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The Implementation of Inter-American Norms on Freedom of Religion in the National Legislation of OAS Member States

*Evaldo Xavier Gomes**

INTRODUCTION

On November 22, 1969, members of the Organization of American States (“OAS”) met in San José, Costa Rica, to adopt the American Convention on Human Rights (“Convention”).¹ After its eleventh ratification, deposited by Grenada on July 18, 1978, the treaty went into force.² Through this Pact of San José, the OAS established two organs “to supervise the implementation and enforcement of the rights contained therein.”³ These organs, namely, the Inter-American Commission on Human Rights (“Commission”) and the Inter-American Court of Human Rights (“Court”), have protected the right to exercise religious freedom in the American hemisphere by vigorously promoting the defense of all human rights. While the Commission existed prior to adoption of the Convention, the Convention redefined its functions⁴ and created the Inter-American Court of Human Rights.⁵ It also outlined specific human rights and norms, including rights to religious freedom.⁶

* PhD in *Utroque Iure* (Canon and Civil Law). The author would like to thank Rex P. Nielson for his help in translation and the staff of the BYU Law Review for their editorial assistance.

1. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter Convention].

2. *See id.* at art. 74(2). The table of signatory states and dates of ratification is included at 1144 U.N.T.S., at 144 n. 1. *Id.*

3. SCOTT DAVIDSON, THE INTER-AMERICAN COURT OF HUMAN RIGHTS 21 (1992).

4. *See* Convention, *supra* note 1, at arts. 34–51.

5. *See id.* at arts. 52–73; *see also* Victor Rodriguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593, 600, 610 (2000).

6. Convention, *supra* note 1, at art. 12(1)–(4) (“1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or in private. 2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs. 3.

On various occasions, the Court and the Commission have intervened to revise domestic legislation of OAS member states to guarantee religious freedom. These interventions are particularly significant because of the relationship between Inter-American regional norms and the internal legal ordinances of states parties to the Convention. Article 2 of the Convention obligates the states parties to ensure the rights and freedoms guaranteed therein,⁷ and therefore the regional norms espoused by the Convention prevail over conflicting national laws.⁸ Practical examples of both the regional organs protecting human rights and the pronouncements of the General Assembly of the OAS corroborate the efficacy of the system in protecting religious freedom for each individual.

In this Article, I discuss the legal instruments enacted to expand and enforce human rights among the member states of the OAS. I also summarize examples of specific cases brought before the Commission and the Inter-American Court of Human Rights. While both organs are valuable institutions for the development of human rights law in the Inter-American system, they cannot replace protection of religious freedom at the national level. The Inter-American system's organs of human rights protection serve the important purpose of voicing regional condemnation of human rights violations and of enforcing the commitment of each state to protect its citizens' rights and freedoms. In Part II, I outline the method used by the Commission and the Court to effectuate the rights protected by the instruments of human rights protection in the Inter-American system. In Part III, I discuss cases that have come before the Commission and the Court dealing specifically with the protection of religious freedom.

Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others. 4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.").

7. *Id.* at art. 2.

8. Indeed, the Preamble to the Convention affirms that the parties recognize: [T]hat the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States.

Id. at Pmbl.

II. THE INTER-AMERICAN COMMISSION AND INTER-AMERICAN COURT OF HUMAN RIGHTS: IMPLEMENTATION OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

A. States' Duties to Guarantee Rights

In the first article of the American Convention on Human Rights, the states parties to the Convention agree to undertake to respect, guarantee, and permit the exercise of the rights and freedoms recognized in the Convention.⁹ Among the rights specified in the Convention is the right of each individual person¹⁰ who is subject to the jurisdiction of a member state to exercise his rights and freedoms without any discrimination of a religious nature.¹¹ Thus, the Convention incorporates into its first article the principle of nondiscrimination.

According to the norms of Article 2 of the Convention, states parties have the duty to guarantee the right to exercise freedoms protected by the Convention.¹² To accomplish this, they must, in accordance with their own constitutional processes, adopt legislative or other measures necessary to implement these rights and freedoms.¹³ While such measures are to be adopted in accordance with the respective constitutional norms of the member state, the obligation to comply with the terms of the Convention are unqualified. The most obvious method for member states to give effect to the norms of the Convention is by including these norms in their national legislation, but the Convention does not forbid doing so through measures of another nature. The intent of Article 2 is thus to guarantee the efficacy of the norms of the Convention by imposing a positive duty on the states parties to change any noncompliant laws. Otherwise, the Convention would run the risk of becoming a dead letter, having no application in the lives of the individuals within the jurisdiction of its member states.

The Commission plays an important role in monitoring the states' observance of Article 2 of the Convention. To this end, the

9. *Id.* at art. 1.

10. The Convention clarifies the definition of "person" as meaning "every human being." *Id.* at art. 1(2).

11. *Id.* at art. 1(1).

12. *Id.* at art. 2.

13. *Id.*

Commission releases an annual report identifying human rights problems within states parties to the Convention. This system of monitoring encourages countries found to have human rights problems to voluntarily remedy violations through changes in their domestic laws before being brought before the Commission or the Court. A concrete example of a change in law that resulted from the influence of the Commission on an OAS member state is Colombian law No. 288/96, passed by the Congress of Colombia on July 5, 1996.¹⁴ This law regulates the procedure to comply with the decisions of international organs to protect human rights, such as the Commission,¹⁵ which had condemned Colombia for violating human rights.¹⁶ The Colombian law created a competent Committee of Ministers to consider the decisions of the international organization, and in cases where the Committee agrees with the international body's decision, the law requires the government to pay compensation to human rights victims.¹⁷ The adoption of law No. 288 by Columbia was subsequently recognized by the Inter-American Commission as a "very important measure taken to protect human rights in Columbia."¹⁸ However, the Commission noted that Colombia needed to take further steps to effectively ensure compliance with all of the Commission's recommendations, including the recommendations that states investigate and sanction those who violate human rights.¹⁹

14. See Annual Report of the Inter-American Commission on Human Rights, Inter-Am. C.H.R., OEA/Ser.L./V/II.95, doc. 7 rev., Ch. V, ¶ 7 (1996), available at <http://www.cidh.oas.org/annualrep/96eng/chap.5.htm#COLOMBIA> [hereinafter 1996 Annual Report]. The report was approved by the Commission in its 95th Ordinary Period of Sessions, held between February 24, 1997, and March 14, 1997.

