

A UNITED STATES VIEW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

*Douglass Cassel**

The American Convention on Human Rights¹ created an Inter-American Court of Human Rights, which came into being in 1979, and whose seven judges sit in San José, Costa Rica.

The Court has two kinds of jurisdiction. First, it has advisory jurisdiction with respect to all members of the Organization of American States ("OAS"), whether or not they have ratified the Convention.² For example, even though the United States has not ratified the Convention or accepted the contentious jurisdiction of the Court, the Court is empowered to render advisory opinions on

* Executive Director, International Human Rights Law Institute of DePaul University College of Law; Former Legal Adviser to UN Truth Commission for El Salvador.

1 *American Convention on Human Rights*. Done at San José, Nov. 22, 1969. Entered into force, July 18, 1978. O.A.S. Treaty Ser. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23 doc. 21 rev. 6 (1979), *reprinted in* 9 *I.L.M.* 673 (1970).

2 Art. 64 of the Convention, quoted below (citations herein to Articles refer to articles of the Convention).

Annual Reports of the Court cited herein are the English language versions as follows: Inter-Amer. Ct.H.R., OEA/Ser.L/V/III.9, doc.13 (1983); OEA/Ser.L/V/III.10, doc.13 (1984); OEA/Ser.L/V/III.12, doc.13 (1985); OEA/Ser.L/V/III.15, doc.13 (1986); OEA/Ser.L/V/III.17, doc.13 (1987); OAS/Ser.L/V/III.19, doc.13 (1988); OAS/Ser.L/V/III.21, doc.14 (1989); OAS/Ser.L/V/III.23, doc.12 (1990); OAS/Ser.L/V/III.25, doc.7 (1991); OAS/Ser.L/V/III.29, doc.4 (1993). For convenience, they are cited in the following illustrative form: 1988 Ann.Rep. 13, 31, para. 35. The year appearing in parenthesis following cases in the text is the year the case was decided, not necessarily the year of the Annual Report in which it appears.

whether the United States, as a member of the OAS, is complying with its human rights obligations under the OAS Charter.³ Rights under the Charter, the Court has held, are those specified in the American Declaration of the Rights and Duties of Man.⁴

Second, the Court has contentious jurisdiction to issue binding judgments in cases involving states which have ratified the Convention and accepted the Court's contentious jurisdiction.⁵ To date, of the 25 states which have ratified the Convention, 16 have accepted the Court's contentious jurisdiction.⁶ They include 14 of the 16 Spanish-speaking nations of South and Central America. (The only exceptions are Bolivia and El Salvador).

A. SOME CONSIDERATIONS BEARING ON UNITED STATES ACCEPTANCE OF THE COURT'S CONTENTIOUS JURISDICTION

The United States signed the American Convention on Human Rights in 1977 but has not to date ratified it.⁷ Until the United States ratifies the Convention, it will not be eligible to accept the Inter-American Court's contentious jurisdiction.⁸ The issues involved in United States ratification of the Convention are beyond the scope of

3 In Advisory Opinion OC 3-83, 1984 Ann.Rep. 12, 21-27, paras. 30-44, the Court rejected Guatemala's contention that, "although Article 64(1) . . . authorize[s] [the Commission] to seek an advisory opinion from the Court regarding the interpretation of any article of the Convention, if that opinion were to concern a given State directly as it does Guatemala in the present case, the Court could not render the opinion unless the State in question has accepted the tribunal's [contentious] jurisdiction . . ." (Para. 30.) (Advisory Opinions are herein cited as "OC-___".) The Court's reasoning would similarly authorize an advisory opinion on the interpretation of the OAS Charter, even if it directly concerned the United States.

4 Advisory Opinion OC-10, 1989 Ann. Rep. 109, 120, paras. 43-46, 48.

5 Arts. 62-63, 67-68.

6 1993 Ann.Rep. Appendix XVI.

7 1993 Ann.Rep. at 127, Appendix XVI.

8 Arts. 61.1, 62.

this analysis,⁹ which is limited to the role of the Court. This analysis, in effect, looks ahead to whether the United States, upon ratifying the Convention, should also accept the contentious jurisdiction of the Court.

