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THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Dinah Shelton*

INTRODUCTION

The Inter-American human rights system has set ambitious goals for the promotion and protection of human rights in the Western Hemisphere. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are primarily responsible for monitoring the implementation by states parties of the human rights obligations contained in the Charter of the Organization of American States (OAS)¹ and the American Convention on Human Rights.² The growing jurisprudence of the Court details the meaning and scope of many of the guaranteed human rights and correlative state duties. Of equal importance, the Court's decisions enunciate evidentiary and procedural rules applicable to those appearing before the Court. The decisions and opinions of the Court are thus particularly useful in assessing the accomplishments and limitations of the system.

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1. Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, U.N.T.S. 48 [hereinafter Charter]. The member states of the OAS are Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, and Venezuela. See Inter-American Commission on Human Rights, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser. L.V/II.82, doc. 6 rev. 1 (1992) [hereinafter BASIC DOCUMENTS] (discussing the member states of the OAS).

2. American Convention on Human Rights, *reprinted in* BASIC DOCUMENTS, *supra* note 1, at 25, [hereinafter Convention]. Twenty-five OAS member states have ratified the American Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. BASIC DOCUMENTS, *supra* note 1, at 53.

I. INSTITUTIONAL EVOLUTION

In 1948, the Ninth International Conference of American States transformed the Pan-American Union into the Organization of American States when it adopted the OAS Charter.³ The Charter contained two provisions on human rights. The first proclaimed "the fundamental rights of the individual without distinction as to race, nationality, creed or sex."⁴ The second provision provided that each State shall respect the rights of the individual and principles of universal morality in developing freely its cultural, political and economic life.⁵ The same Conference also adopted the American Declaration of the Rights and Duties of Man.⁶

Subsequent OAS meetings built on the foundations of the Charter and Declaration. The Tenth International Conference of American States (Caracas, Venezuela 1954) adopted the Declaration of Caracas, renewing

the conviction of the American States that one of the most effective means of strengthening their democratic institutions is to increase respect for the individual and social rights of man, without any discrimination, and to maintain and promote an effective policy of economic well-being and social justice to raise the standard of living of their peoples.⁷

In 1959, the Fifth Meeting of Consultation of Ministers of Foreign Affairs (Santiago, Chile) adopted the Declaration of Santiago which proclaimed that "harmony among the American republics can be effective only insofar as human rights and fundamental freedoms and the exercise of representative democracy are a reality within each one of them."⁸

3. BASIC DOCUMENTS, *supra* note 1, at 1. The origins of the Inter-American system are found in the 1826 Congress of Panama and the treaty of Perpetual Union, League and Confederation proposed by Simon Bolivar. *Id.* *The International Conferences of American States* (James Brown Scott, ed., 1931) at vii-xxix. The Congress led to a series of regional meetings formalized with the establishment of the International Union of American Republics, renamed the Pan-American Union in 1910. *Id.* at xv-xvii, 176.

4. Charter, *supra* note 1, art. 3.

5. Charter, *supra* note 1, art. 16.

6. American Declaration of the Rights and Duties of man (1948), *reprinted in* BASIC DOCUMENTS, *supra* note 1, at 17.

7. Pan American Union, *International Conferences of American States, Second Supplement, 1942-1954* 436 (1958).

8. Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12-18, 1959. Final Act, OAS Off. Rec., OEA/Ser.C/II.5.

The Declaration also called upon member governments to maintain a system of individual freedom and of social justice originating from respect for fundamental human rights.⁹ During the same meeting, the Ministers created the Inter-American Commission on Human Rights as an autonomous entity of the Organization.¹⁰ The OAS Council then adopted the Statute of the Commission, charging the Commission with furthering human rights, defined as "those set forth in the American Declaration of the Rights and Duties of Man."¹¹

The OAS adopted the American Convention on Human Rights in 1969 to strengthen human rights protections.¹² The drafters drew upon the American Declaration, the European Convention of Human Rights and the International Covenant on Civil and Political Rights.¹³ The Convention, in force since 1978, contains 82 articles codifying more than two dozen distinct rights.¹⁴ Both the Commission, under a revised Statute approved subsequent to the entry into force of the Convention,¹⁵ and the Inter-American Court of Human Rights, created by the Convention, safeguard the implementation of these rights.¹⁶

The OAS has adopted other instruments protecting human rights in recent years. In 1985, the General Assembly approved the American Convention to Prevent and Punish Torture.¹⁷ Three years later, the OAS

9. *Id.*

10. *Id.* at 10-11. The Commission lacked a firm juridical basis until the 1967 Protocol of Buenos Aires extensively amended the OAS Charter and made the Commission a principal organ of the organization pursuant to article 51(e) and 112. Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324 [hereinafter the Protocol]. Throughout its history, the Commission has been composed of seven members elected in their individual capacities by the OAS General Assembly for a term of four years. *Id.*

11. Statute of the Inter-American Commission on Human Rights OEA Ser. G II/C-sa 373(3) art. 2 [hereinafter 1960 Statute]. The present Statute states that human rights are contained in the American Convention on Human Rights for states parties thereto, and the rights set forth in the American Declaration of the Rights and Duties of Man, for the remaining member states. Statute of the Inter-American Commission on Human Rights art. 1(2), reprinted in BASIC DOCUMENTS, *supra* note 1, at 93.

12. Convention, *supra* note 2.

13. See *Conferencia Especializada Interamericana Sobre Derechos Humanos, San Jose, Costa Rica, 7-22 noviembre de 1969, Actas y Documentos*, OEA/Ser.K/XVI 1.2 (1973) (providing for the legislative history of the American Convention); see also INTER-AM. Y.B. OF HUM. RTS. 1969-1970 (discussing the history of the American Convention).

14. Convention, *supra* note 2.

15. 1960 Statute, *supra* note 12.

16. Convention, *supra* note 2, art. 33.

17. Inter-American Convention To Prevent and Punish Torture, OAS T.S. No. 67,

General Assembly opened for signature the Protocol of San Salvador.¹⁸ In 1990, the General Assembly approved the Protocol to Abolish the Death Penalty.¹⁹ Finally, in 1994, it adopted two conventions: the Inter-American Convention on Forced Disappearances²⁰ and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.²¹

II. OPINIONS AND JUDGMENTS OF THE COURT

During its first fifteen years, the Inter-American Court has issued fourteen advisory opinions and decided the merits of five contentious cases. Two other cases were dismissed, one as untimely,²² one after a settlement.²³ Four cases are pending.²⁴ The Court issued an advisory

Feb. 1987 reprinted in BASIC DOCUMENTS, *supra* note 1, at 83. The states parties to the Convention are Argentina, Chile, Dominican Republic, Guatemala, Mexico, Panama, Paraguay, Peru, Suriname, and Venezuela. BASIC DOCUMENTS, *supra* note 1, at 90.

18. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, OAS T.S. No. 69, reprinted in BASIC DOCUMENTS, *supra* note 1 at 677. As of July 1, 1992 only Suriname had ratified the Convention. BASIC DOCUMENTS, *supra* note 1, at 78.

19. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, OAS T.S. No. 73, reprinted in BASIC DOCUMENTS, *supra* note 1, at 79. Six states have signed the Protocol; however, only Panama had ratified the Protocol as of July 1992. BASIC DOCUMENTS, *supra* note 1, at 80.

20. Adopted by the 24th General Assembly, June 9, 1994.

21. Convention of Belem do Para, Brazil, adopted by the 24th General Assembly June 9, 1994.

22. *Id.* at 41. On February 3, 1993, the Court found that the case of *Cayara v. Peru* was brought by the Commission outside the time period established by Article 51(1) of the Convention. *Cayara v. Peru*, Preliminary Objections, Judgment of February 3, 1993, Inter-American Court of Human Rights, OEA/Ser. L/V/III. 29, doc. 4, Ann. 1993 Rep. Inter-Am. Ct. Hum. Rts. 25 (1994) [hereinafter *Caraya case*].

23. In January 1994, the Court closed the Reggiardo Tolosa Case (Government of Argentina) concerning children appropriated by an officer of the Federal police after being born during their mother's detention by the military government. The government complied with a resolution adopted by the acting President of the Court on November 19, 1993, and returned the children to their biological family. Inter-American Court of Human Rights, Press Release CDH-CP2/94.

24. On January 21, 1994, the Court unanimously rejected the preliminary objections of Colombia in the Caballero Delgado and Santana Case concerning the disappearances of two persons in February 1989. Inter-American Court of Human Rights, Press Release CDH-CP2/94, 2. The Commission submitted two new cases in January, 1994. The first case, against Nicaragua, alleges a denial of justice regarding the death of Jean Paul Genie Lacayo. The second case alleges that a special force of the Vene-

opinion annually except in 1988 and 1992. In 1988 the Court decided its first contentious case. Two companion cases were decided in early 1989, and the three cases no doubt were the focus of the Court's work during 1988. Similarly, in 1992, the Court had before it several cases concerning Peru and Suriname, as well as a request for a thirteenth advisory opinion. In this regard, the balance of the Court's workload may continue to shift in the direction of contentious proceedings as the Commission completes processing additional cases against states that have accepted the jurisdiction of the Court.

Of the fourteen requests for advisory opinions, five have come from the Commission, four from Costa Rica and three from Uruguay. Colombia and Peru each filed one request and Argentina joined one of Uruguay's submissions. All the states requesting advisory opinions are parties to the Convention and all have accepted the Court's contentious jurisdiction. Thus far, the Court's broad advisory competence has failed to entice non-parties to submit requests to it, although they have filed observations on questions presented to the Court by other states and the Commission.²⁵

The contentious cases submitted to the Court reflect the gravity of human rights violations in the hemisphere. All concern disappearances or arbitrary killings of individuals or groups, linked to government actions in Argentina, Colombia, Honduras, Nicaragua, Peru, Suriname, and Venezuela. Some of the events in question took place during periods of military control and remained unresolved after the restoration of democratic governments. Although the Court has found state responsibility in most of the cases, many people who disappeared have never been located and the payment of reparations often has been grudging or lacking.

zuelan military and police murdered fourteen Venezuelan fishermen on October 29, 1988. The remaining action is the Chipoco and Peruvian Prison cases against Peru.

25. Convention, *supra* note 2. Article 64 extends the Court's advisory jurisdiction to all OAS member states, whether or not they are parties to the Convention. *Id.* Among the latter, Dominica, the Dominican Republic, El Salvador, Jamaica, Mexico, Panama, prior to accepting the Court's jurisdiction, St. Vincent and the Grenadines, Santa Lucia, and the United States have filed observations in one or more advisory proceedings. *Id.* The United States has participated twice, first concerning the effect of reservations on the entry into force of the Convention. The Effect of Reservations on the Entry Into Force of the American Convention (arts. 74 and 75), Advisory Opinion OC-2/82 of Sept. 24, 1982 (1983) [hereinafter Effect of Reservations]. Subsequently, the United States filed its views on the legal status of the American Declaration of the Rights and Duties of Man (OC-10/89). These cases are discussed *infra*.

