

THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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L'auteur explique l'origine historique, la nature et la constitution de la Cour Interaméricaine des droits de la personne. Il analyse ensuite son rôle consultatif ainsi que son rôle contentieux.

El autor explica el origen histórico, naturaleza y constitución de la Corte Interamericana de Derechos Humanos.

Analiza el carácter dual de su jurisdicción, consultiva y contentiousa.

The Inter-American Court of Human Rights was created under the American Convention on Human Rights which entered into force in 1978. The judges were elected a year later and the Court's inaugural session was held in September 1979. The Court consists of seven judges, elected at a session of the OAS General Assembly by the States Parties to the Convention from a list of individuals nominated by these same states.

The Court has advisory and contentious jurisdiction. Let me speak first about its advisory jurisdiction. The Court's advisory jurisdiction is significantly more extensive than the advisory jurisdiction of any international tribunal in existence today. The provision in the Convention that confers this power is Article 64. It empowers the Court to render advisory opinions with regard to three matters: first, an interpretation of the Convention; second, an interpretation of "other treaties concerning the protection of human rights in the American States"; and, third, an interpretation concerning the compatibility of a national law with the Convention or the above mentioned treaties. Advisory opinions may be requested by all OAS Member States and, within their sphere of competence, by all organs of the OAS.

Notice that the Court's advisory power is not limited only to the interpretation of the Convention. It extends also to other treaties. Since the concept of "other treaties concerning the protection of human rights in the American States" did not have a fixed meaning in the OAS legal framework, the Government of

Peru asked the Court in 1981 to interpret this provision. The Court did so and concluded that the term embraced within its scope the human rights provisions of any treaty, whether or not concluded within the OAS or Inter-American framework, in which an American state is or could be a party. Thus, in theory, the Court might be asked in an appropriate case to interpret the human rights provisions of the U.N. Charter or the Geneva Conventions on Humanitarian Law, or the Protocols thereto. Although the Court has this broad power, it also exercise indicated in the Peruvian advisory opinion that it would exercise it only in special circumstances particularly when concerned treaties whose membership was not limited to American States.

To date, the Court's advisory jurisdiction has been resorted to much more extensively than its contentious jurisdiction, enabling the Court to develop an important body of human rights law. It has done so in the area of *habeas corpus*, with regard to freedom of expression and the concept of legality. It has held, for example, that the rights to *habeas corpus* may not be suspended during a state of emergency, that the interpretation of human rights treaties falls under a special legal regime, that provisions of human rights treaties from which no derogation is permitted are not subject to reservations, that the obligation to exhaust domestic remedies does not apply in a country where the legal community is subject to a well-founded fear of retribution by the government for taking human rights cases. The Court has also held that, despite the fact that the Convention does not say so expressly, the right to *habeas corpus* may not be suspended during a national emergency. It based its holding on the fact that these rights are non-derogable under the Convention. And in a famous advisory opinion dealing with freedom of expression, the Court has held that the requirement that journalists, as a condition of the exercise of their profession, must belong to a journalism association, violates Article 13 of the Convention which guarantees freedom of expression. In a controversial opinion it has ruled that, even though the American Declaration is not a treaty, it may under certain circumstances be interpreted under the Court's

advisory powers. The importance of this opinion results from the fact that it recognizes the normative character of the Declaration.

I could go on, because the advisory jurisprudence of the court is very rich, but we don't have much time. Suffice it to note that the Court has thus far made a major contribution to international human rights law through its advisory opinions.

This brings me to the second competence of the Court, its so-called contentious jurisdiction. Here the Court has jurisdiction to decide or adjudicate disputes in which a state is charged with violation of one of the specific rights guaranteed in the Convention. These disputes or cases originate in petitions or complaints filed with the Commission by individuals or other States Parties. The basic provision of the Convention that governs contentious proceedings is Article 62.

