

INTERNATIONAL LAW AND THE PROTECTION OF HUMAN
RIGHTS IN THE INTER-AMERICAN SYSTEM:
RETHINKING NATIONAL SOVEREIGNTY
IN AN AGE OF REGIONAL INTEGRATION

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SUMMARY: I. *Sovereignty versus International Jurisdiction*. II. *The normative status of decisions issued by the current institutional human rights mechanisms within the organization of American States*.

In attempting to assess the effectiveness of an intergovernmental human rights mechanism one could approach the subject from a number of different angles. First, from a practical point of view, for example, one could ask how many lives have been saved, how many prisoners and detainees have been released from detention and how many individuals have been saved from torture due to the timely intervention of the mechanism in question. Second, a more theoretical, approach could ask what the mechanism has contributed to the evolving “culture of human rights” in the world. What new rights have been added to the growing number of rights protected by the international community? What new international instruments have been adopted with the assistance of this mechanism? How has this mechanism served to increase an awareness of human rights among individuals and groups by means of educational and promotional activities? And third, one could ask what kind of law this international human rights mechanism has created? This legalistic approach could look at the system as generating legal obligations on the part of states and ask how effective and enforceable this law is at the domestic level. How does it fit into the domestic hierarchy of norms? It is this last approach which is the subject of this paper.

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I. SOVEREIGNTY *VERSUS* INTERNATIONAL JURISDICTION

The United Nations was organized in 1945 on the principle set forth in the UN Charter, of the "sovereign equality" of all member states (article 2(1)). Only states could aspire to membership in regional or international organizations and only states were the subjects of international law. The international order institutionalized the principle of sovereignty by affording membership exclusively to states. On a practical level, sovereignty is the freedom of a state from control by other states. It was considered revolutionary in the 1950s to give the individual rights vis à vis the state under international human rights law which allowed for the first time the right of individual petition against the state. Human rights activists today seek to give the individual autonomous standing before international law. Currently most international human rights instruments provide that an individual's rights can be enforced only through the intermediary of states and between states on the individual's behalf. The state, by taking up the individual's case is in reality asserting its own rights, ensuring respect for the rules of international law in the person of its subjects.²

Article 2(7) of the UN Charter provides, in relevant part, that "[N]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state (...)". Historically, sovereignty meant the power to command, and the sovereign was one "who, after God, acknowledges no one greater than himself".³ Today, sovereignty generally means nonrecognition of an authority higher than the state, decisions of such a state's highest national tribunal are final and unappealable. Consequently, any attempt by a regional or an international organization to exercise jurisdiction over the state's actions would be resisted.

Infringements on a state's sovereignty may be brought about by contractual obligations entered into bilaterally or multilaterally. Entering into such obligations, as for example, when a state becomes a party to an international human rights treaty, may be considered tantamount to ceding sovereignty to an international jurisdictional body.

The United States, for example, ratified the UN's International Covenant on Civil and Political Rights in 1992. It was, however, unwilling to undertake any new obligations in ratifying this international human rights treaty and limited itself to guaranteeing the protections afforded under the US Constitu-

² *Cfr.* Levi, Werner, *Contemporary International Law*, 2d ed., 1991, at p. 73.

³ See Levi, *op. cit.*, note 2 at p. 80 (2d edition, 1991) citing Jean Bodin's formulations of sovereignty in 1576.

tion. In presenting its first report to the UN Committee on Human Rights, which supervises compliance with this international instrument, the US Government report stated that:

as a matter of domestic law, treaties as well as statutes must conform to the requirements of the Constitution; no treaty provision will be given effect as US law if it conflicts with the Constitution. *Reid v. Covert*, 354 U.S. 1 (1957). Thus, the United States is unable to accept a treaty obligation which limits constitutionally protected rights, as is the case of Article 20 of the Covenant on Civil and Political Rights, which infringes upon freedom of speech and association guaranteed under the First Amendment to the Constitution. (...) When elements or clauses of a treaty conflict with the Constitution, it is necessary for the United States to take reservations to those elements or clauses, simply because neither the President nor Congress has the power to override the Constitution.⁴

The US position is the classic position on state sovereignty.

The United States has become a party to few international human rights instruments. Current opposition in the United States Senate to ratification of the American Convention on Human Rights of the Organization of American States (OAS), and other human rights treaties, can be traced back to an important isolationist trend in American foreign policy as well as to Cold War fears of Communism which characterized the 1950s. The current US position has evolved from this earlier rejectionist stance but in the name of "federalism" still avoids any subordination to, or interference by, international jurisdictional bodies.⁵ Although the United States has ratified the International

4 US Department of State: Civil and Political Rights in the United States, Report of the United States of America Under the International Covenant on Civil and Political Rights (July 1994) at p. 28. *Cfr.* M. Cherif Bassiouni, "Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate", in Symposium: The Ratification of the International Covenant on Civil and Political Rights, 42 De Paul Law Review 1169, note 3, at 1169, 1177.

