

## The First Years of the Inter-American Court of Human Rights

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In the late 1970's, while teaching at the University of Texas Law School in Austin, I was closely following the drafting process of the American Convention on Human Rights, its adoption and subsequent entry into force in 1978.<sup>1</sup> I was drawn to the American Convention because my research on the European Convention of Human Rights and its impact had convinced me that regional human rights systems were more likely to produce better human rights results than the efforts of the United Nations.

That is why I also regularly discussed the human rights activities of the Organization of American States (OAS) in the human rights classes I taught at the State University of New York (Buffalo) Law School, and later at the University of Texas Law School (Austin). Considering the US policy of ratifying only very few human rights treaties, I frequently made the point to my students that the United States would probably not ratify the proposed American Convention in the very near future, if ever. As a result, no US national would ever sit on the new Inter-American Court of Human Rights because it was most un-

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<sup>1</sup> See Buergenthal, T., The American and European Conventions on Human Rights, 30 American Univ. Law Rev. 155, 1980. See also Fox, D., The American Convention on Human Rights and Prospects for United States Ratification, 3 Human Rights (ABA) 242, 1973.

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likely that another state party would nominate a US national for a seat on the Court.

Then, one day, the phone rang in my office at the University of Texas. The caller identified himself as the Costa Rican ambassador to the OAS. He explained that his Government wanted to nominate me to the new Inter-American Court of Human Rights. He was therefore instructed to inquire whether I would accept the nomination.

When I heard these words, I was sure that the caller was not who he said he was, but a student in one of my classes making fun of my repeated comments that no US national would ever sit on the Court. But when the caller turned out to be who he said he was, I enthusiastically and with profound appreciation accepted Costa Rica's invitation. I was then duly elected, together with six other individuals, to serve as one of the first seven judges on the newly established Inter-American Court of Human Rights for the maximum six-year term from 1979 to 1985.<sup>2</sup> I was re-elected for another full term and served on the Court until 1991.

The Court was formally inaugurated on September 3, 1979 in San José, Costa Rica. Participating in that event, in addition to the President of Costa Rica, were many dignitaries, among them, representatives of the OAS, the United Nations, and the European Court of Human Rights. The Court's newly elected President, Judge Rodolfo Piza of Costa Rica, also spoke at the event.

The Court's initial tasks consisted of the preparation of its draft Statute as well as its proposed budget. Both had to be submitted to the OAS General Assembly for approval. Also, to be drafted were our Rules of Procedure. They did not require Assembly approval to enter into force. Finally, we had to prepare a draft headquarters agreement to be negotiated with the Government of Costa Rica.

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<sup>2</sup> The following individuals were elected at that time: Thomas Buergenthal (USA), Máximo Cisneros Sánchez (Perú), Huntley Eugene Munroe (Jamaica), César Ordóñez Quintero (Colombia), Rodolfo Piza Escalante (Costa Rica), Carlos Roberto Reina Idiaquez (Honduras), and M. Rafael Urquia (El Salvador). Mr. Urquia never accepted his election. Pedro Nikken (Venezuela) was elected a few months later to replace Mr. Urquia.

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Initially, our professional staff consisted of Mr. Manuel Ventura (Costa Rica). When Mr. Charles Moyer (U.S.A.), Deputy Secretary of the Inter-American Commission on Human of Human Rights, became the Chief Clerk of the Court, Mr. Ventura became his Deputy. Many years later Mr. Ventura was elected a judge of the Court. The draft Statute, which the Court submitted to the General Assembly meeting at La Paz, Bolivia, in October 1979, was approved with the exception of a provision that sought to transform the Court into a full-time rather than a part-time judicial institution. That this provision was not adopted was to be expected; not so, however, the failure of the Assembly to approve our first budget. The vote on the budget came in short of the one vote needed for its approval by the required two-thirds vote majority. This result was due to the allegedly unintended failure of one delegation to cast a vote because, as it later explained, its representative in the chair had fallen asleep at the critical moment of the vote. In due course, Costa Rica helped the Court to overcome the temporary consequences of this problem until its budget was approved at the next session of the Assembly.

