Denver Journal of International Law & Policy

Volume 13
Number 2 *Winter*

Article 7

May 2020

Advisory Opinions of the Inter-American Court of Human Rights

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I. INTRODUCTION

The regional arrangement for the protection of human rights in the western hemisphere took an important step forward in 1978, with the entry into force of the American Convention on Human Rights and the subsequent creation of the Inter-American Court of Human Rights.[1] The Court offers a means not only of adjudicating disputes arising under the Convention itself,[2] but of generating advisory decisions on the Conven-

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1. The American Convention on Human Rights, *opened for signature*; San Jose, Costa Rica, on Nov. 22, 1969, *entered into force*, July 18, 1978 [hereinafter cited as *Human Rights Convention*]. For the official text, *see* ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS [hereinafter cited as HAND-BOOK] 27, OEA/Ser.L/V/11.50 doc. 6 (1980). The text as it appears in OAS Official Records, OEA/Ser.K/XVI/1.1, doc. 65, Rev. 1, Corr. 2 (1970), is *reprinted in* 9 I.L.M. 673 (1970).

The following OAS member states have ratified the Convention: Barbados, Bolivia, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, and Venezuela. The United States has signed but not ratified the Convention, consistent with its egregious record on the ratification of human rights instruments. *See generally* U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? (Lillich ed. 1981).

Art. 33 of the Convention provides for the competence of the Inter-American Commission on Human Rights and reads in part as follows: "The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: . . . The Inter-American Court of Human Rights, referred to as 'the Court.' "

2. Human Rights Convention, *supra* note 1, art. 62. Art. 62 sets out the adjudicatory or contentious jurisdiction of the Court and reads as follows:

> 1. 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. 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court. 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 Party to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

tion and other human rights instruments of inter-American concern.[3] While 17 of the 29 member states of the Organization of American States have ratified the Convention, to date only four have recognized the jurisdiction of the Court in contentious cases pursuant to article 62.[4] Costa Rica is the only state to have submitted an article 62 case.[5] Recently the Court decided the first two cases submitted to it under its advisory jurisdiction.[6] This article will analyze those decisions and their importance to the future development of procedures for the protection of human rights in this hemis-phere.

While the European experience is encouraging with 19 of the 21 member states of the Council of Europe now recognizing the compulsory jurisdiction of the European Court of Human Rights[7]—it is important for the Inter-American Court to gain stature and acceptance within the community so that states will shed their reluctance to submit themselves to its compulsory jurisdiction. The advisory jurisdiction established by article 64 of the Convention may offer the most effective means of demonstrating the Court's usefulness and providing the Court with an opportunity to develop a consistent and influential body of human rights jurisprudence. With the decisions in its first two advisory cases the Court is off to a good start. Both cases involved the interpretation of provisions of the Convention, and the Court, acting unanimously in both, presented articulate, well-reasoned opinions.

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3. *Human Rights Convention, supra*, note 1, art. 64, set out in text accompanying note 12. Note also that individuals are not empowered to bring a case directly to the Court; "[o]nly the States Parties and the Commission shall have the right to submit a case to the Court." *Human Rights Convention, supra*, note 1, art. 61.

4. The four states are Costa Rica, Honduras, Peru, and Venezuela. Note that a state is not deemed to have accepted the jurisdiction of the Court merely by ratifying the Convention. Acceptance of the Court's jurisdiction is optional and requires a separate declaration or a special agreement. Nevertheless, all state parties to the Convention may permit the Court on an ad hoc basis to adjudicate a specific dispute relating to the application of the Convention. For an excellent introduction to the Court *see* Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231 (1982). *See also* Dunshee de Abranches, *The Inter-American Court of Human Rights*, 30 AM. U.L. REV. 79 (1981). On the topic of the inter-American system for protecting human rights, *see generally* T. GUERGENTHAL, R. NORRIS, & D. SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS (1982).

5. Government of Costa Rica (In the Matter of Viviana Gallardo *et. al*), No. G101/81, Decision of Nov. 13, 1981, Annual Report of the Inter-American Court of Human Rights 1982, OEA/Ser.L/III.5, doc. 13 at 13 (Sept. 23, 1982), *reprinted in* 20 I.L.M. 1424 (1981).

6. Other Treaties Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), No. OC-1/82, Decision of Sept. 24, 1982, *reprinted in* 22 I.L.M. 51 (1083) [hereinafter cited as *Consultative Jurisdiction*; *The Effect of Reservations On the Entry Into Force of the American Convention (Arts. 74 and 75), No. OC-2/82, Decision of Sept. 24, 1982, reprinted in* 22 I.L.M. 37 (1983) [hereinafter cited as *Effect of Reservation*].

7. Activities of the Council of Europe in the Field of Human Rights in 1982, H(83)1, Strasbourg, Jan. 25, 1983, Council of Europe at 2.

II. THE FIRST ADVISORY OPINION

Pursuant to article 52 of the Court's Rules of Procedure,[8] the Court had before it written observations from a number of states and OAS organs.[9] In addition, the Court accepted amicus briefs from several nongovernmental organizations.[10] In so doing, the Court set an important precedent, implicitly recognizing the significant role played by non-governmental organizations (NGO's) in the development of human rights law.[11] The Court's first advisory opinion related to a request of the government of Peru[12] concerning the interpretation of article 64 of the American Convention granting advisory jurisdiction to the Court. Article 64 reads as follows:

> 1. The member states of the Organization may consult the Court

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8. The Inter-American Court of Human Rights: Rules of Procedure, 44, O.A.S. Doc. OEA/Ser. L/V/III.3/doc. 13, corr. 1 (1981) (corrected version *reprinted in* 20 I.L.M. (1289) (1981).

9. In response to the Peruvian request for an advisory opinion, the following states and OAS organs submitted written observations: Costa Rica, Dominica, Dominican Republic, Ecuador, St. Vincent and the Grenadines, and Uruguay; the General Secretariat, the Inter-American Commission on Human Rights, the Inter-American Juridical Committee, the Pan American Institute of Geography and History, and the Permanent Council. *See,* Annual Report of the Inter-American Court of Human Rights, 1982, 25. OEA/Ser. L/113.F, doc. 13(1982) [hereinafter cited as *Annual Report*].

10. With respect to the Peruvian request for an advisory opinion, the following nongovernmental organizations submitted amicus briefs: Inter-American Institute on Human Rights; The International Human Rights Law Group; The International League for Human Rights; The Lawyer's Committee for International Human Rights; and the Urban Morgan Institute for Human Rights at the University of Cincinnati College of Law. *See, Annual Report, supra* note 9.

11. Since human rights law by definition erects limits on governmental actions, either by establishing prohibitions on certain actions (such as arbitrary detention) or by creating new obligations (such as education), it should not be surprising that few governments are found in the forefront of promoting human rights.