1. The Court's Performance To Date

The Court is relatively new. It rendered its first advisory opinion in 1982,¹⁰ and its first final decision in a contentious case only in 1988.¹¹ Through November 1994 it issued 13 advisory opinions and decided the merits of only five contentious cases.¹²

Yet the Court has begun to show promise as an important legal mechanism for protection of human rights in the Americas. For example, in an advisory opinion on a matter of particular concern to the United States, it has interpreted the Convention to be more protective of free expression than any other international human rights treaty.¹³ And in historic rulings in contested cases, it held Honduras liable for forced disappearances of activists and awarded substantial damages — the first reported cases in which any government in the world has been held accountable for disappearances.¹⁴

At the same time, the Court's rulings have been balanced. Where the evidence warrants, or where there have been serious procedural

9 In June 1994 the American Bar Association, the principal membership organization of lawyers in the United States, reaffirmed its support for United States ratification of the Convention. It also created a working group, chaired by the author, to review possible reservations and the question of acceptance of the contentious jurisdiction of the Inter-American Court. The working group has not yet completed its review. Opinions and conclusions stated herein are those of the author, not necessarily those of the Association or its working group.

10 OC-1/82, September 24, 1982, 1983 Ann.Rep. 12.

11 Velásquez Rodríguez, July 29, 1988, 1988 Ann.Rep. 35.

12 See cases discussed *infra*.

13 OC-5/85, 1985 Ann.Rep. 19, discussed *infra*.

14 Velásquez Rodríguez, 1988 Ann.Rep. 35, and Godínez Cruz, 1989 Ann.Rep. 15, both discussed *infra*.

defects in bringing a case before the Court, governments win. Thus, in another disappearance case the evidence of a violation by Honduras was deemed insufficient,¹⁵ and where the Commission failed to bring a case against Peru in a timely manner, the Court ruled in favor of the defendant state.¹⁶

A summary of the Court's jurisprudence to date appears in part B, below.

2. The Court's Potential

If the Court succeeds in practice as envisioned by the Convention, it will provide the first real hope of legal relief for victims of human rights violations in many nations in the hemisphere. As the United States Department of State Country Reports for 1993 have again recognized, many domestic judicial systems generally fail to afford justice in human rights cases. In Guatemala, for example, "The judicial system is ineffective and often unable to ensure a fair trial ..."¹⁷

This is not to suggest that the Inter-American Court can or should become a complete substitute for failed national judiciaries. But it can perform two essential functions. First, it can afford justice in at least a manageable number of exemplary cases. Second, by so doing, it may stimulate governments to improve their judiciaries, even if only to avoid the international stigma and monetary expense of repeatedly losing cases before the Inter-American Court.

15 Fairén Garbi, 1989 Ann.Rep. 69.

16 Cayara, 1993 Ann.Rep. 25.

17 Staff of Senate on Foreign Relations and House Comm. On Foreign Affairs, 103D Cong., 1S Sess., *Country Reports on Human Rights Practices* 451 (Comm. Print 1993). See also *id.* at 368 and 370 (Bolivia); 387 (Chile); 433 and 438 (El Salvador); 475 (Honduras); 493 (Mexico); and 534 (Peru). This list is not meant to be exhaustive. And other credible observers are often more critical than the Department of State. See, e.g., "From Madness to Hope," the Report of the United Nations Commission on the Truth for El Salvador, March 15, 1993.

3. Diplomatic Support for the Court

However, several participating governments have resisted their obligations under the Convention to cooperate with the Court's proceedings and to comply fully with its judgments.¹⁸ Honduras has only partially paid the damages awarded in the disappearance cases.¹⁹ In two recent cases Suriname, too, has failed to pay damages by deadlines set by the Court.²⁰ In another case Guatemala reportedly refused even to appear before the Court, until the Foreign Minister's refusal was overruled by the President.²¹

The Court's lack of diplomatic support to date has also been reflected, for example, in its budget from the OAS, which has been so inadequate that the Court was forced to suspend publishing its proceedings.²² In part for lack of resources, the full Court has met for only a few weeks each year.