The negotiations with Costa Rica relating to the headquarters agreement were concluded in due course and without any complications. One of its provisions, in addition to those usually included in such documents, was prompted by the felt need, given the authoritarian regimes in power in the Americas at the time, to ensure that the judges would continue to enjoy full diplomatic protection even if they incurred the displeasure of their own governments. To achieve this result, Costa Rica agreed to the inclusion in the headquarters agreement of provision granting a Costa Rican diplomatic passport to a judge of the Court if the country of his or her nationality failed to do so. To my knowledge, this provision has to date not had to be invoked by any judges of the Court.

During its first two terms, only two contentious cases reached the Court. The first contentious case —assuming it was, in fact, a contentious case and not a request for an advisory opinion or neither of the two— concerned Viviana Gallardo. She was a young Costa Rican woman who, together with some other individuals, had been arrested by the police following a shootout in which one policeman was killed.

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While being held in a police station, Viviana Gallardo was killed by an off-duty policeman who was a friend of the dead policeman. This murder shocked Costa Rica, prompting its President to submit the case directly to the Court, thereby skipping the prior exhaustion of the country's domestic remedies requirement, and without first referring the case to the Commission.

In ruling on this case, the Court held that while Costa Rica was free to waive the exhaustion of domestic remedies, this was not true of the proceedings before the Commission. To allow such a waiver, the Court concluded, would deprive individuals of their Convention right to manage their cases before the Commission on an equal footing with the States Parties. The Court therefore decided that the case was inadmissible and referred it to the Commission, which took no further action because the family of Viviana Gallardo did not pursue the matter. So much for the Court's first contentious case, assuming it was indeed such a case.<sup>3</sup>

It took six years, that is until 1985 and thus the end of the Court's first term, for a second case to reach the Court. It started as a contentious case before the Commission and ended up in the Court as an advisory opinion request by Costa Rica. The case concerned Stephen Schmidt, a US national who was working as a journalist in Costa Rica, writing both for *La Nación*, Costa Rica's largest daily newspaper, and *The Tico Times*, an English-language weekly newspaper. Mr. Schmidt decided to challenge the provision of Costa Rica's Journalism Law that severely limited the rights of foreign nationals to work as journalists for Costa Rican newspapers. Convicted by Costa Rican courts for violating that law, Schmidt appealed to the Commission, which rejected his claim by a vote of 6 to 1, and refused to refer the case to the Court.<sup>4</sup>

Thus ended the contentious proceedings of the Schmidt Case before the Commission. It was, however, eventually revived as an advisory opinion request filed Costa Rica with the Court. This rather curious course of events was brought about

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<sup>3</sup> In the Matter of Viviana Gallardo, Inter-Am. Ct. H.R., No. G101/81 (1981), 20 ILM 1424, 1981.

<sup>4</sup> Case 9178, Inter-Am. Comm. H.R., Resolution No. 17/84.

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by the Inter-American Press Association. It challenged the President of Costa Rica to test the Commission's ruling in the Court, after he had proudly boasted that the Commission had vindicated Costa Rica's position that its Journalism Law did not violate the Convention. The President agreed and referred the case as an advisory opinion request to the Court, which unanimously ruled that the Costa Rican law violated the Convention.<sup>5</sup> In reliance on this advisory opinion, the constitutional panel of Costa Rica's Supreme Court, in due course, annulled the relevant provision of its Journalism Law.

The Schmidt Case also provided the Court with an opportunity to criticize the Commission's failure to refer the case to the Court as the contentious case it was when it was submitted to the Commission. Noting that although the Convention does not specify what cases should be referred by the Commission to the Court, it declared that it was "implicit in the functions that the Convention assigns to the Commission and to the Court that certain cases should be referred to the Court". In its view, the Schmidt Case was clearly such a case.<sup>6</sup> The Court's remonstrations had the desired effect. A year later, the Commission referred three cases to the Court. Popularly known as the Honduran Disappearance Cases,<sup>7</sup> these cases dealt with disappearance claims filed against the Government of Honduras.