5 *Cfr.*, Stewart, David P., "United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations" in De Paul Symposium (*op. cit.*, note 3, *supra*) note 5 at 1184-5 (1993). "The principal argument arrayed against the Covenant (and the Genocide Convention) at that time was that ratification posed a threat to the federal system of government. More particularly, the argument was that use of the treaty-making power to establish and protect individual rights would violate, or at least unacceptably limit, the rights of the individual states and deprive U. S. citizens of their right to self-government. Underlying this concern, of course, was fear that the federal government would rely on the treaty-making power in assuming an activist role in the elimination of legalized racial discrimination then still prevalent in a number of southern states. Moreover, the debate over human rights treaties initially took place amid a genuine fear of communist subversion and ideological assault aimed at taking over the United States and the remainder of the free world. Thus it was not just that the treaties were seen as improperly opening to international review and regulation matters thought to be exclusively domestic, but that the ensuing loss of U. S. sovereignty to an illegitimate world government (the United Nations) was part of the general effort to eliminate democracy. The debate culminated in the

Covenant on Civil and Political Rights, it has not accepted the Optional Protocol to that treaty which affords inhabitants of the state party the right to petition the UN Human Rights Committee directly regarding alleged violations of the Covenant.⁶ Similarly, although the United States is subject to the jurisdiction of the Inter-American Commission on Human Rights, it has not ratified the American Convention on Human Rights or recognized the compulsory jurisdiction of the Inter-American Court of Human Rights, the latter being the jurisdictional body of the inter-American system with the power to sanction violators. The Commission applies the American Declaration on the Rights and Duties of Man to the United States and other states which have not yet ratified the American Convention.⁷

The United States position is derived from its status as a superpower and is not typical of that of the majority of states. The former Mexican Ambassador to the OAS, Mr. Santiago Oñate, for example, once stated before the OAS Permanent Council, that Mexico's ratification of the American Convention on Human Rights did not imply a limitation of Mexico's sovereignty, but rather was an exercise of it. In concordance with this view, international tribunals have consistently held that the conclusion of treaties is an exercise of an attribute of sovereignty, not a limitation of it.⁸

As of July 1, 1996, twenty-five of the thirty-five member states of the OAS have ratified the American Convention on Human Rights.⁹ In addition, seventeen of the twenty-five have accepted the compulsory jurisdiction of the Inter-American Court of Human Rights, pursuant to Article 62 of the Con-

defeat in January 1954 of the so-called Bricker Amendment to the U. S. Constitution, which was actually a series of proposals offered from July 1951 to early 1954. In its most developed form, the Bricker Amendment would have provided, *inter alia*, that any treaty denying or abridging any right enumerated in the Constitution would have no force or effect, that the rights of the states under the Tenth Amendment would be preserved from federal encroachment, and that a treaty would become effective as international U. S. law only through enactment of appropriate legislation by the Congress."

6 The UN Human Rights Committee is a quasi-jurisdictional body created by the International Covenant on Civil and Political Rights. The normative status of the Committee's decisions or "views" on individual communications appears to be evolving, in the opinion of Committee members, from that of recommendations to legally-binding obligations.

7 The Inter-American Commission on Human Rights applies the American Declaration of the Rights and Duties of Man to all member states of the Organization of American States until they become parties to the American Convention. The American Convention contemplates this two-tier procedure until all states have become parties. For further information regarding the functioning of this unique mechanism, see OAS/Ser.L.V/II.90, doc. 31 rev. 2, September 22, 1995: Basic Documents Pertaining to Human Rights in the Inter-american System (1995).

8 See Levi, *op. cit.*, note 2 at p. 82.

9 The twenty-five states that have ratified the American Convention on Human Rights as of July 1, 1996 are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

vention.¹⁰ The ten OAS member states that have not yet ratified the American Convention are subject to compliance with the American Declaration of the Rights and Duties of Man which is also supervised by the Inter-American Commission on Human Rights.¹¹

Is a state's assumption of international obligations tantamount to the contracting away of its sovereignty? Clearly it is not. The question as to the primacy of national versus international law is always resolved in favor of national jurisdiction or sovereignty. International law only enters into play when available remedies at the national level have been exhausted, are absent or have failed to be effective. International law is subsidiary to national law and must be consented to by the state to be effective and enforceable.

The growing number of regional political and economic organizations which now condition membership on compliance with certain threshold standards of conduct, be they human rights obligations, notions of good governance or environmental standards, oblige governments to make commitments to respect these standards if they wish to join that organization.

Russia, for example, has recently undertaken a long list of obligations in the human rights area in order to gain admission to a regional organization, — the Council of Europe, considered the stepping stone to entry into the European Union.¹² The Russian Federation was admitted to the Council of Europe in February 1996. The obligations undertaken run the gamut from ratification of human rights treaties such as the European Convention on Human Rights (at the moment of accession) to signing and ratifying (within one year from the time of accession) Protocol No. 6 of the European Convention on the abolition of the death penalty in time of peace, the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, the European Framework Convention for the Protection of National Minorities and the European Charter on Local Self-Government and the Charter for Regional and Minority Languages.¹³

In addition, it is quite extraordinary that Russia has also undertaken a number of political obligations. For example, it has given assurances that it will bring to justice those found responsible for human rights violations—espe-

¹⁰ The seventeen OAS member states that have accepted the compulsory jurisdiction of the Court as of July 1, 1996 are: Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

¹¹ The ten states that have not yet ratified the American Convention on Human Rights as of July 1, 1996 are: Antigua and Barbuda, The Bahamas, Belize, Canada, Cuba, Guyana, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and the United States.