15. *Id.* at Ch. V, ¶¶ 7-8.

16. In its 1995 report, the Commission condemned Colombia for failure to comply with Article 2 of the Convention when the Colombian army executed a Swiss missionary. Hildegard Maria Feldman v. Colombia, Case 11.010, Inter-Am. C.H.R., Report No. 15/95, OEA/Ser.L./V/II.91, doc. 7 rev. (1995), available at <http://www.cidh.oas.org/annualrep/95eng/Colombial1010.htm>.

17. See 1996 Annual Report, *supra* note 14, at Ch. V, ¶ 8.

18. *Id.* at Ch. V, ¶ 10.

19. *Id.*

B. Meaning and Reach of Commission Recommendations According to the Interpretation of the Inter-American Court of Human Rights

As part of its responsibilities, the Commission makes recommendations to member nations. In order to fully understand the meaning of the term “recommendations” as it is used by the Commission, it is helpful to look to the judgments of the Inter-American Court. According to the judgment of the Court in the case of *Caballero-Delgado & Santana*, the term should be interpreted according to the regulations of Article 31(1) of the Vienna Convention on the Law of Treaties.²⁰ In the understanding of the Court, this means that “a recommendation does not have the character of an obligatory judicial decision for which the failure to comply would generate State responsibility.”²¹ Thus, states cannot be held responsible for refusing to follow a Commission recommendation—the recommendation is not obligatory. Apart from suffering the potential embarrassment or reciprocity that may attend flouting the decisions of an international organization, states are free to ignore Commission recommendations without fear of reprisal.

Nearly two years later in the case of *Loayza-Tamayo v. Peru*,²² the Inter-American Court reaffirmed this same understanding, but in a more nuanced way. From a wider perspective which takes into account the principle of good faith “embodied in . . . Article 31(1) of the Vienna Convention,” the Court judged that a member state participating in a treaty on human rights “has the obligation to make every effort to apply [sic] with the recommendations of a protection organ such as the Inter-American Commission.”²³ Specifically regarding a state’s responsibility to comply or not with the recommendations, the Court asserted that, by ratifying the Convention, states parties “engage themselves to apply the

20. *Caballero-Delgado & Santana v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 22, ¶ 67 (Dec. 8, 1995), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_22_ing.pdf. Article 31(1) of the Vienna Convention states, “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.” Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

21. *Caballero-Delgado & Santana*, Inter-Am. Ct. H.R. (ser. C) No. 22, ¶ 67.

22. *Loayza-Tamayo v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_33_ing.pdf.

23. *Id.* ¶ 80.

recommendations made by the Commission in its reports.”²⁴ The Court does not use the term obligation, but rather affirms the duty of the states parties to follow the recommendations of the Commission as part of the commitment assumed as members of the Inter-American system and as part of their adherence to the Commission’s legal instruments.

C. State Implementation of Inter-American Norms Protecting Religious Freedom

When a country violates a right guaranteed by the Convention, a person or group of persons, or any legally recognized non-governmental entity may petition the Commission to review the state’s conduct.²⁵ Upon acceptance of a petition the Commission collects the facts, seeks to assist the parties in reaching a friendly settlement, and may issue recommendations to the involved parties.²⁶ Depending upon the violation and the Commission’s judgment of the best interests of the state, the Commission might refer the violation to be reviewed by the Inter-American Court.²⁷ According to the Statute of the Inter-American Court on Human Rights, the Inter-American Court is an “autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the Convention and the Statute.”²⁸ When considered necessary, the Court imposes upon the responsible state (or states) the obligation to make reparations for the harm caused and to pay an adequate indemnity.²⁹ Furthermore, Article 63(1) of the Convention states that in the event of a violation, “the

24. *Id.* ¶ 81.

25. Convention, *supra* note 1, at art. 44. For more detail on the Commission’s procedure for resolving cases, see the Commission’s website article, *What is the IACHR?*, <http://www.iachr.org/what.htm> (last visited Mar. 31, 2009).

26. Rules for admissibility of petitions and procedures for resolution of the matter are outlined in the Convention at Articles 46 through 51. Convention, *supra* note 1, at arts. 46–51.

27. *Id.* at art. 61; *see also* *What is the IACHR?*, *supra* note 25 (“The decision as to whether a case should be submitted to the Court or published should be made on the basis of the best interests of human rights in the Commission’s judgment.”).

28. Organization of American States [OAS], *Statute of the Inter-American Court of Human Rights*, art. 1, AG/RES. 448 (IX-O/79), (Oct. 1979), *available at* [http://www.cidh.org/basicos/english/basic19.statute %20of%20the%20ia%20court.htm](http://www.cidh.org/basicos/english/basic19.statute%20of%20the%20ia%20court.htm).

29. *See* Convention, *supra* note 1, at art. 63.

Court shall rule that the injured party be ensured the enjoyment of his right of freedom that was violated.”³⁰ Thus, the Court not only has power to order states to pay indemnities, it also has power to enjoin the States prospectively to guarantee their citizens’ human rights.

