see 1 THE INTER-AMERICAN SYSTEM, *supra* note 6, pt. 1, at 335. Given the Court's opinion, this recommendation should not be applied to human rights treaties.

92) It is important to note, in this connection, that when Argentina on Sept. 5, 1984 deposited an instrument of ratification of the Convention containing a reservation, the OAS Secretary Gener-

al. on the advice of the new Legal Adviser, Dr. Hugo Caminos, decided that Argentina had become a party to the Convention on that date. Consistent with the Court's advisory opinion, the fact that the ratification contained a reservation was not deemed to require delaying the entry into force of the Convention for Argentina.

93) Convention, Art. 74(1).

94) Effect of Reservations, *supra* note 18, para. 35.

95) Restrictions to the Death Penalty, *supra* note 20, para. 61.

96) On Article 27 in general, see Buergenthal, *The Inter-American System for the Protection of Human Rights*, 1981 ANUARIO JURIDICO INTERAMERICANO 80 (1982).

97) *See, e.g.*, International Covenant on Civil and Political Rights, Annex to GA Res. 2200 (1966), Art. 4; European Convention on Human Rights, *supra* note 62, Art. 15; American Convention on Human Rights, Art. 27. *See also* Buergenthal, *International and Regional Human Rights Law and Institutions: Some Examples of their Interaction*, 12 TEX. INT'L L.J. 321, 324-25 (1977).

98) *See* Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS 72, 78-86 (L. Henkin ed. 1981); Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1 (1981); Higgins, *Derogation under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281 (1975-76).

99) Restrictions to the Death Penalty, *supra* note 20, para. 61.

100) *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §339, particularly comment a (Tentative Draft No. 1, 1980); Lillich, *Civil Rights*, in Meron (ed.), *supra* note 4, at 115, 119-20; Domb, *Jus Cogens and Human Rights*, 6 ISR. Y.B. HUM. RTS. 104 (1976). *See generally* Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AJIL 946 (1967).

101) The following states have accepted the jurisdiction of the Court: Argentina, Costa Rica, Ecuador, Honduras, Peru and Venezuela.

102) The contentious jurisdiction of the Court is governed by the provisions of Article 62 of the Convention, which reads as follows:

> 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
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> 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.
>
> 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.