¹² See Opinion No. 193 (1996) on Russia's request for membership of the Council of Europe, Parliamentary Assembly, Council of Europe.

¹³ *Ibidem*.

cially in relation to events in Chechnya, and that it will ratify (in a period of six months after its accession) the Agreement of 21 October 1994 between the Russian and Moldovan Governments and to continue the withdrawal of the 14th Army and its equipment from Moldova, within a time-limit of three years from the date of signature of the Agreement.¹⁴

One might argue that by undertaking these and other obligations that Russia has contracted away its sovereignty to the Council of Europe. That argument would not be persuasive, however, since Russia has undertaken these obligations voluntarily; in an exercise of its sovereignty it has consented to them.

II. THE NORMATIVE STATUS OF DECISIONS ISSUED BY THE CURRENT INSTITUTIONAL HUMAN RIGHTS MECHANISMS WITHIN THE ORGANIZATION OF AMERICAN STATES

The current institutional mechanisms within the Organization of American States for the protection of human rights in the Americas are three:

1. Supervision of compliance with a state's treaty obligations under the American Convention on Human Rights by the Inter-American Commission on Human Rights;

2. Supervision of compliance with a state's obligations under the American Declaration of the Rights and Duties of Man (for those states that have not yet ratified the American Convention) by the Inter-American Commission on Human Rights;

3. Supervision of compliance with a state's treaty obligations under the American Convention on Human Rights by the Inter-American Court of Human Rights.

These institutional mechanisms do not apply to all states equally because the OAS member states, in the exercise of their sovereignty, have undertaken differing levels of international commitments.

The Inter-American Commission on Human Rights (hereinafter, "Commission") monitors compliance with a state's treaty obligations in the twenty-five member states that have taken the decision to become states parties to the American Convention.¹⁵ The Commission monitors compliance with a state's obligations in the ten member states that have not yet become states parties to the American Convention by applying the human rights obligations set forth in the American Declaration of the Rights and Duties of Man.¹⁶ And lastly,

¹⁴ *Ibidem*.

¹⁵ See note 9 (*supra*).

¹⁶ See note 11 (*supra*).

the Inter-American Court of Human Rights monitors compliance with a state's obligations under the American Convention in seventeen of the twenty-five countries that have become states parties to the American Convention and in addition, have recognized the compulsory jurisdiction of the Court pursuant to Article 62 of the American Convention.¹⁷

In order to assess the effectiveness of the OAS mechanisms mandated to protect human rights, one must first inquire as to their competence to issue legally binding decisions.¹⁸ If these mechanisms do not have the competence to issue legally binding decisions, but only "recommendations" or "views" then technically the state cannot be faulted for failing to respect international law.

1. *The Normative Status of Reports of the Commission Applying the American Declaration of the Rights and Duties of Man to States not Parties to the American Convention on Human Rights*

In 1988, the Government of Colombia requested an advisory opinion on the normative status of the American Declaration of the Rights and Duties of Man of the Inter-American Court of Human Rights (hereinafter, the "Court"). The Court requested written observations on the question from all the member states of the Organization of American States and from the organs listed in Articles 51 and 52 of the OAS Charter.¹⁹ The wide disparity of views in the government responses to this request is evidence of the prevailing confusion on this issue.

For example, the observations of the Government of Costa Rica stated that it "believes that notwithstanding its great success and nobility, the American Declaration of the Rights and Duties of Man *is not a treaty* as defined by international law (...). Nevertheless, that could not in any way limit the Court's possible use of the Declaration and its precepts to interpret other, related juridical instruments or a finding *that many of the rights recognized therein have become international law* (emphasis added).²⁰

¹⁷ See note 10 (*supra*).

¹⁸ One should then inquire as to the voluntary compliance on the part of states with these binding decisions or the enforcement powers of the system to encourage compliance. Unfortunately the inter-American system has not yet institutionalized a system of follow-up to evaluate the compliance of states with its decisions as has recently been instituted by the UN's Human Rights Committee.

¹⁹ I/A Court H. R., 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. Series A No. 10.

²⁰ *Idem*, at para. 11.

The Government of Costa Rica did little to clarify its position by adding that: “[i]f the Declaration was not conceived by its authors as a treaty, it cannot then be interpreted by advisory opinions rendered by this Court. But *that does not mean, under any circumstance, that the Declaration has no juridical value, nor that the Inter-American Court of Human Rights cannot use it as evidence for the interpretation and application of other legal instruments related to the protection of human rights in the inter-American system.*”²¹

The observations of the United States maintained that the “American Declaration of the Rights and Duties of Man represents a noble statement of the human rights aspirations of the American States. Unlike the American Convention, however, it was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions. Its *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.* The United States recognizes the good intentions of those who would transform the American Declaration from a statement of principles into a binding legal instrument. But good intentions do not make law. *It would seriously undermine the process of international lawmaking —by which sovereign states voluntarily undertake specified legal obligations— to impose legal obligations on states through a process of “re-interpretation” or inference “from a non-binding statement of principles” (emphasis added).*”²²

The Government of Peru stated that “although the Declaration could have been considered an instrument *without legal effect* before the American Convention on Human Rights entered into force, the Convention has recognized *its special nature by virtue of Article 29, which prohibits any interpretation “excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have” and has thus given the Declaration a hierarchy similar to that of the Convention with regard to the States Parties,* thereby contributing to the promotion of human rights in our continent.”²³

The Government of Uruguay maintained 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.*”²⁴

²¹ *Idem.* at para. 18.