United States participation could be of assistance in shoring up the diplomatic support essential for the Court to realize its potential. As long as the United States does not ratify the Convention and accept the Court's contentious jurisdiction, the ability of the United States to support the Court's important role will be limited. This is illustrated by the response of Honduras when, in 1991, the United States Ambassador inquired of then President Rafael Callejas concerning Honduras' failure to comply fully with the Court's judgments. According to the Embassy, President Callejas responded by questioning why the United States was inquiring about the case, in

18 "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." Art. 68.1.

19 See discussion *infra*.

20 See discussion *infra*.

21 Chunimá, 1991 Ann.Rep. 52. Note that the President of the Court had set a hearing for July 29, 1991, but on that date the Court, without public explanation, postponed the hearing until July 30. *Id.* at 53-54, paras. 2 and 4.

22 See, e.g., 1991 Ann.Rep. at pp. 9-10, para. D.

view of the fact that the United States had not ratified the Convention.²³

4. Shaping the Court's Jurisprudence

Ratification of the Convention would give the United States a voice in shaping the composition of the Court. As a state party, whether or not the United States accepts the jurisdiction of the Court, it will become eligible to nominate and vote for judges of the Court.²⁴ Taking the further step of accepting the Court's jurisdiction would enhance the likelihood that, in fact, a United States jurist would be elected to the Court.

In fact, from 1979 through 1991, Professor Thomas Buergenthal, currently Lobingier Professor at George Washington University, served on the Court, initially by nomination of Costa Rica. His participation left its mark on the Court's jurisprudence.²⁵ However, when his second term expired, no United States jurist was nominated to succeed him.

Accepting the Court's jurisdiction would also provide the United States an opportunity to shape the Court's jurisprudence, through appearances and arguments as a party before the Court.

5. Risk of Adverse Rulings

The principal risk to the United States of accepting the Court's contentious jurisdiction is the possibility of adverse decisions. Any such risk is mitigated by five factors. First, the Court's judges to date have been, in the main, eminent jurists. Once the United States ratifies the Convention, it can work to ensure the continued high quality of the Court.

23 Letter from Counselor for Political Affairs, United States Embassy in Honduras, to author, dated November 19, 1991.

24 Art. 53.1.

25 For example, Judge Buergenthal was President of the Court when it rendered its important ruling on freedom of expression in OC-5/85, 19 Ann.Rep. 19.

Second, the Court's rulings to date have been balanced and reasonable; if any criticism is merited, it is not that the Court has been too tough on governments, but that in certain cases it has arguably been too easy.²⁶

Third, the common Western culture shared by judges from the Americas means that the Court's approach to legal questions is more likely to be consonant with the United States approach than may be true of other international bodies with broader geographical representation.

Fourth, before cases may be taken to the Court, the complaining parties must generally exhaust their domestic remedies.²⁷ (Exceptions to this requirement, such as lack of available remedies,²⁸ do not normally apply in the United States.) Thus cases will generally be litigated first in United States courts, where egregious violations of human rights are likely to be remedied, prior to any possibility of review by the Inter-American Court.

Fifth, it is likely that the United States will attach reservations or understandings to its ratification on the most sensitive issues under the Convention, such as capital punishment and abortion.²⁹

Nonetheless a residual risk of adverse adjudication, inherent in any international tribunal, must be acknowledged on at least two levels: (1) the risk that the Court may rule a particular United States reservation to be incompatible with the purpose of the Convention and thus legally void,³⁰ and (2) the risk that the Court may disagree with the United States interpretation of a particular provision of the

26 See, e.g., the opinion of the three dissenting judges in the Gangaram Panday case, discussed *infra*.

27 Art. 46.1.a.

28 Art. 46.2; see also Velásquez Rodríguez, 1988 Ann.Rep. at 48-50, paras. 61-68.

29 See Report of the United States Delegation to the negotiating conference, 91 I.L.M. 710, 716-17 (1970).

30 See OC-3/83, 1984 Ann.Rep. 12, 27-28, para. 45, and pp. 33-38, paras. 60-76.

Convention. The former risk may be minimized by careful and narrow targeting of reservations,³¹ the second is a risk inherent in litigation before any court.