In deciding the contentious cases and rendering its advisory opinions, the Court has had to consider broad questions of its own role and that of the Commission, as well as general issues of treaty interpretation and the assessment of damages for human rights violations. In addition, it has discussed state obligations to respect and ensure human rights, the juridical status of the American Declaration of the Rights and Duties of Man, and the meaning of specific human rights guaranteed by Inter-American texts. These are considered below.

III. JURISDICTION OF THE COURT

The Inter-American Court, formally constituted in 1979, consists of seven judges nominated and elected by states' parties to the Convention.²⁶ The Convention limits the Court's jurisdiction to states' parties that have accepted the Court's jurisdiction.²⁷ Only states parties and the Commission may refer cases to the Court or be parties before it.²⁸ The decisions of the Court are final and binding on the parties to the dispute.²⁹

In addition to hearing contentious cases arising under the Convention, the Court has broad advisory jurisdiction extending to all OAS member states, who may consult the Court on interpreting the Convention or other treaties concerning the protection of human rights in the Ameri-

26. Convention, *supra* note 2, arts. 52, 53. See Buerghenthal, *The Inter-American Court of Human Rights* 76 AM. J. INT'L L. 231, 231 (1982) (discussing the Court's framework and jurisdiction).

27. Convention, *supra* note 2, art. 62. The following states have accepted the Court's jurisdiction as of February 1994: Argentina, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Peru, Suriname, Trinidad and Tobago, Uruguay, Venezuela, Bolivia, and Paraguay. Inter-Am. C.H.R., Annual Report of the Inter-American Commission on Human Rights. OEA/ser.L/V/II. Doc. 9 rev., February 11, 1994.

28. *Id.* art. 61(1). Judge Rodolfo E. Piza Escalante, in both separate and dissenting opinions, maintains that the only active party to a contentious proceeding is the victim who possesses the rights allegedly infringed. In his view, the role of the Commission is similar to that of a public prosecutor; it is a party only in a procedural sense and not in a substantive or material sense. See, e.g., In the Matter of Viviana Gallardo, *et. al* Government of Costa Rica, Decision of Nov. 13, 1981, Inter-Am. Ct. H.R. 12, OEA/Ser. L/V/III. 7 doc 13, Ser. A and B. No. G.101/81, (1982) [hereinafter Viviana Gallardo], Explanation of Vote by Judge Piza, para. 8 reprinted in 20 I.L.M. 1424; Velasquez Rodríguez Case (Government of Honduras), Judgment of June 26, 1987, Inter-Am. Ct. H.R., app. IV-A, OEA/Ser. L/V/III. 17 doc. 13, Ser. C: No. 1 Dissenting Opinion of Judge Piza, para. 3 (1988).

29. Convention, *supra* note 2, art. 67.

cas.³⁰ They also may request an opinion on the compatibility of any domestic laws with such instruments.³¹ The latter includes requests concerning the compatibility of proposed laws—and probably proposed reservations to the Convention—as well as existing legislation.³²

Article 64(1) permits various OAS organs, including the Inter-American Commission on Human Rights, to seek advisory opinions on matters falling “within their spheres of competence.”³³ This requires a showing by the petitioning organ of a “legitimate institutional interest” in the questions posed by the request.³⁴ The Court, noting the broad powers of the Commission relating to the promotion and observance of human rights, has emphasized that 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.”³⁵

The scope of the Court’s advisory jurisdiction has been discussed in several opinions. The Court observed that its advisory jurisdiction is more extensive than that accorded any other international tribunal.³⁶ It extends to all parts and provisions of the American Convention, including questions of the Convention’s entry into force and the compatibility of reservations with the treaty.³⁷ It also extends to any other treaty so

30. Convention, *supra* note 2, art. 64(1); see Buergenthal, *The Advisory Practice of the Inter-American Court* 79 AM. J. INT’L L. 1 (1985) (discussing the Court’s advisory jurisdiction practice).

31. Convention, *supra* note 2, art. 64(2).

32. See Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion No. OC-4/84 of Jan. 19, 1984, Inter-Am. Ct. H.R. 43, OEA/Ser. L IV/III. 10, doc. 13 Ser. A: No. 4 (1984) [hereinafter Proposed Amendments] (stating that the extension of the term “domestic laws” to proposed laws is necessary to avoid frustrating the purpose of the advisory jurisdiction to enable states to fulfill their human rights obligations).

33. Convention, *supra* note 2, art. 64(1).

34. Effect of Reservations, *supra* note 25, para. 14, *reprinted in* 22 I.L.M. 37 (1983).

35. *Id.* at 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 Inter-Am. Ct. H.R. 12, OEA/Ser. L/V/III. 10, doc. 13, ser. A and B: No. 3 para. 42. (1984) [hereinafter Restrictions to the Death Penalty], *reprinted in* 23 I.L.M. 320 (1984).

36. “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, Inter-Am. Ct. H.R. 13, OEA/Ser. L/V/III. 9 doc. 13, ser. A and B: Judgments and Opinions, No. 1, paras. 14-16 (1983) [hereinafter Other Treaties], *reprinted in* 22 I.L.M. 51 (1983).

37. Effect of Reservations, *supra* note 25 at paras. 17-40; Restrictions to the

long as it is related to the protection of human rights in a member state of the OAS.³⁸ The treaty need not be one exclusively concerning human rights nor one concluded within the Inter-American framework so long as the provision in question concerns human rights in one of the American States.

The Court has stated that its advisory jurisdiction "is as extensive as may be required to safeguard human rights"³⁹ within the limits set by the Convention. The Court cannot render an advisory opinion if it concludes that the request mainly concerns the international obligations of a non-American State or the structure or operation of international organs or bodies outside the Inter-American system.⁴⁰ Also, it will not render an opinion in a disguised contentious case, because the request would weaken the system and distort the advisory jurisdiction of the Court.⁴¹

The Court claims that its jurisdiction is permissive, including the power to define, clarify or reformulate the questions submitted to it, severing issues outside the scope of jurisdiction.⁴² A "power of appreciation" enables it to weigh the circumstances in each case, with a presumption in favor of the exercise of its advisory jurisdiction. In fact, the Court exercises its advisory jurisdiction to the extent of its competence: "The Court must have compelling reasons founded in the belief that the request exceeds the limits of its advisory jurisdiction under the Convention before it may refrain from complying with a request for an opinion."⁴³ The Court must issue an opinion when it declines to exercise jurisdiction, although the Court will generally not render a separate decision if it finds the request admissible.

The Court has twice confronted the problem of distinguishing its advisory jurisdiction from contentious cases. In 1983, the Court accepted a request by the Commission over Guatemalan objections that the question presented was a matter of dispute between it and the Commis-

Death Penalty, *supra* note 35.

38. Other Treaties, *supra* note 36, para. 21.

39. Proposed Amendments, *supra* note 32.

40. Other Treaties, *supra* note 30, para. 21.

41. *Id.* at para. 25.

42. See Enforceability of the Right to Reply or Correction (arts. 14(1), 1(1) and 2, American Convention on Human Rights), Advisory Opinion No. OC-7/86 of Aug. 29, 1986, 50 Inter-Am. Ct. H.R. 25 OEA/Ser. L/V/III. 15, doc. 13 ser. A, No. 7, para. 12 (1986) [hereinafter Right to Reply] (indicating that the Court reformulates submitted questions).

43. *Id.* paras. 30-37.

sion.⁴⁴ More recently, the Court declined a request by the government of Costa Rica, judging it to affect individual cases pending before the Commission.⁴⁵

In the former matter, the Commission asked the Court to interpret Articles 4(2) and 4(4) of the Convention to determine whether a government with a reservation to Article 4(4) could apply the death penalty to new crimes. The Commission acknowledged in its request that its views differed on this legal point from those of Guatemala. The Commission was at the time preparing a general report on the human rights situation in the country and there were numerous disputes of fact and law between it and the government. The Court did not find this a bar, noting that the Commission would normally request advisory opinions where the interpretation of a provision was disputed. Declining such requests could effectively bar the Commission from utilizing the Court's advisory jurisdiction. More broadly, the Court called its advisory jurisdiction "a parallel system to that provided under Article 62 and . . . 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."⁴⁶ To decline would "rob" Article 64 of its utility "merely because of the possible existence of a dispute regarding the meaning of the provision at issue in the request."⁴⁷

The broad language of the opinion suggested that the Court might allow the Commission or an interested state to refer a question to it during the pendency of Commission proceedings. The Court, however, has been solicitous of individual petitioners and the procedural guarantees they are afforded. The more recent advisory opinion makes clear that the Court will not render an opinion that would limit petitioners' procedural rights before the Commission. The Court unanimously declined to reply to Costa Rica's request that the Court advise it on the compatibility with the Convention, Article 8(2)(h), of its draft legislation amending the Code of Criminal Procedure and establishing a Court of

44. Restrictions to the Death Penalty, *supra* note 35 paras. 30-46.

45. Compatibility of Draft Legislation with Article 8(2) of the American Convention on Human Rights, Advisory Opinion OC-12/91 of Dec. 6, 1991, Inter-Am. Ct. H.R. OEA/Ser. L/V/III. 25, doc. 7, ser. A No. 12 (1992) [hereinafter Draft Legislation].

46. Restrictions to the Death Penalty, *supra* note 35, para. 43.

47. *Id.*

Criminal Appeal. During the proceedings, the Court asked the Commission to inform it of cases filed against Costa Rica for violation of Article 8(2)(h). As the Court may already have known, nine such cases had been filed since 1984 and only one of them had been decided, in 1986; the rest remained open files "pending compliance by Costa Rica with the Commission's recommendation that it conform its domestic legislation to the terms of the Convention"⁴⁸ The Court noted that, according to the Commission, the government had been given repeated extensions of time to comply with the Commission's recommendation in the 1986 case. In a much-needed rebuke, the Court criticized the Commission for unreasonably delaying the disposition of the cases.⁴⁹ Only after the Commission decided in 1991 to refer the 1986 case to the Court did Costa Rica request an advisory opinion on the still-draft legislation. Under these circumstances, the Court stated that a reply to the questions presented by Costa Rica could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the petitioners their undeniable right to participate in the proceedings. Therefore, it declined to hear the matter.

