

INTERNATIONAL LAW AND THE PROTECTION OF HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM*

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I. INTRODUCTION

The effectiveness of an intergovernmental human rights mechanism can be analyzed from a number of different angles. First, using

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a practical approach, 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. A more theoretical approach might examine how the mechanism has contributed to the evolving global culture of human rights by asking: 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? Finally, one might ask what kind of law this international human rights mechanism has created?

This last approach, which is the subject of this article, views human rights instruments as systems which generate legal obligations on the part of states. The issue which must be addressed in determining the success of these instruments is how effectively the member states enforce their obligations under the agreement.

II. SOVEREIGNTY VERSUS INTERNATIONAL JURISDICTION

The United Nations was organized in 1945 on the principle set forth in the U.N. Charter of the "sovereign equality" of all member states.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.² Sovereignty is the freedom of a state from control by foreign powers.³

It was considered revolutionary in the 1950s to give the individual rights vis a vis the state under international human rights law, which allowed for the first time the right of the individual to 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.⁴ The state, by taking

1. U.N. CHARTER art. 2, para. 1.

2. *See id.* arts. 3-4.

3. *See* ARTHUR LARSON ET AL., SOVEREIGNTY WITHIN THE LAW 125 (1965).

4. *See* WERNER LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 73 (2d ed. 1991).

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.⁵

The U.N. 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.”⁶ Historically, sovereignty meant the power to command, and the sovereign was one “who, after God, acknowledge[s] no one greater than himself.”⁷ Today, sovereignty generally means there is no authority higher than the state.⁸ Similarly, the decisions of a state's highest tribunal are generally final and not subject to appeal. Consequently, any attempt by a regional or international organization to exercise jurisdiction over the state's actions will meet with resistance.

Infringements on a state's sovereignty may be brought about by contractual obligations entered into bilaterally or multilaterally.⁹ Thus, when a state becomes a party to an international human rights treaty, many consider this tantamount to ceding sovereignty to an international jurisdictional body.

The United States ratified the U.N.'s International Covenant on Civil and Political Rights¹⁰ on June 8, 1992.¹¹ It was unwilling, however, to undertake any new obligations, and limited itself to guaranteeing the protections afforded under the U.S. Constitution.¹² In presenting its first report to the U.N. Committee on Human Rights, the organization which supervises compliance with this international instrument, the United States declared that:

as a matter of domestic law, treaties as well as statutes must conform to the requirements of the Constitution Thus, the United States is unable to accept a treaty obligation which limits constitutionally protected rights, as in the case

5. *See id.*

6. U.N. CHARTER art. 2, para. 7.

7. EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 57 (1920).

8. *See* MALCOLM N. SHAW, *INTERNATIONAL LAW* 238 (2d ed. 1986).

9. *See* GEORG SCHWARZENBERGER & E.D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 24–25 (6th ed. 1976).

10. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 172, 6 I.L.M. 368 [hereinafter ICCPR].

11. *See* SENATE COMM. ON FOREIGN REL., REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. REP. 102-23 (1992), reprinted in 31 I.L.M. 645, 645 (1992) (noting in the “I.L.M. Content Summary” that the instrument of ratification was deposited by the United States on June 8, 1992).

12. *See id.* at 10, reprinted in 31 I.L.M. at 653.

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.¹³

The United States has become a party to relatively few international human rights instruments.¹⁴ Current opposition in the U.S. Senate to ratification of the American Convention on Human Rights of the Organization of American States (OAS),¹⁵ as well as opposition to other human rights treaties can be traced back to sovereignty

13. U.S. DEP'T OF STATE, CIVIL AND POLITICAL RIGHTS IN THE UNITED STATES: INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. HUMAN RIGHTS COMMITTEE UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 28 (1994). Article 20 of the ICCPR outlaws "propaganda for war" and "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." ICCPR, *supra* note 10, art. 20, 999 U.N.T.S. at 178, 6 I.L.M. at 374.