Once the United States ratifies the Convention, the question it will face is whether these risks outweigh the potential benefits for human rights in the hemisphere of United States acceptance of the contentious jurisdiction of the Court. That question is best evaluated in light of a review of the Court's jurisprudence to date, which follows.

B. SUMMARY OF THE COURT'S JURISPRUDENCE THROUGH NOVEMBER 1994.

Within its contentious jurisdiction to date, the Court has rendered five final decisions on the merits, four rulings on damages, seven rulings on emergency measures, and numerous rulings on preliminary objections. Four cases are pending.³²

31 The Court has held that while a reservation that suspends a non-derogable right is incompatible with the object and purpose of the Convention and thus not permitted, "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." OC-3/83, 1984 Ann.Rep. at 33 para. 61. In fact, in that case the Court sustained the permissibility of a reservation by Guatemala to one aspect of the non-derogable right to life. *Id.*

Reservations to aspects of non-derogable rights are likewise not absolutely barred under the International Covenant on Civil and Political Rights. See General Comment No. 24(52), adopted November 2, 1994, by the Human Rights Committee under Article 40, paragraph 4 of the Covenant, United Nations document CCPR/C/21/Rev.1/Add.6, 2 November 1994. The Committee there observes, "While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation." *Id.* pp. 3-4. para. 10.

32 See 1993 Ann.Rep. at 10-11 (Neira Alegria et al. case from Perú) and at 11 (Caballero Delgado y Santana case from Colombia). Also pending are two cases referred to the Court during 1994: the Genie Lacayo case from Nicaragua, involving an alleged denial of justice in the investigation of a death, and the El Amparo case from Venezuela, involving the alleged murder of citizens by members of the military and police.

The Court has also issued thirteen advisory opinions to date; a fourteenth is pending.³³

1. Contentious Jurisdiction

Article 62.3 of the Convention defines the Court's contentious jurisdiction as follows: "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."

Victims or other persons complaining of violations of the Convention may not take cases before the Court. Instead, they may take their complaints to the Inter-American Commission on Human Rights.³⁴ In the event the Commission rules that there has been a violation, either the Commission or the State Party may then refer the case to the Court for a binding ruling.³⁵

Once the case reaches the Court, Article 63.1 of the Convention provides as follows: "If the Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

The Court imposes no liability, either civil or criminal, on individuals; the only defendant is the state.

33 See Request for Advisory Opinion OC-14 and observations of the governments of Brazil, Costa Rica and Peru, 1993 Ann.Rep. 101, Appendix XII.

34 Art. 44.

35 Art. 61.

a. *Rulings on Merits*

The Court's first three decisions on the merits all involved forced disappearances allegedly committed by or with the acquiescence of Honduran security officials. In the first two cases, *Velásquez Rodríguez*³⁶ (1988) and *Godínez Cruz* (1989),³⁷ upon finding that Honduran officials carried out or tolerated a systematic practice of disappearances, and that the particular disappearances at issue fell within that practice, the Court held Honduras responsible.³⁸

In so holding the Court emphasized the affirmative obligation imposed on States Parties by Article 1.1 of the Convention, by which States commit not only to respect rights, but also to "ensure" their free and full exercise.³⁹ The Court explained:

This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention . . .⁴⁰

Failure to comply with this affirmative duty, the Court held, in itself constitutes a violation of the Convention.⁴¹

36 1988 Ann.Rep. 35.

37 1989 Ann.Rep. 15.

38 1988 Ann.Rep. at 63-66, paras. 147-48; 1989 Ann.Rep. at 46-49, paras. 153-56.

39 Article 1.1 provides in full: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

40 *Velásquez Rodríguez*, 1988 Ann.Rep. 35, para. 166; *Godínez Cruz*, 1989 Ann.Rep. 15, para. 175.