IV. PROCEDURE

Unlike other human rights systems, there is virtually no limit on who may file a petition with the Inter-American Commission. Any person or group of persons or any non-governmental entity legally recognized in a member state may lodge a petition, regardless of whether or not the petitioner is the victim.⁵⁰ After the Commission completes its consideration of a petition, however, only the Commission or a member state may submit a case to the Court.⁵¹

48. Draft Legislation, *supra* note 45.

49. *Id.* Extensions are frequently granted to governments by the Commission long past the time limits set forth in the Commission's regulations.

50. Convention, *supra* note 2, art. 44; Regulations of the Inter-American Commission on Human Rights, art. 26, in BASIC DOCUMENTS, *supra* note 1, at 103 [hereinafter Commission Regulations].

51. Convention, *supra* note 2, art. 61(1). The second paragraph of Article 61 requires completion of the procedures set forth in articles 48 and 50 before the Court may hear a case. *Id.* at 61(2). Article 50 requires the Commission to prepare a report and transmit it to the "states concerned." *Id.* at 50(2). The latter term has not been interpreted by the Court and it is unclear which states other than the one accused of violating the victim's human rights may refer a case to the Court. Liberally interpreted, all parties to the Convention are concerned with human rights and potentially have standing to submit a case if they have accepted the Court's jurisdiction. More

In an effort to provide some legal certainty for applicants and states parties, the Court insists on compliance with procedural requirements of the Convention. In its first decision, the Court refused a case submitted by Costa Rica because it was not been filed with and considered first by the Commission.⁵² Recently, the Court has been critical of the Commission for delays in processing cases. It also dismissed a case the Commission submitted beyond the time limit provided by the Convention.⁵³ In another proceeding, the Court indicated that the Commission lacks discretion to submit a case to the Court without attempting to achieve a friendly settlement, absent exceptional and justified reasons.⁵⁴ It advised that the Commission cannot comment on the merits of a case it has found inadmissible.⁵⁵ Finally, the Court cautioned the Commission that it lacks authority to determine a state's adherence to constitutional precepts in establishing internal norms.⁵⁶ While critical of procedural irregularities, the Court has affirmed the broad functions of the Commission to promote human rights, including the power to examine the conformity of a state's domestic laws with its international legal obligations.⁵⁷

The Court's demonstrated concern for procedural regularity is welcome, and may improve the handling of cases by the Commission. In the Cayara case, the Court rightly commented that observation of procedures helps to maintain an equilibrium between justice and legal certainty, on which the juridical security of the parties depends.⁵⁸ At the same time, the Court should avoid "over-reliance on rigid formalism."⁵⁹ In this regard, the Court must keep a proper balance between the protection of human rights, the ultimate aim of the system, and legal certainty and

narrowly, the accused state and the state of nationality of the victim are directly concerned.

52. Viviana Gallardo, *supra* note 28, para. 25.

53. Cayara Case, *supra* note 22.

54. Caballero Delgado and Santana Case (Government of Colombia), Preliminary Objections, Judgment of Jan. 21, 1994, para. 27.

55. Certain Attributes of the Inter-American Commission on Human Rights (arts. 41, 42, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-12/93 of July 16, 1993, Inter-American Court of Human Rights, para. 42 [hereinafter Certain Attributes].

56. *Id.* paras. 29, 35. The Court also stated that "because the functions of the Commission must conform to the law, the terminology it uses must be carefully chosen and should avoid concepts that might be ambiguous, subjective or confusing." *Id.*

57. *Id.* para. 26-27.

58. Cayara Case, *supra* note 22, paras. 42, 63.

59. Certain Attributes, *supra* note 55, para. 41.

procedural equality which assure the stability of the international process and are indispensable to the authority and credibility of international supervisory organs.

A. EXHAUSTION OF REMEDIES

In the Inter-American system, the requirement that domestic remedies be exhausted before a petition may be considered is less stringent than in other human rights systems.⁶⁰ Both the Convention⁶¹ and the Commission's Statute⁶² and Rules⁶³ require that the petitioner exhaust domestic remedies. The Convention adds, however, that the requirement shall not apply in a number of circumstances: (1) where the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated, (2) where the party alleging violation of his rights is denied access to the remedies under domestic law or prevented from exhausting them, and (3) where there is unwarranted delay in rendering a final judgment in the domestic forum.⁶⁴

The Court has emphasized and detailed the obligation of states to provide effective domestic remedies. In its first case, the Court held that the rule requiring exhaustion of domestic remedies is designed for the benefit of the state and is thus a defense to international procedures.⁶⁵ As such, it may be waived, even tacitly, by the state.⁶⁶ More recently, the Court held that the state claiming non-exhaustion has an obligation to prove that unexhausted, effective domestic remedies remain.⁶⁷ Once

60. For example, in the European system, during 1992 only 189 of 1704 cases were declared admissible, many due to failure to exhaust domestic remedies. European Commission on Human Rights, *SURVEY OF ACTIVITIES STATISTICS 6* (1992).

61. Convention, *supra* note 2, art. 46(1)(a).

62. See Statute of the Inter-American Commission on Human Rights, in *BASIC DOCUMENTS*, *supra* note 1, at art. 20(c) (stating that the Commission has the duty to determine whether all domestic remedies have been exhausted).

63. Commission Regulations, *supra* note 50, art. 34(1).

64. Convention, *supra* note 2, art. 46(2)(a)-(c). In practice, the Commission requires that all petitions include initial information on whether domestic remedies were exhausted or whether exhaustion was impossible. When the petitioner is unable to prove exhaustion as required, the government must demonstrate lack of exhaustion of remedies, unless it is "clearly evident" from the background information that the petitioner did not exhaust all remedies. Commission Regulations, *supra* note 50, art. 34(3).

65. Viviana Gallardo, *supra* note 28, para. 26.

66. Viviana Gallardo, *supra* note 28 paras. 26-27. For this reason, exhaustion of remedies may be considered a procedural as much as a jurisdictional matter.

67. Velasquez Rodriguez Case (Government of Honduras), Preliminary Objections,

the state proves the existence of specific domestic remedies that should have been utilized, however, the burden shifts and the opposing party must show that those remedies were exhausted or that the case comes within one of the permissible exceptions.⁶⁸

The Court cautioned against the presumption of a state's failure to comply with its obligation to provide effective domestic remedies, remedies that must be "in accordance with the rules of due process of law"⁶⁹ To be adequate, domestic remedies must be suitable to address the infringement of a legal right. To be effective, the remedy must be capable of producing the designed result. The mere fact that a remedy does not produce a favorable result does not alone show that remedies are ineffective.

The Court emphasized the extent of the obligation to provide effective remedies in two advisory opinions.⁷⁰ Both opinions concern the extent to which judicial guarantees and remedies may be limited or suspended during periods of emergency. Article 27 of the Convention permits a State to take measures derogating from its obligations under certain precise conditions.⁷¹ Some rights, however, may not be suspended under any circumstances, nor may "the judicial guarantees essential for the protection of such rights."⁷² The Court found that different judi-

Judgment of June 26, 1987, Objections], Inter-Am. Ct. H.R., ser. C: Decisions and Judgments, No. 1, para. 88 [hereinafter Velasquez Rodriguez Preliminary].

68. Velasquez Rodriguez Case (Government of Honduras), Judgment of July 29, 1988, Inter-Am. Ct. H.R., ser. C: Decisions and Judgments, No. 4, para. 60 [hereinafter Velasquez Rodriguez].

69. *Id.* para. 62 (quoting from Preliminary Objections). In a subsequent advisory opinion, the Court reiterated that the absence of an effective remedy for violations of the rights recognized by the Convention is itself a violation of the Convention. It is not sufficient that there is a legal or formally recognized remedy; "rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory . . . cannot be considered effective." Judicial Guarantees in States of Emergency (arts. 27(2), 25, and 8, American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Inter-Am. Ct. H.R., ser. A: Judgments and Opinions, No. 9, para. 24. [hereinafter Judicial Guarantees].

70. Judicial Guarantees, *supra* note 69; Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987, ser. A: Judgments and Opinions, No. 8 (1987) [hereinafter Habeas Corpus].

71. Convention, *supra* note 2, art. 27(1) (listing these measures as "time of war, public danger or other emergency that threatens the independence or security of a state party").

72. Convention, *supra* note 2, art. 27(2). Some of the nonderogable rights are:

cial remedies will be "essential" depending upon the rights that are at stake, but in any event they must effectively guarantee the full exercise of the rights and freedoms protected by Article 27.⁷³ The Court concluded that writs of *habeas corpus* and *amparo* are among those judicial remedies essential for the protection of non-derogable rights.⁷⁴ Any suspension of either remedy would be incompatible with the Convention, as would any legal system that permits such a suspension.⁷⁵ The determination of other "essential" judicial remedies will depend on a case by case analysis of the juridical order and practice of each state party, the rights involved, and the facts of the matter.⁷⁶

Assuming remedies exist, what circumstances will excuse an individual from the exhaustion requirement? In 1990, the Commission asked the Court to indicate whether indigency could provide such an excuse.⁷⁷ It also asked whether the requirement would apply to an individual complainant who could not retain representation due to a general fear in the legal community.⁷⁸ The Commission requested that the Court articulate criteria for determining the admissibility of petitions in both circumstances.⁷⁹ The Court read Article 46(2)(a) and (b) as applying to situations where domestic remedies cannot be exhausted because they are not available either as a matter of law or as a matter of fact.⁸⁰ The Court emphasized that merely because a person is indigent does not waive the requirement of exhaustion of domestic remedies; instead the question must be whether the law or circumstances permit compliance.⁸¹ The Court linked the fair trial requirements of Articles 24 (equal protection) and 8 (right to a fair trial) to the non-discrimination requirement of Article 1.⁸² It found that if the cost of the proceedings or obtaining counsel prevents a person from asserting rights guaranteed

the right to life (art. 4), freedom from slavery (art. 6), freedom of conscience and religion (art. 2) and the right to participate in government (art. 23). *Id.*

73. Habeas Corpus, *supra* note 70, paras. 27, 29.

74. *Id.* para. 42.

75. *Id.* para. 43.

76. Judicial Guarantees, *supra* note 69, para. 40.

77. Exceptions to the Exhaustion of Domestic Remedies (art. 46(1), 46(2) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of Aug. 10, 1990, Inter-Am. Ct. H.R. ser. A: Judgments and Opinions, No. 11, para. 2 (1990) [hereinafter *Exhaustion of Domestic Remedies*].

78. *Id.* para. 2.

79. *Id.*

80. *Id.* para. 17.

81. *Id.* para. 20.