²² *Idem.* at para. 12.

²³ *Idem.* at para. 13.

²⁴ *Idem.* at para. 14.

The Government of Venezuela asserted that "as a general principle recognized by international law, a declaration is not a treaty in the true sense because it does not create juridical norms, and it is limited to a statement of desires or exhortations. A declaration creates political or moral obligations for the subjects of international law, and its enforceability is thus limited in contrast to a treaty, whose legal obligations are enforceable before a jurisdictional body."²⁵

Clearly, the lack of a consensus on the normative status of the American Declaration frustrates any attempt at a facile definition or uniform enforceability. A state which does not consider the report of the Commission (applying the American Declaration of the Rights and Duties of Man) to be legally binding will not consider it necessary to comply with that decision. The states which chose to respond to the Court's request for observations demonstrated that their views extend clear across the possible spectrum of interpretation from the view that the American Declaration is a set of non-binding principles to the interpretation that it is a set of binding norms of customary international law.

The Inter-American Court of Human Rights, for its part, given the diversity of views in the hemisphere on the question, did not provide the states with much guidance in the context of this Advisory Opinion. The Court stated that "the member states of the Organization have signaled their agreement that the Declaration contains 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".²⁶

In establishing its jurisdiction, the Court noted that both the Charter and the American Convention are treaties, and consequently it found that it could exercise advisory jurisdiction over the Declaration as well as the Convention, pursuant to Article 64 (1) of the American Convention.²⁷ Further, the Court found that "[F]or the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration,

²⁵ *Idem*, at para. 15.

²⁶ *Idem*, at para. 43.

²⁷ *Idem*, at para. 44. Article 64 (1) of the American Convention provides: "The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court."

with the result that to this extent the American Declaration is *for these States a source of international obligations related to the Charter of the Organization*.²⁸

The Court then stated that: “[F]or the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself. It must be remembered however, that, given the provision of Article 29 (d), these States cannot escape the obligations they have as members of the OAS under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto.”²⁹ The Court, however, skirts a more precise formulation of the normative value of the Declaration for states that are not parties to the Convention. Instead, it offers this ambiguous final paragraph, grammatically plagued with double negatives:

“That the Declaration is not a treaty does not then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it within the framework of the principles set out above”.

The American Declaration of Human Rights, when adopted, was considered, as was the Universal Declaration of Human Rights, to have no binding force.³⁰ In 1949, the Inter-American Juridical Committee, a legal arm of the OAS, affirmed that “it is obvious that the Declaration of Bogota did not create a legal contractual obligation” and that it, therefore, lacked the status of “positive international law.”³¹ In an article published in 1975 by Professor Thomas

²⁸ *Idem*, at para. 45. Article 1 (2) (b) of the Commission’s Statute provides: *Article 1 (2)*. For the purposes of the present Statute, human rights are understood to be: (b). The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states. Article 20 of the Commission’s Statute provides: *Article 20*. In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18: a. to pay particular attention to the observance of the human rights referred to in Article I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man; b. to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and, c. to verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

²⁹ *Idem*, at para. 46.

³⁰ See Eleanor Roosevelt’s oft-cited statement made on the eve of the adoption of the United Nations’ Universal Declaration of Human Rights: “In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligations. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.” UN Doc. A/C.3/SR, p. 12, reprinted in Department of State Bulletin, 19 December, 1948.

³¹ Cited in Buergethal, “The Revised OAS Charter and the Protection of Human Rights”, American Journal of International Law 69, 1975, p. 828.

Buergenthal, who was a Judge on the Inter-American Court of Human Rights from 1979 to 31 December 1991, the argument was launched that the Protocol of Buenos Aires, which amended the OAS Charter in 1967, and elevated the Commission to the status of a "principal organ" of the OAS, also transformed the normative status of the American Declaration. Professor Buergenthal suggested that:

In view of the fact that the Charter speaks of the 'present Commission' without otherwise indicating what its 'structure, competence and procedure' shall be, and since these matters are regulated by the Statute of the Commission which predates the adoption . . . of the revised OAS Charter, it is reasonable to assume that the reference to the 'present Commission' embraces the Statute and thus incorporates it by reference.