41 1988 Ann.Rep. at 69-73, paras. 161-83; 1989 Ann.Rep. at 53-57, paras. 170-93.

In the third case, *Fairén Garbi* (1989), on the other hand, the Court declined to find Honduras responsible, in view of some uncertainty as to whether the disappearances might have taken place in Guatemala or possibly El Salvador.⁴²

The fourth and fifth cases both involved Suriname. In *Aloeboetoe* (1991), during oral argument before the Court, Suriname confessed its responsibility for an army massacre of seven of its citizens.⁴³

In *Gangaram Panday* (1994), which involved the death of a prisoner while in custody, the Court unanimously held Suriname responsible for the prisoner's unlawful detention, largely because Suriname failed to provide certain information requested by the Court pertaining to the lawfulness of the detention (including its own statutes).⁴⁴ However, by a 4-3 vote, the Court declined to hold Suriname responsible for the prisoner's death. The majority argued, given some indications of possible suicide, that the evidence of murder by security forces was insufficient.⁴⁵

b. Damages

In the two Honduran disappearance cases the Court awarded damages, in Honduran currency, equivalent to several hundred thousand dollars.⁴⁶ However, Honduras delayed until well past the Court's payment deadline, and by the time it paid, its currency had lost considerable market value.⁴⁷ When the Court then ordered

42 1989 Ann.Rep. at 69, paras. 155-158.

43 1991 Ann.Rep. at 57, para. 22.

44 Slip Op., paras. 49-51.

45 *Id.*, paras. 52,56,60-62.

46 In *Velásquez*, the Court awarded 500,000 lempiras (approximately \$165,000) in compensatory damages, and 250,000 lempiras (approximately \$80,000) in moral damages. In *Godínez*, the Court awarded 400,000 lempiras (approximately \$133,000) in compensatory damages, and 250,000 lempiras (approximately \$80,000) in moral damages. *Velásquez Compensation Judgment*, 1989 Ann.Rep. 123, paras. 49-52. *Godínez Compensation Judgment*, 1989 Ann.Rep. 141, paras. 47-52.

47 1990 Ann.Rep. 43, 47 and 51, Appendices V, VI and VII.

Honduras to pay the full original market value,⁴⁸ Honduras balked, and to date continues to fail to comply with this portion of the Court's rulings.⁴⁹ In the subsequent Suriname cases, the Court has been careful to award damages in hard currency terms.⁵⁰

The majority of the damages awarded to the widows and children in both Honduran cases were for lost wages and benefits; the remainder was for "moral damages" (pain and suffering).⁵¹ The Court ruled that punitive damages are not available under the Convention.⁵²

In the Suriname massacre case, the Court awarded a total of about \$450,000 to the widows, children and dependent parents of the seven victims. As a form of compensatory damages for injury to the children's health and education, the Court also ordered Suriname to reopen a clinic and school in the victims' village. The families were also awarded their costs in pursuing the matter before the Suriname authorities; these came to about \$1,000 per family.⁵³

In the Suriname unlawful arrest case, the Court awarded \$10,000 in damages to the survivors.⁵⁴

c. Emergency Relief

Article 63.2 of the Convention provides: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it

48 1990 Ann.Rep. 53, Appendix VIII.

49 1990 Ann.Rep. 85, 89, Appendices X and XI; 1991 Ann.Rep. at 9, 34 (Appendix III), and 36 (Appendix IV); see also United States Department of State, Country Reports on Human Rights Practices for 1991, on Honduras, at pp. 651-652.

50 E.g., Aloeboetoe, 1993 Ann.Rep. 61, 89, para. 116(1) and (4).

51 E.g., Velásquez Rodríguez, 1989 Ann.Rep. 123, 136-37, paras. 49-52.

52 E.g., Velásquez Rodríguez, 1989 Ann.Rep. at 134, paras. 37 and 38.

53 1993 Ann.Rep. 61, 81-89, paras. 87-116.

54 1994 Ann.Rep. 21, 39 para. 71(4).

deems pertinent in matters it has under consideration. In matters not yet submitted to the Court, it may act at the request of the Commission."