82. *Id.* paras. 14-31.

by the Convention, that person is being discriminated against by reason of his economic status and is unlawfully denied equal protection before the law.⁸³ Article 8 requires legal counsel when it is necessary for a fair hearing.⁸⁴ Where an indigent does not receive counsel free of charge from the state, the state is precluded from claiming that appropriate remedies existed but were not exhausted.⁸⁵

In criminal proceedings, the fair trial guarantees of Article 8(1) provide that an individual has an inalienable right to legal representation from a counsel of choice or from state-provided counsel. States now have considerable incentive to provide public defenders because an indigent individual is excused from exhausting remedies if counsel is not provided free of charge. Furthermore, not providing public defenders could constitute an independent breach of the non-discrimination requirement of Article 1, as well as the fair trial guarantees of Article 8.

For civil proceedings, the Court is less categorical; the circumstances of each case, its significance, its legal character, and its context in a particular legal system, are factors relevant to determining if legal representation or waiver of filing fees is necessary for a fair hearing. Where legal services or payment of filing fees are required, either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized, and a person is unable to comply because of indigency, the person is exempt from the requirement of exhausting domestic remedies.⁸⁶

It is worth noting that the Court does not indicate if discretion remains with the state to determine indigency or whether the Commission may evaluate this fact in a petition review. It would seem appropriate for the Commission to undertake some review if abusive denial of indigency status is alleged. The Commission, however, should also give deference to a state's determination of the threshold for public aid. The Court does indicate that the Commission is to determine whether legal representation is necessary and whether such representation was, in fact, available. All such determinations are fully reviewable by the Court.⁸⁷ Finally, if the state shows remedies are available, the applicant has the

83. *Id.* para. 22. It is unclear how far the Court's opinion extends: would the state be required to provide free transportation to an indigent who otherwise could not attend a court proceeding? If attendance is necessary to a fair trial, a broad reading of the decision suggests the answer may be yes.

84. Convention, *supra* note 2, art. 8.

85. *Exhaustion of Domestic Remedies*, *supra* note 77, para. 26.

86. *Id.* para. 30.

87. *Id.* para. 38-39.

burden of proving that indigency, or a generalized fear among the legal community, or any other applicable circumstance prevented access to legal remedies necessary to assert or enjoy rights guaranteed in the Convention.⁸⁸ If the state tolerates circumstances or conditions that prevent individuals' recourse to legal remedies designed to protect their rights, the state violates its affirmative duties under Convention Article 1 to ensure the full and free exercise of human rights and freedoms.⁸⁹

B. *AMICUS CURIAE* PARTICIPATION

The Court, beginning with its first case, accepted amicus briefs without specific authorization in either the Convention or its rules. Buergenthal cited Article 34 of the Court's Rules of Procedure as a possible basis for the Court's early practice.⁹⁰ The Article applied to contentious cases, although it could be invoked in advisory proceedings pursuant to Article 53 of the Rules of Procedure.⁹¹ The Court now has explicit authorization to accept amicus briefs concerning advisory matters. The 1991 Rules of Procedure contain a provision permitting the President of the Court to invite or authorize any interested party to submit a written opinion on the issues covered by a request for an advisory opinion. Where the request concerns matters of national law, this is to be done after consulting with the Agent of the requesting state.⁹²

In each issued opinion, the Court has formally noted the briefs with the exception of the most recent case.⁹³ At least one amicus brief has been accepted in each advisory proceeding and each contentious case.⁹⁴

88. *Id.* para. 41.

89. Convention, *supra* note 2, art. 1.

90. Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 15 (1985). As then written, the Rule provided that "[t]he 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." Rules of Procedure of the Inter-American Court of Human Rights, art. 34.1 [hereinafter Rules of Procedure], reprinted in BASIC DOCUMENTS, *supra* note 1, at 145.

91. Rules of Procedure *supra* note 89, at 53. Article 53 stated that "[w]hen the circumstances require, the Court may apply any of the Rules governing contentious proceedings to advisory proceedings." *Id.*

92. Rules of Procedure, *supra* note 90, art. 54(3).

93. In the Gangaram Panday Case, Judgment of January 21, 1994, the Court failed to refer to the *amicus* briefs that were filed.

94. In the fourth advisory proceeding, on naturalization rules in Costa Rica, the

In addition, states parties, notified of all requests for advisory opinions and contentious cases, often submit their observations. It does not appear that the Court has ever rejected an amicus filing.

During the Court's first advisory proceeding, interpreting the term "Other Treaties" subject to the advisory jurisdiction of the court, six member states submitted observations, and various organizations as amici curiae submitted "points of view."⁹⁵ Although the Court made no reference to its authority to accept amicus submissions, two of the briefs addressed the issue.⁹⁶ The International League for Human Rights and the Lawyers Committee for International Human Rights reviewed the practice of the PCIJ and ICJ, arguing that:

nothing in the Statute of the Rules of Procedure of the Inter-American Court . . . explicitly permits or prevents the filing of such briefs. Yet the powers of the Court under Article 60 of the American Convention to "adopt its own Rules of Procedure" and under Article 1, paragraph 2, of the Rules to "adopt such other Rules as are necessary to carry out its functions" provide ample authority for the Court to permit the filing of such documents.⁹⁷

Several human rights groups have regularly submitted information to the Court. The International Human Rights Law Group has filed briefs in eight advisory proceedings and one of the contentious cases. The International League, the Lawyers Committee for International Human Rights, Americas Watch, Amnesty International, and the International Commission of Jurists also have participated several times. Other briefs have come from university-based groups at Denver, Cincinnati, and De Paul, the Netherlands group SIM, bar association human rights committee (New York and Minnesota), commercial enterprises (the International Herald Tribune, Wall St. Journal) and individuals.⁹⁸

Court itself invited certain Costa Rican juridical institutions to present their views on the request and any other information or relevant documents. The institutions were selected by the Court in consultation with the government of Costa Rica. *Proposed Amendments*, *supra* note 30, para. 4.

95. Other Treaties, *supra* note 36, at 85-175. The organizations submitting briefs were the Inter-American Institute on Human Rights, the International Human Rights Law Group, the International League for Human Rights & Lawyers Committee for International Human Rights, and the Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law. *Id.*

96. *Id.* at 128, 151.

97. Other Treaties, *supra* note 36, Ser. B: Pleadings, Oral Arguments and Documents No. 1, p. 128.

98. Maria Elba Martinez, in her capacity as lawyer for the Argentine Foundation

The Court rarely quotes from amicus briefs or refers to them explicitly. Comparing the opinions of the Court, however, with briefs filed by amicus indicates that the latter may have an impact. For example, in the first advisory opinion, the League/Lawyers Committee brief contained drafting history on the provisions in question. The same citations appear in the Court's opinion. In the Court's second advisory opinion,⁹⁹ an amicus brief seems to be a source of the Court's oft-quoted discussion of the nature of human rights obligations as they differ from the traditional exchange of reciprocal treaty rights and duties.¹⁰⁰ In its opinion, the Court reprints the brief's quotation from a decision of the European Commission on Human Rights on the objective character of human rights obligations.¹⁰¹ The Court explicitly refers to the submissions of two amici in its fifth advisory opinion.¹⁰²

The thirteenth request for an advisory opinion, brought by Argentina and Uruguay, challenged several practices of the Inter-American Commission on Human Rights.¹⁰³ Due to the importance of the issues, eleven groups filed amicus briefs and the Court, for the first, time permitted three groups to participate in the oral proceedings. The Centro por la justicia y el derecho internacional (CEJIL), the International Human Rights Law Group, and Americas Watch joined the Commission,

Justice and Peace, was accepted as amicus curiae in advisory opinion 13. This extremely important proceeding concerning the powers of the Inter-American Commission produced eleven amicus briefs. Certain Attributes, *supra* note 55, at para. 9.

99. Compare the opinion, *supra* note 28, at paras. 17-31, with the amicus brief, *supra* note 94.

100. Compare The Effect of Reservations, *supra* note 25, paras. 18-19 with ser. B: Pleadings, Oral Arguments and Documents No. 2, at 80-82.

101. See The Effect of Reservations, *supra* note 25 ser. B No. 2. (quoting Eur.Comn.H.Rts., Application No. 788/60 (Austria v. Italy), 4 Y.B. Eur. Conv. Hum. Rts. 138, 140 (961) (decision on admissibility)). The opinion contains the quotation at para. 29. *Id.*

102. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights) Advisory Opinion OC-5/85 of Nov. 13, 1985, Inter-American Court of Human Rights, Ser. A: Judgments and Opinions No. 5, para. 60 (1985) [hereinafter Compulsory Membership]. Most of the eleven amicus briefs filed in the case came from professional journalists associations: The Inter-American Press Association; the Colegio de Periodistas of Costa Rica; the World Press Freedom Committee; the International Press Institute, the Newspaper Guild and International Association of Broadcasting; the American Society of Newspaper Editors and Associated Press; the Federation Latinoamericana de Periodista, the International League for Human Rights, the Lawyers Committee, Americas Watch and the Committee to Protect Journalism.

103. Certain Attributes, *supra* note 55, para. 9.

the government of Mexico and the government of Costa Rica in presenting their views to the Court. The participation of non-governmental organizations thus continues to expand.

V. EVIDENTIARY ISSUES

To determine the merits of petitions, the Commission and Court have the power to request information from the governments involved as well as from the petitioners.¹⁰⁴ Neither the kind nor amount of information that can be requested, however, is specified in the rules and regulations. Indeed, none of the basic documents establishes rules of evidence or allocates burdens of proof. The Court has taken a flexible approach to the admissibility of evidence and shown considerable initiative in acquiring proof. Until its most recent case, it also took a realistic approach toward the burdens and disparity of power facing applicants seeking to prove governmental responsibility. The Court gives no deference to Commission determinations of facts or interpretations of law. Every proceeding at the Court is *de novo*.

Even though the accusing party should bear the burden of proving the facts alleged, direct proof may not be necessary.¹⁰⁵ In the *Velasquez Rodriguez* case, the Commission argued that when the existence of a systematic practice or policy violating a specific right is shown, then a particular violation may be proved through circumstantial or indirect evidence.¹⁰⁶ The government did not object to the Commission's approach and the Court accepted it, requiring that the practice be proved and that the particular case be "linked" to that practice.¹⁰⁷

The standard of proof seemingly will depend upon the nature, character and gravity of the case. Where a state is accused of serious violations, such as disappearances, the Court applies a standard of proof "which considers the seriousness of the charge and which . . . is capable of establishing the truth of the allegations in a convincing manner."¹⁰⁸ Direct evidence, circumstantial evidence, and presumptions may be considered, so long as they lead to conclusions consistent with the facts.¹⁰⁹

104. Convention, *supra* note 2, arts. 34-43, 48.

105. See *Velasquez Rodriguez*, *supra* note 55, paras. 122-39 (explaining that the proceedings were unlike criminal trials but rather aimed at protecting individuals from conduct and as such were not privy to the same type of evidentiary restrictions).