14. Of the 14 treaties the U.N. deems "Human Rights Treaties," the United States has not ratified the following:

1. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.
2. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 302.
3. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Dec. 16, 1968, 754 U.N.T.S. 73.
4. International Convention on the Suppression and Punishment of the Crime of *Apartheid*, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243.
5. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13.
6. International Convention Against *Apartheid* in Sports, G.A. Res. 40/64 G, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53 (1985).
7. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1985).
8. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/128 (1990).
9. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/RES/45/158 (1990).
10. Agreement Establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, *opened for signature* July 24, 1992, Document of the Intergovernmental Technical Meeting for the Preparation of the Indigenous Fund.

See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1994, at 83, 108, 153, 156, 158, 162, 189, 191, 203, 204, 205, U.N. Doc. ST/LEG/SER.E/13, U.N. Sales No. E.95.V.5 (1995) (listing 14 treaties under the "Human Rights" section and supplying ratification, accession, and succession tables for all 14 treaties).

15. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

concerns in U.S. foreign policy and Cold War fears of Communism which characterized the 1950s.¹⁶ The current U.S. position has evolved from this earlier isolationist stance, but in the name of “federalism” still avoids any subordination to, or interference by, international jurisdictional bodies.¹⁷

Although the United States has ratified the International Covenant on Civil and Political Rights, it has not accepted the Optional Protocol to that treaty.¹⁸ This additional agreement affords inhabitants of the state party the right to petition the U.N. Human Rights Committee directly regarding alleged violations of the Covenant.¹⁹

Similarly, while the United States is subject to the jurisdiction of the Inter-American Commission on Human Rights,²⁰ it has not

16. See David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1184 & n.5 (1993).

17. See *id.*

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 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 internal U.S. law only through enactment of appropriate legislation by the Congress.

Id. at 1184 n.5.

18. See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302, 302.

19. See *id.* art. 1. The U.N. Human Rights Committee is a quasi-jurisdictional body created by the International Covenant on Civil and Political Rights. See ICCPR, *supra* note 10, art. 28, 999 U.N.T.S. at 179, 6 I.L.M. at 376. The normative status of the Committee's decisions or “views” on individual communications appears to be evolving from that of recommendations to legally-binding obligations.

20. See SHAW, *supra* note 8, at 202 (stating the Commission has authority over all members of the OAS independent of individual ratification of the American Convention on Human Rights).

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.²¹ The Inter-American Commission on Human Rights applies the American Declaration on the Rights and Duties of Man²² to the United States and other states which have not yet ratified the American Convention.²³

The United States' position is derived from its status as a super-power and is not typical of the majority of states. The former Mexican Ambassador to the OAS, Mr. Santiago Oñate, 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 sovereignty. In accordance with Oñate's view, international tribunals have consistently held that the conclusion of treaties is an exercise of sovereignty, not a limitation of sovereignty.²⁴

As of December 19, 1996, twenty-five of the thirty-five member states of the OAS have ratified the American Convention on Human Rights.²⁵ 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 Convention.²⁶ The ten OAS

21. See American Convention, *supra* note 15, arts. 33, 61–65, at 153, 159–60.

22. American Declaration of the Rights and Duties of Man, Res. XXX, OAS Int'l Conf. of Am. States, 9th Conf., OEA/ser. L/V/I.4 (1948), reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 17, OEA/ser. L.V/II.71, doc. 6 rev. 1 (1988) [hereinafter BASIC DOCUMENTS].

23. 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. See Statute of the Inter-American Commission on Human Rights, [hereinafter Commission Statute] reprinted in BASIC DOCUMENTS, *supra* note 22, art. 20(a), at 65, 71. The American Convention contemplates this two-tier procedure until all states have become parties. See *id.* arts. 19–20, at 70–72.

