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## In the Wrong Place, at the Wrong Time: Problems with the Inter-American Court of Human Rights Use of Contentious Jurisdiction

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# NOTES

## In the Wrong Place, at the Wrong Time: Problems with the Inter-American Court of Human Rights Use of Contentious Jurisdiction

### ABSTRACT

*The Inter-American region has a history of widespread human rights abuse. To combat this problem the Organization of American States has developed a regional system for the protection of human rights. The system's adjudicatory body is the Inter-American Court of Human Rights (the Court). In recent years the Court has expanded its power through its exercise of contentious jurisdiction. Certain factors, however, that are unique to the Inter-American region weigh against the Court's use of contentious jurisdiction.*

*Tracing the development of the Inter-American human rights system in general and the Court in particular, this Note evaluates the Court's powers and questions whether contentious jurisdiction should be utilized to protect and promote human rights in the Inter-American region. Next, this Note discusses those cases over which the Court has exercised contentious jurisdiction. This Note concludes with a discussion of three specific problems raised by the Court's exercise of contentious jurisdiction: its effect on Inter-American citizens' perception of the Court; its potential effect on advisory opinions issued by the Court; and, its effect on United States ratification of the American Convention on Human Rights.*

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## I. INTRODUCTION

Since its inception in 1948, the Organization of American States (the OAS)<sup>1</sup> has been developing methods for promoting and protecting human rights. In recent years, particularly since the advent of the Inter-American Court of Human Rights (the Court),<sup>2</sup> the Inter-American system for the protection of human rights has expanded its authority rapidly.<sup>3</sup> The Court's exercise of contentious jurisdiction is the most recent OAS effort to quell human rights violations.

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1. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter]. The OAS was created to achieve peace and justice, promote solidarity, strengthen collaboration, and defend sovereignty within and among the American States. *Id.* Within the United Nations, the OAS is a regional agency. The OAS member states as of 1991 were: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, and Venezuela. 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, booklet 1, at 45 (Thomas Buergenthal & Robert E. Norris eds., 1982); THE WORLD ALMANAC AND BOOK OF FACTS 1992, at 827-28 (1991).

2. The Court came into existence when the OAS adopted its statute in 1979. *See infra* note 64; *see also* Resolution No. 448 taken by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz, Bolivia, Oct. 1979.

3. *See infra* Part II.

The emergence of an Inter-American system for the protection of human rights is a victory for the region, but in the context of the American States, the system's speed of development raises some concerns. This Note considers whether contentious jurisdiction should be used to protect human rights in the Inter-American system. At issue is how much authority the Court can exert without eroding past gains or inhibiting future progress.

This analysis of the Court's impact on the region begins with an outline of the structure of the Inter-American human rights system. Part II describes the regional human rights system's development, including its origin, authority, and major organs. As a means of illustrating the effects of contentious jurisdiction, Part III summarizes those cases in which the Court has exercised its contentious jurisdiction.

Finally, Part IV presents various ways in which the Court's exercise of contentious jurisdiction may impact the regional human rights system. The focus is on the potential drawbacks of exercising contentious jurisdiction from the perspectives of citizens of the region, the Court's existing body of law, and United States ratification of the American Convention.

## II. ORIGIN AND STRUCTURE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The current Inter-American system for protection of human rights has two legal sources: the Charter of the Organization of American States<sup>4</sup> (the OAS Charter) and the American Convention on Human Rights<sup>5</sup> (the American Convention). These sources represent two distinct phases in the development of the Inter-American system for the promotion and protection of human rights; however, they share some of the same institutions and norms and together comprise a unified regional system.

### A. *The OAS Charter*

In 1948, at the Ninth International Conference of American States, two documents codified and formally introduced the concept of human rights in the Inter-American system: the OAS Charter<sup>6</sup> and the Ameri-

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4. OAS Charter, *supra* note 1.

5. American Convention on Human Rights, Nov. 22, 1969, OEA/Ser. A/16 (English), OAS T.S. No. 36, 9 I.L.M. 673 [hereinafter American Convention].

6. The OAS Charter was opened for signature in Bogota, Colombia in 1948 and entered into force in 1951 when Colombia became the fourteenth state to deposit its ratification of the OAS Charter. OAS Charter, *supra* note 1, at 2394, 119 U.N.T.S. at 48.

can Declaration of the Rights and Duties of Man<sup>7</sup> (the American Declaration). These documents initiated the first phase in the development of the Inter-American human rights system.<sup>8</sup>

The OAS Charter and American Declaration treat human rights differently because of their differing objectives. The OAS Charter makes relatively few references to human rights, and those references are in nonspecific terms. For example, article 5(j) contains a general proclamation of "fundamental rights of the individual without distinction as to race, nationality, creed or sex,"<sup>9</sup> and article 13 constrains the free development of member states to acts that "respect the rights of the individual and the principles of universal morality."<sup>10</sup> The American Declaration, however, contains a specific and extensive enumeration of human rights. It identifies civil and political rights as well as social, cultural, and economic rights.<sup>11</sup> As part of the OAS Charter, the American Declaration is legally binding.<sup>12</sup>

Twelve years after formally introducing the human rights concept, the OAS established the Inter-American Commission on Human Rights<sup>13</sup> (the Commission) as an "autonomous entity of the Organization of American States."<sup>14</sup> Its seven members act in their individual capacities,

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7. American Declaration of the Rights and Duties of Man, OAS Res. XXX, adopted by the Ninth International Conference of American States (May 2, 1948), *reprinted in* 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 1, booklet 5, at 1 [hereinafter American Declaration].

8. Because the American Declaration is now a part of the OAS Charter, this section examines the two documents together. *See infra* note 12.

9. OAS Charter, *supra* note 1, art. 5(j), at 2418, 119 U.N.T.S. at 54.

10. *Id.* art. 13, at 2419, 119 U.N.T.S. at 56.

11. For particular rights contained in the American Declaration, see *supra* note 7, article 3 (Right to Religious Freedom and Worship), article 5 (Right to Protection of Honor, Personal Reputation, and Private and Family Life), article 6 (Rights to a Family and to the Protection Thereof), article 7 (Right to Protection for Mothers and Children), article 12 (Right to Education), article 13 (Right to the Benefits of Culture), article 14 (Right to Work and to Fair Remuneration), article 15 (Right to Social Security), and article 16 (Right to Recognition of Juridical Personality and of Civil Rights).

12. *See* TOM J. FARER, THE GRAND STRATEGY OF THE UNITED STATES IN LATIN AMERICA 70-71 (1988) [hereinafter FARER, THE GRAND STRATEGY]. The OAS did not intend originally for the American Declaration to be binding. However, the Protocol of Buenos Aires, effective since 1970, amended the OAS Charter to incorporate by reference the Statute of the Inter-American Commission on Human Rights, which defines human rights as those rights set forth in the American Declaration. *Id.*

13. Fifth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser.C/II.5 (English), 4-6 (1960), *reprinted in* 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 1, booklet 6, at 134, 138.

14. 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, *supra* note 1, booklet 9, at

not as state representatives.<sup>15</sup> Initially, the Commission's responsibility was to "promote respect for human rights"<sup>16</sup> enumerated in the American Declaration. A 1965 resolution, however, expanded the Commission's powers and gave it the responsibility of submitting an annual report to the OAS on the progress and protection of human rights in the region.<sup>17</sup> Subsequently, a 1970 amendment to the OAS Charter<sup>18</sup> (the 1970 Amendment) elevated the Commission to the status of an independent OAS Charter organ.

The 1970 Amendment broadened the Commission's powers and gave it a more active role in the protection of human rights.<sup>19</sup> In addition to its original task of promoting human rights, the Commission obtained the authority to investigate large-scale human rights violations through "country studies"<sup>20</sup> and to act on individual petitions involving violations of rights that the American Declaration proclaimed. The 1970 Amendment explicitly anticipated the creation of the American Convention on Human Rights<sup>21</sup> and alluded to the creation of an Inter-American Court

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iii. The OAS created the Commission to promote the observance and defense of human rights and to serve as a consultative organ of the OAS. *Id.*

15. Statute of the Inter-American Commission on Human Rights, arts. 2-3, OEA/Ser.L/V/II.65, doc. 6 (1985) (approved by Resolution No. 447, taken by the General Assembly of the OAS at its Ninth Session, held in La Paz, Bolivia, Oct. 1979), *reprinted in ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM* 103 [hereinafter Statute of the Commission]. The OAS Council elects each of the seven members. All member states of the OAS participate in electing individuals to the Commission. Acting in their individual capacities allows those who are elected to eschew state partiality. *See id.*

16. *Id.* art. 1. The Commission's original responsibilities included making general recommendations to each individual member state as well as to all member states as a group, to prepare studies it considered advisable, to urge the governments of the member states to provide the Commission with information on measures they adopted regarding matters of human rights, and to serve as an advisory body to the OAS on human rights issues. *Id.* art. 9.

17. Second Special Inter-American Conference, Res. XXII, (Rio de Janeiro, Nov. 17-30, 1965), *reprinted in* 1 *HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM*, *supra* note 1, booklet 6, at 164.

18. Protocol of Amendment to the Charter of the Organization of American States, Feb. 27, 1967, 21 U.S.T. 607 (Protocol of Buenos Aires of 1967, entered into force Feb. 27, 1970) [hereinafter Protocol of Buenos Aires]; *see also* OAS Charter, *supra* note 1, art. 53(e), at 2426, 119 U.N.T.S. at 70.

19. *See* Protocol of Buenos Aires, *supra* note 18, arts. 111, 150, at 691-701.