106. *Id.* para. 124.

107. *Id.* para. 124.

108. *Id.* para. 129.

109. *Id.* para. 130.

In *Velasquez*, the Court held that the state cannot rely on the defense that the complainant has failed to present evidence when such evidence cannot be obtained without the state's cooperation.¹¹⁰ Since human rights procedures are not analogous to criminal proceedings, silence on the part of the government may be interpreted as an acknowledgement of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law.¹¹¹ The Court will weigh the evidence presented without express limits on admissibility.¹¹² When testimony is questioned, the challenging party has the burden of refuting it, rather than seeking to have it excluded.¹¹³ Press clippings may be considered as "the manifestation of public and well-known facts which, as such, do not require proof"; others may have evidentiary value, particularly if they reproduce official statements of government officials or corroborate testimony.¹¹⁴

The rules of evidence established in the *Velasquez* case, with utilization of inferences and presumptions from state silence, appear to have been undermined or limited by the *Gangaram Panday* Case, decided January 21, 1994.¹¹⁵ In that case, Gangaram Panday was illegally detained and died while in government custody. The complaint alleged that Suriname violated the victim's rights to life, humane treatment, personal liberty and judicial protection, as well as the general obligation to respect and ensure the Convention rights.

The Court unanimously found a violation of the right to personal liberty, but in its first divided opinion, held 4-3 that government responsibility for the victim's death had not been proved. The decision not only inexplicably retreats from the evidentiary framework established in the *Velasquez* judgment, it conflicts with long-standing customary norms on state responsibility for the treatment of aliens.¹¹⁶ By failing to shift

110. *Id.* para. 135.

111. *Id.* para. 138.

112. *Velasquez Rodriguez*, *supra* note 68 para. 141(c).

113. *Id.* para. 144. (rejecting the 'unacceptable' argument that persons who resort to the system are untrustworthy due to disloyalty to their country).

114. *Id.* para. 146.

115. An English version of the opinion is not yet available.

116. See *Quintanilla Claim (Mexico v. US)*, US-Mexican General Claims Commission, 4 R.I.A.A. 101, 103 (1926) (stating that "[a] foreigner is taken into custody by a state official. It would go too far to hold that the Government is liable for everything which may befall him. But it has to account for him. The Government can be held liable if it is proven that it has treated him cruelly, harshly, unlawfully; so much the more it is liable if it can say only that it took him into custody—either in jail or

the burden to the government to come forward with evidence on the treatment and fate of the victim during the period he was in government custody, the Court has imposed a heavy and undue burden on future litigants.

VI. RIGHTS AND DUTIES

A. APPLICABLE NORMS

The Inter-American human rights system, like that of the United Nations, is based upon several inter-linked normative texts. All member states are bound by the OAS Charter and the human rights references it contains. States' parties to the Convention must also respect and ensure the rights the Convention guarantees. The Convention itself mentions the Charter, the American Declaration of the Rights and Duties of Man, and the Universal Declaration of Human Rights.¹¹⁷ In this construct, the normative status of the American Declaration is of particular interest. Pursuant to its Statute, the Commission has long applied the American Declaration as the relevant text for assessing human rights within the OAS member states.¹¹⁸ In 1985, Colombia requested an advisory opinion of the Court concerning the legal status of the Declaration.¹¹⁹ The application by the government acknowledged its understanding that the Declaration is not a treaty. It added, however, that

This conclusion does not automatically answer the question. It is perfectly reasonable to assume that the interpretation of the human rights provisions

in some other place and form—and that it ignores what happened to him.”); *see also* the Turner Claim (US v. Mexico), 4 R.I.A.A. 278, at 281 (1927) (holding that Mexico was liable for what befell an individual having a period of illegal custody).

117. Convention, *supra* note 2, pmbl, arts. 26, 29(d).

118. Resolution No. 21/81, Case 2141 (United States), 6 March 1981, Inter-American Commission on Human Rights, ANNUAL REPORT OF THE COMMISSION 1980-1981, OEA/Ser.L/V/II.54, doc. 9, rev. 1, 16 October 1981, at 38.

119. *See* Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, Inter-American Court of Human Rights, Ser.A: Judgments and Opinions, No. 10 (1990) [hereinafter Interpretation of American Declaration] (posing the question of whether article 64 authorizes the Court to render advisory opinions interpreting the Declaration). In that case, Columbia argued that Article 64 allows the Court to be consulted regarding the interpretation of the Convention “or of other treaties concerning the protection of human rights in the American states.” *Id.* Thus, the question of the normative status of the Declaration was presented in a way that allowed the Court to consider the matter. *Id.* at paras. 24-28.

contained in the Charter of the OAS, as revised by the Protocol of Buenos Aires, involves, in principle, an analysis of the rights and duties of man proclaimed by the Declaration, and thus required the determination of the normative *status* of the Declaration within the legal system for the protection of human rights.¹²⁰

Costa Rica, the United States, Peru, Uruguay and Venezuela submitted observations on this issue;¹²¹ all but the United States are parties to the Convention. The US could be seen as the state most directly affected by the Court's decision because, as a non-party to the Convention, the Declaration has been applied in cases brought against it. The Commission also had a strong institutional interest in the Court's pronouncement concerning the Declaration; inexplicably, it failed to submit any written observations or otherwise intervene during the proceedings.

Among the states submitting comments, only Venezuela argued that the Declaration was without any juridical value; calling the Declaration a "statement of desires or exhortations" creating political or moral obligations, it concluded that the Court could not interpret the Declaration within its Article 64 jurisdiction.¹²² Similarly, the United States said the Declaration's "normative value lies as a declaration of basic moral principles and broad political commitments and as a basis to review the general human rights performance of member states, not as a binding set of obligations."¹²³ The US statement is somewhat inconsistent in calling the Declaration a basis for reviewing the human rights performance and commitments of OAS member states, yet not legally binding. During the hearings, the US representative clarified its position, clearly echoing the Venezuelan view that the Court lacked jurisdiction to interpret the Declaration or determine its normative status within the system. It called on the Court to dismiss the request for an advisory opinion, or alternatively, to find that the Declaration remained "for all member states of the OAS what it was when it was adopted: an agreed statement of non-binding general human rights principles."¹²⁴

Costa Rica's position was similar to that of Colombia, although less precisely drafted.¹²⁵ Peru's statement noted the incorporation of the Declaration in Convention Article 29, finding that it has thus "a hierar-

120. *Id.* para. 2.

121. *Id.* para. 6.

122. *Id.* para. 15.

123. *Id.* para. 12.

124. *Id.* para. 17.

125. *Id.* para. 11.

chy similar to that of the Convention *with regard to the States Parties* (emphasis added)."¹²⁶ Using this analysis, presumably, the Court could then interpret the Declaration in its function of advising Convention parties of their human rights obligations. Uruguay presented the strongest support for the Declaration, stating that:

The juridical nature of the Declaration is that of a binding, multilateral instrument that enunciates, defines and specifies fundamental principles recognized by the American States and which crystallizes norms of customary law generally accepted by those States.¹²⁷

The Court had little difficulty with the issue of the admissibility of the request, because Colombia had framed the issue as one of interpreting the scope of Convention Article 64, unquestionably a matter within the Court's jurisdiction. The legal status of the Declaration concerned the merits of the request. On the latter point, the Court found that the object of its advisory jurisdiction is treaties. Using the definition of treaties found in the Vienna Convention on the Law of Treaties,¹²⁸ the Court held that the Declaration is not a treaty within the meaning of Article 64. Despite this, "the mere fact that the Declaration is not a treaty does not necessarily compel the conclusion that the Court lacks the power to render an advisory opinion containing an interpretation of the American Declaration."¹²⁹ First, due to the references to the Declaration in the American Convention, the Court may be called upon to interpret the Declaration as part of that treaty. For states that are not parties to the Convention, the Court relies upon the ICJ Namibia opinion¹³⁰ to find that the Declaration should be looked at in light of the evolution the Inter-American system has undergone since the adoption of the Declaration, and not at the normative value and significance attached to the instrument in 1948. In this regard certain essential human rights must be protected as obligations *erga omnes*. Moreover, looking at the evolution of the OAS Charter and institutions, the Court concludes that

by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains

126. *Id.* para. 13.

127. *Id.* para. 14.

128. Vienna Convention on the Law of Treaties, May 22, 1964 U.N. Doc A/CONF.38/27 (1969), 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

129. Interpretation of American Declaration, *supra* note 119, para. 35.

130. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Rep. 1971, 16, 16-66.

and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.¹³¹

Emphasizing this point, the Court reiterates that "for the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter."¹³² Thus, it is the source of international obligations for all OAS member states, including those that have ratified the Convention.

B. CANONS OF INTERPRETATION

The provisions of the Vienna Convention on the Law of Treaties¹³³ are the starting point for interpreting the normative texts of the system. According to the Court, the Vienna Convention rules of treaty interpretation "may be deemed to state the relevant international law principles applicable to this subject."¹³⁴ They give primacy to the text in light of the object and purpose of the treaty.

In applying this rule, the Court has emphasized the unique character of human rights treaties.

[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 benefits 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.¹³⁵

131. Interpretation of the American Declaration, *supra* note 119, para. 43.

132. *Id.* at para. 45.

133. Vienna Convention, *supra* note 128.

134. Restrictions to the Death Penalty, *supra* note 35, para. 48.

135. Effect of Reservations, *supra*, note 25, para. 29; *see* Other Treaties, *supra* note 36, para. 24 (explaining further that the treaties are created for the benefit of individuals, not states themselves); Restrictions to Death Penalty, *supra* note 35, para. 50 (providing that the unique character of human rights instruments means that reservations made by a state to such a treaty must be interpreted by the supervisory organs in light of relevant principles of international law, not unilaterally by the reserving state). Furthermore, a reservation which would act to suspend any non-

The Convention is thus viewed as a multilateral legal instrument enabling States to make binding unilateral commitments not to violate human rights. It must 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."¹³⁶ Indeed, if there are rights or restrictions recognized differently in more than one applicable human rights treaty, the rule most favorable to the individual must be applied.¹³⁷

The Convention itself, in Article 29, sets forth restrictions on interpretation. These can be seen as requiring application of the most favorable norm, as well as incorporating the American Declaration of the Rights and Duties of Man. Article 29(c) opens up the possibility that the Court could articulate rights not expressly found in the Convention.¹³⁸

Restrictions on rights are to be interpreted narrowly. Article 29 provides that the Convention is not to be read to allow a state party to suppress the enjoyment or exercise of rights or to restrict them to a greater extent than is provided for in the Convention.¹³⁹ Moreover, Article 30 establishes limitations on the types of restrictions that can be established.¹⁴⁰

The Court's opinions frequently use other international court decisions and international human rights instruments to interpret and apply Inter-American norms. There are references to the European Convention on Human Rights,¹⁴¹ the International Covenant on Civil and Political Rights and other United Nations treaties,¹⁴² decisions of the European Human Rights Commission and Court,¹⁴³ and those of the International

derogable right is incompatible with the object and purpose of the Convention and thus prohibited. Restrictions to the Death Penalty, *supra*, note 34, para. 61.