While the Honduran disappearance cases were pending before the Court, two witnesses were killed. The Court responded by ordering Honduras to report on its investigations of these deaths and to take steps to protect the remaining witnesses.⁵⁵

In addition, in six cases the Commission has asked the Court to order emergency relief, even before a case on the merits had reached the Court. In four of those cases the relief was granted; in two it was denied. The evidentiary test in such cases, the Court has held, is "not a question of fully determining the truth of the facts; rather, the Commission must have a reasonable basis for assuming [the alleged facts] to be true" (*Chunimá*,⁵⁶ 1991). Where no direct evidence is presented, the Court has denied relief (*Peruvian Prisons case, infra*).

In a case involving the alleged army murder of a journalist in Peru, (*Bustíos-Rojas*,⁵⁷ 1990), after a witness was killed, the Court ordered Peru to take steps to protect witnesses and survivors.

Similarly, in two Guatemalan cases, one involving an ongoing series of murders and threats against human rights activists and judges, (*Chunimá*,⁵⁸ 1991), and the other a series of threats against jurists, (*Colotenango*,⁵⁹ 1994), the Court ordered Guatemala to take measures to protect their lives and physical integrity.

Finally, in a case involving the custody of children of the disappeared in Argentina who had been given to police families, (*Reggiardo-*

55 1988 Ann.Rep. at 43-47, paras. 39-49.

56 1991 Ann.Rep. 52, para. 6.

57 1991 Ann.Rep. 15, para. 5.

58 1991 Ann.Rep. 52, para.8.

59 Slip Op., "Resolves" paras. 1-3.

Tolosa,⁶⁰ 1993), the acting President of the Court ordered Argentina to return them to the biological grandparents, pending a meeting of the full Court on the matter. Before the full Court could meet, an Argentine court awarded permanent custody to the grandparents, mooting the matter.⁶¹

In two 1992 cases from Peru, the Court declined to grant emergency relief. In the *Peruvian Prisons* case, the Commission alleged reports of mistreatment of prisoners and asked the Court to order Peru to permit the Commission to inspect the prisons. The Court declined to order an inspection on the ground that the Convention expressly requires government consent for on-site inspections.⁶² It denied further relief on the ground that no direct evidence of mistreatment had been submitted.⁶³

In the *Chipoco* case a prosecution had allegedly been initiated against a human rights lawyer for "apology for terrorism." After Peru denied that it had initiated any such prosecution, the Court declined to grant emergency relief.⁶⁴

d. Preliminary Rulings

Among numerous rulings on preliminary objections or matters, the more important include the following:

60 1993 Ann.Rep. 95, "Orders" para.1.

61 Order, January 1994.

62 1992 Ann.Rep. 101, para. 5.

63 *Id.*, para. 6.

64 1992 Ann. Rep. at 97, "Whereas" para. 6. From the facts of the case, it appears that Peru had, indeed, initiated some form of legal action against Mr. Chipoco, but then withdrew it following international pressure, including the pendency of the matter before the Inter-American Court. Thus, although emergency relief was formally denied by the Court, the request for such relief may, in fact, have achieved its intended result.

- States Parties cannot bypass the Commission to take a case directly to the Court, but they can waive the exhaustion of their domestic remedies (*Viviana Gallardo*,⁶⁵ 1981);
- The procedure for friendly settlement before the Commission is not mandatory and need not be pursued by the Commission unless circumstances warrant (Honduran disappearance cases,⁶⁶ 1987);
- Domestic remedies need not be exhausted unless the remedies are both adequate and effective in redressing the wrong (*id.*,⁶⁷ 1988);
- The Commission may appoint the victim's lawyer to assist it in proceedings before the Court (*Gangaram Panday*,⁶⁸ 1991);
- The three-month period under the Convention for the Commission to refer a case to the Court following the Commission's initial resolution is jurisdictional; while the mere formality of an extra three-day delay does not divest the Court of jurisdiction, a withdrawal and resubmission of the case several months later, even if requested by the State Party, places the case beyond the Court's jurisdiction (*Cayara*,⁶⁹ 1993).