20. *See infra* subpart II(C) for a description of "country studies."

21. The Protocol of Buenos Aires was drafted in 1967, two years before the adoption of the American Convention, and entered into force in 1970. *See* Protocol of Buenos Aires, *supra* note 18, at 607.

of Human Rights.<sup>22</sup> Article 112(2) of the amendment provided that “[a]n Inter-American convention on human rights shall determine the structure, competence and procedures of this Commission, as well as those of other organs responsible for these matters.”<sup>23</sup>

### B. *The American Convention on Human Rights*

The 1978 entry into force of the American Convention,<sup>24</sup> foreshadowed by the 1970 Amendment,<sup>25</sup> initiated the second phase in the development of the Inter-American human rights system. The American Convention, similar to article 5(j) of the OAS Charter, contains a broad nondiscrimination provision to ensure enjoyment of its enumerated rights and freedoms “without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”<sup>26</sup> Unlike the OAS Charter, however, the American Convention also provides a catalog of specifically protected human rights.

Among the American Convention’s protected rights are twenty-three categories of civil and political rights.<sup>27</sup> In addition, the Convention requires state parties to undertake adoption of progressive measures for “the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos

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22. *See id.* art. 150, 21 U.S.T. at 701.

23. *Id.* art. 112, 21 U.S.T. at 691.

24. *See* American Convention, *supra* note 5. The American Convention on Human Rights was opened for signature on November 20, 1969 in San Jose, Costa Rica. It entered into force on July 18, 1978, upon Grenada’s deposit of the eleventh instrument of ratification. The following member states have ratified the Convention: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Annual Report of the Inter-American Court of Human Rights 1989, app. VII, OAS/Ser.L./V./III.21, doc. 14 (1989).

25. *See* Protocol of Buenos Aires, *supra* note 18, art. 150, 21 U.S.T. at 701.

26. American Convention, *supra* note 5, art. 1(1), at 1, 9 I.L.M. at 675.

27. These civil and political rights include the right to juridical personality, right to life, right to humane treatment, freedom from slavery, right to personal liberty, right to a fair trial, freedom from ex post facto laws, right to compensation for miscarriage of justice, right to privacy, freedom of conscience and religion, freedom of thought and expression, right of reply, right of assembly, freedom of association, rights of the family, right to a name, rights of the child, right to nationality, right to property, freedom of movement and residence, right to participate in government, right to equal protection of the law, and right to judicial protection. *See id.* arts. 3-25, at 2-8, 9 I.L.M. at 676-82.

Aires."<sup>28</sup> Although the American Convention allows state parties to deviate from certain obligations, it does not permit derogation of a series of basic human rights.<sup>29</sup> Finally, similar to the American Declaration, the American Convention details individual duties supplemental to the enumerated individual rights: "(1) Every person has responsibilities to his family, his community, and mankind; [and] (2) The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."<sup>30</sup> To ensure that the state parties honor these human rights commitments, the American Convention grants supervisory authority to two organs: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.<sup>31</sup>

### C. *The Inter-American Commission on Human Rights*

Although the Inter-American Commission on Human Rights functions as an organ of both the OAS Charter and the American Convention,<sup>32</sup> it performs distinct roles for each entity. Under the OAS Charter, the Commission conducts country studies and investigates individual petitions which allege violations of rights that the American Declaration identifies.<sup>33</sup> The Commission may exercise these functions with respect to any OAS member state.<sup>34</sup> In comparison, the Commission's main function under the American Convention is to investigate individual petitions and interstate charges of human rights violations.<sup>35</sup> Thus, the Com-

28. *Id.* art. 26, at 9, 9 I.L.M. at 683.

29. *Id.* art. 27. The Convention "does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights." *Id.*

30. *Id.* art. 32, at 10, 9 I.L.M. at 684. *See* American Declaration, *supra* note 7, for its list of duties, which includes: article 29 (Duties to Society), article 30 (Duties toward Children and Parents), article 31 (Duty to Receive Instruction), article 32 (Duty to Vote), article 33 (Duty to Obey the Law), article 34 (Duty to Serve the Community and the Nation), article 35 (Duties with Respect to Social Security and Welfare), article 36 (Duty to Pay Taxes), article 37 (Duty to Work), and article 38 (Duty to Refrain from Political Activities in a Foreign Country).

31. American Convention, *supra* note 5, art. 33, at 11, 9 I.L.M. at 685.

32. *Id.* arts. 34-51, at 11-15, 9 I.L.M. at 685-89.

33. Statute of the Commission, *supra* note 15, art. 18, at 109-10.

34. *Id.*

35. *See* American Convention, *supra* note 5, arts. 41-51, at 12-14, 9 I.L.M. at 686-



mission may initiate country studies under its OAS Charter authority, investigate individual petitions under the OAS Charter or the American Convention, and investigate interstate charges under American Convention authority. The Commission may exercise its American Convention powers, however, only with respect to states that have ratified the Convention.<sup>36</sup>

Country studies are on-site observations the Commission conducts in an OAS member state.<sup>37</sup> Pursuant to its OAS Charter authority, the Commission first gathers information about human rights conditions in a particular state and prepares a draft report addressing the state's potential violations of rights enumerated in the American Declaration.<sup>38</sup> Next, the Commission allows the state the opportunity to review the draft report and to present additional evidence or comments.<sup>39</sup> The Commission analyzes the state's response to determine if its report requires modification to reflect any new information.<sup>40</sup> The Commission then decides whether to publish the report.<sup>41</sup> If the responding state refutes evidence of any violations or agrees to comply with the recommendations the Commission sets forth in the report, the Commission has no obligation to publish the report.<sup>42</sup> In addition to publishing the report, the Commission may submit it to the OAS General Assembly as part of its annual report to that body.<sup>43</sup> The General Assembly's subsequent discussion of a country study, particularly if it elects to pass a resolution in line with the report, may influence a state's decision whether to cease human rights violations.<sup>44</sup>

The Commission reviews individual petitions pursuant to its authority under either the OAS Charter or the American Convention. If the suspect state is a party to the American Convention, the Commission reviews individual petitions under that authority; otherwise, it reviews

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89. An "interstate charge" arises when a state party alleges that another state party has committed a violation of a right that the Convention guarantees. *Id.* art. 45, at 13, 9 I.L.M. at 687.

36. *Id.*

37. Regulations of the Inter-American Commission on Human Rights, arts. 55-62 (1980), reprinted in HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, *supra* note 15, at 115 [hereinafter Commission Regulations].

38. *Id.* arts. 59-62, at 136-37.

39. *Id.* art. 62(a), at 137.

40. *Id.* art. 62(c), at 138.

41. *Id.* art. 62(d), at 138.

42. *Id.*

43. *Id.* art. 63, at 138-39.

44. *Id.* art. 53, at 135.

them under its OAS Charter authority.<sup>45</sup> The source of the Commission's authority determines procedures and, at times, the outcome of the Commission's review.

The OAS Charter and the American Convention differ with regard to the Commission's powers and procedures in three significant areas: human rights petitions and communications, the definition of human rights, and the available remedies. First, the procedure for filing petitions and communications depends on whether the state has ratified the American Convention. States that have ratified the Convention must adhere to the petition procedure outlined in article 19(a) of the Statute of the Commission, pursuant to articles 44-51.<sup>46</sup> Nonratifying OAS member states follow the Commission's original procedure, which is restated in article 20 of the Statute of the Commission.<sup>47</sup> The most significant difference between the filing procedures is that petitions and communications which allege violations by state parties to the Convention are subject to a stringent list of requirements.<sup>48</sup> Communications about an OAS member state that is not a party to the Convention are not subject to such strict requirements; the Commission therefore is able to pursue its investigations more easily.

Second, the definition of protected human rights depends on whether the Commission is acting under the OAS Charter or the American Convention. In its role as an OAS Charter organ dealing with member states that have not ratified the American Convention, the Commission draws exclusively upon the American Declaration's definition of human rights.<sup>49</sup> When dealing with states that have ratified the American Convention, however, the Commission relies on the American Convention's definition.<sup>50</sup> This distinction is important because, although the American Convention draws heavily on the American Declaration, there are

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45. Statute of the Commission, *supra* note 15, arts. 18-19, at 109-10. The Commission on occasion has argued that the Convention or some part of it is binding even on states that have not ratified it. See David Forsythe, *Human Rights, The United States and the Organization of American States*, 13 HUM. RTS. Q. 66, 69 (1991) (citing Larry LeBlanc, *Problems in Interpreting and Applying Inter-American Human Rights Regime Norms* (1989) (unpublished paper)).

46. Statute of the Commission, *supra* note 15, art. 19(a), at 110; see also Commission Regulations, *supra* note 37, arts. 31-41, at 127-31 (containing the many rules applicable to petitions and communications regarding state parties to the Convention).

47. Statute of the Commission, *supra* note 15, art. 20, at 111; see also Commission Regulations, *supra* note 37, arts. 51-52, at 134 (demonstrating the lack of strict rules applicable to petitions concerning members that are not parties to the Convention).