136. Viviana Gallardo, *supra* note 28, para. 16.

137. Compulsory Membership, *supra* note 102, para. 46.

138. Convention, *supra* note 2, at 37. ["No provision of this Convention shall be interpreted as: . . . (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government . . . "] *Id.* Article 31, however, provides an express means of extending the list of guaranteed rights protected by the Inter-American system. *Id.* at art. 31.

139. Convention, *supra* note 2, art. 29.

140. Convention, *supra* note 2, art. 30.

141. See e.g. Compulsory Membership, *supra* note 102, para. 43-46; Right to Reply, *supra* note 42, para. 25 (explaining the principle by applying language from the European Court of Human Rights and its interpretation of the European Convention of Human Rights).

142. *Id.*; Proposed Amendments, *supra* note 32, paras 50-51.

143. Effect of Reservations, *supra* note 25, para. 29; Proposed Amendments, *supra*

Court of Justice¹⁴⁴ and the Permanent Court of International Justice.¹⁴⁵ Similar cross-referencing by global and regional human rights bodies could lead to a consistent body of human rights law; there is little evidence, however, of a trend in this direction. Indeed, the Inter-American Court has been using fewer references from outside the system in its recent opinions, as its own jurisprudence has expanded.

C. DUTIES OF STATES

The obligations of states parties to the Convention are to "respect" and "ensure" the rights guaranteed by it.¹⁴⁶ The Court has interpreted the scope of these terms, especially in regard to state failure to combat human rights violations committed by private entities. The Court has held that the obligation to "ensure" human rights requires that states parties to the Convention take measures to prevent violations by private parties.¹⁴⁷ In the *Velasquez Rodriguez* case, the Commission presented testimony and documentary evidence concerning disappearances in Honduras between 1981 and 1984.¹⁴⁸ It argued that the Armed Forces of Honduras committed those acts in partial reliance on government tolerance.¹⁴⁹ The Court held that the obligation to respect and ensure forms the basic foundation for the protection of rights under the Convention, and is key in assigning any responsibility to a State party for human rights violations.¹⁵⁰ A state becomes responsible for a public authority's

note 32, para. 56; The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986, Inter-American Court of Human Rights: Ser. A, Judgments and Opinions, No. 6, para 20; Compulsory Membership, *supra* note 102, para. 43-46, 69; Viviana Gallardo, *supra* note 28, paras. 26-27.

144. Other Treaties, *supra* note 36, para. 23; Effect of Reservations *supra* note 25, para. 30; Restrictions to Death Penalty, *supra* note 35, paras. 24, 32, 40, 44; Proposed Amendments, *supra* note 32, paras. 23, 37.

145. The Word "Laws", *supra* note 143, para. 23.

146. Convention, *supra* note 2, art. 1(1)

147. *Velasquez Rodriguez*, *supra* note 67; *see also* Compulsory Membership, *supra* note 100, para. 48 (noting that Article 13(3) of the Convention expressly prohibits private controls of freedom of expression expressly in Article 13(3) of the Convention).

148. *Velasquez Rodriguez*, *supra* note 67, para. 82.

149. *Id.*

150. *Id.* paras. 163-64.

acts or omissions which result in the impairment of human rights recognized under international law.¹⁵¹

While the obligation to respect entails the restriction of State power, the obligation to "guarantee" the rights recognized by the Convention means that states' parties have the duty to organize governmental structures wielding public power to ensure that the public enjoys its human rights.¹⁵² Thus, states must be proactive in protecting rights under the Convention and must investigate and punish violations.¹⁵³ Further, the Convention requires states to try to restore rights and to compensate for damages caused by human rights violations.¹⁵⁴

The Court noted that international law makes a State responsible for the acts and omissions of its agents done in their official capacity, even if outside their authority or in violation of internal law.¹⁵⁵ The agent's motivation or intent is irrelevant. It is a state's lack of due diligence to prevent a violation or to respond to it as the Convention requires that leads to international responsibilities for an act not directly imputable to the State.¹⁵⁶ What is decisive is whether the violation occurred with the support or the acquiescence of the government, or whether the state allowed the act to be carried out without taking measures to prevent it or to punish those responsible.¹⁵⁷ In addition, the government must ensure the victim adequate compensation for the victim.¹⁵⁸

The Court, like other organs of the OAS, has considered the importance of democratic regimes to the fulfillment of human rights.¹⁵⁹ In

151. *Id.* para. 164.

152. *Id.* para. 166.

153. *Id.*

154. *Id.* para. 170.

155. *Id.* at 173.

156. *Id.* paras. 172, 173.

157. *Id.* at para. 176. While the Court did not make a list of all measures necessary to prevent violations, it stated that they include all means of a legal, political, administrative and cultural nature that promote the safeguarding of human rights and ensure that violations are treated as illegal acts. *Id.* at para. 175 The duty to guarantee includes an obligation to investigate every situation involving a human rights violation, to punish the perpetrators, and restore the victims' full enjoyment of their rights. *Id.* The state becomes responsible under international law as having assisted in the violation of rights if the state neglects to seriously investigate the acts of private parties. *Id.* para. 176.

158. *Id.* para. 174.

159. The Commission and the OAS General Assembly have both called upon member states to work toward having free elections, universal suffrage and the secret ballot to develop a representative democracy. Inter-Am. C.H.R. 1238, para. 5 AG/Res.

the Compulsory Membership opinion, it regarded democratic institutions and the rights of individuals as basic values of society.¹⁶⁰ In another instance, it held that the meaning of "laws" in Article 30 of the Convention must be construed from the desire of American States to consolidate human rights "within the framework of democratic institutions." The system surrounding the Convention embraces representative democracy as its "determining factor."¹⁶¹ The Organization of American States stated this belief in its basic instrument, the OAS Charter.¹⁶² The Court also pointed out that the Convention includes political rights among those that cannot be suspended during periods of emergency.¹⁶³ It concluded that restrictions on human rights can only be imposed by means of normative acts "passed by a democratically elected legislature and promulgated by the Executive Branch."¹⁶⁴

D. INTERPRETATION OF SUBSTANTIVE RIGHTS

The Court has elaborated on the meaning of several of the rights guaranteed by the Declaration and Convention, among them the right to life, freedom of expression, the right to nationality, and freedom from discrimination. In regard to the right to life, the Court specifically has considered the death penalty, noting that the Convention restricts its usage and seeks to define narrowly the conditions under which it may be imposed.¹⁶⁵ On the issue of nationality, the Court has found that it

778 (XV-0/85) (1985); *see also* IACHR, Annual Report of the Inter-Am. C.H.R. 1985-86, OEA/ser.LV/II.68, doc. 8, rev. 1, at 191 (stating that having human rights recognized requires a functioning representative democracy).

160. Compulsory Membership, *supra* note 100, paras. 66.

161. The Word "Laws", *supra* note 143, para. 34.

162. *Id.*

163. *Id.*

164. *Id.* para. 35. In regard to a later Costa Rican request for an advisory opinion on draft legislation, Uruguay objected that the Court lacked jurisdiction because the word "laws" as used in Convention article 30 means only legal norms approved by the legislative branch and promulgated by the executive branch. The Court rejected the contention, noting that in the article 30 opinion, it was expressly stated that such terms as "laws" "law" and "legislative provisions" do not necessarily have a uniform meaning throughout the Convention, but must have their meaning specifically determined in each case. Further, article 30 "is a very special provision which proceeds on the assumption that certain restrictions to the enjoyment of rights and freedoms may only be applied in accordance with laws that are already enacted and in force." Draft Legislation, *supra* note 45 para. 17.

165. Restrictions to the Death Penalty, *supra* note 35, para. 57. The Court noted that a proposal to abolish the death penalty in Article 4 of the Convention had no

is generally accepted today as an inherent right of all human beings. Although traditionally a matter of domestic jurisdiction, the modern trend in international law has been to place some limits on States' power in that realm.¹⁶⁶ The demands imposed by the international system for the protection of human rights should inform the balance between the right to a nationality and the principle that conferral of nationality is within the domestic jurisdiction of the State. One such demand is the principle of nondiscrimination contained in Article 1(1).

According to the Court, any discrimination in the exercise of the rights guaranteed by the Convention is a treaty violation *per se*.¹⁶⁷ In attempting to define what constitutes discrimination, the Court has stated that "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."¹⁶⁸ In other words, 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" there is no discrimination.¹⁶⁹

The Court also has issued an opinion on freedom of the press and of expression, guaranteed by Article 13 of the Convention. In rejecting the compulsory licensing of journalists, the Court noted that the Convention's prohibition of both direct and indirect controls indicates the extremely high value placed on freedom of expression.¹⁷⁰ The Court found that the American Convention is designed to be more generous in this regard than the European Convention.¹⁷¹ In interpreting the limitations clause applicable to freedom of expression, the Court stated that restrictions imposed on freedom of expression require a com-

votes cast against it, although it failed to receive the requisite number of affirmative votes to be adopted. *Id.* para. 58.

166. Proposed Amendments, *supra* note 31, para. 33.

167. *Id.* para. 53.

168. *Id.* para. 57.

169. *Id.* Using this test, the Court unanimously found that proposed amendments to the naturalization laws of Costa Rica which would treat women differently from men were incompatible with the State's obligations under the Convention. *Id.*

170. Compulsory Membership, *supra* note 102, para. 54. The Court distinguished "extreme violations" from ordinary ones, stating that an extreme violation is one where governmental power is used expressly to impede the free circulation of information, ideas, opinions or news. *Id.*

171. *Id.* para. 45.

elling governmental interest for legality.¹⁷² Furthermore, the least burdensome alternative must be imposed; it must be proportionate and clearly tailored to the accomplishment of the legitimate governmental objective necessitating it.¹⁷³ Freedom of expression, the Court noted, is basic to a democratic society, which could not exist without freedom to debate and to dissent.¹⁷⁴

In general, the Court has utilized the Vienna Convention on the Law of Treaties, as well as the jurisprudence of the International Court of Justice and the European Commission and Court of Human Rights to aid in its interpretation of the system's normative instruments. Although the early Court decisions and opinions were far-reaching in upholding the object and purpose of the system's human rights guarantees, recently the Court has become somewhat more formalistic in its treatment of the applicable rights and procedures. As with other courts, this may reflect the different views of new judges on the Court.