24. See LEVI, *supra* note 4, at 82.

25. The 25 states that have ratified the American Convention on Human Rights as of December 19, 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. See *B-32: American Convention on Human Rights "Pact of San Jose, Costa Rica"* (last modified Dec. 19, 1996) <[gopher://oasunix1.oas.org:70/00/pub/english/treaties/series_b/b32e](http://oasunix1.oas.org:70/00/pub/english/treaties/series_b/b32e)> [hereinafter *B-32*]. Dates of ratification and signatories to OAS treaties may be found at *Gopher Menu* (last modified Dec. 19, 1996) <[gopher://oasunix1.oas.org:70/11/pub/english/treaties](http://oasunix1.oas.org:70/11/pub/english/treaties)>.

26. 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. See *B-32*, *supra* note 25.

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.²⁷

When a state assumes international obligations, is this tantamount to contracting away its sovereignty? This article suggests that it is not. The question as to the primacy of national versus international law is usually resolved in favor of national jurisdiction or sovereignty. International law applies when local remedies are exhausted, absent, or ineffective.²⁸ International law is subsidiary to national law and must be consented to by the state to be effective and enforceable.²⁹ 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, recently endeavored to achieve a number of human rights obligations to gain admission to the Council of Europe—considered the preliminary step to entry into the European Union.³⁰ The Russian Federation was admitted to the Council of Europe in February 1996.³¹ As a member, Russia has promised to assume additional human rights obligations.³² Russia also promised to undertake a number of political obligations including assurances that it will bring to justice those found responsible for human rights violations—especially involving events in Chechnya³³—and that it

27. Nine eligible states have not yet ratified the American Convention on Human Rights as of December 19, 1996: Antigua and Barbuda, the Bahamas, Belize, Canada, Guyana, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and the United States. *See id.*

28. *See* BIN CHENG, *GENERAL PRINCIPLE OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 178–79 (1987) (discussing the “local remedies rule,” which requires an individual to exhaust all local/domestic remedies and procedures before applying to international law tribunals for relief).

29. *See* SCHWARZENBERGER, *supra* note 9, at 25 (stating that states’ consent to treaty obligations is the primary source of international law).

30. *See* *Russia Joins the Council of Europe*, in 35 I.L.M. 808 (1996).

31. *See id.*

32. Among the conditions are that Moscow is required to sign and ratify a number of Council of Europe conventions, including the European Convention for the Protection of Human Rights and Fundamental Freedoms. *See id.* Russia is also required to sign a convention abolishing capital punishment. *See* Leonid Bershidsky, *Yeltsin Welcomes Council Accession*, *THE MOSCOW TIMES*, Jan. 27, 1996, available in LEXIS, World Library, Allwld File.

33. *See id.* The Council of Europe, however, has no power to punish Russia for defaulting on these promises. *See id.* Russia has not yet fulfilled this promise, and the Council has been criticized by human rights groups for admitting Russia with no conditions attached. *See id.*

will ratify the Agreement of 21 October 1994 between the Russian and Moldovan Governments.³⁴

One might argue that, by conceding to these and other obligations, Russia has contracted away its sovereignty to the Council of Europe. That argument is less persuasive, however, because Russia has undertaken these obligations voluntarily. Thus, by exercising its sovereignty, it has consented to these obligations.

III. THE NORMATIVE STATUS OF DECISIONS ISSUED BY THE CURRENT INSTITUTIONAL HUMAN RIGHTS MECHANISMS WITHIN THE OAS

Currently, there are three mechanisms within the Organization of American States for the protection of human rights in the Americas:

- 1) The Inter-American Commission on Human Rights monitors compliance with a state's treaty obligations in the twenty-five member states that have agreed to become parties to the American Convention;³⁵
- 2) The Commission also monitors compliance with the ten member states that have not yet become parties to the Convention by applying the human rights obligations set forth in the American Declaration of the Rights and Duties of Man;³⁶
- 3) 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 parties to the Convention and

34. See Trevor Waters, *Moldova: Continuing Recipe for Instability*, JANE'S INTELLIGENCE REV., Sept. 1, 1996, at 398, available in LEXIS, World Library, Allwld File. As per the Agreement, Russia was to withdraw the 14th Army and its equipment from Moldova within three years from the date of signature of the Agreement. See *id.* However,

it remains to be seen just what the promise implicit in the three year timetable really amounts to in practice. It is still unclear when the countdown on the three year schedule is actually to begin: Moldova hopes that by next year the OGRF will be gone. Russian deputies maintain that the agreement must first be ratified, which the Duma has thus far signally failed to do. (When Russia was admitted to the Council of Europe in January 1996, it undertook to ratify within six months the army withdrawal agreement.) . . . the situation is slowly improving . . . but withdrawal still remains a somewhat vacuous notion.