48. American Convention, *supra* note 5, arts. 44-51, at 13-14, 9 I.L.M. at 687-89.

49. Statute of the Commission, *supra* note 15, art. 1, at 105.

50. *Id.*

some critical distinctions. For example, the American Convention enumerates only civil and political rights,<sup>51</sup> whereas the American Declaration enumerates economic and cultural rights as well.<sup>52</sup>

Third and most significant, the two documents provide different remedies. Individual petitions for relief from violations by states that have not ratified the American Convention usually conclude with a final report.<sup>53</sup> The Commission may publish the decision and present it to the OAS General Assembly in the Commission's Annual Report.<sup>54</sup> Presentation to the General Assembly may then lead to the passing of a General Assembly resolution. Passing a General Assembly resolution can have a significant impact on the behavior of a state that the Commission has charged with a human rights violation.<sup>55</sup> OAS General Assembly resolutions carry considerable moral and political weight; they are not, however, legally binding. In contrast, the Commission acting under the American Convention may bring cases arising from individual petitions before the Court, which may result in binding decisions.<sup>56</sup>

The American Convention also authorizes the Commission to accept interstate petitions,<sup>57</sup> but the jurisdictional rules for handling state complaints vary from those governing individual complaints. For example, the Commission obtains jurisdiction over individual petitions regarding any state that has ratified the American Convention.<sup>58</sup> The Commission may accept such individual petitions from almost anyone,<sup>59</sup> there is no

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51. American Convention, *supra* note 5, arts. 3-25, at 2-8, 9 I.L.M. at 676-83. However, article 26 of the American Convention incorporates by reference the specific economic and cultural rights set forth in the OAS Charter. *Id.*, art. 26, at 9, 9 I.L.M. at 683.

52. American Declaration, *supra* note 7, arts. 13-14.

53. Commission Regulations, *supra* note 37, art. 53, at 135.

54. Statute of the Commission, *supra* note 15, art. 18, at 109-10. This is similar to the Commission's treatment of a country study. *See supra* subpart II(C).

55. *See* AG/Res. 950 (XVIII-0/88) Annual Report of the Inter-American Commission on Human Rights (Resolution adopted in the thirteenth plenary session, held on Nov. 19, 1988) reprinted in INTER-AMERICAN YEARBOOK ON HUMAN RIGHTS 1046 (1988).

56. Statute of the Commission, *supra* note 15, art. 19, at 110. States may also bring cases before the Court. *See infra* subpart II(D). Even when states bring the action, however, the Commission must also appear. American Convention, *supra* note 5, art. 57, at 17, 9 I.L.M. at 691.

57. American Convention, *supra* note 5, art. 45, at 13, 9 I.L.M. at 687.

58. *Id.* arts. 44, 74(2), at 13, 20, 9 I.L.M. at 687, 694. The Convention enters into force with respect to a ratifying state on the date of the deposit of its instrument of ratification. *Id.* art. 74(2), at 20, 9 I.L.M. at 694.

59. *Id.* Specifically, any person, group, or legally recognized nongovernmental entity may file a petition. *Id.* art. 44, at 13, 9 I.L.M. at 687.

requirement that a victim or a victim's surviving relative file the petition. A state, however, may only file a petition against another state if both states have ratified the American Convention and formally recognized the Commission's jurisdiction to receive interstate complaints.<sup>60</sup> Thus far, only a handful of states have formally recognized the Commission's jurisdiction over interstate petitions.<sup>61</sup>

Although the Commission's functions under the American Convention and the OAS Charter overlap, there are distinctions in the application of the Commission's authority. Generally speaking, when operating as an American Convention organ, the Commission's jurisdiction is more specific and its powers more extensive, whereas when operating as an OAS Charter organ, the Commission's power is less distinct but more flexible. For example, the Commission may move on its own initiative to investigate human rights conditions by performing a country study in any OAS member state without any formal interstate or individual complaints.<sup>62</sup> The speed and ease of this type of intervention is available under the OAS Charter, but it is not possible under the more formal American Convention system.

Because of its dual role under the American Convention and OAS Charter, the Commission is able to operate among and within those member states that have not ratified the American Convention. The duality has helped the Commission to evolve as the central body in the Inter-American human rights system. This ability to promote and monitor respect for human rights in the entire Inter-American system, together with the Commission's nonadjudicatory nature, support maintenance of the Commission as the system's central body for human rights enforcement.<sup>63</sup>

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60. *Id.* art. 45, at 13, 9 I.L.M. at 687.

61. As of 1986, the following states recognized the Commission's jurisdiction over interstate petitions: Argentina, Colombia, Costa Rica, Ecuador, Jamaica, Peru, Uruguay, and Venezuela. THOMAS BUERGENTHAL ET AL., *PROTECTING HUMAN RIGHTS IN THE AMERICAS* 386 (2d ed. 1986) [hereinafter BUERGENTHAL, *PROTECTING HUMAN RIGHTS*].

62. Statute of the Commission, *supra* note 15, arts. 18-20, at 109-10, 111.

63. American Convention, *supra* note 5, art. 33, at 11, 9 I.L.M. at 685. The American Convention recognizes the Commission and the Inter-American Court of Human Rights as its organs that address matters relating to state parties' adherence to the Convention. *Id.* Because the Commission has been much more active than the Court and has existed for a longer period of time, the Commission acts as the principal organ under the Convention. *See* Statute of the Commission, *supra* note 15.

#### D. *The Inter-American Court of Human Rights*

In addition to recognizing the Commission as an OAS Charter organ and granting the Commission new powers, the American Convention created the Inter-American Court of Human Rights.<sup>64</sup> The Court's stated purpose is "the application and interpretation of the American Convention on Human Rights."<sup>65</sup> The Court executes this purpose through its exercise of advisory or contentious jurisdiction.<sup>66</sup> Unlike the Commission, the Court does not play a second role as an OAS Charter organ; rather, it functions only pursuant to the American Convention. The American Convention, however, does confer on the Court limited judicial powers over OAS member states that have not ratified the American Convention.<sup>67</sup> While its advisory jurisdiction extends to all OAS member states,<sup>68</sup> the Court may exercise its contentious jurisdiction only over states that are parties to the American Convention and that have specifically recognized the Court's contentious jurisdiction.<sup>69</sup>

##### 1. Advisory Jurisdiction

Advisory opinions are not legally binding.<sup>70</sup> Moreover, any OAS member state or OAS organ<sup>71</sup> has standing to seek an advisory opinion

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64. American Convention, *supra* note 5, arts. 52-69, at 16-18, 9 I.L.M. at 690-93. The Statute of the Inter-American Court of Human Rights, which the OAS adopted in 1979, governs the Court's actions. See Statute of the Inter-American Court of Human Rights, reprinted in HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS, *supra* note 15, at 143 [hereinafter Statute of the Court].

65. Statute of the Court, *supra* note 64, art. 1, at 145.

66. American Convention, *supra* note 5, arts. 62, 64, at 17, 9 I.L.M. at 691-92.

67. *Id.* art. 64, at 17, 9 I.L.M. at 692. The Court's authority with respect to those OAS member states that have not ratified the Convention is limited to advisory opinions. *Id.*

68. *Id.*

69. *Id.* art. 62, at 17, 9 I.L.M. at 691-92. See *infra* section II(D)(2).

70. American Convention, *supra* note 5, art. 64, at 17, 9 I.L.M. at 692.

71. American Convention, *supra* note 5, art. 64, at 18, 9 I.L.M. at 692. The OAS organs that may request advisory opinions are those listed in Chapter X of the OAS Charter, and requests are restricted to matters falling within their respective spheres of competence. *Id.* art. 64, at 17, 9 I.L.M. at 692. The OAS organs are: the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences, and the Specialized Organizations. OAS Charter, *supra* note 1, art. 51, at 2425, 119 U.N.T.S. at 68. See The Effect of Reservations on the Entry into Force of the American Convention (arts. 74, 75), Advisory Op. No. OC-2/82 (Sept. 24, 1982), Inter-Am. Ct. H.R. (ser. A): Judgments and Opinions, No. 2, para. 14 (1982), reprinted in 22 I.L.M. 37 (1983).

from the Court.<sup>72</sup> The Court's advisory jurisdiction is not limited to interpretation of the American Convention. It extends to interpretations of other treaties "concerning the protection of human rights in the American states."<sup>73</sup> In fact, any OAS member state may request an advisory opinion regarding any international agreement that concerns human rights in any member state of the OAS.<sup>74</sup> Additionally, any OAS member state may request an advisory opinion regarding the compatibility of its laws with the American Convention or any other human rights treaty.<sup>75</sup>

While the Court enjoys the broadest advisory powers of any international court,<sup>76</sup> it must work under three limitations.<sup>77</sup> First, the Court may consider only those treaties involving the protection of human rights in an OAS member state.<sup>78</sup> Second, the Court cannot grant a request for an advisory opinion that is likely to undermine the Court's contentious jurisdiction or negatively affect the American Convention system.<sup>79</sup> Third, if the Court declines to render an opinion, it must do so by issuing a statement that explains why it elected not to exercise its jurisdiction.<sup>80</sup>

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72. American Convention, *supra* note 5, art. 64, at 17, 9 I.L.M. at 692; Statute of the Court, *supra* note 64, art. 2(2), at 105.

73. *Id.* "American states" is defined as the OAS member states. *See supra* note 1 and accompanying text.

74. *See* "Other Treaties" Subject to the Consultative Jurisdiction of the Court (art. 64), Advisory Op. No. OC-1/82 (Sept. 24, 1982), Inter-Am. Ct. H.R. (ser. A): Judgments and Opinions, No. 1, para. 14 (1982), reprinted in 22 I.L.M. 51 (1983) [hereinafter Other Treaties]. The question of what defines a "treaty" was most recently addressed in an advisory opinion which Peru requested. The Court concluded that its advisory jurisdiction can be exercised with regard to any provision dealing with human rights contained in any international treaty applicable in any OAS member state. This includes treaties in which one or more of the parties are not OAS member states. *Id.*

75. American Convention, *supra* note 5, art. 64(2), at 17, 9 I.L.M. at 692.

76. Thomas Buergenthal, *Human Rights in the Americas: View from the Inter-American Court*, 2 CONN. J. INT'L L. 303, 308 (1987) [hereinafter Buergenthal, *Human Rights*].