In the first two of these cases —Velázquez Rodríguez Case and Godínez Cruz Case— the Court found the Government of Honduras responsible for the disappearance of the named individuals. These findings were based on a legal theory, developed by the Court, that consisted of three steps: first, the Commission had to demonstrate the existence of a practice of disappearances in Honduras at the time of the disappearance in question; second, it had to show that the individuals disappearing had similar backgrounds or engaged in similar activities as those people who were disappearing; third, at that point, the burden of proof

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<sup>5</sup> Schmidt Case, Inter-Am. Court H.R, Advisory Opinion OC-5/85 (1985).

<sup>6</sup> *Supra* note 5, at 25.

<sup>7</sup> Velázquez Rodríguez Case, Judgment 1988; Godínez Cruz Case, Judgment 1989; Fairén Garbí and Solís Corrales Case, Judgment 1989.

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shifted to Honduras to prove that it was not responsible for the disappearance in question. Honduras was not able to sustain that burden in the first two cases. It was successful, however, in the Fairén Garbi and Solís Corrales Case. It concerned two young Costa Ricans traveling to Mexico allegedly to visit a relative. Based on the evidence before the Court, these individuals did not resemble the group of people who were disappearing in Honduras. They also did not have any connections to Honduras.

These Honduran Disappearance Cases occupied the Court beyond its first six-year term. That was due to the fact that after finding Honduras responsible for the disappearances, it had to decide on the applicable measure of damages; on the rights of the next of kin; and on the partial failure of Honduras to fully comply with the damages assessed against it by the Court. As a matter of fact, it was not until Judge Carlos Roberto Reina, who had served as the Court's second President after Judge Piza, became President of Honduras and ordered it to comply fully with the damages assessed against it, that Honduras finally complied.

The Honduran Disappearance Cases helped to establish the Court's international reputation. These cases have been cited by the European Court of Human Rights, and various other international and regional human rights bodies, as well as by some domestic courts. They have also been extensively commented on in international law and human rights journals.

In contrast to its very meager contentious case docket during its early years, the Court adopted a good number of advisory opinions during that time.<sup>8</sup> Although these advisory opinions dealt with some important legal issues and demonstrated the Court's broad knowledge of international law and international human rights law, they attracted considerably less attention than the Honduran Disappearance Cases. That is not really surprising considering their subject matter.

Only the Court's advisory opinion in the Schmidt Case came to be widely known and discussed, particularly in the Americas,

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<sup>8</sup> Buergethal, T., *The Advisory Practice of the Inter-American Court of Human Rights*, 79 *Am. J. Int'l L.* 1, 1985.

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because the decision proved to be of great interest to the news media of some of countries in the region, where similar journalism laws were in force.

Another important advisory opinion adopted by the Court during its early years was the Advisory Opinion on Restrictions to the Death Penalty.<sup>9</sup> It was filed by the Commission seeking an interpretation of Article 4 of the Convention, which deals with the right to life, and Guatemala's reservation to that article. Here Guatemala argued that its reservation to Article 4 prevented the application of that provision to the executions taking place in Guatemala following trials lacking basic due process guarantees. To obtain a ruling from the Court on the effect of the reservation in a contentious case pending before it, the Commission had to file the instant advisory opinion request because Guatemala had not, at the time, accepted the Court's contentious jurisdiction.

In the oral hearings before the Court on that advisory opinion request, Guatemala first challenged the Court's jurisdiction to deal with the request on the ground that the related contentious case was pending before the Commission. When the Court rejected that argument and ordered Guatemala to address the merits of the advisory opinion request, the Guatemalan representative formally declared that, since the Court had rejected Guatemala's argument based on its reservation, he was authorized to formally declare that Guatemala would henceforth stop such executions.

Guatemala's action not to engage in further executions has always had a special meaning for those of us who sat as judges in this case, and not only because the executions did in fact stop, but for another reason. It had to do with a visit of Pope John Paul II to Costa Rica. During that visit, which took place before the Guatemalan case reached the Court, the Pope granted us judges a special audience. When, during that audience, the Pope asked us about the situation of human rights in the region, he was told, *inter alia*, of the executions taking place in Guatemala. Knowing

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<sup>9</sup> Restrictions to the Death Penalty, Advisory Opinion OC-3/83, Inter-Am. Court HR, Series A. Judgments and Opinions, 1983. See also Moyer, C. and Padilla, D., Executions in Guatemala as Decreed by Courts of Special Jurisdiction in 1982-83:A Case Study, 6 Human Rights Quarterly 507, 1984.