Id.

35. See Commission Statute, *supra* note 23, art. 19, reprinted in BASIC DOCUMENTS, *supra* note 22, at 65, 70-71.

36. See *id.* art. 20, at 71-72.

recognized the compulsory jurisdiction of the Court pursuant to Article 62 of the American Convention.³⁷

These institutional mechanisms do not apply to all states equally due to the fact that the OAS member states have undertaken differing levels of international commitments.

In assessing the effectiveness of the OAS institutions mandated to protect human rights, it must first be asked whether they are competent to issue legally binding decisions.³⁸ If these mechanisms do not have the authority to issue legally binding decisions, but only recommendations or views, then technically the state cannot be faulted for failing to respect international law.

A. *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 (Court).³⁹ The Court requested written observations on the question from all the member states of the OAS and from the organs listed in Articles 51 and 52 of the OAS Charter.⁴⁰ The wide disparity of views in the responses to this request is evidence of the prevailing confusion on this issue.

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*

37. See American Convention, *supra* note 15, art. 62, at 159.

38. Following this inquiry, one should then examine the voluntariness of state compliance with decisions made by these organizations, and the enforcement powers of the system to encourage compliance. Unfortunately, the Inter-American system has not yet institutionalized a follow-up system to evaluate the compliance of states with its decisions, as has recently been instituted by the U.N. Human Rights Committee.

39. 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, Inter-Am. Ct. H.R., para. 1 (1989) [hereinafter Advisory Opinion], reprinted in 29 I.L.M. 378, 379 (1990).

40. See *id.* para. 4, at 380.

the rights recognized therein have become international customary law."⁴¹

The Government of Costa Rica did little to clarify its position by adding that

"if 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 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."⁴²

The observations of the United States maintained:

"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 principals [sic] 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 principals [sic] 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 'reinterpretation' or 'inference' from a non binding statement of principles.*"⁴³

The Government of Perú stated that:

41. *Id.* para. 11, at 381 (quoting the written observations of the Government of Costa Rica) (emphasis added).

42. *Id.* para. 18, at 384 (quoting the written observations of the Government of Costa Rica) (emphasis added).

43. *Id.* para. 12, at 381–82 (quoting the written observations of the Government of the United States) (emphasis added).

“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.”⁴⁴

The Government of Uruguay maintained that “[t]he 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.*”⁴⁵

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.”⁴⁶

Clearly, the lack of a consensus on the normative status of the American Declaration frustrates any attempt at uniform enforceability. A state which does not consider the report of the Commission to be legally binding will not consider it necessary to comply with that decision. The responses to the Court’s request for observations demonstrated the variety of opinions—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.

44. *Id.* para. 13, at 382 (quoting the written observations of the Government of Perú) (emphasis added).

45. *Id.* para. 14, at 382 (quoting the written observations of the Government of Uruguay) (emphasis added).

46. *Id.* para. 15, at 382 (quoting the written observations of the Government of Venezuela) (emphasis added).

The Inter-American Court of Human Rights did not provide the states with much guidance in 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.⁴⁷

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.⁴⁸ 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, with the result that to this extent the American Declaration *is for these States a source of international obligation related to the Charter of the Organization.*⁴⁹

47. *Id.* para. 43, at 389.

48. *See id.* paras. 25–28, at 385.