77. Other Treaties, *supra* note 74, paras. 18-31, 22 I.L.M. at 56-59; *see* BUERGENTHAL, PROTECTING HUMAN RIGHTS, *supra* note 61, at 296-302.

78. American Convention, *supra* note 5, art. 64, at 17, 9 I.L.M. at 692; Other Treaties, *supra* note 74, para. 52.

79. Other Treaties, *supra* note 74, para. 52, 22 I.L.M. at 65.

80. American Convention, *supra* note 5, art. 66, at 18, 9 I.L.M. at 692.

## 2. Contentious Jurisdiction

The Court's second function is to conduct adjudicatory proceedings under its contentious jurisdiction. Contentious jurisdiction decisions are legally binding.<sup>81</sup> Only the Commission and those state parties that are signatories to the American Convention have the right to submit a case to the Court.<sup>82</sup> Individuals may access the Court only through the Commission's individual petition procedure.<sup>83</sup> In order to be subject to the Court's adjudicatory power, a state must have ratified the American Convention and formally submitted to the Court's contentious jurisdiction.<sup>84</sup> A state party may acquiesce to the Court's contentious jurisdiction unconditionally, on condition of reciprocity, for a set period, or even for resolution of a single case.<sup>85</sup>

### III. CONTENTIOUS JURISDICTION DECISIONS

As of this writing, the Court has decided only three<sup>86</sup> contentious jurisdiction cases: the Velasquez Rodriguez Case<sup>87</sup> (*Velasquez Rodriguez*), the Fairen Garbi and Solis Corrales Case<sup>88</sup> (*Garbi and Corrales*), and the Godinez Cruz Case<sup>89</sup> (*Godinez Cruz*). All three of the cases concern disappearances in Honduras, and all arose from individual petitions the

81. *Id.* art. 68, at 18, 9 I.L.M. at 693.

82. *Id.* art. 61, at 17, 9 I.L.M. at 691; Statute of the Court, *supra* note 64, art. 2(1), at 105.

83. American Convention, *supra* note 5, arts. 44, 61, at 13, 17, 9 I.L.M. at 687, 691.

84. *Id.* art. 62, at 17, 9 I.L.M. at 691-92. Thus far, the following states have accepted the Court's contentious jurisdiction: Argentina, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Peru, Suriname, Uruguay, and Venezuela. Annual Report of the Inter-American Court of Human Rights 1989, *supra* note 24.

85. American Convention, *supra* note 5, art. 62, at 17, 9 I.L.M. at 691-92; Statute of the Court, *supra* note 64, art. 2(1), at 105. When a state accepts the Court's contentious jurisdiction on a condition of reciprocity, that state agrees to recognize the Court's contentious jurisdiction only with regard to interstate claims filed by other states that have recognized the Court's contentious jurisdiction.

86. This number does not include an earlier case, submitted to the Court in 1981 by Costa Rica, that the Court declined to examine because the Inter-American Commission had not first considered the matter. *See* Matter of Viviana Gallardo, Inter-Am. Ct. H.R. (ser. G): Judgment of Nov. 13, 1981.

87. Velasquez Rodriguez Case, Inter-Am. Ct. H.R. (ser. C): Judgment of July 29, 1988, No. 4 [hereinafter *Velasquez Rodriguez*].

88. Fairen Garbi and Solis Corrales Case, Inter-Am. Ct. H.R. (ser. C): Judgment of Mar. 15, 1989, No. 6 [hereinafter *Garbi and Corrales*].

89. Godinez Cruz Case, Inter-Am. Ct. H.R. (ser. C): Judgment of Jan. 20, 1989, No. 5 [hereinafter *Godinez Cruz*].

Commission investigated and presented to the Court.<sup>90</sup> In each of the three cases, the Commission asked the Court to determine whether Honduras had violated the American Convention.<sup>91</sup>

#### A. *Facts and Proceedings at the Commission*

*Velasquez Rodriguez* was the first case the Commission investigated. It involved the disappearance of Angel Manfredo Velasquez Rodriguez, a student at the National Autonomous University of Honduras.<sup>92</sup> On October 7, 1981, the Commission received a complaint alleging that on September 12, 1981, Velasquez Rodriguez "was violently detained without a warrant for his arrest"<sup>93</sup> and "accused of alleged political crimes, and subjected to harsh interrogation and cruel torture"<sup>94</sup> by members of the Honduran armed forces.

The Commission, in carrying out its investigation of the complaint, requested certain information from Honduras.<sup>95</sup> By 1983, despite the Commission's repeated requests, Honduras still had not supplied the requested information. At that point, relying on article 42 of its regulations,<sup>96</sup> the Commission presumed "as true the allegations contained in the communication of October 7, 1981, concerning the detention and disappearance of Velasquez Rodriguez in the Republic of Honduras"<sup>97</sup> and advised Honduras that it had violated the American Convention.<sup>98</sup>

In response to Honduras' request for reconsideration, the Commission once again gave Honduras an opportunity to present observations and

90. American Convention, *supra* note 5, arts. 50-51, at 14, 9 I.L.M. at 689; *see supra* notes 88-89.

91. American Convention, *supra* note 5, art. 4 (Right to Life), art. 5 (Right to Humane Treatment), art. 7 (Right to Personal Liberty); *Velasquez Rodriguez*, *supra* note 87, paras. 1-2; *Garbi and Corrales*, *supra* note 88, paras. 1-2; *Godinez Cruz*, *supra* note 89, paras. 1-2.

92. *Velasquez Rodriguez*, *supra* note 87, para. 3.

93. *Id.*

94. *Id.*

95. Case 7920, *Velasquez Rodriguez Case*, Inter-Am. C.H.R. 61, OEA/ser.L./V./II.61, doc. 44, res. 30/83 (1983).

96. Article 42 states:

The facts reported in the petition whose pertinent parts have been transmitted to the government of the State in reference shall be presumed to be true if, during the maximum period set by the Commission under the provisions of Article 34 paragraph 5, the government has not provided the pertinent information, as long as other evidence does not lead to a different conclusion.

Commission Regulations, *supra* note 37, art. 42, at 131.

97. Case 7920, *Velasquez Rodriguez Case*, Inter-Am. C.H.R. at 61.

98. *Id.*



evidence in its favor.<sup>99</sup> Again, Honduras failed to provide any satisfactory information.<sup>100</sup> Consequently, the Commission denied Honduras' request for reconsideration, and found that all evidence showed that Velasquez Rodriguez was still missing and that the Government of Honduras had not offered convincing proof that would allow the Commission to determine that the allegations were not true.<sup>101</sup> The Commission concluded that Honduras had violated article 4 (Right to Life), article 5 (Right to Humane Treatment), and article 7 (Right to Personal Liberty) and resolved to refer the matter to the Court.<sup>102</sup>

The Commission next examined *Garbi and Corrales*.<sup>103</sup> This petition, which the Commission received on January 14, 1982, complained of the December 1981 disappearance of Fairen Garbi and Solis Corrales.<sup>104</sup> The petition alleged that Garbi and Corrales disappeared while driving through Honduras in route to Mexico from Costa Rica.<sup>105</sup> The petition claimed that the Honduran government denied that Garbi and Corrales had ever entered Honduras, while the Nicaraguan government confirmed their departure for Honduras through the Las Manos border post on December 11, 1981.<sup>106</sup>

After Honduras made various inconsistent statements regarding Garbi and Corrales' entry into Honduras, the Commission found that Honduras had violated article 4 (Right to Life) and article 7 (Right to Personal Liberty) of the American Convention.<sup>107</sup> Although the Commission granted Honduras' request for reconsideration,<sup>108</sup> it determined that Honduras offered no reason for the Commission to alter its initial findings.<sup>109</sup> Therefore, the Commission reaffirmed its initial conclusion that Honduras was accountable for the disappearance of Fairen Garbi and

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99. Case 7920, Velasquez Rodriguez Case, Inter-Am. C.H.R. 68, OEA/ser.L./V./II.68, doc. 8, rev. 1, res. 22/86 (1986).

100. *Id.*

101. *Id.*

102. *Id.*

103. Case 7951, Fairen Garbi and Solis Corrales Case, Inter-Am. C.H.R. 84, OEA/ser.L./V./II.66, doc. 10, rev. 1, res. 16/84 (1985).

104. *Id.*

105. *Id.* at 85.

106. *Id.* Nicaragua submitted photocopies of the immigration cards in the handwriting of the travelers.

107. *Id.* at 103.

108. Case 7951, Fairen Garbi and Solis Corrales Case, Inter-Am. C.H.R. 47, 49, OEA/ser.L./V./II.68, doc. 8, rev. 1, res. 23/86 (1986).

109. *Id.* Honduras initially denied that Garbi and Corrales had entered Honduras but later claimed that Garbi and Corrales had passed through Honduras and continued into Guatemala.