For an analysis of the role played by NGO's, see Cassese, *Progressive Transnational Promotion of Human Right*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 249 (B. Ramcharen ed. 1979); Forsythe and Wiseberg, *Human Rights Protection: A Research Agenda*, UNIVERSAL HUMAN RIGHTS, (Oct.-Dec. 1979); Scoble and Wiseberg, *Human Rights NGO's: Notes towards Comparative Analysis*, 9 REVUE DES DROITS DE L'HOMME 611 (1976); Scoble and Wiseberg, *The International League for Human Rights: The Strategy of a Human Rights NGO*, GA. J. INT'L & COMP. L 289 (1977); Scoble and Wiseberg, *Monitoring Human Rights Violations: The Role of Human Rights NGO's*, in HUMAN RIGHTS AND U.S. FOREIGN POLICY (Rubin and Spiro eds.); Shestack, *Sisyphus Endures: The International Human Rights NGO*, 24 N.Y.L. SCH. L. REV. 89 (1978); Weissbrodt, *The Role of International Non-Governmental Organizations in the Implementation of Human Rights*, 12 TEX. INT'L L.J. 293 (1977); Weissbrodt and McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. INT'L L. 1 (1981). For current information on human rights activities of NGO's, *see The Human Rights Internet Reporter*, a periodical published 5 times per year by the Human Rights Internet.

12. Request for an Advisory Opinion Presented by the Government of Peru, *reprinted in* Annual Report of the Inter-American Court of Human Rights 1982, 25. OEA/Ser. L/III.7, doc. 13 (1982).

> 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.
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> 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.

The Peruvian request was concerned with the meaning of the phrase "or of other treaties concerning the protection of human rights in the American states." Peru offered, in the alternative, three possible interpretations of "other treaties": (a) only those treaties adopted within the framework or under the auspices of the inter-American system; (b) treaties included solely among the American states, that is, those treaties in which only American states are parties; (c) all treaties in which one or more American states are parties.[13]

Before deciding the question, the Court found it necessary to ascertain the extent of its advisory jurisdiction, noting that limits to that jurisdiction are not clearly spelled out in article 64.[14] The Court found that article 64 confers on it the most extensive advisory jurisdiction of any international tribuna in existence today.[15] All organs of the OAS listed in Chapter X of the Charter of the Organization and every OAS member state, whether a party to the Convention or not, are empowered to seek advisory opinions.[16] Additionally, the Court's advisory jurisdiction is not limited to the Convention but extends to other treaties concerning the protection of human rights in the American states.[17] All OAS member states have the right to request advisory opinions on the compatibility of any of their domestic laws with the aforementioned international instruments.[18]

In contrast, the Court noted, the International Court of Justice may not receive requests for advisory opinions from member states of the United Nations. Rather, only the General Assembly and the Security Council, and under certain conditions other organs and specialized agencies of the United Nations, are authorized to request advisory opinions from that body.[19] The European Court of Human Rights may receive a

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13. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. at 53.
14. *Id.* at 54.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. U.N. CHARTER, art. 96, paras. 1 & 2 reading as follows:

> 1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
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> 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advi-

request for an advisory opinion only from the Committee of Ministers and that opinion may deal only with legal questions concerning the interpretation of the Convention and its protocols.[20] Furthermore, the protocol excludes from the advisory jurisdiction of that tribunal the interpretation of any question relating to the content or scope of the rights or freedoms defined in these instruments, or any other question which the European Commission on Human Rights, the European Court, or the Committee of Ministers might have to consider in consequence of any proceeding that could be instituted in accordance with the Convention.[21]

The Court next attempted to delineate the precise limits of its advisory jurisdiction. Looking to the preparatory work of the American Convention, the Court determined that the drafters' intention was to cast the Court's advisory jurisdiction "in the broadest terms possible."[22] Nonetheless, certain restrictions flowed from the Court's status as an inter-American juridical institution. The Court held that is advisory jurisdiction did not extend to international agreements concluded by non-member states of the inter-American system nor to legal provisions governing the structure or operation of international organs or institutions not belonging to the inter-American system.[23] These limitations, however, did not necessarily restrict the power of the Court to interpret a treaty that is directly related to the protection of human rights in a member state of the inter-American system.[24]

To illustrate the Court's view of the scope of its advisory powers,

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sory opinions of the Court on legal questions arising within the scope of their activities

See L. Goodrich, E. Hambro & A. Simons, Charter of the U.N.: Commentary and Documents (1969) at 560: "Thus, a state can obtain an advisory opinion from the Court only if its proposal is adopted by one of the organizations or agencies authorized to make such a request."

20. European Convention for the Protection of Human Rights and Fundamental Freedoms, *done at* Rome, Nov. 4, 1950, *entered into force* Sept. 3, 1953, Europ. T.S. No. 5, 213 U.N.T.S. 221, *reprinted in* COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS COLLECTED TEXTS (11th ed. 1976) [hereinafter cited as *European Convention*]. Protocol No. 2 (Sept. 21, 1970) Article (1) of this Convention reads: "The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto." For a comparison of the European and American Conventions, *see*, Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U.L. REV. 155 (1981).

21. *European Convention, supra* note 20, Protocol No. 2, Article 1(2) Sept. 21, 1970. *See* L. Sohn and T. Buergenthal, INTERNATIONAL PROTECTION OF HUMAN RIGHTS at 1106 (1973): "[T]he limitations which Article 1(2) of the Protocol imposes on the Court's power to render advisory opinions taken together with the fact that only the Committee of Ministers may request them, greatly diminishes the significance of the Court's advisory functions."

For an excellent study, *see* A.H. Robertson, *Advisory Opinions of the Court of Human Rights, reprinted in* 1 RENE CASSIN AMICORUM DISCIPULORUMQUE LIBER 224-46 (Paris, 1969).

22 *Consultative Jurisdiction, supra* note 6, 22 I.L.M. at 55.

23. *Id.* at 56.

24. *Id.*

suppose Uruguay were to request an advisory opinion on its obligations under the International Covenant on Civil and Political Rights.[25] Under the Court's analysis, the Court would not be empowered to pass upon the appropriateness of procedures used by the Human Rights Committee set up under the International Covenant, but it could adjudicate the question of whether or not Uruguay was meeting its obligations under that instrument. As the matrix of ratifications of human rights treaties included below points out, 14 of the 26 OAS member states have ratified the International Covenant on Civil and Political Rights, and 11 have ratified the Optional Protocol permitting individual petitions.