49. Advisory Opinion, *supra* note 39, para. 45, at 389–90. Article 1 of the Commission Statute provides: “[f]or the purposes of the present Statute, human rights are understood to be: . . . the rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.” Commission Statute, *supra* note 23, art. 1, *reprinted in* BASIC DOCUMENTS, *supra* note 22, at 65. Article 20 of the Commission's Statute provides:

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 Articles 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

The Court then stated that

For 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. This notwithstanding, it must be remembered that, given the provisions of Article 29(d), these States cannot escape the obligations they have as members of the OAS under the Declaration.⁵⁰

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.⁵¹

The United States was not alone in its view that the American Declaration of Human Rights did not have binding force upon its members. In 1949, the Inter-American Juridical Committee, a legal arm of the OAS, affirmed that “[i]t is obvious that the Declaration of Bogota does not create a legal contractual obligation” and that it, therefore, lacked the status of positive international law.⁵² Professor Thomas Buergenthal argued in a 1975 article that the Protocol of Buenos Aires⁵³ elevated the Commission to the status of a “principal organ” of the OAS and transformed the normative status of the American Declaration.⁵⁴ Professor Buergenthal suggested that:

In view of the fact that the Charter speaks of the “present Commission” without otherwise indicating what its “struc-

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- 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.

Id. art. 20, at 71–72.

50. Advisory Opinion, *supra* note 39, para. 46, reprinted in 33 I.L.M. 378, 390.

51. *Id.* para. 47, at 390.

52. See Report to the Inter-American Council of Jurists Concerning Resolution XXXI of the Bogota Conference, Inter-Am. Juridical Comm., in HUMAN RIGHTS IN THE AMERICAN STATES 163, 164–65 (prelim. ed. 1960).

53. Protocol of Amendment to the Charter of the Organization of American States (“Protocol of Buenos Aires”), Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324.

54. See Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT’L L. 828, 833–36 (1975).

ture, 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 “present Commission” embraces the Statute and thus incorporates it by reference.⁵⁵

It was the incorporation of the Statute into the Charter, according to Professor Buergenthal’s article, that changed the normative status of the American Declaration.⁵⁶

In 1981, the Inter-American Commission on Human Rights, for the first time, adopted this reasoning in a case involving the United States⁵⁷ where the petitioners alleged that the United States Supreme Court decisions in *Roe v. Wade*,⁵⁸ and *Doe v. Bolton*⁵⁹—declaring abortion to be legal in the United States under certain specific circumstances—violated the right to life as defined in Article 1 of the American Declaration.⁶⁰

The Commission held that no violation of Article 1 had occurred, but stated that the American Declaration was legally binding on the United States using reasoning similar to that used in Professor Buergenthal’s argument.⁶¹ Its decision, in relevant part, stated that:

15. The international obligation of the United States of America, as a member of the Organization of American

55. *Id.* at 834.

56. Professor Buergenthal’s argument is that

[i]n 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 Commission 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.

Id. at 835 (emphasis added).

57. *See* Case 2141, Inter-Am. C.H.R. 25, OEA.ser.L/V/II.54, doc. 9 rev. 1 (1981) [hereinafter Case 2141].

58. 410 U.S. 113 (1973).

59. 410 U.S. 179 (1973).

60. *See* Case 2141, *supra* note 57, at 27.

61. *See id.* at 38–39, 43.

States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights (IACHR) is governed by the Charter of OAS (Bogotá, 1948) as amended by the Protocol of Buenos Aires on February 27, 1967, ratified by United States on April 23, 1968.

16. As a consequence of Articles 3 j, 16, 51 e, 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 U.S. Government, are the following:

- American Declaration of the Rights and Duties of Man (Bogotá, 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 1979–1980.⁶²

The Commission used the same reasoning and language in another “right to life” case when it became the first intergovernmental human rights body to find the United States in violation of international human rights norms.⁶³ Once again, the Court maintained that the American Declaration was legally binding on the United States.⁶⁴

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, because 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.”⁶⁵ If all the member states of the OAS were to become parties to the American Convention there would be no further justification for maintaining that the American Declaration had binding legal force. The United States requested reconsideration of the Commission’s decision arguing, *inter alia*, that it did not accept

62. *Id.* at 38 (emphasis added).