VII. REPARATIONS

Some of the Court's most significant contributions to international human rights law has been in the area of remedies for victims of violations. Article 63(1) of the American Convention provides:

If the Court finds that there has been a violation of a right or freedom protected by this 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.¹⁷⁵

The Inter-American Court has declared this article to codify a rule of customary law that is one of the fundamental principles of international law.¹⁷⁶ The reparations obligation it contains is governed by interna-

172. *Id.* para. 46.

173. *Id.* para. 46.

174. *Id.* para. 69.

175. Convention, *supra* note 2, art. 63(1). The article 63(1) threshold for reparations is lower than in the European system, where the European Court may order measures beyond declaratory relief only when "necessary." European Convention, for the Protection of Human Rights and Fundamental Freedoms, *supra* note 2, art. 50. Grants of monetary damages are infrequent in the European system and the amounts are generally much lower than the amounts awarded thus far by the Inter-American Court. Of course, the human rights violations considered by the European Court are as a rule not as grave or as widespread as those brought before the American Court.

176. Velasquez Rodriguez, Compensatory Damages, Judgment of July 21, 1989

tional law in all its aspects, including its scope, characteristics, and beneficiaries, and may not be modified or suspended by a state through invocation of its domestic law.¹⁷⁷

The Court has awarded compensation in the four cases thus far in which it has found a violation of the Convention.¹⁷⁸ In so doing, it has detailed the factors relevant to damage awards and other reparations. It has created innovative mechanisms for ensuring compliance with the awards, while conservatively approaching the issue of granting costs and attorneys fees.

In general, Article 63 distinguishes between future conduct, ensuring renewed enjoyment of the right or freedom that was violated and consequences of the past, reparations and fair compensation. The Court holds that it is principle of international law, "which jurisprudence has considered 'even a general concept of law,' that every violation of an international obligation which results in harm creates a duty to make adequate reparation."¹⁷⁹ Compensation is the most usual way of doing so. Reparation consists of full restitution, *restitutio in integrum* "which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."¹⁸⁰

All of the cases considered by the Court involved actual or presumed loss of life, for which reparation must be in the form of pecuniary compensation.¹⁸¹ In each case, the Court faced the difficult question of

(art. 63(1) Am. Convention on Human Rts.); Inter-Am. Ct. H.R., Ser. C: No. 7 para. 25; *Godinez Cruz Case*, Compensatory Damages, Judgment of July 21, 1989 (art. 63(1) American Convention on Human Rights) [hereinafter *Godinez Cruz Compensation*], Inter-American Court of Human Rights, Ser. C: No. 8, para. 23 [hereinafter *Velasquez Rodriguez Compensation*]. As evidence of the customary norm, the Court cites opinions of other tribunals: *Factory at Chorzow*, 1927 P.C.I.J. (ser. A) No. 9, at 21; *Factory at Chorzow*, P.C.I.J. (ser. A) No. 17 at 29; *Reparation for Injuries Suffered in the Service of the United Nations*, 1949, I.C.J. 184 (advisory opinion).

177. *Aloeboetoe, et al. Case*, Reparations (art. 63(1) of the American Convention on Human Rights), Judgment of September 10, 1993, para. 44 [hereinafter *Aloeboetoe*].

178. *Velasquez Rodriguez Compensation*, *supra* note 176; *Godinez Cruz Compensation*, *supra* note 176; *Aloeboetoe*, *supra* note 177; *Gangaram Panday*, *supra* note 92.

179. *Velasquez Rodriguez Compensation*, *supra* note 176, para. 25.

180. *Id.* para. 26.

181. In *Gangaram Panday*, the Court did not find the government responsible for the loss of life, only for illegal detention of the victim. *Gangaram Panday*, *supra* note 92 at paras. 68-71. It thus awarded nominal damages not including lost earnings or other indirect damages, nor costs. *Id.* The victim's wife and any children were to be

how direct or remote are the consequences that will be compensated. The Court has said that requiring complete restoration by a perpetrator for wrongs committed is impossible, since the damages are immeasurable.¹⁸² Therefore, there must be a point at which harm becomes too remote from the action for compensation to be appropriate. The Court's language on this point is not very useful to those seeking guidance for future cases because the Court broadly calls for reparation for the immediate effects of wrongs, but "only to the degree that has been legally recognized."¹⁸³ In other words, the law says pay when the law says pay. The application of this statement in the decisions is more helpful in assessing who are the beneficiaries and to what are they entitled.

The Court faced difficult issues of determining beneficiaries in the *Aloeboetoe* case.¹⁸⁴ The nature of reparations due was the only issue before the Court.¹⁸⁵ The Commission asked the Court to require that Suriname adequately pay reparation to the victims' next of kin.¹⁸⁶ In its brief, the Commission claimed damages on behalf of the minor children and the adult dependents of the persons killed.¹⁸⁷ The Commission asked the Court to consider the family structure of the Saramaca Maroons, the tribe to which the victims belonged, in determining which persons were entitled to compensation. The tribe is matriarchal and polygamous, entrusting the care of family members to a communal group organized along maternal lines. Most marriages are not registered because of a lack of state registry offices in the interior of the country. Thus, in the Commission's view, the claimant's degree of financial dependence upon the deceased should govern the measure of compensatory rights arising from direct, personal monetary damages.¹⁸⁸ In addition, moral damages for the psychological harm to relatives and for the suf-

paid U.S.\$10,000 or its equivalent in Dutch florins within six months of the date of the judgment. *Id.* The Court's treatment of this case was generally out of line with its precedents. *Id.*

182. *Aloeboetoe*, *supra* note 177, at 48.

183. *Id.* para. 49.

184. *Id.*

185. *Aloeboetoe*, *supra* note 177, at paras. 5-6. The government of Suriname conceded the merits at the beginning of the Court's proceedings. *Id.* The case involved an attack by Surinamese soldiers on a group of 20 males of the Saramaca Tribe of Maroons, also referred to as Bushnegros, seven of whom died.

186. *Id.* para. 9. Other measures of reparation were requested and are discussed *infra*.

187. *Id.* para. 16.

188. *Id.* para. 17.

fering of the villagers and of the tribe should be compensated, and costs and expenses of over \$50,000 should be paid.

The complex social structure of the Saramacas led the Court to appoint its own experts to obtain information on the points at issue.¹⁸⁹ It also asked the Commission to supply it with a list of names of the persons it contended were the children and spouses of the victims. The Commission complied, adding the names of other dependents.

The Court held that the victims themselves were entitled to compensation for their suffering up to the time of their death as well as for their deaths; this right to compensation "is transmitted to their heirs by succession."¹⁹⁰ Claimants who are not successors must provide specific proof justifying their right to damages. Perhaps understating the problem, the Court noted that "in the instant case, there is some difference of opinion between the parties as to who the successor of the victims are."¹⁹¹ The Commission urged application of Saramaca tribal customs, while Suriname asked that its civil law be used. The Court referred to its general principle that international law applies to all aspects of reparations, including the determination of beneficiaries. Perhaps concerned about the resulting need to create international family law, the Court found it useful to refer to the national family law in force, "for certain aspects of it may be relevant."¹⁹² On this point, the Court found that Suriname recognized the existence of Saramaca customary law and that Surinamese family law is not effective over the tribe.¹⁹³ The Commission's brief did not help because the Court found it impossible to determine what legal norm the Commission applied for the purpose of determining successors. "It would appear that the Commission simply took a pragmatic approach."¹⁹⁴

The Court concluded that under international law there is no conventional or customary rule of personal succession; therefore, it must apply general principles of law pursuant to Article 38(1)(c) of the Statute of the International Court of Justice.¹⁹⁵ Doing so, the Court found

189. The Court also sent its Deputy Secretary to Suriname to gather information on the economic, financial, and banking situation of the country, presumably to assist it in setting the conditions and amounts of the award. Aloeboetoe, *supra* note 177, para. 40.

190. Aloeboetoe, *supra* note 177, para. 54.

191. *Id.* para. 55.

192. *Id.* para. 56.

193. *Id.* para. 58.

194. *Id.* para. 61.

195. Convention, *supra* note 2, at 25.

[i]t is a norm common to most legal systems that a person's successors are his or her children. It is also generally accepted that the spouse has a share in the assets acquired during a marriage; some legal systems also grant the spouse inheritance rights along with the children. If there is no spouse or children, private common law recognizes the ascendants as heirs.¹⁹⁶

The terms used must be interpreted according to local law, in this case Saramaca custom "to the degree that it does not contradict the American Convention." Applying the Convention, the Court found that the term "ascendants" must make no distinction on the basis of gender, even if this is contrary to Saramaca custom; in notable contrast and without discussion, the Court implicitly found no bar to polygamy, as multiple spouses were awarded damages by the decision. In regard to non-successors, the Court distinguished between actual and moral damages. For the former, the Court held that there must be proof of regular payments actually made by a victim to the claimant, with some basis for assuming that they would continue, and representing a benefit the claimant could not have been able to obtain on his or her own.¹⁹⁷ The Court found that the Commission had not offered sufficient proof of these elements for the twenty-five persons it claimed were dependents of the victims.

Moral damages to non-successors must also be proved. In this case, parents who could not be deemed successors because of the existence of spouse or children of the victim were found entitled to compensation: "... in this particular case, it can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their child." Beyond this, the Court rejected moral damages for the tribe. It found that the Commission had not proved that the attack was racially motivated, nor that there was a unique social structure of the Saramacas that made the community more susceptible than others to suffering due to harm to one of its members.¹⁹⁸

196. Aloboetoe, *supra* note 177, para. 62.

197. *Id.* para. 68. In addition, while successors are presumed to have suffered damage and be entitled to compensation for sufferings of the victim, third parties to not benefit from any presumptions, but have the burden of proof that they are dependents who are entitled to compensation.

198. *Id.* paras. 82-84. The Commission presented a third argument for compensating the tribe, based on territorial rights violated by the army. The Court rejected this as well.