Unlike those of the Commission, the decisions of the Court have a definitive character and may not be appealed.³¹ Therefore, the condemned State must respect and comply with them. However, in order for the Court to issue binding decisions on particular cases, the state in question must have already consented to the Court’s “contentious jurisdiction.”³² For those states that do subject themselves to the Court’s jurisdiction, the rights guaranteed by the Convention trump any contrary state law, and the Court constitutes the highest authority on the interpretation and protection of those rights. In cases of extreme gravity, demonstrated need, or in order to avoid irreparable harm, Article 26 of the Court’s Rules of Procedure provides that the Court may *ex-officio*, or at the request of the parties, judge that a member State adopt provisional measures.³³

Certainly member states are not always anxious to comply with Court decisions. The Court generally issues two types of remedies for a member’s violation: (1) a trial and decision pursuant to alterations in the state’s domestic law, and (2) monetary compensation.³⁴ However, while states do often pay financial compensation, they “routinely ignore the requirement that they punish offenders or change their laws.”³⁵ While the Court does not

30. *Id.*

31. *Id.* at arts. 67–68 (“The judgment of the Court shall be final and not subject to appeal.”).

32. Convention, *supra* note 1, at art. 62; see Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT’L. L. 1, 2 (1985); Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 96 CAL. L. REV. 1693, 1721 (2008) (noting that each member country of the Organization “must make a separate declaration to the Secretary General of the OAS giving unconditional consent to jurisdiction, or consent on condition of reciprocity, for a specific period of specific cases”). As of 2008, twenty-four countries have submitted to the Court’s contentious jurisdiction. *Id.* Significantly, the United States and Canada are not among them. *Id.* The American states’ various declarations, reservations, and denunciations of the Court and Convention are available at <http://www.oas.org/juridico/English/sigs/b-32.html>.

33. RULES OF PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS art. 26(1) (2009), available at http://www.corteidh.or.cr/motivos_ing.pdf.

34. Guzman & Landsidle, *supra* note 32, at 1721.

35. Eric A. Posner & John C. YOO, *Judicial Independence in International Tribunals*,

release positive statistics for full compliance with its decisions, figures can be derived from other statistics kept by the Court. In 2007 the Court reported that it had decided ninety-five cases over the course of its existence.³⁶ It further reported that eighty-four cases remained in a stage of monitoring of compliance.³⁷ Since the Court only closes a case after it has declared full compliance, one would assume that only eleven cases had obtained a level of compliance sufficient to warrant the cessation of monitoring. If this estimate is accurate, the rate of full compliance with Court decisions would be about 11.6%.³⁸ Increased member compliance with Commission opinions and Court decisions is one of the main goals for the organization's future.

D. The Relation between Regional Inter-American Norms Protecting Religious Freedom and Member States' Domestic Laws

On several occasions, the Court and the Inter-American Commission have made pronouncements stipulating that states parties to the Convention cannot invoke internal laws to circumvent Inter-American System compliance. The most telling illustrations of this principle are revealed in the Commission's and the Court's amnesty cases. For instance, Uruguay, Argentina, Peru, Chile, Suriname, and El Salvador³⁹ passed amnesty laws that the Commission considered to be incompatible with the content and spirit of the Convention.⁴⁰ Moreover, when Peru implemented a decree providing amnesty to individuals suspected of substantial human rights violations,⁴¹ the Court found that the Peruvian

93 CAL. L. REV. 1, 43 (2005).

36. Annual Report of the Inter-American Court of Human Rights 59 (2007).

37. *Id.* at 64.

38. Posner and Yoo, writing in 2005, estimate an even lower rate of compliance of 5%. Posner & Yoo, *supra* note 35, at 43. They observe that, according to their estimate, the Court enjoys a mere 1% advantage over compliance with the Commission's non-binding recommendations. *Id.*

39. *See generally* PHILIP ALSTON & JAMES CRAWFORD, THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 336 (Cambridge Univ. Press 2000).

40. *See* Antônio Augusto Cançado Trindade, *Reporting in the Inter-American System of Human Rights Protection*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 333, 336 (Philip Alston & James Crawford eds., 2000).

41. These violations included torture; summary, extra-legal, and arbitrary executions; and forced disappearances. *See* Antonio Augusto Cançado Trindade, *The Merits of Coordination of International Courts on Human Rights*, 2 J. INT'L CRIM. JUST. 309, 311 (2004).

government had passed these laws intending to impede the investigation of human-rights violations and were therefore prohibited by the Convention.⁴² Similar rulings have been applied to amnesty laws adopted by Chile, Suriname, and El Salvador.

In the case of *Almonacid Arellano v. Chile*, the Court judged that the Chilean amnesty law, Decree No. 2.191, was inconsistent with the content and spirit of the Convention and therefore had no legal effect.⁴³ The origins of the case stemmed from a *coup d'état* which overthrew the Chilean government on September 11, 1973.⁴⁴ In connection with the *coup*, the new military government performed a “cleanup operation” wherein it summarily executed several officials of the former government as well as individuals thought to be dangerous because of their leftist ideas.⁴⁵ On September 16, 1973, Mr. Almonacid-Arellano, an activist in the Chilean Communist Party, was arrested at his home and then shot by the police while entering the police truck.⁴⁶ He was taken by the police to the hospital where he died the following day.⁴⁷ Chilean courts initiated a criminal investigation, but after nearly a year of dismissals and appeals, the Appeals Court of Rancagua confirmed the investigation’s dismissal.⁴⁸ In 1978, the government declared that the Chilean state had overcome the “civil commotion” that had required military rule and, citing a need for national unity, passed a decree providing amnesty “to all individuals who performed illegal acts, whether as perpetrators, accomplices or accessories after the fact, during the siege in force from September 11, 1973”⁴⁹ The military regime ended in 1990, and after domestic criminal charges for Almonacid-Arellano’s murder failed, Mr. Almonacid-Arellano’s next of kin filed a petition with the Inter-American Commission

42. *See id.* (discussing the Court’s judgment in the case of *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf).