63. Case 9647, Inter-Am. C.H.R. 147, OEA/ser. L/V/11/71, doc. 9 rev. 1 (1987) (stating that the United States violated Articles I (right to life) and II (equality before the law) in the sentencing to death and execution of two juvenile offenders).

64. *See id.* at 173. The Commission cited Professor Buergenthal’s American Journal of International Law article, as well as Case 2141, as authority and precedent. *See id.* at 165–66.

65. *See id.* para. 49.

the Commission's interpretation declaring the American Declaration was legally binding.⁶⁶

This decade-long conflict of opinion between the Commission and the United States regarding the normative status of the American Declaration provides the background for the 1988 Colombian request for an advisory opinion on the issue. Given the opposition of the United States 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:

1. undermine the Commission's jurisprudence in this area by stating that the Commission's opinions under the American Declaration were not legally binding; or
2. supports the Commission, albeit timidly, by acknowledging that its opinions had some "legal effect" without identifying the nature of these obligations.

This difficult choice led the Court to render the *Caballero Delgado and Santana Case*⁶⁷—an ambiguous and confusing advisory opinion regarding the normative status of Commission reports which apply the American Declaration to states not parties to the American Convention.

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

The American Convention is silent in regard to the normative status of the reports of the Commission. Articles 50 and 51 of the American Convention provide:

66. See Request for Reconsideration of Resolution 3/87, Case 9647 (United States), Inter-Am. C.H.R., reprinted in HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, PART 3: CASES & DECISIONS 155 (1988). The United States noted that

the Commission, in reiterating (at p. 20) 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 United States in its submission of July 15, 1986 (at p. 6, n. 6). 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.

Id. at 156 n.1.

67. *Caballero Delgado & Santana Case*, Inter-Am. Ct. H.R. 135, OAS/ser. L/V/III.33, doc. 4 (1995), in ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (1996).

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 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 1e 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 Committee 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.⁶⁸

In the Court's judgment of December 8, 1995, in the *Caballero Delgado and Santana Case*, the Court offered the following dictum regarding the normative status of the Commission's reports:

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-*

68. American Convention, *supra* note 15, arts. 50–51, at 157.

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 will draw up a final report. Therefore, if the matter has 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 accordance 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.⁶⁹

It is, of course, not for the Court to define the competence of the Inter-American Commission on Human Rights—that role is reserved to the Commission.⁷⁰ This unfortunate dictum attempts to subordinate the role of the Commission to the Court in a system where the two were designed to be co-equal bodies.⁷¹

69. Caballero Delgado & Santana Case, *supra* note 67, at 154 (second and third emphasis added).

70. See American Convention, *supra* note 15, arts. 44–47, at 155–56 (stating that the Commission *may* admit petitions if the complaining member state recognizes the competence of the Commission).

71. For a discussion of the relationship between the Commission and the Court, see Christina M. Cerna, *The Structure and Functioning of the Inter-American Court of Human*

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.⁷² On the contrary, Article 51 explicitly allows the Commission discretion to submit a case to the Court, make recommendations to the State, and/or publish the Commission's report.⁷³

The Commission would serve no legitimate purpose in reaching conclusions on whether the State incurred 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. Because the Commission is currently processing approximately eight hundred 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?⁷⁴

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. Under Article 51(1) of the American Convention the Commission may "set forth its opinion and conclusions" on an individual petition.⁷⁵ These "opinions and conclusions" are buttressed by "recommendations," which the Commission may issue under Article 51(2).⁷⁶

However, these recommendations are not obligatory and the State may choose to comply or ignore them as it chooses. The "opinion[s] and conclusions" do, however, carry legal consequences. If the State fails to remedy the violations outlined in the Commission's report, it is considered to have ignored its international obligations under the Convention. Such inaction by members will likely be reported to the General Assembly of the OAS,⁷⁷ which may take whatever action it deems necessary.

The Government of Colombia is unique in recognizing the obligatory character of decisions of the Inter-American Commission on Human Rights. Colombia—the object of eleven adverse decisions of the Inter-American Commission during the past nine years, and of

Rights (1979–1992), reprinted in *THE BRITISH YEAR BOOK OF INTERNATIONAL LAW* 135, 145–56 (1992).