A second source of limitations on the Court's advisory jurisdiction derives from the unique role envisioned for the Court by the drafters of the Convention. This role was to include "assist[ing] the American States in fulfilling their international human rights obligations and . . . assist[ing] the different organs of the inter-American system to carry out the functions assigned to them in this field."[26] The Court was concerned with the possibility that a state might invoke the advisory jurisdiction of the Court out of a desire to avoid the contentious jurisdiction mandated by the Convention. For example, if the Commission were investigating a state action, the state might seek an advisory opinion upon the matter under investigation. This would prevent the Commission from bringing the matter up under the Court's contentious jurisdiction, thus enabling the state to avoid a binding determination. To sanction this sort of "race to the courthouse" strategy would clearly defeat the purposes of the Convention. Unlike most treaties, human rights treaties do not involve reciprocal interests of states; rather, they provide for individual rights and limitations upon the actions of states. If a state were permitted to circumvent the binding nature of a judgment simply by invoking the Court's advisory jurisdiction, the Court would impede those individual rights it was set up to protect.[27]

Although article 64 and the rest of the Convention are silent as to the question, the Court concluded that its advisory jurisdiction is not

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25. In 1970 Uruguay ratified the International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16), 49, U.N. Doc. A/6316 (1967). For a thorough review of Uruguay's poor record of compliance with the Covenant, *see* THE INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, URUGUAY'S HUMAN RIGHTS RECORD: COMMENTS, ANALYSIS AND BACKGROUND INFORMATION ON THE GOVERNMENT OF URUGUAY'S 1982 REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE (1982).

26. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. at 57-58.

27. *Human Rights Convention, supra* note 1, art. 63(1), does, however, provide a remedy:

> 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.

mandatory but permissive.[28] This holding is consistent with the jurisprudence of the International Court of Justice.[29] Thus the Court may decide on a case-by-case basis whether to accept or reject a request for an advisory opinion. The Court's broad discretionary powers are not, however, to be viewed as totally unlimited.[30] Before it may refrain from honoring a request for an opinion, "[t]he Court must have compelling reasons founded in the conviction that the request exceeds the limits of its advisory jurisdiction under the Convention . . . Moreover, every decision by the Court declining to render an advisory opinion must conform to the provisions of Article 66 of the Convention,[31] which require that reasons be given for the decision."[32]

It is interesting to note that the Court's concern with bogus requests for advisory opinions was anticipated in a "Model American Convention on Terrorism," drafted by the Standing Committee on World Order Under Law of the American Bar Association.[33] One of the unique features of the Draft Convention is that it provides a built-in procedure for utilizing the advisory jurisdiction of the Inter-American Court.[34] When a state receives a request for extradition of a person under the terms of the treaty, and the state believes that the person may be subjected to persecution in the requesting state, it may request an advisory opinion from the Court.[35] The drafters of the Draft Convention, realizing that an extradition request might be referred by a state which sought in reality not to prosecute the alleged offender but rather to avoid his prosecution by returning him to a safe haven, included a provision defeating such fraudu-

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28. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. at 58.

29. *See*, Interpretation of Peace Treaties with Bulgaria, Hungary, and Rumania, (1950) I.C.J. 65, 271-72, distinguishing Statute of Eastern Carelia, (1923) P.C.I.J. Ser. B, No. 5 and recognizing the ICJ's discretionary jurisdiction in advisory cases wherein the question presented is directly related to an actual dispute between states.

30. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. at 58.

31. *Human Rights Convention, supra* note 1, art. 66 reads:

> 1. Reasons shall be given for the judgment of the Court. 2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.

32. *Consultative Jurisdiction, supra*, note 6, 22 I.L.M. at 58.

33. Lockwood, *The Model American Convention On the Prevention and Punishment of Certain Serious Forms of Violence Jeopardizing Fundamental Rights and Freedoms* 13 RUTGERS L.J. 579 (1982).

34. *Id.* at 596. Article 9 of the Model Convention reads:

> Upon receipt of a request for extradition for an offense included in Article 1, a Contracting State may refer the matter to the Inter-American Court of Human Rights pursuant to Article 64 of the American Convention on Human Rights for an advisory opinion as to whether granting the request for extradition would violate the provisions of this Convention. In like manner, a Contracting Party, which has made a request for extradition for an offense included in Article 1, may refer the matter to the Inter-American Court for an advisory opinion.

35. Model Convention, *supra* note 34, art. 9.

lent requests.[36] They were particularly concerned with the problem of a state making an extradition request in favor of a "secret agent" who may have committed acts of terrorism in another state.[37] If such a case were to reach the Inter-American Court, the Court—under the authority of its present decision—could refuse to grant an advisory opinion.[38]

Although the Court did not specifically raise the issue, its decision regarding the permissive nature of its advisory jurisdiction implicitly addresses another potentially troublesome situation. Cases may arise in which the Court is called upon to interpret a treaty which establishes a separate tribunal for the adjudication of conflicts arising under the treaty. For example, note again that eleven member states of the OAS have ratified the optional protocol to the International Covenant on Civil and and Political Rights.[39] Under the provisions of the protocol, an individual may lodge a complaint against a ratifying state with the Human Rights Committee.[40] If the advisory jurisdiction of the Inter-American Court were mandatory, the state could avoid an unfavorable binding decision in the Human Rights Committee by raising the matter before the Inter-American Court pursuant to article 64. Under the authority of the present decision, the Court could refrain from complying with the request.[41] Clearly, this is sound judicial policy. Just as the Court seeks to avoid institutional conflict within the inter-American system,[42] so should it respect those parallel world bodies set up for the protection of human rights. By recognizing the permissive nature of its advisory jurisdiction, the Court ac-

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36. Lockwood, *supra* note 33 at 595-6. Article 6 of the Model Convention states:

> Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offense included in Article 1 has been maintained for the purpose of obstructing or preventing the prosecution or punishment of a person alleged to have committed an offense included within Article 1.

37. Lockwood, *supra* note 33 at 587.

38. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. at 58.

39. International Covenant on Civil and Political Rights, *supra* note 25, and accompanying text.

40. *Id.* Art. 1 of the optional protocol provides in part:

> A State Party to the Covenenat that becomes a party to the present Protocol recognizes the competence of the [Human Rights Committee] to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.

The Human Rights Committee is provided for by art. 28 of the Inter-national Covenant on Civil and Political Rights.

41. The hypothetical request would probably fall within the conclusions set forth in *Consultative Jurisdiction, supra* note 6, 22 I.L.M. 59: "Finally the Court has to consider the circumstances of each individual case and if, for compelling reasons, it declines to render an opinion lest it exceed the aforementioned limitations and distort its advisory jurisdiction, it must do so by means of an opinion, containing the reasons for its refusal to comply with the request." Compare the comment of Fitzmaurice, *infra*, note 43, regarding the similar problem of the Inter-national Court of Justice facing a case falling within the concurrent jurisdiction of a treaty tribunal.