43. *Almonacid-Arellano et al. v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 119 (Sept. 26, 2006), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf.

44. *Id.* ¶ 82(3).

45. *Id.* ¶¶ 82(3)–(7).

46. *Id.* ¶¶ 82(8)–(9).

47. *Id.*

48. *Id.*

49. *Id.* ¶ 82(10).

challenging the amnesty decree.⁵⁰ Finally, in 2005 the Court received the case and in 2006 found Chile's amnesty law to violate Convention norms.⁵¹

Similarly, in the case of *Barrios Altos v. Peru*, the Court found Peru's amnesty laws⁵² incompatible with the American Convention on Human Rights and, therefore, "lack[ing] legal effect."⁵³ The Commission adopted the same posture, and the Court confirmed it in relation to the 1989 amnesty law of Suriname, formerly Dutch Guiana, in the case of *Moiwana Community v. Suriname*.⁵⁴

The Commission case of *Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador*⁵⁵ is considered of great political, social, and religious significance on an international level. The Inter-American Commission determined that the Republic of El Salvador's approval

50. *See id.* ¶¶ 6, 82(11)–(37).

51. *Id.* ¶¶ 121–22 ("Since it ratified the American Convention on August 21, 1990, the State has kept Decree Law No. 2.191 in force for sixteen years, overtly violating the obligations set forth in said Convention. . . . [T]he Court determines that by formally keeping within its legislative *corpus* a Decree Law which is contrary to the wording and the spirit of the Convention, the State has not complied with the obligations imposed by Article 2 thereof.").

52. The Peruvian decree, adopted by the Congress of Peru on June 14, 1995, and signed by the President the next day granted a general amnesty to all those members of the security forces and civilians who were the subject of a complaint, investigation, indictment, trial or conviction, or who were serving prison sentences for human rights violations committed between May 1980 and June 15, 1995. *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 75, ¶ 2(i)–(j) (Mar. 14, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf. The effect of the decree was to quash the judicial investigations that had been initiated by Judge Antonia Saquicury of the Sixteenth Criminal Court of Lima. *Id.* ¶¶ 2(h)–(i). Judge Saquicury, however, held the law contrary to the Constitution and therefore inapplicable to the pending criminal case. *Id.* ¶ 2(k). This decision was appealed, but before a public hearing could be held, the Peruvian Congress approved a second amnesty law, Law No. 26492, which "declared that the amnesty could not be 'revised' by a judicial instance and that its application was obligatory," *id.* ¶ 2(l)–(m), thus preventing judgments from being pronounced regarding the legality or applicability of the first amnesty law. *Id.*; see also *Gómez Palomino v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 136, ¶ 54.7 (Nov. 22, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_136_ing.pdf.

53. *Barrios Altos*, Inter-Am. Ct. H.R. (Ser. C) No. 75, ¶ 44.

54. *Moiwana Community v. Suriname*, Inter-Am. Ct. H.R., (Ser. C) No. 124, ¶ 167 (June 15, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf ("As the Tribunal has asserted on repeated occasions, no domestic law or regulation—including amnesty laws and statutes of limitation—may impede the State's compliance with the Court's orders to investigate and punish perpetrators of human rights violations. If this were not the case, the rights found in the American Convention would be deprived of effective protection." (footnote omitted)).

55. *Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador*, Case 11.481, Inter-Am. C.H.R., Report No. 37/00, OEA/Ser.L./V/II.106, doc. 6 rev. (1999), available at <http://www.cidh.org/annualrep/99eng/merits/elsalvador11.481.htm>.

of the “General Amnesty Law for the Consolidation of Peace” (Decree No. 486 of 1993) was a violation of the Convention.⁵⁶ More explicitly, the Commission declared that the State in question:

[V]iolated Article 2 of the American Convention. In addition, by applying it to this case, the State has violated the right to justice and its duty to investigate, try, and make reparations, established in Articles 1(1), 8(1), and 25 of the American Convention, to the detriment of Monsignor Romero’s next-of-kin, the members of the religious community to which he belonged and Salvadoran society as a whole.⁵⁷

In similar fashion, the Commission declared that by approving this law, the Salvadorian government violated the “right to know the truth,”⁵⁸ thereby injuring the relatives of Monsignor Romero, his religious community, and all Salvadorian society.

Thus, a characteristic of the Inter-American System is the preemption of conventional regional norms over state internal laws that might offend protected human rights or restrict judicial procedure. When a country’s domestic laws encroach on fundamental human rights, it is the responsibility of the Commission and the Court within the Inter-American System to preserve enjoyment of these rights by declaring those laws invalid.

III. PROTECTION OF RELIGIOUS FREEDOM IN THE INTER-AMERICAN SYSTEM

A. Protecting the Right to Conscientious Objection and Religious Freedom Through an “Amicable Solution”—Case of Alfredo Díaz Bustos v. Bolivia

While cases condemning states for denial of religious freedom do not dominate the dockets of the Commission and the Court, the American Convention on Human Rights guarantees religious freedom so such cases would therefore fall within the jurisdiction of both the Commission and the Court. In the case of *Alfredo Díaz Bustos v. Bolivia*, the Ombudsman of the Republic of Bolivia, on behalf of Mr. Bustos, a member of the Jehovah’s Witness faith,

56. *Id.* ¶¶ 1–4.

57. *Id.* ¶ 158, available at <http://www.cidh.oas.org/annualrep/99eng/Merits/ElSalvador11.481a.htm>.