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that the Pope was planning to travel to Guatemala from Costa Rica, we expressed the hope that he might raise this matter with the Guatemalan government. To our great disappointment, the executions continued after the Pope's visit to that country. But when, much later, our ruling in the case put an end to the executions, we proudly noted that the Court had been able to achieve this important result while the Pope apparently failed to do so. Of course, we never found out whether the Pope had in fact raised the issue of the executions with the government of Guatemala.

Not long after the Court was established, we decided to establish close relations with the European Court of Human Rights. To that end, we began an exchange of visits of European Court judges to Costa Rica, and return visits by us to the European Court in Strasbourg. These visits were particularly important for us since there was much for us to learn from the European Court's extensive prior experience.

I remember one such visit to Strasbourg particularly well. We were sitting in on a hearing of the European Court at which it had to decide whether the practice of allowing teachers to spank school children who misbehaved in class violated the European Convention of Human Rights. As that argument continued, one of my colleagues turned to me and whispered: "When a case on this subject comes to us, we will know that most of our region's human rights problems will have been solved".

Of the many fond memories I have of my time as a judge of the Inter-American Court of Human Rights, one stands out: the cordial relations that existed among us judges. There were times, of course, when we disagreed regarding the proper outcome of a case or some language in a draft opinion, but I don't remember one instance in which such a disagreement gave rise to an intemperate outburst or some insulting remark. I must admit that, coming from an academic environment where faculty meetings tend, at time, to become rather heated, I cannot think of a comparable instance during our deliberations at the Court.

Altogether, I look back at my 12 years at the Court for the wonderful learning experience it was, for the very special individuals I had the pleasure of working with and, above all, for ena-

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bling us to help provide some victims of human right violations, or their next of kin, the justice which had been denied to them.

### ADDENDUM THE ESTABLISHMENT OF THE INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS

Beginning with an informal preliminary meeting of the newly elected judges, which took place at the OAS in Washington, D.C., before the Court's formal inauguration in Costa Rica, the judges reflected on the need for a non-governmental center or institute to promote the work of the Court and Commission through teaching, research and advocacy of human rights in the hemisphere, and to engage in fundraising in support of these activities. None of these activities the Court could engage in, but they were obviously needed at a time when the mere mention of "human rights" could have negative consequences in some of our countries in the region.

To explore this matter further, Judge Carlos Roberto Reina and I were designated to pursue the objective of establishing such an entity as soon as the Court was formally inaugurated in San José. Within a few months of its inauguration, and following a recommendation of the Reina/Buergenthal committee, the Court convened a meeting in San José of leading human rights experts from the region and from other parts of the world to discuss the advisability and feasibility of the establishment of such a human rights institute, as well as its functions and relationship to the Court and Commission.

Following the experts' strong support for such an institute, the Court and the Government of Costa Rica concluded a treaty that established the Inter-American Institute of Human Rights as a non-governmental, non-political academic center for the promotion of human rights with its seat in San José, Costa Rica.

One of the strongest supporters of this treaty on Costa Rica's side of the negotiations was Judge Elizabeth Odio, at the time Vice President and Minister of Justice of Costa Rica. It was understood that all members of the Court and Commission would

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serve on the Institute's board. To the Court's regret, the Commission informed the Court that it did not wish to be formally affiliated with the Institute.

At the first meeting of the Institute's Board, I was elected its President. I served in this capacity until 1991, when my second term on the Court came to an end. At that point, I was elected to serve as the Institute's Honorary President. Once the Institute had been formally established, Sonia Picado, later Judge Picado, became the Executive Director of the Institute and, subsequently, also its President. More than anyone else, Sonia Picado deserves most of the credit for as the growth of the Institute and for enabling it to become America's most important non-governmental academic human rights center.