72. See American Convention, *supra* note 15, art. 48, at 156–57.

73. See *id.* art. 51, at 157.

74. The system as currently structured cannot bear, nor was it designed to handle, the transfer of all petitions from the Commission to the Court.

75. See American Convention, *supra* note 15, art. 51, at 157.

76. See *id.*

77. See *id.* arts. 41(g), 65, at 155, 160 (requiring the Commission and Court, respectively, to provide annual reports to the General Assembly of the OAS).

three adverse decisions of the U.N. Human Rights Committee—adopted a law by which the State is obliged to implement decisions of the Committee and the Commission.⁷⁸ The law posits the establishment of a Committee comprised of the Ministers of Interior, Foreign Relations, Justice, and Defense, who would review the decisions of these international bodies.⁷⁹ This governmental Committee would have forty-five days from the date of official notification of an international decision to issue its opinion.⁸⁰ If the Committee feels 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.⁸¹

This Colombian law is unique in the hemisphere in proclaiming the obligatory nature of Commission decisions and instituting an implementation mechanism for the payment of indemnity when recommended by the Committee or the Commission. It also evidences an appreciation of the Inter-American Court as a forum for serious disputes between the Commission and States, rather than as a routine international appeals process, which is the role that the Court has intimated for itself in the Caballero decision.

78. See “Por medio de la cual se establecen instrumentos para la indemnización de perjuicio a las víctimas de violaciones de derechos humanos en virtud de lo dispuesto por determinado órganos internacionales de Derechos Humanos,” D.O., 5 de julio de 1996.

79. See *id.* art. 2(2) (“Que exista concepto previo favorable al cumplimiento de la decisión del órgano internacional de derechos humanos proferido por un Comité constituido por: a) El Ministro del Interior; b) El Ministro de Relaciones Exteriores; c) El Ministro de Justicia y del Derecho; d) El Ministro de Defensa Nacional.”).

80. See *id.* art. 2, para. 3 (“El Comité dispondrá de un plazo de cuarenta y cinco (45) días contados a partir de la notificación oficial del pronunciamientos de los órgano internacional de que se trate para emitir el concepto correspondiente.”).

81. See Ernesto Samper Pizano, Palabras del Señor Presidente de la Republica, Doctor Ernesto Samper Pizano, en el Acto de Sancion de la Ley que Establece Instrumentos para la Indemnizacion de Perjuicios a las Victimas de Violaciones de los Derechos Humanos, en Virtud de lo Dispuesto por Determinados Organismos Internacionales de Derechos Humanos 2–3 (July 5, 1996):

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) (unpublished document received courtesy of the Embassy of Colombia) (on file with the *Houston Journal of International Law*).

C. *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 explicitly states that the jurisdiction of the Court is legally binding on those states who, in the exercise of their sovereignty, choose to recognize the competence of the Court.⁸² Article 62(1) provides:

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.⁸³

While the Court's judgment does not legally bind the Member States, the States *are* obligated to submit themselves to the Court's jurisdiction.⁸⁴

Article 63(1) 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.⁸⁵

Regarding the judgments of the Court, Article 67 of the Convention provides that they "shall be final and not subject to appeal."⁸⁶ Article 68 adds that "[t]he States Parties to the Convention [agree to] *undertake to comply* with the judgment of the Court in any case to which they are parties."⁸⁷

Article 68 recognizes the implicit sovereignty of the state. It does not order the state to give legally binding force to the Court's

82. See American Convention, *supra* note 15, art. 62, at 159.

83. *Id.*

84. See *id.* art. 62(3) ("The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, *provided that the States Parties to the case recognize or have recognized such jurisdiction . . .*") (emphasis added).

85. *Id.* art. 63(1).

86. *Id.* art. 67, at 160.