Since the Statute had become "an integral part of the Charter," in Professor Buergenthal's view, the consequence thereof is a change in the normative status of the American Declaration. Given the importance of this argument it is useful to cite it in full:

In analyzing the changed status of the American Declaration, it should be recalled that Article 2 of the Statute provides that 'for purposes of this Statute, human rights are understood to be those set forth' in the American Declaration. This provision must be read together with Article 150 of the OAS Charter which requires the Court to 'keep vigilance over the observance of human rights'. The OAS Charter does not, however, 'define human rights.' Therefore, since Article 150 incorporates the provisions of the Statute by reference, 'human rights' within the meaning of Article 150 are those 'set forth in the American Declaration'. The human rights provisions of the American Declaration can today consequently be deemed to derive their normative character from the OAS Charter itself. This means at the very least, that *until the American Convention enters into force*, the Commission is empowered by the OAS Charter to judge the conduct of its member States by holding them to the standards articulated in the American Declaration.³²

In 1981, the Inter-American Commission on Human Rights, for the first time, adopted this reasoning in a decision on a case involving the United States. In case No. 2141 (United States), the petitioners alleged that the United States had violated the right to life (Article I of the American Declaration) on 22 January 1973, when the US Supreme Court handed down its decision in *Roe v Wade*,

³² *Idem*, at 835 (emphasis added).

410 US 113, and *Doe v. Bolton*, 410 US 179, declaring abortion to be legal in the United States under certain specific circumstances.³³ The Commission held that no violation of Article I had occurred, but stated, *obiter*, that the American Declaration was legally binding on the US Government for the reasons set forth in Professor Buergethal's argument. Its decision, in relevant part, stated that:

The international obligation of the United States of America, as a member of the Organization of American States (OAS) under the jurisdiction of the Inter-American Commission on Human Rights, is governed by the Charter of the OAS (Bogota, 1948) as amended by the Protocol of Buenos Aires on February 27, 1967, ratified by the United States on April 23, 1968.

As a consequence of Articles 3j, 16, 51e, 112 and 150 of this Treaty, the provisions of other instruments and resolutions of the OAS on human rights *acquired binding force*. Those instruments and resolutions approved with the vote of the US Government are the following:

- American Declaration of the Rights and Duties of Man* (Bogota, 1948).
- Statute and Regulations of the IACHR 1960, as amended by resolution XXII of the Second Special Inter-American Conference (Rio de Janeiro, 1965).
- Statute and Regulations of IACHR of 1979-1980 (emphasis added).³⁴

The Commission used the same reasoning and language in another "right to life" case when, in Resolution No. 3/87, Case No. 9647 (United States) it became the first intergovernmental human rights body to find the United States in violation of international human rights norms, specifically, Articles I (right to life) and II (equality before the law) in the sentencing to death and execution of two juvenile offenders;³⁵ and it again maintained that the American Declaration was legally binding on the United States.³⁶

The Commission took the position that the entry into force of the American Convention did not render moot the binding legal force of the American Declaration, since its Statute provided that human rights are the rights set forth in the American Declaration "in relating to States not parties to the American Convention on Human Rights".³⁷ If all the member states of the OAS were

³³ See Resolution 23/81, Case 2141 (United States) in the Commission's Annual Report 1980-1.

³⁴ *Idem*, paras. 15 and 16.

³⁵ See Res. No. 3/87, Case No. 9647 (United States), 27 March 1987: Commission's Annual Report 1986-7, at p. 147.

³⁶ Case No. 9647, *idem*, at para. 48. The Commission even cited Professor Buergethal's American Journal of International Law article, as well as Case No. 2141, as authority and precedent. The article, it should be recalled, argued that the IACHR was empowered by the OAS Charter to judge the conduct of its member states under the American Declaration "until the American Convention enters into force".

³⁷ See Res. 3/87, *op. cit.*, note 33, para. 49.

to become states parties to the American Convention there would be no further justification for maintaining that the American Declaration had binding legal force. The US Government requested reconsideration of the Commission's decision and argued, *inter alia*, that it did not accept the Commission's interpretation that the American Declaration was legally binding.³⁸

This decade-long conflict of opinion between the Commission and the United States Government regarding the normative status of the American Declaration provides the background to the 1988 Colombian request for an advisory opinion on the issue. Given the opposition of the US Government and its failure to recognize as legally binding the Commission's resolutions under the Declaration, the Court had the unpleasant option of having to select from one of two difficult choices: to undermine the Commission's jurisprudence in this area by stating that the Commission's opinions under the American Declaration were not legally binding, or to support its jurisprudence, albeit timidly, by acknowledging that the Commission's opinions had some "legal effect" without identifying the nature of these obligations. The ungrateful choice before the Court led it to render this ambiguous and confusing advisory opinion.

2. *The Normative Status of Reports of the Commission Applying the American Convention on Human Rights to States Parties Thereto*

In a recent judgment of the Inter-American Court of Human Rights the Court offers an interpretation regarding the normative status of reports of the Commission applying the American Convention on Human Rights to States parties thereto.³⁹

The American Convention is silent as regards the normative status of the reports of the Commission. Articles 50 and 51 of the American Convention provide as follows:

Article 50

1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its

³⁸ See Request for Reconsideration of Resolution 3/87, Case No. 9647 (United States), in Buergenthal & Norris (eds.), *The Inter-American System* (Oceana Publications, Inc., July 1989), Binder IV, Booklet 21.3 (7/88), p. 155 at p. 156. The United States notes: "... that the Commission, in reiterating its erroneous conclusion that the Declaration acquired binding force with the adoption of the Protocol of Buenos Aires, makes no effort to respond to the arguments to the contrary, made by the US in its submission of July 15, 1986. Further evidence that the character of the Declaration did not change with the entry into force of the revised Charter in 1970 is given by the fact that the terms of the Commission's competence over individual communications contained in Article 20 of its Statute have not been changed since adoption in 1965".