Solis Corrales.<sup>110</sup>

The third case the Commission investigated was *Godinez Cruz*.<sup>111</sup> On October 9, 1982, the Commission received an individual petition alleging that on July 22, 1982, Saul Godinez Cruz, a schoolteacher, disappeared.<sup>112</sup> The petition alleged "that an eyewitness saw a man in a military uniform and two persons in civilian clothes arrest a person who looked like Godinez."<sup>113</sup> Further, Godinez Cruz's "house had been under surveillance, presumably by government agents, for some days before his disappearance."<sup>114</sup>

As in *Velasquez Rodriguez*, Honduras ignored the Commission's repeated efforts to secure information regarding Godinez Cruz's disappearance.<sup>115</sup> Thus, the Commission, relying on article 42 of its regulations,<sup>116</sup> presumed the truth of the allegations in the individual petition.<sup>117</sup> After initially granting Honduras' request for reconsideration<sup>118</sup> and providing Honduras ample opportunity to present evidence on its behalf, the Commission resolved that it could not reconsider its decision because Honduras' request was "unfounded and lack[ed] information other than that already examined" by the Commission.<sup>119</sup> The Commission concluded that Honduras had violated article 4 (Right to Life), article 5 (Right to Humane Treatment), and article 7 (Right to Personal Liberty) and resolved to refer the matter to the Inter-American Court of Human Rights.<sup>120</sup>

### B. *Proceedings in the Court*

On April 18, 1986, the Commission resolved to refer all three cases to the Court pursuant to articles 50 and 51 of the American Convention.<sup>121</sup>

110. *Id.*

111. *Godinez Cruz*, *supra* note 89.

112. *Id.* para. 3.

113. *Id.*

114. *Id.*

115. *Id.* para. 4.

116. Commission Regulations, *supra* note 37, art. 42.

117. *Godinez Cruz*, *supra* note 89, para. 4.

118. Case 8097, *Godinez Cruz* Case, Inter-Am. C.H.R. 49, 50, OEA/ser. L./V./II.68, doc. 8, rev. 1, res. 2/86 (1986).

119. *Godinez Cruz*, *supra* note 89, para. 12.

120. *Id.* paras. 4, 12.

121. American Convention, *supra* note 5, arts. 50-51, at 14, 9 I.L.M. at 689. The Commission was authorized to bring the Honduran cases before the Court after completing its internal evaluation because Honduras became a Party to the American Convention on September 8, 1977, and accepted the Court's contentious jurisdiction on September 9, 1981 (Inter-Am. C.H.R. resolutions: 22/86, 23/86, and 24/86 (Apr. 18, 1986)).

For each of the three cases, Honduras presented six preliminary objections to the Court's jurisdiction.<sup>122</sup> The Court dismissed five of the objections and joined one regarding exhaustion of domestic legal remedies<sup>123</sup> with the merits of the cases.<sup>124</sup> Upon review of testimony and documentary evidence, the Court noted that under the American Convention the otherwise required exhaustion of domestic legal remedies does not apply where due process of law is unavailable or where a state denies access to domestic remedies.<sup>125</sup> The Court placed the burden of showing that each case fell within this exception on the Commission because it was the party alleging the exception.<sup>126</sup>

The Court next focused on the merits of each case. In *Garbi and Corrales*, the Court found that it could not hold Honduras responsible because the evidence failed to establish where the two individuals had

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American Convention, *supra* note 5, art. 62, at 17, 9 I.L.M. at 691-92.

122. The six objections made by the Government were: a) lack of a formal declaration of admissibility by the Commission; b) failure to attempt a friendly settlement; c) failure to carry out an on-site investigation; d) improper application of articles 50 and 51 of the Convention; and e) nonexhaustion of domestic legal remedies. *See Velasquez Rodriguez Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 1; Godinez Cruz Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 3; Fairen Garbi and Solis Corrales Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 2.*

123. Exhaustion of domestic-legal remedies is a jurisdictional prerequisite to the admissibility of the Commission's petitions. The Court held that it must determine whether this requirement is met because it is a matter of interpretation or application of the Convention. *See Velasquez Rodriguez Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 1; Godinez Cruz Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 3; Fairen Garbi and Solis Corrales Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 2.*

124. *Velasquez Rodriguez Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 1; Godinez Cruz Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 3; Fairen Garbi and Solis Corrales Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 2.*

125. *Velasquez Rodriguez Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 1; Godinez Cruz Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 3; Fairen Garbi and Solis Corrales Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 2.*

126. *Velasquez Rodriguez Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 1; Godinez Cruz Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 3; Fairen Garbi and Solis Corrales Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 2.*

actually disappeared.<sup>127</sup> By analyzing the signatures on the border-crossing documents, the Court concluded that Garbi and Corrales exited Nicaragua on December 11, but it could not determine whether they entered Guatemala on December 12.<sup>128</sup> Due to the inconsistent evidence presented, the Court could not conclusively establish that Honduras played a part in their disappearance.<sup>129</sup>

Upon review of the merits of *Velasquez Rodriguez* and *Godinez Cruz*, the Court addressed the Commission's allegations that Honduras had violated articles 4, 5, and 7 of the American Convention.<sup>130</sup> Regarding Honduras' objection that the complainants had not exhausted domestic remedies, the Court determined that the legal remedies in Honduras were ineffective.<sup>131</sup> The Court attributed the ineffectiveness to the clandestine nature of the imprisonment, the practical inapplicability of the legal remedies, indifference on the part of the authorities, and an atmosphere of fear and intimidation in the legal profession.<sup>132</sup> After hearing the testimony of witnesses and reviewing the evidence, the Court found sufficient proof of the following facts: from 1981 to 1984, 100 to 150 persons disappeared in Honduras; those disappearances followed a similar pattern; it was public knowledge in Honduras that the state conducted the kidnappings; the disappearances occurred in a systematic manner; the weapons and equipment the perpetrators used were reserved for official use; the victims were subjected to cruel and humiliating treatment and torture; the authorities systematically denied any knowledge of

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127. *Garbi and Corrales*, *supra* note 88, paras. 157-60.

128. *Id.* paras. 4, 39, 45, 116, 117, 124(a), 124(c), 138. Guatemala stated that Garbi and Corrales had entered Guatemala from Honduras on December 12, 1981, at the El Florido border post. Subsequently, Guatemala changed its position and stated that Garbi and Corrales never entered its territory. Although Guatemala had originally produced border documents evidencing their crossing, Guatemala later claimed that the border documents were falsified and that the list of entries into Guatemala through El Florido for December 1981, had disappeared.

129. *Id.* paras. 157-60.

130. Because of the similarities in the facts of *Velasquez Rodriguez* and *Godinez Cruz*, the Court rendered identical opinions except for its determination of damages. See *Velasquez Rodriguez*, *supra* note 87; *Godinez Cruz*, *supra* note 89.

131. *Velasquez Rodriguez*, *supra* note 87, paras. 50-81; *Godinez Cruz*, *supra* note 89, paras. 53-88.

132. *Velasquez Rodriguez* Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 1; *Godinez Cruz* Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C): Judgment of June 26, 1987, No. 3. In *Velasquez Rodriguez*, three habeas corpus applications and two criminal complaints were filed unsuccessfully. In *Godinez Cruz*, three habeas corpus applications and one criminal complaint were filed unsuccessfully.

the detentions; and judicial proceedings under state authority were processed slowly with a clear lack of interest.<sup>133</sup>

The Court also found that the disappearances of Velasquez Rodriguez and Godinez Cruz were part of that pattern.<sup>134</sup> Briefly stated, the Court found that Honduran officials carried out or tolerated a practice of disappearances that existed from 1981 to 1984 and that Honduras' tolerance of the disappearances was a violation of human rights.<sup>135</sup> In addition, the Commission concluded that the circumstances surrounding the disappearance of Velasquez Rodriguez and Godinez Cruz coincided with the pattern of disappearances during that time.<sup>136</sup>

The Court concluded that Honduras had violated articles 4, 5, and 7 in *Velasquez Rodriguez* and *Godinez Cruz*.<sup>137</sup> First, the Court determined that the deprivation of "physical liberty without legal cause and without a determination of the lawfulness of [their] detention by a judge or competent tribunal"<sup>138</sup> directly violated their right to personal liberty under article 7 of the American Convention.<sup>139</sup> Second, the Court held that the "subjection of [Velasquez Rodriguez and Godinez Cruz] to prolonged isolation and deprivation of communication"<sup>140</sup> represented cruel and inhumane treatment,<sup>141</sup> and further, that such treatment violates every detainee's right "under Article 5(1) and 5(2) to treatment respectful of his dignity."<sup>142</sup> Third, with regard to both *Velasquez Rodriguez* and *Godinez Cruz*,<sup>143</sup> the Court found that Honduras violated article 4

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133. *Velasquez Rodriguez*, *supra* note 87, paras. 147(a)-(d); *Godinez Cruz*, *supra* note 89, paras. 153(a)-(d).

134. *Velasquez Rodriguez*, *supra* note 87, paras. 147, 148; *Godinez Cruz*, *supra* note 89, para. 154.

135. *Velasquez Rodriguez*, *supra* note 87, para. 148; *Godinez Cruz*, *supra* note 89, para. 156.

136. *Velasquez Rodriguez*, *supra* note 87, para. 148; *Godinez Cruz*, *supra* note 89, para. 156.

137. *Velasquez Rodriguez*, *supra* note 87, para. 185; *Godinez Cruz*, *supra* note 89, para. 195.

138. *Velasquez Rodriguez*, *supra* note 87, para. 186; *Godinez Cruz*, *supra* note 89, para. 196.

139. American Convention, *supra* note 5, art. 7, at 3, 9 I.L.M. at 676.

140. *Velasquez Rodriguez*, *supra* note 87, para. 187; *Godinez Cruz*, *supra* note 89, para. 197.

141. *Velasquez Rodriguez*, *supra* note 87, para. 187; *Godinez Cruz*, *supra* note 89, para. 197.

142. *Velasquez Rodriguez*, *supra* note 87, para. 187; *Godinez Cruz*, *supra* note 89, para. 197.