87. *Id.* art. 68(1) (emphasis added).

judgment, but rather calls upon it 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 . . . [specifying] cases in which a state has not complied with its judgments, [and] making any pertinent recommendations.”⁸⁸ Thus, the Convention anticipates the problem of non-compliance with its judgments and refers such matters to the General Assembly—which is directed to adopt political measures in order to insure compliance.

The Convention precisely addresses the Court’s power to sanction the state for a violation. 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.”⁸⁹ 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.⁹⁰ The Convention does not state whether these advisory opinions are purely “recommendations” 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 stating:

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-

88. *Id.* art. 65.

89. *Id.* art. 68(2).

90. *See id.* art. 64, at 159–60. 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.

Id.

American Court. 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 associated with the contentious judicial process.⁹¹

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? 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.⁹² Judge Piza participated in a recent decision before the Constitutional Chamber of the Costa Rican Supreme Court concerning Law 4420 of 22 September 1969.⁹³ 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.⁹⁴ After Costa Rica won the case before the Commission, it took the matter to the Court asking for an advisory opinion. The Court concluded that the law at issue was incompatible with Article 13.⁹⁵ However, Costa Rica did not repeal the law. In fact, on March 23, 1990, when questioned about the status of Law 4420 by the U.N. 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,

91. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83 of Sept. 8, 1983, Inter-Am. Ct. H.R. para. 43, Ser. A., No. 3, at 55 (emphasis added) (citations omitted).

92. See Rodolfo E. Piza Escalante, “Relaciones entre derecho internacional y derecho interno, con especial alusión al derecho de los derechos humanos” (May 31, 1996) (unpublished manuscript presented at the *Primer Concurso Interamericano de Derechos Humanos*, Washington College of Law, American University, on file with the author).

93. 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 [hereinafter Sentencia #2313-95].

94. See Case No. 9178, Inter-Am. C.H.R. 51, OEA/ser. L/V/11.66, doc.10 rev.1 (1985).

95. See *id.* at 60.

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 person 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 Association 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.⁹⁶

The debate was ultimately rendered moot in 1995 when the Constitutional Chamber of the Costa Rican Supreme Court repealed Law 4420.⁹⁷ In its decision, the Court relied on the Advisory Opinion of the Inter-American Court which had found Law 4420 incompatible with the American Convention.⁹⁸ The Costa Rican Court, in a very important judgment, stated:

96. U.N. Human Rights Comm., 38th Sess., 959th mtg., U.N. Doc. CCPR/C/SR.959 (1990) (statement by Mr. Gutierrez, Costa Rican Minister of Justice).

97. Sentencia #2313-95, *supra* note 93.

98. *See id.*

If the Court praised the fact that Costa Rica came before it seeking an advisory opinion, issued ten years ago, it is inexplicable what has been occurring since that date in the country, as regards the matter which has been decided, given that things have remained the same and the norm which was declared *incompatible* on that occasion, has remained in force during the entire time that has elapsed since the date of that judgment. This gives one pause for reflection, and in order to prescribe a certain logic to the system, in Part I, the Convention sets forth among the obligations of the States, the duty *to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms* (article 2). Even more important is article 68 which provides: “[t]he States Parties to the Convention undertake to comply with the judgments of the Court in any case to which they are parties.”

If the position is taken that this norm, which refers to states that “are parties,” only contemplates the situation of contentious cases, the Inter-American Court itself has expanded the binding character of its decisions to include advisory opinions (OC-3/83), and in the case under examination there is not doubt in the mind of this Court that Costa Rica assumed the role of party in the consultative procedure, since she formulated the request and the opinion refers to the specific case of a Costa Rican law declared incompatible with the Convention. Consequently, we are dealing with a law (the specific norm) which has been formally declared illegitimate.⁹⁹

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 U.N. Human Rights Committee in 1990, it is significant that the Constitutional Chamber of the Costa Rican Supreme Court 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. Because international human rights law is only enforceable at the national level through the domestic court system, its efficacy depends upon the political

99. *Id.* 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.

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. The new Colombian Law is an excellent example of the dedication States must give to human rights organizations—may it be the first of many in this direction.