58. *Id.* ¶¶ 146–48.

sought assistance from the Inter-American Commission.⁵⁹ The petition claimed that Bolivia had violated Articles 1(1) (duty of the state to recognize rights and freedoms recognized in the Convention), 2 (duty of the state to adopt internal legal provisions to protect human rights), 12 (right to freedom of conscience and religion), 24 (right to equal protection), and 25 (right to judicial protection) of the Convention.⁶⁰ The Commission further identified potential violations of Articles 13.1 (freedom of thought and expression), 22 (freedom of movement and residence), and 23 (right to participate in government) and declared the case admissible.⁶¹

According to Mr. Bustos, Bolivia violated his freedom of conscience and religion and failed to comply with its obligations to protect rights guaranteed by the convention by refusing his claim to exemption from military service.⁶² The state further violated his right to equal protection by discriminating against him as a member of the Congregation of Jehovah's Witnesses since Bolivian law permitted the exemption of Catholics from military service but not members of other faiths and religious confessions.⁶³ Mr. Bustos further argued that, since the Bolivian Constitutional Court had held that "the right to conscientious objection to compulsory military service was not within the purview of the courts," Bolivia had also deprived him of the right to judicial protection.⁶⁴

The case of *Alfredo Díaz Bustos v. Bolivia* is a good example of the application of Article 48(1)(f) of the Convention, which requires the Commission to "place itself at the disposal of the parties . . . with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in [the] Convention."⁶⁵ On July 4, 2005, Bolivia and Bustos reached a friendly settlement in which Bolivia agreed to give Bustos his document of completed military service and to stipulate that as a conscientious objector, the government would not send him to the battlefield nor call him as an

59. Alfredo Díaz Bustos v. Bolivia, Admissibility Petition 14/04, Inter-Am. C.H.R., Report No. 52/04, OEA/Ser.L./V/II.122, doc. 5. rev. 1, ¶¶ 1-2 (2004), available at <http://www.cidh.oas.org/annualrep/2004eng/Bolivia.14.04eng.htm>.

60. *Id.*

61. *Id.* ¶ 4.

62. *Id.* ¶ 2.

63. *Id.*

64. *Id.*

65. Convention, *supra* note 1, at art. 48(1)(f).

aide in an armed conflict.⁶⁶ For his part, Bustos agreed to (1) present a sworn statement (this was required for internal administrative purposes of the Ministry of Defense); (2) request that the Commission assign the status of friendly settlement to the case; and (3) renounce all costs and damages and agree not to initiate a new action based on the same facts.⁶⁷

An aspect of great relevance in this case was its influence in modifying the application of internal norms of the member states of the Inter-American System. As part of the agreement between parties, Bolivia, represented by the Ministry of Defense, agreed to:

[I]nclude the right to conscientious objection to military service in the preliminary draft of the amended regulations for military law currently under consideration by the Ministry of Defense and the armed forces; [and] together with the Deputy Ministry of Justice, to encourage congressional approval of military legislation that would include the right to conscientious objection to military service.⁶⁸

The resolution of this case by friendly settlement precluded the Commission from issuing any recommendations regarding whether Article 12 of the Convention guarantees an absolute right to object to compulsory military service.⁶⁹ The case does, however, show the profound effect that the Commission can have on developing the internal laws of states in the Inter-American System. Bolivia began at a point where the question of whether individuals had a right to conscientious objection could not even be considered by the highest court, but ended with an agreement to encourage congressional approval of such a right. Unfortunately, the Commission appears not to have pursued Bolivia's adoption of these measures, and thus, the right to conscientious objection on religious grounds in Bolivia remains unclear.

66. Alfredo Díaz Bustos v. Bolivia, Friendly Settlement, Petition 14/04, Inter-Am. C.H.R., Report No. 97/05, OES/Ser.L./V/II.124 Doc. 5, ¶ 16 (2005), available at <http://www.cidh.oas.org/annualrep/2005eng/Bolivia14.04eng.htm>.

67. *Id.*

68. *Id.*

69. See HITOMI TAKEMURA, INTERNATIONAL HUMAN RIGHT TO CONSCIENTIOUS OBJECTION TO MILITARY SERVICE AND INDIVIDUAL DUTIES TO DISOBEY MANIFESTLY ILLEGAL ORDERS 116–17 (2008). The Commission did express the opinion that the friendly settlement was “fully consonant with the evolving nature of international human rights law, which protects the status of conscientious objector *in those countries in which that status has been established by law.*” *Alfredo Diaz Bustos Friendly Settlement*, ¶ 19 (emphasis added).

B. Implementing Inter-American Norms Through Adjudication—the Case of “The Last Temptation of Christ” v. Chile

The Inter-American Court case of “*The Last Temptation of Christ*”⁷⁰ is perhaps the most renowned and contentious case relating to the right to freedom of religion in all of the Inter-American System of Human Rights Protection.⁷¹ In this case, Chilean citizens accused the Chilean government of violating Articles 12 (freedom of religion) and 13 (freedom of thought and expression) of the Convention based on the “judicial censorship of the cinematographic exhibition of the film ‘The Last Temptation of Christ,’ confirmed by the Supreme Court of Chile . . . on June 17, 1997.”⁷²

The dispute surrounded Martin Scorsese’s controversial film, *The Last Temptation of Christ*, based on the book by Nikos Kazantzakis. In the film, the story of Jesus is portrayed but departs significantly from the rendition of the Gospels, including several elements considered outrageous by Christians.⁷³ The Chilean Cinematographic Classification Council, a body authorized to supervise exhibition of films in Chile, originally refused to allow the exhibition of the film.⁷⁴ However, in 1996, United International Pictures Ltd. succeeded in obtaining the Council’s authorization to exhibit the film for mature audiences.⁷⁵ The Chilean Supreme Court’s censorship soon followed after a group of Chileans, acting “for and in the name of Jesus Christ, the Catholic Church, and themselves” obtained a judgment from the Court of Appeal of Santiago annulling the Council’s decision to authorize the film’s exhibition on January 20, 1997.⁷⁶ The Supreme Court confirmed the Court of Appeal’s decision on June 17, 1997.⁷⁷ According to the

70. “The Last Temptation of Christ” (Olmedo Bustos *et al.* v. Chile), Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf.