³⁹ I/A Court H. R., Caballero Delgado and Santana Case, Judgment of December 8, 1995, published in the Court's Annual Report for 1995 at p. 135.

conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report.

2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.

3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.

Article 51

1. If within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

In the Court's judgment of December 5, 1995 in the *Caballero Delgado and Santana Case*, the Court offered the following *dictum* regarding the normative status of the Commission's reports:

67. In its final pleading, the Commission requested that the Court 'declare that based on the principle of *pacta sunt servanda* in accordance with Article 26 of the Vienna Convention on the Law of Treaties, the Government has violated Articles 51(2) and 44 of the American Convention read in conjunction with Article 1(1), by deliberately failing to comply with the recommendations made by the Inter-American Commission.' In this respect it is enough to state that this Court, in several judgments and advisory opinions has interpreted the meaning of Articles 50 and 51 of the Convention. Article 50 provides for the drafting of a preliminary report that is transmitted to the State so the State may adopt the proposals and recommendations of the Convention. The second provision provides that, if within a period of three months, the matter has not been resolved or submitted for a decision of the Court, the Commission shall draw up a final report. Therefore, if the matter has not been submitted for a decision of the Court, as it has been in the instant case, there is no authority to draw up the second report.

In the Court's judgment, the term 'recommendations' used by the American Convention should be interpreted to conform to its ordinary meaning, in accord-

ance with Article 31(1) of the Vienna Convention on the Law of Treaties. *For that reason, a recommendation does not have the character of an obligatory judicial decision for which the failure to comply would generate State responsibility.* As there is no evidence in the present Convention that the parties intended to give it a special meaning, Article 31(4) of the Vienna Convention is not applicable. *Consequently, the State does not incur international responsibility by not complying with a recommendation which is not obligatory.* As to Article 44 of the American Convention, the Court finds that it refers to the right to present petitions to the Commission, and that it has no relation to the obligations of the State (emphasis added).⁴⁰

It is, of course, not for the Court to define the competence of the Inter-American Commission on Human Rights; that is reserved to the Commission.⁴¹ This unfortunate *dictum* on the part of the Court attempts the subordinate the role of the Commission to the Court in a system where the two were designed to be co-equal bodies.⁴²

The Convention specifies that the Commission shall determine its case load, and there is no requirement in the Convention that every case presented to the Commission be transmitted to the Court. On the contrary, Article 51(1) explicitly leaves open the option of submitting a case to the Court, reaching a friendly settlement, or publishing the Commission's report on the case in its Annual Report to the General Assembly.

What purpose would be served for the Commission to reach conclusions on the case as regards whether the State incurred in a violation of any of the rights set forth in the Convention if the State were not obligated to act appropriately in response to these conclusions? Since the Commission is currently processing approximately 800 petitions and there are less than a dozen cases currently pending before the Court, is the Court suggesting that the efficacy of the system is limited to the few cases before the Court?

The system as currently structured cannot bear, nor was it designed to, the wholesale transmission of all petitions from the Commission to the Court. The question of the criteria for the submission of cases to the Court has been an issue of much debate and little resolution, both in the European and the inter-American systems. Article 51 of the American Convention refers to the "opinion and conclusions" of the Commission's report on an individual

⁴⁰ *Idem*, at para. 67.

⁴¹ It is a fundamental principle of administrative law that an administrative body defines the scope of its own competence.

⁴² On the issue of the relationship between the Commission and the Court, see Christina M. Cerna, "The Structure and Functioning of the Inter-American Court of Human Rights (1979-1992)" in *The British Year Book of International Law* 135, at 146-156 (1992).

petition. The Commission's "opinion and conclusions" that a state has violated a right set forth in the Convention is buttressed by the "recommendations" which the Commission may issue under Article 51 (2), but which are not obligatory, as the state may or may not comply with these recommendations, as it chooses. The "opinion and conclusions", however, carry legal consequences. If the state does not comply with the recommendations, it has ignored its international obligations under the Convention to remedy the violation which the Commission has found it to have incurred and is set forth in the "opinion and conclusions" of its report.

The Government of Colombia has recently demonstrated itself as being in the vanguard in recognizing the obligatory character of decisions of the Inter-American Commission on Human Rights. Colombia, recognizing that it has been the object of eleven adverse decisions of the Inter-American Commission during the past nine years and of three adverse decisions of the United Nations Human Rights Committee, all of which make reference to the issue of the payment of an indemnity, has adopted a law by which the State is obliged to implement decisions of the Committee and the Commission.⁴³ Law No. 000288 of July 5, 1996 posits the establishment of a Committee comprised of the Ministers of Interior, Foreign Relations, Justice and Defense, who would review the decisions emitted by these international bodies. This governmental Committee would have 45 days from the date of official notification of an international decision to issue its opinion.⁴⁴ If this governmental Committee is of the view that either of these international bodies has decided a case erroneously, then the law requires the government to take the matter to the Inter-American Court of Human Rights.⁴⁵

This Colombian Law is unique in the hemisphere in proclaiming the obligatory nature of Commission decisions and in instituting an implementation

43 See "Palabras del señor Presidente de la República, doctor Ernesto Samper Pizano, en el acto de sanción de la Ley que establece Instrumentos Para la Indemnización de perjuicios a las víctimas de violaciones de los Derechos Humanos, En virtud de lo dispuesto por determinados órganos internacionales de derechos humanos, Santafé de Bogotá, 5 de julio de 1996." Unpublished document received courtesy of the Embassy of Colombia.