65 Slip Op., paras. 25,26.

66 Velásquez Rodríguez, 1987 Ann.Rep. 35, paras. 44,45; Fairén Garbi, 1987 Ann.Rep. 57, paras. 50,51; Godínez Cruz, 1987 Ann.Rep. 81, paras. 48,49.

67 Velásquez Rodríguez, 1987 Ann.Rep. 35, para. 93; Fairén Garbi, 1987 Ann.Rep. 57, para. 92; Godínez Cruz, 1987 Ann.Rep. 81, para. 95. In the merits judgments, the Court discussed at length why the domestic remedies suggested by Honduras were inadequate and ineffective in the instant cases, and discussed as well what constitutes adequate and effective remedies generally. Velásquez Rodríguez, 1988 Ann.Rep. 35, paras. 51-81; Godínez Cruz, 1989 Ann.Rep. 15, paras. 54-88; Fairén Garbi, 1989 Ann.Rep. 69, paras. 77-111.

68 1991 Ann.Rep. 64, para. 27.

69 1993 Ann.Rep. 25, para. 60.

2. Advisory Jurisdiction

The Convention confers two kinds of advisory jurisdiction on the Court: advice on interpreting any human rights treaty affecting American states (Article 64.1), and advice on the compatibility of national laws with such treaties (Article 64.2). The Court has jurisdiction to provide such advice to any OAS member state, whether or not it has ratified the Convention.⁷⁰

Article 64 provides:

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 [OAS organs] . . . may in like manner consult the Court.
2. The Court, at the request of a member state of the Organization, may provide the state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

The Court's advisory rulings have addressed five substantive areas – freedom of expression, discrimination, naturalization, national legal remedies for human rights violations, and reservations to non-derogable rights – as well as various matters relating to the functioning of the inter-American system for protection of human rights.

Taken together, the Court's thirteen advisory opinions to date have developed a thoughtful jurisprudence strongly supportive of human rights. For example, as discussed below, the Court has interpreted the OAS Charter to impose specific human rights obligations on all OAS member states; it has broadly interpreted freedom of expression under the Convention; and it has interpreted the

70 See footnote 2 *supra*.

Convention to require that habeas corpus be available even during states of emergency.

In brief, the Court has ruled as follows:

a. Freedom of Expression

The Court has advised that compulsory licensing of journalists in Costa Rica violates freedom of expression (OC-5,⁷¹ 1985). It has also ruled that States Parties are under an affirmative obligation to ensure the right of reply (OC-7,⁷² 1986).

In the journalist licensing case, the Court broadly explained the concept of freedom of expression under the Convention, in terms that parallel United States First Amendment law and that go beyond the protections in other international human rights treaties.

Thus, it ruled that "... the legality of restrictions imposed ... upon freedom of expression, depend[s] upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected."⁷³

The Court stressed "the extremely high value that the Convention places on freedom of expression. A comparison. . . with . . . the European Convention and the [Civil and Political] Covenant indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas."⁷⁴

71 1985 Ann.Rep. 19.

72 1986 Ann.Rep. 49.

73 1985 Ann.Rep. 19, para. 46.

74 *Id.*, para. 50.

b. Discrimination

The Court advised that provisions in Costa Rican naturalization laws that favored persons literate in Spanish and Costa Rican history and values; persons from nations with related cultures; and citizens of those nations by birth rather than by naturalization; were not illegally discriminatory, whereas provisions that discriminated on the basis of gender violated the Convention (OC-4,⁷⁵ 1984).

In so ruling, the Court broadly explained its interpretation of discrimination under the Convention, as follows:

. . . [N]ot all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity. The European Court of Human Rights . . . has held that a difference in treatment is only discriminatory when it "has no objective and reasonable justification".⁷⁶

Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason, or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of mankind.⁷⁷

75 1984 Ann.Rep. 43, 61-63, paras. 60-67. Judge Buergenthal dissented, objecting to discrimination in favor of citizens of other nations by birth rather than by naturalization. Judge Piza-Escalante dissented with regard to discrimination against those who are not literate in Spanish and familiar with the history and values of the country in which they wish to become citizens.