71. See, e.g., Benedetto Conforti, *La Tutela Internazionale della Libertà Religiosa*, XV. 2 *Rivista Internazionale dei Diritti dell’Uomo* 269–83 (2002).

72. “*The Last Temptation of Christ*” Case, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶¶ 1–2.

73. For instance, the film portrays Christ as an ordinary man struggling with guilt and sexual temptations and also shows him forsaking his mission for a life of mortal comfort. See *The Last Temptation of Christ (film)*, [http://en.wikipedia.org/wiki/The_Last_Temptation_of_Christ_\(film\)](http://en.wikipedia.org/wiki/The_Last_Temptation_of_Christ_(film)) (last visited Apr. 11, 2009).

74. “*The Last Temptation of Christ*” Case, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 60.

75. *Id.*

76. *Id.*

77. *Id.*

Chilean Supreme Court, the defamed and dishonored presentation of the figure of Jesus Christ offended all those who, as was the case of the petitioners, founded their faith in Him.⁷⁸

The Court received the case after the Inter-American Commission on Human Rights, during its 100th regular session, adopted report No. 69/98.⁷⁹ In that report, the Commission concluded that: (1) the prohibition of the film *The Last Temptation of Christ* by the Chilean courts was incompatible with the norms of the Convention; (2) the Chilean State had violated the rights protected by Articles 12 (freedom of conscience and religion) and 13 (freedom of thought and expression) of the Convention; and (3) by upholding this censorship, the Chilean state had not complied with its commitment made in Article 2 of the Convention, which required it to adopt internal regulations that protected the rights recognized by the Convention.⁸⁰ The report recognized the efforts of the Chilean democratic government to effectuate the right to freedom of expression, but recommended that the Chilean government suspend the censorship of the film *The Last Temptation of Christ* and also recommended that the Chilean government adopt internal legislation to guarantee the enjoyment of the rights and freedoms protected by the Convention.⁸¹ These recommendations were not accepted by the Chilean government and, consequently, the Commission directed the case to the Inter-American Court on Human Rights.⁸² The Commission requested the Court to order Chile:

1. To authorize the normal cinematographic exhibition and publicity of the film “The Last Temptation of Christ.”
2. To adapt its constitutional and legal norms to the standards of freedom of expression embodied in the American Convention, [in order] to eliminate prior censorship of cinematographic productions and their publicity.

78. *See id.* ¶ 45(c) (summarizing the expert report of José Zalaquett Daher, lawyer, specializing in human rights, who had argued before the Commission that the Supreme Court’s decision to “suppress declarations made in the film as blasphemous or at least heretical because, in that Court’s opinion, they were shocking” constituted a confusion of the issues).

79. *Id.* ¶ 10.

80. *Id.*

81. *Id.*

82. *Id.* ¶¶ 11–12.

3. To ensure that, in the exercise of their different powers, public bodies[,] their authorities and officials [effectively] exercise the rights and freedoms of expression, conscience and religion recognized in the American Convention and . . . abstain from imposing prior censorship on cinematographic productions.

4. To make reparations to the victims in this case for the damage suffered.

5. To pay the costs and reimburse the expenses incurred by the victims when litigating this case in both [the] domestic sphere and before the Commission and the Court, as well as reasonable fees for their representatives.⁸³

The case was resolved with a unanimous decision of merit and reparations by the Court on February 5, 2001. The Court affirmed the existence of a violation by Chile of the right to freedom of expression and thought protected by Article 13 of the Convention.⁸⁴ However, the Court determined that Chile had not violated the right to freedom of religion protected under Article 12.⁸⁵ The Court explained its rejection of the Article 12 claim in paragraph seventy-nine.⁸⁶ The Court declared that the right to freedom of conscience and religion “is one of the foundations of democratic society. In its religious dimension, it constitutes a far-reaching element in the protection of the convictions of those who profess a religion and in their way of life.”⁸⁷ With this understanding, after analyzing the probable violation of the right to religious freedom, the Court decided that Chile had not violated the religious freedom in accordance with the norms of Article 12 of the Convention since the prohibition “did not impair or deprive anyone of their right to maintain, change, profess or disseminate their religion or beliefs with total freedom.”⁸⁸

In his separate opinion, Judge Roux-Rengifo further interpreted the protection of religious freedom. He interpreted Article 12 to prohibit coercion in religious matters, including coercion to retain

83. *Id.* ¶ 3.

84. *Id.* ¶ 103.

85. *Id.*

86. *Id.* ¶ 79.

87. *Id.*

88. *Id.*

religious beliefs.⁸⁹ According to Judge Roux-Rengifo, in order for the censorship to have violated Article 12, the petitioners would have had to prove by specific evidence that the prohibition impaired their personal rights to change their religious beliefs.⁹⁰ The judge agreed that a state has the duty to guarantee the freedom of every individual to change religion or beliefs, which is “usually the result of a long, complex process that includes hesitation, reflection and research.”⁹¹ He emphasized that the state should guarantee that:

[A] person may undergo this process in an environment of complete freedom and, in particular, that no one should be prevented from gathering information and experience and all the elements of an emotional, conceptual or any other nature, without violating the rights of others, that he considers necessary in order to make a fully-informed decision to change or maintain his faith.⁹²

Judge Roux-Rengifo concluded by declaring that “if the State, by act or omission, fails to ensure those rights, it violates the right to freedom of conscience and religion.”⁹³ The prohibition of the film, however, simply did not rise to the level of preventing anyone from realizing these rights.