42. *Consultative Jurisdiction, supra* note 6, I.L.M. 56.

knowledged that as a regional institution it is complementary to other tribunals at the global level.[43]

The Court next turned to the specific question presented by the Peruvian request, i.e., which of the three alternatives[44] offered the correct interpretation of the phrase "or of other treaties concerning the protection of human rights in the American states."[45] The Court settled upon the broadest of the three alternatives, concluding that the Court may properly interpret any human rights treaty to which one or more American states are parties.[46] In reaching its decision, the Court relied on traditional international law methods of interpretation, particularly those codified in articles 31 and 32 of the Vienna Convention of the Law of Treaties.[47] The nub of the problem as the Court saw it was determining

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43. Sir Gerald Fitzmaurice has addressed this problem with reference to the International Court of Justice. Fitzmaurice maintains that where an advisory case may conflict with the jurisdiction of a treaty tribunal, the issuance of an advisory opinion runs the risk of frustrating the expectation interests of the parties to the treaty. The problem cannot be disposed of by simply citing the non-binding character of an advisory opinion, since an opinion would surely affect future interpretations by the treaty tribunal and might be deemed conclusive as to some questions. "The difficulty," he concludes, "is one which, like others in the field, cannot be solved by any general formula, and its solution must depend on the individual circumstances of each case." Fitzmaurice, *The Law and Procedure of the International Court of Justice* 1951-4, 34 BRIT. Y.B. INT'L L. 1, 147 (1958). Even though the particular state requesting an advisory opinion of the Court would not be frustrated by the rendering of an opinion, it is clear in the hypothetical that the expectations of the parties to the human rights instrument would be frustrated if the protections could be circumvented. For an indepth examination of the scope of the International Court of Justice's advisory jurisdiction, *see* K. KEITH, THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (1971); D. Pratap, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT (1972); I. Shihata, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION (1968).

44. *Supra*, at text accompanying note 13.

45. *Human Rights Convention, supra* note 1, art. 64.

46. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. at 65.

47. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, UN Doc. A/CONF. 39/27 (1969), UN Doc. A/CONF. 39/27/Corr.1 (1969), *reprinted in* 8 I.L.M. 679 (1969) and 63 Am. J. Int'l L. 875 (1969). [hereinafter cited as *Vienna Convention*]. Art. 31 provides:

> *General Rule of Interpretation* 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:
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> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
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> (b) any instrument which was made by one or more parties in conne-xion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
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> 3. There shall be taken into account, together with the context: (a)any subsequent agreement between the parties regarding the interpre-tation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in

what international obligations the American states intended to make subject to interpretation by advisory opinion.[48] In making this determination, the Court found, it was not useful to distinguish between multilateral and bilateral treaties, nor to look to the main purpose of the treaty which is the source of the obligation.[49] Rather, the ordinary meaning of the terms of article 64 itself, viewed in light of the object and purpose of the Convention, provided the appropriate guide to construction.[50]

Applying the ordinary meaning rule, the Court held that the phrase "American States" in article 64[51] embraces all states which may ratify or adhere to the Convention in accordance with article 74, i.e., all member states of the OAS.[52] Further, the Court could find no compelling reason why human rights obligations incurred by American states under treaties concluded outside the inter-American system, or with non-American states as parties, should be excluded from its advisory jurisdiction.[53] In reaching this result the Court looked to the text of article 64,[54] the object and purpose of the Convention,[55] the rules of interpretation set forth in article 29 of the Convention,[56] the practice of the Inter-American Commission on Human Rights,[57] and the preparatory work of the American Convention.[58]

The ordinary meaning of the text of article 64 was held not to compel a narrow interpretation.[59] "Since a restrictive purpose was not expressly

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the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 provides:

Supplementary means of interpretation Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclu-sion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

48. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. at 59.

49. *Id.* Under this reasoning it does not matter that the protection of human rights is not the principal object of the treaty from which the obligation stems. Objections arising under the UN Charter or the Charter of the OAS—instruments which are not primary targeted at human rights—would therefore be subject to interpretation by advisory opinion in the Inter-American Court.

50. *Id.* at 59-60. Here the Court applies a customary rule of interpretation of international agreements as codified in art. 31 of the Vienna Convention on the Law of Treaties, *supra* note 47.

51. *Human Rights Convention, supra* note 1, art. 64 set out at text accompanying note 12.

52. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. 60.

53. *Id.* at 64.

54. *Id.* at 60-61.

55. *Id.* at 61.

56. *Id.* at 61-62.

57. *Id.* at 62-63.

58. *Id.* at 63.

59. *Id.* at 60.

articulated, it cannot be presumed to exist."[60] In further support of a broad interpretation, the Court noted that the Convention itself urged an integrated view of the regional and universal systems.[61] For example, the Convention makes repeated references to instruments that are not inter-American in character.[62] Article 29, which contains rules governing the interpretation of the Convention "clearly indicates an intention not to restrict the protection of human rights to determinations that depend on the source of the obligations,"[63] the Court found. Not only does the article make express reference to the American Declaration of the Rights and Duties of Man "and other international acts of the same nature,"[64] it further provides that nothing in the Convention may be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."[65] It is difficult to imagine any stronger textual language in support of the proposition that the Court, in its role as the authorized interpreter of the Convention, is empowered to look beyond the Convention to any human rights treaty entered into by one or more American State.[66]

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60. *Id.* Moreover, as the Court might have noted, nothing in the Rules of Procedure of the Inter-American Court of Human Rights, *supra* note 8, indicates that the judges should propound a restrictive interpretation of article 64. To the contrary, article 50 of the Rules repeats the language of article 64: "1. If an interpretation is requested of other treaties concerning the protection of human rights in the American States, as provided for in Article 64.1. . . ." Article 51 of the Rules also parallels the wording of article 64(2) which it implements, giving no indication that the "international instruments" mentioned are exclusively regional and not universal.

61. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. 61.

62. *See inter alia* the Convention's Preamble, noting that "these principles have been set forth in the Charter of the Organization of American States in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and . . . have been reaffirmed and refined in other international instruments, *worldwide as well as regional in scope*" (emphasis added); art. 22(7), establishing the right to receive political asylum "in accordance with the legislation of the state international conventions. . ."; art. 26, adopting the economic, social and cultural standards set forth in the Charter of the OAS as amended by the Protocol of Buenos Aires; art. 27(1), providing for emergency supervision of the Convention's guarantees when "such measures are not inconsistent with . . . [a Party's] other obligations under international law. . . ."

63. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. 61.

64. *Human Rights Convention, supra* note 1, art. 29(d).

65. *Human Rights Convention, supra* note 1, art. 29(b).

66. Article 29 may be said to explain the reference in article 64(1) to "other treaties" and to clarify the content of article 64(2). The expression employed in article 29, "another convention to which one of the said states is a party," is not by its terms limited to American instruments, nor does it contain any qualifying or limiting modifier other than the logically implied requirement that one of the parties to the instrument be an American state. This is apparently the only limit that was intended on the Court's advisory jurisdiction, and explains why the second paragraph of article 64 which authorizes member states of the OAS to request advisory opinions was included.