In general, the Court's decision on beneficiaries is among the most subjective of the opinions it has issued, although there are references to the Convention and to general principles of law. The tenor of the discussion is somewhat understandable, given the problems of a near complete absence of international law on the question and the impossibility of reconciling tribal practices with general family law throughout the hemisphere. Viewed one way, the Court could be balancing uniformity and diversity, as it extends some benefits to those not commonly treated as successors while rejecting the interests of the tribe as a whole. The latter position conservatively fails to acknowledge the uniqueness of tribal societies, perhaps because the group in question is not "indigenous," but composed of the descendants of escaped African slaves.¹⁹⁹ Another balance could be seen in the Court's treatment of gender equality and cultural diversity, leading to its acceptance of polygamy and its rejection of matriarchy. Alternatively, the "balance" of these two practices may simply derive from how the issues resonate among the almost entirely male court.²⁰⁰

On the type of reparations and compensation that may be awarded, the Court first presented criteria in the Velasquez Rodriguez case, calling for them to be applied flexibly to "arrive at a prudent estimate of the damages, given the circumstances of each case."²⁰¹ Moral damages are to be an indemnification based upon the principles of equity.

In general, the compensation to be paid must be in an amount sufficient to remedy all the consequences of the violations that took place.²⁰² The desired aim is full restitution for the injury suffered but, where this is not possible, fair compensation should be awarded as a substitute.²⁰³ Actual damages relate to lost earnings, the amount that

199. *Id.* para. 56.

200. *Id.* para. 97. It may also be noted that in the distribution of compensation, the Court allocates on the basis of "fairness" one-third of the material damages to the wife or wives, and two-thirds to the children; moral damages are to go one-half to the children and one-quarter each to the wives and parents. *Id.*

201. Velasquez Rodriguez Compensation, *supra* note 176, para. 40 et seq.

202. Aloboetoe, *supra* note 177, para. 47.

203. Godinez Cruz Case, Interpretation of the Compensatory Damages Judgment, Judgment of August 17, 1990 (art. 67 American Convention on Human Rights) [hereinafter Godinez Interpretation], Inter-Am. Ct. H. R., ser.C: No. 10 (1992), para. 27. The same request was submitted and opinion given in the Velasquez Rodriguez Case. See Velasquez Rodriguez Case, Interpretation of the Compensatory Damages Judgment, Judgment of August 17, 1990 (art. 67 American Convention on Human Rights) [hereinafter Velasquez Interpretation], Inter-American Court of Human Rights, Ser. C: Decisions and Judgments, No. 9 (1992).

the victims would have earned throughout their working life had they not been killed, based on the economic activities pursued by each of them²⁰⁴ and on their probable life span.²⁰⁵ In *Aloeboetoe*, the Court calculated the annual income of each victim in Surinamese florins and then converted it into dollars at the rate of exchange in effect on the free market.

The principles of equity on which moral damages are based include the amount of suffering by the victim and the egregiousness of conduct by the government. In *Velasquez Rodriguez* and *Godinez Cruz*, the Court considered the psychological impact suffered by the families because of the violations.²⁰⁶ In the *Aloeboetoe* case, the victims were found to have suffered moral damages due to abuse by an armed band that deprived them of their liberty and later killed them:

The beatings received, the pain of knowing they were condemned to die for no reason whatsoever, the torture of having to dig their own graves are all part of the moral damages suffered by the victims. In addition, the person who did not die outright had to bear the pain of his wounds being infested by maggots and of seeing the bodies of his companions be devoured by vultures.²⁰⁷

As the Court noted, anybody subjected to the aggression and abuse described will experience moral suffering. With the dual focus on suffering of the victim and wrongfulness of government conduct, it seems that moral damages may partially substitute for or include elements of punitive damages.²⁰⁸

Other compensation includes expenses incurred by the families who search for the disappeared and an amount to enable minor children to continue their education.²⁰⁹ In the *Aloeboetoe* case, this compelled the

204. *Velasquez Compensation*, *supra* note 176, para. 49; *Godinez Cruz Compensation*, *supra* note 176, paras. 47 and 50.

205. *Godinez Cruz Interpretation*, *supra* note 203, para. 29.

206. See *Velasquez Compensation*, *supra* note 173, para. 50 (stating that the court focused on "... the dramatic characteristics of the involuntary disappearance of persons").

207. *Id.* para. 51.

208. *Id.* para. 38. In *Velasquez* the attorneys asked for an award of punitive damages as part of the indemnity, because of the seriousness of the violations. *Id.* The Court found that the term "fair compensation" refers to reparation of the injured party and that the concept of punitive damages "is not applicable in international law at this time." *Id.*

209. *Velasquez Rodriguez*, *supra* note 68, paras. 40-42. Such amounts must be pleaded; in *Velasquez* they were omitted from the pleadings and proofs and denied by

Court to order as part of the compensation that the government reopen by 1994 the school in the village and staff it with teaching and administrative personnel. Further, the medical dispensary was to be made operational and reopen at the same time.

Some of the Court's most innovative decisions have come in regard to the practical ordering of compensation. In *Velasquez Rodriguez and Godinez Cruz*, the Court ordered the payment of the tax free sum either in a single payment or in six monthly installments. In the latter event, interest at current rates in Honduras were to be added. One-quarter of the Velasquez award was designated for the spouse, with the remaining three-fourths distributed to the children through a trust fund to be created in Honduras "under the most favorable conditions permitted by Honduran banking practice."²¹⁰ A similar award was made in the *Godinez* case.

The Commission later asked the Court to interpret its judgment because of uncertainties in how the compensation was to be paid.²¹¹ The problem arose because of inflation in Honduras, causing the trust fund established for *Godinez*' daughter to decline in purchasing power. The Court found that *restitutio in integrum* is linked to the possibility of maintaining the real value of the damages stable over a relatively long period of time, where the damages are to be paid in installments over time.²¹² Even where the amount is to be paid in a single payment or within a short time, the notion of preserving the real value of the amount fixed is implied. Thus, any act or measure by a trustee appointed to handle the compensation must ensure that the amount assigned maintains its purchasing power and generates sufficient earnings or dividends to increase it. Without using the term, the Court in effect imposes fiduciary obligations on the trustee.²¹³ In addition, the government had to bear the loss caused by a delay in paying the damages, where the Honduran currency had lost value between the date it should have paid the judgment and the date on which it actually paid.²¹⁴

In *Aloeboetoe*, the Court ordered the government to create two Surinamese trust funds in dollars for the beneficiaries, under the most favorable conditions consistent with banking practice. One fund is for

the Court as a result. *Id.*

210. *Id.* para. 58.

211. *Godinez Cruz* Interpretation, *supra* note 176.

212. *Id.* para. 29.

213. *Id.* para. 31.

214. *Id.* para. 42.

the benefit of the minor children, the other for the adult beneficiaries. A foundation was created on order by the Court with trustees named by the Court under conditions set by the Court. The Court established certain limits on the amount that may be withdrawn from the fund semi-annually by each of the beneficiaries. At a plenary meeting, the members of the Foundation, with the collaboration of the Executive Secretary of the Court, had to define their organization, statutes and by-laws, as well as the operational structure of the trust funds. The Court receives all documents of the Foundation. The government of Suriname was ordered to pay \$4,000 for the operating expenses of the Foundation and to ensure that the Foundation operations are not subject to new restrictions or taxes.

With regard to non-monetary reparations, the Court has issued few orders. The wife of Velasquez asked the Court for a dozen measures of non-monetary reparations, including an end to forced disappearances in Honduras, an investigation of 150 such cases, a complete and truthful public report on what happened, trial and punishment of those responsible and other guarantees.²¹⁵ Many of these the Court found inherent in the judgment on the merits.²¹⁶ In Aloeboetoe, the Commission asked the Court to order an apology be issued to the Saramaca tribe, and that the apology be given in person to the chief of the tribe. The reopening of the school and clinic can be considered within this category, although in the body of the case, the Court describes it in terms of compensation.

Finally, with regard to attorneys fees, the Court has shown extreme hesitation. Indeed, it has rejected every request submitted thus far. In *Velasquez Rodriguez* and *Godinez Cruz*, the Court refused to award attorneys fees because they had not been requested in the initial pleadings.²¹⁷ In Aloeboetoe, the Court refused to award fees on the surprising basis that when the attorney was obtained the victims had already filed their case at the Commission and therefore did not need a lawyer. The attorney was characterized by the Court as the legal advisor of the Commission rather than the representative of the victims. This being the case, the Commission could not ask that fees be paid to someone it contracted instead of using its own staff. The decision is odd because attorneys for petitioners have generally been referred to as advisors to the Commission in prior cases, due to the lack of standing for

215. Velasquez Compensation, *supra* note 176, para. 7.

216. *Id.* para. 34.

217. Velasquez Rodriguez, *supra* note 68, at para. 193.

individuals before the Court.²¹⁸ The denial of attorneys fees on this basis may have a very dissuasive effect on representatives of applicants.

CONCLUSION

During its first fifteen years, the Inter-American Court has made significant contributions to the interpretation and application of human rights norms in the western hemisphere. In some areas, its decisions have set precedents for the entire corpus of international human rights law, such as its opinions detailing the obligations of states and reparations for violations of human rights. The Court's early decisions were particularly thoughtful, showing considerable concern for the object and purpose of the system, that is, the protection of human rights and fundamental freedoms. The practice of accepting *amicus curiae* briefs provides an essential element in this regard.

Recently, the majority of the Court has retreated from some of the earlier decisions, while the entire Court has emphasized procedural regularity. The danger is that form will overtake function and victims will be forgotten in the process. The Court, however, has expressed itself aware of this problem and for now seems to be insisting rightly that OAS institutions and parties adhere to the rules of procedure set forth in the basic texts. The situation is different with regard to the burden and standard of proof demanded of those alleging human rights violations. The result in *Gangaram Panday* is alarming, because the burden of proof it imposes suggests states may escape condemnation by means of silence and concealment, in spite of the holding of *Velasquez*.

The denial of attorneys fees and costs to litigants is another matter of some concern. The Commission is overworked and lacks the funding to hire more staff; there is a risk that cases cannot be fully prepared with the resources available to the Commission. It is therefore very important that petitioners be able to obtain legal representation. When the case is meritorious, appropriate compensation should include the amount spent in litigating the claim, the more so as the state had the possibility to settle the claim during the period when domestic remedies were being exhausted.

There will no doubt be further evolution in the views of the Court as its membership changes through new elections. Given the importance of

218. See, e.g. *Velasquez Compensation*, *supra* note 176, at para. 12 (providing insight of Claudio Grossman, Advisor, "in representation of the Inter-American Commission on Human Rights").

the human rights issues in the hemisphere, hopefully all OAS member states will give serious attention to the quality of persons nominated and elected judge of the Court. The Court's influence can be considerable and its decisions far-reaching. In the end, both will help determine the degree of success of the Inter-American human rights system.