76 *Id.*, para. 56.

77 *Id.*, para. 57.

c. *Naturalization*

In the same advisory opinion the Court ruled that the Convention confers no right of naturalization that would be violated by Costa Rica's laws.⁷⁸

d. *Legal Remedies for Human Rights Violations*

Article 27 of the Convention authorizes the suspension of certain rights in emergencies, but not of such essential rights as the right to life, nor of "judicial guarantees essential for the protection of such rights."

The Court has advised that the writ of habeas corpus is such an essential judicial guarantee, which may not be suspended in time of emergency (OC-8,⁷⁹ 1987). It has also advised that other remedies provided for in national law which are suitable for protecting the full exercise of non-derogable rights, may also not be suspended in time of emergency (OC-9,⁸⁰ 1987).

The Court has further advised (OC-11,⁸¹ 1990) that the requirement of exhaustion of domestic remedies prior to recourse to the Inter-American Commission of Human Rights does not apply to complainants who are unable to secure legal representation, either because of indigence, or because of a general fear in the legal community to take human rights cases, in cases where legal representation is necessary for a fair hearing.⁸²

78 1984 Ann.Rep. at 53-58, paras. 31-51.

79 1987 Ann.Rep. 17.

80 1988 Ann.Rep. 13.

81 1990 Ann.Rep. 31.

82 "Article 8 must, then, be read to require legal counsel only when it is necessary for a fair hearing." 1990 Ann.Rep. at 38, para. 26.

e. Reservations to Non-Derogable Rights

In interpreting the scope of a Guatemalan reservation relating to the death penalty, the Court advised that blanket reservations to non-derogable rights are void as incompatible with the purpose of the Convention, but that a reservation would be permitted if it "sought merely to restrict certain aspects of a non-derogable right without the right as a whole of its basic purpose" (OC-3,⁸³ 1983).

f. Functioning of the Inter-American System

Finally, in addition to its ruling on right to counsel in OC-11, the Court has issued several advisory rulings on the functioning of the inter-American human rights system. Among the more notable of such rulings are the following:

- The Court has advisory jurisdiction to interpret treaties between OAS member states and non-members, including treaties not adopted under OAS auspices, so long as the treaty "directly involves" protection of human rights in an OAS member state (OC-1,⁸⁴ 1982).
- States become parties to the Convention from the date of their ratification or adherence, independently of when other states may accept them as parties (OC-2,⁸⁵ 1982).
- "Laws" which authorize restriction of rights in certain circumstances under the Convention are limited to "normative acts directed towards the general welfare, passed by a democratically elected legislature and promulgated by the Executive Branch" (OC-6,⁸⁶ 1986).

83 1984 Ann.Rep. 12, para. 61; see also note 30 *supra*.

84 1983 Ann.Rep. 13, para. 31.

85 1983 Ann.Rep. 31.

86 1986 Ann.Rep. 13, para. 35.

- The Court has advisory jurisdiction to interpret the American Declaration of the Rights and Duties of Man when necessary in order to interpret the OAS Charter, the American Convention, or other human rights treaties (OC-10,⁸⁷ 1989).
- The Court will not render an advisory opinion requested in an effort to bypass a pending contentious proceeding (OC-12,⁸⁸ 1991).

The Commission may find that national laws violate the Convention, but may not rule on whether they violate the internal legal order of a state (OC-13,⁸⁹ 1993, among other rulings on competence of the Commission).

C. CONCLUSION

The Court's first fifteen years of jurisprudence have established a record which is both strongly supportive of human rights and fair to governments. In view of that record and the considerations reviewed above, once the United States ratifies the American Convention on Human Rights, it should also join the great majority of South and Central American nations in accepting the contentious jurisdiction of the Inter-American Court of Human Rights.

87 1989 Ann.Rep. 109.

88 1991 Ann.Rep. 114.

89 1993 Ann.Rep. 47.