It is also worth noting that standing to request advisory opinions concerning "other treaties" was originally reserved to the principal organs of the OAS and was later extended to the member states, whereas the member states had from the first draft on the right to

The Court went on to note the practice of the Inter-American Commission on Human Rights.[67] In particular the Court found that the Commission, it its reports and resolutions, had made repeated reference to treaties concluded outside the inter-American system which entailed obligations of American states.[68] Since the Court could not always review an interpretation made by the Commission of a country's treaty obligation unless its advisory jurisdiction was held to encompass at least as broad a field as that assumed by the Commission, it was found to be in the best interests of the states themselves for the Court to construe its article 64 powers broadly.[69]

In the preparatory work on the American Convention the Court found two facts in support of its conclusion. First, by the time the drafters of the Convention delineated the Court's advisory jurisdiction, the more narrowly drawn provisions of article 1 of Protocol No. 2 of the European Convention[70] had already been adopted.[71] Thus in shaping the expansive terms of article 64, the drafters purposefully eschewed the narrow boundaries of the European system.[72] Second, the Court noted that after the drafting of the International Covenant of Economic, Social and Cultural Rights[73] and the International Covenant on Civil and Political

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request an advisory opinion with respect to the compatibility between those "other treaties" and their domestic law. *See* Conferencia Especializada Interamericana Sobre Derechos Humanos: Actas Y Documentos, OEA/Ser. K/XVI/1.2 (1969) at 377. Article 19 itself underwent only minor stylistic modifications and paragraphs (b) and (d) came through the process practically unchanged. Since article 29 makes such a forceful call for a broad interpretation of the Court's advisory jurisdiction, it is indeed significant that it underwent virtually no change; article 64, by contrast, would seem to have been modified to comport with article 29.

67. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. 62.

68. *Id.* 62-63. The Court specifically cited the following country reports and resolution of the Inter-American Commission: El Salvador (OAS/Ser. L/V/II.46, doc. 23, rev.1, November 17, 1979) at 37-38; Cuba (OAS/Ser. L/V/II.48, doc. 24, December 14, 1979) at 9; Argentina (OAS/Ser. L./V/II.49, doc. 19, April 11, 1980) 24-25; Nicaragua (OAS/Ser. L/V/II.53, doc. 25, June 30, 1981) 31; Colombia (OAS/Ser. L/V/II.53, doc. 22, June 30, 1981) 56-57; Guatemala (OAS/Ser. L/V/II.53, doc. 21, rev. 2, October 13, 1981) 16-17; Bolivia (OAS/Ser. L/V/II.53, doc. 6, rev. 2, October 31, 1981) 20-21; Case 7481 - Acts which occurred in Caracoles (Bolivia), Resolution No. 30/82 (OAS/Ser. L/V/II.55, doc. 54, March 8, 1982).

The Commission's status was raised to that of a consultative organ of the OAS by the Amended Protocol of OAS Charter, *signed* Feb. 27, 1970, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 324. For a thorough discussion of the Commission's on-site observations *see* Norris, *Observations in Loco: Practice and Procedure of the Inter-American Commission on Human Rights*, TEX. INT'L L.J. 46 (1980), *see also* Research Note, *Synopsis of the 1980-81 Country Reports of the Inter-American Commission on Human Rights*, 4 HUMAN RTS. Q. 406 (1982).

69. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. 63.

70. *European Convention, supra* notes 20 and 21.

71. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. 63.

72. *Id.*

73. International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

Rights and its optional protocol,[74] the OAS Council consulted member states of the organization in June of 1967 regarding the advisability of continuing the work on an American Convention.[75] Ten of the twelve states responding to the inquiry favored continuing the work on the Convention, with the understanding that an effort would be made to draw upon the provisions of the UN Covenants.[76] Thus the history of the Convention demonstrated a tendency to conform the regional system to the universal system, a tendency which was reflected in the text of the Convention itself.[77]

A number of the submissions addressed to the Court by member states and OAS organs under article 52 of the Court's Rules of Procedure[78] urged a more restrictive interpretation of article 64.[79] The concern was evinced in these submissions that conflicting interpretations might result from having more than one international body pass upon particular instruments.[80] Noting that the possibility of conflicting interpretations is a fairly common phenomenon in all legal systems that are not strictly hierarchical in character, the Court was not persuaded.[81] It further noted that the broad jurisdiction of the International Court of Justice even made it possible for the ICJ to pass upon instruments framed within the inter-American system.[82] Another concern expressed in some of the submissions was that decisions regarding non-inter-American treaties could affect states which had little to do with the Convention or the Court and

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74. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).

75. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. 63.

76. *Id.*

77. *Id.*

78. *Supra* notes 8 and 9 and accompanying text.

79. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. 64.

80. *Id.* For a discussion of the problems that may arise from conflicting interpretations by international human rights tribunals, *see* Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AM. J. INT'L L. 754 (1982). Meron notes a concern that, given the growing number of U.N. and regional bodies interpreting human rights instruments, it may be necessary to achieve a greater degree of coordination among these bodies in order to prevent conflicting interpretations of human rights norms. While this concern has merit, there is also merit in allowing diverse bodies to address common issues arising under the respective instruments. There has been too little rather than too much chalking out of the substantive meaning of the human rights norms; as with the development of the common law, the product of diverse bodies may yield greater insight into the appropriate rule of law than would complete judicial harmony. One of the chief merits of the Inter-American Court's decision is that it permits the Court to examine a wide complement of human rights instruments when considering a particular case. For one approach to coordinating the procedural and normatic human rights mechanisms established by the American Convention with those of the U.N., *see* Piza, *Coordination of the Mechanisms for the Protection of Human Rights in the American Convention with Those Established by the United Nations*, 30 AM. L. REV. 167 (1981).

81. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. 64.

82. *Id.*, *See* sources listed *supra* at note 43 on the scope of the ICJ's advisory jurisdiction.

which could not even be represented before the Court.[83] This matter, the Court found, was disposed of by its decision to proceed on an ad hoc basis and to view its advisory jurisdiction as permissive.[84] A final safeguard with respect to these concerns was the fact that the Court's advisory jurisdiction by definition involved non-binding decisions.[85]

Although the Court did not directly confront the issue, it seems fair to conclude that it would define the term "treaties" in article 64 to be generic in character, encompassing a broad range of international instruments bearing upon human rights.[86] Supporting this conclusion is the text of the Vienna Convention[87]—cited by the Court as a key guide to interpretation[88]—which defines a "treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments *whatever its particular designation.*"[89] (Emphasis added.) The full breadth of the term "treaty" as used in the Vienna Convention is indicated by the International Law Commission in its report to the UN General Assembly: "[I]n addition to 'treaty,' 'convention,' and 'protocol,' one not infrequently finds titles such as 'declaration,' 'charter,' 'covenant,' 'pact,' 'act,' 'statute,' 'agreement,' 'concordat,' whilst names like 'declaration,' 'agreement,' and *modus vivendi* may well be found given both to formal and less formal types of agreements."[90]

The International Law Commission concluded that "treaty" is used throughout the Vienna Convention, then in draft form, "as a generic term covering all forms of international agreement in writing concluded between States,"[91] and that a majority of jurists accept this usage.[92] The Court itself attached heavy importance to article 29 of the Convention, which prohibits any interpretation which would exclude or limit "the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."[93] Thus the plain international meaning of "treaty" should be deemed to encompass such instruments as, inter alia, the American Declaration of the Rights and Duties of Man,[94] the Universal Declaration of Human Rights,[95] the OAS

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83. *Consultative Jurisdiction, supra* note 6, 22 I.L.M. 64.