44 Law No. 000288 of July 5, 1996, "por medio de la cual se establecen instrumentos para la indemnización de perjuicios a las víctimas de violaciones de derechos humanos en virtud de lo dispuesto por determinados órganos internacionales de derechos humanos". (See, paragraph three).

45 See, "Palabras del Señor Presidente..." (*op. cit.* n. 43): "Puede ocurrir que a juicio del Gobierno, como representante del Estado colombiano, las decisiones de la Comisión Interamericana de Derechos Humanos y del Comité del Pacto de Derechos Civiles y Políticos, no reúnan los presupuestos de hecho y de derecho establecidos en la Constitución Política y en los tratados internacionales aplicables. En ese evento, la actitud responsable, que es la que nos traza la ley que he sancionado y que es la que asumiremos, consistirá en demandar esa decisión ante el organismo jurisdiccional competente: La Corte Interamericana de Derechos Humanos para el caso de las resoluciones de la Comisión Interamericana" (Emphasis added).

mechanism for the payment of indemnity when recommended by the Committee or the Commission. It also posits an advanced appreciation of the Inter-American Court as a forum for serious disputes between the Commission and States and not as a routine second instance in an international appeals process which is the role that the Court has intimated for itself in the *Caballero* decision.

3. *The Normative Status of Judgments of the Court Applying the American Convention on Human Rights to States Parties that Have Accepted the Obligatory Jurisdiction of the Court*

The American Convention on Human Rights is explicit that the jurisdiction of the Court is legally binding on those states that, in the exercise of their sovereignty, choose to recognize the competence of the Court. Article 62(1) provides that: "A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as *binding, ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention"(emphasis added). What is legally binding is the obligation on the part of the state to submit itself to the jurisdiction of the Court. It is not the Court's judgment which is termed legally binding.

Article 63(1) provides that "[I]f 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 consequence 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*."(emphasis added).

As regards the judgments of the Court, Article 67 of the Convention provides that they "shall be final and not subject to appeal," and Article 68 provides that the "States Parties to the Convention *undertake to comply* with the judgment of the Court in any case to which they are parties"(emphasis added). Article 68 is once again a recognition of the implicit sovereignty of the state. It does not order the state to give legally binding force to the Court's judgment, but it calls upon the Court to "undertake to comply," a much vaguer obligation. In addition, the Court is further mandated by Article 65 of the Convention, to submit, for the General Assembly's consideration "a report on its work during the previous year. It shall specify, in particular, the cases in which *a state has not complied with its judgments, making any pertinent rec-*

ommendations". Consequently, the Convention foresees that some states will not comply with its judgments and the General Assembly is selected to be the appropriate body to adopt political measures to further compliance.

The Convention, however, is precise on the Court's power to sanction the state for a violation, and Article 68 (2) provides "[T]hat part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state." Consequently, the state is encouraged (!) to ensure that measures exist at the national level to give domestic enforcement to the Court's order for compensation.

The Court is competent to decide litigious cases and to issue advisory opinions. Article 64 of the American Convention provides for the Court's competence to issue advisory opinions.⁴⁶ The Convention does not state whether these advisory opinions are purely "recommendatory" as their name would suggest or whether they bear legal obligations for the state. In an advisory opinion issued in 1983, the Court compared its competence to issue advisory opinions with its competence to decide contentious cases and stated the following:

As this Court already had occasion to explain, neither the International Court of Justice nor the European Court of Human Rights has been granted the extensive advisory jurisdiction which the Convention confers on the Inter-American Court. (Other Treaties, *supra* 32, paras. 15 and 16). Here it is relevant merely to emphasize that the Convention, by permitting Member States and OAS organs to seek advisory opinions, *creates a parallel system to that provided for under Article 62 and offers an alternate judicial method of a consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions association with the contentious judicial process*⁴⁷ (emphasis added).

Is this "alternate judicial method" legally binding on the states which have recognized the jurisdiction of the Court under Article 62 of the American Convention?

⁴⁶ Article 64 of the American Convention provides: 1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

⁴⁷ I/A Court H. R., Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3 at para. 43.