For Chile, the consequences of this ruling included a requirement to modify its domestic law in order to eliminate the censorship of the film, and also an order to reimburse the victims and their representatives for expenses arising from the proceedings.⁹⁴ In its November 28, 2003, order, the Court declared that Chile had fully complied with its declaration.⁹⁵

The Court’s decision in this case, finding that censorship violated freedom of expression but not religious freedom, as Conforti agrees,⁹⁶ was most likely influenced by the posture adopted with

89. *Id.* (Roux-Rengifo, J., separate opinion).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* ¶¶ 103(4)–(5) (full court opinion).

95. “The Last Temptation of Christ” Case (Olmedo Bustos *et al.* v. Chile), Compliance with Judgment at 6, Inter-Am Ct. H.R. (Nov. 28, 2003), http://www.corteidh.or.cr/docs/supervisiones/tentacion_28_11_03_ing.pdf.

96. Conforti, *supra* note 71, at 283 (“La Corte interamericana ha adottato l’approccio della Commissione europea, ritenendo che proprio l’interdizione totale, e non limitata ai soli

respect to religious freedom in the European System. In fact, in its judgment, the Court cited the European Court of Human Rights in finding that the right to freedom of expression includes the right to convey information that may “shock, concern or offend the State or any sector of the population.”⁹⁷

On one hand, this decision recognized that a state can limit the exercise of free religious expression when there is a conflict with other rights or when such expression constitutes a threat to society or political stability.⁹⁸ On the other hand, however, the Court concluded that, in the terms of the Convention, the state cannot prohibit the exercise of religious expression by prior censorship when it does not incite violence.⁹⁹ Thus, it can be seen that the Inter-American Court interprets the freedom of expression as one of the foundational principles of democratic society, considering it an abuse to censor ideas and opinions, even if they are unpopular.¹⁰⁰ Moreover, according to the understanding of the Inter-American Court, the right to freedom of expression in a religious sense is valid not only for those ideas that are favorably received, but also for those that shock, unsettle, or offend a state or a fraction of its population.¹⁰¹

adulti, della proiezione della pellicola, abbia violato la libertà di espressione.”).

97. *“The Last Temptation of Christ” Case*, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 69 (quoting *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 49, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=handyside&sessionid=21918775&skin=hudoc-en>).

98. *See id.* ¶¶ 76–80 (finding that the state did not violate Article 12 because the censorship “did not impair or deprive anyone of their right to maintain, change, profess or disseminate their religion or beliefs with total freedom” and recognizing that freedom of religious expression “may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others”).

99. *See id.* ¶ 63 (citing Article 13, which prohibits prior censorship of expression except when necessary “for the sole purpose of regulating access to [public entertainments] for the moral protection of childhood and adolescence” and criminalizes “[a]ny propaganda for war and any advocacy of national, racial or religious hatred that constitute incitements to lawless violence”).

100. *Id.* ¶¶ 64–69 (identifying both an individual dimension (right to express one’s thoughts) and a social dimension (right to receive information and thoughts expressed by others) in the right to freedom of thought and expression and concluding that “both dimensions are of equal importance and should be guaranteed simultaneously in order to give total effect to the right of freedom of thought and expression in the terms of Article 13 of the Convention”).

101. *Id.* ¶ 69 (quoting *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 49, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=handyside&sessionid=21918775&skin=hudoc-en>).

IV. CONCLUSION

The American Convention on Human Rights has changed the way the OAS encourages member states to adopt human rights norms in their internal legal structures. With the reorganization of the Inter-American Commission on Human Rights and the creation of the Inter-American Court of Human Rights, the Convention established legal organs to more effectively effectuate human rights. As states ratified the Convention, they agreed to implement the rights outlined therein and to subject themselves to the reports and recommendations of the Commission and the contentious jurisdiction of the Court.

While these measures have made the advancement of human rights protection in the Inter-American System possible, the effectiveness and relevancy of the Commission and the Court still face significant challenges. Foremost among these challenges is the lack of power to enforce the recommendations and decisions made against specific states. As mentioned above, states frequently ignore orders from the Court to investigate and punish those responsible for human rights violations.¹⁰² Going further, another weakness of the Inter-American System is the distinct grade of participation of the member of OAS in their human rights protection's organs. Two of the most important nations of the hemisphere in territory and economic influence are not part of the Inter-American Convention,¹⁰³ and in consequence refuse to recognize the jurisdiction of the Inter-American Court. In this sense, it is important to consider the limited adhesion of English speaking countries and the contrary massive adhesion of Latin American countries to the system's organs and legal instruments.

This result stands in stark contrast to the circumstances observed in the European human rights system. While the European Court of Human Rights does not see full compliance with every decision handed down, the rate of compliance in that system far exceeds the

102. See discussion *supra* Part II.C; see also Morse H. Tan, *Upholding Human Rights in the Hemisphere: Casting Down Impunity Through the Inter-American Court of Human Rights*, 43 TEX. INT'L L.J. 243, 272 (2008).

103. Canada has not signed the Convention and, while the U.S. signed the Convention in 1977, it has never ratified it. See Organization of American States, American Convention on Human Rights Signatories and Ratifications, <http://www.oas.org/juridico/English/sigs/b-32.html> (last visited Sept. 15, 2009).

rate observed thus far by the Inter-American Court.¹⁰⁴ Why should this be? Both systems have in place methods for monitoring compliance and these methods appear to be substantially similar. In Europe, the Council of Europe's Committee of Ministers, with the assistance of the Department for the Execution of Judgments, supervises compliance with decisions of the European Court of Human Rights by requiring state reporting of steps taken in compliance with judgments.¹⁰⁵ Similarly, the Inter-American Court monitors compliance by receiving reports from the states along with observations from complainants and the Inter-American Commission on Human Rights.¹⁰⁶ Why then should the European system enjoy a high rate of compliance while the Inter-American System fails to achieve complete remediation of human rights violations?