84. *Id.*

85. *Id.* at 65.

86. The question of whether instruments such as the American Declaration on the Rights and Duties of Man, which are not treaties *per se*, fall within the scope of article 64, was raised in Buergenthal, *supra* note 4 at 243.

87. *Supra* note 47.

88. *Id.* and accompanyint text.

89. *Vienna Convention, supra* note 47, art. 2, para. 1(a).

90. Report of the International Law Commission to the General Assembly, U.N. Doc. A/6309/Rev. 1 (1966), *reprinted in* 1 Y.B. INT'L L. COMM'N 169, 188; U.N. Doc. A/CN.4/Ser. A/1966/Add. 1.

91. *Id.*

92. *Id.*

93. *Supra*, note 63 and accompanying text.

94. The American Declaration of the Rights and Duties of Man, 1948, *reprinted in*

Charter,[96] and the two UN Human Rights Covenants;[97] the Court's advisory jurisdiction would seem to extend to such instruments.

III. THE SECOND ADVISORY OPINION

In the second case, the Court again had before it the written observations of several American states and OAS organs,[98] and the amicus briefs of two nongovernmental organizations.[99] The Inter-American Commission's request for an advisory opinion presented the following question: At what point in time does a state become a party to the American Convention on Human Rights, where the state has deposited an instrument of ratification or adherence, containing one or more reservations to the Convention, with the General Secretariat of the OAS?[100] The request was necessitated by an ambiguity in the American Convention's provisions pertaining to ratifications and reservations.[101] On the other hand, article 74(2) provides, in pertinent part, that with respect to a state depositing an instrument of ratification or adherence after the Convention's entry into force "the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence."[102] On the other hand, article 75 provides that "[t]his Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969."[103] In order to understand the source of confusion it will be necessary to set forth the relevant provisions of the Vienna Convention. Articles 19 and 20 provide:

Article 19

Formulation of reservations
A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
(a)the reservation is prohibited by the treaty;
(b)the treaty provides that only specified reservations, which do not

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HANDBOOK, *supra* note 1, 17, OEA/Ser. L/V/11.50 doc. 6 (1980).

95. Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217, U.N. Doc. A/810 (1948).

96. Charter of the Organization of American States, Apr. 30 1948, 2 U.S.T.S. 2394; T.I.A.S. No. 2361; 119 U.N.T.S. 48.

97. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200 A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 9(1966); International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200 A, 21 U.N. GAOR Supp. (No. 16), 49, U.N. Doc. A/6316 (1966).

98. The following states and OAS organs submitted written observations; Costa Rica, Mexico, St. Vincent and the Grenadines, the United States, the Permanent Council, the Inter-American Juridical Committee and the General Secretariat.

99. Amicus briefs were submitted by the International Human Rights Law Group and the Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law.

100. *Effect of Reservations, supra* note 6, 22 I.L.M. 38-39.

101. *Human Rights Convention, supra* note 1, arts. 74, 75.

102. *Id.* art. 74(2).

103. *Id.* art. 75.

include the reservation in question, may be made; or
(c)in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of an objection to reservations
1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
(a) acceptance of another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
(b) an objection of another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.
5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.[104]

The Court began its discussion by noting that article 74(2) of the Convention is silent as to whether it applies exclusively to ratifications and adherences which contain no reservations or whether it also applies to those with reservations.[105] The General Secretariat of the OAS, as depositary of the Convention, read the relevant provisions of the Vienna Convention to mean that a reserving state is not a party to the Convention until the expiration of one year from the date on which other state parties received notification of the reservations or expressed their consent to be bound by the treaty with respect to their reservations.[106] This view

104. *Vienna Convention, supra* note 47, arts. 19, 20.
105. *Effect of Reservations, supra* note 6, 22 I.L.M. 42.
106. Request for an Advisory Opinion Presented by the Inter-American Commission on Human Rights, *reprinted in* ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1982, 28. OEA/Ser. L/III.7, doc. 13 (1982). [hereinafter cited as Request for an Advi-

was further advanced in the written observations submitted to the Court by the United States.[107] In its observations, the United States argued that paragraphs 4(c) and 5 of article 20 were incorporated into the American Convention by reference in article 75.[108] Paragraph 4(c) of that article provides that an act expressing a state's consent to be bound by the treaty and containing a reservation is effective when at least one other state party has accepted the reservation. Paragraph 5 presumes such an acceptance by another state if the latter has raised no objection to the reservation in twelve months after notification of the reservation.[109] Thus, reading article 20, the United States concluded that the Secretariat General may not deposit an instrument of ratification containing a reservation until a state party accepts the reservation, such acceptance being presumed of any state that fails to object within a twelve-month period.[110]

This question is of great importance to the Inter-American Commission because its powers are different respecting states that are parties to the Convention and those that are not. Article 33 of the Convention grants the Commission competence with respect to matters relating to the fulfillment by state parties of their commitments thereunder.[111] Article 41(f) authorizes the Commission to take actions on petitions and other communications pursuant to its authority under articles 44 through 51.[112] The effect of petitions and communications to the Commission is different, depending upon whether the state concerned is a party to the Convention.[113] It is necessary for the Commission to know when a particular state is a party to the Convention in order to apply the correct procedures to petitions and communications, as well as to apply the relevant norms.

The provisions of the Vienna Convention dealing with reservations[114] provide for the application of different rules to different categories of treaties, the Court found.[115] Thus it was necessary for the Court to determine how the American Convention was to be classified for purposes of the relevant provisions of the Vienna Convention.[116] In so doing, the Court was to look for guidance to the language of article 75 and the pur-

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sory Opinion.]

107. Observations of the Government of the United States of American Concerning the Request for an Advisory Opinion Submitted by the Inter-American Commission on Human Rights (Sept. 3, 1982).

108. *Id.* at 6-7.

109. *Vienna Convention, supra* note 47, arts. 20(4)(c), 20(5).

110. Observations of the Government of the United States of American Concerning the Request for an Advisory Opinion Submitted by the Inter-American Commission on Human Rights (Sept. 3, 1982) 9.

111. *Human Rights Convention, supra* note 1, art. 33.

112. *Id.* at arts. 41(f), 44-51.

113. Request for an Advisory Opinion, *supra* note 106.

114. *Vienna Convention, supra* note 47, arts. 19-23.

115. *Effect of Reservations, supra* note 6, 22 I.L.M. at 42.