143. *Velasquez Rodriguez*, *supra* note 87, para. 188; *Godinez Cruz*, *supra* note 89, para. 198.

of the American Convention.<sup>144</sup> The Court determined that the circumstances surrounding their disappearances and the lack of knowledge about their fate created a reasonable presumption that they were killed.<sup>145</sup>

Finally, the Court held that the violations of articles 4, 5, and 7 necessarily implied a violation of article 1(1) of the American Convention.<sup>146</sup> Article 1(1) creates a legal duty on the part of the state parties to guarantee the rights and freedoms recognized in the American Convention.<sup>147</sup> The Court held that Honduras' failure to provide the protections of articles 4, 5, and 7 was a violation of its legal duty under article 1(1) of the Convention to ensure the rights recognized in the Convention.<sup>148</sup>

In a separate opinion on the issue of damages, the Court awarded compensatory damages in the amount of 750,000 lempiras to be paid by Honduras to the family of Velasquez Rodriguez.<sup>149</sup> In a concurrent opinion, the Court awarded compensatory damages in the amount of 650,000 lempiras to the family of Godinez Cruz.<sup>150</sup>

#### IV. EFFECTS OF CONTENTIOUS JURISDICTION

An international system for the protection of human rights operates through the people it protects, the governments it monitors, and the organs of the system itself. In order to maximize its effectiveness, a system should take each of these elements into account in planning its development. While the concept of human rights is universal, the methods of promotion and protection of those rights vary. Unique cultural, political, and economic factors justify the regionalization of human rights systems. Similarly, an analysis of a regional human rights system necessarily considers these factors in its measurement of a system's successes and failures. Moreover, the uniqueness of each region counsels against compari-

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144. American Convention, *supra* note 5, art. 4, at 2, 9 I.L.M. at 677.

145. *Velasquez Rodriguez*, *supra* note 87, para. 188; *Godinez Cruz*, *supra* note 89, para. 198.

146. *Velasquez Rodriguez*, *supra* note 87, paras. 161-62; *Godinez Cruz*, *supra* note 89, paras. 170-71.

147. American Convention, *supra* note 5, art. 1(1), at 1, 9 I.L.M. at 675.

148. *Velasquez Rodriguez*, *supra* note 87, para. 182; *Godinez Cruz*, *supra* note 89, para. 192.

149. *Velasquez Rodriguez Case, Compensatory Damages, Inter-Am. Ct. H.R. (ser. C): Judgment of July 21, 1989 (art. 63(1) No. 7)*. The Court set loss of earnings at 500,000 lempiras and moral damages at 250,000 lempiras. *Id.* paras. 49, 51.

150. *Godinez Cruz Case, Compensatory Damages, Inter-Am. Ct. H.R. (ser. C): Judgment of July 21, 1989 (art. 63(1) No. 8)*. The Court set loss of earnings at 400,000 lempiras and moral damages at 250,000 lempiras. *Id.* paras. 47, 50.

sons with other regional human rights systems.<sup>151</sup> Given the characteristics of the American States, it is questionable whether contentious jurisdiction, so effective in other regions, is an appropriate tool for the enforcement of human rights in the OAS.

A. *Contentious Jurisdiction's Effect on Citizens' Perceptions of the Court*

The best human rights system is ineffective without the support of the citizens it protects, and a court cannot obtain that support unless it tailors itself to the culture that it serves. Over two-thirds of the OAS is made up of Latin American states.<sup>152</sup> Such a large presence necessarily makes Latin America a major player in the creation, implementation, and ultimate success of any Inter-American human rights effort. Thus, the potential impact of Latin American culture on the exercise of the Court's contentious jurisdiction is an important consideration for planning the speed and direction of the Court's growth.

The Court's exercise of contentious jurisdiction infringes on at least two fundamental tenets of Latin American culture.<sup>153</sup> First, Latin Americans share a distrust of authority;<sup>154</sup> second, this distrust escalates when

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151. For examples of comparisons between the European and Inter-American systems, see Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585 (1987); Thomas Buerghental, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1 (1988); Jochen A. Frowein, *The European and the American Conventions on Human Rights—A Comparison*, 1 HUM. RTS. L.J. 44 (1980).

152. Twenty-five of the thirty-five OAS member states are Latin American: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. JOYCE MOSS & GEORGE WILSON, *PEOPLES OF THE WORLD: LATIN AMERICANS* (1989); *THE WORLD ALMANAC AND BOOK OF FACTS 1992*, *supra* note 1.

153. See LEWIS HANKE, *CONTEMPORARY LATIN AMERICA: A SHORT HISTORY* 255-59, 460-76 (1968); MICHAEL D. OLIEN, *LATIN AMERICANS: CONTEMPORARY PEOPLES AND THEIR CULTURAL TRADITIONS* 103-06 (1973); UNESCO, *Cultura y Sociedad En America Latina y El Caribe* 25-45, 131-53 (1981); HUGH O'SHAUGHNESSY, *LATIN AMERICANS* 25-37 (1988); THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* 339-43, 355-58 (1984); UNESCO, *America Latina En Sus Ideas* 95-117, 201-38 (1986); VICTOR ALBA, *THE LATIN AMERICANS* 17-47, 138-71, 277-332, 335-52 (1969).

154. See LEWIS HANKE, *CONTEMPORARY LATIN AMERICA: A SHORT HISTORY* 255-59, 460-76 (1968); MICHAEL D. OLIEN, *LATIN AMERICANS: CONTEMPORARY PEOPLES AND THEIR CULTURAL TRADITIONS* 103-06 (1973); UNESCO, *Cultura y Sociedad En America Latina y El Caribe* 25-45, 131-53 (1981); HUGH O'SHAUGHNESSY, *LATIN AMERICANS* 25-37 (1988); THOMAS E. SKIDMORE & PETER

foreign institutions threaten national sovereignty.<sup>155</sup> These cultural traits may surface as skepticism toward an external guardian of human rights such as the Court.

With the exception of the United States, Canada, and the English-speaking Caribbean, the Inter-American region has suffered from a lack of stability and permanence in government and legal systems.<sup>156</sup> Latin American states have experienced protracted social and economic upheaval punctuated by warring political factions, military rule, and coup d'états.<sup>157</sup> The widespread instability may be responsible for causing in the citizenry a tacit expectation, if not fear, of transience in their leaders, governments, and justice systems. This condition has made it difficult for the Inter-American human rights system to gain the trust and faith of the Latin American people.<sup>158</sup>

During the past two decades, the Commission has endeavored to overcome the Latin American citizens' skepticism and distrust by steadily expanding the scope and effectiveness of its human rights work in the region.<sup>159</sup> Latin Americans have seen the Commission expose many human rights violations.<sup>160</sup> In addition, Latin Americans have seen their governments subject themselves to Commission investigations and comply with Commission recommendations and Inter-American Court advisory opinions.<sup>161</sup>

H. SMITH, *MODERN LATIN AMERICA* 339-43, 355-58 (1984); UNESCO, *America Latina En Sus Ideas* 95-117, 201-38 (1986); VICTOR ALBA, *THE LATIN AMERICANS* 17-47, 138-71, 277-332, 335-52 (1969).

155. *Id.*

156. JACQUES LAMBERT, *LATIN AMERICA: SOCIAL STRUCTURE AND POLITICAL INSTITUTIONS* (1967). Lambert notes:

The fact is that in no other part of the world has political life been so stormy: 5 assassinations of heads of states between 1955 and 1961; over 30 military coups between 1940 and 1965, and even two real social revolutions—in Bolivia in 1952 and in Cuba in 1959. Nowhere else have there been so many short-lived constitutions; nowhere else have personal dictatorships disguised themselves so well behind a facade of legality.

*Id.*

157. *Id.*

158. Forsythe, *supra* note 45, at 80-92.

159. *See supra* subpart II(C) discussing the Commission's evolution.

160. *O.A.S. Human Rights Report Warns Mexicans on Election Fraud*, N.Y. TIMES, June 4, 1990, at 17A.

161. *See* Restrictions to the Death Penalty, Advisory Op. No. OC-3/83, Inter-Am. Ct. H.R. (ser.A): Judgments and Opinions, No. 3 (1983) (Commission's request for an advisory opinion led Guatemala to suspend the death penalty in cases involving crimes related to political offenses); Robert E. Norris, *Observations In Loco: Practice and Procedure of the Inter-American Commission on Human Rights 1979-1983*, 19 TEXAS



The Court's exercise of contentious jurisdiction could erode the Inter-American system's success in gaining the respect and trust of Latin Americans. An erosion of confidence might result if, in an effort to avoid a contentious judgment, states restrict the Commission's ability to conduct country studies and discourage individual petitions to the Commission through internal methods of suppression.<sup>162</sup> Before the Court began its exercise of contentious jurisdiction, the Commission and the Court developed visibility and respect for their decisions by appealing to the power of publicity.<sup>163</sup> A negative state reaction to contentious jurisdiction could result in a loss of the Commission's and the Court's ability to expose some of the human rights violations. In the end, a state's refusal to allow the kind of access granted in the past may cause conditions to become worse than they are today. If this occurs, the Inter-American system's effectiveness may be reduced dramatically.

A second obstacle to public acceptance of the Court's contentious jurisdiction is the traditional importance of national sovereignty to Latin American states.<sup>164</sup> Many of the Inter-American states have a great deal of national pride, despite the domestic problems they may have.<sup>165</sup> This strong sense of nationalism causes the people of a given state to be fiercely protective of their state's sovereignty.<sup>166</sup> Perhaps as a result of living in the shadow of the United States, this preoccupation with sovereignty is particularly evident in the Latin American region.<sup>167</sup> This factor may operate to limit the effectiveness of the Inter-American system's protection of human rights. Aggressive exercise of contentious jurisdic-

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INT'L L.J. 285 (1984); *A Gain for the Latin Media*, N.Y. TIMES, Dec. 14, 1985.