Article 62 makes clear that a contentious case can only be heard by the Court if the states parties to the case have recognized the Court's jurisdiction. Thus far the following countries have accepted the Court's jurisdiction: in Central America, Costa Rica, Honduras, Guatemala and Nicaragua; in the Andean Pact region, Venezuela, Colombia, Peru and Ecuador; in the Southern Cone, Chile, Argentina and Uruguay. One English-speaking Caribbean country—Trinidad and Tobago—plus Panama and Suriname have also done so. The following states have ratified the Convention without accepting the Court's jurisdiction: Jamaica, Barbados, Bolivia, Paraguay, Mexico, Grenada, Dominican Republic, El Salvador and Haiti. Of course, there are a number of OAS states that has neither ratified the Convention nor accepted the Court's jurisdiction. These are, among others, the United States, Brazil, Canada, Guyana and some of the smaller English-speaking Caribbean countries.

Let us now turn to the manner in which a contentious case can get to the Court. The first thing you have to know is that you cannot get to Court until the Commission has dealt with the case and the proceedings set out in Article 48 to 50 of the Convention have been completed. What does it mean? It means that you will first have to file your case with the Commission. For it to be admissible,

you will have to have exhausted all available domestic remedies and have filed your case within 6 months of such exhaustion. There are other admissibility requirements, but since Dr. Edith Marquez has already dealt with this subject, I won't go into it again. Suffice it to say that, if all the admissibility requirements set out in Articles 44 through 47 have been satisfied, the Commission will apply the provisions of Articles 48 through 50 of the Convention, that is, it will investigate the facts, it may hear the individual and the state concerned, and it may seek to negotiate a friendly settlement between the individual and the state. If no friendly settlement has been reached, the Commission must prepare the so called Article 50 report. This report should set out the facts found and the Commission's conclusions thereon. It may also contain various recommendations.

Once the Article 50 report has been transmitted to the state concerned, the Commission and the state have three months within which to submit the case to the Court. Note that the individual has no standing to refer the case to the Court. This is the anomalous part of our system: the Convention permits the victim to go to the Commission, but it does not permit him to go to the Court.

Let me note that the Inter-American Court of Human Rights received no cases from the Commission in the first seven years of its existence. The first contentious cases to be referred by the Commission to the Court were the Honduran Disappearance cases, and they were filled with the Court in 1969. In the past few years the Commission's attitude on this subject has changed dramatically, particularly since Dr. Marquez has become Executive Director of the Commission. At the moment there are three contentious cases pending in the Court, referred to it by the Commission. Two concern Suriname and one Peru. The Commission has recently also requested the Court to render protective measures in other cases.

Thus far I have only focused on the Commission, but states may also refer cases to the Court within the aforementioned period of three months. While states have thus far not done so, it certainly might make sense for them to refer a case to the Court when they believe that the findings of the Commission are wrong as a matter

of law. In the European system, there are many examples of states taking cases to the Court and winning them.

Before moving on, it is useful to note that the Commission included the lawyers of the individuals in its delegation in the Honduran Disappearance cases and thus enabled them to take an active part in the Court proceedings. The new rules of procedure of the Court accord the individual some additional privileges, like the rights to receive all Court documents relating to his case. But neither the Court nor the Commission can amend the Convention by making the individual a formal party to the proceedings.

Judgements of the Court in contentious cases are final and binding on the parties. That is what the Convention provides and the failure of a state to comply with a judgment is yet another violation of the Convention, which may give rise to additional damages. In its judgment the Court has the power to award damages and to declare what measures a state must take to ensure the enjoyment of the right that was violated.

Finally, there is another important provision of the Convention that should be mentioned. This is Article 63(2). It permits the Court to adopt provisional measures or protective measures "in cases of extremes gravity and urgency, and when necessary to avoid irreparable damage to persons." The Court may apply this provision in two types of cases. First, in cases that are already pending before the Court and, second, in cases that are before the Commission and have not yet been referred to the Court. In the second type of case, the request for provisional measures must come from the Commission. In the first, the Court may order them either at the request of the parties to the case or on its own motion. To date, provisional measures have been ordered by the Court in both types of cases.

In many ways, the power to grant provisional measures is the most important power the Court has. Now that the Commission is resorting to it in the type of serious cases for which this provision was intended, the Court may be able to play a more immediate role than it has in the past in saving human lives in imminent danger.

During the first seven years of its existence, the inter-American human rights system did not function properly because the Commission did not refer any cases to the Court. This failure

weakened not only the Court but also the Commission. Now that these two bodies are working together, the inter-American system is finally beginning to do what it was set up to do in 1979.