116. *Id.*

pose for which it was designed.[117] Turning to article 19, the Court determined that the reference to the Vienna Convention in article 75 was a reference to paragraph (c) of Article 19.[118] Paragraph (a) was inapplicable in that the Convention does not prohibit reservations; likewise, paragraph (b) was inapplicable since the Convention does not specify permissible reservations.[119] It thus followed that paragraph (c), permitting reservations which are not "incompatible with the object and purpose of the treaty,"[120] was the governing provision.[121] The Court's interpretation was buttressed by reference to the preparatory work of the Convention, which indicated that the drafters wished to provide for a flexible reservations policy.[122]

The Court applied a similar analysis to article 20 of the Vienna Convention. The chief question with respect to article 20 was whether reservations to the Convention required acceptance by the other state parties. If not, then a ratifying state would be deemed a party to the Convention upon the deposit of the instrument of ratification, regardless of whether the ratification was accompanied by a reservation. On the other hand, if acceptance of reservations by other state parties was a prerequisite under the Convention, a reserving state would not be deemed a party until at least one other state party had accepted the reservation. As mentioned earlier,[123] the latter view was adopted by the General Secretariat of the OAS and advanced in the written observations submitted to the Court by the United States. The Court, however, concluded differently. Noting that the Convention did not involve a limited number of negotiating states exchanging reciprocal rights, nor did the application of the treaty in its entirety to all of the parties appear to be an essential condition of the consent of each to be bound, the Court found that paragraph 2 of article 20 was inapplicable.[124] Likewise, paragraph 3 could be eliminated since the Convention was not a constituent instrument of an international organization.[125] The Court's determination thus came down to a choice between paragraph 1 and paragraph 4 of article 20. In selecting the approach codified in paragraph 1, the Court held that reservations to the Convention do not require acceptance by any other contracting states.[126] Thus it followed that a reserving state is bound from the date of the de-

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117. *Id.*

118. *Id.* at 44.

119. *Id.*

120. *Vienna Convention, supra* note 47, art. 19, para. (c).

121. *Effect of Reservations, supra* note 6, 22 I.L.M. 44.

122. *Id.* at 44-46. The Court cited to the proceedings and documents of the Specialized Inter-American Conference on Human Rights, which met in San Jose, Costa Rica from Nov. 7 to 22, 1969, to adopt the Convention. These materials are reprinted in Conferencia Especializada Interamericana Sobre Derechos Humanos, OEA/Ser. K/XVI.2 (1973).

123. *Supra* notes 106 and 107 and accompanying text.

124. *Effect of Reservations, supra* note 6, 22 I.L.M. 46.

125. *Id.*

126. *Id.* at 49.

posit of its instrument of ratification.[127] It should be noted that the Court's view reflected the interpretation put forward by the Urban Morgan Institute for Human Rights of the College of Law at the University of Cincinnati in its amicus brief.

The Court's views were strongly guided by the unique nature of human rights treaties. In most treaties, the Court noted, reciprocal rights are exchanged for the mutual benefit of the state parties.[128] Article 20(4) of the Vienna Convention is geared to the demands of this traditional system.[129] While it liberalizes the ratification process insofar as it permits reservations, article 20(4) still requires that at least one state party accept the reservation before the treaty is operative as to the reserving party. Further, it enables the other contracting states to accept or reject the reservations to determine whether they wish to enter into treaty relationss with the reserving state. By contrast, modern human rights treaties do not have as their object the reciprocal exchange of rights for the mutual benefit of contracting states; rather, they aim to protect the basic rights of individuals from encroachments by the state of their nationality or any other contracting state.[130] "In concluding these human rights treaties," the Court found, "the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction."[131] The Court buttressed its conclusions by reference to statements of the European Commission on Human Rights[132] and the advisory opinion of the International Court of Justice in the *Genocide Convention Case*.[133]

The Court's general views concerning the nature of human rights treaties were found to apply with particular force to the American Convention.[134] Unlike other treaties, including the European Convention, the American Convention confers on individuals the right to file a petition

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127. *Id.*

128. *Id.* at 46-47.

129. *Id.*

130. *Id.* at 47. D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982); Imbert, *Reservations and Human Rights Conventions*, 6 HUM. RTS. REV. 28 (1981).

131. *Effect of Reservations, supra*, note 6, I.L.M. 47. *Cf.* Imbert, *supra* note 130 at 33: In a human rights treaty, "one Party's obligations cannot be modified by another Party's attitude; to allow a State to set aside its obligations simply because another State has conferred this right upon itself by making a reservation would be to detract from the goal that conventions of this kind pursue, if only because the victim of this reciprocal arrangement would not be the reserving State but individuals, the persons whom the convention is designed to protect."

132. Effect of Reservations, supra note 6, 22 I.L.M. 47-48. *See also* Application No. 788/60 (Austria v. Italy), 4 Y.B. EUR. CONV. HUM. RTS. 138, 140 (1961).

133. *Effect of Reservations, supra* note 6, 22 I.L.M. 47-48. *See also, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 22-23.

134. *Effect of Reservations, supra* note 6, 22 I.L.M. 48.

with the Inter-American Commission against any state that has ratified the Convention.[133] States, however, may not institute proceedings against another state until each has ratified the Convention.[136] This structure, the Court found, "indicates the overriding importance the Convention attaches to the commitments of the States Parties vis-a-vis individuals. . . ."[137]

Article 20(4) of the Vienna Convention, providing for the entry into force of a ratification with a reservation only upon its acceptance by another state, was thus determined to have been intended to apply to a more traditional treaty arrangement.[138] By contrast, the American Convention was "a multilateral legal instrument or framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction."[139] In this context, the Court found, article 75 of the Convention must be held to refer to paragraph 1 of article 20, which addresses those cases in which no subsequent acceptance of a reservation is required.[140] The fact that article 20(1) refers to reservations "expressly authorized by a treaty" was no obstacle; while the Convention authorizes no *specific* reservations, the Court concluded, it sanctions in general those reservations that are consistent with the object and purpose of the Convention.[141]

In closing, the Court emphasized that its holding was restricted to reservations compatible with the object and purpose of the Convention.[142] As the ultimate arbiter of the meaning of the Convention, the Court has the power to determine what reservations are incompatible and thus void ab initio.[143] While the Court refused to consider in the abstract what sort

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135. *Id.* at 48. *See, Human Rights Convention, supra* note 1, art. 44.

136. *Effect of Reservations, supra* note 6, 22 I.L.M. 48. *See also, Human Rights Convention, supra* note 6, art. 45.

137. *Effect of Reservations, supra* note 6, 22 I.L.M. 48.

138. *Id* at 46.

139. *Id.* at 48.

140. *Id.* at 49.

141. *Id.*

142. *Id. See also,* Koh, *Reservations to Multilateral Treaties,* 23 HARV. INT'L L.J. 71, 97 (1982).