Dr. Rodolfo E. Piza Escalante, a former judge of the Inter American Court of Human Rights and currently a member of the Costa Rican Supreme Court is of the view that advisory opinions of the Court are legally binding.⁴⁸ Judge Piza participated in a recent decision before the Constitutional Chamber of the Costa Rican Supreme Court concerning Law 4420 of 22 September 1969.⁴⁹ The issue of the compatibility of this law with Article 13 of the American Convention (concerning freedom of expression) had been presented to the Commission in a specific case.⁵⁰ The Costa Rican Government won the case before the Commission and then the Government of Costa Rica took the matter for an advisory opinion to the Court. The Government could have taken the case as a litigious matter, but selected the option of taking it for an advisory opinion. The Court concluded in its advisory opinion that the Costa Rican Law 4420 was incompatible with Article 13 but the Costa Rican Government did nothing to repeal the Law. In fact, on March 23, 1990 when questioned about the status of Law 4420 by the UN Human Rights Committee, the Costa Rican Minister of Justice replied that:

... every profession, including journalism, was governed by the organic law of the relevant professional association. All professions were considered to be public corporations, since they were established by law; they were completely free from government control. The officials of each association were elected by the members, who were required to hold a degree from a Costa Rican university. Licenses authorizing a person to exercise a particular profession were granted by the association, not the State. A persons must apply for admission to such an association, in accordance with the requirements under the law. If he was rejected even though he had met all the legal requirements, he had recourse to the remedy of *amparo* and to an administrative litigation tribunal.

A person engaged in journalism without a license was doing so subject to a fine. With regard to the case brought before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, having received a complaint, had ruled that there had been no contradiction between the organic law of the Costa Rican Association of Journalists and the American Convention on Human Rights. That ruling was binding on Costa Rica. Subsequently, the Inter-American Press As-

48 Piza Escalante, Rodolfo E., "Relaciones entre derecho internacional y derecho interno, con especial alusión al derecho de los derechos humanos." (Unpublished paper presented at the Primer Concurso Interamericano de Derechos Humanos, Washington College of Law, American University, 31 May 1996).

49 Law 4420 required that journalists who wished to exercise their profession in Costa Rica were required to belong to the Costa Rican Association of Journalists. See Sala Constitucional de la Corte Suprema de Justicia, Sentencia #2313-95 de 16:18 hs. del 9 de mayo de 1995.

50 See Resolution No. 17/84, Case No. 9178 (Costa Rica), in the Commission's 1984-5 *Annual Report* at pp. 51 ff.

sociation had requested the Government of Costa Rica to take the complaint to the Inter-American Court of Human Rights for an advisory opinion. The Court had issued an advisory opinion stating that there had been a contradiction between the American Convention on Human Rights and the law of the Association of Journalists. As a result, Costa Rica had both *a binding ruling from the Inter-American Commission and an advisory opinion from the Inter-American Court*. The Government had taken no action to amend the organic law of the Association of Journalists (emphasis added).⁵¹

In 1995, the Constitutional Chamber of the Costa Rican Supreme Court repealed Law 4420.⁵² In that judgment the Court relied on the Advisory Opinion of the Inter-American Court which had found Law #4420 incompatible with the American Convention. The Costa Rican Court, in a very important judgment, stated:

Ahora bien, si la Corte elogió el hecho de que Costa Rica acudiera en procura de su opinión, emitida hace diez años, resulta inexplicable lo que desde aquella fecha ha seguido sucediendo en el país en la materia decidida, puesto que las cosas han permanecido igual y la norma declarada *incompatible* en aquella ocasión, ha gozado de plena vigencia durante el tiempo que ha transcurrido hasta la fecha de esta sentencia. Eso llama a la reflexión, porque, para darle una lógica al sistema, ya en la Parte I, la Convención establece dentro de los deberes de los Estados, *respetar los derechos y libertades reconocidos en ella y garantizar su libre y pleno ejercicio* (art. 2). Especialmente debe transcribirse lo que dispone el artículo 68:

“1. Los Estados Partes en la Convención se comprometen a cumplir la decisión de la corte en todo caso en que sean partes.”

Si se pretendiera que tal norma, por referirse a quienes “*sean partes*”, solamente contempla la situación de los casos contenciosos, la Corte Interamericana misma ha ampliado el carácter vinculante de sus decisiones también a la materia consultiva (OC-3/83), y en el caso bajo examen no le cabe duda a la Sala que Costa Rica asumió el carácter de parte en el procedimiento de consulta, toda vez que ella misma la formuló y la opinión se refiere al caso específico de una ley costarricense declarada incompatible con la Convención. Por lo tanto, se trata de una ley (la norma específica) declarada formalmente ilegítima.⁵³

⁵¹ Statement by Mr. Gutierrez, Costa Rican Minister of Justice, responding to a question by Mrs. Rosalyn Higgins, before the UN Human Rights Committee, 23 March 1990; UN Doc. CCPR/C/SR.959, 28 March 1990.

⁵² Sentencia #2313-95, *op. cit.*, note 49 (*supra*).

⁵³ *Idem*. International human rights instruments to which Costa Rica is a party, insofar as they grant greater rights or guarantees to individuals than the Costa Rican Constitution, have supremacy over the Constitution in the domestic legal hierarchy.

Although the Inter-American Court's advisory opinion in this matter was issued in 1985 and the Costa Rican Government defended its failure to comply to the UN Human Rights Committee in 1990, it is significant that the Constitutional Chamber of the Costa Rican Supreme Court ten years later, in 1995, considered the advisory opinion legally binding so as to warrant conformity with that opinion in a judgment of the highest court at the domestic level. Since international human rights law is only enforceable at the national level through the domestic court system, its efficacy depends upon the political willingness of states parties to these instruments, particularly on the part of the judicial system, to recognize the obligatory nature of these views, advisory opinions, decisions and judgments. May the new Colombian Law (*supra*) be the first of many in this direction.