The answer to this question is now and probably will remain elusive. Posner and Yoo argue that the success of independent adjudicative bodies in the European system is best explained by the unique political arrangement of the European states.¹⁰⁷ While many member states of the OAS do share certain political attributes and colonial origins, their political and economic ties are far less substantial than those found in the European system. Perhaps it is this political difference that explains the Inter-American System's

104. Posner and Yoo complain that good data to corroborate compliance estimates for the European Court of Human Rights is not available. Posner & Yoo, *supra* note 35, at 65. However, based on their count, states subject to an ECHR judgment alter their domestic law in compliance with the judgment about sixty-four percent of the time. *Id.*; see also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 296 (1997) ("The rate of compliance by states with the ECHR's rulings is extremely high. Indeed, its judgments have been described as being 'as effective as those of any domestic court.'" (citing BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 309 (2d ed. 1995))).

105. After the judgment is handed down, the Committee of Ministers invites the state subject to the judgment to report on the measures it has taken to comply. The Committee does not strike the judgment off its list of cases until the state has fully complied. In the event a state resists compliance, the Committee may apply political or diplomatic pressure. Council of Europe, *Monitoring arrangements and means used by the Committee of Ministers*, http://www.coe.int/t/e/human_rights/execution/01_introduction/01_introduction.asp#P88_12564.

106. RULES OF PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS art. 63 (2009), available at http://www.corteidh.or.cr/motivos_ing.pdf.

107. Posner & Yoo, *supra* note 35, at 66 ("We believe that the relationship between states within the European Union is closer to the relationship between, say, Illinois and Indiana, than the relationship between Indonesia and Peru. European states share a legislative body, a bureaucracy, and a decades-long commitment to political unity. Other states do not.").

comparatively low rate of compliance. Or, conversely, perhaps low compliance should be expected and the European System's success is abnormal.¹⁰⁸

Perhaps another factor that could contribute to this difference in compliance is the type of cases heard in each system. Since its foundation, the Inter-American Court has frequently had to respond to the violent violations of human rights perpetrated by many Latin-American dictatorial governments, including disappearances, arbitrary and summary executions, and the like.¹⁰⁹ The European Court of Human Rights, on the other hand, hears comparatively few cases regarding such atrocities and, instead, often hears cases regarding "ordinary" violations of human rights, such as the right to a fair trial or free speech.¹¹⁰ With violent violations of human rights, full remedy of the violation requires investigation, prosecution, and punishment of those responsible. Conversely, with "ordinary" violations of human rights, mere payment of damages and revision of violating domestic laws will often suffice. Yet, as discussed above, compliance with orders to pay damages is high, even in the Inter-American System.¹¹¹ American states, however, often ignore orders to punish those responsible for violating human rights or, when they do respond, they often inflict only light sentences.¹¹² Thus, while full compliance in general among the American states appears low, these numbers might be deceptive when it comes to the Court's and the Commission's protection of *religious* rights because compliance with those judgments may not inflict the same costs upon states as orders to criminally punish wrongdoers.

108. It has been said that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." David H. Moore, Essay, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879, 879 (2003) (quoting LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979)). However, noncompliance with international law is prevalent and has been observed to be, perhaps, most prevalent in the context of international human rights law. *Id.*

109. See David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 1, 1-2 (David J. Harris & Stephen Livingstone eds., 1998).

110. *Id.*

111. See *supra* note 35 and accompanying text.

112. See Tan, *supra* note 102, at 271-72 (hypothesizing that states may be unwilling to prosecute human rights violations either because they lack the resources to bring perpetrators to justice or because investigation might reveal that the government itself was responsible and accepting responsibility would be politically untenable).

While only a small number of the Commission's recommendations and the Court's decisions have dealt directly with the issue of religious freedom, they have had a profound effect in applying the Inter-American Human Rights instruments and norms to the laws of the states that have complied with the recommendations and decisions. Furthermore, decisions not dealing directly with religious freedom have nevertheless had an impact on the religious freedom for citizens of the member states. Applying laws respecting the rights of conscientious objectors to all individuals no matter what their creed has been a change that recognizes an individual's right to practice a religion that may not be shared by the majority of citizens in a particular state. Encouraging states to repeal amnesty laws will help to bring to justice those who have violated basic human rights, including religious freedom.

While the Court's decision in the "*Last Temptation of Christ*" case stated that Chile had not violated the religious freedom provision of the Convention (Article 12) when it refused to allow the showing of the film, *The Last Temptation of Christ*, the decision did focus on freedom of expression, which has a profound effect upon the enablement of religious freedom. Just as the Court allowed expression that was contrary to certain religious beliefs, some may see the decision as promoting the freedom to express religious beliefs and to practice religion without the fear of censure by the state.

The legal instruments and the action of the Court and of the Commission mediating and adjudicating human rights violations has created a stronger voice for the effectuation of human rights norms through national laws and constitutions. While full compliance with recommendations and decisions is not high, both organs have had a relevant impact in changing the laws of member states. Perhaps more importantly, however, the recommendations and decisions have brought more attention to human rights violations and have put a spotlight on the norms of the American Convention of Human Rights as a model for the proper treatment of individuals. Religious freedom plays an important part in these norms, and the efforts of the Commission and the Court have and will continue to stand as a symbol of the Inter-American System's dedication to improving this right for all peoples.