143. Mr. Golsong has forcefully argued that this is the appropriate result where a tribunal is empowered to interpret and apply a human rights treaty. In such a case, "[f]ormal acceptance or formal objection on the part of other Contracting States of one, or several reservations formulated by another Contracting State can have no juridical validity." Golsong, *Contribution to the Rome Colloquy, in* PROCEEDINGS OF THE 4TH INTER-NATIONAL COLLOQUY ABOUT THE EUROPEAN CONVENTION ON HUMAN RIGHTS 271-72 (1975). Imbert; *supra* note 130 at 35, noted prior to the question arising before the Inter-American Court that "[a] solution of this kind would . . .be suited to . . .the American Convention on Human Rights . . . ." Indeed, it would appear to be the case that the view that only organs responsible for ensuring enforcement of a human rights treaty are qualified to judge the compatibility of reservations is widely held. Imbert, *id.* at 36; Cohen-Jonathan, *Les Rapports entre la Convention Europeenne des Droits de l'Homme et le Pacte des Nations Unies sur les Droits Civils et Politiques, in* REGIONALISME ET UNIVERSALISME DANS LE DROIT INTERNATIONAL CONTEMPORAIN 334-35 (1977).

of reservation might be deemed to conflict with the object and purpose of the Convention, it clearly perceived the safeguarding of contracting states from improper reservations to be an important function of the Court.[144]

The opinion of the Court was also important with respect to two preliminary matters relating to competence. First there was the question of the Court's own competence to hear the case. Since the Secretary General of the OAS was assigned depositary functions under the Convention,[145] and, furthermore, since the past practice of the OAS had been to have the Secretary General handle disputes concerning ratifications,[146] the argument could be made that the Secretary General rather than the Court was authorized to settle the main question in the case. The Court had no hesitancy in declaring that the article 64 explicit grant of power to the Court to render advisory opinions interpreting the Convention encompassed the question posed by the Commission.[147] The Court distinguished those treaties with respect to which the Secretary General established its past practice of dispute resolution, noting that the Convention set up a formal supervisory mechanism—the Court—for the adjudication of questions arising under the Convention.[148] The Court's competence in this regard was expressed in article 33(b)[149] and reinforced by article 1 of the Court's Statute, which declares that the Court "is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights."[150]

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144. *Effect of Reservations, supra* note 6, 22 I.L.M. 49. It is also important to note that any interest other states parties to the Convention have as to reciprocity is protected by art. 21 of the Vienna Convention governing the legal effects of reservations and also incorporated by reference in the American Convention. Under art. 21, a reservation operates reciprocally between the reserving state and any other party, so that it modifies the treaty for both of them in their mutual relations to the extent of the reserved provisions. The International Law Commission was of the opinion that this rule in large measure safeguarded the interests of states. International Law Commission, *Report of the International Law Commission to the General Assembly on the Work of its 18th Session,* [1966] 2 Y.B. INT'L L. COMM'N 207. Under the American Convention, therefore, it would not be possible for a state to enter a complaint against another state before the Commission if the complaining state had reserved on the gravamen of the complaint.

145. *Human Rights Convention, supra* note 1, arts. 74, 76, 78, 79, 81.

146. *Effect of Reservations, supra* note 6, 22 I.L.M. at 40. *See also* Standards on Reservations of Inter-American Multilateral Treaties, OAS G.A. Res. 102 (III-O/73) (April 14, 1973), AG/doc. 375/73 rev. 1, *reprinted in* OEA/Ser. P/III-O.2, Vol. I (1973).

147. *Effect of Reservations, supra* note 6, 22 I.L.M. at 40.

148. *Id.*

149. *Human Rights Convention, supra* note 1, art. 33(b).

150. Statute of the Inter-American Court of Human Rights. For the official text, *see Handbook, supra* note 1, at 105, and Annual Report of the Inter-American Court of Human Rights to the General Assembly, 1980, 16, OEA/Ser. L/V/III.3, doc. 13, Corr. 1 (1981). The Statute is *reprinted in* 19 I.L.M. 635 (1980).

Thus the Court rejected the view that the Secretary General is empowered to determine whether and at what time a ratification is to take effect. While the Secretary General's position on the main question in the case was contrary to the Court's holding, (*supra* note 106 and accompanying text), there is no indication that the Secretary General asserted a primary power to decide the question.

Similarly, the Court found that the Inter-American Commission was competent to request the advisory opinion under article 64 of the Convention.[151] The Court noted that, under article 64, member states of the OAS enjoy an absolute right to seek advisory opinions.[152] By contrast, OAS organs can request advisory opinions only "[w]ithin their spheres of competence."[153] The Commission is one of the organs listed in Chapter X of the OAS Charter[154], which is incorporated by reference in article 64. Since the Commission has different powers with respect to those member states that are parties to the Convention and those that are not,[155] it was imperative for the Commission to know precisely when a reserving state became a party. The Commission's request was therefore within its sphere of competence.[156] Furthermore, the Court observed that, given the broad powers conferred upon the Commission by the OAS Charter,[157] "the Commission enjoys, as a practical matter, an absolute right to request an advisory opinion within the framework of article 64(1) of the Convention."[158] Thus, for the purposes of article 64, the Commission stands on precisely the same footing as a member state of the OAS.

IV. CONCLUSION

With the advent of the Inter-American Court of Human Rights, an additional body has been added to the regional apparatus for the promotion and protection of human rights. Serious and wide-ranging violations are occurring on a quotidian basis in this hemisphere and one would rival Dr. Pangloss for optimism if one thought that the establishment of the court would lead to immediate and dramatic improvements in the observance of human rights by governments. Nevertheless, our best hope remains in the rule of law and in the institutions dedicated to ensuring its even-handed, objective enforcement.

The two advisory opinions of the Court should demonstrate to states the confidence they may place in this new institution. The opinions are

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Note also that the Court's position on the scope of the Secretary General's duties as depositary is supported by the Vienna Convention, art. 77. In its draft form, this article required that the depositary "examine whether. . . an instrument or a reservation is in conformity with the provisions of the treaty." Report of the International Law Commission to the General Assembly, *supra* note 90, at 269. Despite this apparent command to inspect reservations, the International Law Commission made it clear that this draft provision was not intended to make the depositary a judge of the validity of the reservation. *Id.* In its final form, however, art. 77 excludes the examining of reservations from the depositary's functions. It is thus safe to conclude that under the Vienna Convention a depositary is not to make legal judgments as to the validity of treaties.

151. *Effect of Reservations, supra* note 6, 22 I.L.M. at 41.

152. The text of art. 64 can be found *supra* at text of accompanying note 12.

153. *Human Rights Convention, supra* note 1, art. 64(1).

154. *See* The Charter of the Organization of American States, *supra* note 96.

155. *Supra* notes 111-113 and accompanying text.

156. *Effect of Reservations, supra* note 6, 22 at I.L.M. 41.

157. *See* The Charter of the Organization of American States, *supra* note 96, art. 112.

158. *Effect of Reservations, supra* note 6, I.L.M. 41.

well-reasoned, lawyer-like products, and correct in their conclusions. We can only hope that states, with increasing frequency, will resort to the Court both in its advisory and contentious capacities.