162. See Norris, *supra* note 161, at 288-97. In 1979, during a Commission on-site investigation in Argentina, the Commission and witnesses were harassed, and files gathered for the Commission were confiscated under a judge's order. *Id.*

163. Approximately 4000 new individual petitions were filed during the Commission's on-site investigation in Argentina in 1979, and approximately 3,000 individual petitions were filed during the Commission's visit to Nicaragua in 1980. Weston et al., *supra* note 151, at 619. Both of these figures were substantial increases over the number of petitions normally received. *Id.* Professor Tom Farer, former President of the Inter-American Commission, has stated that "the prospect or consequences of a Commission inquiry has saved lives, averted torture, terminated arbitrary detentions, and ameliorated conditions of detention." Tom J. Farer, *The OAS at the Crossroads: Human Rights*, 72 IOWA L. REV. 401, 403 (1987); see also Norris, *supra* note 161, at 285; FARER, THE GRAND STRATEGY, *supra* note 12, at 86-97; TOM J. FARER, THE FUTURE OF THE INTER-AMERICAN SYSTEM 138 (1979) [hereinafter FARER, THE FUTURE].

164. HANKE, *supra* note 153, at 255-59, 460-76.

165. *Id.*

166. *Id.*

167. *Id.*

tion could incite strong feelings of nationalism and result in a backlash against the Court's interference in domestic affairs.

Since 1948 the terms of the OAS Charter have reflected the Latin preoccupation with national sovereignty.<sup>168</sup> The OAS Charter contains language which stresses regional endorsement of national sovereignty and nonintervention in domestic affairs.<sup>169</sup> This resulted from Latin efforts to restrict United States intervention.<sup>170</sup>

Historically, the Latin American states have reacted negatively and sometimes violently to foreign intrusion into domestic matters. For example, many Latin American states opposed United States intervention in the Cuban revolution in 1959.<sup>171</sup> Similarly, most OAS states opposed United States covert action against the Sandinista government in Nicaragua and the United States invasion of Grenada.<sup>172</sup> Most recently, this preoccupation with national sovereignty manifested itself in OAS members' unanimous condemnation of the United States invasion of Panama in 1989.<sup>173</sup>

In the face of such public distrust of foreign influence, actions by a foreign judicial body may encounter serious difficulties. Contentious jurisdiction and related adjudicatory authority give the Court the power to intrude on states' domestic affairs.<sup>174</sup> While in the context of human rights this seems desirable, there is a danger that Latin Americans will perceive this ability to shape domestic affairs as a threat to national sovereignty. The Court should consider Latin Americans' reactions to other foreign intrusions in determining whether it should expand its use of contentious jurisdiction.

#### B. *Contentious Jurisdiction's Effect on Advisory Opinions*

Some human rights observers portray the Court's advisory jurisdiction as a temporary and imperfect vehicle for the Court's authority, with the ultimate goal being the full and routine use of contentious jurisdiction.<sup>175</sup> The source of this view may be the European Court of Human Rights'

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168. Forsythe, *supra* note 45, at 77.

169. *Id.*; see also OAS Charter, *supra* note 1, arts. 8, 9, 13, at 2419, 119 U.N.T.S. at 55-56. "States are judicially equal, enjoy equal rights and equal capacity to exercise these rights and have equal duties." *Id.* art. 9, at 2419, 119 U.N.T.S. at 55.

170. Forsythe, *supra* note 45, at 77.

171. *Id.* at 81.

172. *Id.*

173. *Id.*

174. See *supra* subpart III(B).

175. See *Regional Human Rights Regimes*, *supra* note 151; Buergenthal, *Human Rights*, *supra* note 76, at 309-10.

(the European Court) extensive use of contentious jurisdiction.<sup>176</sup> It is true that the European Court's use of contentious jurisdiction has been highly successful.<sup>177</sup> It does not necessarily follow, however, that a similar level of use would be as effective in the Inter-American system. Considering the characteristics of the region's peoples, the Inter-American system's more extensive reliance on its advisory jurisdiction seems more appropriate.

Advisory opinions tend to yield general legal principles without adjudicating guilt or fault.<sup>178</sup> That is, they simply set forth the Court's opinion on a matter, and the state parties are free to disregard the opinion with legal, if not moral, impunity.<sup>179</sup> Fortunately, the state parties have generally shown respect for the Court's advisory opinions and often voluntarily follow the Court's guidance.<sup>180</sup> This excellent record may be due in part to the voluntary nature of advisory opinions.

In contrast, compliance with decisions rendered under contentious jurisdiction is not voluntary, as it is with those decided under advisory jurisdiction. The exercise of contentious jurisdiction yields legally binding decisions; these decisions instruct a state what that state must do.<sup>181</sup> This aspect of contentious jurisdiction conflicts with the cultural "machismo" inherent in Latin American governments and leaders.<sup>182</sup> "Machismo" represents a Latin American "sense of manliness which if ignored or undermined produces humiliation."<sup>183</sup> As anyone familiar with Latin American culture can confirm, giving orders is not the best way to win support and compliance.<sup>184</sup> In fact, anyone interfering with this Latin American sense of manliness "is considered an enemy, one to be dealt

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176. The European Court currently decides 30 to 40 cases each year under its contentious jurisdiction. As of 1987, the European Court had decided 114 cases, approximately two-thirds of which were decided since 1980. Brian Walsh, *The European Court of Human Rights*, 2 CONN. J. INT'L L. 271, 284 (1987). As of 1988, 19 of 21 state parties to the European Convention on Human Rights had accepted the European Court's contentious jurisdiction. *Id.*

177. See Weston et al., *supra* note 151.

178. Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 18 (1985) [hereinafter Buergenthal, *The Advisory Practice*].

179. *Id.*; see also American Convention, *supra* note 5, art. 64, at 17, 9 I.L.M. at 692.

180. See Buergenthal, *The Advisory Practice*, *supra* note 178, at 1.

181. American Convention, *supra* note 5, art. 68, at 18, 9 I.L.M. at 693.

182. See generally MARVIN K. MAYERS, A LOOK AT LATIN AMERICAN LIFESTYLES (1976).

183. *Id.* at 39.

184. *Id.* at 14.

with, if not destroyed."<sup>185</sup> Advisory opinions have not encountered this obstacle because they recommend action rather than dictate it. Imposing binding legal authority may result in a refusal to abide by decisions rendered under the Court's contentious jurisdiction, which may lead to a deterioration of respect for the Court.

If extensive use of contentious jurisdiction erodes respect for the Court, it may also lead to a loss of respect for advisory opinions. Compliance with an advisory opinion does not carry the stigma of guilt, nor is compliance legally required.<sup>186</sup> Consequently, cooperation with advisory opinions is more forthcoming and refusals to cooperate with advisory opinions are less damaging to the Court's stature. Disregard for a contentious jurisdiction decision, however, could have more serious consequences because contentious jurisdiction decisions are legally binding yet unenforceable in practice.<sup>187</sup> In order to avoid an adverse reaction to binding decisions, the Court should refrain from expansive use of its contentious jurisdiction. Moreover, scholars and politicians should not promote the exercise of contentious jurisdiction as an eventual replacement for advisory jurisdiction. Since contentious jurisdiction is likely to conflict with Latin culture, the OAS should retain the Court's advisory jurisdiction as the principal means of curbing human rights abuses in the region.

### C. *Contentious Jurisdiction's Effect on United States Ratification of the American Convention*

United States support for a regional human rights system is at best inconsistent. Historically, the United States has shown support for the Inter-American system when it appeared the system could serve as an anticommunist watchdog.<sup>188</sup> Most of the time, however, the United States has sought to limit the reach of the human rights organs.<sup>189</sup> The United States has neither ratified the American Convention nor accepted the Court's contentious jurisdiction. Obtaining United States ratification

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185. *Id.* at 39.

186. See Buergenthal, *The Advisory Practice*, *supra* note 178, at 1.

187. Even a single state's refusal to adhere to a decision may damage the Court's stature. Although Honduras cooperated with the first few contentious jurisdiction proceedings, but there is no guarantee that future decisions will command the same respect. As the International Court of Justice discovered, respect for a court's decisions in Latin America is not guaranteed. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Nov. 26); 1986 I.C.J. 14 (June 27) (facts and holding discussed *infra* subpart IV(C)).

188. Forsythe, *supra* note 45, at 81-89.

189. *Id.*

is an important goal for the Inter-American system. Because the Court's use of contentious jurisdiction strengthens United States arguments against ratification, the OAS should carefully consider this cost before expanding.

Initially, the United States opposed a dynamic or authoritative human rights system, supporting instead a weak system geared towards promotion rather than enforcement of human rights.<sup>190</sup> When the OAS created the Inter-American Commission in 1960, the United States sought to reduce the length of its sessions and to disallow its authority over individual complaints.<sup>191</sup> Growing concern over human rights violations in Cuba temporarily altered this position.<sup>192</sup> The Commission's focus on Cuba played a large part in United States acquiescence to an increase in the scope of Commission activities.<sup>193</sup> For the most part, however, the United States, like most OAS members, has maintained the position that human rights issues are a domestic matter and prefers an extremely weak Commission.<sup>194</sup> Generally, United States support for regional human rights throughout the 1950s, 1960s, and early 1970s existed only to the extent that human rights protection coincided with the promotion of democracy.<sup>195</sup>

The Carter administration took a more active role in promoting a strong regional human rights system. President Carter, in addition to making the promotion of human rights an express part of his foreign policy,<sup>196</sup> signed the American Convention and submitted it to the Senate for advice and consent.<sup>197</sup> The Senate, however, failed to ratify the

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190. *Id.*; see Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599 (1986).

191. Forsythe, *supra* note 45, at 76-78. The United States abstained from the vote creating the Commission. *Id.*

192. *Id.* at 82-83.

193. *Id.* The United States willingness to tolerate a more active Commission is attributable to its intent to use the OAS for anticommunist ends. *Id.*

194. *Id.* at 80-89. During the Kennedy administration, the United States placed slightly greater importance on human rights protection, but it continued to regard human rights as a method of socioeconomic reform tied to anticommunism. *Id.* at 84; see FARER, *THE GRAND STRATEGY*, *supra* note 12, at 69-78, 86-97; Donnelly, *supra* note 190, at 624-28.

195. See FARER, *THE GRAND STRATEGY*, *supra* note 12, at 3-60.

196. Richard R. Fagen, *The Carter Administration and Latin America: Business as Usual?*, 57 FOREIGN AFF. 652 (1978).

197. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES: FOUR TREATIES PERTAINING TO HUMAN RIGHTS, S. EXEC. DOCS. C, D, E, & F, 95th Cong., 2d Sess. (1978).

American Convention.<sup>198</sup>

Despite the Carter administration's failure to achieve United States ratification of the American Convention, the United States played an important role in urging others to ratify the Convention and to accept the Court's contentious jurisdiction.<sup>199</sup> Yet, even the Carter administration's support for human rights was imperfect, as evidenced by its indifference to human rights violations by President Pinochet in Chile after the United States-backed overthrow of Marxist President Allende in 1973.<sup>200</sup>

The Court's exercise of contentious jurisdiction makes United States ratification of the American Convention or acceptance of the Court's contentious jurisdiction unlikely because it exacerbates United States concerns regarding national sovereignty and constitutional conflicts.<sup>201</sup> First, critics opposing United States adherence to international human rights treaties and decisions argue that human rights are a matter of domestic jurisdiction.<sup>202</sup> Under its Constitution, the United States cannot use its treaty-making power to regulate a matter not subject to international negotiation.<sup>203</sup> Human rights, critics argue, are a strictly domestic concern and are therefore outside the purview of an international agreement.<sup>204</sup> Thus, an international court of human rights, particularly one with adjudicatory jurisdiction, is not compatible with the United States system of justice.

The second argument these critics raise is that the laws or decisions

198. President Carter's 1977 Address to the Senate set forth the Convention's conflicts with United States constitutional law. The President submitted the American Convention for ratification with a specific reservation that United States adherence is subject to its Constitution and laws. *Id.*; see also INTERNATIONAL HUMAN RIGHTS LAW GROUP, U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES 104-13 (1981).

199. WESTVIEW SPECIAL STUDIES ON LATIN AMERICAN AND THE CARIBBEAN, LATIN AMERICA, THE UNITED STATES, AND THE INTER-AMERICAN SYSTEM (J. Martz & L. Schoultz eds., 1980). The United States has been particularly willing to urge human rights compliance in states receiving United States economic or security assistance. See Foreign Assistance Act §§ 502B, 116, as amended 22 U.S.C. §§ 2304, 2151 (1988).

200. In contrast to the Carter administration's endorsement of the Convention, the Reagan and Bush administrations have been indifferent and even hostile to the American Convention and the Court. Forsythe, *supra* note 45, at 86-88.

201. See Thomas Buergenthal, *The U.S. and International Human Rights*, 9 HUM. RTS. L.J. 141 (1988) [hereinafter Buergenthal, *International Human Rights*].

202. *Id.* at 147.

203. U.S. CONST. art. II, § 2; see LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 143-48 (1972).

204. Buergenthal, *International Human Rights*, *supra* note 201, at 147.

that the American Convention and the Court generate may conflict with United States constitutional law.<sup>205</sup> The concern is that an external body will develop United States constitutional law or that external decisions will modify fundamental tenets of United States law.<sup>206</sup> A practical example of this conflict is the recent Commission resolution that found the United States in violation of the American Declaration.<sup>207</sup> The Commission found that the United States execution of two individuals convicted of murder before they were eighteen years of age violated article I of the American Declaration (Right to Life).<sup>208</sup> The United States did not heed the Commission's requests to stay the executions because the executions did not violate the United States Constitution.<sup>209</sup>

Even if the United States had accepted the Court's contentious jurisdiction at the time the Commission reviewed this question, it is possible that the United States would have ignored a Court decision to stay the executions. Evidence of how the United States might have responded appears by analogy to the United States lack of respect for the judgment of the International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua*.<sup>210</sup> After the International Court of Justice ruled against the United States, the United States withdrew its qualified consent to jurisdiction.<sup>211</sup> "[S]ubtle factors of national pride"<sup>212</sup> with respect to the constitutional system prevent the United States from admitting the need to submit to international human rights law.<sup>213</sup> These same "subtle factors" will make it more difficult to obtain United States ratification of the American Convention if a body of regional human rights case law begins to supplement the Convention.

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205. *Id.* at 148; see also INTERNATIONAL HUMAN RIGHTS LAW GROUP, *supra* note 198, at 104-13.

206. Buergenthal, *International Human Rights*, *supra* note 201, at 147.

207. Case 9647, Inter-Am. C.H.R. 61, OEA/ser.L./VII.71, doc. 9, rev. 3 (1987).

208. American Declaration, *supra* note 7, art. 1; Case 9647, Inter-Am. C.H.R. at 61.

209. *Pinkerton v. McCotter*, 473 U.S. 925 (1985); *Roach v. Martin*, 757 F.2d 1463 (4th Cir. 1985). The two defendants were tried as adults. The United States denied the existence of a customary international law norm prohibiting the execution of juveniles and maintained that it had dissented from such a treaty standard.

210. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Nov. 26); 1986 I.C.J. 14 (June 27).

211. Forsythe, *supra* note 45.

212. Laura Dalton, Comment, *Stanford v. Kentucky and Wilkins v. Missouri: A Violation of an Emerging Rule of Customary International Law*, 32 WM. & MARY L. REV. 161, 184 (1990) (citing Richard B. Bilder, *Integrating International Human Rights Law into Domestic Law - U.S. Experience*, 4 HOUS. J. INT'L L. 1, 8 (1981)).

213. *Id.*

The constitutional issue also raises a question regarding the impact that ratification of the Convention or acceptance of contentious jurisdiction would have on federalism in the United States. Since under United States constitutional law international treaties have the same legal weight as federal statutes,<sup>214</sup> the American Convention has the potential to "federalize" legal issues that individual states currently decide based on state law.<sup>215</sup>

Contentious jurisdiction decisions, while not technically a component of the American Convention, may arguably be incorporated as case law.<sup>216</sup> If so, use of contentious jurisdiction would have the effect of continuously adding to United States federal law. This threatens to make the Inter-American Court the equivalent of a second United States Supreme Court, allowing the Inter-American Court to federalize new legal questions at will. Thus, the existence of contentious jurisdiction case law strengthens United States arguments against ratification of the Convention.

Ratification of the Convention by the United States should be a top priority at this point in the Inter-American system's development. It would lend an air of legitimacy, which has eluded the system, and would enhance the credibility of the Commission and the Court, thereby increasing the strength of its advisory opinions. Instead of trying to expand its contentious jurisdiction, which lessens the likelihood of United States ratification, the Court should focus on obtaining United States ratification and expanding its use of advisory opinions.

## VI. CONCLUSION

During the past fifteen years, which saw the adoption of the American Convention and the creation of the Inter-American Court of Human Rights, the regional system for protection of human rights has vastly expanded its scope. Although the Court exercised only advisory jurisdiction in its early years, it recently has asserted its contentious jurisdiction. The exercise of contentious jurisdiction, however, may conflict with Latin American culture, with continued respect for advisory opinions, and with efforts to obtain United States ratification of the American

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214. *Whitney v. Robertson*, 124 U.S. 190 (1888).

215. *Missouri v. Holland*, 252 U.S. 416 (1920) (state powers may be transferred to the Federal Government through the treaty making process); Buergenthal, *International Human Rights*, *supra* note 201, at 147-48.

216. This is similar to the way United States case law is used to interpret and give meaning to the United States Constitution. *See* 16 C.J.S. *Constitutional Law*, §§ 17, 20, at 169-74.



Convention. These conflicts suggest that precipitated and uncontrolled exercise of the Court's contentious jurisdiction may detract from the region's perception of the Court as a permanent sentry for the protection and preservation of human rights.

It is possible that contentious jurisdiction will be appropriate at some future time in the Court's development; however, now is not the time. Instead, the Inter-American system in general and the Court in particular should focus on developing the Court's advisory jurisdiction. This includes securing ratification by those states that have not yet done so, enhancing respect for the Court's advisory opinions, developing a larger body of advisory opinions, and increasing the awareness of human rights throughout the region. If state parties perceive the Court as inflexible and dictatorial so early in its development, they may discontinue their voluntary submission to the Court's jurisdiction. Such a response would jeopardize the future exercise of contentious jurisdiction—if it should ever become appropriate.

The Inter-American system will live or die by the support of the region it serves. It is an unfortunate reality that the region is plagued by periodic violence, government instability, widespread social inequality, and economic stagnation. The Inter-American system must consider these realities and the unique characteristics of the OAS member states, the state parties, and the citizens of the region before it decides to undertake extensive use of contentious jurisdiction.

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